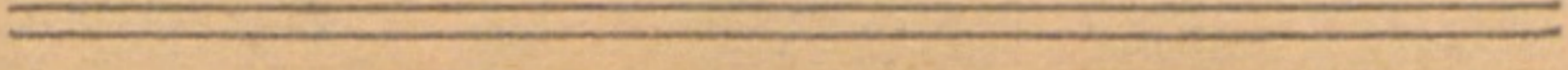


No. 10

THE LAW OF TAXATION.



EZRA A. BOURNE

VERSUS

CITY OF BOSTON.

R E P O R T

OF THE CASE OF

EZRA A. BOURNE

VERSUS

THE CITY OF BOSTON,

TRIED IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS,

AT DEDHAM, MARCH, 1853.

REPORTED BY

WILLIAM ROGERS,

COUNSELLOR AT LAW.

BOSTON:

1853.

EASTBURN'S PRESS.

SUPREME JUDICIAL COURT.

NORFOLK SS.

FEBRUARY TERM, 1853.

BEFORE HON. B. F. THOMAS, JUSTICE.

EZRA A. BOURNE v. CITY OF BOSTON.

EDWARD D. SOHIER, }
CHARLES A. WELCH, } *Counsel for the Plaintiff.*

P. W. CHANDLER, *City Solicitor, for the Defendant.*

THIS was an action of contract, brought by Ezra A. Bourne, described as of Newport, in the State of Rhode Island, gentleman, against the City of Boston, wherein the plaintiff alleged that the defendant owed him \$3,571.50, for money received by the defendants to the plaintiff's use. The writ was dated November 29, 1851, and was made returnable to the Court of Common Pleas for the County of Norfolk, on the third Tuesday of February, 1852. The case was removed to the Supreme Judicial Court, upon the defendant's affidavit, in the usual form, April 29, 1852.

The plaintiff's bill of particulars was as follows :

“ City of Boston to E. A. Bourne, Dr.

“ 1st. To amount of taxes upon personal property and poll tax illegally assessed upon him and paid by him under protest, November 29, 1851, by the hand of E. D. Sohier, \$3,571.50.”

The answer of the city admitted that the said sum had been received by the city, and was paid under protest ; but denied that the city owed the plaintiff the same or any part thereof ; or that the city received the same or any part thereof to the plaintiff's use ; or that the same or any part thereof was paid for taxes illegally assessed to him ; and it alleged that the said money was paid by the plaintiff to the defendant for city of Boston and county of Suffolk taxes, legally assessed to him upon his personal property and for his poll tax.

The trial of the case commenced at Dedham, in Norfolk county, on the 2d day of March, 1853.

Mr. WELCH opened the case for the plaintiff. He stated to the jury, that the tax which Mr. Bourne sought to recover back, consisted of three classes ; 1st, his poll tax and the tax upon his own personal property ; 2d, the tax upon the personal property of his wife, held by him in trust ; and 3d, the tax assessed upon him as guardian and trustee for the Miss Thorndikes, the daughters of his wife by her former husband. The taxes upon real estate situated in Boston were, of course, properly assessed in Boston. But in relation to the taxes upon his own personal property and that of his wife, those could only be assessed to him in the town where he was an inhabitant on the first day of May, 1851 ; and the same rule applied to the tax upon the personal property held by him as guardian of the younger Miss Thorndike. In relation to the personal property held by Mr. Bourne as trustee of the young lady who was of age on the 1st day of May, a still further question arose ; and he should maintain that for the portion of the tax assessed thereon, Mr. Bourne was not

legally taxed, wherever his residence might have been. The personal property of a minor under guardianship was, by the Revised Statutes, to be assessed to the guardian, in the town of which he was an inhabitant; but personal property held in trust, for the benefit of a person who was not a married woman or a minor, was to be assessed to the person for whose benefit the property was held in trust, in the place where such person resided. This part of the tax should not have been assessed to Mr. Bourne in any event.

These taxes having been, as the counsel contended, illegally assessed upon Mr. Bourne, he was compelled to pay them, to avoid having his person arrested or his property taken by process of law; and he did pay the same under protest. He now brought this action to recover back the amount. The main question for the jury now to determine would be, was Mr. Bourne an inhabitant of Boston, for the purpose of taxation, on the 1st day of May, 1851. The question where he did reside was of secondary importance. If he was not an inhabitant of Boston, if that was not his legal domicil, he was certainly not taxable in Boston. But if he was an inhabitant of any other place, he could not be an inhabitant of Boston. A person can have but one such residence, at any particular time, as will render him liable to taxation. Our courts have decided that, in a doubtful case upon a question of residence, a mere declaration of an intention to reside in one town rather than in another, will be sufficient to turn the scale. An election to be taxed in one town rather than in another, has the same effect. If a person has a domicil in one place, that domicil continues until he has acquired a domicil in some new place. He should maintain that another place, and not Boston, was the place of Mr. Bourne's residence on the 1st day of May, 1851. This would appear from the facts of the case, which he would briefly state.

In 1847, and for many years previous, Mr. Bourne resided in Boston, in the house of his wife in Pemberton Square, the year round, except for a portion of the year, which he spent in a visit to his farm on the Eastern shore of Maryland. In

1848, he moved to Brookline in this county, in the latter part of April, and remained until November of the same year. When he removed, he gave notice to the assessors of Boston and of Brookline, that he had changed his place of residence from the former to the latter place. He was taxed in Brookline that year, and paid his tax; and he was not taxed in Boston. In 1849, he again went to Brookline in April, and returned in October or November; was taxed and paid his tax in Brookline, and was not taxed in Boston. In 1849, he hired a house in Newport, on a lease of five years. In April, 1850, he removed to Newport, in the State of Rhode Island, and notified the assessors of Newport. He was taxed that year in Newport, paid his taxes there, and was not taxed in Boston. He returned to Boston in the fall. During his absence, he left his house in Boston under the charge of his domestics. He left orders with his trades-people to supply his domestics with provisions and groceries. He had property invested in Boston, and he did not change his investments when he removed. In April, 1851, he again removed to Newport. His daughter-in-law, Mrs. Rice, came on from Maryland, where she resided, to Boston, in the spring of 1851, and Mr. Bourne gave her the use of his house while she was here. She was about to be confined, and was anxious to be under the care of Dr. Warren, who had always been the family physician. Mr. Bourne left his carriage in Boston, and allowed Mrs. Rice to make use of it when she wished to ride out, and did everything in his power to make her comfortable. He and Mrs. Bourne then paid their usual spring visit to their farm on the Eastern shore of Maryland. Mrs. Bourne returned first, and was with her daughter during the most dangerous period of her illness. Mr. Bourne afterwards came on from Maryland, and resided at Newport, where Mrs. Rice and the rest of the family joined him when she had sufficiently recovered, and they spent the summer there. He was taxed that year in Newport, and paid his taxes there.

Mr. WELCH then put into the case what were supposed to

be copies of the tax bills paid by Mr. Bourne under protest, the originals having been lost. These were three, and were dated October 1, 1851.

1. Ezra A. Bourne.

Poll,	-	-	-	-	-	-	1.50
Personal estate or income,	-	-					875.00

\$876.50

2. Ezra A. Bourne, trustee of Mrs. M. M. Bourne.

Real estate,	-	-	-	-			175.00
Personal estate or income	-	-					875.00

\$1050.00

3. Ezra A. Bourne, trustee and guardian of the Misses Thorndike.

Real estate,	-	-	-	-			366.10
Personal estate or income,	-	-					1820.00

\$2186.10

He also put in the summonses thereon, issued in the usual form, and dated November 20, 1851. It was admitted that all of the above taxes had been paid by Mr. Bourne, under protest, except those on real estate.

Mr. WELCH then put in the answers of George E. Head, one of the assessors of the city of Boston, to certain interrogatories proposed by the plaintiff, as follows:—

1. A tax was assessed upon Ezra A. Bourne upon personal property in 1847, and, from the books of the treasurer of said city, said tax appears to have been paid. This, I believe, was the last tax on personal property, assessed upon Mr. Bourne, prior to July, 1851.

2. I find on the files in the assessors' office for 1848 and 1849, letters, of which the copies, dated in those years, and annexed to the interrogatories, are correct. I do not find letters, dated in 1850 and 1851, of which papers purporting to be copies are annexed to the interrogatories, and therefore am unable to answer in regard to them. The letters of 1848

and 1849 were addressed to the permanent and assistant assessors of the city of Boston, and must have been received by them.

The following were the copies annexed to the said interrogatories :—

BROOKLINE, MAY 1, 1848.

To the permanent and assistant Assessors of the City of Boston :

Gentlemen,—

This is to give you notice, that, on the 29th ult., I removed together with my whole family, from my house in Boston to my house in Brookline, where I am domiciliated, and a citizen according to law, on this first day of May, 1848, and where I propose to reside and pay all my taxes for the future, excepting upon real estate in Boston, as trustee, for which only shall be legally liable.

Respectfully,

Your obedient servant,

E. A. BOURNE.

BROOKLINE, MAY 1, 1849.

To the permanent and assistant Assessors of the City of Boston :

Gentlemen,—

This is to give you notice, that I have removed to my house in Brookline, where I am domiciliated and a citizen, according to law, on this first day of May, 1849, and where I propose to reside, and pay all my taxes for the future, excepting upon real estate as trustee and guardian, for which only I shall be liable, as follows, viz. :—

House No. 19 Pemberton Square.

Do. do. 5 Otis Place.

Do. do. 6 do.

Do. do. 7 do.

Do. do. 6 Winthrop Place.

Respectfully,

Your obedient servant,

(Signed)

E. A. BOURNE.

Gentlemen,—

I would give you notice that I am liable to be taxed, as trustee and guardian, upon the same real estate as last year, in the city of Boston. I shall be domiciliated in my house out of this city, on or before May 1st, 1850, where I shall be taxed upon my personal property, for the future, as heretofore.

Respectfully,

Your obedient servant,

E. A. BOURNE.

To the permanent and assistant Assessors of the city of Boston.

April 26, 1850.

I would give you notice that I am liable to be taxed, as trustee and guardian, upon the same real estate as last year, in the city of Boston.

I shall be domiciliated in my house, out of this city, on or before May 1, 1851, where I shall pay all taxes upon my personal property, for the future, as heretofore.

Respectfully,

Your obedient servant,

(Signed)

E. A. BOURNE.

To the permanent and assistant Assessors of the city of Boston.

April 26, 1851.

The following witnesses were then called, sworn, and examined, on behalf of the plaintiff:—

Charles Stearns.—I reside in Brookline, in Norfolk County. I was, in 1848, 1849, 1850, and 1851, an assessor for the town of Brookline. I know the plaintiff, Ezra A. Bourne. He was assessed as an inhabitant of Brookline in 1848 and 1849. I found him in Mr. Francis's house, in the north part of the town, when I went to assess the taxes. It was on the 1st day of May, 1848. I saw him myself. He gave us notice, in April, of his intention to reside in Brookline. I

saw him there at other times. He was also assessed in 1849. He paid his taxes in each of those years. I live within three quarters of a mile of the house in which he lived in Brookline. I saw him frequently.

Cross-examined.—I could not say what day in April he gave notice to the assessors. It was by letter. The letter was dated in Boston. I looked for it the other day, and could not find it. This letter stated that he intended to reside in Brookline, and wished to be taxed there. I found him, on the 1st of May, in Mr. Eben. Francis's house. It was in the north part of the town, between the mill dam road and Charles River. It is remote. No road passes by it. The land was taxed to Mr. Francis; the house to Mr. Bourne. His tax, in 1848, was \$136.55. His tax on the house was about \$6. His whole tax, as trustee and guardian, was \$136.55. I cannot tell what the items were, as I did not take them down. I don't recollect whether any return of stocks were made from the officers of corporations to the assessors of Brookline. We doomed him.

Otis Withington.—I have been collector of Brookline since March, 1849. Mr. Bourne paid me taxes in 1849. I left his bill at the house owned by Mr. Eben. Francis. I did not see him then. He came to my house and paid the taxes, just before the 1st of October. I was not collector in 1848.

Cross-examined.—The amount of Mr. Bourne's tax, in 1849, was \$147.50. His tax as trustee was \$70; as guardian, \$50. He was taxed for his poll, \$1.50; for real estate, \$6; personal estate, \$140. I do not know whether he requested to be taxed on his house. I had no tax against him in 1850. The house was remote, on the banks of Charles River.

Direct resumed.—The house was just off of the mill dam road. An avenue leads to it. It is a large house.

Cross-examined.—The house might rent for \$400 or \$500 this year; it might for more. I should think \$150 would be a cheap rent.

Direct resumed.—Another family lived in the part called

the farm house. One part is called the farm house, and the other part the mansion house. A farmer carried on the farm.

Charles Stearns, recalled by the defendant. Mr. Bourne's whole tax was less in 1848 than in 1849. We did not tax him in 1850. I did not find any body in the house in 1850.

Mr. WELCH then put in the following depositions :—

DEPOSITION OF NATHAN B. HAMMETT,
OF NEWPORT, R. I.

Questions by the plaintiff's counsel.

1. What town office did you hold in the year 1850? what in the year 1851?

Ans. I was one of the assessors of taxes, and one of the town auditors, in the years 1850 and 1851.

2. Do you know the plaintiff in this suit, Mr. Ezra A. Bourne?

Ans. He saith that he is acquainted with the said Mr. E. A. Bourne.

3. Whether or not was the said Bourne an inhabitant of the town of Newport during the years 1850 and 1851, or either of them?

Ans. The said Ezra A. Bourne was an inhabitant of said Newport, in the years 1850 and 1851.

4. Whether or not was any tax assessed upon him, as upon personal property or his poll, during said years, or either of them; and if yea, did he or not pay the same?

Ans. Mr. Bourne was assessed a personal property tax, on the sum of ten thousand dollars, in the year 1850, and a personal property tax on thirty thousand dollars, in the year 1851. The tax book shows that he paid the said taxes.

Cross interrogatories by the defendants' counsel.

1. How long have you known the plaintiff, and how long has he, to your knowledge, been a resident of Newport?

Ans. I first became acquainted with him in the year 1850. I cannot tell how long he has been a resident of Newport.

2. At what time of the year are taxes assessed upon the inhabitants of Newport?

Ans. In August of each year.

3. At what time is the residence of individuals fixed to render them liable to be taxed, and at what time is their residence taken for the purpose of assessing them?

Ans. Whenever the assessors of taxes ascertain that a person has become a resident of the town. There is no particular time, except that the person resides here, previous to the tax being ordered.

4. If you answer to the 4th interrogatory that the plaintiff did pay a tax in Newport, either in 1850 or 1851, or during both of these years, please annex copies of his tax bills to your answers. If you have not his tax bills or copies, please annex extracts from your tax books, showing the amount of personal property for which he was taxed in Newport in any capacity, and the amount of taxes he paid therefor.

Ans. I can only say that he was taxed on ten thousand dollars for the year 1850, and thirty thousand for the year 1851. The tax collectors collect the taxes, give receipts, and keep the books.

5. State the number of years the plaintiff has been taxed in Newport, the amount for which he has been taxed in each year, and the amount of taxes he has paid in each year.

Ans. Mr. Bourne has been taxed three years in this town; on ten thousand, personal property in 1850; on thirty thousand, personal property in 1851; on thirty thousand, personal property in 1852. The tax book shows that he paid thirty-two dollars for 1850, eighty-seven dollars for 1851, and one hundred and twenty-three dollars for 1852—the rate of taxes having been increased.

Additional direct interrogatory by the plaintiff.

5. Whether or not did you receive a notice, of which the annexed is a copy, and, if so, when?

(Copy.)

NEWPORT, APRIL 30TH, 1850.

Gentlemen,—

This is to give you notice that I have become an inhabitant of Rhode Island, and a citizen of Newport, and that it is my intention to make this my permanent residence, and it is my wish to pay my tax here upon my personal property. I occupy a small house on Kay street. Hoping and trusting you will exercise your power with clemency and moderation,
I am, with great respect,

Your obedient servant,

E. A. BOURNE.

To the Assessors of the town of Newport.

