

Harris Vs. Elliott

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SooperKanoon Citation : sooperkanoon.com/79526

Court : US Supreme Court

Decided On : 1836

Appeal No. : 35 U.S. 25

Appellant : Harris

Respondent : Elliott

Judgement :

Harris v. Elliott - 35 U.S. 25 (1836)

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Harris v. Elliott

35 U.S. (10 Pet.) 25

*ON CERTIFICATE OF DIVISION BETWEEN THE JUDGES OF THE CIRCUIT
COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS*

SYLLABUS

Certain streets were laid out by the Town of Charlestown, Massachusetts, and the proceedings relative to the same were afterwards confirmed by an act of the legislature. The streets passed over the land of John Harris, and he afterwards

received a compensation from the town for taking the land occupied by the streets. In 1800, the United States, under the authority of an act of the Legislature of Massachusetts, purchased of Mr. Harris several parcels of land, now occupied as a navy yard. And in 1801, by an arrangement between the Town of Charlestown and the United States, the streets, so far as they were within the limits of the navy yard, were closed up and have ever since been discontinued,

and have been used as apart of the navy yard. The agent of the United States and Mr. Harris not agreeing as to the value of the land taken for the navy yard, the value was ascertained and determined by a jury proceeding under a law authorizing the same, and the amount of the valuation paid to Mr. Harris by the

United States. The jury did not appraise the land on which the streets were

laid out. One lot of ground was appraised "with the appurtenances." This action was instituted by the heirs of Mr. Harris claiming to be paid the value of the land on which the streets had been laid out, but which had been discontinued. The defendant was the commandant of the navy yard.

By the Court.

"The term 'appurtenances,' in common parlance and in legal acceptance, is used to signify something appertaining to another thing as principal, and which passes as incident to the principal thing. Land cannot be appurtenant to land. The soil and freehold of the streets did not pass to the United States, under and by virtue of the term 'appurtenances.'"

The right of the plaintiffs to the freehold of the streets is not barred by the first section of the act of the Legislature of Massachusetts of 30 October, 1781.

The law in Massachusetts is well settled that where a mere easement is taken for a public highway, the soil and freehold remain in the owner of the land encumbered only with the easement, and that upon the discontinuance of the highway, the soil and freehold revert to the owner of the land.

It has been repeatedly ruled in this Court that the whole case cannot be brought here under the act of 1802 upon such a general question. The act provides only for bringing up in this manner specific questions upon which the judges in the circuit court may be apposed in opinion.

This was an action of trespass *quare clausum fregit*, instituted in the Circuit Court of the United States at October term, 1833, against the defendant, Jesse D Elliott, the commandant of the United States Navy Yard at Charlestown, Massachusetts, in

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order to determine the title claimed by the plaintiffs as heirs of John Harris, formerly of Charlestown, Massachusetts. The United States, the real possessors and asserting an ownership of the property, took defense in the suit, being desirous of having the rights asserted by the plaintiffs ascertained and determined.

The cause was submitted to the Court on a statement of facts agreed upon by the counsel for the plaintiffs, and the district attorney of the United States. They were as follow:

"In the year 1780, a committee appointed by the Town of Charlestown, in the County of Middlesex, in the State of Massachusetts, projected certain streets in said town, and laid them down on a map or plan, which was deposited and now remains in the office of the Secretary of State of the Commonwealth of Massachusetts, and on the thirtieth day of October, 1781, the legislature of said commonwealth passed an act confirming the doings of said committee, and barring actions in certain cases therein specified. The street now called Water Street (being the most southerly street on said plan) was not in fact entirely laid out by said town until the year 1795 or 1796 (a street commonly called Battery Street, which ran in the same direction, being used as a highway until that time), and that the most northerly street on said plan, called Henley or Meetinghouse Street, was not in fact laid out by said town until the year 1798 or 1799."

"That John Harris, late of said Charlestown, merchant, deceased, purchased several parcels of land in said Charlestown, viz., one parcel of Andrew Newell, by deed duly executed on 11 January, 1791, described as follows: a tract of land containing five acres more or less, bounded southwesterly on land of Joseph Barrell; northwesterly on a road leading to the brick kilns; northeasterly on a highway leading from the Battery to Moulton's Point; southeasterly on Charles River down to low water mark; saving and reserving a highway through the same from the Battery to Moulton's Point. Another parcel of land of Joseph Barrell, by deed duly executed on 16 June, 1792, viz., a certain piece of land, bounded and measuring as follows, viz., front on Battery Street, S.S.E.,

