tion, is the issue in law before us. It is contended for the defendant, that his promise is to pay, not his own debt, but the debt of another, and that there is no consideration to support this collateral promise.

It is true that a promise to pay the debt of another is void, unless made on a sufficient consideration. But this principle does not appear applicable to the case before us. As this case is presented by the pleadings, *Cobb* and the defendant each assumes, for value received, to pay to the plaintiff the same sum; *Cobb's* promise being on one side of the paper, and the defendant's on the other; the defendant's promise not importing any guaranty or collateral stipulation. If, as has been suggested, the defendant endorsed his name as a guarantor, and the present endorsement was afterwards made without his consent, or any authority from him, he should not have demurred to the declaration, but should have pleaded the general issue, and on the trial he might have availed himself of this defence. As he has demurred to the declaration, he has confessed it, and as it appears to us to be substantially sufficient, the plaintiff must have judgment (*a*).

(*a*) Vide *Hunt* vs. *Adams*, 7 *Mass.* 518. and 6 *Mass.* 519. Sed vide cases in the note to *Hunt* vs. *Adams*, ante, 358.—*Blankenhagen* vs. *Blundell*, 2 *Barn. & Ald.* 417.—*Coolidge* vs. *Ruggles*, 15 *Mass.* 387.—*Tenny* vs. *Prince*, 4 *Pick.* 385 *S. C.*—7 *Pick.* 243 on another trial.

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*JOHN DILLINGHAM *versus* JONATHAN SNOW, KENELM WINSLOW, AND ANTHONY GRAY.

Where no act of incorporation can be found of a parish which had existed more than forty years, the Court admitted proof of its incorporation by reputation.

Where a parish is by the legislature created into a town, the parish is not of course extinguished.

Where such a town is sued for property claimed by it in right of the parish, the parish ought to defray the expenses of the defence of such suit, and may assess the amount of the expenses as a parish tax.

An agreement between neighboring towns, not to tax in one the lands of the inhabitants of the other in their own occupation, is invalid, as against the provisions of law regulating the assessment of taxes.

An action of *trespass vi et armis* does not lie against assessors for an error in judgment in omitting to assess some taxable estate; provided they have been duly chosen and qualified, the tax legally ordered, the assessment made and the warrant is sued in due form of law, and the poll or estate of the plaintiff be legally taxable.

DILLINGHAM *vs.* SNOW & AL.

THIS action was again (1) tried upon the general issue, at the sittings after the last October term here, before *Sewall*, J.

By the brief statement filed by the defendants, claiming to have acted as assessors for the north parish of *Harwich*, as mentioned in the former report of this case, it appeared, or was otherwise admitted on the trial, that certain cows, the property of the plaintiff, had been taken by one *David Foster*, acting as collector of the said north parish, and by virtue of a warrant under the hands of the defendants, for the collection of a tax assessed by them upon the plaintiff and others, as inhabitants of the said north parish, the plaintiff's proportion thereof being 13 dollars, 71 cents. The defendants then gave in evidence certain proceedings of the said north parish, to show, first, their choice of parish officers, March 8th, 1803, when the defendants were appointed assessors, and the said *Foster*, a collector, at which meeting the parish voted an assessment for parish charges: secondly, a warrant dated October 6, 1803, and a meeting pursuant thereto holden on the 17th of the same month, when the parish voted and agreed to raise the sum of seven hundred dollars, to defray charges, and *to carry on a lawsuit;* this sum, with fourteen dollars added for future abatements, being the tax assessed by the defendants. They further gave in evidence the proceedings on a certain petition for partition, commenced and prosecuted
* by *John Dillingham* and others, depending in the years [* **548**]
1803 and 1804, wherein the petitioners alleged themselves to be seised, in common with the inhabitants of *Brewster*, of certain lands, of which partition was prayed, and to which petition, in consequence of an order of notice to that town, certain agents appointed by the town of *Brewster* appeared, and among other things, pleaded and answered that *John Simpkins*, minister of the north parish of *Harwich*, was seised to him and his successors, &c

For the plaintiff it was objected upon this evidence, that the defendants had acted under a void authority from the parish, because it appeared that the tax in question had not been granted for parish purposes.

