

although they may have not been partners, still they may have promised jointly.

Jewett
v.
Davis.

If the issue joined had involved the question merely, whether the two Jewetts promised as partners, the verdict might perhaps have been deemed sufficient. But that question is not involved in the issue. No court would be warranted in construing the allegation, that they were partners and promised jointly, as an allegation that they promised as partners.

The rule is, that if the point on which the verdict is given, be so uncertain that it cannot be clearly ascertained whether the jury meant to find the issue or not, it cannot be helped by intendment. 1 Mason, 170; Com. Dig. "Pleader," S. 22; 11 Pick. 45; 3 ditto, 124.

Judgment reversed.

A. W. MORSE *versus* E. CHILD and E. CARLTON.

An agreement to cancel a deed of land without actually cancelling it, cannot have the effect of a reconveyance.

One who has acted as an appraiser, in making an extent of an execution upon land, may be estopped to set up a title against the title acquired by the extent; but he is not estopped to say that nothing passed by the extent.

THIS was a writ of entry, brought to recover a tract of land in Bath, in this county.

The cause was tried upon the general issue, at May term, 1833.

It appeared in evidence, that L. Pulsifer and H. Wells, being seized of the demanded premises, on 23d September, 1812, by deed, conveyed the same to Joseph Fifield, in fee. This deed was recorded January 18, 1814.

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On the 18th August, 1826, Fifield, by deed, conveyed the same premises to the demandant.

The tenants then showed, that at the time the land was conveyed to the demandant, and for a long time before, they had been in possession of the premises.

They then showed a judgment in their own favor, against Moody Moore, rendered by the court of Common Pleas, in this county, at February term, 1816, for \$50 damage, and \$14,34 costs, and an execution, issuing upon the judgment, extended upon two undivided third parts of the demanded premises, on the 5th April, 1816. It appeared by the extent that Fifield, the demandant's grantor, was one of the appraisers in making the extent.

But the execution was never returned to the clerk's office.

The tenants then offered to prove, that in the fall of 1812, Fifield agreed with Pulsifer and Wells, his grantors, to cancel their deed to him, and that the purchase money was repaid to Fifield, and he abandoned the possession ; but it being admitted that the deed was not actually cancelled, the court rejected the evidence.

A verdict was taken for the demandant, by consent, subject to the opinion of this court upon the above case.

J. Smith, for the tenants,

Contended, that the tenants being in possession when Fifield conveyed to the demandant, the latter must stand in Fifield's place, and take the title, subject to every objection that would be legally made to it in the hands of Fifield.

Fifield, having received back the purchase money, and agreed to cancel the deed of Pulsifer & Wells, that deed must now be considered, with respect to Fifield and this demandant, as if it had never existed.

With respect to two undivided third parts of the demanded premises, there is another ground on which the tenants are entitled to prevail. Fifield was an appraiser

in the extent under which the tenants claim. And as it does not appear, that he made any objection to the extent, or set up any title to the land then, he is now estopped to claim the land against the tenants, and this estoppel binds the demandant. 2 Starkie's Ev. 31 & 38 ; 1 Fonbl. 163 ; 14 Mass. Rep. 437 ; 5 N. H. Rep. 188.

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Bell, for the demandant.

GREEN, J. delivered the opinion of the court.

A new trial is claimed in this case, because the evidence, offered by the tenants to prove the agreement between Fifield, and Pulsifer & Wells, to cancel the deed, was rejected. But we are of opinion that the evidence was rightly rejected. It has been settled that a mere agreement to cancel a deed, without actually cancelling it, cannot have the effect of a reconveyance. 4 N. H. Rep. 191, *Farrar v. Farrar*.

Another ground, on which a new trial is claimed, is, that the demandant is estopped to claim the land against the tenants, because Fifield, whose title the demandant has, was an appraiser in their extent, and set up no title then to the land.

If the extent, under which the tenants claim, had been perfected so as to be sufficient to pass the land, and it had appeared that Fifield set up no claim when the extent was made, we are not prepared to say that Fifield, or any one claiming under him, could have been permitted to set up a title against the extent.

But the execution, which was extended upon the land, was never returned, and of course the extent was of no validity to pass the title. And we are not aware of any ground on which it can be held that Fifield, or any one claiming under him, is estopped to say, that nothing passed by the extent. Fifield's conduct may have been such as to preclude this demandant from setting up any title against a title acquired by the extent, but it cannot preclude him from saying that no title was acquired by the extent.

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We are therefore of opinion that the demandant is entitled to

Judgment on the verdict.

ASA ROBBINS *versus* THE TOWN OF BRIDGE-
WATER.

The power of selectmen to lay out highways is not judicial.

But the power of a court to lay out highways is judicial, and, in general, its proceedings are conclusive, until quashed upon a certiorari.

But the proceedings of a court, in laying out a highway, in a case where it can, under no circumstances, have jurisdiction, are void.

Where a court had laid out a town way, upon a petition, which stated, that the selectmen of the town had refused to lay out the way, and an individual had brought an action to recover his damage, awarded him by the court by reason of laying out the road through his land, it was held, that it might be presumed that the court had evidence of the refusal of the selectmen to lay out the road, although the evidence was not filed in the case.

DEBT, upon a judgment of the Court of Sessions in this county, rendered against the town, at September term, 1823, in favor of the plaintiff, for \$75, being the damage by him sustained, by reason of a highway laid out through his land, upon a petition to the said court.

The town pleaded, among other things, *nil debet*, upon which, issue was joined. The cause was tried at the sittings of the Common Pleas, in September, 1833, and a verdict taken for the plaintiff, subject to the opinion of this court, upon the following case.

The record of the proceedings, in the Court of Sessions, was produced. The petition to that court alleged, that an application had been made to the selectmen of Bridgewater, to lay out the highway, and that the selectmen had rejected the application. But it did not appear,