

# Supreme Court.

1

THE TOWN OF SOUTHAMPTON,  
Respondent,

AGAINST

EDWIN POST,  
Appellant.

This action was tried before Hon. Jasper W. Gilbert, as Referee, and was decided by him on the 9th day of April, 1888. <sup>2</sup>

Judgment was entered on his report in favor of the plaintiff on the 23d day of April, 1888, for six cents damages and \$444.02 costs.

## NEW YORK SUPREME COURT.

THE TOWN OF SOUTHAMPTON,  
Plaintiff,

AGAINST

EDWIN POST,  
Defendant.

Summons.

3

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your



4 answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in this complaint.

Dated May 28, 1887.

THOMAS YOUNG,  
Plaintiff's Atty.

Office and Post Office address,  
Huntington, Suffolk Co., N. Y.

5 N. Y. SUPREME COURT,  
SUFFOLK COUNTY.

THE TOWN OF SOUTHAMPTON,  
Plaintiff,

AGAINST

EDWIN POST,  
Defendant.

} Copy Complaint.

6 The plaintiff complains of the defendant and says:

FIRST.—That the plaintiff is and for more than a hundred years last, past and since the early settlement of the Town of Southampton has been the owner of a certain tract, piece or parcel of land, situate, lying and being in the villarge and town of Southampton, Suffolk County, N. Y., substantially as the same is now surrounded by fence, commonly called the "Old Burying Ground" (for which purpose it has always been used by the



people of said town), and of the narrow strip of 7  
land used as a road in passing to and from said  
burying ground from the main street or highway.

SECOND.--That this defendant on or about the  
1st day of July, 1886, and at divers times between  
that date and the commencement of this suit,  
wrongfully entered upon said premises and turned  
his horses, cattle and hogs therein and depastured  
the same, and trod and trampled down the graves  
therein, and disturbed and injured the fences  
around the same, and broke down the tombstones  
therein, and dug up and carried away the soil  
therefrom, and otherwise wrongfully injured and  
trespassed upon said premises to plaintiff's damage 8  
of one hundred dollars (\$100).

Wherefore, plaintiff asks judgment against the  
defendant for the sum of one hundred dollars  
(\$100), with costs.

THOMAS YOUNG,  
Plaintiff's Atty.

County of Suffolk, ss.:

GEORGE G. WHITE, being duly sworn, says: That  
he is President of the Trustees of the Freeholders  
and Commonalty of the Town of Southampton;  
that he has read the foregoing complaint, and that  
the same is true of his own knowledge, except as 9  
to the matters therein stated to be alleged on in-  
formation and belief, and as to those matters he  
believes it to be true.

GEO. G. WHITE.

Sworn to before me, this {  
13th day of July, 1887, }

LEWIS BOWDEN,  
Notary Public.



SUPREME COURT,  
SUFFOLK COUNTY.

10

THE TOWN OF SOUTHAMPTON

VS.

EDWIN POST.

The defendant, for answer to the complaint of the plaintiff herein:

11 I.—Denies that the plaintiff is or ever has been the owner of the premises described in the complaint, or any part thereof.

12 II.—Admits that the Trustees of the Freeholders and Commonalty of the Town of Southampton now own, and for a long period of time have owned, one acre of land for a public burial ground, situate in the village and town of Southampton, Suffolk County, N. Y., bounded on the north by the land of the heirs of Micaiah Herrick, deceased, and on the east, south and west by the land of this defendant, said acre being a portion of the premises described in the complaint, and avers that said acre has not been used by said owners, or by the inhabitants of said town, within about one hundred years last past.

III.—Denies each and every allegation in said complaint contained, not hereinbefore specifically denied.

Wherefore, defendant asks that the complaint of the plaintiff be dismissed, with costs.

TIMOTHY M. GRIFFING,  
Attorney for Defendant,  
Riverhead, N. Y.

Suffolk County, ss.:

13

EDWIN POST, the defendant, being duly sworn, says: That the foregoing complaint is true to his own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

EDWIN POST.

Sworn before me, this 27th }  
day of September, 1887, }

LEWIS BOWDEN,  
Notary Public.

At a Special Term of the Supreme 14  
Court, held at the County Court  
House, at Riverhead, on the 5th day  
of December, 1887.

Present—Hon. C. F. BROWN, Justice.

N. Y. SUPREME COURT,

SUFFOLK COUNTY.

THE TOWN OF SOUTHAMPTON

VS.

EDWIN POST.

15

On reading and filing the annexed consent, and on motion of Thomas Young, attorney for the plaintiff, it is hereby ordered that all the issues herein be and they hereby are referred to Hon. Jasper W. Gilbert to hear and determine.

Enter,

C. F. BROWN.



16 NEW YORK SUPREME COURT,  
SUFFOLK COUNTY.

THE TOWN OF SOUTHAMPTON,  
Plaintiff,

AGAINST

EDWIN POST,  
Defendant.

17 Before Hon. JASPER W. GILBERT, Referee.

Hearing at SOUTHAMPTON, Dec. 23, 1887.

APPEARANCES:

For Plaintiff, Hon. THOS. YOUNG, THOS. F.  
BISGOOD, Esq.

For Defendant, T. M. GRIFFING, Esq., Hon.  
J. H. TUTHILL.

It is stipulated and agreed between counsel that  
the oath of the Referee be waived.

18 It is also further stipulated and agreed that  
the fees of the Referee shall not be limited to  
those fixed by the statute.

It is agreed that a stenographer be employed  
whose fees shall be paid by the plaintiff, in the first  
instance, and be a taxable disbursement.

Mr. Bisgood, plaintiff's counsel, offers in evi-  
dence the patent from Gov. Dongan to the Town  
of Southampton:

PATENT OF GOV. DONGAN.

Thomas Dongan Capt Generale Governor in  
Chiefe and Vice Admirall in and over the Province  
of Newyorke and Territoryes Depending thereon  
in America &c. under his Majesty James the sec-  
ond By the grace of God King of England Scot-  
land ffrance and Ireland Defender of the faith &c.  
To all whom this shall come sendeth Greeting  
Whereas the Right Honorable Edmund Andross  
Esquire, Seigneur of Suzrainte Lievt. and Governr.  
Genll. under his Royall Highs James Duke of  
yorke and Albany &c: now his present Majesty of  
all his Territoryes in America did by a certaine  
writeing or Patent under the seale of the Province 20  
bearing date the first day of November one thou-  
sand six hundred and seventy six grant Ratifye  
and confirme unto John Topping Justice of the  
peace Capt. John Howell Thomas Halsey Senior  
Joseph Raynor Constable Edward Howell John  
Jagger John Foster and Francis Sayres Overseers  
Lievt. Joseph Fordham Henry Pierson John  
Cooper Ellice Cook Samuell Clarke Richard Post  
and John Jenings as Patentees for and in behalfe  
of themselves and their Associates the ffreeholders  
and Inhabitants of the Towne of Southampton a  
certaine tract of Land lyeing and being scituate in  
the southside of Long Island in the Eastriding of  
Yorkshire towards the Maine sea the Eastwards 21  
bounds where of extends to a certaine place or  
plaine called Wainscott where the bounds are set-  
tled betwixt their Neighbors of the Towne of East-  
hampton and them their southern bounds being  
the sea and so runs Westward to a place called  
Seatuck where a stake was sett at their furthest  
extent that way then crossing over the Island to  
the northward to Peaconock great river not  
contradicting the agreement made betweene  
their towne and the towne of Southold after  
their tryall at the Court of Assizes and so to  
runn Eastward alongst their north bounds to



22 the Easternmost part of Hoggenoch, over against Shelter Island includeing all the necks of Land and Islands within the aforesaid described bounds and limitts together with all Rivers Lakes waters quarries Woodland plaines meadows pastures marshes fishing hawking hunting and fowling and all other profitts, Commodities and Hereditaments to the said Towne tract of Land and premisses within the Limitts and bounds afore menconed described belonging or in any wise appertaineing To have and to Hold all and singular the said Lands hereditaments and premisses with their and every of their appurtenances and of every part and parcell thereof to

23 the said Patentees and their associates ther heires Successors and Assignes forever according to the tenure & custome of the Manor of East Greenwich within the County of Kent in England in fee and Comon Soccage and by fealty only Provided alwayes notwithstanding that the extent of the bounds before recited do no nowayes prejudice or infringe the particular proprieties of any person or persons who have the right by Patent or other lawfull claime to any part or parcell of land or Tenements within the Limitts aforesaid only that all the Land and Plantacons within the said Limitts or bounds shall have relacon to the towne in Genll for the well government thereof And if

24 it shall so happen that any part or parcell of the lands within the bounds and Limitts aforescribed be not already purchased of the Indyans it may be purchased (as occasion) according to law And moreover he the said Edmund Andross Lievt and Goremr Genll as aforesaid did further grant and confirme unto the said Patentees and their Associates their heires Successors and Assigns all the priviledges and Imunities belonging to a towne within this Government and that the place of their present habitacon & abode shall continue and retaine the name of Southampton by which name & stile it shall be distinguished and knowne

in all bargaines & sales Deeds Records and writings they the said Patentees and their Associates their heires Successors and Assignes makeing improvement on the said land and confirmeing themselves according to law and yielding and paying therefore yearly & and every yeare as an acknowledgement Quittrent on fat lamb unto such officer or officers as shall be impowered to receive the same as by said Patent Recorded in the Secretaries Office relacon being thereunto had may more fully and at large appeare And Whereas of Late some difference hath happened betweene the Inhabitants of said Towne of Southampton and the Indyans adjacent to said towne concerning the bounds above specified and also that the clauses above expressed for constituting them a towne and giving them privileges and Imunities are not sufficient in the law to convey to them such privileges & Imunities as was designed to be given them And Whereas Major John Howell a ffreeholder and one of the Patentees of the aforesaid towne of Southampton by Order of the ffreeholders of the said towne hath made application unto me that I would confirm unto ye ffreeholders of said Towne in a more full & ample manner all the abovesited tracts and parcells of land within the limitts and bounds aforesaid and finally determine the difference between the Indyans and the ffreeholders of the said towne of Southampton And also that I

25

26

27

would Erect the said Towne of Southampton within the Limitts and bounds aforesaid into one Towneship Now Know Yee That I the said Thomas Dongan By virtue of the power and authority to me derived from his most Sacred Majesty aforesaid and in pursuance of the same have examined the matter in variance between the ffreeholders of the said Towne of Southampton and the Indyans and do finde that the ffreeholders of the Towne of Southampton aforesaid have lawfully purchased the lands within the Limitts and bounds aforesaid of the Indyans and have payd them



28 therefore according to agreement so that all the  
 Indyan right by virtue of said purchase is invested  
 into the ffreeholders of the Towne of Southampton  
 aforesaid and for and in consideracon of the Quitt-  
 rent hereinafter reserved and other good and law-  
 full consideracons me thereunto moveing Have  
 Granted Ratified Released and Confirmed and by  
 these presents do grant Ratifye Release and Con-  
 firme unto Major John Howell Thomas Hallsey  
 Senior Edward Howell John Jagger John Foster  
 Francis Sayres Joseph ffordham Henry Pearson  
 Samuell Clarke Job Sayres William Barker Isaac  
 Halsey ffreeholders & Inhabitants of Southampton  
 herein after erected and made one body Corporate  
 29 and Politique and willed and determined to be called  
 by the name of the trustees of the ffreeholders  
 and comonalty of the Towne of Southampton and  
 their Successors all the afore recited tracts & necks  
 of land within the bounds and limitts aforesaid  
 together with and singular the houses Messuages  
 Tenements buildings millnes millnedames fencings  
 Inclosures gardens orchards fields pastures woods  
 underwoods trees timber Comon of pastue feed-  
 ings meadows marshes swamps plaines Rivers  
 Rivolets waters lakes ponds Brookes streames  
 beaches Quarris mines mineralls Creeks harbours  
 highwayes and Easements fishing hawking hunt-  
 ing and fowling (silver and gold mines Excepted)  
 30 and all other franchizes profitts Comodityes and  
 hereditaments whatsoever to the said tracts &  
 neckes of land and premises belonging or in any  
 wise appurtaineing or therewithall used occupied  
 accepted reputed or taken to belong or in any  
 wayes to appertaine to all intents purposes and  
 constructions whatsoever as also all and singular  
 the rents arrearages of rents Issues and profitts of  
 the said tract of land and premises heretofore due  
 payable To Have and To Hold all the aforere-  
 cited tract and parcell of land and premises with  
 their and every of their appurtennces unto  
 the said Major John Howell Thomas Hallsey