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there measuring one hundred and seventy-seven feet; upon land of Andrew Newell, E.N.E. four hundred and fifty-eight feet; upon Back lane, N.N.W. one hundred and eighty-four feet; upon land of the heirs of Joseph Lemman, Esq. W.S.W. four hundred and fifty feet; then turning upon said Lemman's land, W.S.W. fifty-seven feet, till you come into Battery Street. Also, a part of a wharf and land upon Battery Street, opposite to where the cellar stands, on said lane, measuring upon Battery Street, N.N.W., one hundred and fourteen feet; on Charles River, S.S.E., and continues the same breadth to low water mark, or however otherwise bounded, or be the same measure more or less, together with all the rights, privileges, and appurtenances to said granted land and premises. Another parcel of land of John Larkin, by deed duly executed 6 July, 1793, viz., a certain parcel of land containing about one acre and one-half, bounded on land of John Harris W.S.W., on said Harris southerly, on land of Captain Thomas Edes; southerly, on land of Captain Thomas Harris and Amos Sampson, W.S.W. on Back Lane, N.N.W., on John Harris formerly Joseph Barrell, Esq. E.N.E. to Battery Street. Another parcel of land of David Munroe, by deed duly executed on the third day of April, 1793, viz., a piece of land containing by estimation about one-eighth of an acre, butted and bounded as follows, viz., easterly and northerly by land formerly of Edward Wilson, but lately _____ Lemmon; westerly by land formerly of Colonel John Phillips and lately owned by Benjamin Wheeler, deceased, and southerly by

the Street or highway called Wapping Street, or however otherwise bounded or reputed to be bounded. The above described parcels of land comprise the two parcels of land described in the writ and are parts of the land covered by said streets as laid down on said plan and afterwards laid out."

"The said Town of Charlestown, in the year 1795 and 1796, laid out the easterly part of the southerly highway on said plan (now called Water Street) over a part of the former Battery Street, and a part of the land of said John Harris conveyed to him as above described, and the said John Harris by the award of referees, dated July 25, 1796, received from said town a part of the land forming the old (Battery) Street and the sum of four

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hundred and fifty dollars in damages for taking his land over which said highway passed. The following is a copy of said award: "

"The subscribers, referees chosen to determine a difference between the Town of Charlestown on one part, and John Harris of said Charlestown, merchant, on the other part, pursuant to a law for amending the streets of said town, laid waste by fire by the British troops, have met and fully heard the parties, and viewed the premises, and considered the disadvantage to the said John Harris' lots on the street leading from the swing bridge to the place of the old battery, in said Charlestown (so far as the same has not been heretofore settled), by taking a part of said lots into the street, and also the advantage derived to said lots by discontinuing the old street, where it does not make a part of the present street, and also the advantage of the new street being more wide, commodious, and direct, than the old street was -- do award that the said Town of Charlestown do pay to the said John Harris the sum of four hundred and fifty dollars, and relinquish all claims to that part of the old street which comes within said lots, as they are left by the said new street. The lots considered extend on the northwest side of the street, from the northeast corner of Thomas Edmands, formerly Henley's, to a place marked on the plan by the word 'stump,' being on the plan a corner of a street proposed to lead to the meeting house, but not yet opened. The Town of

Charlestown is to pay the cost of the referees, and the tavern bill of the house where they set."

"Done at Charlestown, 25 July, A.D. 1796."

"JAMES WINTHROP"

"MATTHEW CLARK *Referees* "

"AMOS BOND"

"That in the year 1798 or 1799, the said Town of Charlestown laid out the most northerly street or highway, marked on said plan, called Meetinghouse or Henley Street, through and over the land of said John Harris conveyed to him as above recited, and on the _____, said John Harris received from the said Town of Charlestown the sum of _____ in damages for taking the land belonging to him, over which said street last mentioned passed. "

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"That in the year 1800, the government of the United States, under the authority of the statute of Massachusetts passed June 17, 1800, purchased of said John Harris several parcels of land in said Town of Charlestown, which are now included within the limits of the navy yard in said town. The value of the land so taken was ascertained by the verdict of a jury (agreeably to the provisions of said statute). And on 29 November, 1800, and 6 February, 1801, said Harris received from the United States the sums so ascertained as the value of said lands."

"The proceedings in ascertaining the value of said lands were as follows: "

"Commonwealth of Massachusetts. To the honorable the Justices of the Court of General Sessions of the Peace, begun and held at Concord, in and for the County of Middlesex, on Monday next preceding the second Tuesday of September, A.D. 1800."

