

to decide. What facts will authorize a jury to presume an ouster is often a matter of law for the court to decide. *Taylor v. Horde*, 2 Smith L. C. 497. Here the plaintiff contended that, upon the evidence, the jury ought to presume that the entire title to the whole land had in some way passed to the said John N. Sherburne. Whether it had or had not, was a question submitted to the jury, with the question also of adverse occupation by the said John N. The plaintiff had the benefit of the fact that in 1828 John N. Sherburne undertook to convey by mortgage the whole of the Pickering farm; but a mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster. *Wilson v. Colleshaw*, 1 Harris 276. Upon the execution of the mortgage the whole legal estate in any event was presumed to vest in Elizabeth, the mortgagee. The possession of the mortgager, the mortgagee had the right doubtless to treat as a disseizen at her election; or the mortgager may have been in possession for a time, with the privity and assent of the mortgagee, and in subordination to her title. Then the mortgagee may have set up an exclusive possession, and obtained an adverse occupation of the premises, and established a full and perfect foreclosure. Or, take the plaintiff's view of the case: The mortgager, by some unequivocal act, hostile to the title of the mortgagee, and brought home clearly and distinctly to her knowledge, may have taken open and adverse possession of the premises, and terminated the holding, as mortgager, and actually disseized the mortgagee. The act which is thus to change the character of the possession must be a clear, open, and explicit denial of the mortgagee's title, and a refusal to hold under it; and until such actual disseizin by the act of the mortgager, or by the election of the mortgagee, the possession is not adverse, but in privity with the mortgagee; and the statute of limitations does not begin to run. *Tripe v. Marcy*, 39 N. H. 445, and authorities. Whether, under the circumstances as proved, there had been a foreclosure of the mortgage, was a question of fact, properly submitted to the jury.

Judgment on the verdict.

BOSTON & MAINE RAILROAD v. CILLEY.

A statute, giving to land-owners a right of appeal from decisions of selectmen laying out highways, will not be construed as applicable to proceedings pending at the time of its passage, unless such intent of the legislature is clearly manifested.

THIS is an appeal by the railroad from the decision of the selectmen of Exeter, laying out a highway under chapter 2621, Pamphlet Laws. At the first term after the entry of the appeal, the railroad moved "that the petition be dismissed, and that the decision of the selectmen thereon be reversed," for various reasons.

And the appellees, being the original petitioners for said highway, at the same term moved that the appeal be dismissed: because

at the time of the passage of the act of June 27, 1862, under which the right of appeal is claimed in this case, the petition for said highway was pending before the selectmen of said Exeter, the same having been presented, notice issued, and a hearing had thereon before said selectmen on May 17, 1862; and the further consideration was postponed from time to time until said highway was laid out; and therefore the said act does not apply to the laying out of said highway, and the railroad has no right of appeal.

For the purposes of this case it was admitted that the statements in the motion of the appellees were true.

The questions of law raised by the foregoing motions were reserved.

Stickney, for the appellees.

C. H. Bell, for the appellants.

BARTLETT, J. Chapter 2621 of our Pamphlet Laws is not expressly and in terms made applicable to proceedings pending at the time of its enactment, and it will not be construed as extending to them, unless such an intent of the legislature is clearly manifested. *Broom Leg. Max.* 29; *Rich v. Flanders*, 39 N. H. 341, 367.

The mere fact that the language of the statute is broad enough to extend to pending proceedings, or that a proviso restricting its effect to future cases is omitted, will not alter this rule. *Kennett's Petition*, 24 N. H. 141; *Colony v. Dublin*, 32 N. H. 433.

It is claimed that an intent to make the provisions of the first section of the act in question applicable to pending proceedings is to be inferred from the specific exception in the third section, which repeals section 8 of chapter 51 of the Revised Statutes, "except as to matters now pending thereon." The statute thus repealed relates merely to appeals by land owners, from awards of land damages made by the commissioners, and perhaps its repeal would not have affected the proceedings then pending; R. S., ch. 1, sec. 26; and the broad exception in sec. 3 of ch. 2621 would not seem inconsistent with the rule of construction in the Revised Statutes. *Dickinson v. Lovell*, 36 N. H. 367; R. S., ch. 1, sec. 30.

We do not think that the restriction in the third section of the effect of the repeal by it of the provisions as to appeals from awards of land damages in sec. 8 of ch. 51 of the Revised Statutes, to "matters" not then "pending thereon," clearly shows an intent to extend to pending proceedings the right of appeal from decisions of selectmen laying out highways, given to land owners, &c., by the first section.

No other reasons are suggested for the construction contended for by the appellants, and

The appeal must be dismissed.