

Wilson  
vs.  
Gamble.

On the 23d January, 1835, they, by deed of warranty, conveyed the land to the plaintiff, without any reservation whatever.

On the 30th July, 1835, the defendant entered, and cut and carried away the rye.

A verdict was taken for the plaintiff, by consent, subject to the opinion of the court upon the foregoing case.

*S. Butterfield*, for the plaintiff.

*H. B. Chase*, for the defendant.

RICHARDSON, C. J. Leases by parol, and not in writing, are to have the force and effect of leases at will. 1 *N. H. Laws*, 535.

A lease at will is a lease at the will of both parties, and is to have a reasonable termination. And the rule is, when a tenant holding for an uncertain time, sows the land, he is entitled to the crop as emblements. 5 *Barn. & Adol.* 105, *Graves vs. Weld*; *Littleton*, cap. 8, sec. 68; *Co. Littleton* 55, a & b; *Woodfall L. & T.* 237; 2 *Pick.* 7, *Ellis vs. Paige*.

As the plaintiff had notice, he is bound by the parol agreement. The defendant had a right to the rye, and the verdict must be set aside.

*New trial granted.*

### WILSON vs. GAMBLE.

In actions in form *ex delicto*, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on trial.

Where one tenant in common commences an action to recover damages for a

trespass, and another gives a release, this is no bar to the maintenance of the suit, but the plaintiff is entitled to damages only to the extent of his interest.

Wilson  
vs.  
Gamble.

*TRESPASS quare clausum fregit.* The defendant pleaded the general issue, and filed a brief statement, setting forth that one James Emerson was tenant, in common with the plaintiff, of the close described in the declaration, when the trespasses complained of were committed, and that, after the commencement of the action, said Emerson released to the defendant said trespasses.

It appeared in evidence, on the trial, that said Emerson was tenant, in common with the plaintiff, of said close, as set forth, and that he cut wood and timber thereon at the same time; and the defendant offered in evidence a release, executed by said Emerson, since the commencement of this suit, and contended that the same was a sufficient bar to the plaintiff's action.

The court ruled that the evidence was inadmissible for that purpose, but admitted it to go in reduction of the damages, to the extent of Emerson's interest. The defendant's counsel excepted to the above ruling of the court, and, the jury having returned a verdict for the plaintiff, moved for a new trial.

*James Sullivan*, for the plaintiff.

*Bowman & Porter*, for the defendant.

GREEN, J. The general rule is, that tenants in common should join in personal actions. 3 *Bac. Abr.*, *Joint Tenants, K.*; *Co. Lit.* 198.

In actions in form *ex delicto*, if a party who ought to join be omitted, the objection can only be taken by plea in abatement, or by way of apportionment of the damages on trial. 1 *Chitty's Plead.* 53.

Where several join in a personal action to charge a defendant, the release of one is a bar to all. 3 *N. H. R.* 96, 100.

Brown  
vs.  
Davis.

In this case, one tenant in common brings his suit to recover his portion of the damages sustained. There is no plea in abatement, and the release of the other tenant is no discharge, it not being a joint suit.

The court was right in excluding the evidence, for any other purpose than assessing damages.

*Judgment on the verdict.*

### BROWN vs. DAVIS.

Between the parties to a suit, and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, as bail and endorsers, the return of the sheriff, of matters material to be returned, is so far conclusive evidence, that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them.

But such evidence is not conclusive as to third persons, whose interests are not connected with the suit, but whose interests may be affected by the proceedings of the sheriff, nor as to collateral facts, or matters not necessary to be returned.

Where an officer made a return, upon a writ, that he had attached certain property on the 8th of November; and another officer attached the same property on the 10th, and took it from the possession of a person to whom the first had delivered it on the 9th, which was Sunday; after which the first retook it—*held*, in an action of trespass against him for thus retaking the property, that it was not competent for the plaintiff to show that the defendant did not actually attach the property on the 8th, his return being conclusive evidence of that fact, in such action.

TRESPASS, for taking and carrying away, from the possession of the plaintiff, a two horse wagon.

The defendant pleaded the general issue, and filed a brief statement, alleging that he was a deputy sheriff—that the wagon was the property of one Daniel Cressey, and had been attached by him on two writs against said Cressey, one in