"The petition of Aaron Putnam, agent of the United States of America, respectfully sheweth that your petitioner having been directed by the government of the United States to purchase a certain tract of land in Charlestown, for a navy and dock yard for the United States, and not being able to agree with Mr. John Harris of said Charlestown, for sundry lots of land belonging to him, which lots are within the limits pointed out by the government, your petitioner therefore prays that the Honorable Court would order the sheriff of said county to summon a jury to appraise and value said lots or tracts of land, that the United States may possess the same at a fair and equitable value, agreeably to a law of the said commonwealth in that case made and provided."

"September 11, 1800."

"AARON PUTNAM"

" *Agent for the United States* "

"October 22, 1830 A copy"

"Attest A. BIGELOW, Clerk"

"Middlesex, ss. 4 October, 1800"

"We, the jury, empanelled and sworn as before certified, having been shown several lots of land which belong to John Harris of Charlestown, in the County of Middlesex, merchant,

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lying within the limits mentioned in the act in this case made and provided, and fully heard the said Harris as well as Aaron Putnam, Esquire, agent for the United States, together with the testimony by them respectively produced touching the value of the said lots, we have set out the said lots by metes and bounds, and do appraise and value the same as follows, *viz.*, one lot containing five acres, two quarters and thirty-five rods, bounded as follows: beginning at the northerly corner of Amos Samson's land, by the lane which leads to the brick yards, thence running

southerly, as the fence now stands, partly by land of the said Samson, and partly by land of Thomas Harris to the street lately laid out from the meetinghouse to Charles River, thence running easterly on the same street until it comes to a cedar post marked, with stones about it; thence running in the same direction to a stake and stones; thence running northerly on a straight line to a post in the fence, with the top hewn on all sides; thence running still northerly, as the fence now stands, to the lane first mentioned; thence running westerly by the same lane to the place first mentioned, which same tract of land on our oaths we do appraise and value at thirteen thousand dollars and no more."

"Also one other lot of land with the appurtenances containing one-half of an acre, bounded as follows, *viz.*, beginning at a stake and stones, by the street lately laid out from the meetinghouse to Charles River, thence running southerly by land of Thomas Edes until it comes to a post in the southeasterly corner of said Edes' fence by Battery Street, thence running northerly by the same street till it comes to a stake and stones standing where the same street meets the street lately laid out as aforesaid; thence running southwesterly by the same street to the stake and stones first mentioned; which same tract and lot of land we do, on our oaths, appraise and value at thirteen hundred dollars and no more."

"Also one other lot of land containing one acre and two quarters, more or less, bounded as follows, *viz.*, beginning at a stake and stones where Wapping Street and Battery Street intersect each other; thence running northeasterly by Battery Street to a stake and stones by land claimed by the said Edes

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and in dispute between him and the said Harris; thence running southeasterly by the same land to low water mark; thence running southwesterly by low water mark till it comes to Wapping Street aforesaid; thence westerly by the same street to the stake and stones first mentioned, which same tract of land we do, on our oaths, appraise and value at one thousand five hundred dollars and no more."

"Also one other tract and lot of land containing three quarters of an acre, more or less, bounded as follows, viz., beginning at a stake and stones by Battery Street, by the northwesterly corner of the lot of land last described, thence running southeasterly by the same lot of land to low water mark; thence running northeasterly ninety-seven feet, by low water mark; thence running northwesterly on a straight line to a stake and stones by Battery Street aforesaid; thence southwesterly by the same street to the stake and stones first mentioned, which same tract of land we do, on our oaths aforesaid, appraise and value at five hundred dollars and no more."

"Also one other lot of land containing one acre and one-quarter, more or less, bounded as follows, viz., beginning at a stake and stones at the northwesterly corner of the lot of land last described, thence running northeasterly by said Battery Street to land of John Larkin; thence running southeasterly by land of said Larkin to low water mark; thence southwesterly by low water mark to the piece and lot of land last described; thence northwesterly by the same lot of land to the stake and stones first mentioned, which same lot of land we do appraise and value, on our oaths aforesaid, at the sum of seven hundred and eighty-seven dollars and no more."

"In witness whereof, &c.;"

"The foregoing is a true copy of the verdict of the jury summoned by the Sheriff of the County of Middlesex by virtue of a warrant to him directed, which issued from the Court of Sessions for the County of Middlesex on the application of Aaron Putnam, agent for the United States, to appraise the value of certain lands taken for a navy and dock yard in Charlestown for the United States, which lands belonged to John Harris of said

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Charlestown. Which verdict is annexed to said warrant and on file with the files of said court of sessions for September term, 1800."