But this objection to the defence was overruled, and the defendants proceeded to prove, by a resolve of the General Court for that purpose, and by a certificate of the secretary of the commonwealth, that no act of incorporation could be found, the establishment in 1746 of a separate parish in *Harwich*, and by the records since kept of their meetings and proceedings, that the said parish had taken, successively and at different times, the names of "the first precinct in *Harwich*," "the precinct," "the parish," "the north parish," and

(1) Vide ante, *Vol.* 3. 276.

in January, 1803, "the north parish lying in *Harwich* and *Brewster*." The defendants also introduced the testimony of several witnesses, and other evidence, to prove a dividing line between the two parishes in *Harwich*, and the recognition for more than forty years of a north and south parish in that town, and an observance of the said line in the assessment of parish taxes, and performance of parish duties, and the residence of the plaintiff within the bounds of the north parish, his serving as a parish officer and committee there, his attendance with his family upon public worship at the parish meeting-house, &c.

For the plaintiff this evidence and testimony were encountered by other testimony to prove some uncertainty [*549] *in the supposed boundary line between the two parishes in *Harwich*, and that no such line had been established or recognized by the inhabitants, and that the lands of the inhabitants, situate within the town of *Harwich*, had been valued and assessed at the place of their residence, or by the parish where each inhabitant belonged, whether such lands were situate within the same parish or not, and without regard to the supposed boundary line between the two parishes, and that this practice had been continued since the incorporation of the town of *Brewster*, comprising the said north parish. Other testimony was also adduced, from which it appeared to be clearly proved, that lands situate within the said north parish, but belonging to inhabitants of the adjoining town of *Orleans*, had not been valued or assessed by the defendants in making the assessment in question; that omissions of this kind had been usual there, and were in consequence of an agreement formerly existing between the towns of *Harwich* and *Orleans*, and recently renewed between the towns of *Orleans* and *Brewster*; to prove which agreement, a writing executed by the committees of those towns appointed for that purpose, was admitted in evidence, an objection made for the defendants to the admission of it being overruled by the judge.

The directions of the judge to the jury were to this effect; that they had sufficient evidence of a tax lawfully voted and granted for parish purposes by the said north parish, if they were satisfied of the original establishment, and of the continuance of such a parish To prove the establishment of it, the best evidence had been offered, which the nature and circumstances of the case would admit, if no act of incorporation by the legislature could be found. To the continuance of the parish, and of the liability of the plaintiff there, when the tax in question was voted and assessed, the incorporation of *Brewster*, the proceedings which led to that event, [*550] *and the provisions of the statute enacted for that pur

pose, afforded no valid objection, according to the opinion of the whole Court, in setting aside the former verdict and granting a new trial in this case; and that opinion was to be considered as decisive upon that question.

The questions of fact, therefore, only remained open for their inquiry, *viz.* whether there was a north parish of *Harwich*, and whether the plaintiff was proved to be an inhabitant within the bounds of it; and if the jury were satisfied for the defendants upon these points, their verdict would be for them, unless the other objection should prevail.

But upon that question, the evidence seemed to be against the defendants; and if it appeared that, either in consequence of any agreement between *Orleans* and *Brewster*, or from any other motive not warranted by law, the defendants had intentionally omitted from the valuation, upon which their assessment was made, any lands situate within the north parish, and belonging to inhabitants of *Orleans*, then their assessment was illegal and void, and the verdict ought to be for the plaintiff.

Upon a verdict being rendered for the defendants, the plaintiff, by his counsel, filed a motion to set the verdict aside, and for a new trial to be granted him for the following causes:

1. Because, although he was heard by his counsel before the jury on the question of the boundaries of the said north parish, yet he was not heard, and his counsel understood that they were not permitted to be heard in his behalf, on the following points, the same being considered by the judge as questions of law already decided, or to be decided by the Court, and as such reserved accordingly, *viz.*—1. Whether, if there once was such a corporation as the north parish in *Harwich*, it was not surrendered by a vote and petition of the same corporation for that purpose, which petition was granted *by the legislature.—2. Whether the tax shown [*551] in evidence by the defendants, as the tax assessed by them, was not materially different from that alleged by them in their brief statement.—3. Whether the said tax shown in evidence by the defendants, as the parish tax assessed by them, was not illegal, inasmuch as it was granted not only to pay the charges of said parish, but also to carry on a lawsuit, which suit, as shown in evidence by the defendants, was an action between the towns of *Harwich* and *Brewster*, in which the said pretended parish was not a party.—4. Whether the assessment of the said tax by the defendants was not illegal also in this, that they knowingly and intentionally omitted a part of the ratable property of said parish. Which questions were urged by the plaintiff's counsel to be mixed questions of law and fact.

and proper to be argued to the jury upon the evidence, subject to the direction of the judge to the jury.

