

there was a variance was *pro forma* overruled. Verdict guilty, and motion in arrest of judgment.

*Cogswell and Stone*, for the respondent.

*Rogers*, solicitor, for the state.

STANLEY, J. The motion for the discharge of the respondent should have been granted. There was a variance between the indictment and the proof. The out-building did not adjoin the dwelling-house. "Adjoining" is a synonym for "adjacent to," "contiguous." It was not adjacent to or contiguous, that is, in contact with the house. *Arkell v. Ins. Co.*, 69 N. Y. 192; *Rex v. Hodges*, 1 Moo. & M. 341; *Peeverelly v. People*, 3 Park. 59; 2 Russ. Cr. 557-561.

The statute upon which this indictment was found specifies three distinct offences, although the punishment is the same in all of them. They are,—first, burning a dwelling-house; second, burning any out-building adjoining a dwelling-house; third, burning any building whereby a dwelling-house shall be burned. The words an out-building adjoining a dwelling-house are words of description, and must be proved. A conviction under this indictment, upon the evidence received, would be no bar to an indictment for attempting to set fire to an out-building whereby a dwelling-house might be burned, and the evidence received in this case would support such a charge.

*Judgment arrested.*

BINGHAM, J., did not sit: the others concurred.

---

COLE & a. v. LACONIA SAVINGS-BANK.

The right of homestead exemption does not exist in land on which no home is established, or which is no part of a homestead and is not connected with one by beneficial use.

BILL IN EQUITY, for the assignment of a homestead (reported *ante*, p. 53). The plaintiff Cole, and Prescott, owned the land in common, and used it for raising hay. Neither of them lived upon the land, and there was no house upon it. The plaintiffs, Cole and his wife, were boarders about three miles away from the land. Cole had talked of buying Prescott's interest in the land, but had no fixed purpose about it. The defendants, having an execution against Cole, levied it upon his undivided part of the land, subject only to his wife's contingent right of dower.

*Barnard*, for the plaintiffs.

*Hibbard*, for the defendants.

ALLEN, J. To entitle the claimant to a homestead, there must be a home established on the land claimed, or the land must be a part of that which constitutes the homestead, or connected with it by beneficial use. The case shows no home on the land, and the land is no part of a homestead, and is not connected with one by use, nor in any way appurtenant or incident to one. Mere intention cannot make a home.

*Bill dismissed.*

BINGHAM, J., did not sit: the others concurred.

---

STATE v. MORGAN & a.

When the statute of 1791, directing proceedings in case of forcible entry or detainer of lands or tenements, was repealed, in the revision of the statutes in 1842, the common law and English statutes in relation to such proceedings, so far as they had been adopted in this state, were also repealed.

INDICTMENT, for forcible entry and detainer. The respondents offered to show that Morgan was mortgagee of the premises upon which the alleged offence was committed; that he recovered a judgment for the possession of the mortgaged premises, and was put in possession by the sheriff in June, 1875, by virtue of a writ of possession upon which due return was made; that the complainant, Robinson, who was the mortgageor, and in occupation of a portion of the dwelling-house upon the premises, was a mere trespasser and wrong-doer, in possession without right (having been suffered to remain by the officer), and refusing to leave; that Morgan and the other respondents, as his servants, entered forcibly, in April, 1878, and expelled him. The evidence was rejected, and the respondents excepted. A verdict of guilty was directed against three of the respondents, and the case withdrawn as to the others, and continued, to await the decision of the questions of law raised by the rejection of the evidence.

*Pike & Parsons* (with whom was *Whipple*), for the respondents.

*Tappan*, attorney-general (with whom were *Barnard & Barnard*), for the state.