"Attest, A. BIGELOW, *Clerk* "

"Clerk's office, Cambridge, October 27, 1830"

"The street called Battery Street in the foregoing description is now called Water Street."

"It appears from the foregoing description that such part of the street as was given up to said Harris by the town by the award of the referees on 25 July, 1796, was included in the transfer to the United States and paid for by them."

"That on 14 January, 1801, a committee of the Town of Charlestown appointed to consider the subject of granting or exchanging the roads and streets for the accommodation of the navy and dock yard, having conferred with the agent of the United States, and examined the land particularly located for that purpose, made a report which was adopted by the town and is as follows:"

" That in consideration of the benefit expected from so important an establishment, such parts of the following streets and passage ways belonging to the town as are included in the limits of the navy and dock yard, be granted for the sole use of the United States, and that their termination from the main street be as follows: the street laid through the land lately belonging to Mr. John Harris by a line across the same from the easterly bounds of the land of Capt. Thomas Edes; the Wapping and Battery Streets by a line across the same on the easterly bounds of a passage way twenty-one feet wide, belonging to the town, which leads to low water mark, the road leading to Moulton's Point by a line across the same from the northerly bounds of the land lately belonging to Aaron Putnam, Esq., provided however that if the navy and dock yard should be discontinued or the land converted by the United States to private uses, these grants shall be void, and the aforesaid streets and passage ways shall be opened as before for the use and accommodation of the town."

"John Harris requested an entry of his protest to the report on account of his right to the advantages of the said streets."

"That from and after the passing of the foregoing vote the two

streets marked on the said plan, so far as the same are contained within the limits of said navy yard, were and have been discontinued and have ceased to be used as public highways and have been used as a part of the navy yard."

"That at the time the United States took the land of John Harris, there were three wooden buildings on lot No 2, and no buildings on the other lots."

"That said John Harris at that time owned a small gore of land adjoining the west end of lot No 2, which was sold by his administrators to Commodore Hull in 1817, and afterwards sold by said Hull to the United States. The same gore of land is now enclosed within the walls of the navy yard."

"That the Town of Charlestown, on 2 March, 1801, sold to Aaron Putnam a part of the road leading to the brick yards, which said Putnam afterwards, on 2 April, 1801, sold to the United States, and it is now within the limits of the navy yard."

"That said John Harris died on 19 October, 1804, having devised all his real estate to his brothers, Thomas Harris and Jonathan Harris who, together with a niece, to whom said John gave an annuity, were the heirs at law of said John, never having made an entry on the land covered by said streets, nor did the said Thomas or Jonathan ever enter therein."

"That said Thomas Harris died on ____ of June 1814, intestate, and his estate descended to his children, Thomas Harris John Harris and Mary Coleman."

"That said Jonathan Harris died on 14 August, 1814, intestate, and his estate descended to his children, Samuel D. Harris, Richard D. Harris, Charles Harris, Henry Harris, Mary Harris, Charlotte Harris, and Augusta Harris, and that the said Charlotte and Augusta were infants within the age of twenty-one years at the time of the decease of the said Jonathan, and the other children of said Jonathan were of full age at the time of his decease. That the heirs of said Jonathan and Thomas Harris claim to hold said two parcels of land described in the writ as tenants in common, and that the said Richard, for himself and the other heirs of said

Jonathan and the heirs of said Thomas above mentioned, made an entry into said two

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parcels of land on 4 September, 1830, claiming title to the soil and freehold thereof, but have been constantly repulsed and kept out of possession by the officers of the United States in command of the navy yard, and particularly at the time of the trespass complained of in this action by the present defendant, the commandant of the navy yard. A similar entry was made on 22h September, 1833, which was repulsed in the same manner."

"An act for widening and amending the streets, lanes, and squares in that part of the Town of Charlestown which was lately laid waste by fire. Passed 30 October, 1781."

"Whereas great desolation and destruction was, some time since, made by the British troops in Charlestown, wantonly destroying the same by fire. And whereas a committee was appointed by the town aforesaid for regulating the streets, lanes, and squares in that part of the town which was so laid waste, and the committee hath accordingly proceeded to lay out the same, a plan whereof hath been laid before this Court and is now deposited in the secretary's office."

"Sec. 1. Be it therefore enacted by the Senate and House of Representations in general court assembled and by the authority of the same that the said proceedings of the committee be, and are hereby confirmed, and all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c.;, laid out as aforesaid, or for damages sustained or occasioned thereby shall be utterly and forever barred."