Senior Edward Howell John Jagger John 31  
 Foster Francis Sayres Joseph Fordham Henry  
 Pierson Samuell Clarke Job Sayres William  
 Barker Isaac Halsey ffreeholders and Comon-  
 alty of the towne of Southampton and their  
 Successors forever to and for the severall and Res-  
 pective uses following and to no other use intent  
 and purpose whatsoever That is to say as for  
 and concerning all and singular the severall respec-  
 tive parcells of Land and meadow part of the  
 granted premises in any wayes taken up and ap-  
 propriated before the day of the date hereof unto  
 the severall and respective present ffreeholders and  
 Inhabitants of the said Towne of Southampton by  
 virtue of the aforerecited deed or Patent to the 32  
 only use benefite and behoofe of the said respective  
 present freeholders and Inhabitants and to their  
 severall and respective heires and assignes forever  
 And as for and concerning all and every such par-  
 cell or parcells tract or tracts of land Remainder of  
 the Granted premises not yet taken up or appro-  
 priated to any particular person or persons by  
 virtue of the aforerecited deed or Patent to the use  
 benefite and behoofe of such as have been pur-  
 chasers thereof and to their heires and assigns for-  
 ever in proporcon to their severall and respective  
 purchases thereof made as tenants in Comon with-  
 out any lett hindrance or molestation to be had or  
 reserved upon pretence of joynt tenancy or survi-  
 vorship anything contained herein to the contrary 33  
 in any ways notwithstanding To Bee Holden of his  
 said Majesty his heires and Successors in ffree and  
 Comon Soccage according to the Mannor of East  
 Greenwich in the County of Kent within his  
 Majestyes Realme of England Yielding rendering  
 and paying therefore yearly and every yeare from  
 henceforth unto our Sovereigne Lord the King his  
 heires and Successors or to such Officer or Officers  
 as shall be appointed to receive the same the sume  
 of one lamb or the value thereof upon the five and  
 twentieth day of March at Newyorke in full of all



34 Rents or former reserved rents services acknowl-  
 edgements and demands whatsoever And further  
 By virtue of the power and authority to me the  
 said Thomas Dongan as aforesaid given and in pur-  
 suance of the same and for the reasons and con-  
 sideracons above recited I have willed determined  
 declared and granted And by these presents do will  
 determine declare and grant that the said Inhabit-  
 ants ffreeholders the ffreemen of Southampton  
 aforesaid Comonly called by the name of the ffree-  
 holders and Inhabitants of the towne of Southamp-  
 ton or by whatever name or names they are  
 called or named & their heires and Successors  
 forever henceforward are and shall be one  
 35 body Corporate and Politique in Deed and  
 name by the name of the trusteess of the  
 ffreeholders & comonalty of the towne of South-  
 ampton and them by the name of the Trustees of  
 the ffreeholders and comonalty of the towne of  
 Southampton one body corporate and Politique in  
 deed and name I have really and fully for his said  
 Majesty his heires and Successors erected made or-  
 dained constituted and declared by these presents  
 and that by the same name they have succession  
 forever And that they and their Successors by the  
 name of the Trustees of the ffreeholders and  
 comonalty of the Towne of Southampton be and  
 shall be forever in future times persons able and  
 Capable in law to have perceive receive and possesse  
 36 not only all and singular the premises but other  
 messuages lands Tenements Privledges Jurisdic-  
 tions franchizes and heriditaments of whatsoever  
 kind or species they shall be to them and their Suc-  
 cessors in ffee forever or for the term of a yeare  
 or yeares or otherwise whatsoever manner it be  
 and also goods Chattells and all other things of  
 whatsoever name nature quality or species they  
 shall be and also to give grant release aliene as-  
 signe and dispose off lands Tenements heredita-  
 ments and all and every other act and acts thing  
 and things to do and Execute by the name afore-

said and that by the same name of the trustees of 37  
 the ffreeholders and comonalty of the towne of  
 southampton to plead and be impleaded answer  
 and be answered unto, defend and be defended  
 they are and may be Capable in whatsoever place  
 and places and before whatsoever Judges and  
 Justices or other persons or officialls of his said  
 Majesty his heires and Successors in all & all man-  
 ner of accons Plaints suites Complaints causes  
 matters and demands whatsoever of what kind  
 quality and species the same be and shall be in  
 manner and forme as any other of his majestyes  
 Liedge people within this Province can or are able  
 to have require receive possesse Enjoy retaine give  
 grant release aliene assigne and dispose plead & 38  
 be impleaded answer and be answered unto defend  
 and be defended do permitt or execute And for  
 the better enabling the Trustees of the ffreeholders  
 and comonalty of the towne of Southampton  
 aforesaid in doing and Executing all and singular  
 the premisess I have willed granted and determined  
 and by these presents do will grant and determine  
 that from henceforward and forever hereafter the  
 said Trustess of the ffreeholders and comonalty of  
 the towne of Southampton doe and may have and  
 use a Common seale which shall serve to Execute  
 the causes and affairs whatsoever of them and  
 their Successors And further I will and by these  
 presents in behalfe of his said Majesty his heires 39  
 and Successors that henceforward forevermore  
 there be and shall be Trustees of the ffreeholders and  
 comonalty of the towne of Southampton aforesaid  
 to be chosen and elected as in these presents here-  
 after is menconed who shall be and shall be called  
 the Trustees of the ffreeholders and Comonalty of  
 the towne of Southampton and they and their Suc-  
 cessors shall and may at all convenient times here-  
 after upon a publique sumons to be obtained at  
 the request of any three of the Trustees aforesaid  
 from any of his Majesty's Justices of the peace of  
 the said towne or for default thereof from any of



40 the Justices of the County of Suffolk for the time being assemble and meet together in the towne house of the said towne or in such other publique place as shall be from time to time appointed to make such acts and orders in writing for the more orderly Doeing of the premisses as they the said Trustees of the ffreeholders and Comonalty of the towne of Southampton aforesaid and their Successors from time to time shall and may think Convenient so allwayes as the said acts and orders be in no wayes repugnant to the laws of England and of this Province which now are or hereafter may be Established and that they be not in any wayes against the true intent and meaning of these presents

41 And also I will ordaine and determine that all and singular the aforesaid acts and orders from time to time shall be made and ordered by the vote of the Major part of the said Trustees of the ffreeholders and Comonalty of the towne of Southampton aforesaid or at least by the vote of the Major part of such of them as shall from time to time Assemble and meet together in manner as aforesaid so alwayes there be not fewer in number than seaven of the said Trustees present at such meetings so to be held as aforesaid and for the better Execucon of this grant in this behalfe I have assigned nominated Created Constituted and made and by these presents do assigne nominate Create

42 Constitute and make Major John Howell Thomas Halsey Senior Edward Howell John Jagger John Foster Francis Sayres Joseph Fordham Henry Pearson Samuell Clarke Job Sayres William Barker Isaac Halsey to stand and be the first modern Trustees of the ffreeholders and Comonalty of the Towne of Southampton to continue in the aforesaid Office from and after the date of these presents until the time that others be elected and Chosen in their stead According to the manner and forme herein after expressed And moreover I do by these presents for and on the behalfe of his Most Sacred Majesty aforesaid his heires and

Successors appoint that the Trustess of the 43 ffreeholders and Comonalty of the town of Southampton Constables and Assessors within the towne of Southampton aforesaid be yearly Chosen on the first twesday of Aprill forever Viz: twelve Trustees of the ffreeholders and Comonalty of the towne of Southampton two Constables and two Assessors in such publique place as the trustees for the time being shall appoint and direct and that the Trusteess Constables and assessors be Chosen by the Majority of voices of the ffreeholders and freemen of the towne of southampton aforesaid And Lastly I give and grant for and on behalfe of his said Majesty his heires and Successors by these presents 44 to all and every person and persons and to whatsoever person subject to his said Majesty his heires and Successors free and lawfull power ability and authority that they or any of them any messuages Tenements Lands meadows feedings pastures woods underwoods rents revercons services and other heriditaments whatsoever within the said County of Suffolke (which they hold of his Sayd Majesty his heires and Successors unto the aforesaid Trustees of the ffreeholders and Comonalty of the towne of Southampton and their Successors shall and may Give grant Bargaine sell and alienate to have hold and Enjoy unto the said Trustees of the ffreeholders and Comonalty of the Towne of Southampton and their Successors forever 45 Yielding and paying therefor unto his said Majesty his heires and Successors on the said twenty fifth day of march yearly and every yeare forever the full and just sume of forty shillings Current money of this Province at Newyorke Wherefore by virtue of the power and authority aforesaid I do will and Command for and on behalfe of his said Majesty his heires & Successors that the aforesaid ffreeholders and Comonalty of the towne of southampton and their Successors have hold use and Enjoy And that they shall and



46 may forever have hold use and Enjoy all the Libertyes authorities Customes orders ordinances franchises acquittances lands tenements and hereditaments goods and Chattells aforesaid according to the tenure and effect of these presents without the lett or hinderance of any person or persons whatsoever In Testimony Whereof I have caused the seale of the said Province to be hereunto affixed and these presents to be entered in the Secretaries Office Witness my hand at Fort James the sixth day of December One thousand and six hundred Eighty six & in the second yeare of his said Majestyes Reigne

THOMAS DONGAN

47 Also the town records of town of Southampton, vol. 1, this entry on the 5th of January, 1665.

Mr. Griffing: That is objected to as incompetent, immaterial and irrelevant.

The Referee: You claim for it that it recognizes the existence of an acre there vested in the town?

Mr. Bisgood: Yes.

The Referee: I think it is admissible upon that ground; upon the ground that where a man bounds his land by a specific monument or another man's land he recognizes title in that other man in adjoining property.

Mr. Griffing: We except.

48

"JANUARY 5th, 1665.

"The overseers have agreed with James Herrick  
"that he shall have one acre of land at the rear  
"of his home lot in consideration of a footway for  
"people up his lot to the burying place where  
"the town have one acre for that use, and James  
"Herrick is to have the hear-bridge of it."

It is admitted that the *locus in quo* is within the boundaries of the patent.

GEORGE W. WHITE, being duly sworn, testifies 49  
as follows:

DIRECT-EXAMINATION by Mr. Bisgood:

I am the president of the Trustees and Freeholders of the Commonalty of the Town of Southampton.

I am well acquainted with the land upon which the alleged trespasses have been committed in this suit and have known it, say, fifty years or more.

It has always been fenced ever since my remembrance same as it is now.

The fences and ditches have never been removed since my remembrance.

That land has been used for burying purposes, 50  
pasture, &c.

Well, it has always, since my remembrance, been about the same as it is now; when a family wanted to bury, they buried there; when they didn't want to bury there they buried in this north ground.

A deed and stipulation are marked Plaintiff's Exhibits A and B, Dec. 23, 1887, are read in evidence.

THE TRUSTEES OF THE FREE-  
HOLDERS AND COMMONALTY  
OF THE TOWN OF SOUTHAMP-  
TON

TO

THE TOWN OF SOUTHAMP-  
TON.

51

Quitclaim Deed.

Dated October 6, 1887.

Consideration \$1.

Conveys the same premises described in the complaint.



SUPREME COURT,  
SUFFOLK COUNTY.

THE TOWN OF SOUTHAMPTON

AGST.

EDWIN POST.

53 It is stipulated that if on or before the trial of this cause, the Trustees of the Freeholders and Commonalty of the Town of Southampton execute and deliver to the Town of Southampton a quitclaim deed of the premises described in the complaint, it may then be considered for the purposes of this action that the plaintiff herein is now and at the date of the commencement of this action was possessed of whatever title to the premises described in the complaint was held or possessed at the date of the commencement of this action by the said trustees, or by this plaintiff, or by either or both of them. It is further stipulated that if the plaintiff shall establish its title to the whole premises described in the complaint it shall have costs.

54 If the plaintiff establishes its title to only one acre, the defendant shall have costs unless plaintiff recovers \$50 damages, and then it has costs.

If plaintiff establishes its title to more than one acre and less than the whole, neither party shall have costs.

Dated October 6th, 1887.

THOS. YOUNG,  
Pltff.'s Atty.

T. M. GRIFFING,  
Deft.'s Atty.

There's gravestones in different places, and a great many have been broken down by pasturing and driving horses and carts, &c., over it. 55

The earliest date on these tombstones that I have is 1682, and the latest date is 1887—May, 1887. The dates run all over that period.

Those old tombstones have been there all my days. I have seen defendant's cattle there within since July. It has been a common, everyday occurrence for the past fifty years, his cattle have been there pasturing—his and his father's.

Well, he had sold off most of his cattle by the first of July, 1886, but there has been two, three, or four since. I have seen probably thirty times his cattle between July 1, 1886, and the commencement of this action. 56

Q. Between those dates? A. Yes.

Q. What else have you seen him do there?

Mr. Griffing: Between those dates?

