

Judges and registers of probate cannot be of counsel in probate matters in their counties. But they may be of counsel in probate matters in other counties, and they may, and constantly do, act as attornies and counsellors in all other courts.

Carlisle
v.
Dodge.

The construction which we give to the clause relative to clerks, seems to us to be in perfect accordance with the spirit of these provisions of the constitution, as they have always been understood in the community.

But can a clerk of the court of common pleas in one county lawfully make a writ returnable to that court in another county? A clerk of the court of common pleas in one county, is not a clerk of that court in another county, nor has he any connexion with the court sitting in another county. The same judges constitute a court in all the counties. But their records and business are as distinct and separate in one county, from those of all other counties, as if there had been a separate court established for each county, composed of different judges in the different counties. And we are of opinion that a clerk of the court of common pleas in the county of Coos, cannot be considered as a clerk of that court in relation to the county of Grafton within the meaning of this clause in the constitution.

We are therefore of opinion, that the judgment in the court below must be reversed.

JOHN T. SANBORN *versus* NATHAN DAVIS.

Where a cause has been submitted to referees by a rule of court, and the parties have agreed to have the report made known and the case settled at the time of the hearing before the referees, the court will not recommit the case to the referees on the ground, that since the hearing, new evidence has been discovered.

Sanborn
v.
Davis.

ASSUMPSIT upon a note, dated February 7, 1827, for \$100, made by the defendant, payable to S. D. Stevens or order, in three years, and endorsed to the plaintiff. The cause was submitted to three referees, by rule of court, at November term, 1830; and, at this term, the referees reported, that the defendant should recover his costs of reference, taxed at \$15,44, and costs of court, to be taxed by the court.

The plaintiff objected to the acceptance of the report; and moved that the cause be recommitted to the referees, on the ground, that since the hearing before them he had discovered new evidence, which he had submitted to the referees, and which in their opinion might have altered the decision of the cause.

The defendant opposed the recommitment, on the ground, that at the time the parties entered into the agreement to refer the cause, the plaintiff agreed that the report should be opened at the time of the hearing before the referees, be made known to the parties, and be there settled without further controversy, and that, under this agreement, the decision of the referees was made known to the parties at the time of the hearing.

Quincy, for the plaintiff.

Britton, for the defendant.

By the court. It is a common practice to recommit cases to referees upon the discovery of new evidence, which is, in the opinion of the referees, material. But there is no case within our recollection, in which the court has interfered, where the parties have agreed to have the report made known at the time of the hearing, and to abide the decision. In such a case the decision of the referees is made conclusive by the agreement of the parties, and ought not to be disturbed by any interference of this court.

When the parties choose to depart from the common course of proceedings in such submissions, they render the common rules by which we govern ourselves inappli-

cable. If the plaintiff cannot rebut the evidence, which goes to prove his agreement to have the award made known and settled at the time of the hearing, we cannot interfere.

Sanborn
v.
Davis.

We think, that in such a case it would be a very unsafe course to recommit a cause, on the ground that evidence had been found that might change the decision.

Report accepted.

D. T. MURRAY and MARY MURRAY *versus* A.
L. WEBSTER.

In trespass *quare clausum fregit*, the title of the defendant, or of the person under whom he entered, may be given in evidence under the general issue to show that the right of possession, which is necessary in trespass, is not in the plaintiff.

If one, who has a good cause of action, join, in trespass *quare clausum fregit*, with one who has no cause of action, the suit cannot be sustained.

THIS was an action of trespass for breaking and entering the house of the plaintiffs, in New-Chester, on the 28th September, 1828, and pulling down and demolishing the same.

At the trial of the cause here, at November term, 1830, upon the general issue, it appeared in evidence, that for a long time, and up to the day when the act, of which they complained, was done, the plaintiffs had been in possession of the house, mentioned in the declaration; that at the superior court in this county, November term, 1826, E. Webster recovered judgment, in a writ of entry, against D. T. Murray, for the land, on which the house stood; that a *pluries* writ of *habere facias possessionem*, issued upon that judgment, May 22, 1828, and was delivered to the defendant, who was a deputy sheriff, to be by him executed; and that the defendant, at the