"Sec. 2. And be it further enacted by the authority aforesaid that no building whatsoever be so erected as to encroach upon any street, lane, or square by them laid out as aforesaid, and that every building so erected be deemed a nuisance and be accordingly taken down or removed by the order of any two justices for the County of Middlesex or the selectmen of Charlestown, the charge of such removal

to be paid out of the moneys which shall be raised by the sale of the materials of such building, which, by the order of said justices or selectmen, shall be sold for that purpose unless the said charges shall be immediately paid by the owner. "

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"Sec. 3. And be it further enacted by the authority aforesaid that if any person or persons whatsoever shall wittingly or willingly, without good authority, pluck up or remove any of the stakes or boundmarks which have been or shall be fixed or set up by said committee, to distinguish and ascertain the streets aforesaid, and shall be thereof convicted before any justice of the peace for the County of Middlesex, each and every person so offending shall forfeit and pay the sum of forty shillings for the use of said town, or, on failure thereof, shall suffer imprisonment for the space of two months. And whereas some persons may suffer damage by laying out the streets, &c.;, according to the plan aforesaid, and others may receive benefit and advantage thereby."

"Sec. 4. Be it further enacted by the authority aforesaid that the value of all lands and buildings and other materials taken from any person by virtue of this act shall be determined by three persons mutually chosen for that purpose, one of which shall be appointed by the selectmen, or a committee chosen for that purpose, which person so appointed by the selectmen or committee shall not be an inhabitant of the town, and the other by the party interested in the land, which two shall choose a third, and the judgment of the three persons, or any two of them, so chosen, shall be final in the case, and the town held and obliged to pay to the person interested in the land, buildings, or materials, aforesaid, the sum at which it may be appraised as aforesaid."

"Sec. 5. And be it further enacted by the authority aforesaid that in any case where the whole of any person's land may not be taken away by the plan aforesaid, the appraisers aforementioned, in estimating the sum said person shall receive, shall consider the advantage his remaining land receives, as well as the value of land taken from him by the plan aforesaid, and from a consideration of all circumstances determine the sum of money such person shall receive as

aforesaid."

"And whereas some estates may be advantaged and rendered more valuable by the execution of the plan aforesaid,"

"Sec. 6. Be it therefore enacted by the authority aforesaid that the selectmen, or a committee appointed by the town for that purpose, shall have power to call upon all persons whose

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estates (in their opinion) are benefited by the execution of the plan aforesaid, to join in the appointment of appraisers in the manner before provided in this act for estimating damages as aforesaid, which appraisers shall have full power and authority to determine the sum that the owner of any estate so benefited ought to pay, which estate shall be subjected to make good the sum so awarded by the appraisers aforesaid."

"And whereas the house lots of Richard Devans, Esq., and Messieurs Ebenezer Breed and Jonathan Penny are taken away by the plan aforesaid,"

"Sec. 7. Be it further enacted by the authority aforesaid that the selectmen of the town aforesaid, or a committee appointed by the town for that purpose, shall be held and obliged to procure good and sufficient house lots for said Richard Devans, Ebenezer Breed, and Jonathan Penny which, in the opinion of appraisers to be chosen as is before provided by this act, shall be equal in value and convenience to those taken away as aforesaid. And when said house lots are procured for the persons aforesaid, then their lots and buildings shall be under the same rules and regulations as to moving the buildings thereon as is before provided by this act for removing and preventing encumbrances and nuisances."

"And whereas some persons, in order to defeat the good purposes designed by this act, may refuse or neglect to join in the appointment of appraisers, as is before herein provided,"

"Sec. 8. Be it further enacted by the authority aforesaid that if any person or person shall, after being duly notified thereof by the selectmen of the town or a committee appointed for that purpose, refuse or neglect to join in the appointment of appraisers as aforesaid, then it shall and may be lawful for the selectmen or committee aforesaid to apply to any two justices of the peace in the Town of Boston, which two justices shall, upon such application, notify the party so refusing or neglecting, and after such notice duly given, the said two justices shall have full power and authority to appoint any three freeholders of the Town of Boston, who shall have the same power and authority in valuing any piece of land, and all persons shall be as fully bound thereby as though the parties had joined in the appointment. "

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"And whereas the inhabitants of the Town of Charlestown are, by reason of their losses in this present war, so reduced in their circumstances as to be rendered unable, without the assistance and encouragement of the public, to carry said plan into execution,"

"Sec. 9. Be it further enacted by the authority aforesaid that from and after the passing of this act, there shall be allowed and paid out of the public treasury of this commonwealth to the Honorable Nathaniel Gorham, Esq., Thomas Russell, Esq., and Mr. David Wood, Jr., or the survivor of them, one-half of all the taxes paid by the Town of Charlestown for the space of seven years, to be applied to the purposes before mentioned."