Ans. He says that he received such a notice, and believes it was about the time of the date.

DEPOSITION OF OLIVER READ.

Interrogatories by the plaintiff's counsel.

1. What town office did you hold in the year 1850? what in the year 1851?

Ans. I was collector of taxes for the year 1850. I held no office in the year 1851, except one of the investing committee of the school fund.

2. Do you know the plaintiff in this suit, Mr. Ezra A. Bourne?

Ans. I know the said Ezra A. Bourne. I called at his house when collecting taxes; and Mr. Bourne afterwards came to my office, and paid me his taxes, himself.

3. Whether or not was the said Bourne an inhabitant of the town of Newport during the years 1850 and 1851, or either of them?

Ans. I should think he was.

4. Whether or not was any tax assessed upon him, as upon personal property or his poll, during said years, or either of them; and if yea, did he or not pay the same?

Ans. In the year 1850 there was a tax of ten thousand

dollars assessed on his personal property, amounting to the sum of thirty-three dollars; which Mr. Bourne paid to me on my receipt to him for the same.

Cross Interrogatories by the defendants' counsel.

1. How long have you known the plaintiff, and how long has he, to your knowledge, been a resident of Newport?

Ans. In the month of June or July, 1850, Mr. Bourne was first pointed out to me. I cannot say how long Mr. Bourne has resided in Newport, but I believe that he resided here some time previously to June, 1850.

2. At what time of the year are taxes assessed upon the inhabitants of Newport?

Ans. The taxes are voted in June, and assessed in August, of each year, generally.

3. At what time is the residence of individuals fixed to render them liable to be taxed; and at what time is their residence taken for the purpose of assessing them.

Ans. Whenever a person gives notice to the proper authorities of his intention to become a citizen of this town.

4. If you answer to the 4th interrogatory that the plaintiff did pay a tax in Newport, either in 1850 or 1851, or during both of those years, please annex copies of his tax bills to your answers. If you have not his tax bills, or copies, please annex extracts from your tax books, showing the amount of personal property for which he was taxed in Newport in any capacity, and the amount of taxes he paid therefor.

Ans. I have no copy of the receipt of taxes paid by Mr. Bourne. The following is a correct transcript from the tax book of 1850:—

		Real.	Personal.	
Paid.	Bourne, E. A.		\$10,000	\$33.00.

The rate being thirty-three cents on a hundred dollars.

5. State the number of years the plaintiff has been taxed in Newport, the amount for which he has been taxed in each year, and the amount of taxes he has paid in each year.

Ans. I cannot say, as I have not had the charge of the tax books since 1850, and can only say that he was taxed for that year, and was not taxed the two years previous. The sum paid in 1850 was thirty-three dollars.

Additional interrogatory by the plaintiff.

(The same as in Mr. Hammett's deposition.)

Ans. He saith that he knows nothing of the notice.

DEPOSITION OF JAMES HORSWELL.

Interrogatories by the plaintiff's counsel.

1. What town office did you hold in the year 1850? What in the year 1851?

Ans. I held no office in 1850. I was collector of the town taxes in 1851.

2. Do you know the plaintiff in this suit, Mr. E. A. Bourne?

Ans. He says that he does.

3. Whether or not was the said Bourne an inhabitant of the town of Newport during the years 1850 and 1851, or either of them?

Ans. I considered him such, because he was assessed at his request.

4. Whether or not was any tax assessed upon him, as upon personal property or his poll, during the said years or either of them, and if yea, did he or not pay the same?

Ans. In the year 1851 he was assessed a personal property tax on thirty thousand dollars, and paid me eighty-seven dollars tax.

Cross Interrogatories by the defendants' counsel.

1. How long have you known the plaintiff, and how long has he to your knowledge been a resident of Newport?

Ans. I have known him about two years, and believe that he has been a resident for that length of time.

2. At what time of the year are taxes assessed upon the inhabitants of Newport?

Ans. The taxes are voted in June, and assessed in August.

3. At what time is the residence of individuals fixed to render them liable to be taxed, and at what time is their residence taken for the purpose of assessing them?

Ans. Whenever the assessors of taxes ascertain that a stranger has become a resident of the town. I know of no particular length of time necessary for a person to claim his residence here before being taxed. If he came here in September, he would not however be assessed and taxed until the following year.

4. If you answer to the 4th interrogatory that the plaintiff did pay a tax in Newport either in 1850 or 1851, or during both of those years, please annex copies of his tax bills to your answers. If you have not his tax bills or copies, please annex extracts from your tax books, showing the amount of personal property for which he was taxed in Newport in any capacity, and the amount of taxes he paid therefor?

Ans. I keep no copies of tax receipts or tax bills. The amount is set down in a tax book, and is marked as follows :

		Real.	Personal.		
Paid.	Bourne E. A.		\$30,000.	\$87 00.	"

This shows that Mr. Bourne was taxed eighty seven dollars on thirty thousand dollars of personal property, and that he had no real estate in this town.

5. State the number of years the plaintiff has been taxed in Newport, the amount for which he has been taxed in each year, and the amount of taxes he has paid in each year.

Ans. I cannot say except as regards the year 1851, when I was collector of taxes. Mr. Bourne paid in that year

eighty seven dollars tax, assessed on him for thirty thousand dollars of personal property.

Additional interrogatory by the plaintiff.

(The same as in Mr. Hammett's deposition.)

Ans. I have no knowledge of that notice.

DEPOSITION OF BENJAMIN B. HOWLAND.

Interrogatories by the plaintiff.

1. What town office did you hold in the year 1850? What in the year 1851?

Ans. I was town clerk in the years 1850 and 1851.

2. Do you know the plaintiff in this suit, Mr. Ezra A. Bourne?

Ans. I am not personally acquainted with him to my knowledge.

3. Whether or not was the said Bourne an inhabitant of the town of Newport during the years 1850 and 1851, or either of them?

Ans. I suppose that he was, because he was taxed on personal property in the years 1850 and 1851.

4. Whether or not was any tax assessed upon him, as upon personal property or his poll, during said years or either of them, and if yea, did he or not pay the same?

Ans. There was a personal property tax assessed on him in both of the said years, and the returns made by the tax collectors on the books in my office, show that he paid the tax assessed on him for the year 1851.

Cross interrogatories by the defendants' counsel.

1. How long have you known the plaintiff, and how long has he to your knowledge been a resident of Newport?

Ans. I do not know the plaintiff, and have no means of ascertaining his residence except from the record.

2. At what time of the year are taxes assessed upon the inhabitants of Newport?

Ans. Generally in August.

3. At what time is the residence of individuals fixed to

render them liable to be taxed, and at what time is their residence taken for the purpose of assessing them?

Ans. Whenever the assessors of taxes suppose that a person has made this place his residence.

4. If you answer to the 4th interrogatory that the plaintiff did pay a tax in Newport, either in 1850 or 1851, or during both of those years, please annex copies of his tax bills to your answers. If you have not his tax bills or copies, please annex extracts from your tax books, showing the amount of personal property for which he was taxed in Newport in any capacity, and the amount of taxes he paid therefor.

Ans. The following are copies from the tax books of 1850 and 1851:

1850.	Real.	Personal.	
Bourne E. A.		\$10,000.	\$33.00.

1851.	Real.	Personal.	
Bourne E. A. (in Eng's house,)		\$30,000.	\$87.00.

Mr. Bourne was taxed thirty three dollars on ten thousand dollars in 1850, and eighty seven dollars on thirty thousand dollars in 1851.

5. State the number of years the plaintiff has been taxed in Newport, the amount for which he has been taxed in each year, and the amount of taxes he has paid in each year?

Ans. Mr. Bourne has been taxed three years. In the year 1850 he was taxed thirty three dollars on ten thousand dollars of personal property. In the year 1851 he was taxed eighty seven dollars on thirty thousand dollars personal property, and in 1852 he was taxed one hundred and twenty three dollars on thirty thousand dollars personal property.

Additional interrogatory by the plaintiff.

(The same as in Mr. Hammett's deposition.)

Ans. I have no recollection of ever receiving any such notice.

Mr. WELCH then put in a lease from Mrs. Engs to Ezra A. Bourne. This lease had no date, except of the year 1849. It was acknowledged the 24th of April, 1849. It was a lease of a dwelling house on Kay street, in Newport, R. I., for four years from June 1, 1849, at the rent of \$200 a year, payable quarterly; the first payment to be made on September 1st, 1849.

He also put in the following depositions :

DEPOSITION OF MRS. ELIZABETH F. RICE,
OF BALTIMORE, MD.

Questions by the plaintiff's counsel.

1. How are you related or connected with the plaintiff in this suit ?

Ans. He is my stepfather.

2. Whether or not were you in Boston in a part of the spring and summer of 1851? If yea when did you come, for what purpose, at what house did you stay, when did you leave, and for what place?

Ans. I was in Boston during a part of the spring and summer of 1851. I came on in April, the last of April, to be confined. I staid at my mother's house, No. 19 Pemberton Square. I left in July of the same year for Newport.

3. What was your object in being confined in Boston?

Ans. It was so as to be under the care of Dr. Warren. I preferred him because he had always been my family physician, and understood my constitution.

4. Whether or not was the plaintiff in Boston on the first of May, 1851, to your knowledge? and state anything which you know in relation to his movements, and of any of his family, immediately previous to 1st of May.

Ans. He was not to my knowledge. He was here in

Boston when I came on ; and the last of April he left here for Newport. Mrs. Bourne, my mother, went to Newport with Mr. Bourne the last of April.

5. When did you again see your mother, after she left in April ?

Ans. I know that I saw her in June, but don't remember whether I saw her before that.

6. How do you fix the time of your seeing her as in June ? Was it or not by her being present when you was confined ?

Ans. It was by her being present when I was confined.

7. When did you again see Mr. Bourne after he left in April, and at what time ? was it or not when your child was born ?

Ans. It was in June, just before the birth of my child.

8. When you went to Newport after the birth of your child, to whose house did you go ?

Ans. To my mother's house.

9. State the street and number if you know it, and who lived there besides your mother.

Ans. Kay street. I don't know that it had a number. It was next the Jewish burying ground. Mr. Bourne and my two sisters lived there besides my mother.

10. Had you any of your own servants with you while you were in Pemberton Square, Boston ?

Ans. I brought one with me, and had another one after I came.

Cross interrogatories proposed on behalf of the City of Boston.

1. When Mr. and Mrs. Bourne went to Newport the last of April, as you have stated in your answer to the 4th question, did the house in Pemberton Square remain open as usual ?

Ans. Yes.

2. When did Mr. Bourne or your mother, or either of them, return to the house after their return in June ?

Ans. I don't know. They came up in the course of the summer for a day or so ; the time I don't know.

3. When did you next see Mr. Bourne after he left for Newport as you have stated? Can you fix the day or week? Are you confident it was not in May?

Ans. I saw him in June. I don't remember whether I saw him before June. I can't fix the day or week. I am not confident it was not in May.

4. When Mr. Bourne was in Boston in the summer of 1851, did he live in the house in Pemberton Square?

Ans. He stopped at the house.

5. How long did your mother remain in the house when she returned in June? Was Mr. Bourne here as long as she was?

Ans. She remained several weeks. Mr. Bourne was not here so long. He was here only for a few days.

6. When did you leave Boston for Newport, and how long did you remain there? Was not the house in Pemberton Square left open as usual in the care of servants?

Ans. I left in July, the first part of July. I staid at Newport till the middle or last of September. The birth of my child was on the 18th of June. I returned from Newport to Boston with Mr. and Mrs. Bourne, and remained a week or so, and then left for New York. I am not certain that Mr. Bourne returned from Newport with us in September. The house was left open as usual in the care of servants. Mr. and Mrs. Bourne joined me at New York, and we went South together.

7. Did Mrs. Bourne return to Newport after she came to Boston in September?

Ans. She did not.

8. Did not Mr. and Mrs. Bourne reside in the house in Pemberton Square during the winter of 1851-2? Did you reside with them, and have you resided with them since?

Ans. They did reside there that winter. I made a visit that winter in December of perhaps about ten days. I have not been here since until my present visit.

9. How long have Mr. and Mrs. Bourne resided in the house in Pemberton Square?

Ans. I can't tell how many years; about eleven years I should think.

10. Has it been for that length of time the family residence in Boston?

Ans. When they have been in Boston they have always lived in this house.

11. Have they during that length of time passed most of their time in Boston?

Ans. I don't think they have. I should think more than half their time has been passed away from Boston.

12. Where have they passed most of their time, if not in Boston?

Ans. I should say in Brookline, Newport, and Maryland.

13. What years in Brookline? what in Newport? what in Maryland? Had they any residence in Brookline or Maryland, or were they merely visiting in the last named places?

Ans. Four or five years in Newport, as near as I can recollect. They have made a visit to Maryland during the spring and fall of every year. The two years previous to going to Newport they went to Brookline. They had a residence both in Brookline and Maryland.

14. Have they spent every winter in Boston? Can you state the months when they usually resided in Brookline, Maryland, and Newport?

Ans. I believe they have spent every winter in Boston. They went to Brookline, I think, in April of each year, and remained there until they went to the South in the fall. I can't tell exactly the months they resided in Maryland. They left here for Newport always in April, and remained until their return to Boston or going to the South.

15. Did they go to Brookline or Maryland in the year 1851?

Ans. They went to Maryland sometime in May, and about October in the fall.

Further direct interrogatories proposed by the plaintiff.

1. Do you recollect seeing Mr. Bourne at any time after he left for Newport in April, 1851, till he came to Boston shortly before your confinement?

Ans. I don't think I did, but I can't say certainly.

2. You have stated that in the fall of 1851 Mr. and Mrs. Bourne spent some time in Maryland; when they left Maryland that year, do you know whether they went to Boston or Newport?

Ans. I don't know of my own knowledge.

EZRA A. BOURNE, }
 v. } *Norfolk Supreme Judicial Court.*
 THE CITY OF BOSTON. }

It is agreed that the deposition of Elizabeth F. Rice be taken on behalf of the plaintiff in the above action by A. S. Wheeler, at No. 19 Pemberton Square, this day. The same to remain open off the files for the use of either party.

December 30th, 1852.

(Signed)

SOHIER & WELCH *for Plaintiff.*

P. W. CHANDLER *for Defendants.*

DEPOSITION OF JAMES HAMMOND,
 OF NEWPORT, R. I.

Interrogatories by the plaintiff's counsel.

1. Do you know the plaintiff in this suit, Mr. Ezra A. Bourne? and how long have you known him?

Ans. I know him; and think I have known him for two years or more.

2. Whether or not was the said plaintiff residing in Newport on the first day of May, 1851? and if yea, state how you know the fact of his residence. How do you remember the same?

Ans. He was residing in Newport on that day. I know that he was residing in Newport, because I received a call from him on that day.

3. At what hour or hours, and in what place or places, did you see the plaintiff on that day?

Ans. I saw him in my counting room and in my store ; and I believe it was in the morning, somewhere about noon.

4. Where did the plaintiff live ? in what street ? and did he occupy a house, or did he board ?

Ans. The plaintiff lived in Kay street, in this town, and occupied the house. He kept house, I know.

Cross interrogatories by the defendants' counsel.

1. Do you know the family of the plaintiff ? Of how many persons does it consist, and what are their names ?

Ans. I know the family of the plaintiff personally. I do not know their names, nor how many it consists of ; it varies at different times. He has a coachman, and other servants.

2. Whether or not did you see any member of the plaintiff's family in Newport, on the first day of May, A. D. 1851 ? if yea, whom did you see, and where, and for how long a time did you see them ?

Ans. I saw Mr. Bourne in Newport on that day, and I believe one other member of his family. I saw Mr. Bourne in the street, and at my store. I saw the other member of his family, I think, in the street and at my store. I don't now recollect whether it was Mrs. Bourne or one of the daughters. They paid me a pretty long visit at my store.

