

Chesley
vs.
Thompson.

By the court.—It is contended, that one tenant in common cannot maintain an action against another ; and this is true to a certain extent ; but the rule is by no means broad enough to embrace the present case. For it has been held, that if two several owners of houses have a river in common between them, and one of them corrupt the water, the other shall have an action on the case. *Coke Littleton* 200, *b.* And it seems, that one tenant in common may have case for waste against another. 8 *D. & E.* 145, *Martyn vs. Knowles.*—4 *East* 110, *Heath vs. Hubbard.*—*Buller's N. P.* 34.—2 *Saund.* 47, *f. g.*—1 *Chitt. Pl.* 180, 170, 155.—15 *John.* 179.—3 *ditto* 175.—2 *ditto* 468.

In this case, the mill has been destroyed by the negligence of the defendant, and we have no hesitation in overruling this objection.

It is further contended, that as the defendant is a tenant in common with the plaintiffs, and as all the tenants in common cannot join in bringing the action, each must have his several remedy.

Had the mill been burnt by the negligence of a stranger to the title, there is no doubt, that all the owners might have joined in the action. 1 *Chitt.* 51.—2 *Wilson* 414, *Weller & a. vs. Baker.*

In *Daniels & a. vs. Daniels*, (7 *Mass. Rep.* 135) case was maintained by several tenants in common against co-tenants, for the destruction of title deeds ; and we are of opinion, that this objection also must be overruled.



JAMES HAYES vs. SAMUEL SHACKFORD AND OTHERS.

The doings of the selectmen of towns in laying out highways must be reduced to writing, and the writing lodged with the town clerk.
The return of the selectmen in such a case must state how wide the road is laid out.

TRESPASS, for breaking and entering the plaintiff's close, in Barrington, on the 5th November, 1821.

The defendants pleaded in bar an entry to open and make a highway, duly laid out by the selectmen of Barrington, through the *locus in quo*. The plaintiff, in his replication,

not only traversed the existence of the highway, but new assigned the trespass *extra viam*, &c.

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The cause was tried here, at February term, 1823, when it appeared in evidence, that the selectmen of Barrington, in July, 1821, surveyed the ground for a highway, through the *locus in quo*, three rods wide, and erected monuments accordingly. On the 28th of the same July, they made a return of their doings in writing, and lodged it with the town clerk. This return described the line, which was intended to be the centre of the highway, but did not state how wide it was to be. On the 5th November, 1821, the defendants entered and opened the road three rods wide, according to the monuments, which the selectmen had erected. On the 24th November, in the same year, the selectmen made and signed a memorandum at the foot of the return, which they had lodged with the town clerk, as follows: "The above mentioned road is laid out three rods wide, Nov. 24, 1821."

A verdict was taken, by consent, for the defendants, subject to the opinion of the court upon the above case.

Hodgdon and *I. Bartlett*, for the plaintiff.

Woodman and *Mason*, for the defendants.

RICHARDSON, C. J. The question to be decided in this case is, whether there was a highway duly laid out by the selectmen of Barrington, through the *locus in quo*, at the time the defendants entered? The statute of February 8, 1791, entitled "an act for laying out roads," does not, in express terms, require that the doings of selectmen in laying out roads should be reduced to writing, or recorded. But we are of opinion, that their doings must be reduced to writing; and the writing lodged with the town clerk, before a road can be considered as duly laid out. We ground this opinion upon the obvious utility and necessity of having the doings of the selectmen, in this instance, reduced to writing, and preserved, and upon what is believed to have been the constant usage and practice under this statute in all parts of the state. Was, then, the return, made by the selectmen in this case, in July, 1821, sufficient? In our opinion it was not. It does not state how wide the road was to be; and this seems to us to be a fatal objection. In cases of this kind, the property

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of individuals is taken and appropriated to the use of the public ; and it must be important to the owners of the land to know, with a reasonable certainty, how far their property is thus appropriated ; and it is not unimportant to those, whose duty it is to keep roads in repair, to be able easily to ascertain the extent of the easement.

We are, however, of opinion, that the amended return of November 24, 1821, was sufficient. But that return cannot avail the defendants as an answer to this action, because not made until after the acts, of which the plaintiff complains, were done. It is clear, then, in this case, there must be

A new trial granted.

ANDREW SIMPSON vs. JOSEPH COE.

In trespass, quare clausum fregit, if the defendant plead in bar that the *locus in quo* is parcel of a close called *A.*, and that *A* is the soil and freehold of the defendant, the plaintiff may reply, that the *locus in quo* is the soil and freehold of the plaintiff, and not of the defendant, and conclude to the country.

TRESPASS, for breaking and entering the plaintiff's close, in Durham. The close was described by metes and bounds in the declaration.

The defendant pleaded in bar, that the close, mentioned in the declaration, long before, and at the several times, when, &c. was parcel of a certain close, known by the name of the Spinny Place, which said Spinny Place, at the said several times, when, &c. was the close, soil, and freehold, of the said *Coe*. Wherefore, &c.

To this the plaintiff replied, that the close, mentioned in his declaration, at the said several times, when, &c., was the soil, close, and freehold of the plaintiff, without that, the said close, in which the said trespass were committed, was at the several times, when, &c. the close, soil, and freehold of the defendant, and concluded to the country.

The defendant demurred to the replication, and assigned for cause, 1st, That it neither denied, nor confessed and avoided the facts alleged in the plea. 2d, That the traverse was badly taken, inasmuch as it contained matter not alleged in the defendant's plea, and narrowed the ground of justifica-