2. Because the said verdict is against the evidence in the case.

3. Because it is against law.

4. Because it is against equity and justice; for in addition to the parish taxes legally assessed on the plaintiff's ratable estate and poll by the town of *Harwich*, for the parish charges there, it subjects him to taxation for the same poll and estate by the said pretended north parish in *Harwich*, for parish charges there, and for the parish and town charges and state taxes of the town of *Orleans*, and also for the charges of the lawsuits of the town of *Brewster;* which fourfold taxation is a perversion of equity and justice, to the grievous injury and oppression of the plaintiff.

5. Because the said verdict is against the direction of the judge, on a point considered by him as too plain to be argued by the plaintiff's counsel.

Upon this motion the action stood continued to this term, and now, after a short argument by *Bidwell, Attorney-General,* for the plaintiff, and *B. Whitman,* for the defendants, the opinion of the Court was delivered by

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PARSONS, C. J. The action was trespass *vi et armis* for taking and carrying away the plaintiff's cows. On the trial it was proved or admitted that the collector of taxes for the north parish in *Harwich* had taken the cows as a distress, under a warrant issued by the defendants as assessors of that parish, for the plaintiff's refusal to pay his parish taxes assessed by the defendants. The plaintiff, to maintain his action, contended at the trial that the assessment of the parish tax on him was illegal and void. A verdict being found for the defendants, the plaintiff has moved for a new trial on a variety of grounds.

He contends that there was no evidence of the existence of a north parish in *Harwich*, authorized by law to raise parish taxes.

On this point, it appearing from the regular evidence that no act of incorporation could be found, the judge very properly, in our opinion, permitted the defendants to prove a parish by reputation. It is a well-known fact that by two several fires in the town of *Boston* (1), a great part of the public records of the late province were burnt; and, unless the existence of a corporation could be proved by reputation, many towns and parishes would lose all their corporate rights and privileges. In the present case, it may be added that the legislature, in the act incorporating the town of *Brewster*, recognize the existence of a north parish in *Harwich*, supposed

(1) 1711 and 1760.

to have definite limits. These limits were proved by parol evidence, and it was also proved that the plaintiff and his estate were within them.

Another objection to the assessment is, that if there ever was a north parish in *Harwich*, its parochial powers and duties were merged by the incorporation of the town of *Brewster*, granted on the application of that parish.

**Brewster* was created a town by the statute of 1802, [*553] c. 76., comprising, by the terms of the act, "the northerly part of *Harwich*," and the boundaries of the new town are particularly described, without any reference to the boundaries of the north parish. We cannot therefore conclude from the statute, that *Brewster* is included within the same limits, which circumscribe the north parish. And whether the limits of the town and the parish are the same or not, does not appear from the report of the judge. If the limits are different, there seems to be no color for argument that the north parish is merged by the incorporation of the town of *Brewster*.

This point came before the Court formerly in this action, upon a motion to set aside a former verdict, and to grant a new trial; when it was decided that the parish was not merged, nor its corporate powers extinguished or surrendered by the incorporation of *Brewster*. And it seems that the plaintiff complains, that the judge would not suffer it again to be questioned before the jury. Certainly the judge was right, as it was merely a matter of law unmixed with fact; and if the plaintiff had been able to persuade the jury to find directly against law, he could not have had any fruits of his verdict, as the Court, in the necessary discharge of its duty, must have granted a new trial.

But the Court are willing to revise the former decision in this case, and if it was wrong, we shall most readily overrule it.

Parishes are incorporated with a very few powers and duties. They are authorized and obliged to elect and support some Protestant public teacher of piety, religion and morality; they may erect houses for public worship, and may have parsonages. To defray the expenses arising from the execution of these powers, they may raise money, by assessing it on the polls and estates of the inhabitants, and by collecting it, for which *purpose [*554] the parish collector is invested with authority to compel payment. Towns are municipal corporations, with power to assess and collect money for the maintenance of schools and of the poor, and for the making and repairing roads, and for some other purposes. Several parishes are often incorporated within the limits of a town, and, sometimes, a single parish embraces parts of different

towns. But when no part of a town is included in, or constitutes a parish, the duties of a parish are required of the town, who are obliged to maintain and support public religious worship. Thus the municipal and parochial powers of towns and parishes may be distinct; and an inhabitant of a town has not unfrequently by the legislature been made a parishioner of a parish not within his town, while his municipal rights and duties remained unaltered. The statute of 1785, c. 54., may be cited as an instance (1). There is, therefore, no inconsistency in the inhabitants of the same territory forming a town, and also being made a distinct corporation with parochial powers.