3. For how long a time had the plaintiff been in Newport on the first day of May, 1851 ? State in detail how often you had seen him in Newport before that day, and at what times, and in what places.

Ans. I cannot answer that question precisely.

4. If in answer to the 2d cross interrogatory you say that you saw none of the plaintiff's family on said first day of May in Newport, state whether or not you knew where the plaintiff's family were residing at that time.

Ans. The plaintiff's family were residing at Kay street ; they always lived there.

5. If you had any conversation with the plaintiff, at or about the time above named, about his family, or their residence, or his own residence, please give the same, according to your best recollection.

Ans. I cannot say whether our conversation related to that subject or not ; knowing that he resided here in Kay street, I did not question him as to that.

Additional interrogatory by the plaintiff's counsel.

5. Whether or not did you see the plaintiff after the first of May, 1851, in Newport. If yea, how often, and generally in what place or places ? and for how long, as far as you can recollect, did you continue to see him at times ?

Ans. I saw him at various times ; how often I cannot say, but very often. The places where I have seen him are either in the street or at my store. Mr. Bourne very frequently calls at my store, and also his family. I saw him and his family at different times, very often during the season, and late in the season.

DEPOSITION OF MRS. ADELINÉ TIRRELL.

OF NEWPORT, R. I.

Interrogatories by the plaintiff's counsel.

1. Where did you reside on the first of May, eighteen hundred and fifty, and the first of May, eighteen hundred and fifty-two ?

Ans. I resided in Newport, in the State of Rhode Island.

2. Do you know the plaintiff in this suit, and how long have you known him ?

Ans. I know him, and have been acquainted with him eight or nine years.

3. Whether or not was the plaintiff residing in Newport on the first day of May, eighteen hundred and fifty-one ; and if yea, whether with or without his family ? and state how you know the fact of his residence.

Ans. Mr. Bourne, the plaintiff, was residing in Newport on that day ; his wife was with him. I know that fact, because myself and daughter dined with him on that day at his house. I recollect it because it was May-day.

4. At what time or times, and in what place or places, did you see the plaintiff on that day ?

Ans. I only recollect seeing him at dinner, and at his house.

5. Where did the plaintiff live? in what street? did he occupy a house, or did he board? and how near did you live, and how intimate, or otherwise, were you with him and his family?

Ans. He lived at his house in Kay street. He occupied his own house. I lived on Man avenue, the second house from the corner of Kay street. Mr. Bourne lived in the house next the Jews' burying ground. We were intimate; Mr. Bourne is my brother-in-law.

6. How long did the plaintiff remain in Newport in said year of eighteen hundred and fifty-one?

Ans. He spent the summer here. I do not know how much longer he stayed. He went from here some time in the fall.

7. Whether or not was the plaintiff residing in Newport on the first day of May, eighteen hundred and fifty? and state whether with or without his family.

Ans. Mr. Bourne was residing in Newport on the first of May, 1850, with his family. I stayed at that time in his house a few days, while my house was being prepared for me.

8. Where did the plaintiff live in eighteen hundred and fifty, on the 1st day of May? in what street? did he board, or occupy a house with his family? and if the latter, was it the same house he occupied in May, eighteen hundred and fifty-one; and does he or not occupy said house now?

Ans. He was living in Newport on that day, in his own house; his family was with him. He occupied then the same house that he does now.

9. Do you know the distance between Boston and Newport? and if yea, state the same.

Ans. I believe it is about seventy miles, but am not sure.

10. Do you or not know what were the public modes of conveyance between Boston and Newport on the first day of May, eighteen hundred and fifty-one? and if yea, state the time or times of starting from Newport to Boston after three

o'clock, P. M., on that day, of each of said public modes of conveyance.

Ans. I believe they were pretty much the same as they are now,—railroad and steamboat. I have not the least recollection of their hours of starting.

Cross interrogatories by the defendants' counsel.

1. Whether or not are you related to the plaintiff in this action? If yea, what is your relation to him, and where have you resided for the last five years?

Ans. I am connected by marriage. He is my brother-in-law. I resided the first part of that time in Alabama, then one summer in Virginia, and then removed to Newport, Rhode Island, where I now reside.

2. Of how many persons did the family of the plaintiff consist on the first day of May, 1851? Give their names.

Ans. I only know of the plaintiff and his wife; I do not know of their family arrangements.

3. Where did you reside, and where were you on that day? where were the members of the plaintiff's family on that day? whom of them did you see on said first day of May, 1851, and where did you see them?

Ans. I resided in Newport in my own house. Mr. and Mrs. Bourne were in Newport at their own house. I only remember seeing Mr. and Mrs. Bourne, and at their own house.

4. Where did the family of the plaintiff reside during the months of November and December, 1850, and January, February, March, and April, 1851? Did you see the plaintiff or his family during that time? If yea, when and how often did you see him or them?

Ans. I do not know; I do not remember of seeing them during the times mentioned.

5. In the years 1850 and 1851, how many servants, or persons in the capacity of servants, did the plaintiff have in his family?

Ans. I do not know.

6. During the years 1850 and 1851 did the plaintiff and his family reside in the same or different towns or cities, and

in the same or different houses? If he changed his residence with his family at any time or times, during those years, state the towns or cities from and to which he removed with his family, and the streets and numbers of the houses from and to which he moved. State also the times of these changes, their number, and dates.

Ans. They have lived in Newport, in the same house, ever since April, 1850; how much longer they have lived there I do not know. I came with them from Boston in the latter part of April, 1850, and remained at their house, on a visit, a short time.

7. If you answer to the last interrogatory that the plaintiff did move with his family, in whose charge and keeping were the houses or house, from or to which he moved, left? and did the persons having the charge of such house or houses receive compensation for their services from the plaintiff or any of his family?

Ans. I know nothing about it.

Mr. WELCH stated that it was admitted that Mr. Bourne was trustee for the Misses Thorndike, and guardian for the minor Miss Thorndike.

Mr. CHANDLER then opened for the defendants.

The case, he said, was one of great importance in more respects than one. Important as involving principles affecting the rights of every tax payer, but more especially as relating to the public morals. The public burthens ought to be shared equally by all the citizens in proportion to their property. Equality was equity; and whenever by any management one man was able to avoid his just portion of the expenditures which are for the benefit of all, an injustice was done to the whole body politic. A man has a right to live where he pleases. He may change his domicil whenever he desires to do so; and he is not bound to assign any reason therefor. But such change must be actually made, and it must be made in good faith. No man has a right to have an

actual domicil in one place, and a pretended or fictitious domicil in another place. He cannot reside in, and have the benefits of, one town, and elect to pay his taxes in another town, because they are less than in the town where he actually lives.

Nor had one city or town the least right to complain because any citizen chooses to remove therefrom, and that because his municipal burthens would be less in his new residence. But any *evasion* of law, any *pretended* removal, any attempt by a citizen to enjoy the advantages of one place, and not to share with others in his just proportion of the expenses of that place, was abhorrent to every honorable mind.

The plaintiff had been taxed in Boston in 1851, on the ground that he was a citizen there on the first day of May in that year. He had paid the tax under protest, and now sought to recover it back on the ground that he was not a citizen of Boston on that day. On this point the defendants took issue; they contend that the plaintiff did have his legal domicil in Boston on that day, and that he was legally taxable there for 1851.

Mr. Chandler then proceeded to state the legal definition of domicil, and cited and commented upon various decisions upon the question of domicil, and contended that if the plaintiff, having his home in Boston, made annual visits to Newport, but with the intention when he left Boston in the spring to return in the autumn, this was not a change of domicil for the purposes of taxation. Still less was it so, if his going to Newport before May 1st was not with the *bona fide* intention of changing his home, but was fraudulent and for the purpose of avoiding his share of municipal burthens in Boston. It would be safe to admit all that was alleged by the plaintiff's counsel, and all that he attempted to prove. Suppose the plaintiff was in Newport on May 1st. If he intended to return, if he did not intend to make Newport his permanent home, it was of no consequence where he was on that day.

Where was the *home* of the plaintiff in 1851? This was the question, and upon this point he (Mr. C.) should offer

such conclusive testimony as would save the jury much trouble in coming to a decision.

Ezra A. Bourne, the plaintiff, a gentleman of considerable wealth, retired from active business several years ago, having been president of the State Bank for about twenty years. A few years since, he married the widow of Charles Thordike, a lady of large wealth. He subsequently became trustee of her property, and trustee for several of her children, and guardian of others. Prior to 1848, and for a long series of years, the family had resided in a mansion, suitable to their condition, in Pemberton Square, and Mr. Bourne had been a tax payer in the city of Boston. In 1848 and in 1849, he went to Brookline with his family, and gave notice to the Boston assessors that he had taken up his permanent residence there. He was taxed there in those years. He spent the winters in Boston, and in the spring of 1850, having hired domestics to keep the house in Boston open for the use of the family, when they desired to use it in the course of the summer, he undertook to go out of the state and to gain a domicil in Newport; and this, as the defendants would show, not *bona fide*, but with the intention, and solely for the purpose, of not being taxed in Boston. He gave notice to the Boston assessors that he should be at his home out of the city, and he was not taxed in Boston. In 1851, the plaintiff undertook a more hazardous experiment. He then undertook not only to keep his house open in Boston for use and occupation when necessary, and to pay no taxes there, but as the circumstances of a part of his family or relations render it convenient, he thought he might venture to let all his family remain in Boston, and merely ride down to Newport with his wife and pass a day or two; thence, after a journey to the South, returning and spending nearly the whole summer in town. If an experiment like this could succeed, there was an end of anything like firm and just taxation in Boston. But it could not succeed. The defendants averred and would prove, that the whole arrangement was a sham; he would not say a disgraceful sham—the facts would speak for themselves—but he would say it was a sham that would not even have the merit of success.

It would appear in evidence that the family of the plaintiff consisted of about a dozen persons, and that the whole of them were in the house in Pemberton Square during the whole of May, a large part of June, and into July, with the exception of a visit made by Mr. and Mrs. Bourne to Maryland in May, and a day or two's absence of the same persons about the first of May in Newport. During the winter of 1850-1, the house in Newport was closed and uninhabited. The servants went down to open and clean it about the middle of June. One of those servants would be upon the stand, and would describe the appearance of the house at that time. The cook, who was hired in Boston expressly to work at Newport, did not leave the former city until about the middle of June. Evidence had been introduced by the plaintiff to show that Mr. and Mrs. Bourne dined in their Newport house on May 1st. The jury, from the evidence to be introduced, would judge whether that was true; and if so, they would consider the peculiar circumstances under which that dinner took place. It was not until July that the family of Mr. Bourne went to Newport, and even then the house in Boston was left open in the charge of servants, and so remained the whole period of their absence. They returned early in September. To say that there was any change of domicil, or that the plaintiff was not taxable in Boston on May 1st, was preposterous.

These facts would be proved, and by the very persons who best knew them. Some of the witnesses came here with great reluctance, but were brought here by the summons of this court. The family cook in Boston, the person who was hired to keep the house open in 1850, would be produced here to testify. The cook in 1851, the person who lived in the house during the whole summer, would be here. The Newport cook would also appear. The man-servant, who went with the family to Newport and returned with them to Boston, was here present. He should also place upon the stand the plaintiff's grocer, his provision dealer, his milk-man, his baker, the person who kept his horses in Boston, with their books of account, and the jury would judge from their

statements whether the plaintiff's home was in Boston on May 1st, or in Newport. He should also read in evidence, deeds and other documents, and let the jury see how the plaintiff described himself as to residence. He should also call the clerks of the various corporations in which the plaintiff owned stocks, and the jury would see how they regarded the plaintiff's residence.

It would also appear, or rather, it had already appeared, that the plaintiff had strong inducements in a pecuniary point of view to be taxed out of Boston. For two years past he had been taxed as follows:—

1848.	Brookline,	-	-	-	\$193.55
1849.	Brookline,	-	-	-	261.50

Even this dissatisfied him, and in 1850, when he went to Newport, he wrote the following significant letter:—

(Copy.)

NEWPORT, APRIL 30TH, 1850.

Gentlemen,—

This is to give you notice that I have become an inhabitant of Rhode Island, and a citizen of Newport, and that it is my intention to make this my permanent residence, and it is my wish to pay my tax here upon my personal property. I occupy a small house on Kay street. Hoping and trusting you will exercise your power with clemency and moderation,

I am, with great respect,

Your obedient servant,

E. A. BOURNE.

To the Assessors of the town of Newport.

The "clemency and moderation" exercised by the assessors of Newport, appears from the fact that they taxed Mr. Bourne, in 1850, the large sum of \$33, and in 1851 the larger sum of \$87. This was the whole tax paid by the whole family. The tax in Boston, in 1851 alone, and it was a just and fair tax, was \$3571.50.

There was an obvious saving to the pocket, but how the honor stood affected the jury would be better able to judge when they had heard the evidence.

The following witnesses were then called and examined on behalf of the defendants.

Clement Willis.—I reside in Essex street, in Boston. I was an assessor in 1850 and 1851. I know Ezra A. Bourne, the plaintiff in this suit. I have known him 20 years or more. He was president of the State Bank before he retired from business. His house is numbered 19 Pemberton square. It is a very large house. I was a *per diem* assessor, and his house was in my ward. I visited the house in May, 1851, somewhere from the 12th to the 20th. I called, rung, and inquired for Mr. Bourne.

Mr. CHANDLER.—What was the appearance of the house?

Mr. WELCH.—I object to any testimony as to the appearance of the house.

The COURT.—He may state what he saw.

Witness.—They stated that he had gone to Rhode Island.

Mr. CHANDLER.—What was the appearance of the house outside?

Mr. WELCH objected to the question.

Mr. CHANDLER.—I mean to prove an evasion of the law, by showing the appearance of the house. I intend to show that the plaintiff's going to Rhode Island was for the mere purpose of evading his taxes.

Mr. WELCH.—He had a right to go to Rhode Island, and pay his taxes there, if he chose.

Witness.—The house looked as if it was inhabited. The carpets were not taken up. The front of the house was shut up, and every blind closed. The back part of the house was open. I passed the house almost every week day in May. Every day I saw the front blinds closed, and those on the back part of the house open.

Mr. CHANDLER.—Did this fact make an impression on your mind, so that you spoke of it to others?

Mr. WELCH objected to the question, and it was ruled out.

Witness.—I frequently saw the carriage stop at the door.

Cross-examined.—I usually passed the house about one o'clock. The house fronts the east nearly; the rear is west.

It is the house taxed to the plaintiff as trustee for his wife I had something to do with assessing this tax. I advised the assessment. I took the place of a permanent assessor, and my duties were the same. I think it was after May 12, that the taxes were assessed. I have not been active in getting up this case ; not at all.

Direct resumed.—I noticed always, when I passed, that the front of the house was shut, and the back part open. I passed about one o'clock, or a little after.

Cross-examined.—There are large houses in the rear, standing above it. This is a corner house. There is a large open space in front.

Direct resumed.—I don't recollect any end windows.

Samuel G. Studley.—I am the book-keeper for S. S. Pierce, grocer. I know Ezra A. Bourne by sight only. He dealt with that concern in 1851, and in previous years. Articles were delivered at his house during the summer of 1851. Mr. Bourne paid for them. I have the books here. (Here he opened to Mr. Bourne's account on the ledger.)

Mr. WELCH objected that books were not admissible.

Mr. CHANDLER.—I wish to show that Mr. Bourne paid this very account.

