The jury returned a verdict for the demandants, and the tenants alleged exceptions.

This case was argued at the last October term, by *J. G. Abbott*, for the tenants, and *B. F. Jacobs*, for the demandants.

Shaw, C. J. This case we think must be governed by that of *Ward* v. *Fuller*, 15 Pick. 185. The execution, delivery and acknowledgment of a deed, are by statute made to have the force and effect of livery of seizin, and therefore do constitute some evidence of seizin in the grantee, and therefore in the absence of all proof, on the part of the tenant, may avail. The plea of *nul disseizin* so far admits the tenant's claim to have the freehold, that it is not incumbent on the demandant, to prove the tenant's possession. *Higbee* v. *Rice*, 5 Mass. 352; *Washington Bank* v. *Brown*, 2 Met. 293.

Exceptions overruled.

The Inhabitants of the First Parish in Sudbury *vs.* Samuel A. Jones & others.

A grant of land was made in 1740 "to the inhabitants of the west precinct in S." The town of S. then consisted of two parishes; but the east parish was in 1780 incorporated as a separate town. The town maintained a school-house, on the land granted, from 1735 to 1798, and then removed it. In 1823 the town voted to permit the school-district to move the school-house back to its original site, which was accordingly done; and the school-house remained there for eight or ten years, when it was again removed by authority of the town. The west parish was first organized as a corporation distinct from the town in 1836. In 1847 the town built a new school-house on the site originally occupied by the old one. The land in question was part of the common, which had been used as a training field for more than one hundred years, and on which the meeting-house of the west parish always stood. It was held, that the original grant of the land to "the precinct" impressed upon it a parochial character; that it retained that character, whilst the corporation exercised the functions of both town and parish; and that, upon the separation, it remained the property of the parish. It was held, also, that the erection of the new school-house having been unauthorized by the parish, the town were not entitled to remove it.

This was an action of trespass *quare clausum fregit* against a committee of the town of Sudbury, for building a school

house under a vote of the town, upon the premises described in the writ, being a parcel of land in the village of Sudbury, containing about three fourths of an acre, separated only by a road, and not by any fence, from the lot on which the plaintiff's meeting-house has always stood; the latter, together with the *locus in quo*, having been always kept open and unfenced as a common.

One portion of the *locus in quo*, up to about fifty years ago, had been used for the erection of some four or five horse-sheds, which had remained there a long time previous, and been used by the persons attending meeting at the meeting-house. Up to March 1st, 1836, the town of Sudbury and the first parish were the same, the business relating to all parochial matters being transacted by the town; at that time the separation took place, and the plaintiffs adopted a separate organization, which has been kept up ever since.

The common unfenced land aforesaid, including the *locus in quo*, has been levelled off three times, by taking gravel from the *locus in quo*, carting it upon the other part of the common, and smoothing off the different parts of it; the first time, about fifty years ago, when the meeting-house was built; the second time, about twenty-four years ago, when the same was repaired; and the last time about seven years ago, when the same was altered. And in 1836 the town dug off about one foot in depth of the ground from a rise in one part of the *locus*, and used it for mending the public roads of the town. An old school-house stood on the *locus in quo*, from before 1735 until about 1798, when it was removed to a site back of the town-house, and during all this time was used to keep the town schools in. And while the school-house so stood upon the *locus*, the town of Sudbury, pursuant to a vote of the town to that effect, built a tower attached to the school-house, making the entrance of the latter through the tower; and in the tower hung a bell, which was used for municipal and parochial purposes, until the school-house was removed. After the school-house had remained on its second site back of the town-house, about twenty-five years, the town voted to permit the school district to remove it back to the *locus in quo*,

at their own expense, which was done; and it remained there eight or ten years, when the town again voted to permit some of the inhabitants of the district to remove it at their own expense, to another part of the common, where the town-house now stands. It was so removed, and remained there till 1846, when the present town-house was built, and the school-house removed to a piece of land hired by the town for that purpose, where it remained till 1847, when a new school-house was built by the town substantially on the site occupied by the first one, which was erected previous to 1735.

In 1723, the proprietors of common lands in Sudbury granted the land on which the meeting-house stands, and the common about it, not including the *locus in quo*, "to the west precinct in Sudbury," "for the conveniency of said west precinct's meeting-house, and for a burying place." The east and west precincts in Sudbury corresponded with the present towns of Wayland and Sudbury. The east precinct was in 1780 erected into the town of East Sudbury, (afterwards changed in name to Wayland,) leaving the west precinct the present town of Sudbury. The terms, east and west precinct, were used previous to such separation, to distinguish the different portions of the original town, as different parishes of the same town, and also for all other purposes, as well municipal as parochial.

