

Smith
vs.
Gilman et al.

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

plaintiff. *Buller's N. P.* 139.—1 *Chitty's Pl.* 575.—1 *Wilson* 314, *Lewis vs. Willis*.—5 *D. & E.* 4, *Cook vs. Lozley*.

Hill
vs.
Boutell.

We are therefore of opinion, that there must be
A new trial granted.



ERI KITTREDGE vs. PETER WOODS, junior.

When land is sold and conveyed, manure lying about a barn upon the land, will pass to the grantee, as an incident to the land, unless there be a reservation of it in the deed.

THIS was an action of trespass for breaking and entering, on the 24th May, 1824, the plaintiff's close, and carrying away 40 loads of manure.

The defendant pleaded the general issue, and also a license, on which issue was joined.

The cause was tried here, at April term, 1826; when it appeared, that the plaintiff was tenant of the farm in the year 1823, where the manure in question was made, by cattle about the barn, under the owners, with whom he contracted to use the hay on the farm. In the spring of 1824, the plaintiff purchased one half of said farm, and the defendant the other half; and they held it in common until the 6th April, 1824; when they agreed to divide the farm; and the defendant conveyed to the plaintiff all his interest in the part of the farm, where the said manure was. After this the defendant entered, and took, and carried away one half of the manure.

The court instructed the jury, that the defendant's interest in the manure, passed with his interest in the land, by said conveyance, unless it was otherwise agreed between the parties—and the jury having returned a verdict for the plaintiff, the defendant moved the court to grant a new trial, on the ground of a misdirection to the jury.

C. H. Atherton, for the plaintiff.

E. Parker, for the defendant.

RICHARDSON, C. J. delivered the opinion of the court.

The question, *what are to be considered as fixtures, or appurtenances to land, so as to go with the inheritance*, may arise be-