Witness.—I was with Mr. Pierce at that time. There are charges upon his books, to Mr. Bourne, on the following dates : 1851, January 1, 4, 6, 8, 9 11, 15, 16, 18, 22, 23, 25, 28, 29, 30 ; February 1, 4, 5, 6, 8, 12, 14, 17, 18, 19, 21, 22, 24, 26, 28 ; March 1, 3, 4, 5, 6, 7, 8, 10, 11, 15, 17, 18, 19, 22, 24, 25, 29 ; April 1, 2, 4, 5, 7, 8, 9, 11, 12, 14, 17, 18, 19, 21, 22, 24, 28, 29 ; May, 1, 2, 5, 6, 8, 9, 10, 14, 16, 19, 21, 24, 26, 27, 31 ; June 5, 6, 9, 10, 14, 16, 17, 19, 20, 21, 23, 24, 26, 27 ; July 1, 2, 3, 5, 7, 9, 10, 11, 12, 14, 18, 19, 24, 31 ; August 6, 19, 22 ; September 1, 3, 10, 11, 16, 17, 18, 20, 23, 24, 25, 27 ; October 3, 6, 8, 9, 10, 13, 16, 21, 24, 31 ; November 1, 7, 8, 10, 11, 14, 20, 28, 29 ; December 2, 3, 4, 6, 8, 9, 11, 12, 13, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 30. This account was settled by Mr. Bourne, January 27, 1852. The articles were delivered in the same way in May as in previous

months. I know no change. I drew off a statement of the items at the request of the defendants' counsel. This is the statement.

Mr. SOHIER.—I object to the admission of the account in evidence. The fact that Mr. Bourne had articles in those months is admissible, but not what those articles were.

Witness.—These items were on Mr. Bourne's pass book, and the pass book was receipted.

Cross-examined.—These articles were delivered in the same manner as in previous months. The servants came for them, and brought a pass book. The general order was to deliver no article without the pass book. I don't recollect seeing Mr. Bourne during this time. The same course was pursued during the years 1848, 1849, and 1850.

Direct resumed.—I had no account with Mr. Rice. I have heard of him. I never sold him anything.

Sylvester Seaverns.—I am a provision dealer. I keep at No. 26 School street. The name of the firm is A. Seaverns & Co. I know Ezra A. Bourne. I have known him for five years. I have dealt with him for about the same time. He lives in Pemberton square, No. 19. I had an account with him in 1851. I have it here. There is no charge in February or March, 1851. The account started 29th April, 1851. October 1, 1849, is the first charge on this book. From August 1850, to April 1851, he had very few things. I know no reason for that. The young man carried these things to Mr. Bourne's house. I don't know who ordered them. An order was sent to the store by our young man. He went up to the house. The order was always in writing. We kept all the orders. It was their wish that the orders should be so preserved. It was the wish of Mr. and Mrs. Bourne. Nothing particular was said at the time. Those orders were to serve as checks by which to pay the bills. They had a pass book besides. Mr. Bourne paid these bills. Each item was compared with these orders, and settled with Mr. Bourne, and the orders given to him. There were charges on the following dates: 1851, April 29, 30; May 1, 2, 3, 5, 6, 7, 8,

9, 10, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31; June 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 30; July 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, 30. Those were also delivered on orders. The orders were preserved, and returned, and settled. I will give a copy of these items. I cannot to-night.

Cross-examined.—The pass book was a small book kept at Mr. Bourne's house. The book was not sent down. On these orders was put down the article that was wanted, such as "a piece of beef to roast," or "a piece of mutton to boil." They were brought down by our boy. The boy goes round first to customers to see what is wanted. He brings the order to the shop, and then the article is carried up, and put on the pass book. The order does not bear any formal signature.

Robert Campbell.—I am the boy. I was in the employ of Mr. Seaverns in 1849, 1850, and 1851. I delivered the principal part of what they wanted in Pemberton square. Sometimes somebody else carried them. The orders were given by different persons. They were given by Mrs. Bourne when she was at home. I delivered the articles at No. 19 Pemberton square; the corner house.

The witness was not cross-examined.

George E. Adams.—I reside in Medford. My business is that of a farmer. I supplied Mr. Bourne with milk in 1851, all the time that the house was opened. I cannot say whether the house was shut any part of the time. I did not deliver it myself all summer. I delivered till the first part of July. The bills were sometimes paid by Mrs. Bourne; sometimes the money was left by her. It was mostly paid to my man. My man left the milk after the 1st of July. I think that the money was paid to me.

Cross-examined.—I never saw Mr. Bourne but once. I delivered less milk in the summer than in winter.

Direct resumed.—My man was Sumner Winslow.

Sumner Winslow.—I was in Mr. Adams's employ. I delivered milk in the summer of 1851, at Mr. Bourne's, in Pemberton square. I went on the cars alone from the 5th of July to the 9th of September. I rendered my account to Mr. Adams.

The witness was not cross-examined.

John Taylor.—I am a baker. I do business at No. 134 Pleasant street, Boston. I know Mrs. Bourne. I don't know all the family. I delivered bread at Mr. Bourne's in 1851. I think I stopped in May or June. Bakers keep a book in each house, and enter articles. When I stopped delivering bread Mrs. Bourne said she wanted to change her baker, and asked me to leave the book. I delivered bread at Mr. Bourne's in 1850.

Cross-examined.—I delivered bread in 1848 and 1849. I did not for the whole summer. I think I did not leave any during the summer months.

Nelson E. Nims.—I keep a stable in Chardon street. I know Mr. Bourne. I keep his horses. I kept them in April, May, and June, 1851. They went away on the 3d of July, 1851. I suppose they went to Newport. He kept a coachman, who lodged at his (Mr. Bourne's) house. The carriage was out constantly in May and June. The coachman came to get it. The carriage went from my stable to the house, and then went away. They generally rode when it was pleasant.

Cross-examined.—A hack from my place carried Mr. and Mrs. Bourne to the railroad station, April 29, 1851.

Direct resumed.—I could not say what time of day.

Cross-examined.—They went by the Old Colony Railroad. They don't generally go in their own carriage to railroads when there is baggage.

E. A. Danforth.—I am a clerk in the Transcript office. I have the entire charge of the mail book. That book shows the time when persons out of town commence taking their

papers, and when they stop. Mr. Bourne takes the paper. The change was made in 1851, July 12, from No. 19 Pemberton Square, Boston, to Newport, R. I. The book shows that it was sent to Pemberton Square up to that time.

The witness was not cross-examined.

Henry Sargent.—I am one of the assessors of Boston. I have been an assessor for about eight consecutive years.

Mr. CHANDLER.—Are these the returns received by the assessors of Boston from the offices of different corporations, showing the amount of stocks held in such corporations?

Mr. WELCH.—We object to the evidence.

Mr. SOHIER.—We admit that they are the returns for the years in question; but we do not admit that they are legal evidence in this case.

Mr. CHANDLER.—I offer to put them in for two reasons; 1st, as tending to show an evasion of the tax law of Boston, and 2d, as tending to show that Mr. Bourne's residence was in Boston.

These returns were made by persons acquainted with him, and notwithstanding he claimed to be a resident of Brookline and of Newport, these returns were always sent to Boston; while no returns were ever sent to Brookline or Newport; and this was well known to the plaintiff, and was allowed to go on for years.

The COURT excluded these returns as incompetent evidence, unless they were shown to be connected with Mr. Bourne.

Ellen Murphy.—I reside in Boston. I am cook at Mr. Wm. Appleton's. Mr. Appleton is now away, and I am with Mr. Coolidge. I was in Mr. Bourne's employ from the 22d of April to October 15, 1851. Mrs. Bourne employed me. She employed me to do cooking. I did cooking from the time I went till the last week in July. I was in the house at Pemberton Square all that time, and took care of the house when Mrs. Bourne was away. Mr. Bourne left either on the 29th or 30th of April. I think Mrs. Bourne went with him. She went South, and returned in two or three weeks. I think she

went to Newport with Mr. Bourne, but am not certain. She came back from the South in May. Mrs. Bourne kept seven servants. She did not all times have that number, owing to changes. There were two chambermaids, a seamstress, a laundress, a coachman, an inside man-servant, and a cook. The coachman, the inside man-servant, and the seamstress, went to Newport. The seamstress went in June. The coachman went in July. The inside man-servant went when Mr. and Mrs. Bourne went, about the last week in July. Mrs. Bourne came back from the South, and was in Boston about the last week of May. She remained in Boston till, I think, the last week in July. She was in New York a day or two, and that was all. Mrs. Rice was there till they went to Newport, the last week in July. Mrs. Rice had two servants; a waiting maid and a monthly nurse. I knew no other mistress but Mrs. Bourne. No servants went from the house when Mr. and Mrs. Bourne went on the 29th of April. The seamstress, and a woman hired to do the cooking at Newport, were the first that went. The woman hired to do the cooking at Newport, came and staid at the house in Pemberton Square ten days or a fortnight before she went to Newport. The seamstress and this woman were the first servants that went to Newport that I knew of. I should think that was about the 10th or 12th of June. I did not hear Mr. Bourne give any orders respecting it.

Mr. SOHIER.—I object to testimony of any orders, unless given by Mr. Bourne.

Witness.—The man-servant generally slept in the house, but slept out of the house when the Newport cook was there. I think she occupied his room. I think the carriage went on the 5th of July.

Mr. SOHIER.—We admit that the carriage went to Newport on the 5th of July, or on the 3d.

Witness.—The ladies rode out, sometimes, in Mr. Bourne's carriage, driven by the coachman. I saw no difference in the use of the carriage. One of the Miss Thorndikes was married on the 2d of October, 1851. She went from the house to be married. I remained in the house after the family

went. I kept house. The house was kept open. The chambermaid staid. Miss Anna, Miss Martha, the seamstress, and Mr. Bourne, came there and staid after the family went to Newport. The family returned from Newport about the 15th of September. They did not return to Newport after that time.

Cross Examined.—Miss Thorndike was not married at the house. She went away to be married. Mrs. Rice came there and was confined. Mrs. Rice was taken sick on the 16th of June. Her mother staid with her till she could go to Newport. Mr. Bourne came up and staid awhile; and then went to Newport. They went South in October.

Direct resumed.—I think Mr. Bourne was at the house when the child was born.

Mary Coughlan.—I reside in Boston. I know Mr. and Mrs. Bourne. They live in Boston, in Pemberton Square. Mrs. Bourne engaged me to do cooking in Newport. She engaged me about the last of May, to go to Newport in the summer season. I remained one week in the house in Pemberton Square. I then went to Newport about the 13th of June, and did the cooking. Miss Low, the seamstress, went with me. When I got to Newport I commenced house cleaning. No one was there. The house was shut up. The key was at Mrs. Tirrell's. The house was very damp and cold. The first thing I did was to make a fire. There was nothing there to eat. I found a piece of old cheese that looked as if something had been at it, more than human beings. It was maggoty. Every thing in the house was in a very filthy condition. It took me some time to clean them. The house had the appearance of having been shut up for some time. I did not come back with the family.

Cross-examined.—I did not find dishes lying about unwashed.

Direct resumed. The full complement of servants, as well as I could understand, was at the house in Pemberton Square when I went there. Mrs. Bourne was there when she engaged me. Mr. Bourne was there when I went to Newport.

Cross-examined.—I don't know who the man was who first came and talked with me about my testimony in this case. I did not come back with the family from Newport.

Joseph Williams.—I am termed an in-door servant. I live now with Mr. Nat. Thayer. My native place is Salem. I lived with Dr. Bigelow in April and May, and three or four days in June, 1851. I went from Dr. Bigelow's to live with Mr. Bourne, at No. 19 Pemberton Square. I don't know whether Mr. Bourne was present when I was engaged or not. I had seen him before. Mrs. Bourne engaged me, and came to Dr. Bigelow's after me. I went to Mr. Bourne's to live, on the 5th of June. There were then a cook, two chambermaids, a seamstress and a coachman. I don't know whether there was a laundress or not. There were also two women of Mrs. Rice's; a lady's maid and a nurse. Mrs. Rice, Mrs. Bourne, and one of the Miss Thorndikes were there. I am not sure whether Mr. Bourne was there or not; he was soon after. I had, for a short time, to sleep out of the house, it was so full. Mary Coughlan occupied my room. Mary Coughlan and Margaret went down to Newport first. It was in June, and after I went there. I think it was before June 15th. I think West, and the carriage, and Mr. Bourne went next, July 3. I think I went the last of July. The family went the day before I went; Mrs. Bourne, Mrs. Rice, Miss Thorndike, and Mrs. Rice's two maids. I went down to the depot and saw them off. I went the next day. I went down in April, 1852, to open the house. It was shut up and unoccupied.

Mr. SOHIER.—I admit that the house was shut up in the winter.

Cross-examined.—A person came to me a few days ago, and asked me if I had lived with Mr. Bourne. I don't know his name.

The hour of six having arrived, the Court now adjourned to the next morning, at nine o'clock.

SECOND DAY.

THURSDAY, March 3, 1853.

At the opening of the Court, Mr. CHANDLER applied for a *capias* for Ebenezer Francis, to compel his attendance as a witness. He said the officer who served the summons was not present, but Mr. Francis, after he was summoned, came into his (Mr. CHANDLER'S) office, and stated that he was not able to attend, and would not attend. That was on a very stormy, unpleasant day, and if Mr. Francis was able to be at his office on such a day, he thought he was able to attend the Court now.

Mr. WELCH produced letters from Dr. Jackson, to the effect that it would be unsafe for Mr. Francis to attend Court.

Mr. WELCH said he would admit Mr. Francis's written statement; and that he had offered to have Mr. Francis's deposition taken.

Mr. CHANDLER said that Mr. Francis did not answer one question, which he had a right to have answered; but he disliked to press a matter of this sort, especially with a gentleman of Mr. Francis's age.

Mr. CHANDLER then put in Mr. Francis's statement as follows:—

"I hereby certify that I have examined my books, and find the following entries, under date of October 7, 1848.

"Cash, Dr. to Cedar Grove Farm, \$175
For rent of Mr. Bourne of house, from April 1 to November 1."

Also from my waste book under date October 1, 1849,—

"Cash Dr., Farm Cedar Grove, for rent Mr. Bourne, \$150

EBEN. FRANCIS.

Boston, Feb. 28, 1853.

"Several days since, immediately after being summoned, I wrote Mr. and sent him the substance of the above, it may

not exactly be the same as the above, as I had not time to look so particularly as I have had this day.

Cedar Grove Farm is in the town of Brookline.”

Mr. CHANDLER.—I propose to prove the dividends (a part of them) which were paid to Mr. Bourne, and personally received by him from different corporations, during the years 1850 and 1851. I have had the clerks of the corporations in attendance; and now have the statements made by them.

Mr. WELCH.—Why are these admissible?

Mr. CHANDLER.—To show that Mr. Bourne was an active man, attending to business and collecting dividends; and to show that he was in Boston at the dates.

Mr. WELCH.—We have always admitted that he came up to Boston and received his dividends.

The COURT.—All the acts of the party are competent. As to the effect and weight of the testimony, that is another question.

Mr. CHANDLER was then proceeding to read the paper.

Mr. SOHIER.—This is only admissible to show the dates.

The COURT.—It is admissible to show that he was, at those dates, transacting business in Boston.

Mr. CHANDLER.—A question of domicil, of habitancy, of residence, involves a vast number of considerations. On the question of changing a person's domicil, it is competent to show his wealth, and his station in society. Suppose a man worth half a million, owning a large mansion and costly furniture, keeping a large number of servants, attempts to show a change of residence to a place obviously unfitted to his circumstances. We propose to show Mr. Bourne's wealth, his condition, his position in society, and to argue from these that it was not his *bona fide* intention to change his residence to Newport. This must depend upon a vast variety of circumstances. We might safely admit (but we do not) that he went to Newport in order to spend two or three summer months in Newport. If he had been a man of moderate means, we might suppose that he intended to change his home to the small house on Kay street, mentioned in the plaintiff's

letter. But we cannot think so, when we consider the great wealth of this family. It is not to be believed a moment.

Mr. WELCH.—Mr. Bourne has two residences. There is no doubt about that. The only question is, which was his residence for purposes of taxation.

The COURT.—I doubt that point very much. I doubt whether a man can have two legal residences, for any purpose.

Mr. WELCH.—He may have two residences, but he can have only one for purposes of taxation, and the enjoyment of municipal rights. He has only one residence, in a legal sense.

