

been framed upon the idea that the costs of the original action cannot be recovered back. The defendant cannot obtain a stay of execution until he pays the costs of the original action and files a bond conditioned to pay all such damages and costs as shall be adjudged against him on review, and the plaintiff may prevent a stay of execution by filing a counter bond to refund such sum as the damages shall be reduced on review. Rule 51, 56 N. H. 590; Rule 48, 38 N. H. 592; Rule 47 of edition adopted July term, 1849.

*Exceptions overruled.*

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

---

IRELAND & *a. v.* DROWN.

Technical objections relating to matters of form are waived unless insisted upon at the trial; and a report or verdict will not ordinarily be set aside for a formal defect which might have been obviated by amendment, if the objection had been seasonably made.

A report of a referee will not be set aside on account of variance between the declaration and the proof appearing from reported facts, when the objection was not taken at the trial.

CLARK, J. This action is trespass *qu. cl.* for breaking and entering the plaintiffs' close in Albany, containing about twenty-five acres, described as bounded on the north by land of the plaintiffs known as the Wentworth pasture, on the west by Hale's Location, and south and east by land supposed to belong to the defendant, and cutting and carrying away wood and lumber. The referees by whom the action was tried find that the plaintiffs were in possession of the land described in the declaration, and were the owners of it, when the trespasses complained of were committed by the defendant, and assess damages for the plaintiffs, and the defendant files exceptions. As it does not appear that the defendant offered any evidence of title to the land, it is unnecessary to consider any objections urged by the defendant to the sufficiency of the plaintiffs' title, because possession is sufficient evidence of title to maintain trespass against one showing no title.

Objection is made that the description of the land appearing in the statement of facts reported by the referees does not agree, as to the abuttals, with the description in the declaration. In the declaration the lot is described as bounded west by Hale's Location, north by the Wentworth pasture, and east and south by the defendant's land. In the statement of facts, it appears to be bounded

north by Hale's Location, east by the Wentworth pasture, and south and west by the defendant's land. In the declaration, Hale's Location is described as lying west of the plaintiffs' land. The referees describe it as lying north of it. If it lies north-westerly, it is sufficient. Abuttals described as lying north or south of the plaintiffs' land are not required to be due north and due south. If an abuttal be assigned toward the west though it be north, if it incline to the west it is sufficient. *Rollins v. Varney*, 22 N. H. 99, 102. The objection is that there was a variance between the declaration and the proof. If this objection would have been valid if made at the proper time, it is now too late to make it. The exception is purely technical, relating to a matter of form and not of substance, and should have been taken at the trial. Exceptions of this character are regarded as waived, unless insisted upon at the proper time, when they may be obviated by amendment; and a report or verdict will not ordinarily be set aside for any merely formal matter, or upon a question not raised at the trial. *McConihe v. Sawyer*, 12 N. H. 397; *Drew v. Towle*, 30 N. H. 531.

*Exceptions overruled.*

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

*J. C. I. Wood* and *J. B. Nash*, for the plaintiffs.

*G. W. M. Pitman* and *J. H. Hobbs*, for the defendant.

[Cöos, June, 1881.]

ANDREWS v. GREEN.

IN CASE, for damage done the plaintiff by fire alleged to have been negligently set by the defendant on his own land, and so negligently guarded that it escaped upon land of the defendant. The report of a referee was recommitted for a further and more specific finding as to the fact of negligence.

*A. S. Twitchell* and *Bingham & Aldrich*, for the plaintiff.

*Ladd & Fletcher*, for the defendant.

[Grafton, June, 1881.]

KINSLEY v. NORRIS & a.

Subject to the plaintiff's exception, the court granted certain motions made by the defendants, and denied certain other motions