But when a parish is invested with all the municipal powers of a town, if it thereupon *ipso facto* ceased to be a parish, great inconvenience and mischief would follow. At common law, one corporation aggregate cannot be a successor to another aggregate corporation. Now a parish may have settled a public teacher, to whom the inhabitants have contracted to give an annual salary; the parish may be the owner of a house for public worship; and the public teacher may be seised of a parsonage *jure parochiæ*. Upon creating the inhabitants a town with municipal powers, this new corporation is distinct from the parish, and is not a successor to it, on whom may devolve the parish property and contracts. If, then, the parish is extinguished, the contract with the public teacher is annul-
[*555] led, and the parochial *real estate would revert to the grantor or his heirs, from whom the parish acquired it. The principles of moral justice, and of public convenience, are therefore repugnant to the position of the plaintiff, that the investing of a parish with municipal powers by a legislative act, is an extinction of the parish, or a surrender of the corporation to the commonwealth.

Since the incorporation of *Brewster*, the south parish in *Cambridge* has been made the town of *Brighton;* and it is within the knowledge of some of us, that in the practice of that town the parochial and municipal powers are kept distinct, and severally exercised, as belonging to different corporations. And it cannot be supposed that the legislature would, by making a town of a parish, extinguish the parish, unless care was taken in the statute to devolve on the town all the rights, duties and property of the parish.

Another objection to the verdict is, that admitting the existence and parochial powers of the north parish, yet the money voted to

(1) This was "An act to set off J. P. from the south parish in *Ipswich*, in the county of *Essex*, and to annex him to the first parish in *Rowley*."

be raised by the parish by assessment, a part of which was assessed on the plaintiff, the parish were not authorized to raise.

A parish may by law purchase and hold a parsonage, and the minister is in fact seised of a parsonage in right of his parish. If, therefore, the right of the parsonage is questioned at law, the parish may defend their right; and the necessary expenses of this defence are a charge on the parish, and may be defrayed by money raised by a parish tax.

Let us now examine this objection. The statute incorporating *Brewster* enacted, in the fourth section, that town lands and ministerial property owned by said town (meaning *Harwich* before the division) should be equally divided between the two towns, *viz. Harwich* and *Brewster*. Upon this section, *Harwich* preferred a petition against *Brewster*, for partition of the lands and property owned by the town of *Harwich* before the division; * and among other lands, partition was prayed of certain lands which the minister of the north parish claimed as parsonage land *jure parochiæ*. As *Brewster* was alone summoned to answer to *Harwich*, the former town appeared by its agents to support the claim of the minister of the north parish. Although the north parish, as a parish, was not summoned, nor a party to the suit on record, yet as all the expenses of supporting the claim of their minister were incurred for their use and benefit, in equity and good conscience, the parish ought to defray those expenses; and we are of opinion that the judge did right in overruling this objection. [* **556**]

The defendants appear to have maintained the issue on their part, by proving the existence of the north parish in *Harwich*, that they were the assessors of that parish duly qualified to make legal assessments on the polls and estates of the inhabitants, that the sum assessed was legally voted to be raised, and that by law a part of it might be assessed on the poll and estates of the plaintiff, he being an inhabitant of the parish.

But the plaintiff further objects, that the defendants, in making the assessment, acted illegally in omitting to assess the lands of certain non-residents liable to be assessed; and consequently that the tax on the polls and estates of the inhabitants, of which he is one, is higher than it ought to be.

There seems to have been a former practice for *Harwich* to make some agreement with the towns adjoining, that neither of the towns should tax the lands of non-residents who were inhabitants of the other town, with some exceptions. An agreement of this nature was made by *Harwich* with *Yarmouth*, as far back as 1709, for fifty years, which was revived in 1752: Another agreement of this kind was made by *Harwich* with *Eastham*, in 1762, and with *Chatham*, in

1795, and again in 1797: And since the incorporation
[*557] of *Brewster*, *Harwich*, in 1803, made a similar agreement with *Orleans*, agreeing to pay *Orleans* an annual sum of 17 dollars, 17 cents, as a consideration of the agreement. Agreeably to this practice, *Brewster* and *Orleans*, in 1803, agreed not to assess the lands of non-residents, who were inhabitants of either town; and as this agreement was beneficial to *Orleans*, that town was to pay *Brewster* the annual sum of 10 dollars, 37 cents, which has been paid for two years.