The COURT.—This evidence has a tendency to show that the interests of the plaintiff were likely to keep him in Boston.

Mr. SOHIER.—So far it is admissible; but it is immaterial. It is not admissible to show that he was a rich man, and therefore likely to live in Boston.

The COURT.—Is there any controversy, Mr. Chandler, as to the tax assessed to Mr. Bourne, as trustee of Miss Thorndike?

Mr. CHANDLER.—That will be a question of law, on which I will address the Court. I have some authorities on that point.

Mr. CHANDLER then read the following statement, made out by the officers of the several corporations named below:—

Dividends received and receipted for by the plaintiff in 1850 and 1851.

		20 shares Mass. Cott. Mills.			
Declared.		Paid.			
Jan. 28, 1850.	Jan. 28, 1850,	-	-	-	\$600.00
July 22, "	July 27, "	-	-	-	600.00
Jan. 27, 1851.	Jan. 27, 1851,	-	-	-	600.00
		12 shares Boott Cotton Mills.			
Feb. 15, 1850.	Feb. 18, 1850,	-	-	-	\$360.00
Aug. 15, "	Aug. 16, "	-	-	-	360.00
Feb. 15, 1851.	Feb. 15, 1851,	-	-	-	360.00
Oct. 29, "	Nov. 10, "	-	-	-	360.00

As trustee and guardian ; 8 shares Mass. Cott. Mills.

Declared.	Paid.			
Jan. 28, 1850.	Jan. 28, 1850,	-	-	\$240.00
July 22, "	July 27, "	-	-	240.00
Jan. 27, 1851.	Jan. 27, 1851,	-	.	240.00

Appleton Co. ; for himself, and as trustee and guardian.

June 21, 1850.	June 21, 1850,	14 shares,	\$420.00
Dec. 20, "	Dec. 20, "	do.	420.00

Hamilton Manufacturing Co. ; for himself, and as trustee and guardian.

June 21, 1850.	June 21, 1850,	30 shares,	\$900.00
Dec. 20, "	Dec. 20, "	do.	900.00
June, 1851,	no dividend.		
Dec. 16, 1851.	Dec. 16, 1851,	do.	630.00

Washington Insurance Co. ; 10 shares.

April 9, 1850.	April 9, 1850,	-	-	\$60.00
Oct. 8, "	Oct. 10, "	-	-	60.00
April 8, 1851.	April 11, 1851,	-	-	60.00
Oct. 14, "	Nov. 8, "	-	-	60.00

Hope Insurance Co. ; 10 shares.

April 4, 1850.	April 16, 1850,	-	-	\$50.00
Oct. 4, "	Oct. 5, "	-	-	50.00
April, 1851.	April 9, 1851,	-	-	50.00
Oct. "	Nov. 8, "	-	-	50.00

National Insurance Co. ; for himself, and as trustee and guardian.

April 3, 1850.	April 3, 1850,	93 shares,	\$465.00
Oct. 9, "	Oct. 14, "	do.	372.00
April 9, 1851.	April 9, 1851,	do.	465.00
Oct. 8, "	Nov. 8, "	do.	465.00

Firemen's Insurance Office, 40 shares.

Jan. 4, 1850.	Jan. 14, 1850,	-	-	\$100.00
July 2, "	July 25, "	-	-	100.00

Declared.	Paid.			
Jan. 4, 1851.	Jan. 15, 1851,	-	-	100.00
July 3, "	Aug. 1, "	-	-	100.00

Western Railroad; 286 shares as trustee.

Jan. 1, 1850.	Jan. 1, 1850,	-	-	\$1144.00
July 1, "	July 1, "	-	-	1144.00
Jan. 1, 1851.	Jan. 1, 1851,	-	-	1144.00
July 1, "	July 1, "	-	-	1144.00

State Bank; for himself, and as trustee and guardian.

April 1, 1850.	April 1, 1850,	666 shares,	\$1398.60
Oct. 7, "	Oct. 5, "	do.	1398.60
April 7, 1851.	April 5, 1851,	do.	1398.60
Oct. 6, "	Oct. 4, "	do.	1398.60

Manufacturers' Ins. Co.; 30 shares in his own name.

April 10, 1850.	April 10, 1850,	-	-	\$300.00
Oct. 9, "	Oct. 14, "	-	-	300.00
April 9, 1851.	April 9, 1851,	-	-	300.00
Oct. 8, "	Nov. 8, "	-	-	450.00

Lawrence Manufacturing Co.; in his own name.

March 14, 1850,	25 shares,	\$1000.00
Sept. 20, "	do.	750.00
March 14, 1851,	do.	500.00

Mr. CHANDLER.—I now offer to put in the returns from several corporations to the assessors of Boston.

Mr. WELCH.—I object to their admission, as being merely the statements of the clerks, and therefore not legal evidence.

Mr. CHANDLER.—The clerks will be here, and will testify that their books show that such stock stands thereon in Mr. Bourne's name. This testimony was only ruled out when

offered for the purpose of showing the residence of Mr. Bourne.

Mr. WELCH.—We will admit that Mr. Bourne owned such stocks, if Mr. Chandler will make out a list of them from the returns.

Mr. CHANDLER accordingly asked Mr. Sargent (the assessor who had testified) to make out such a list.

Mr. CHANDLER.—I now offer to put in the account of Mr. Bourne, as guardian of these two daughters, rendered April 22, 1850. I offer it for the same purposes.

Mr. WELCH.—I object to evidence respecting that property which was held by Mr. Bourne as trustee and guardian.

The COURT.—It all has a tendency to show that his interests were in Boston.

Mr. CHANDLER then put in the first account of Ezra Allen Bourne, guardian of Elizabeth Francis and Martha Sylvester Thorndike, of Boston, in the County of Suffolk, minors, settled April 22, 1850.

A schedule of personal property was annexed, amounting to \$211,802.01.

The COURT.—Was the plaintiff guardian in 1851? When did the guardianship terminate?

Mr. CHANDLER.—I will read the whole paper. That will show when his guardianship of Miss E. F. Thorndike terminated. (He then read further from the account, showing a settlement with her, and her receipt dated April 22, 1850.)

Mr. CHANDLER.—I now propose to put in certain deeds from and to Mr. Bourne.

The COURT.—You should call the attention of the jury to all those parts of the account on which you intend to argue.

Mr. CHANDLER.—I intend to rely upon the whole account, and every item of it. I will read it if desired. I propose to show that these persons who are named in the account, all, or most of them, reside in Boston, or have offices in State street.

Mr. WELCH.—I shall object to any argument respecting the property held in trust for Miss Thorndike.

Mr. CHANDLER.—I now offer several deeds, covering the space of time in question, in which Mr. Bourne describes himself as of Boston.

Mr. WELCH.—I object to the evidence. People residing out of town, but doing business in Boston, frequently describe themselves as of Boston. I do myself, although I reside in Waltham. In 5 Vesey's Reports, page 789, *Somerville v. Somerville*, the Master of the Rolls says that he lays no stress whatever on such a description; that it was totally immaterial how a party described himself.

The COURT.—I regard that case as merely showing the opinion of the Master of the Rolls, as to the operation of the fact upon his own mind, in that particular case.

Mr. WELCH.—Perhaps it is so; and is a mere question for the jury. But I thought it my duty to raise the objection.

The COURT.—All the facts and circumstances are open to the jury.

Mr. WELCH.—Are the deeds received by Mr. Bourne admissible?

The COURT.—The fact that he received a deed in which he is described as of Boston, is a fact for the jury; and they are the sole judges of the weight and effect of such a fact.

Mr. CHANDLER.—They were put on record by the grantee.

Mr. WELCH.—That does not appear.

The COURT.—Merely the fact that he *takes* a deed in which he is so described, is a fact for the jury.

Mr. CHANDLER then put in the following papers:—

Letter of guardianship, by Hon. Edward G. Loring, Judge of Probate for the County of Suffolk, to Ezra A. Bourne, of Boston, in said County, Esquire, appointing him guardian of Elizabeth I. Thorndike and Martha S. Thorndike, both of said Boston, minors, above the age of fourteen years, and children of Charles Thorndike, late of said Boston, merchant, deceased; dated July 10, 1848.

The guardian's bond of Ezra A. Bourne, Esquire, as principal, and William Shimmin, Esquire, and H. K. Hall, all of Boston, in the County of Suffolk, as sureties; dated July 10, 1848.

An indenture made March 27, 1849, by and between Mary Adeline Thorndike of Boston, single woman, of the first part, and Ezra A. Bourne, of said Boston, gentleman, of the second part; respecting the income of her trust property. Acknowledged March 27, 1849; recorded March 22, 1851. Lib. 618, fol. 175.

An assignment of a mortgage, by Ezra A. Bourne, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, as trustee of Anna D. Thorndike, to Elisha T. Loring, of Dorchester, in the County of Norfolk and said Commonwealth, merchant; date, June 19, 1850; recorded June 27, 1850. Lib. 611, fol. 230.

An indenture, made March 21, 1851, by and between Anna D. Thorndike, of Boston, single woman, of the first part, and Ezra A. Bourne, of said Boston, gentleman, of the second part, respecting the income of her trust property. Recorded March 22, 1851. Lib. 618, fol. 173.

Mr. CHANDLER.—I now offer an indenture, dated October 2, 1851, between Richard T. Parker of Staten Island, in the State of New York, gentleman, and Martha S. Parker, wife of said Richard, late Martha S. Thorndike, of Boston, in the County of Suffolk and Commonwealth of Massachusetts.

Mr. SOHIER.—What has Mr. Bourne to do with that deed? He is no party to it.

Mr. CHANDLER.—Mrs. Parker was one of this family, and Mr. Bourne was her guardian.

The COURT.—The residence of a minor does not show the residence of her guardian.

Mr. CHANDLER.—I withdraw it. I don't wish to put in anything which may raise any question of law. I will put in another.

I now put in the resignation of Mr. Francis, and the appointment of Mr. Bourne, as trustee of Mrs. Bourne in 1846.

Mr. SOHIER.—What is the object of that?

Mr. CHANDLER.—To show that Mr. Bourne is the trustee. They rely upon his being trustee in order to support their action.

Mr. WELCH.—Mr. Bourne was not liable as trustee, but as

the husband of Mrs. Bourne. I wish to have the object of this testimony stated.

Mr. CHANDLER.—I intend to argue this question to the jury on two grounds.

1st. A change of domicil requires not only an intention to change the domicil, but also the actual carrying of that intention into effect.

2d. If it was the intention of Mr. Bourne to evade taxation anywhere, and he made an arrangement of the property of the family for that purpose, a change of domicil does not avail him. I wish to show a change of property in 1847, so that Mr. Bourne should represent all the property. One object was, to secure the property from the tax collector anywhere. The trust property was never taxed in Newport.

The COURT.—How does the change of the trustee affect the taxation? Mr. Bourne was liable to be taxed while Mr. Francis was trustee.

Mr. CHANDLER.—This was a part of the whole arrangement. If a husband reside out of the State, the property is taxable to the trustee; but if he reside in the State, it is taxable to the husband.

The COURT.—I think the testimony is competent.

Mr. CHANDLER then put in the following papers.

1. Indenture, made January 1, 1846, by and between Ezra A. Bourne, of Boston, merchant, and Mary M. Bourne, wife of said Ezra, of the one part, and Ebenezer Francis, of Roxbury, Esquire, of the second part; by which the trust property formerly held by Mr. Francis for Mrs. Bourne, was transferred to Mr. Bourne as trustee. Acknowledged January 19, 1846; recorded Lib. 556, fol. 175.

2. The resignation of Ebenezer Francis as such trustee, and the appointment of Ezra A. Bourne, January 19, 1846; recorded Lib. 556, fol. 174.

3. The assignment of various mortgages, by Josiah Quincy, Jr., guardian of M. A. P., and A. D. Thorndike, to E. A. Bourne, Esq., trustee of Mary A. P. Thorndike, of the City of Boston, dated March 26, 1847, acknowledged April 6, 1847; recorded Lib. 574, fols. 280, 281, and 282.

4. An agreement, made March 24, 1848, by and between Anna Dodge Thorndike, of Boston, in the County of Suffolk, single woman, of the first part; and Ezra Allen Bourne, of said Boston, Esquire, of the second part, by which she conveyed to him her property in trust for "her own separate use, and to be in no wise liable for the debts, or subject to the control of any future husband of said Anna." Acknowledged March 24, 1848; recorded Lib. 588, fol. 164.

5. A mortgage deed, by Charles Maverick Parker, of the City, County and State of New York, gentleman, formerly known as Charles Parker, to Ezra A. Bourne and Samuel Frothingham, both of Boston, in the County of Suffolk and Commonwealth of Massachusetts, gentlemen, as they are trustees under the last will and testament of John Parker, late of said Boston, merchant, deceased; dated June 28, 1848; acknowledged July 3, 1848; recorded Lib. 591, fol. 290.

6. Assignment of a mortgage, by Ezra A. Bourne, of Boston, in the County of Suffolk, trustee of the property of Anna D. Thorndike, to Thomas Thompson, of Brighton, in the County of Middlesex, formerly of said Boston, gentleman, dated December 15, 1851. Lib. 627, fol. 262.

Mr. CHANDLER then stated the points of law on which he relied in relation to the form of the tax assessed upon the plaintiff. The tax of the plaintiff in 1851 was this:—

His own personal and poll tax,	-	-	-	\$876.50
As trustee of Mrs. Bourne,	-	-	-	875.00
As trustee and guardian of the Misses Thorndike,				1,820.00
				<hr/>
				\$3,571.50

The two first items were correct in form beyond all question, and he did not understand that they were objected to on that account. The objection to the last item was, that one or more of the Misses Thorndike having arrived of age, this property was held by Mr. Bourne *in trust*, and the tax should have been made out to them by virtue of the tenth section of chapter 7, of the Revised Statutes, clause 5, which was in these words:

“All personal property, held in trust by any executor, administrator, or trustee, the income of which is to be paid to any married woman or other person, shall be assessed to the husband of such married woman, or to such other person, respectively, in the town of which he is an inhabitant; but if such married woman, or other person reside out of the state, the same shall be assessed to said executor, administrator or trustee, in the town where he resides.”

But it was to be remembered, that the plaintiff was guardian of one of the Misses Thorndike, and her property was taxable to him by virtue of the Revised Statutes ch. 7, sec. 10, clause 4, which expressly provides that personal property of minors shall be assessed to their guardians in the towns where the guardians reside. Now, then, as a *portion* of this tax was correct, the whole must stand, *so far as this suit was concerned*, because the plaintiff's remedy was by *appeal* to the mayor and aldermen, and not by a suit. Nothing was better settled in law than this: Where any portion of a tax is correct, and a party is dissatisfied with the amount, and alleges that he is taxed for more than he has, or in a capacity which he does not fill, or for what he does not own, then his remedy is by *appeal*, to the county commissioners, in the various counties, except Boston, where the appeal is to the mayor and aldermen. It is only where a party complains that his *whole* personal tax, or his *whole* real estate tax is wrong, *that he is not taxable at all*—it is only in these cases, that suits at law can be maintained.

Where one is overrated by assessors, whether by including, in the valuation, property of which he is not the owner, or that for which he is not liable to be taxed, his only remedy is by an application for an abatement, pursuant to the statute. *Osborn v. Inhabitants of Danvers*, (6 Pickering's Reports 98.)

The same doctrine was laid down in the cases of *Howe v. City of Boston*, recently decided, and *Bates v. City of Boston*, (5 Cushing's Reports 93.) The last case was very similar to the present. The plaintiff there was a member of the firm of Bates & Thaxter, which firm was taxed as such.

There was certain property of which his wife was entitled to the income, and for which he was taxed. He contended that this was not taxable, and brought a suit to recover the tax back. But the Court held, that, as he had some personal property liable to taxation, other than his partnership property, and as the whole tax was set to him, as for his personal property, it was therefore, if wrong, obviously a case of over-valuation, for which his only remedy was by appeal.