A. I have seen him cart manure through there, and he had a vegetable garden up above, and he used to go anywhere diagonally across it or lengthwise, and cart wood, &c.

I remember the funeral of Mr. James Herrick here some time ago, on the 17th day of last May. There was probably three hundred people in the procession, and when that was going through the cattle went through the bars and through the procession.

They went out from the ground, so his son 57 drove them into his yard. I seen him drive his wagons over this property during the time stated.

Q. Do you know anything about a way which was used through land which formerly was owned by James Herrick?

Mr. Griffing: Do you introduce this evidence for the purpose of proving your title to this strip?

Mr. Bisgood: No.

Mr. Griffing: What is the object, then?

Mr. Bisgood: The object is to show it comes out



58 on to the land that we claim; that locates the burying ground.

Mr. Griffing: There is no dispute about the location of the burying ground.

Mr. Young: We also claim the strip of land.

The Referee: What, this road?

Mr. Young: Yes, it is in the complaint.

The Referee: Then, of course, you must go on and prove it.

A. It is through the lot formerly belonging to James Herrick, and Henry Post is located on it now—the son of this defendant.

Q. What is the location of that strip in reference to the location of the burial ground, as it is fenced  
59 in? A. Why, the right of way goes to the southwest.

Mr. Griffing: I object to your speaking of a right of way.

By the Referee:

Q. This strip of land you have in your mind, how did it become a strip of land? A. The town bought it and gave James Herrick one acre for the right of way that has been used all my lifetime.

Q. Do you designate the line that has been used by seeing people use it? A. Yes; been through it a number of times when funeral processions went there.

60 Q. Where is then this land you have seen used as a road to the burying ground? A. It is on the north side of the James Herrick lot, about.

Q. Did it run alongside the fence or inside? A. I don't know; they run alongside the fence sometimes; there was no fence there; it was a movable fence.

By Mr. Bisgood:

Q. As the fence now stands? A. I should think on the north side of the fence as it now stands; it enters the burying ground at the southwest part,

it used to, of the burying ground; about four 61 lengths of fence if my memory is right they came on to the rear of James Herrick's lot.

Q. Going from the burying ground, leaving it and going to the main road, what is the course of that strip? A. It is at right angles with the main road. You say what course?

Q. Yes? A. Well, it is nearly a right angle with the main road after you get by his barns and buildings.

Q. (Mr. Griffing.) You say it entered the lot at the southeast or southwest corner? A. Southwest corner of the burying ground.

Q. Then it goes west? A. It stops, I take it, when you get to the burying ground; but when 62 you get to the main street, nearly a west course; that is the road that I followed funeral processions along to go to the burying ground.

Sometimes when it was convenient they went up the north side, if there was grass on, so as not to disturb his crops any. I suppose that was done for his convenience.

When they went off they would be on what is called the Isaac Willmann, north of the Herrick lot. Probably twice I have been on what is called the Willmann lot.

Q. This burying ground is in the rear of the Isaac Willmann lot? A. Two-thirds. The rest of it is in rear of the James Herrick lot.

Q. Captain White, just look at this plot, will 63 you (handing paper to witness); is that a plan of the burial ground and lots around it? A. It is, as near as can be drawn without an actual survey—it is not an actual survey, but as near as can be drawn.

Q. Does this show correctly the position of the burying ground and of the James Herrick lot in reference to the main street and the lots in the rear of the main street? A. It does, as correctly as can be without an actual survey.

Q. Now, there is a dotted line running from the



64 southwest corner of the burying ground to the main street? A. Yes, sir.

Q. What is there, if anything, where that dotted line is now? A. Nothing only the mark of where the funeral procession used to go and come. The dark line indicates the north line of the James Herrick lot. The fence is moved now on a line running from the southwest corner of the burying ground to his buildings. I should think it somewhere not far from the dotted line.

Q. This plot of land marked 350 feet by 220 feet is the burying ground. This plot of land to the south, marked 385 feet was the acre that was given to James Herrick for the right of way over his lot  
65 by the town. A. I drew this diagram.

Mr. Bisgood: We offer in evidence this diagram.

Mr. Griffing: I object to it; it does not appear that he is a surveyor, it does not appear that the measurements are correct, and there is a lot of matter here expressive of his views.

The Referee: I should not accept it as fixing distances.

Mr. Griffing: What then?

The Referee: Only as added to assist his testimony; a memorandum by him as explanatory of his oral testimony.

Exception.

66 The paper is marked "Plaintiff's Exhibit No. 3, Dec. 28, 1888, G. A. H."

(See end of Case.)

Q. You have said the fence around this ground has always been, as long as you remember, in the position in which it is now; how about the ditch and bank?

Mr. Griffing: There is no testimony as to any ditch.

A. There is a ditch there, and a trench is dug

in the burying ground and the fence on the top  
67 of the bank.

Q. (The Referee). The bank is made by digging out of the ditch, isn't it? A. Yes, sir; the trench is dug outside in this strip, and every man putting his fence on the top of the bank just as it is there. James Herrick's heirs, the descendants of the James Herrick, that owned the lot, own on the north side of this ground. Mr. Post, the defendant, owns on the three other sides.

This lot, now, which we call the 385 feet lot that was laid out in the rear of the James Herrick lot, out of the common lands at that time; the land there was not divided at that time, and the James Herrick lot is now owned by Edwin or Henry Post.  
68 Defendant's son, Henry, resides on it.

Q. Just look at this plot, Captain, and see if the James Herrick home lot is indicated on that map (showing another paper to witness)? A. Yes; that is it, handed from one to the other until it comes to Edwin Post. That is the lot.

The title to the James Herrick home lot is indicated on the map as follows:

James Herrick .....	1650
William Herrick .....	1685
Stephen Herrick .....	1708
George Herrick .....	1760
Lindlay Murray } .....	1777
Ichabod Barnett } .....	
Obadiah Rogers .....	1773
James Post .....	1818
Edwin Post .....	1855

69

By Mr. Young:

Q. Mr. Post, the defendant, also now owns the adjoining home lot on the north.

The Isaac Willmann lot. The rear line of those home lots all along Main street runs mainly from the ditch, a straight line nearly to the woods, the rear line of these home lots clear straight through.



## 70 CROSS-EXAMINATION by Mr. Griffing:

My age is sixty-nine; I commenced whaling in 1834, off and on, all over; up to 1858, I think.

During that time I used to be home, say six or seven weeks in a year, most always; sometimes stayed home a year; sometimes stayed three or months at different times, but when I was home I was always on the move somewheres.

Q. Have been away two years at a time within that period? A. Yes; three or four times. I have never seen any burial in this lot outside of that small portion enclosed with the white fence. There is not any date on any tombstone outside of that enclosure in the present century; the latest  
71 date that I know of outside of the enclosure is, I think, 1795; that is not far from where that enclosure is, probably two or three rods east of it.

The first burial that I remember on the premises now enclosed by that white fence was, I think, one of Mr. Post's brothers; it must have been forty-five or fifty years ago, somewheres round there; I can't carry the date exactly.

Miss Rogers enclosed that lot. Miss Harriet J. Rogers she built a portion of the present fence that is there. I think Mr. Post also did, the defendant Edwin Post or his family, probably his father; it was started in 1857. I don't know but what it was Mr. Post and probably his brother William R., and  
72 I think Mrs. Brown's family was another one that put in. I know it was in 1857 it was built.

I don't know anything about Miss Brown having contributed towards the erection of the fence, nothing more than I heard them talk at that time, I know when it was put up and the impression was common talk. What I have stated was simply common talk.

I saw Captain Cook and Gus. Halsey, I think, together build a fence in 1857. I may be a year out of date, but I don't think I am. I have no knowledge as to the person who employed them. I didn't make any bargain with them myself, I

heard them talk. I did not hear any one make  
73 any bargain with them to build that fence, any more than what I heard them say—the workmen. There's probably six gravestones down that I know of; I won't be positive, but there's quite a number. I won't be positive that there are five; I won't be positive that there are four. I won't be positive that there are three. I won't be positive that there are two; I am certain there is one, because I went to put it up.

As near as I can recollect, probably five or six are broken; I don't know but what more. I am certain that there are two broken; I am certain there's a number broken.

Q. Are you certain there are as many as four  
74 broken? A. Well, I think I won't; there's a number broken. I don't claim that any of those stones have been broken since the date mentioned in the complaint, I don't claim that; they were broken before that. I never saw that stones were broken by Mr. Post's horse and cattle.

The Herricks, the Browns and the Posts and the Rogers are buried within the white fence enclosure, those four. Mr. Rogers was a grandfather of Mr. Post, the defendant. There's a number of families of Rogers.

This Obadiah Rogers mentioned was a grandfather of Mr. Post, and I don't know but there's two or three Obadiah Rogers in that burial ground. I understand they all belong to the same family,  
75 that is, father and son. I have seen cattle of Mr. Post in this enclosure within a year, at different times.

Q. Well, do you recollect any time? A. Well, the 17th day of May, 1887.

Q. You say that those cattle belong to the defendant, do you? A. Well, they were in his yard and were put into the lot again.

Q. You infer that they were the defendant's because they were put in his yard? A. Because he was the owner of them, I suppose.



76 Q. Have you any knowledge, Captain, as to who owned those cattle? A. He has control of them, that is—I can say as to that.

Q. Don't you know that his son has conducted the farm for years? A. Yes.

Q. What is his son's name? A. Henry, the one that conducted the farm; but he is not the one that put them in the yard. I don't know in what lot they were before they got into the cemetery. No, not that day; they were in when I saw them. I don't know what lot they came from. I know the bars were open for free access from one lot to the other and were left on the fence; the cattle didn't lay them there. The day before I  
77 saw one in the upper lot and one in the south lot, in the James Herrick lot—not in the burying ground—and one in the burying ground.

There was three that day; whether there was more or not I don't know; it was a common occurrence; it is a common occurrence to have the cattle pasture there in that lot, during the past year, from July 1, 1886, to June 1, 1887, it was a common occurrence to see them pasture there in one sense of the word, but there was a portion in the cemetery, I think, he cut his mowing grass off. I saw the cattle there thirty times, if not more, during the year, from July 1, 1886, to June 11th, 1887. I never saw defendant turn  
78 an animal in there, I don't know that he owned any of the cattle, no more than if I see you driving a horse that you take care of; I don't know whether you own it or not. I saw his son take care of them. I never saw him take care of the cattle during that time.

I saw him driving diagonally across the lot in the year 1886, somewhere in the harvest time; it might have been July, August or September, somewhere thereabouts; I was with Captain Herrick; he pointed it out to me; he is now dead.

He entered on the southwest and left on the northeast. I think he was alone. I don't know

as I said I saw him cart wood, there was not any  
79 on the wagon, I think, I don't know but it might have been a horse-rake on the wagon, I couldn't say. He was probably twenty rods from me.

I have no idea when those fences were built; they were built before my day; the ditches were built before my day; never been disturbed. There are ditches on all four sides of the lot. Well, I say four; the trenches of the ditch, the trench dug up and a bank made. Sometimes they call a trench a ditch; a fence is on the centre of the bank that was moved up out of the ditch; the trenches there are, and the banks on the four sides, but it is not so distinct on the west side, but the rest if it is.

I suppose there were other ditches on his farm  
80 now; I have seen them; there are marks of the ditches between all his lots.

Q. That is not only true of his land but the land of others all through? A. Where there is a division line between a man there's trenches on both sides.

Q. I ask you if that is not true about owners of other lands; haven't they ditches and banks on their land that are not division lines? A. Yes, most have; but most of them have them smoothed off now.

Q. There used to be on every man's? A. Yes; when I was a youngster, it was so all through.

Q. You say that lot belonged to James Herrick.  
81 Of course your opinion is based upon what you see on the records? A. Yes.

Q. You have no knowledge about it, of course? A. No; that was a good deal before my time.

Q. And you can't identify the lines except as you see them on the map? A. Well, we can find them this way by an actual survey; they are laid out in four acre lots from main street to the rear.

Q. Can you identify the lines from personal knowledge? A. I say we could from a survey.

Q. I say, have you any actual knowledge as to



82 the lines between these respective lands? A. Only by the ditches.

Q. Do you know which ditch marks the line between certain person's lots? A. I know the line between the Isaac Wilmann lot and the James Herrick was originally—

Q. (Interrupting.) I say do you know which ditch marks the line between certain person's lots? A. I cannot; they were done before my day—the first division—but never been removed.

Q. How do you know that? A. Well, we know by the survey of the land.

Q. You made this diagram that has been admitted here? A. Yes, sir.

83 Q. You are not a surveyor? A. No, sir; I did it to keep it in my memory when questions were asked. Of course I didn't survey it.