Imitating this practice, the assessors of the north parish omitted to tax the lands of non-residents, who were inhabitants of *Orleans*. Whether the annuity paid by this last town is, or is not a full equivalent for the tax on non-residents' lands, so that each inhabitant of *Brewster* has the benefit of the agreement, by lessening the sum to be assessed, it is not material to ascertain. For we are all of opinion, that notwithstanding this agreement, the assessors of the north parish acted irregularly, and without legal authority, in omitting to tax the lands in that parish, the property of the inhabitants of *Orleans*; and of this opinion was the judge who tried the cause. To this agreement, if valid in law, the north parish were not a party. But the agreement is unquestionably invalid.

It is dangerous to attempt being wiser than the law. The general tax acts direct in what manner public taxes shall be assessed by the assessors of towns; and the lands of non-residents are expressly directed to be assessed by the assessors of the towns in which they are situate, and provision is made for the collection of those assessments. And by the statute of 1785, c. 49. § 8., all county, town and parish taxes are to be assessed by the same rules which regulate the assessment of public taxes.

The last question is, whether, in consequence of this irregularity,
[*558] the assessment complained of is void, and the assessors answerable in this action as trespassers *with force and arms. The judge who tried the cause was of opinion that the defendants were answerable as trespassers, and so directed the jury, who, notwithstanding, probably influenced by the supposed equity in their favor, acquitted them. This is the foundation of the last objection to the verdict, that it was found contrary to the direction of the judge in a matter of law. And if the direction of the judge was right, the objection must prevail.

If the objection prevail, the conclusion is that the whole assessment, and the warrant issued to collect it, are illegal; and the collector is not obliged to obey his warrant, or to collect the tax of any person assessed; but if he do, he may not be a trespasser, and he may receive of any person his tax, for *volenti non fit injuria*

It deserves great consideration, before we decide that an assessment, through an error in judgment, or mistake of the assessors, is void, so that no part of it can be collected. A great portion of the funds of the government arises from annual assessments made by town and district assessors; and county, town, and parish charges are generally to be defrayed by money raised in the same manner. The inconveniences suffered by any of these corporations, from a void assessment not to be collected, is manifest. They must be in arrear in discharging their contracts, and their creditors will be injured by the delay of the payment of their dues. This delay will fall heavily on men supported by annual salaries; and the provision for the poor will be embarrassed, unless the overseers charge the towns with a new debt for supplies procured on credit for their maintenance.

When we consider further, that mistakes by assessors, however attentive to their duty, will be very frequent in omitting taxable polls and estates in their assessments; sometimes from want of knowledge of all the inhabitants, and especially in large towns; and sometimes from misapprehension of the liability of persons or
* estates to taxation, great confusion would be the con- [*559]
sequence of holding assessments affected by these errors to be void.

The statute contemplates that assessors may mistake in the quantum assessed on the polls and estates of any persons, and has given a remedy by appeal to the Sessions, which appeal is now transferred to the Common Pleas. And as there is no statute provisions declaring an assessment in any case void, its nullity must result from the principles of the common law applicable to the case.

Now, when judicial officers, deriving their authority from the law, mistake or err in the execution of their authority, in a case clearly within their jurisdiction, which they have not exceeded, we know of no law declaring them to be trespassers *vi et armis*. If the law were otherwise respecting assessors, who, when chosen, are compellable to serve or pay a fine, hard indeed would be their case. But the same law must apply to them, as to inferior judicial officers. If, therefore, the persons acting as assessors have been duly chosen and qualified to execute that office, if the sum assessed has been legally ordered to be assessed, if the assessment be made, and the warrant of collection be issued by them, or a major part of them, in due form of law, and the poll and estate of the party complaining of the assessment be legally taxable, he cannot, in our opinion, maintain an action against them as trespassers *vi et armis*, for any mistake or error of theirs in the exercise of their discretion.

Unquestionably the assessors may be punished for malfeasance in

their office on information or indictment. And we would not be understood as deciding that a man injured by the assessment, in being compelled to pay beyond his legal proportion, by the malfeasance of the assessors, may not maintain a special action of the case against them, to recover a sum equal to the excess
[*560] *of his tax beyond his legal proportion. As, however, that case is not before us, we give no opinion.

But we are all satisfied, that for an error in judgment committed by the assessors, in omitting to assess some taxable estate, they are not answerable as trespassers with force and arms. It is, therefore, our opinion that the jury did right in acquitting the defendants; and the judge, before whom the cause was tried, having since the trial had time fully to consider the subject, which was impossible in the course of it, is now satisfied with the verdict.

A new trial cannot be granted, but judgment must be rendered on the verdict.

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