

Smith  
*v.*  
 Chamberlain.

by the term "witnesses," must necessarily be understood, from the connexion in which it is used, *competent witnesses*.

In the clause of the statute now under consideration, there is nothing which indicates an intention in the legislature to require, that witnesses to a deed should be competent to prove its execution at the time they subscribe it as witnesses. We have been much at a loss to conjecture why two witnesses were in this instance required by the statute. Surely they were not intended to be placed round a grantor for the same reasons that they are placed round a testator. The most plausible conjecture is, that it was intended to render the proof of the instrument more certain. If this were the object, there is good reason to suppose that the word "witnesses" was, in this instance, used in the simple sense of spectators of the transaction. A witness competent at the time, might, in one hour, become incompetent; and a witness incompetent at the time, might, in one hour, become competent. All that could be done with this view by the legislature was to require, that deeds should be executed in the presence of two or more persons, who should put their names to the deeds as witnesses. It would have been idle to make the validity of the deed depend upon the competency of the witnesses at a time when they could not be wanted to prove the execution of the deed. We are therefore of opinion, that the witnesses to a deed need not be competent witnesses to prove its execution at the time they subscribe the deed as witnesses; and that there must be

*Judgment for the plaintiff.*

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NATHANIEL BROWN *vs.* JOHN MILTIMORE.

Nontenure is in this state a plea in abatement and not in bar.

This was a writ of entry. The tenant pleaded nontenure special in bar of the action. To this plea the demandant demurred, and the tenant joined in demurrer.

*Thom*, for the tenant, cited *Clark vs. Goodwin*, 14 *Mass. Rep.* 239.—2 *Saund.* 44, note 4.—13 *Mass. Rep.* 439, *Prescott vs. Hutchinson*.

*French*, for the demandant, cited *Parker vs. Murphy*, 12 *Mass. Rep.* 485.—*Keith vs. Swan*, 11 *ditto* 216.—*Booth* 28.—*Rastall's Entries* 225, 381, 404, 539.

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*By the court.* If in this state as in Massachusetts all pleas in abatement must by law be filed on the first day of the term, at which the action is entered, we should probably be induced to follow the decisions of the courts of that state, and permit nontenure to be pleaded in bar. But in this state pleas in abatement may be filed by our rules of practice any time during the first term; so that tenants in real actions have ample time to instruct counsel, and avail themselves of a plea of nontenure in abatement, if they see fit. On the other hand, if the tenant be not in fact tenant of the freehold, it is proper that he should be compelled to disclose that circumstance at the first term, and not be permitted to protract a suit, in which nothing can be settled. We are therefore of opinion, that there is no reason why we should depart from the rules of the common law on this subject, and that the plea in this case must be adjudged insufficient.

*Judgment for the demandant.*

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JACOB THRASHER vs. DAVID HAINES, jun.

*A.* and *B.* having a controversy respecting certain accounts between them, agreed to refer the same to arbitrators; *C.* appeared before the arbitrators at the hearing as *B.*'s agent, and assisted in managing the case. The arbitrators made a report in favor of *A.*, who procured a judgment upon the same report, sued out an execution, and caused the execution to be extended upon land which *B.* had conveyed to *C.*, and then brought a writ of entry against *C.* to recover the land: it was held, that *C.* was not estopped by the judgment to shew that there was nothing due from *B.* to *A.*

This was a writ of entry, in which *Thrasher* demanded a farm in Deerfield, in this county, and counted upon his own seisin within twenty years, and upon a disseisin by the tenant.

The cause was tried here at February term, 1820, upon the general issue.

It was admitted, that one *Jonathan Eastman* was once seized of the demanded premises. The demandant shewed the record of a judgment in his favor against the said *East-*