

when the payment was made, this would have been evidence of a waiver. So we think the plaintiff's continuance in possession, and the defendant's conduct in allowing it, in connection with the payment, were competent to be submitted to the jury, as tending to show a waiver. *Church v. Burghart*, 8 Pick. 328; *Taylor L. & T.*, sec. 487. Of the weight of this evidence, under the circumstances of this case, we are not called on to express any opinion. If the views already expressed are correct, the last instructions asked by the defendant were properly refused. There must be

*Judgment on the verdict.*

---

### DOLLOFF v. DANFORTH.

The purchaser of a crop of growing grass is entitled to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal, and may maintain trespass *quare clausum fregit* against a stranger who, during that time, wrongfully enters and cuts and carries away the grass.

TRESPASS *quare clausum fregit* and for cutting down and carrying away ten acres of the plaintiff's grass. Plea, the general issue with a brief statement.

The plaintiff offered evidence tending to show that about the 20th of June, 1859, he purchased of Edward W. Sanderson all his upland grass in the field, and paid him for the same; that on the same day he made a contract with said Sanderson to cut said grass and put it into a barn upon the same premises where he had agreed with said Sanderson that it might remain till the plaintiff should remove it, and paid said Sanderson for so doing; that the latter part of July said Sanderson under said contract, was cutting said grass, and had got about two thirds of the same cut and in the barn, when the defendant entered and attached the balance, and harvested and sold the same.

The defendant offered evidence tending to show that the close in which, &c., was the close of one Ichabod W. Sanderson, and that said Edward W. Sanderson was tenant of said Ichabod W. that year, living with said Ichabod on the farm, and carrying on the same, and having the income; that the plaintiff was never upon the premises except at the time of the pretended purchase, and at the time of the sale of the grass he resided in Nashua; and that the pretended sale from Edward W. Sanderson, of this grass, to the plaintiff, was fraudulent and void, as against said Sanderson's creditors; and that one Sackrider had a valid debt against said Sanderson at the time, which was sued; and that the proceedings and the attachment of the grass on said writ, and the sale of the same upon said writ, were legal and valid; and that said grass was fully ripe when it was attached.

*Sawyer & Stevens*, for the defendant.

*Morrison & Stanley*, for the plaintiff.

BARTLETT, J. The only question raised in the case is whether the plaintiff upon his own evidence can maintain trespass *quare clausum*. We think he can; his agreement with Sanderson entitled him to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal; and such exclusive right would enable him to maintain trespass *quare clausum* against any stranger who wrongfully enters and cuts and carries away the grass. *Crosby v. Wadsworth*, 6 East 603; 2 Hill. Torts 8; 2 Greenl. Ev., sec. 614; 2 Saund. Pl. and Ev. 867; *Waddington v. Bristow*, 2 B. & P. 542. The fact that Sanderson agreed to cut the grass as his servant, does not alter the case.

*Judgment on the verdict.*

---

### PERKINS v. TOWLE.

Exemplary damages may be recovered in actions of trespass *quare clausum fregit* when there are such circumstances of aggravation, of insult, or of malice, as would warrant such recovery in any other form of action.

In an action of trespass, where the general issue is pleaded, all the acts and circumstances directly connected with and attendant upon the transaction complained of, are competent for either party to prove, as tending to favor or rebut the presumption of malice; but that is the extent of the rule under this plea.

In trespass *quare clausum*, and for tearing down the plaintiff's house, evidence that the house was occupied by lewd females, and that persons, a short time before the trespass, in visiting said house passed over the defendant's land and left his bars down, struck the defendant and disturbed a religious meeting at his house, swore at him, &c., is not admissible under the general issue, to rebut the presumption of malice, or in answer to a claim for exemplary damages.

THIS was a review of an action of trespass, for breaking and entering the house of the plaintiff, situated in Barnstead, in this county, and tearing off the outer boards and covering of the same, demolishing the inside partition, doors, plastering, chimneys, &c., on the night of the 7th of October, 1858.

The defendants, eight in number, confessed as damages, \$40, and pleaded the general issue as to the residue. The plaintiff claimed that the actual damages exceeded this sum, and also claimed exemplary damages.

To show that the trespass was not malicious, and to rebut the claim of exemplary damages, the defendants offered evidence tending to show that a family of lewd females lived in said house, who were visited by many profane and disorderly men, who passed over the land of A. K. Green, one of the defendants, and left his bars down, also to the injury of Loammi Green; and that the plaintiff was requested by them to remove the nuisance, and was also notified by Kaim, one of the selectmen of Barnstead, and other neighbors, to the same effect; and that five of these men, proposing to visit this house on Sunday, a short time before the trespass, disturbed a religious meeting at the house of A. K. Green, one of the