Q. (The Referee.) Do you know any other means of ascertaining the boundaries of this burying ground except where these fences are—taking these fences as lines? A. No, sir; couldn't give a deed to any one; the first settlers of the town set these apart, and they had nobody to give a deed to.

84 Q. Do you know what the first settlers set apart—were you there? A. No, I wasn't there; but I suppose I came from there. I suppose the leader of the company was one of my ancestors. I have seen funeral processions go occasionally through the Isaac Wilmann lot—probably twice. The last time that I saw funeral processions go through the Isaac Wilmann lot was probably in 1887. I couldn't locate the time before that—fifteen or twenty years ago. I wouldn't say; I think there's only two I ever saw go through there; there have been twenty-five burials made within that enclosure—the present enclosure—within my recollection.

That white fence enclosure, I should say, twenty-five; that is nearly the correct number since my

remembrance. I have attended personally, I 85 should say, fifteen.

Q. On the south side of this lot described in the plan, there is a farm way—drive way—that has been used by the defendant ever since you remember anything, hasn't it? A. No, sir.

Q. You say it has not? A. I say it has not.

Q. How long within your recollection has it been used by the defendant? A. Fifteen or twenty years it has been used, sometime about fifteen or twenty years,

Q. Hasn't it been used longer than that? A. I can't say.

Q. Don't you know it has been used at least thirty years? A. I could not say; it may be. 86

Q. Has this roadway been used all your life? A. There is no road there that I know of.

Q. Do you mean by that that there are no indication of a road so far the general appearance of the ground is concerned? A. I mean by that there is no more than from the northwest to the northeast; they are all alike; that is, the road on the south side of this lot is no better defined than any other crossway in the lot on the premises. There's one from the northwest corner to the southeast corner; a very distinct one; and one from the southwest to the southeast corner, and that is very distinct, all used about the same, I should think. I don't think I have seen him use the diagonal one as frequently as the other. I don't know but what that diagonal one was a little more distinct than any other a few years ago. 87

Q. You speak of this lot, Captain White, as 385 feet long; you say that is the lot that was given to James Herrick in exchange for a footway? A. By tradition handed down.

Q. You know nothing about it? A. Of course not.

Q. You never saw any record of it? A. No; only by tradition.

Q. And you say that your information is that it



88 was directly in the rear of James Herrick's lot? A. That is what the record says.

Q. You say there is no record of it; you take your information from a book written by Mr. Pelletreau? A. I take it from the town records.

Q. Do you say the town records fix this lot in the rear of James Herrick's lot? A. Yes.

Q. Are you sure of that? A. To the best of my knowledge it does.

Q. Your statement as to the location of that lot is based upon your reading of that record? A. Yes.

REDIRECT-EXAMINATION by Mr. Bisgood:

89 These dates of death are marked on the different stones: Charlotte Post, 1868; James A. Post, 1660; William R. Post, 1847; O. Rogers, 1817. H. H. Rogers, 1822; J. Post, 1822; H. Post, 1831, I think it is; Phoebe Post, 1842; Phoebe R. Post, 1843; William Herrick, 1819; Elizabeth Herrick, 1884; William Herrick, 1841; Nancy Herrick, 1860; Clara Rogers, 1856; James Herrick, 1849; Cornelia Herrick, 1858; George Herrick, 1873; James Herrick, 1887; James Post, 1855; H. Post 1879; J. Rogers, 1779; Obadiah Rogers, 1783; Abigail Rogers, 1782; Phoebe Brown, 1857; William Brown, 1871; Nancy Brown, 1876; David Brown, 1850. There's Mr. Post's grandson there, I didn't  
90 take his date, who died a few years ago.

The first settlers of the town, they were buried there but no monuments erected to them.

Q. (The Referee.) No headstones? A. No headstones; nothing to mark them. One of my ancestors was buried in 1755, but I know where he was buried from his children.

RECROSS-EXAMINATION by Mr. Griffing:

Q. Captain, do you know any grave there—can you identify the grave of any person, where there is no headstone? A. Well, nothing more than by old wills.

Q. Have you any personal knowledge of any 91 grave there where there is no headstone? A. No, sir; I never saw any of them ever buried there.

By Mr. Bisgood:

Q. Whether there are in that ground any indications of graves? A. Well, I know from what Mr. Post tells me all the grave yard was covered over once.

Q. How do you mean covered over? A. With graves.

Q. There is another burying ground used now? A. Yes; there's another now right adjoining me; they commenced on that in 1721; when I was a boy they used to pick up bones in that, showing 92 had been buried over once or twice.

By Mr. Griffing:

Q. The present yard? A. Yes, sir.

Q. The yard that is now used in another part of the village, you mean? A. Yes, sir.

Q. Then, it is pretty evident the first settlers were buried there? A. No, sir; 1721 was the first grave put in that yard.

Q. Do you remember that? A. Well, the mark is on the headstone, "Joseph Post," the first burial in this yard; that is pretty good evidence, isn't it.

Q. You mean the headstone recites that. You 93 don't know it yourself? A. No, of course not, it was a long time before my day.

It was about four years ago, as near as my memory serves me, that Edwin Post told me that this lot was full of graves. Albert Post was with me at the time. Mr. Post didn't say anything as to the number of graves; he said the yard had been full and they moved up and bought another piece of ground up at the north end.



94 LEWIS BOWDEN, being duly sworn, testifies as follows:

DIRECT-EXAMINATION by Mr. Bisgood:

I live in Southampton, am Town Clerk of the town; the records of the town are in my office. I received them from my predecessor; I think I have the Dongan patent here.

CHARLES FEE, being duly sworn, testifies as follows:

DIRECT-EXAMINATION by Mr. Bisgood:

95 I live at Shinnecock Hills; I was living in the summer of 1886, in Mr. Edwin Post's house; I know what is known as the old burying ground there; I have seen defendant there, Mr. Edwin Post.

Q. Under what circumstances have you seen him there, what has he been doing there?

Mr. Griffing: Since the first of July, 1886?

Mr. Bisgood: Yes.

Q. (Continued.) In the summer—July? A. I have seed him go across the burying ground to his garden.

Q. In what way did he go across? A. He was in his wagon.

Q. How many times? A. About five or six, probably.

96 Q. What kind of a wagon was it? A. One-horse wagon; I could not say whose farm wagon that was; Mr. Post was in it and his son; Mr. William Post, I don't know whose it was, several times since the 1st of July, 1886, that summer.

CROSS-EXAMINATION by Mr. Griffing:

There is a well defined path on the south of this lot, running along the south side of the lot; I never noticed any wagon paths marked across; I don't know whether there was or not; there was grass on the road, but it was very low, very low.

That was the only road I see him go; I don't 97 know whether that road was ever mowed; I can't say; I don't think it was.

By the Referee:

Q. What was this wagon doing there? A. Going through.

Q. Were you in the wagon? A. No, sir.

Q. Where were you? A. I was in the house.

His garden was to the eastward of the burying ground, he drove the horse into the garden with him, to work with him, in cultivating corn; I believe he returned the same way.

By Mr. Griffing:

98 There is grass growing over the road; I mean by that there are one or two strips of grass running between the ruts; this road is well defined; the ruts and horse path are in it.

By Mr. Bisgood:

Q. Do you mean to say there was no grass growing anywhere else but between the ruts? A. Between the ruts and ridges; there was grass where the horse went, but very short.

By Mr. Griffing:

Q. And room for one or two horses? A. I should 99 say two horses.

It is admitted that this suit was commenced May 30, 1887.

Mr. Bisgood states that this is the case for plaintiff.

Mr. Griffing: I think, your Honor, that on proof presented here we are entitled to a dismissal of the complaint. Conceding all that the plaintiff claims here, it does not appear that there has been any intentional injury done to the premises of the plaintiff. Conceding this to be, for the



100 purpose of the argument, the town land—the whole of it—there is nothing to indicate that we have done anything more than any other townsman had a right to do; we have simply crossed over it. It does not appear that any person has ever objected to anything that the defendant has done, that any objection has been made by an officer of the town or any citizen of the town. There is evidence that he passed up and down this road, but there is no evidence that the town sustained any injury by his doing so. There is evidence that there are one or two broken stones there, but it is not claimed or pretended that injury was done, or at least any part of it was done, within the period covered by the complaint, and that is the only real  
101 injury that has ever been suggested.

The Referee: That only goes to the quantum of the recovery. If the town have a title to this land, why no person has a right to enter upon it. That, of itself, is a technical invasion of the right, although the consequences might be immaterial. The remedy is an extremely technical one, and any invasion of that right gives ground to maintain the action; therefore if a man's fruit falls over the fence on the side of a man's lot and he goes over there, that is a technical trespass. It all depends upon the title of the town. Now they show, as I understand it—take these grants—here is a grant to this town; that puts title in them.  
102 Then we had the testimony of the captain, White, that it has been used, this plot of ground within those fences, for a public use, it seems to me, irrespective of that recital in the book, to make out a *prima facie* case. They start with a title by the grant to the town, and there does not appear to have been any disposition of this land except what appears in the testimony here, that they have devoted it to the public use of a graveyard or cemetery or burial place. I don't see how I am to nonsuit. I must deny the motion.

Exception.

EDWIN POST, being duly sworn, testifies as follows: 103

DIRECT-EXAMINATION by Mr. Griffing:

I am seventy-two years of age, and I am the son of James Post, deceased; he died in 1855. At the time of his death he was seventy-six years of age. Obadiah Rogers was my grandfather, but I couldn't remember him. I know him by tradition.

Q. (The Referee.) On your mother's side? A. Yes, sir. He died in 1817, I think. I know of the lot spoken of here as the James Herrick lot, that my grandfather received from Murray & Barnett.

Q. (Mr. Bisgood.) That is the home lot? A. I mean the home lot. 104

Mr. Griffing: Well, if we call it the James Herrick lot that identifies it. There is no other James Herrick lot.

Witness: Those lots indicated on each side of Main street are known as home lots.

Q. I ask you (handing paper to witness) if this is the deed for that property—the Murray & Barnett deed? A. I recognize it.

Q. You received that from whom? A. I received it from my father, and he from his wife's father.

Deed read in evidence marked "Defendant's Exhibit A, Dec. 23, 1887."

### Defendant's Exhibit A. 105

To all people to whom these presents shall come Greeting: Know ye that we Lindley Murray and Ichabod Barnet Merchants in New York and in consideration of the sum of three hundred and ten pounds current money of New York to us in hand paid before the ensealing hereof by Obadiah Rogers, Mariner of Southampton in the County of Suffolk and Colony of New York the receipt whereof we do hereby acknowledge and our Selves therewith fully Satisfied and contented and of



106 every part and parcel thereof do hereby exonerate  
 acquit and discharge him the said Obadiah Rogers  
 his heirs, Executors and administrators for ever  
 by these presents, Have given granted Bargained  
 sold aliened conveyed and confirmed and do by  
 these presents freely fully and absolutely give  
 grant bargain sell aliene convey and confirm unto  
 him the said Obadiah Rogers and to his his heirs  
 and assigns for ever one Messuage or dwelling  
 House Barn and out houses together with all that  
 tract of land on which said buildings now Standeth  
 which contains by Estimation twenty four acres be  
 it more or less. Butted and Bounded north by  
 Peter Mackie and Micaiah Herrick East by the  
 highway. South by Micaiah Herrick and west by  
 107 the Town Street of Southampton, To have and To  
 Hold the said granted and Bargained premises  
 with the appurtenances privileges and Commodi-  
 ties to the same belonging or in any wise apper-  
 taining to him the said Obadiah Rogers his heirs  
 and assigns for ever. To his and their only proper  
 use Benefit and behoof for ever. And we the said  
 Lindley Murray and Ichabod Barnet for us and  
 our heirs Executors & Administrators do covenant  
 promise and Grant to and with him the said Oba-  
 diah Rogers his heirs and assigns that before the  
 ensealing hereof we are the true sole and lawful  
 owners of the above Bargained premises, and are  
 lawfully Seized and possessed of the Same in our  
 108 own proper rights as a good perfect and absolute  
 Estate of inheritance in Fee Simple and have in  
 our Selves good right full power and lawful Au-  
 thority to grant Bargain Sell, convey, and Confirm  
 said Bargained premises in manner as above, said  
 and that the said Obadiah Rogers his heirs  
 and assigns shall and may from time to time and  
 at all times for ever hereafter by force and virtue of  
 these presents lawfully peaceably and quietly have  
 hold use occupy possess and Enjoy the said demised  
 and Bargained premises with their appurtenances  
 free and Clear and freely and Clearly acquitted

exonerated & Discharged of from all and all man- 109  
 ner of former or other Gifts, Grants, Bargains,  
 Sales Leases Mortgages Wills Entails, Joyntures  
 Dowries Judgments, Executions, Encumbrances  
 and Extents, Furthermore we the said Lindley  
 Murray and Ichabod Barnet for our Selves our  
 heirs Executors & administrators Covenant and  
 Engage the above demised premises to him the  
 Said Obadiah Rogers his heirs and assigns against  
 the lawful claims and demands of any person or  
 persons whatsoever for ever hereafter to warrant  
 secure and Defend.