Grants were made by the proprietors of common lands in Sudbury for the support of the ministry in the west parish, out of which a fund has arisen, which has since come into the possession of the plaintiffs.

The *locus in quo* was included in a grant from the proprietors of common land to Richard Biddlecom in 1722. And said proprietors in 1740 exchanged with John Haynes "some part of the land laid out for a training field," &c.; in consideration of which Haynes conveyed "unto the inhabitants of the westerly precinct in said Sudbury forever, all his right, title and interest in and unto about half an acre of land laid out to the right of Richard Biddlecom, within the common and undivided land in said Sudbury, and on the westerly side of Sudbury River, and is the land whereon the school-house now stands"

For more than one hundred years the whole common, both the *locus in quo*, and that part on which the meeting-house stood, has been used as a training field by the militia of Sudbury, without any objection from any source.

The case was submitted to the court upon the foregoing statement of facts, with power to draw such inferences as a jury would be warranted in making, and to render such judgment as the law and facts might require.

This case was argued at Boston in February last.

A. H. Nelson, (with whom was *B. R. Curtis*,) for the plaintiff, cited *Dillingham* v. *Snow*, 3 Mass. 276, and 5 Mass. 547; *Milford* v. *Godfrey*, 1 Pick. 91; *First Parish in Medford* v. *Medford*, 21 Pick. 199; *First Parish in Sutton* v. *Cole*, 3 Pick. 232; *Sudbury* v. *Stearns*, 21 Pick. 148; *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297.

J. G. Abbott, (with whom was *R. Choate*,) for the defendants, cited *First Parish in Medford* v. *Pratt*, 4 Pick. 222; *First Parish in Shrewsbury* v. *Smith*, 14 Pick. 297; *Milton* v. *First Parish in Milton*, 10 Pick. 454; *First Parish in Medford* v. *Medford*, 21 Pick. 199; *Humphrey* v. *Whitney*, 3 Pick. 167; *Emerson* v. *Wiley*, 10 Pick. 317.

Shaw, C. J. The estate in controversy belonged to the town of Sudbury, when it was a corporation, having the functions both of a town and parish, prior to 1780; and after dividing and forming two distinct corporations, one municipal and the other parochial, the question is, to which it belongs. The general rule in this commonwealth, to which it is believed the case of such double corporation of town and parish is peculiar, is, that if land is specially granted to a town, thus acting in a double capacity, either for municipal or parochial use; or if such a town specially, by vote or significant act, dedicates and appropriates a portion of its own territory to either the one or the other use; and it so remains, until the separation; it will vest in the town or the parish, respectively, according as it shall have been originally so given, or subsequently appropriated to parochial or municipal uses. The difficulty usually is in applying this rule to particular cases, where, as in the present case, grants and acts are equivocal.

It appears that the original grant of this land, lying open and in common with a lot on which the meeting-house stands, and separated from such meeting-house lot by a travelled road only, and not by any fence, was granted by one Haynes, more than a century ago, to the west precinct of Sudbury. The term, "precinct," in law and in common acceptance, is used synonymously with "parish." *Inhabitants of Milford* v *Godfrey*, 1 Pick. 96. The grant being to a parish, was *primâ facie* evidence that it was granted for a parochial use. This would seem to be decisive, but for one consideration, which is, that the territory, then (1740) constituting the town of Sudbury, embraced a much larger surface, including another parish, since (1780) incorporated into a separate town, called East Sudbury, the name of which was subsequently changed by law to that of Wayland. The precinct of West Sudbury, therefore, at that time very nearly conformed in territory to that which, after the incorporation of East Sudbury, constituted the entire town of Sudbury. Still, however, it was not then a town. As a precinct, it had the functions of a parish only, although, after the incorporation of East Sudbury, the people of the same territory became a municipal corporation, and exercised the powers both of town and parish. The presumption, therefore, still remains, that the grant was made to the precinct for parish use.

Whether the corporation, after it acquired the functions both of town and parish, could have changed the appropriation of land granted to the parish, we have no occasion to decide, because we perceive no evidence of any intent to make such change. Certainly no vote to that effect appears; and we find no evidence of any decisive act. The use of it for a school-house to stand upon, from 1735 to 1780, was whilst West Sudbury was a precinct or parish only, and before it became a town by the incorporation of the new town of East Sudbury. The continuance of the school-house on the same till 1798 seems to have been simply permissive, and without any act or vote; and it was then removed and placed on land of the town. The subsequent vote of the town, authorizing the replacing of the school-house on the land in

question, was not a permanent appropriation to municipal use; and it seems not to have been so considered by the town, because, in eight or ten years after, and before the division of the corporation into town and parish, the town again passed a vote, authorizing the removal of the school-house to other acknowledged town land. There was no school-house or other town building upon it, when the present parish was organized, by the separation of the two characters of town and parish.

