

two thousand dollars for the expenditures of that year. The word *expenditures* is entirely equivocal and may, in its natural sense, signify as well the application of money to purposes, for which towns have not authority to raise money, as to purposes, for which they have such authority. And, by the rule above stated, we cannot understand by this allegation, that the money was voted to be raised for a legal purpose; and the pleas must be adjudged insufficient.

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JONATHAN SMITH vs. NICHOLAS GILMAN AND  
CHARLES CLARK.

In an action of trespass, brought by *S.* against *G.* and *C.* *G.* was defaulted, and the cause being tried between *S.* and *C.* a verdict was returned for the plaintiff, and judgment rendered against both defendants. *S.* afterwards sued out a writ of review against both defendants—held, that the writ of review might be maintained against *C.*, but not against *G.* who had been defaulted.

In this case, *Smith* brought an action of trespass against the defendants, which was entered here at February term, 1823, when *Gilman* was defaulted. *Clark* pleaded the general issue, which was tried at September term, 1824, and a verdict returned for *Smith*, with damages assessed at \$130; whereupon judgment was rendered for the plaintiff, for that sum, against *Gilman* and *Clark*. *Smith* then sued out this writ of review against *Gilman* and *Clark*, which their counsel moved the court to quash,—on the ground, that a writ of review could not, under such circumstances, be sustained.

*E. Cutts*, for the plaintiff.

*Gilman* and *Sullivan*, for the defendants.

RICHARDSON, C. J. In the case of *Andrew Lovejoy vs. John A. Harper*, Strafford, November term, 1815, it was decided, that a writ of review could not be sustained, except in cases, where there was an issue in fact, to be tried by a jury, joined between the parties. To this decision, the court has constantly adhered since that time; and the question must now be considered as settled and at rest. It is clear then, that with respect to *Gilman*, who was defaulted, this writ of review cannot be sustained. There was no issue

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joined between him and the plaintiff to try ; and as to him this writ must be quashed. 6 *Mass. Rep.* 498.

But between the plaintiff and *Clark* an issue was joined, and with respect to that a review may be sustained. 1 *Mass. Rep.* 482, *Emerson and others vs. Pattee*. We are therefore of opinion, that so far as regards *Clark* the motion must be overruled, and as to *Gilman*, the writ must be quashed.

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HILLSBOROUGH, OCTOBER TERM, 1826.

JAMES HILL vs. JAMES BOUTELL.

In an action of assumpsit for the occupation of land, where an express promise to pay rent is shewn, the defendant cannot controvert the title of the plaintiff.

ASSUMPSIT for use and occupation of a shop and tools in Hancock, in this county, from December 1, 1823, to September 13, 1824.

The cause was tried here, upon the general issue, at April term, 1826 ; when it appeared in evidence, that on the 29th November, 1823, the defendant contracted with the plaintiff for the use of the shop and tools, for which he was to pay a reasonable rent ; and that he immediately went into possession under the contract, and occupied the shop and tools until the 13th September, 1824.

The defendant then offered to prove, that at the time, when the said contract was made, the plaintiff was not the owner of the shop and tools. To the admission of this evidence the plaintiff objected, but it was admitted. And the jury having returned a verdict for the defendant, the plaintiff moved for a new trial, on the ground, that the said evidence had been improperly admitted.

*Luke Woodbury*, for the plaintiff.

*Brown*, for the defendant.

*By the Court.* It is well settled, that in an action for use and occupation, when an express promise to pay is shewn, the defendant cannot be permitted to controvert the title of the