In witness whereof we have hereunto set our  
 hands and Seals this twentieth Day of May in the  
 year of our Lord one Thousand seven hundred and 110  
 seventy eight—1778—

Sealed and delivered }  
 by Ichabod Barnet } ICH B. BARNET [L S]  
 in presence of } LINDLEY MURRAY [L S]

LAW. HARTSHORNE  
 AOVER HIGBIE

Sealed and delivered }  
 by Lindley Murray }  
 in presence of }

PHEBE RAYNOR  
 EDWARD STEPHENS

I recognize the description in that deed. I made  
 this diagram (referring to diagram produced). 111  
 These red lines indicate the outside lines of the lot,  
 according to this deed and according as the fences  
 always stood. These premises include the premises  
 in dispute. My grandfather left a will.

This is the original will:

The will read in evidence, dated February 1,  
 1816, and proved the 24th of June, 1817, contains  
 the following provision:

"I give unto my son-in-law, James Post, for his  
 "heirs and assigns forever, all my lands, wood-  
 "lands, buildings, meadows and commonage,



112 "together with all my personal estate, except  
 "what is above given and what I shall hereafter  
 "otherwise dispose of; provided, however, that  
 "he pay my just debts, support my wife comfort-  
 "ably during her natural life, and also pay to my  
 "daughter Nancy Howell thirteen hundred dollars  
 "in cash, and also pay to my daughter Phoebe  
 "Brown the sum of thirteen hundred dollars,  
 "together with all the other legacies."

Q. Your father occupied those premises under this will? A. He lived on the premises and carried on the farm and occupied and improved it. I know he improved all the land. I am seventy-two years  
 113 old; was born here. I have always been at home. I never followed the water. Since my father's death I have occupied these premises myself until within—well, I have always lived there, but I have not improved the premises personally within a few years. Henry H. has.

Q. (The Referee.) What title did you claim—the title derived under this will of your grandfather?  
 A. And a will from my father.

Will of James Post, dated February 19, 1853, and proved September 19, 1883, read in evidence.

The seventh provision thereof is as follows: "I  
 "give, bequeath and devise to my son, Edwin Post,  
 114 "all the rest, residue and remainder of my real  
 "and personal estate, subject to the uses, enjoy-  
 "ments and charges by this instrument made  
 "upon the same in favor of my wife, Hannah,  
 "and my daughter Mary."

The premises indicated on the map last referred to—indicated by the red lines referred to—are the same premises as I occupied under my father's will. I made this diagram (last referred to).

Q. (The Referee.) The red lines I understood you to say corresponded with the fences?

Mr. Griffing (to witness): Up to which you have 115  
 occupied? A. Yes.

Mr. Griffing: I offer it in evidence.

Received and marked "Defendant's Exhibit  
 D, December 23, 1887, G. A. H."

The read lines include the premises in dispute. The last interment in the cemetery proper outside of that private ground, I think was in 1790, but I can't give the odd year.

Q. (The Referee.) That is outside of that white fence? A. Yes. The oldest inscription inside the white fence is my grandfather's grandfather in 1783, his name was Obadiah Rogers, who was my great-great-grandfather. That interment in 1783  
 116 was some four or five years after the conveyance to Obadiah Rogers. The burials within that paling consist entirely of members of my grandfather's family, and father's and the Herrick family, all close relations, being Rogers, Post, Brown and Herrick.

Mrs. Brown was my mother's sister; William R. Post is my brother. I presume Mr. White was mistaken when he said there was a William R. Post buried there. That lot was enclosed by myself, with the addition of Herrick—the end that encloses the Herrick graves, which was simply a continuation of my fence. I made that enclosure, I think, in 1857—there had never been any enclosure prior to that date.  
 117

The Herricks were cousins to my father on one side and my mother on one side; cousins on both sides. There is in the parcel described in the complaint within a fraction of two acres, a very small fraction less.

(Another map shown to witness.) I recognize this map; it was made by David H. Raynor, who is a surveyor—practical surveyor. This is a correct indication of the premises.

"Defendant's Exhibit E, Dec. 23, 1887,  
 G. A. H."



118 Q. (Showing Defendant's Exhibit E of this date to witness.) Mr. Post, what is this portion here that is indicated as a road, that is twenty feet and two-tenths wide—do you recognize that? A. Yes, sir.

Q. How long has that been used for that purpose? A. As long as I can remember; nearly all my life.

Q. (The Referee.) You mean for the general purpose of a road? A. Passing from the home lots below through the tract of land east of the cemetery. There was never any indications of any burial or graves upon that tract, no appearance of any graves ever being there at all. The road runs on the south side of this *locus in quo*, close up to fence.

Q. Why has that fence been maintained by you on the south side of this road?

Mr. Bisgood: Objected to.

Q. State whether or not you have maintained this fence on the south side of this road? A. I have as often as it needed it.

Q. (The Referee.) How long has that fence been there? A. Since I have been there and my father; as long as I can remember.

Q. Why has that fence been maintained by you on the south side of this road?

120 Mr. Bisgood; Objected to as incompetent and immaterial.

Q. (The Referee.) It is a division of lots on your land? A. Yes.

Q. You did own on the other side of the fence? A. Yes.

Q. The south? A. Yes.

The Referee: It does not matter what his motive was.

Objection sustained and exception.

I always cropped this land south of that division and so did my father, as long as I can remember.

I owned the land east and west of this plot described. I maintain those fences. 121

By the Referee:

Q. Do you know who put up the fences that now enclose this plot of an acre and five-eighths?

A. This cemetery lot—I put up three sides of it and the other side was the adjoining neighbor which the fence was to divide, irrespective of the burying ground throughout; and I made the half outside throughout and all the inside.

Q. Had there been any fences there before, Mr. Post, before you put these up? A. Oh, yes, I suppose so; there have been fences there as long as I can remember and I have maintained them. 122

By Mr. Griffing:

Q. I call your attention to the portion of this map colored light blue, the portion north and west of what is marked "Private ground." A. Yes, sir.

Q. State whether there were any indications of any graves there? A. None at all. I never saw any indications at any time.

Q. State, if anything you have done, with reference to those premises—this portion colored blue? A. I have improved it.

Q. For how many years? A. Through all my time from boyhood up. I run the farm before my father's death for years and managed it the same as I would my own, and before that he managed it; he was in his prime and I did all the work I could on it. 123

Q. Mr. Post, did you ever hear of any claim being made to this portion called the road or this portion indicated with the light blue color; at any time, by any person prior to the last four or five years?

Mr. Young: Objected to as irrelevant.

Question allowed. Exception.

(Unanswered.)



124 Q. You have always conceded that the town had the right to an acre here for the purpose of burial?

Mr. Young: I object to that.

The Referee: You need not prove that.  
(Unanswered.)

Q. Under that right to herbage state what you have done and what your ancestor has done in reference to this acre?

Mr. Bisgood: I object to that; it calls for a conclusion.

Question allowed. Exception.

125 A. We have always fed it off and pastured it to a certain extent, as much as the cows felt disposed to eat it.

Q. You say *we* have? A. I.

Q. How was it with your father? A. He did, and that has been true as long as I remember; I claimed the right to do it. I presume my father did, as far as ever I knew; I always heard him say so; always improved the ground throughout, to my knowledge, for the past sixty or seventy years.

Mr. Young: I object to that; he was not asked about that.

By the Referee:

126 Q. What did your father do or say, and in what connection did he do anything more than live there and take herbage and turn cattle in there and anything else? A. As far as graves, we didn't do anything with them, except when I was a boy I was sent to stub thistles and keep it from going wild. There was not any dispute about that, to my knowledge, until within three or four years. I have made a special examination of the premises marked "road," with a view to determining whether it could ever have been used for burial purposes; in connection with Mr. Robert Woodburn. He has been in the habit of digging graves

for years. I think we made eight excavations, five on the road and three north of the white fence and on the east line of it. I was present when those examinations were made; the ground presented no indications whatever of ever having been disturbed before.

Q. Something has been said about ditches. I now call your attention to the first map, the one which you made yourself, and I ask you if there are other ditches on your farm (showing plaintiff's exhibit to witness)? A. Yes; there are; these side fences all have ditches under them and some of the cross fences.

Q. There is a letter "A" and "B" here marked. State whether or not there was or is a ditch there? 127

A. There is now and always has been a fence with a bank under it.

Q. The ditch adjoining the bank? A. Yes.

Q. State whether there is a fence and ditch between the points "D" and "C" on the map? A. I guess there was up to about three years ago. As long as I can remember there was always a separation between the two large lots; these ditches were probably to prevent sheep from going through. It was the common custom to bank under the fence to keep sheep in.

By the Referee:

Q. Then, I understand you, Mr. Post, your father, as far as you know, and yourself since your father's death, have not claimed the title to this acre here? 128

Mr. Griffing: That was the question I asked, and you would not permit it. He conceded the town had a right to burial in one acre of this tract.

Witness: We assented to it.

By Mr. Griffing:

I never drove across from the southwest to the northeast corner of these premises. I never saw



130 any one in my life drive across there. I recollect the funeral on the 17th day of May last very well.

At that time the premises south of these described premises were in possession of my son and owned by him. I know the fact of his pasturing some cows there; one of those cows were his, the other three belonged to Smith Philips. I had nothing at all to do with the cows getting into the cemetery on that day. When I speak of my son I mean my son Henry.

131 That stone has been broken, I can't say how long, approximately; eight or ten years; I know of but one stone outside of this private ground that has been broken. I have examined there for the purpose of ascertaining; I am confident that was broken six or eight years ago.

Q. (The Referee.) Do you know how it came to be broken? A. I do not. It is a soft red stone and very heavy, and stood leaning for a good many years; whether it broke of its own weight or not, I don't know.

Q. Reference was made by Mr. White to this lot which was indicated on his map as 385; that acre. He undertook to locate that acre. Will you state whether you ever knew that acre to be located or identified? A. It never was identified that I know of.

132 Q. Did you ever hear that it was until he said so? A. Until it was agitated here lately.

Q. He referred to a conversation that he had with you in reference to this cemetery. What did you say to him upon that occasion when he called, when you had an interview with him in connection with this cemetery and the cemetery now in use? A. Well, I think it must have been about this, the fact that the community began to bury in this ground in 1721, and left off there entirely about 1740.

Q. You mean by this ground the one now in use? A. It is called the North End Cemetery. I said it was probable that their acre here was full

and more than full, and that they needed more 133 ground at that early date and got up and got it. That is about all. I have heard of Andrew Mackey, sometimes called Dr. Mackey. He owned what they term the Wilmann lot, and what has been called here the Wilmann lot, situated adjoining these premises I have already described on the north. He conveyed to my grandfather.

Q. (Handing paper to witness.) Is that the deed?

A. That is the deed. This has always been in my possession; I received it from my father. Yes, sir.

Mr. Griffing: I offer this in evidence, being a deed by Andrew Mackey to Obadiah Rogers, the witness' grandfather.

Mr. Young: Of what premises? 134

Mr. Griffing: Of the premises called the Wilmann lot.

Mr. Young: Does it include any portion of the premises in dispute?

Mr. Griffing: It doesn't include any portion of the premises in dispute.

Mr. Young: We object to it.

Mr. Griffing: You have described it on three or four occasions as the Wilmann lot, and we want to show what this Wilmann lot is.

Mr. Young: Is it your contention that that deed includes any of the premises in question?

Mr. Griffing: It recognizes the premises in ques- 135 tion.

Mr. Young: In other words, it is a statement by this Mackey that at this date Obadiah Rogers was the owner of the easterly portion of the premises in dispute?

The Referee: And the acceptance of this deed is, in fact, an assertion of the boundary.

Mr. Young: A statement by Mackey that Obadiah Rogers was the owner is not competent or relevant as against the town.

The Referee: It does not have that effect; it only shows that the person who took the deed—



136 the grantor and the grantee—it was an act of the grantee in the transportation of the title in which that boundary was recognized and it harmonizes with their claim; it is corroborative of their claims.

Mr. Young: We object to that as incompetent and irrelevant.

The Referee: I will rule it out as immaterial.

Exception.

CROSS-EXAMINED by Mr. Young:

I have always claimed to own of the premises in dispute what I now claim to own thereof. The premises in dispute is the piece included in the whole of this outer line on Exhibit E, and I have  
137 claimed all this land that was not buried over; I have always claimed a portion of the premises in dispute. And I have always claimed that portion which I now claim on the trial, all that has not been buried over.