Applying these principles to the present case, it is obvious that the tax must stand, even on the plaintiff's own ground, because a portion of it was taxable to the plaintiff, and if it was *too large*, the remedy was by appeal. Besides, it is a mere technical ground, and not to be favored. Suppose the tax bill ought to have been made out in the name of Miss Thorndike instead of the name of the plaintiff, it was clear that he held her property as trustee, and he would pay the tax. He never before made any objection to the form of it or it would have been changed at once; and now the objection was merely technical and formal, and did not affect the legality of the tax in the least.

Mr. CHANDLER remarked, that the tax bills which were actually paid, were lost. The bills put in, were taken by the assessors from their books; and were not copied from the originals.

Mr. WELCH. I recollect that these are like the bills that are lost.

Mr. CHANDLER. I would suggest that it would be the more convenient ruling, to rule this point in favor of the defendant. In that case, if the verdict should be rendered for the defendants, and the whole bench should think the ruling incorrect upon this point, the plaintiff might have judgment for the amount of the tax assessed upon him as trustee for Miss Thorndike, without having a new trial upon the whole question. But if the ruling should be in favor of the plaintiff, and should be reversed by the full bench, we should be obliged to try the whole case over again.

The COURT. My impression is, that in *Lincoln v. Worcester*,

a case which was decided last October, and is not yet reported, there was a tax to the plaintiff as trustee, and the Court took the ground now taken by the defendants' counsel. They held that it was a question of over-valuation.

Mr. WELCH. The present case is different. Here it appears on the very face of this judicial act of the assessors, if it may be so called, that there has been an error.

The COURT. In the case of *Bates v. Boston*, there was no difficulty as to the person taxed. The only difficulty in the present case is, as to the person to be taxed.

Mr. CHANDLER. Precisely the same argument was used in the case of *Bates v. Boston*. Suppose Mr. Bourne had been taxed as guardian, and the word trustee had been omitted?

The COURT. There would have then been no difficulty.

Mr. CHANDLER. The whole tax should not be avoided for a technical inaccuracy.

The COURT.—It has been decided that inaccuracy in description shall not avoid a tax. But when there is an uncertainty as to the *person* to be taxed, a different question is presented. I do not wish to anticipate what the counsel for the plaintiff may say, but merely to suggest the difficulty which arises in my own mind.

Mr. WELCH.—Your honor has stated it much better than I could.

Mr. CHANDLER.—It would be more convenient to rule *pro forma* for the defendants on this point, if indeed the Court has any doubt upon it.

The COURT.—My impression is, that the case of *Lincoln v. Worcester* decides this point in favor of the defendants.

Mr. CHANDLER then called as a witness

Pamelia Sprague.—I reside at Charles P. Curtis's, in Mt. Vernon street, Boston. I am his cook. I have lived in his family about 20 years altogether. I went to live with Mr. Bourne, in Pemberton square, in the first part of December, 1849. I staid through the winter. I was engaged to stay through the summer, if I could, and keep the house open. I had another

woman with me. I kept the house open till about the middle of July. I lost a relative, and had to go home. Mr. Bourne was at home himself a part of the time; I think about a fortnight at a time. I could not tell exactly. Mr. Bourne told me he should be at home a part of the time. It was said, when I was engaged, that the family would be up some of the time; that Mrs. Bourne would.

Cross-examined.—Mr. Bourne, at one time, was there about a fortnight. I could not recollect exactly what month. I think it was the first part of the time. Mr. and Mrs. Bourne went to Newport in the spring. They wanted me to keep the house in such order, that if any of the family came to Boston they would have a place to stop.

Mr. WELCH then called the following witnesses for the plaintiff:—

Ira Martin.—I was in Mr. Bourne's employ in 1848 and 1849.

Mr. CHANDLER.—What is the object of this testimony?

Mr. SOHIER.—The defendant has shown that the house was open in 1850 and 1851. We wish to show that precisely the same thing was done in 1848 and 1849.

Mr. CHANDLER.—I feel inclined to have the fact in; but I think the principle is a bad one. I have been rebutting their testimony. They admitted that Mr. Bourne kept the house open. I merely showed how and why it was done.

Mr. SOHIER.—They try to show that Mr. Bourne gained a new residence in Boston in 1850. I wish to show that he did nothing more than in 1848 and 1849.

The COURT.—The only question is, whether this is new matter or not.

Mr. SOHIER.—They admitted that Mr. Bourne had a residence in Brookline, and they try to show that he gained a new residence in Boston.

Mr. CHANDLER.—The point is this, no new matter was put in by the defendants. The plaintiff put in the fact of keeping the house open.

The COURT.—You put in evidence to show that it was kept open for a different purpose. I shall admit the testimony, if insisted on.

Mr. SOHIER.—Rather than have any question raised, I will waive it.

Margaret Low.—I lived in Mr. Bourne's family in 1851, and some time previous.

Mr. WELCH.—Did you go down to Newport in June, 1851?

Mr. CHANDLER.—I object to the testimony, as not rebutting.

Mr. WELCH.—We intend to prove, by this witness, that she found that the house had been inhabited, that the beds were not made, and that they found there the remains of a breakfast.

Mr. CHANDLER.—If that is the extent, I admit it. Go ahead; I don't object.

Witness.—I was at Newport in 1850. The house was shut up quite late, and I was not the last one who was there. It was put in *some* order when I left. I went down in June, 1851. I went down with a woman who was engaged for that purpose. I opened the house, and engaged a colored woman. The house looked as if it had been inhabited a short time before I went down. I remained there until August.

Cross-examined.—In June I found the house locked up. I opened it. I think I had the key with me, but can't remember. I found the remains of a meal in the dining room, which had not been cleared away. I have lived with Mr. Bourne about 16 years. One of the daughters was married at Newport that summer. She was married at church. I suppose she went from Mrs. Tirrell's. I suppose she had been staying at Mrs. Tirrell's from the 19th of June. She had not been staying at the small house on Kay street. I did not remark that it would not do for Mr. Bourne to go to Boston, or he would have to pay taxes. I don't think I ever made a remark upon it.

Mary Coughlan was recalled by the defendants' counsel.

Mr. CHANDLER.—Did the last witness state to you anything about Mr. Bourne's taxes in 1851?

Mr. SOHIER.—I object to the question.

The COURT.—It is incompetent. The question put to the last witness was purely collateral.

Mr. CHANDLER closed the case for the defendants, substantially as follows :—

Every thing in art and nature, he said, had certain specific and distinctive characteristics which distinguish it from every other thing, and which stand out in such bold relief that the mind is impressed with its general quality, without reference to the details which produce the effect. We say of a picture that it is pleasing, without the least knowledge of the rules of art, and perhaps with an entire inability to point out the reasons for the impression left on the mind. We admire certain countenances; we pronounce them beautiful without reflecting upon the reasons of our judgment. So of certain transactions; we are painfully or otherwise affected by them, according to the general impression which they leave; we do not stop to analyze them carefully, but we praise them or we denounce them as they appear to us as a whole. So of legal controversies. After wading through a mass of evidence until the mind is weary, and many of the details of proof are dimly remembered—perhaps forgotten entirely—we get a distinct impression of the whole matter without being able to recall at once the reasons for such a result or readily to defend it. We take a comprehensive view of the whole thing. We are strongly impressed with certain prominent facts, which stand out in bold relief, and throw a shadow upon the minor details of the picture. We unhesitatingly arrive at certain conclusions; we exclaim that it is a fair, honorable, and just claim, one that ought to be enforced; or perhaps we denounce it as an unjust, dishonorable, possibly a mean cause, and one that ought not in good conscience to succeed, although the technical rules of law may be in its favor.

Regarding the present case, as it now stood, upon the whole

evidence, what impression had it made upon the minds of the jury? Did it strike them as a claim which ought to succeed; which, upon the plaintiff's own showing, was entitled to favor; or did it seem to them like a claim which was entitled to no favor whatever, and one which ought not to succeed, unless the strict rules of law gave it a title to success.

Before examining the details of the evidence, he desired the jury to look at the broad features of the case; to consider certain facts which were not in dispute on either side.

In 1851 the authorities of the City of Boston declared that the plaintiff's proportion of the municipal burthens of that year was \$3,571.50; and they ordered him to pay that amount for his own personal tax, and for the tax on certain property owned by his wife and by her daughters, of which he had the custody. The plaintiff paid this amount, and has brought this suit to recover it back, on the ground that he was not liable to be taxed at all in Boston on his personal property, nor for that held by him in trust, because he says he was not a citizen of Boston, and consequently not liable to taxation there.

This sum, if recovered by the plaintiff, is to be made up by the other tax-payers of Boston. Their rates in the coming year must be increased sufficiently to cover this amount; and the question here is really one between him and them.

It was not denied that the plaintiff and his family were very wealthy. It appeared that he was trustee of the property owned by his wife and by some of her daughters, and guardian of those who were under age. On April 22, 1850, he paid over to one of these daughters \$105,901.01, as her individual share. The other daughters and the wife had each at least an equal amount, and it was clear that there was more than half a million of personal property which ought to be taxed *somewhere*. Property, too, which was extremely well invested, and yielded a very large and certain income. This property was almost entirely invested in this Commonwealth, and most of it in corporations doing business in the city of Boston. It was protected by Massachusetts legisla-

tion. The expenditures for municipal purposes were for the benefit of the plaintiff in proportion to his large estate. While he slept, the watchful guardian of the night protected his property. At any lawless aggression upon his person or upon his rights, the whole power of the city, civil and military, would be instantly brought to his aid. For him the policeman made his hourly round. For him the firemen was ready at a moment's warning, to toil, to struggle, and perhaps to die. He had all the rights, immunities, and privileges of every other citizen, and he makes no complaint that the public authorities have not done their whole duty so far as the protection of himself and of his property are concerned.

What would the insurance, bank, and other stocks of Mr. Bourne be worth if there were no watch, no police, no fire department, no city government? Why, if these institutions were blotted from existence, the plaintiff would go from this court house comparatively a poor man.

So also of the public schools. The plaintiff sends no children to them. Personally, he and his family have never used them, perhaps. But they exist nevertheless, for his and their benefit. All property—all personal property—depends entirely upon the laws for its protection. The laws are but the will of the people, expressed in an organized form; and what security is there to wealth—upon what basis does property rest, where knowledge is not generally diffused? where the wildest theories are the current coin; where lust is uncontrolled; where every wicked passion rages with fury, unrestrained by the light of truth or the fear of God? The New England school-house is the real protector of property, and every child who leaves its walls is ready to guard the rights of others as well as to protect his own.

It is admitted that the plaintiff, with his accomplished and amiable family, passes all his winters in Boston. Here is his home. Whatever technical arguments may be made, or nice distinctions drawn upon the question of domicil, it is impossible not to see that Boston was, and is, in reality, the home of this family. Here were the plaintiff's friends. Here he entertains in a style of liberal and generous hospitality; and

to the order, cleanliness, and good repute of Boston, he and the ladies whom he represents in this matter, were as much indebted as any other persons living.

Now, there is no pretence here that the plaintiff has been taxed more than his proportionate share for all these purposes. If he were so taxed, he had a plain and adequate remedy for such over-valuation. But he contends that he is not liable at all. He complains that *any* tax is assessed upon the personal property owned and represented by him. Why should he complain? The whole tax paid by this family in four years in Brookline and Newport, was \$575. Their just tax in Boston for the same years would have been more than \$12,000! The plaintiff's tax in Boston in 1851, (and, as before stated, it was a just and reasonable tax, in proportion to his property,) was \$3,571.50. The Newport tax, which the plaintiff contended was the only tax he ought to pay, was \$87!

Now then, the question is, can the plaintiff recover this sum back? Can he thus escape taxation? Can such monstrous injustice be worked under our laws? Is it possible for a citizen, whose proportionate and just tax is \$3,571.50, to get off legally by paying one of \$87? Can he have all the advantages of our laws, of our municipal regulations and expenditures, and not share in the common burthens; but compel other citizens exclusively to pay for what he enjoyed in common with them?

The defendants denied that this could be done. The City of Boston took issue on this point, and contended that neither in law or in equity, in good conscience or in good sense, was there any ground upon which the plaintiff could rest his cause.

The defendant corporation met the plaintiff on his own ground; in his own forum. He had come into this county, at great inconvenience to himself, and to his counsel, and to his witnesses. Why did he come here? Did it seem absurd to him, who is as well known in Boston as any citizen there, to go before a jury of his neighbors and deny that he was a citizen, and try to convince them that they were all in an

error on this point? Or did he suppose that he stood better here, from the natural prejudice in the minds of a Norfolk jury, on this question of taxation? Did it occur to him as a reason for coming here, that the towns in this county have an advantage from persons leaving Boston to avoid taxation, and therefore would be more favorable to his cause? If he did reckon on any thing of this sort, he reckoned without his host! A Norfolk jury would try this case as fairly as any jury on earth. The inhabitants of this county, like those of every county in the state, hate meanness, or evasion of the law, whenever and wherever they find it. They believe in equality; that every man ought to be taxed his proportionate part of the common burthens of society. The question here was not whether the plaintiff should be taxed in Boston or in Norfolk, but whether he should be taxed at all. The question was, whether Massachusetts men could go out of the state nominally, and live here really, and yet avoid taxation here altogether.

To that question he addressed himself, and in reviewing the evidence, he should treat the whole matter with great plainness of speech. He should try this case precisely as if the plaintiff were the humblest citizen in the community, and where he alleged fraud, and proved fraud, he would call it fraud, and nothing else.

The only question of fact for the jury to pass upon was as to the domicil of the plaintiff on May 1st, 1852. Was it in Boston, or in Newport, R. I.?

The law required that a person should be taxed for his personal property "in the town where he shall be an inhabitant on the first day of May."

In the first place, then, it was necessary to understand what was meant by the term *habitaney*? The meaning was simply a person's home; and a person could have but one home. He might have several *residences*, but he could have but one domicil for purposes of taxation; and this was defined in the law as his *habitation fixed in any place, without any present intention of removing therefrom*. It had also been repeatedly decided, that if a person go out of the state, or county

or town, for a particular purpose, and do not take up a permanent residence elsewhere, he cannot be considered as having removed so as to affect his domicil or inhabitancy. The intention to abandon a domicil, and actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, would not produce a change of domicil. Persons who went from home for specific purposes, travellers, seamen, members of Congress, the President of the United States, did not lose their domicil. Mr. Webster for many years occupied a house in Washington, but his home was in Marshfield. There he was taxed, and there he exercised his municipal and political rights. The case of *Sears v. City of Boston* (1 Metcalf's Reports, 250) was directly in point. The plaintiff left Boston to be absent several years in a foreign country. He leased his house in Boston; but the Court held that his domicil continued there, and that he was taxable there, because he had not abandoned the city, but was absent for a temporary purpose, and intended to return.

In the present case, if the plaintiff, having his home in Boston, made annual visits to Newport, but intending to return in the autumn, this was not a change of domicil.

Upon this view of the law, it was perfectly safe to admit all that the plaintiff had proved; and still he was not entitled to recover in this action. He was at great pains to prove that he was at Newport on May 1st, with his wife. Suppose he was; that alone did not make him a citizen there. The great question was, where was his *home*? This was, in one sense, a complex term. It was not merely where a man, or his wife, or even the whole family, happened to be on a particular day, that constituted the domicil. It was that large variety of considerations, facts, and circumstances, concurring to make up that endearing appellation, which no other language had any word to express in its full significance; what we understand by the term—*home*. Not alone did the head of the family compose it. The hearth-stone, around which infancy had sported, and old age had sat in peace; the library, the pictures, the furniture—familiar, old, and yet so dear—the servants; were these no part of the dom-

icil? The plaintiff did himself and the rest of his household great injustice, and unconsciously abused the term, when he supposed, that, by merely transporting himself, he changed the home of his family.

Here woman reigns; the mother, daughter, wife!