"Sec. 10. And be it further enacted that the treasurer of this commonwealth be and hereby is directed to pay into the hands of the said Nathaniel Gorham, Thomas Russell, and David Wood, Jr., or the survivor of them, one-half of all the taxes laid upon said town for the purposes aforesaid."

"An Act authorizing the United States to purchase a certain tract of land in Charlestown, for a navy yard. Passed 17 June, 1800."

"Sec. 1. Be it enacted by the Senate and House of Representations in general court assembled and by the authority of the same that the consent of this commonwealth be and hereby is granted to the United States to purchase a tract of land situated in the northeasterly part of the Town of Charlestown, in the County of Middlesex, adjoining and bounded on two sides by Charles and Mystic Rivers, not exceeding sixty-five acres, exclusive of flats, for the purpose of a navy or dock yard, or both of them, and erecting magazines, arsenals, and other needful buildings. The evidence of the purchases aforesaid, to be entered and recorded in the registry of deeds in the said County of Middlesex. Provided always, and the consent aforesaid is granted upon the express condition that this commonwealth shall retain a concurrent jurisdiction with the United States in and over the tract of land aforesaid, so far as that all civil and such criminal processes as may issue, under the authority of this commonwealth, against any person or persons

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charged with crimes committed without the said tract of land, may be executed therein, in the same way and manner as though this consent had not been granted."

"Sec. 2. And be it further enacted that if the agent or agents employed for the United States, and the owner or owners of said tract of land so to be purchased, cannot agree in the sale and purchase thereof, such agent or agents may apply to any court of general sessions of the peace which shall be holden within and for the aforesaid County of Middlesex, which court, after due notice given to the said owner or owners, are hereby empowered and directed to hear and finally determine the value of the same tract of land, or any part or portion thereof, by a jury, under oath, to be summoned by a sheriff or his deputy for that purpose or by a committee of three persons, if the parties aforesaid can agree upon them, and the value thereof being thus ascertained by the verdict of such jury or the report of such committee, who are also to be under oath faithfully and impartially to value said tract of land or any portion of the same, and such verdict or report being accepted and recorded by said court, and the amount thereof being paid or tendered to the owner or owners of said tract of land, or to the owner or owners of

any part of said tract of land, that shall have been thus valued, with his or her reasonable costs; the said tract of land, or such parts of the same as shall be thus valued shall forever be vested in the United States and shall and may be by them taken, possessed, and appropriated to the purposes aforesaid."

"Upon the trial and statement of facts in this cause, the following questions occurred on which the opinions of the judges were opposed, and thereupon it was ordered by the court, on motion of William Minot, of counsel for the plaintiffs, that the points on which the disagreement happened should be certified to the Supreme Court for their decision."

"1. Whether the soil and freehold of the street called Henley or Meetinghouse Street, and of the street called Battery or Water Street, did or did not pass to the United States under and by virtue of the term appurtenances, used by the jury in its verdict in the description of the lot No. 2, or by the description

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in said verdict of lots No. 1 and 3, or by the proceedings by which the land was taken by the United States."

"2. Whether the limitations contained in said statute of October 30, 1781, is a bar to the plaintiffs' right to recover the soil and freehold of said streets."

"3. Whether, upon the discontinuance of a high way in Massachusetts by the public, the soil and freehold of such highway reverts to the owner of the land taken for such highway."

"4. And upon the facts stated, whether the plaintiffs have any right or title to the lands taken for streets, in which the trespass is supposed to have been committed, and can maintain their said action. "

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

This is an action of trespass, and the declaration contains two counts. In the first count the *locus in quo* is described as a certain close situated in the Town of Charlestown, measuring four hundred feet in length and forty feet in width, formerly called Henley Street, and in the second count, the *locus in quo* is described as a close in the same town measuring seven hundred and fifty feet in length and forty feet in width, formerly called Battery or Water Street. And upon the trial of the cause, the following questions occurred, upon which the opinions of the judges were opposed, and the points have been certified to this Court, *viz.*,

1. Whether the soil and freehold of the street called Henley or Meetinghouse Street, and of the street called Battery or Water Street, did or did not pass to the United States under and by virtue of the term appurtenances, used by the jury in their verdict, in description of lot No. 2, or by the description in said verdict of lots Nos. 1 and 3, or by the proceedings by which the land was taken by the United States.