Q. Isn't there a strip along the north side here that appears, so far as now appears, not to have been buried over? A. I think there is some appearance of it having been buried over near the fence.

Q. When did you discover that? A. Always.

Q. You think that this has all been buried over up to this line but not beyond. Is that your idea (referring to the east line of the white fence)? A.  
138 I think it has been buried over up to the east side of the white fence. I think they buried over more than the acre. I think they have buried over up to this fence, the east white fence.

Q. Then, this line that I now point to, marked *H*, indicates nothing in respect to the ground which has been buried over, there are graves on both sides of that? A. Yes, sir.

Q. Of the line *H*? A. Yes. I directed the gentleman to make and lay off an acre from that side, and this line is made simply because, starting from the east line and excluding what I have

marked as the lane, the acre comes up to this line; that is the reason the line was located in that particular place. 139

The Referee: You mean excluding the road from that?

Mr. Young: Yes; that excludes the road from that measurement. I claim to own myself this that is marked as "private ground." Yes, I claim to own the whole of it, except by permission I gave—I gave this Herrick family permission to bury on that end of it. I claimed the title to it before they had permission to bury there; when that permission was given them to bury they occupied the ground. Then it was a virtual release of so much ground as they were buried under. 140

Q. (The Referee.) Did you give them that in writing? A. No; that was simply a verbal permission.

Q. Who asked this permission? A. Micaiah Herrick.

Q. Asked permission of you? A. Of my father.

Q. Did you hear him? A. I did not.

Mr. Young: I ask to have that stricken out.

Mr. Griffing: Objected to.

The Referee: Motion granted.

Exception.

I claim to own this that is marked light blue; I have always claimed to own that. I have had an interview with the trustees in regard to this matter, the town trustees, they have objected to what I have done in respect to those premises, within a short time; never before. First, I should think three years; three or four years; I can't be positive; I can't remember the date; it may be four years since they began to agitate the question at all. I have no recollection of any objection made to me turning my cattle in there before that time by any one. I should say I don't recall any person who ever did it. 141

It is not true that I have not always claimed



142 what I now claim; I have always claimed what I now claim and nothing else.

Q. I will ask this question, Mr. Post: If you have claimed to own up to this line, why haven't you put your fence up there? A. For the fact that it is an expense, and I have put in there ground enough to last for several years, with the idea in my own mind that I could carry the fence along according to my wishes without consulting anybody, as I had the fee in the soil as I understood it by my title.

Q. Have you made any distinction in turning your cattle into pasture between one portion of the premises in dispute and the other? A. Over  
143 the whole.

Q. You say you have claimed the right to pasture this under this entry in the old records of 1665 that has been read in evidence; is it under that that you claim this right to pasture? A. Yes; doesn't read so? I always enjoyed it.

Q. It is your idea, then, that for the sake of having a footway from this southwest corner out to the street the town was willing to give you or your predecessors one acre of land adjoining on the south, and also the privilege of pasturing over the whole burying ground; is that your idea?

Mr. Griffing: I object to that.

The Referee: That is competent on cross-examination.  
144

Exception.

A. I pastured it under that claim.

Q. That does not answer my question, that you said before. A. What is your question?

Q. (Question repeated.) A. Yes.

I have mowed the blue portion.

The Referee: Do I understand that you have turned cattle in there since July, 1886?

Mr. Griffing: No, sir; it has been in his son's charge since then, and the fact is the cattle have never been turned in.

Witness, interposing: Since these claims have  
145 been brought up and urged, we have for the sake of peace not driven those cattle in there. We have driven them in *there*.

Q. Where? A. Up that side road.

Q. Do you say they have not been turned in there to pasture? A. I say they have not been turned in to pasture there lately. Nor this blue portion; not last summer, nor the summer before. We have made no point of turning cattle in there. I have not used the farm for the last five or six years. I have had no interest in its cultivation, none whatever, except occasionally to feed my horse with a little hay growing on it. I did not own any of the stock or cattle.

He has had horses. He has got a team of horses.  
146

Q. There has only been one head of horned cattle on the premises? A. That belonged —

Q. (Interrupting.) I didn't ask about belonged. A. Well, he has rented the pasture.

Q. You say there has been one head of horned cattle on that farm of late years. I say on your premises or pasture? A. One owned there —

Q. (Interrupting.) I didn't ask what had been owned there. I asked what had been there? A. Do you mean been there for pasture?

Q. Been there for any purposes no matter what? A. There has been three besides last year and the year before.  
147

Q. I say been there, I don't say for what purpose or who owned them? A. I didn't understand that; the last time that I permitted cattle to pasture on the premises in question, is quite a good while, about five years I guess, about five years ago. I can't say whether it was five years or longer, I can't remember. I think not within six years; it is possible I may have in seven. I don't recollect distinctly, because I sometimes forget dates. I have not planted any kind of crops on the premises in question; never. Two years ago I mowed the



148 blue piece over and carted the hay in the barn; two years I mowed part of it.

Q. This last summer you mean? A. Yes the summer before I mowed the hay and carted it in the barn.

On this map D that I made this narrow portion near the main street, indicates a part of the Herrick home lot, and indicates what I own on the street; all of the Herrick lot that I own on the street is indicated there.

149 The Herrick home lot goes to the angle; to the premises in question. The description in the deed, Defendant's Exhibit A, does not include the premises on this map marked "James Foster;" there is no westerly boundary given so far as the James Foster lot is concerned in this deed; it has nothing to do with it whatever; it has no reference to it; there is none.

This lot on this map is bounded westerly by the James Foster lot as well as by the highway. The Mackey premises mentioned in this deed are known as the Pound lot and the Pound lot is the Isaac Willman lot.

150 Micaiah Herrick's premises extended from the Willman lot to the extreme end. The Micaiah Herrick property included all on the south side of the premises described in this deed; my house is situated on the Willman lot, right here (indicating) about the middle of the lot, at the letter E, and the house occupied by my son is there at the words "Henry Post."

I have farmed, cultivated and pastured the premises included within these red lines other than the premises in dispute. Used it for general farm purposes.

REDIRECT by Mr. Griffing.:

The largest portion of the funerals within my recollection have been through the Willman lot; the largest portion of these burials has been

151 through the Willman lot. That is through the lot that I occupy what is called the Pound lot. There is no lane nor has there been any lane at all leading to this cemetery, nor indication of any lane; in passing through this Willman lot, they would strike in a pair of bars at the northwest corner; they would go into my land from the northward, that had no connection with the Herrick land, and go right up; or, if necessary or convenient, they would turn up this side (indicating) and go in on the southwest corner.

From the road they would come in a considerable distance from opposite that road; if that road had been continued down to the highway it would be through Squire Foster's land.

152 There has been no claim to any right through that Willman lot at any time.

By Mr. Young :

This portion of the premises included within the red lines represented the front of the Herrick home lot on main street that I own.

Refer to Pelletreau map. The lot headed "James Herrick" is a part of the Herrick home lot which I now own; not all.

153 This south line of the premises in question, if extended westerly at a point south of the front of the Herrick home lot which I own, would strike the main street at a point to the south of the front of the Herrick home lot which I now own.

There is a fence on my premises in a line with the south line of the premises in dispute; been there for six or eight years; I put it there myself as a matter of convenience; it had no connection with any thing; it was for convenience in going up and down to the barn.

Q. (The Referee.) Was there ever any user of a footpath up the Herrick home lot? A. No, sir; not in my time or before me.

Q. How did the people get to the burying ground



154 when they went to a funeral? A. They went up this Willman lot in a majority of cases. They went in the Willman lot and turned up the other side, just as it suited our convenience. They generally enter the old burying ground near the southwest corner; that is the way they went up the Willman lot; they went in at that corner, the northwest corner; there is a pair of bars here at each corner.

Q. (The Referee.) These funerals that you are speaking of were all funerals of relatives, and all within that white fence? A. All family matters.

The Referee: It is of no consequence how these family burials within that white paling were  
155 carried on; I don't see that what course they adopted has any reference to a claim for the foot-path, or any user under this reservation in the grant by the town. On the contrary, it would be in the exercise of a hostile claim.

HENRY H. POST, being duly sworn, testifies as follows:

DIRECT-EXAMINATION by Mr. Griffing:

I am a son of the defendant, Edwin Post. I am thirty-five years of age. I recollect the occasion referred to as the 15th or 17th, I think, of May—the funeral there. On that day I did turn cattle  
156 onto the premises which I was occupying. I did in the morning.

The premises southwest and east of the disputed premises. One of those cattle was mine; Wm. S. Philips owned the others. I was in occupation of the farm at that time. I didn't suppose at the time that there was any chance of the cattle getting into this plot.

Q. I now call your attention to Exhibit D, of Dec. 23, 1887. State whether or not there is a fence and ditch between the letters A and B?

Mr. Young: I object to that as irrelevant, and  
move to strike it out. 157

The Referee: What is the object of that?

Mr. Griffing: The object is simply to show that the ditch that has been spoken of was not necessarily a boundary line between adjoining owners, but that the owners of the grants on all sides divided up their own lands with ditches.

The Referee: I don't think it is of any importance. They have claimed that is the usual way of building fences. I didn't understand Captain White to say that was a characteristic boundary fence alone.

Mr. Griffing: If that is your Honor's understanding of it, I am content. 158

I have been in charge of the farm since the spring of 1879, and within my recollection all of the premises included within the red lines here have been improved by my father, for general farming purposes, with the exception of the old burying ground; that has been grazed on.

Q. (The Referee.) What do you mean by the old burying ground? A. The whole of the disputed property has been used for grazing purposes.

Q. And the portion on exhibit indicated in blue has always been used in what other way? A. Well, father says he mowed it; I didn't know it had been mowed; I didn't do it. And this portion marked "road" has been used as a road contin-  
uously, ever since I can recollect. 159

CROSS-EXAMINATION by Mr. Young:

I have driven over the north side for any purpose I wanted to go for, in passing east or west, from one side to the other. I have not used the north side of the premises anything like as much as the south. The principal part of that was done in one or two seasons when we came out of the northwest corner of what I call the middle lot; but with the exception of one or two years when I



160 was a boy, the south side as indicated on the map, was used entirely.

The north side now shows indications of travel as much as the south.

REDIRECT:

Q. Why does the north side show indications as much as the south?

Mr. Bisgood: Objected to.

Question allowed; exception.

A. Because it was done more recently by me while the farm was in my charge. In driving over that north side, I suppose if there were any graves there, I suppose I drove over them.

161 Q. Well, were there any there? A. Yes, I suppose there were half way down the north side of the disputed property. There is a grave in the north corner there. The graves extend up this way, measuring from the east. I suppose two-thirds of the way down to the blue portion. And if there are any graves there I went over them I suppose.

ROBERT WOODBURN, being duly sworn, testifies as follows:

DIRECT-EXAMINATION by Mr. Griffing:

162 I reside here in this village, in the immediate vicinity. I am a grave digger. I have dug graves in what is called the North End Cemetery and also some in this enclosure within the white paling. I recollect making an examination of the portion of the disputed premises marked on this map as "road," that is, the south portion of the disputed premises, in connection with Mr. Edwin Post. I recollect having made excavations on those premises and also on the western portion of the premises. I believe we made eight altogether; the object of those excavations was to determine whether

there was any trace of any burial ever having been made there. I did not detect any indication that the ground had ever been disturbed before. 163

I believe I took off from four or five inches over all the portion within the white fence and sodded it over again. I guess, at the request of Mr. William R. Post. He is a brother of Edwin Post. I have mowed it out several times; not all of it, but the part of Mr. Post.

EDWIN POST, recalled, testifies as follows:

EXAMINED by Mr. Griffing:

Q. (Handing paper to witness.) I call your attention to the diagram made by Captain White and to what is called the footway, which he marks as a footway on the James Herrick lot. 164

The Referee: That runs through the barnyard, through a portion of it.

Q. (Continued.) I ask you if there was any indication of a footway there at all? A. No, sir; there is now standing on the northwest corner of that lot a dwelling house where my son Henry lives; that was built about nine years ago.

The Referee: Is the footway on that diagram on that side?

Mr. Griffing: On that side.

A. (Continued.) A large old house stood there prior to this; the present house occupies the same part of the ground of the old house; I recollect, of course, that old house distinctly; we supposed it had been there 170 or 180 years; that was close to the north side of the Herrick lot. Now, the plot which Mr. White indicates as a plot given to James Herrick; there is no proof of that whatever that I have ever known of. I never saw any thing to indicate that he received that plot in that way. 165

The Referee: What do you mean—a deed or record?

Mr. Griffing: Any deed or any record or any monument?