The court are of opinion, that the original grant of this land, by Haynes to the "precinct," impressed upon it a parochial character; that it retained that character, whilst the corporation exercised the functions of both town and parish; and that upon the separation it remained the property of the parish.

Judgment for the plaintiffs.

The case was then referred to an assessor, who made his report at the October term, 1852, submitting to the court the question, whether the defendants had the right to remove the school-house from the premises; and if they had, assessing damages at thirty-five dollars; if they had not, then at one dollar.

A. H. Nelson, for the plaintiffs.

J. G. Abbott, for the defendants.

Bigelow, J. The decision of the question presented by the report of the auditor in this case depends upon elementary principles. The term "land" legally includes all houses and buildings standing thereon. Whatever is affixed to the realty is thereby made parcel thereof, and belongs to the owner of the soil. *Quicquid plantatur solo, solo cedit.* Things personal in their nature, but prepared and intended to be used with real estate, having been fixed to the realty and used with it, became part of the land by accession, pass with it, and belong to the owner of the land. 1 Cruise Dig. (Greenl. ed.) 41; Gibbons on Fixt. 2. It follows, that where there is no agreement to change the legal rights of the parties, materials, when used for building a house, become part of the freehold, and cannot be reclaimed by their original owner after annexation to the realty, as against the owner of the land to which they have been affixed. Buildings erected on land of another

voluntarily and without any contract with the owner become part of the real estate, and belong to the owner of the soil. *Washburn* v. *Sproat*, 16 Mass. 449; *Leland* v. *Gassett*, 17 Verm. 403; *Peirce* v. *Goddard*, 22 Pick. 559.

An exception is admitted to this general rule, where there is an agreement, express or implied, between the owner of the real estate and the proprietor of materials and buildings, that, when annexed to the realty, they shall not become parts of it, but shall still remain the property of the person annexing them. In such case, the law gives effect to the agreement of the parties, and personal property, though affixed to the realty, retains its original characteristics, and belongs to its original owner. Within this exception are included not only cases where there is an express agreement between the parties, that personal property shall not become real estate by annexation to the soil, but also that large class of cases which arise between landlord and tenant, in which by agreement, either express, or implied from usage or otherwise, the tenant is allowed to retain as his own property, if seasonably removed, fixtures erected by him for purposes of trade, ornament or ordinary use, upon leasehold premises during his tenancy. *Hare* v. *Horton*, 5 B. & Ad. 715; *Russell* v. *Richards*, 1 Fairf. 429, and 2 Fairf. 371; *Heermance* v. *Vernoy*, 6 Johns. 5.

There is nothing in the case at bar to take it out of the operation of the general rule. The building erected by the defendants was not only not built with the assent, express or implied, of the plaintiffs, but was placed on the premises against their will and in violation of their legal rights. Although this was done by the defendants in the exercise of what they supposed and believed to be a right of property in themselves in the soil, yet they acted at their peril, and having failed to establish their title to the premises on which the school-house was erected, they must now bear the legal consequences of their act. It was not necessary for them to have erected a building on the land, in order to try their title to the real estate. They might have made use of other means, quite as effectual for that purpose, and unattended with serious consequences to themselves. The defendants cannot now be permitted to en-

ter again upon the plaintiffs' land against their consent, for the purpose of removing materials which by their original act of trespass they have annexed to the freehold. To permit this, would be to allow a trespasser to justify a second act of trespass by pleading the commission of a previous one.

It was urged in behalf of the defendants, that if they did not remove the building from the land of the plaintiffs, its continuance there might be regarded as a continuation of the original trespass, and they might thus be subjected to another action for damages. The obvious and conclusive answer to this suggestion is, that the plaintiffs, by refusing to allow the defendants to remove the building, have waived all further claim for damages by reason of its continuance on their premises. Its continuance there has now ceased to be the act of the defendants.

Judgment for the plaintiffs for one dollar damages.

The Inhabitants of School District Number Six in Natick *vs.* Edwin C. Morse & others.

The prudential school committee of a school district, duly chosen in March, and authorized to contract with teachers, cannot interfere with a teacher engaged by the general school committee of the preceding year, under *St.* 1846, *c.* 223, § 1, for the entire winter term; and if they close, against a teacher so engaged, the school-house in which he is accustomed to keep his school, such general school committee may forcibly break open the school-house, and reinstate the teacher.

This was an action of trespass for breaking and entering the school-house of the plaintiffs on the 16th and 17th of March, 1848; and was submitted to the court on the following statement of facts: —

In the year 1832, the town of Natick was divided into six territorial school districts, of which the plaintiffs were one. On April 27th, 1833, school district No. 6, was organized as a corporation by the choice of a clerk and other district officers,