2. Whether the limitations contained in the said statute of October 30, 1781, is a bar to the plaintiffs' right to recover the soil and freehold of said streets.

3. Whether, upon the discontinuance of a highway in Massachusetts, by the public, the soil and freehold of such highway reverts to the owner of the land taken for such highway.

4. And upon the facts above stated, whether the plaintiffs have any right or title to the land taken for said streets on which the trespass is supposed to have been committed.

It appears from the statement of facts in the case that in the

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year 1780, a committee, appointed by the Town of Charlestown projected certain streets in the town and laid them down on a plan or map, which was deposited and now remains in the office of the Secretary of State of the Commonwealth of Massachusetts, and that on 30 October, 1781, the legislature of that state passed

an act confirming the doings of that committee and barring actions in certain cases therein specified. John Harris, the ancestor of the plaintiffs, about the year 1793, became the purchaser and owner of certain tracts of land, which comprised the two parcels described in the declaration, and which are parts of the land through which said streets are laid down on the said plan or map in the year 1780, although, in point of fact, Battery or Water Street was not laid out and opened until the year 1795 or 1796, and Henley or Meetinghouse Street not until the year 1798 or 1799. These streets passed over the land of John Harris and he received from the Town of Charlestown a compensation in damages for taking the land belonging to him for the streets.

In the year 1800, the government of the United States, under the authority of an act of the Legislature of Massachusetts, purchased of John Harris several parcels of land now included within the limits of the navy yard in the Town of Charlestown, and in the year 1801, by an arrangement between the Town of Charlestown and the United States, these streets, so far as they were within the limits of the navy yard, were closed up and have ever since been discontinued and ceased to be used as public highways, and have been used as a part of the navy yard. The act of the Legislature of Massachusetts consenting to the purchase, and ceding the jurisdiction, provides that if the agent of the United States and the owners of the land so to be purchased cannot agree in the sale and purchase thereof, application may be made to any Court of General Sessions of the Peace of the County of Middlesex, which court is authorized to summon a jury to value the same. The agent of the United States and John Harris not agreeing as to the value of the land so taken by the United States, the same was ascertained by a jury duly summoned according to the provisions of the act, and by the proceedings of the jury for that purpose and the return made thereupon, five lots of land were appraised, which belonged to

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John Harris which are particularly described by metes and bounds, and some part of the land so appraised is bounded upon and by the said streets, but no part of the *locus in quo* in either count in the declaration is included within such bounds

and description.

The description of one of the lots so taken and appraised begins as follows: "One other lot of land, with the appurtenances, containing one-half of an acre, bounded as follows," &c.;, particularly describing the lot, but not including the highway, and one of the questions arising under the first point is whether, under the term "appurtenances," the soil and freehold of the street passed to the United States. This term is not used in the description of either of the other lots. The inquest of the jury, after particularly describing by metes and bounds, each lot, concludes in each case as follows: "Which same tract of land, on our oaths, we appraise and value at _____," and the act of the Legislature of Massachusetts declares that such parts of the land so valued and paid for by the United States shall be forever vested in the United States, and shall and may be taken possession of and appropriated to the purposes aforesaid. This inquest therefore shows that the jury appraised the land only included within the description, and the act only vests the title to such land as shall be appraised. The streets were clearly not appraised, and so did not pass to the United States unless they passed as an incident under the term "appurtenances."

If, from the use of this term, connected with and explained by the other parts of the inquest, it clearly appeared to have been the intention of the jury to include the streets, it might be considered a part of and explanatory of the description and be carrying into effect the intention of the jury. But if no such conclusion can be drawn, the term must receive its legal and appropriate interpretation. There is no ambiguity in the description of the lot, necessary to be explained, and it is difficult to conjecture what could have been the understanding of the draftsman by the use of the term. It is not introduced in the description of any of the other lots. It does, to be sure, appear that there was upon this lot several houses, and none upon any of the other lots, and it is not unlikely that it was intended to apply to the buildings upon the lot, but this was unnecessary, as they would pass

with the land, although from the facts as disclosed in the case we cannot discover any appropriate application of the term, yet we cannot undertake to say that there was not any right or interest incident to this lot which would pass under the term "appurtenances." But there is no ground to warrant a construction that it was used in reference to the soil and freehold of the street or anything to take it out of the strict, legal, and technical interpretation of the term. This term, both in common parlance and in legal acceptance, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord Coke says, Coke Lit. 121b, a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, land cannot be appurtenant to land.