166 Witness: Nothing at all. During my lifetime there has been no entry by any funeral from Main street upon the Herrick lot; all entered upon the Willman lot.

The Referee: Mr. Post has already testified there have been no funerals there at all within his recollection except those buried within that enclosure.

Mr. Griffing: Yes, sir; that is the fact.

Mr. Griffing: I now offer certified copy of deed from James Herrick to William Herrick from the town book.

Mr. Bisgood: We object to that, unless it is shown it covers—

167 Mr. Griffing, interposing: Unless we show it relates to it it can be stricken out.

Received and marked "Defendant's Exhibit 1, Jan. 24, 1888."

Mr. Griffing, reading: "Bounded by the commons on the east."

Q. This Mr. Herrick, the grantor of this deed, is the one referred to on the map as one of the owners of that lot, of the Herrick lot? A. Yes, sir.

Q. Mr. Post, please indicate on that map which you have, the east boundary of that lot which is described in this deed as "Commons." Does that indicate the portion that Mr. White has marked as the lot exchanged for the burying ground? A. 168 The lot he has marked "exchanged" is above.

Mr. Bisgood: We object to that; Mr. Post says so; he says that is the piece of land.

Mr. Griffing: I asked him if he identified the premises. I understand he identifies the eastern boundary as that lot which Mr. White has marked as the lot given in exchange for the burying ground. In order to show the significance of that it is fair I should call your attention to the fact, Judge Young, that this deed is dated some sixteen or seventeen years after the Town Record;

in exchange for the footway, I mean, not for the 169 burying ground.

Mr. Young: If that is the purpose for which it is offered we object to it as irrelevant, because it becomes then the mere statement of the grantor, and we object to it as irrelevant and incompetent.

Q. The grantee in this deed is his son? A. Yes, sir.

The Referee: I don't see how I can admit it, Mr. Griffing; he is a grantee of the town, to be sure, but he can't prejudice the rights of the town by any acts of his own. There is no privity between them after he takes title to his acre.

Mr. Griffing: It has a bearing as to the identity of the acre. 170

The Referee: You can bind anybody who took under him.

Mr. Griffing: This is a declaration against his own interest.

The Referee: I don't think that is competent; it strikes me so; I don't see how I can admit a declaration of a grantee of the town against the town; there is no privity between them.

Ruled out; exception.

Q. (Handing another map to witness.) Do you recognize that map now shown you, Mr. Post? A. Yes, sir.

That was made by Mr. Addison M. Cook in the present month, in company with me. I think it 171 is correct; we took the courses and distances and run the lines.

The map referred to is offered in evidence, received and marked "Defendant's Exhibit No. 2, January 24, 1888."

By Mr. Young:

I am acquainted with Mrs. Charlotte Herrick of Southampton. I knew her husband, George Herrick. His mother paid for the extension of the



172 fence which enclosed those who were buried of their family, and that is a part of south end of the white fence, at her request. He did not pay at any time; his mother's contribution was when the fence was first erected, no other persons shared in the expense of that fence, speaking of the fence as a whole, but myself. I know Mrs. Harriet J. Rogers; she never paid me anything toward the erection or repair of that fence; I don't know anything further than the family furnished the money that that end of the fence cost; whether she contributed or not I don't know of my own knowledge. Neither she nor any of her family ever ask my permission to bury there; Mr. George Herrick did not ask my permission to bury there; Mr. George Herrick's father did, but not of me. I never heard him ask permission of any one myself.

By the Referee:

Q. There are other persons there? A. Certainly. No requests as to the persons buried there made to me.

By Mr. Young:

174 No, not to me personally. Miss Harriet J. Rogers or her immediate family are related to me; her mother was a double cousin to my father—Harriet Rogers' mother and my father were own cousins. No, excuse me, Mrs. Harriet Rogers' mother was own cousin to my father, but it was the other part of the family that come in on the double cousin. Mr. Rogers was not any relation to me; Mr. Rogers himself was no relation, except his marriage connection.

It is admitted that Miss Harriet J. Rogers was a maiden lady.

Q. (The Referee.) Before the fence was made, the burials were promiscuous? A. Yes, sir; the fence was put up in 1837, I mean 1857. Be-

tween 1756 or 1757 and 1793 or 1794, there was no interments in the ground outside of the white fence as far as I can ascertain; and after that, those two interments, the one made in 1795 and about that time, were made east of that white fence; a little distance, my fence just excluded them. 175

I mean to say that I discover no gravestones with dates during that period; that is what I mean to say.

Q. How many were buried there during that period and no tombstone erected, of course I know not.

By the Referee:

My recollection goes back 63 years or more to the use of that burying ground; there have not been any interments outside of this white fence during my recollection. 176

It is stipulated and agreed between counsel that if under the stipulation already made neither party should be entitled to costs, then the Referee's and stenographer's fees shall be borne equally by the parties.

[DEFENDANT RESTS.]

JAMES H. FOSTER, being duly sworn, testifies as follows: 177

DIRECT-EXAMINATION by Mr. Bisgood:

I reside in Southampton and am Justice of the Peace of the town. I am a farmer and undertaker; in the latter capacity I have taken charge of funerals in Southampton; I know the burial ground in question.

Q. You can state whether or no at any time you



178 have asked any permission from any one to bury there?

Mr. Griffing: I object.

The Referee: He is an undertaker having the management of funerals. I will give it amount of weight to which it is entitled.

Mr. Griffing excepts.

179 A. I have not. I have buried in the enclosure, within the white fence always; I buried there a man last spring, and in connection with my father—we were then acting together—I buried one there about ten years ago; I helped dig the grave. I went there with the body and found there wasn't any grave there.

I got to the graveyard from Main street by passing up Mr. Post's lot. Always, I think, since I have had anything to do with it, north of the barn. I think we have always entered in recent years at the northwest corner.

By the Referee:

Q. You entered from the main street at the northwest corner? A. Yes, sir.

Q. And then did you go right straight through the bars into the lot where the burying ground is—the enclosure; or did you go to the other corner?

180 A. I entered at the northwest corner of the lot itself.

By Mr. Young:

I mean the general burying ground, not that lot enclosed by the picket fence. We entered at his gateway just north of the old house, the only entrance we could make.

By Mr. Bisgood:

That is north of the old house; we entered about 150 feet from the southwest corner of Mr. Post's land. About 150 feet from my own land. I think

we passed within thirty feet of the house; Mr. 181 Post's house, the old house, north of the house.

I have attended other funerals besides those at which I have been employed at this place; I guess every burial that has been there in the last 35 years I have gone as a relative of those who were buried. Have always taken the same route; I think we went south of the barn twenty or thirty years ago.

I do not know of anybody being buried there that was not related to the Post family, but those that were distantly related; they were all cousins, fourth and fifth, some of them.

A good many of the people in that town are related within five and six degrees. 182

By the Referee:

Q. Do you know any instances of a burying ground, established burying ground, where particular families have made an enclosure within the general burying ground? A. That is practiced very largely in our other village cemetery.

Q. The same is in all cemeteries where families have lots? A. They exert squatter sovereignty there.

By Mr. Bisgood:

Q. They have no claim? A. No, only presumptive; they presume to take it. 183

Q. The other cemetery you speak of is where? A. In the village.

CROSS-EXAMINATION by Griffing:

Q. Do you remember whose funeral that was thirty odd years ago when you passed south of the barn?

I can't recall; I know there were burials there as long ago as that, and I past south of the barn—excuse me, south of where the barns are now, I should have said. The barns are changed.



184 I own the property immediately adjoining Mr. Post on the south. I consider James Herrick and Cornelia fourth or fifth cousins; yes, I can tell the exact relationship if you give me time. I do not think of any fourth and fifth cousin except James and Cornelia; I can tell the exact relationship with time.

These two are the most remote, James and Cornelia Herrick. I know brothers who have lots together in the old burying ground. My uncle and my father enclosed ground together, in the old cemetery, twenty or thirty years ago. I think I know of others brothers; I couldn't say positively.

185 HARRIET J. ROGERS, being duly sworn, and examined as a witness on the part of the plaintiff:

I am 84 years of age. I was born in Southampton, and that has been my home all my life except as I have been away in New York and different places; I know the old burying ground at Southampton; I have seen people interred there frequently. I think the road went past Mr. Post's house, "Didn't it Lizzie?"

My impression is that the road went north side of Mr. Post's old house; I am not certain, but I think so; it is sometime since I attended a funeral—several years. George Herrick's was the last.

186 My mother is buried there. I know that part of the ground enclosed by a picket fence; my mother is buried in that portion. There was no fence there when my mother was buried.

Q. Who put up that fence? A. I think Messrs. Post had it in charge and saw to it and caused it to be done; I don't know what carpenter put it up; they paid for it I suppose and I suppose that other people that had friends buried there assisted; I assisted, it is so long ago I couldn't tell; it is a thing that went from my mind some years ago. I do not remember the year of my mother's death; it is a great while ago; do not recollect how old I

was at the time. Do not recollect how many 187 people were buried in that part of the graveyard before my mother.

Q. Do you recollect the occasion of putting up that fence—why it was put up? A. Well, it was considered best to put it up. I remember my grandmother being buried there; I remember the funeral, it is a long while ago; her name was Martha Herrick. I have an uncle and cousins buried there—different relatives. I think when people were buried there permission was asked of Mr. Post, it was considered his burial ground. I don't believe I ever asked permission to bury my mother, but I think it was generally done; I really don't remember if I ever asked permission to bury 188 there, but I don't think I did—it is so long ago.

I don't think I ever heard any one ask permission of Mr. Post; to bury; I think it was asked of Mr. Edwin Post; I was under the impression that it was he that owned the burying ground.

I don't know anything about the road to the burying ground.

CROSS:

I could not tell how long ago since I attended George Herrick's funeral, I should think about five or six years ago, I think it is as much as twenty years since my mother was buried; I do not think it is as much as thirty.

189 I attended the funeral of Mrs. George Herrick, and her son James, Edward Herrick's, James Herrick's young daughter—I mean George Herrick's young daughter, I could not remember to whom I paid money towards the fence; I think I handed it to Mr. Post; I cannot tell; it is so long ago the things have passed from my memory; I don't think any families are buried there except the Posts, Herricks and the Browns, who were connections of the Posts.



190 REDIRECT:

None of the Rogers buried there except my mother. I don't remember if any of the Posts buried there before my mother. I do now remember there were some Rogers buried there who were not connections of mine, but were of the Posts.

CHARLES HOWELL, being duly sworn, testifies as follows :

DIRECT-EXAMINATION by Mr. Bisgood :

191 I live in the village of Southampton. I was eighty-six last September. I have always lived here ; this is my native place ; I was born on this sod here ; right where I live now. I know the old burying ground. I have known that as long ago as I know anything, I know that.

The ground and the fences around it, are, with reference to what they were when I first knew them ; just the same as they was then. When I first knew them there were old tombstones there.

I know of funerals having taken place there during that time ; my time ; I had an uncle die, I think in 1817, who was buried toward the near where that fence is around a lot of graves now ; just to the left hand of that, I think. Obadiah Rogers ; and that was his father's name, Obadiah ; his gravestone is there somewhere ; I have seen it—I have attended funerals there.

192 Q. How did the funeral procession go there, get into there, from Main street ? A. Why they went up through the door there and through a pair of bars and traveled right alongside of the fence.

Q. You say they went through the door there whose door there ? A. Where Mr. Post's heirs now live.

Q. They went through the pair of bars whereabouts—where with reference to the house ? A. Well, they were to the east of it and to the north, pretty near alongside of the division fence between that and what used to be called the Pound lot.

That Pound lot was a lot where the first church 193 was ; I expect that is why they gave it that name ; be that as it may, a court-house was there, I have heard say.

It was called the Pound lot and the division was by the side of an old shop ; my uncle, Obadiah Rogers, was a cooper by trade, and he used to work there ; and Captain Post in his day did a good deal of work there one way and another.

I suppose anybody that wanted to be buried there was buried there ; that is all I know about any regulations as to who should be buried there.

Mr. Griffing: I object to that—what he supposed about anybody to be wanting to be buried there. 194

As far as I know people were buried there without any restriction.

Mr. Griffing; I object to that.

I don't recollect any relative buried there except this uncle of mine, Obadiah Rogers, and there might have been others ; I have forgotten ; I can't remember a thousand things that I used to know and could tell. His wife might have been buried there, but I don't know when she died ; I have forgotten.

CROSS-EXAMINATION by Mr. Griffing:

Q. That shop, Mr. Howell, that you have referred to, stood on the Pound lot, didn't it ? A. No ; it was right alongside the line ; it stood on the lot south of the Pound lot. 195

That lot belonged—well, if you want me to go into all the history that I have ever heard of it, I can tell you ; I never heard it called the Herrick lot.