A great deal had been said as to a man's right to live where he pleased. There was no doubt of that, whatever. A man may change his home as often as he desires; he may make his home in France, Tartary, or Hindostan. But he must act in good faith. He must not pretend to go there, and, in point of fact, remain here. He cannot have all the advantages of a home in one place, and, at the same time, by his mere will, escape the public burthens which contribute to render that home agreeable.

The great question in the case was this: Was the home of this plaintiff on the first day of May, 1851, in his house on Pemberton square—that stately mansion, fitted up in a style of luxurious magnificence, suitable to his position, in which he and his family had resided for so many years, and which was never closed, summer or winter—or was it in the “small house on Kay street,” as he described it in his letter to the assessors of Newport, “next the Jews’ burying ground,” as Mrs. Tirrell speaks of it, hired of Mrs. Engs, at a rent of \$200 per annum, which was never occupied except in the summer months, and was closed and utterly abandoned the rest of the year?

The plaintiff averred, and asked for a verdict upon the ground, that the latter residence was his home instead of the former, and he offered evidence on this point which it was necessary to examine.

First, we had the testimony of the Newport assessors that they taxed the plaintiff in 1850 and 1851. But this was not of the least consequence, because their time of taxation was in August, and there was nothing to show that mere residence in Rhode Island, whether they have a fixed domicile there or not, was not sufficient for purposes of taxation. It

might therefore have been that he was taxable here and there too, an inconvenience that persons who undertake to reside in different states often suffer. Besides, it is quite noticeable, that the assessors speak of the plaintiff's requesting to be taxed there.

Then we had the testimony of Mr. James Hammond that he saw Mr. Bourne and "one other member of his family" in Newport on May 1st, 1851. "They paid me a pretty long visit at my store," he said. He gave no reason whatever, why they were at his store, or how he came to remember it so distinctly. But it would be very safe to admit that he was correct, and that the plaintiff and "one other member of his family" were at Newport on that day, and did pay Mr. Hammond "a pretty long visit at his store." Indeed, the next witness seemed to settle that point conclusively, and to her own satisfaction at least.

This witness was Mrs. Tirrell, Mrs. Adeline Tirrell; and her testimony was so singular and suggestive that it must receive a moment's consideration. Mrs. Tirrell, who is the sister of Mrs. Bourne, testifies that she dined with the plaintiff and his wife on that day at his house in Newport. She recollects it "because it was May-day." There was something a little singular in this matter of the dinner in more respects than one. In the first place Mr. and Mrs. Bourne left Boston on the very last or last day but one in April. They took no servant with them. The Newport house had been closed all winter. Mrs. Tirrell was living in Newport; and as it was not usual to invite persons to dinner on the very day of opening a house for the season, it seemed strange that Mrs. Tirrell did not *invite her sister to dine with her*. Probably this arrangement, however, would not suit the plaintiff's purpose in going to Newport on that day. It might be desirable to establish the fact that he was actually in his own house on that day. But there was another difficulty! Who cooked the dinner in the plaintiff's house on that day? He took no servants with him. His Newport cook did not go down from Boston until six weeks afterwards. When she arrived the house was closed, and had the appearance of

having been closed a long time. *Who cooked that dinner?* It would be easy for the plaintiff to show it. Why had he not done so?

He (Mr. C.) was not disposed to deny Mrs. Tirrell's statement that she dined in the plaintiff's house on that first day of May. Nor did he doubt that she took her cook with her! For this whole affair, as well as the "pretty long visit" at Mr. Hammond's store, was doubtless got up for the occasion. The plaintiff had a case to make out. He desired evidence that he was in Newport on May 1st, and that he was living at his own house. He invited company to dinner for this very purpose, and then he actually brings that company to testify to these facts.

By all means admit the fact of the dinner. It was an occasion to be remembered—that social re-union in a cold, disordered house, on that bleak shore—that dinner in the "small house on Kay street," "next the Jewish synagogue and burying ground," it was not in the least strange that the witness remembered it so well. Probably the plaintiff himself would not soon forget that May-day, 1851.

Old men forget; yet all shall be forgot,
But he'll remember, with advantages,
What feats he did that day!

So much for the Newport witnesses. We next had the testimony of Mrs. Rice as to the state of things in the house in Pemberton Square. He approached this witness with some reluctance, because her relation to the party placed her in an embarrassing position, and ought to protect her from any remarks not strongly called for. But the defendants did not place her in the position of a witness. She was called by her step-father, and to prove facts which he might just as well have proved by others; because anything she knew, was known by others who might have been called by him. And it was a singular fact, that the defendants called the very witnesses which the plaintiff would naturally have called, if he had not feared their testimony.

Mrs. Rice says that she came to Boston the last of April,

1851 ; and she states the reason why she came. Was that object one that would be likely to drive her mother away, almost as soon as she came home ? Was it credible that the sole object of Mrs. Rice in coming here was to be under Dr. Warren's care ? Was it not much more reasonable to suppose that she desired, at that most trying period of her life, to be with her mother ? and yet she would have us believe, that, although she arrived here the last of April, her father and mother immediately changed their residence to another state, and that this mansion in Pemberton Square was given into her hands at a time when her mind must have been occupied with thoughts and considerations utterly inconsistent with the management of this great establishment. There was something singular, too, in the way this witness speaks of the family mansion. She says, "I staid at my mother's house, No. 19 Pemberton Square." Her mother's house ! True, but was it not also her father's house ? Would she have us infer that he had no right there ? that he was merely a visitor there ? This was obviously her intention, because in answer to the question, whether, when Mr. Bourne was in Boston, he lived at the house in Pemberton Square ; her answer was in these words, "He stopped there." Indeed ! But what was the meaning of this excessively cautious manner of stating simple facts. One would almost suppose from Mrs. Rice's evidence, that Mr. Bourne was at most but a visitor at "her mother's house," a sort of day boarder ; or that he "stopped there" as he would at an inn. Indeed the expressions used by this witness, and the whole evidence on the part of the plaintiff in relation to his peregrinations at Newport and elsewhere during that eventful summer, in search of taxation, recalled those fine lines of an old poet, as peculiarly applicable to his circumstances :—

Whoe'er has travelled life's dull round,
Where 'er his stages may have been ;
Must sigh to think he always found
His warmest welcome in an inn.

So much for Mrs. Rice's testimony. It is objectionable, not so much for what she states, as for what she omits to state,

and for the impressions she leaves as to the occupation of the house in Boston. Great pains had been taken to show that Mrs. Rice had good reasons for coming to Boston at that time. The counsel on the other side had explained these in his opening, and almost the first question asked of the witness by the other counsel, referred to these reasons. Doubtless her reasons were good. So far as the evidence in this case went, they certainly were. But they did not alter the facts or the law. Every man had some good reason for living in one place rather than another. The fact that Dr. Warren lived in Boston induced Mrs. Rice to come at that time ; and the fact that she desired to come induced the plaintiff and his family to remain there, and to offer her a home. The fact that Mrs. Rice desired the services of Dr. Warren did not fix Mr. Bourne's residence in Newport. It was very proper, doubtless, that she should come ; very proper that she should find a home in her mother's house, and still more proper that the plaintiff should be taxed in Boston that year.

Now upon this point, as to the manner in which the Boston establishment was carried on, the defendants had called a number of witnesses, and they were the very persons who knew the most of these transactions. They had produced the plaintiff's grocer, his provision dealer, his milk-man, his baker, his stabler, his Boston cook, his Newport cook, and his man servant. It was unnecessary to recapitulate their testimony. It was uncontradicted, and it was too plain and clear to be misunderstood. It appeared that Mr. and Mrs. Bourne left, the last of April, for Newport ; that they or one of them returned to Boston immediately, and then took their usual journey south. They soon returned to Boston, and Mrs. Bourne certainly was there for several weeks. All the servants they ever had were in the house. The carriage came often to the door. Every thing went on as usual until the first of July, when this family, like hundreds of others, left the city during the warm season. Even after this the house was kept open until September, when the whole family returned. During this whole period the house bills went on as

usual, and all were paid by Mr. Bourne. No servant in that house ever heard that there was any change in the head of it. Seven domestics were there under Mrs. Bourne, and knew no other mistress. Mrs. Rice brought one servant and hired another after her arrival; neither of whom were produced by the plaintiff. No one who supplied the establishment had anything to do with Mrs. or Mr. Rice, or ever heard of them as keepers of this house, so far as appears in evidence. As to the intimation that the house was in charge of the servants alone, it would not bear the least examination. If the jury would look at the grocer's account, and examine some of the items, it would put this intimation at rest. Was it Mr. Bourne's habit to furnish his servants with fine Otard brandy, and cases of claret, and articles of this description? It was an insult to common sense for the plaintiff to ask the jury to believe that he had given this house up to Mrs. Rice, and that it was her house during this summer, and not his. It was a case not uncommon, of a lady's coming home to make a visit under peculiar circumstances, and just those circumstances which would keep her parents at home and not send them away—circumstances utterly inconsistent with the idea of her assuming the cares of the establishment.

Then as to Newport, the defendants had produced the cook, who went there and opened the house for the plaintiff. She did not leave Boston till about the middle of June. When she arrived at Newport, the house was closed. It was cold and damp, and in great disorder, like a house which had not been occupied for a long time. The plaintiff called a witness to contradict the cook on an immaterial point, but her evidence very much strengthened the defendants' case; for she testified that when they opened the house, they found the remains of a meal on the table, which shows that there could have been no regular cook in the house, and that the May-day dinner was a hasty affair, there not being time to clean up after it was over.

Upon this evidence, could it be pretended for a moment, that the domicil of the plaintiff was not in Boston on May

1, 1851? If such acts as these—such sudden migrations from town to town and state to state constituted a change of domicil, then there was an end to every thing like fair, equal and just taxation in this Commonwealth; a man might elect his place of taxation and still reside elsewhere whenever he pleased.

But the case did not stop here. The arguments thus far had been confined to the year 1851. That was the only year now in controversy. But the facts in the case tend strongly, almost conclusively, to show, that all these departures from Boston since 1847, were for the express purpose of evading the laws respecting taxation.

Up to 1847, the plaintiff had been taxed in Boston. It appeared from the evidence, that prior to 1846, the largest part of this property was not in the plaintiff's hands. In 1846, Ebenezer Francis, the trustee of Mrs. Bourne's estate, resigned at her request, and Mr. Bourne took his place. In 1847, the property of two of the children came into his hands, and in 1848 he was appointed guardian of the two others, and thus the whole property was in his hands. Now, the first year that he sent to the Brookline assessors requesting to be taxed there, was this very year 1848, and where in Brookline did he go? Why, to the house on the farm of Mr. Francis, the gentleman who had been the trustee of Mrs. Bourne, who was too unwell to be examined here as a witness, although, fortunately, able to be about his business in Boston. He was taxed there two years, then he went to Newport. Now, one significant fact, with many others tending to show that all these movements were made with special reference to taxation and to that alone, was that he was constantly writing letters to the various assessors. Some fifteen days before he moved to Brookline, he wrote the assessors there a letter that he was coming, and that he desired to be taxed there; and the first year he went to Newport he wrote a letter to the assessors, in April, although their time for taxation was not until July. Every year, for four years, he wrote the Boston assessors a letter that he was going out of town. Why should he take all this pains? Do men ordina-

rily take so much trouble? If he had acquired, or if he intended to acquire a *bona fide* residence in another town, would he take all these precautions? Nor was this all. In the two first letters to the Boston assessors he told them he had removed to "his house in Brookline." In the two next, after he went to Newport, he said not a word of the place where he was going. "*I shall be domiciliated,*" he says, "*in my house out of this city, on or before May 1, 1851, where I shall pay all taxes upon my personal property, for the future as heretofore.*" The tax in Brookline had been raised the second year. Did he find that place too near Boston? Did he desire that the Boston assessors should be ignorant of where he was going in 1850?

Then let it not be forgotten, that during all these years, his house was open the whole year through. He resided in it every winter, and "stopped there" when in the city. He also always held himself out as "of Boston," in legal documents—solemn instruments, whenever he deemed it for his interest so to do. March 4, 1848, we find "Anna D. Thorndike of Boston," one of the daughters, making an assignment of mortgages to "Ezra A. Bourne of Boston." June 28, 1848, Charles M. Parker "of the City, County and State of New York," makes a conveyance to E. A. Bourne and Mr. Frothingham, "*both of Boston.*" July 10, 1848, the judge of probate for Suffolk appoints "Ezra A. Bourne of Boston, in said county," guardian of Elizabeth F. Thorndike and Martha S. Thorndike, "minors and children of Charles Thorndike, late of said Boston." On the same date a guardian's bond is executed by Ezra A. Bourne as principal and Wm. Shimmin and H. K. Hall, as sureties, "*all of Boston in the county of Suffolk.*"

So much for 1848. On March 27, 1849, an indenture was made between Mary A. Thorndike "*of Boston,*" and E. A. Bourne "*of Boston.*"

In 1850, June 19, E. A. Bourne "*of Boston, in the county of Suffolk,*" assigns a mortgage to E. T. Loring. April 22, 1850, E. A. Bourne, guardian of Elizabeth F. and Martha S. Thorndike "*of Boston,*" renders an account in the Probate Court.

In 1851, March 21, an indenture is made between E. A. Bourne "*of Boston,*" and Anna D. Thorndike, also "*of Boston.*" December 15, 1851, E. A. Bourne "*of Boston,*" assigns a mortgage to Thomas Thompson "*of Brighton, formerly of Boston.*"

Upon these facts could the jury hesitate for a moment in coming to the result, that the plaintiff not only had no domicil in *point of fact*, in Newport, in May 1851, but that he never *intended* to change his domicil from Boston; that his whole effort and desire was to gain some sort of residence out of Boston *for the purposes of taxation*, and for no other purpose, and thus to evade the law and compel others to pay his just share of the public burthens; that he meant to enjoy and did enjoy the benefits of our municipal institutions, without paying his proportion of their cost?

But could this be so? Was it possible that a gentleman of great wealth, of a decided position in society, of a well established character, who had made his riches in Boston; who had lived there nearly his whole life; all of whose habits of thought and associations were connected with that city—could it be possible that he had for years been endeavoring to evade his just proportion of the taxes in the municipality where he chose to live; that he pretended to change his domicil when he had no real intention of doing so, and had been content to share the privileges for which he was unwilling to pay? Could this be so? Was there such a man living? He (Mr. C.) would not answer this question broadly in the affirmative, in a manner that might be deemed offensive. The facts in the case answered it. They spoke louder than words could speak. He would answer it in language that would be to the jury like an orphic saying, for they would not understand it. Did they ask if such a man lives?

VIVIT? IMO VERO ETIAM IN SENATUM VENIT! *

Mr. SOHIER then addressed the jury, in substance as follows:—

* The plaintiff was present in court during the trial, and sat by his counsel.

GENTLEMEN OF THE JURY,—

As this question is only one of legal domicil, it is instructive to see the pains and ingenuity of counsel to apply to it every other epithet which could be invented. He calls it a question of principle, of morals, of evasion of taxes. He says it is a question of importance. It is a question of importance, but not of the importance that he attributes to it. The real question is, can or cannot a man, who owns two houses in different places, choose where he will be domiciled, though one of them is larger than the other? If the doctrine of the learned counsel is correct, no man can change his domicil. No man who owns a house in the city can actually get out of Boston, especially if the house in Boston happens to be the largest. The learned counsel calls it a question of morals. According to the morals of Boston, it is immoral to pay taxes into any treasury except into the Boston treasury. It is a question of morals. If this is an illegal tax, it is immoral in the city of Boston to keep it. We say it is an illegal tax.

If a person has a house in Boston, and lives in the country, they say it is an evasion of taxes. The city says, you have the benefit of municipal regulations, and therefore should pay taxes in the city. The people in the country say, in the country you have the benefit of fresh air and healthy exercise, and therefore should pay taxes in the country. And one is as reasonable as the other.