In the case of *Jackson v. Hathaway*, 15 Johns. 454, the court said it is impossible to protect the defendant on the ground that the adjoining road passed by the deed as an incident to the lands professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant, but it would be absurd to allow the fee of one piece of land not mentioned in the deed to pass as appurtenant to another distinct parcel which is expressly granted by precise and definite boundaries. And in the case of *Leonard v. White*, 7 Mass. 6, it was decided that by the grant of a grist mill, with the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill, did not pass, although it might be considered as a grant of the easement for the accommodation of the mill. Cro.Eliz. 704. Cro Char. 57. 3 Salk. 40. The answer, therefore, to this branch of the question must be that the soil and freehold of the streets did not pass under and by virtue of the term appurtenances, nor is there anything in the description of lots Nos. 1 and 3 in the verdict of the jury, nor in the proceedings by which the land was taken by the United States, from which it can be inferred that the soil and freehold of the streets passed to the United States. It has been shown by the notice already taken of the verdict and proceedings that they do not include the streets. The same answer must therefore be given to this branch of the question.

2. That part of the act of 30 October, 1781, under which

the second question arises, is as follows:

"Section 1. That the said proceedings of the committee be and hereby are confirmed and all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c.;, laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and forever barred."

The preamble to this act refers to the destruction of Charlestown by fire, and that a committee had been appointed by the town for regulating the streets, lanes, and squares in that part of the town which had been laid waste by the fire, and that the committee had proceeded to lay out the same, a plan of which had been deposited in the secretary's office. This preamble states that the committee was appointed to regulate the streets, which might not perhaps, in strictness, authorize them to alter the streets, but the act, in several parts of it, evidently looks to and provides for cases where the streets were widened and altered. This mode of laying out streets was not according to the general law of Massachusetts, and the object of the act was to legalize and confirm the proceedings of the committee, and to bar all actions to recover possession of any land so taken for streets, lanes, squares, &c.;, or for damages sustained by anyone thereby. This bar of all actions, was to protect and establish the doings of the committee in laying out the streets, but does not seem to look to any question relating to the soil and freehold of the streets, if the easement should at any time thereafter be discontinued. This question is not stated with precision, and might perhaps admit of a more general view of the act of 1781, and open the inquiry whether the right of the plaintiffs to the soil and freehold of the streets was not taken away by it, but as the cause must go back for further proceedings, we do not think proper to enter into the more general consideration of this act or touch the question as to its effect upon the plaintiffs' right to the soil and freehold of the streets. But only decide that such right, if it exists, is not barred by the first section of the act.

3. Upon the third point, the law in Massachusetts is well settled that where a mere easement is taken for a public highway, the soil and freehold remains in the owner of the land, encumbered only with the easement, and that upon the discontinuance

of the highway, the soil and freehold revert to the owner of the land. 4 Mass. 427, 6 *id.* 454, 13 *id.* 259, 16 *id.* 33.

4. The fourth question is too general, embracing the merits of the whole case, and does not present any single point or question, and it has been repeatedly ruled in this Court that the whole case cannot be brought here under the act of 1802 upon such a general question. This act provides only for bringing up in this manner specific questions, upon which the judges in the circuit court may be opposed in opinion.

Several questions growing out of the facts in this case have been suggested at the bar deserving consideration, but they are not stated in such specific points as is required by the settled course of the Court, and no opinion will, of course, be expressed upon them.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts and on the points and questions on which the judges of the said circuit court were opposed in opinion and which were certified to this Court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof it is the opinion of this Court, on the first question so certified as aforesaid, that the soil and freehold of Henley or Meetinghouse Street, and of Battery or Water Street, did not pass under and by virtue of the term "appurtenances" used by the jury in their verdict, nor was there anything in the description of lots one and three in the verdict of the jury that passed the soil and freehold of the said streets to the United States.

2. On the second point, it is the opinion of this Court that the right of the plaintiffs to recover the soil and freehold of the said streets is not barred by the limitations contained in the statute of October 30, 1781, as set forth in the record.

3. On the third point, it is the opinion of this Court that upon the discontinuance of a highway in Massachusetts by the public, the soil and freehold of such highway

revert to the owner of the land taken for such highway.

4.

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On the fourth question, no specific point being stated, this Court can express no opinion, as it has been repeatedly ruled in this Court that the whole case cannot be brought here under the Act of Congress of 1802 upon such a general question.

Whereupon it is ordered and adjudged by this Court, that it be so certified to the said circuit court.

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