By the Referee:

Q. What did you hear it called, Captain Howell ? A. Well, it was called the Lindley Murray lot—



196 the author of the grammar—and then there was a man by the name of Wright, from New York, a brother of Jordan Wright; everybody knows who Jordan Wright was.

I don't recollect having attended funerals of the people besides my own family, anybody could bury in that ground.

Q. Well, people didn't dig their own graves, did they? A. No, sir.

Q. When a death occurred and they wanted to bury there, who designated the spot—who pointed out where the grave should be dug? A. Well, they designated graves themselves, I suppose.

197 Q. Do you remember anything about that? A. No, sir; I don't remember anything about that; but there was no dictation by any man; there was no question to be asked of anybody, as far as liberty to go there and do it that was a mind to, that ever I heard of.

By Mr. Griffing:

I can't tell the year when that shop was moved off; I should think it might be fifteen years; Mr. Post went into taking boarders, then he began to move such buildings as were not very sightly thereabouts.

198 CHARLOTTE E. HERRICK, being duly sworn, testifies as follows.

DIRECT-EXAMINATION by Mr. Bisgood:

I live in Southampton, my husband's name was George Herrick; he died in 1873, the 5th of October—was buried down in that graveyard. What is known as the old burying ground; he was buried in the south end of it, not far from the fence—the boundary from Mr. Post. That is what I have reference to the picket fence, yes, he was inside, not far from the picket fence.

I did not ask permission of anybody to have him

buried there; there are others of my family buried 199 there, a daughter and son; my daughter was buried in 1859, I think, in the same part of the ground and my son. He was also in the line, you know, was buried last May, the 17th, and the same part of the ground. I did not ask permission for either of them to be buried there. I do not know of any permission having been asked for them to be buried there.

No others of my own family buried there; no others but my son and daughter and husband. Oh, husband's family, yes.

James Herrick, a brother-in-law, my husband's brother; I can't tell when; it was as early—it was in 40 I think, somewhere; the latter part of the 200 40's between '40 and '50—he was buried within this enclosure; a sister also. Two sisters in fact; Elizabeth Gelston and Cornelia; buried in the same part of the ground.

I do not know of any permission having been asked of anybody for them to be buried there. I have attended funerals there, the funeral procession went to get to that ground from Main street by Mr. Post's; south of his house—I can't tell how far south—how far I can't say; as far as from one end of this room to the other. I suppose twice as far as near as I can judge, well, perhaps it was not twice; I mean the distance from the road to the house.

201

By the Referee:

Q. You mean, it is twice the width of this room, or the length? A. The length; my husband's father was Micaiah Herrick.

CROSS-EXAMINATION by Mr. Griffing:

I refer to Mr. Edwin Post's house by "the Post house" south of which this procession passed. It is a fact that my husband was living when my daughter died; I think it was '56, and he was at home then.



202 When I refer to Mr. Edwin Post's house, I refer to the new one.

RECROSS :

I mean the house that Mr. Edwin Post now occupies.

EDWIN POST recalled, testifies as follows :

DIRECT-EXAMINATION :

203 I know the building referred to by Mr. Howell, it was used as a shop by my father and myself and I had it moved ; and I know where it stood, very near. I should think 30 or 40 feet north of the old house that was taken down a few years ago ; the old house was very close to the north line of the Herrick lot—within, I should think, three or four feet—not over that, the house in the northwest corner of the Herrick lot.

CROSS-EXAMINATION by Mr. Bisgood :

South of the old house, there used to be when I was a boy a small piece used for a vegetable garden. I never had a garden.

I remember when I was a boy there was a little plot they used to put vegetables in. Since there was a garden there, it is 40 years or more, for all I know.

204 The portion of the land south of the old house is fenced in in front, the land in the rear has shrubbery, etc., on it.

The foregoing is all the evidence given on the trial.

SUPREME COURT.

THE TOWN of SOUTHAMPTON

AGAINST

EDWIN POST.

The undersigned, appointed by this Court Referee to hear and determine this action and the issues therein, having duly considered the allegations and proofs of the parties, and having heard Judge Young and Mr. Bisgood for the plaintiff and Messrs. Griffing and Tuthill for the defendant, reports to the Court as follows : I find the following facts, namely: 206

FIRST.—That the plaintiff is now, and that for more than a century last past it and those under whom it holds have been, the owners in fee and in possession of the tract, piece or parcel of land described in the complaint herein and known as "the old burying ground."

SECOND.—That the defendant, on or about the fifteenth day of July, in the year 1886, and on or about the first day of August, in the year 1886, wrongfully entered upon said premises, and trampled down the grass, herbage and soil thereof, and injured the property of the plaintiff therein. 207

THIRD.—That the plaintiff has sustained damages by reason of the aforesaid trespasses of the defendant to the amount of six cents.

I find, as matter of law, that the plaintiff is entitled to recover of the defendant the sum of six cents, besides the costs of this action, and I hereby direct that judgment be entered against said defendant accordingly.

BROOKLYN, April 9th, 1888.

J. W. GILBERT,  
Referee.



THE TOWN OF SOUTHAMPTON

AGAINST

EDWIN POST.

209 The plaintiff in its complaint avers its ownership of the *locus in quo*, namely, "the old burying ground," substantially as the same is now surrounded by fence. The answer of the defendant, read in connection with the stipulation of the parties, dated October 6th, 1887, admits the title of the plaintiff to one acre, parcel of the premises described in the complaint, but puts in issue the title of the plaintiff to the residue of said premises.

The defendant also has denied the trespass alleged in the complaint.

210 The source of the title is the Colonial grant made by Gov. Dongan to the Trustees of the Freeholders and Commonalty of the town, December 6th, 1686, confirmatory of a previous patent granted by Governor Andrus November 1st, 1676. There is no question that the *locus in quo* is embraced in these grants, and there is no direct evidence that the grantee has ever parted with the title thereto or any part thereof prior to this action. The plaintiff put in evidence an entry in the town records, dated January 6th, 1665, stating that "the Overseers have agreed with James Herrick, that he shall have one acre of land at the rear of his home lot, in consideration of a footway up his lot, to the burying place, where the town have one acre for that use, and James Herrick is to have the herbage of it." That entry antedates both the Dongan and Andrus patents many years. Yet no mention of any grant by or on behalf of the town is contained in either of those instru-

ments. Assuming, however, that there had been, 211 prior to the entry of January 5th, 1665, a valid reservation or dedication to public use of "the old burying ground," as both parties have conceded, the principal question is whether the whole of the present enclosure, or only one acre thereof, was embraced in such dedication.

The plaintiff's claim is limited to, and co-extensive with, the burying ground as now enclosed. The defendant admits the plaintiff's title to one acre within that enclosure. The northern, eastern and southern boundaries thereof have been quite satisfactorily established and are not seriously disputed.

212 The real point in controversy relates to the western boundary. After a careful consideration, I have come to the conclusion that the only reasonable inference from the evidence is that the western boundary of the old burying ground is the eastern boundary of the home lots, which lay between it and the main street on the west, for the following reasons, viz.:

I.—The James Herrick home lot is one of those home lots, and the footway up that home lot mentioned in the record of January 5th, 1665, extends to and ends at the burial place. That footway is wholly upon the Herrick home lot, thus showing that the eastern boundary of the Herrick home lot and the western boundary of the old burying ground are coterminous. 213

II.—The acre which Herrick received in exchange is in the rear of his home lot, and must necessarily have been located outside the old burying ground. The location thereof was not conclusively proven, but I think the evidence warrants the inference that it must have been a parcel, adjoining the southern boundary of the old burying ground as now enclosed.



214 III.—The western boundary of the old burying ground as thus established has been designated in the same manner as the other boundaries thereof, viz.: by a permanent fence, for a period whereof “the memory of man runneth not to the contrary,” and it satisfactorily appears that there never has been any other designation of the western boundary thereof.

215 These facts, I think, show an actual location of the old burying ground along the eastern boundary of the home lots. That being so, the extension thereof eastward within the present northern and southern boundaries so as to embrace the parcel really in dispute, would seem to be reasonably established.

The entry in the record of 1665 does not prove that land lying eastward of the premises in dispute, and which had been devoted to a similar use, is the one acre therein referred to. On the contrary, as before stated, the acre referred to in the record is at the termination of the footway on the James Herrick home lot. The earliest burial in the eastern part of the enclosure appears to have been made in 1682. Probably there were earlier burials, but as no memorials of them remain, it is impossible to determine in what part of the old burying ground they were made.

216 To hold that all of them were made in the eastern, and none of them in the western part, would be a conclusion devoid of evidence to support it, and it cannot be presumed. Indeed, there is some evidence that the old burying ground as now enclosed became full of graves a century ago, and for that reason the town set apart another.

Nor can the statement in the record of 1665, that “the town have one acre at the burial place,” operate to limit the quantity of land actually devoted to that use. No doubt it is evidence on that subject, but the quantity actually set apart and appropriated to such use is better evidence. “Ac-

tions speaks louder than words.” It is a significant if not a conclusive fact that the *locus in quo* has, during a period extending beyond the memory of any person now living, constituted a single enclosure and all its boundries have been marked by permanent fences as they now appear. 217

By whom those fences were erected has not been, and, according to common experience, could not be, proved. But excluding acts of the defendant to which I shall presently advert, the land enclosed has been used only for purposes of burial of the dead.

That the defendant and his predecessors have until recently apparently acquiesced in such enclosure abundantly appears. These facts are sufficient to prove a practical location of the boundaries and an acquiescence therein for more than a century. 218

The disturbance of boundaries so established is forbidden by the law of this State (Baldwin *agst.* Brown, 16 N. Y., 359; Hunt *vs.* Johnson, 19 *id.*, 279). The same facts also show the possession of the plaintiff, or at least that *quasi* possession of which the right of burial that is to be occasionally exercised is susceptible.

Such *quasi* possession is *prima facie* evidence of property (Best Ev., 5th Ed., 477), and being supported by the grant contained in the Dongan patent, proves title in the plaintiff.

219 The contention of the defendant that he has title by adverse possession, cannot, I think, be sustained. The conveyance from Murray and Barnett, dated May 20, 1778, merely conveys messuage and designates the exterior boundaries thereof—although that conveyance contained no exception of the premises in question—yet it cannot be construed as embracing a public burying ground, because such a parcel of land from its very nature can form no part of a messuage.

Moreover, the defendant testified that his claim of title under that conveyance excludes the old



220 burying ground. While it is true that he claimed that the old burying ground contains only one acre, yet his claim of title under that deed must be restricted to the actual dimensions of the old burying ground whatever those dimensions may be.

And it is apparent from the acts of the defendant, and his predecessors in title, that the present area of the old burying ground has always been treated as devoted to burial purposes.

If the foregoing views are correct there can be no doubt that some of the acts of the defendant were, in contemplation of law, trespasses on the property of the plaintiff. His use of the strips along the southern and northern boundaries of the *locus in quo* for roadways, and his traversing it with a cart, and other acts which it is not necessary to enumerate, were invasions of the right of property of the plaintiff, and were not done in the exercise of a right which he claims was conferred by the grant of herbage contained in the entry of January 5, 1665. It is not necessary, therefore, to consider the validity, nature or effect of that grant.

The principle is elementary that any willful invasion by a person of the right of property of another, however trifling, and whether followed by any pecuniary damage or not, constitutes an actionable trespass.

222 I think, therefore, that the plaintiff is entitled to judgment declaring that it has title and is in possession of the *locus in quo*, and assessing damages sustained by reason of the trespasses alleged at six cents.

NEW YORK, April 9, 1888.

J. W. GILBERT,  
Referee.

NEW YORK SUPREME COURT,

223

SUFFOLK COUNTY.

THE TOWN OF SOUTHAMPTON,  
Plaintiff,

AGAINST

EDWIN POST,  
Defendant.

Judgment, April  
23, 1888, 1 P. M.

224

The issues in the above-entitled action having been referred to J. W. Gilbert, as Referee, to hear and determine the same, and the cause having been duly tried before the said Referee, and his report having been rendered and filed, whereby, among other things, said Referee found and determined that the plaintiff herein is entitled to recover of the defendant the damage and injury sustained by it for trespasses committed by said defendant, as set forth in said report, to wit, the sum of six cents for such trespasses, besides the costs of this action;

Now, on motion of Thomas Young, attorney for the plaintiff, it is adjudged that the Town of Southampton, the plaintiff above named, is now, and for more than a century last past it and those under whom it holds have been, owners and in possession of the land described in the complaint herein,

225

ce or parcel of land situate,  
Village and Town of South-  
amton, New York, as the same  
is fenced and known as "the  
" and that the Town of South-  
ampton, the plaintiff above named, recover of Edwin  
Post, defendant, the sum of six