So long as the policy of the city government continues as at present,—so long as they build palaces on Deer Island for the maintenance of foreign paupers, at a cost of \$200,000, and jails at a cost of \$500,000,—taxes must be higher in Boston than anywhere else; and so long will people desire to be taxed elsewhere. The learned counsel, while artfully alluding to your supposed prejudices, has, in fact, appealed to your prejudices indirectly, by asking why we try the case here. He says it is because you are supposed to have prejudices in favor of the country, and against the city. We came here, not for that reason, but honestly to try this case. He has alluded to this, that you might give him a verdict in order to avoid being thought to have prejudices. He hoped

that you would stand up so straight as to lean backwards. The learned counsel says that it is a great principle that there should be equality in taxation. It is no such thing. There never was, and never will be, equality in taxation. The great principle is, equality and liberty;—liberty to live where we please. It is perfectly idle to intimate for a moment, that you would be governed by prejudice to give a verdict against the city. The learned counsel himself has been doing all he could to stir up prejudice, on the ground that the plaintiff is rich. I will tell the learned counsel why we came here, that he may not go down to the grave in ignorance. We came here to *avoid* prejudices. Mr. Bourne is a citizen of Newport, and has a right to select any county he pleases to try this case in. We should be very foolish if we had brought this case in Boston, and given the learned counsel an opportunity of appealing to the prejudices of the citizens of Boston, and to accuse the plaintiff of shirking his taxes. They take his money by force of legal process, and under protest, and when he has, in advance, notified them not to assess him; and then call him a shirk, and say, why don't you come into our court house, and let us see you try to get it back? Gentlemen, if you are satisfied that the plaintiff had a legal domicil in Boston on the 1st day of May, 1851, we shall not have a word to say. But if you say he had not a legal domicil in Boston on that day, we ask you to give a verdict according to the facts.

This is an action to recover \$3571.50, assessed to the plaintiff in three distinct tax bills; one made out to Ezra A. Bourne, personally; one to Ezra A. Bourne, as trustee for Mrs. M. M. Bourne; and the third and largest to Ezra A. Bourne, as guardian and trustee of the Misses Thorndike. By the law of the land, if he was not an inhabitant of Boston at that time, on the 1st day of May, 1851,—if he was not legally domiciled in Boston on that day,—this is an illegal tax. Mr. Bourne owes a duty to himself, and to these young ladies, whose property is entrusted to his care, to bring an action to recover back the amount of this tax. How can he reconcile it to his duty, if he honestly believes, as he does

believe, that this is an illegal tax, to lie by, and let that tax be collected out of the property with which he has been entrusted?

The question is, where was his legal domicil on the 1st day of May, 1851? It is an axiom in law, that a man can have but one legal domicil. But that one domicil may be just where he pleases. It is his intention that shall govern where it is. The learned counsel has cited cases in relation to residence, not where the decision was in regard to taxes, but has taken one case where the question was merely in relation to voting; another that related to some probate matter; also the case of *Sears v. City of Boston*, where the party went to Europe, with the intention to come back and to be a citizen of Boston. Side by side with that case is another, where the party removed, and did not intend to come back; the case of *Thorndike v. Boston*, where the decision was in favor of the plaintiff. Yet Mr. Thorndike owned a house in Boston, and had personal property in Boston. The question is not, whether this property escapes taxation; the question is, where was the plaintiff's domicil on the 1st day of May, 1851? I will, with the permission of the Court, read to the jury, in order to illustrate my position, from the case of *Lyman v. Fiske*, in 17 Pickering's Reports, page 231. The plaintiff owned two houses, one in Boston, and one in Waltham, and he was taxed in Waltham. In that case, the Court mention two things as necessary to constitute a residence; an actual residence in a place, and an intention to make that place his home. The Court say, "The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt, that a slight circumstance may turn the balance. In such a case, the mere declaration of the party, made in good faith, of his election to make the one place, rather than the other, his home, would be sufficient to turn the scale." They say further, "The election of a man to pay taxes in one town rather than another, may be a good motive and a justifiable reason for changing his habitancy;

and if such election is followed up by corresponding acts, by which he ceases to be an inhabitant of the one, and becomes an inhabitant of the other, his object may be legally accomplished."

Now, what was the intention of Mr. Bourne? If a man can live where he chooses, his intention is the main thing. I don't care what his motive was. If his intention was to pay his tax in Newport, it was a perfectly legal and proper motive. Our position is, that in point of fact he was a citizen of Newport. But if he was not a citizen of Newport, he was not a citizen of Boston. If he went out of the State, and had not gained a residence in Newport, his old residence was in Brookline. If not a resident of Newport, he was a resident of Brookline, and Boston had no right to claim him. There were no less than three residences, any one of which Mr. Bourne might, if he chose, have made his legal domicile. He had a house in Boston, another in Newport, and another in Maryland. He had hired a house in Newport for four years, and taken a lease of it. Further, Mr. Bourne had long since retired from business; he had nothing to occupy himself except to take care of the few stocks which he had the care of in Boston. In point of fact, he was living in Newport, he and his wife, on the 1st day of May, and on the 29th of April, 1851. This is all proved and admitted. This is a question, in the first place, of intention; and on a question of intention, the declarations of a party are evidence. If his motive in going down there was to pay his tax there, he had a right to do so. This is not a question of liberality, but a question of right. The question is not what it would be liberal for Mr. Bourne to give to the city of Boston, but what they have a right to take from him against his will. He was a citizen of Boston up to 1848. Then he became dissatisfied, and moved out of the city, and gained a residence elsewhere. He sent a notice, about which much was said by the learned counsel for the city. If he had not given such a notice, there would have been a great hue-and-cry about his going slyly out of town to escape taxation; that he moved out of town without giving notice, and the assessors therefore were

not enabled to apportion the tax equally upon the citizens who remained. The learned counsel says he did too much. If he had not given notice every year, they would have said that he did too little. They knew perfectly well what his intention was. He went to Brookline. He made no misrepresentation to the assessors of Brookline. He let them doom him. It is the right of every citizen to do so. He had ceased to become a citizen of Boston. He could not have voted there, nor have sent his children to the public schools. He would have been indicted if he had attempted to vote in Boston. Boston had recognised his having ceased to be a citizen, by forbearing to tax him. He had not regained a residence in Boston. He went to Maryland a part of the year to see to his farm, which takes much more time, and trouble, and care, than to take his few dividends in Boston, of which so much has been said. The same vigilant assessors were in Boston in 1850, but they did not pretend to tax him. Mr. Bourne did the same in 1850 that he did before and in previous years. He was never taxed in 1852, even after this suit was brought. It was mere pride of opinion in these assessors, which induced them to bring this suit, and induces them to take so much pains to prosecute it; probably that very assessor, who was gyrating around the plaintiff's house in the summer of 1851, and who says that he advised the assessment of this tax. They have hunted up all these old servants of Mr. Bourne, whether discarded or otherwise, and have brought them here to help make out their case.

Mr. Bourne never regained any residence in Boston in 1850. There is no proof of any such residence. He showed his intention not to reside in Boston in 1848, 1849, and 1850. The city knew it, and acquiesced in it. The taxes, it is said, are assessed in Newport in August. Very true; but they were also assessed in August 1850. Mr. Bourne had repeatedly shown his intention by his declarations and by his acts; yet they put him to all this trouble and expense. They have not shown a single declaration of his, or brought a tittle of evidence, to prove his intention to gain a residence in Boston.

So much for his intention. I will now ask your attention

for a moment to his doings. You have the evidence of Mrs. Rice, his daughter-in-law, of Mrs. Tirrell, his sister-in-law, and of Mr. Hammond, where he made his purchases, that he was in Newport on the 1st day of May. Mrs. Rice's testimony is valuable, because it shows the habits of the family for years. The evidence shows distinctly that Mr. and Mrs. Bourne were not in Boston on the 1st day of May. It explains everything they have put in here.

(Mr. SOHIER here recapitulated the evidence.)

The learned counsel has dwelt a great deal upon the fact that Mrs. Rice called this her mother's house; and has quoted poetry, and talked very sentimentally about a man's home. But the fact was, it *was* her mother's home. It was bought with her mother's money, and was held by Mr. Bourne in trust for her, and taxed as her's. It was her's before she was married to Mr. Bourne. These young ladies, no doubt, contracted the habit of calling it their mother's house before the marriage. Mrs. Tirrell recollects dining with Mr. and Mrs. Bourne at their house, on the 1st day of May, 1851. She recollects it because it was May-day, which is kept as some sort of a holiday at the South. It would not have been an easy thing to have obtained the testimony of the casual cook whom they employed for the short time they staid there; before they went South. If we had had the whole constabulary force, and all the watchmen of the city of Boston at our command, perhaps we might have done so. But if we had obtained the cook, they would have asked why we did not obtain the evidence of Mrs. Tirrell. There is no such thing as satisfying them. They are like the man who was flogged by the Irish drummer, and kept asking him to strike higher, and to strike lower, until the drummer exclaimed in despair, that there was no such thing as pleasing him, let him strike where he would.

The learned counsel cannot say anything against these witnesses. He says he admits that Mr. and Mrs. Bourne were in Newport on the 1st day of May, 1851. They shut up the house while they went to Maryland. They cannot show any living in Boston afterwards. The counsel has given a long

oration upon home, as described in poetry and ballads. In this case, we have nothing to do with such definitions ; home has a legal meaning. Emigrants from New Hampshire speak of their home in their native State ; emigrants from Europe, of their home across the water ; but they are all legally domiciled here. Mr. Bourne meant to come back to Boston for the winter, as a sojourning place, but not as a permanent abiding place,—as a legal domicil. The city of Boston would never lose a tax, if this doctrine of the learned counsel should prevail. Did Mr. Bourne intend to come back for legal municipal privileges ? Would he gain any right to vote ? Would he have any right to send his children to school ? The fact that he lent his horse to his daughter, and allowed her to use his carriage, amounts to nothing. As to all this evidence, such a mass of idle, insufficient testimony, never was got together by the combined efforts of the whole Boston police. If a man has a large and handsome house in Boston, on which he pays a large tax, and is losing rent, he has a right to use it. All these facts are facts for the jury to consider, but the jury will also say, what weight they will have. He had hired servants ; he must put them somewhere ; he was obliged to keep the house open, and it was most natural that he should put the servants there, until he could come home from Maryland, so that they should be under the control of Mrs. Bourne, who was obliged to be with her daughter, in her hour of danger and distress. As to his furnishing provisions to his servants, it would be very strange if he did not furnish them with provisions. The bills were larger on account of Mrs. Rice. Mr. Bourne has always pursued the same course. Had he not a right to come to his house, and stop there, when in Boston ? Had he not a right to use his own house ? The argument of the learned counsel would destroy all rights of property. Mr. Bourne paid all the bills for provisions and groceries, as he had a right to. As to the brandy and claret, it was probably carried to Newport. It was charged about the time that he went to Newport. As to the carriage, why should it not be left in Boston ? There was no law against allowing his daughter to use it.

Then the learned counsel has put in the fact, that here was a large amount of property. Was it his object fairly to show that the domicil of the plaintiff was in Boston; or was it rather to induce you to give a verdict against the plaintiff because he is rich? It is a new doctrine, that when a man moves, he is obliged to carry away his stocks, however well invested they may be. A great part of the stocks in Boston are owned elsewhere. Why should he change these investments, if they were well invested? As to calling himself of Boston in deeds, that was a mere matter of habit. In matters of description he may describe himself as of what place he pleases. Deeds are made out by counsel, by scriveners, who think nothing about these matters of domicil and taxation. This matter is entitled to no consideration whatever.

It is admitted that the plaintiff left Boston as his legal home in 1848, that he continued to reside elsewhere, in 1849 and 1850. In 1849 his legal home was in Brookline. If he had not gained a residence in another State, his legal home remained in Brookline. He had made repeated declarations of his intention to reside elsewhere than in Boston. On the 1st day of May, 1851, he was bodily in Newport. He paid taxes there. The burden of proof is on the city to show that he changed his residence to Boston. If he was not a resident of Boston at that time, we are entitled to your verdict.

Mr. CHANDLER then asked the Court to rule as follows:—

1. If the plaintiff went to Newport solely for the purpose of paying taxes there, and of evading the taxes in Boston, and not with the *bona fide* intention of making that his home, then he did not thereby gain a domicil in Newport.

2. If the plaintiff had his legal domicil in Boston in the winter of 1849–50, and went to Newport before May 1st, with the present intention of returning to Boston in the autumn, he did not thereby change his domicil for purposes of taxation.

3. If the plaintiff, in the winter of 1851, had his legal domicil in Boston, and went to Newport, with the present intention of returning to Boston in the autumn, he did not thereby change his domicil for the purposes of taxation.

4. If the jury believe that the plaintiff, in 1848-9, acquired a domicil in Brookline, still, if he returned to his house in Boston, with the intention of not returning to Brookline, he acquired a domicil in Boston.

5. The fact of a person's paying a tax in any place is not conclusive evidence of domicil, but is one circumstance tending to show it.

His Honor, Judge THOMAS, charged the jury substantially as follows, upon the law applicable to this case:—

The action was brought by the plaintiff against the city of Boston to recover the amount of a tax, paid by the plaintiff under protest, and which he avers was illegally assessed.

And he says it was illegally assessed, because, on the first day of May, 1851, he was not an inhabitant of Boston, but was an inhabitant of Newport, in the state of Rhode Island.

The only question for the jury to determine was, whether on such first day of May, 1851, the legal home of the plaintiff, his domicil or fixed place of residence, was in Newport or Boston.

As they should find this fact, would be their verdict; if in Newport, for the plaintiff, if in Boston, for the defendants.

The duty of the jury was to ascertain the truth; the law settled the results.

The rules of law upon the subject of domicil were plain and familiar.

The difficulty was in the application of these rules.

No two questions of domicil will be found to be precisely alike, and each case must be determined by a careful application of general rules to its own peculiar facts and circumstances.

Every person has a domicil somewhere, and he can have but one domicil of taxation, under the laws of this commonwealth, at one and the same time.

That is the domicil of a person in which his home is fixed, without any present intention of removing therefrom. Under this rule, it would be seen, two things must concur to constitute a legal domicil; first, residence, and secondly, the inten-

tion to make the place of residence the home of the party ; there must be the *fact* and the *intent*.

And when a person removes from one place to another, with the intention of making the place to which he removes his permanent residence, such place becomes instantaneously his place of domicil.

No time is necessary to fix or mature it. The *fact* and the *intent* are all that is required.

But when a person has a fixed domicil, he does not lose it by absence for any purpose of a temporary nature, with the intention of returning ; as by absence on a voyage at sea, or a journey however protracted, or a summer's residence at a watering place.

Such departures or absences have no legal force or effect to change the domicil of the party, because the party has no intent or purpose to change it. The consent of the mind is wanting.

Under our laws a man may change his domicil whenever it pleases him to do so.

He may go where he pleases.

He may go for whatever motive he pleases.

He has a perfect right, in law, to change his domicil with the view to diminish his taxes.

His motive for the change is not material, if, in point of fact and intent, the change is made.

But he cannot have a domicil of taxation in one place, and his permanent residence and home in another.

And upon the question whether there was, in good faith, a change of domicil, the jury may consider and weigh the fact of the diminution of taxes, and if they are of opinion that the going to Newport was colorably done for the purpose of avoiding taxation in Boston, and not with the view of making Newport his home, the plaintiff's domicil continued in Boston, and he cannot maintain this action.

All the evidence in the case, of his declarations, of his business, of his way of life, is important only as it throws light on the question, whether, on the first day of May, 1851, the plaintiff had his home in Newport or in Boston.

The fact of his being in Newport on the first day of May, the declaration of his purpose to become a citizen and to be taxed there, are evidence tending to show a change of domicil, but they are not conclusive.

Applying the rules of law before stated, the question must be determined upon the whole evidence.

The jury, after an absence of about an hour, returned a verdict for the defendants.