JONATHAN M. REED, PLAINTIFF IN ERROR, *v.* THE PROPRIETORS OF LOCKS AND CANALS ON MERRIMAC RIVER, DEFENDANTS.

It is the duty of the court to give a construction to a deed so far as the intention of the parties can be elicited therefrom; but the doubt in the application of the descriptive portion of a deed to external objects usually arises from what is called a latent ambiguity, which has its origin in parol testimony and must necessarily be solved in the same way. It therefore, in such cases, becomes a question to be decided by a jury, what was the intention of the parties to a deed.[1]

Therefore, there was no error in the following instructions given by the court to the jury, viz.:—"That if the jury believed from the evidence, looking to the monuments, length of lines and quantities, actual occupation, &c., that it was more probable that the parties to the mortgage intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

Where a claim to land was maintained upon an uninterrupted possession of forty years, the death of the original holder and subsequent reception of rent by his widow, did not break the continuity of possession. She is liable to account for the rent to the heirs.

THIS case was brought up, by writ of error, from the Circuit Court of the state of Massachusetts.

It was a suit brought by Reed, a citizen of Michigan, against an incorporated company, called "The Proprietors of Locks and Canals on Merrimac River," in a plea of land, wherein the said Reed demanded against the proprietors a certain piece or parcel of land in the city of Lowell and state of Massachusetts, containing seven acres and one hundred and forty-two and a quarter square rods.

*The state of the case was this: [*275

It was admitted that the demanded premises were part of the farm of Thomas Fletcher, who died seized thereof in 1771, leaving a widow and two daughters, Rebecca and Joanna.

THOMAS FLETCHER.

REBECCA=JACOB KITTREDGE. JOANNA=BENJAMIN MELVIN.

In 1773, Rebecca married Doctor Jacob Kittredge, and removed to Brookfield, Worcester County, Mass., where they lived and died, he in the summer of 1813, and she in September, 1818,—leaving eight children and the heirs of two

[1] DISTINGUISHED. *Boardman et al.* v. *Lake Shore, &c., Ry. Co.*, 84 N. Y., 173. CITED. *Parkinson* v. *McQuaid*, 54 Wis., 478.

deceased children as their heirs at law, and under them the tenants claim to derive their title.

In 1777, Joanna married Benjamin Melvin, senior, who removed home upon the farm. She died in September, 1826, and he died in April, 1830, leaving seven children, as their heirs at law, under whom the plaintiff claims to derive his title.

On the 27th of April, 1782, two transactions occurred which were the source of this dispute. Kittredge and wife conveyed to Melvin one half of 130 acres (which appeared to be the paternal estate), for the consideration of £300. In order to secure the payment of this £300, Melvin (who now owned one half by virtue of the deed just mentioned, and the other half in right of his wife) united with his wife in executing upon the same day to Kittredge a mortgage of a part of the land which is thus described, viz.:—"A certain tract or parcel of land, lying and being in Chelmsford, in Chelmsford Neck, so called, in said county of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece, without any division, except only one county bridle road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased; together with all the buildings of every kind, and all the privileges, appurtenances, and commodities thereunto belonging, or in any wise appertaining.

The great question in the case was, whether or not this mortgage included the demanded premises. On the part of the plaintiff in error, who claimed under Melvin, it was contended that it did not, and that of course the residuum belonged to Melvin.

On the part of the tenants, it was contended that the mortgage included them, and if so, that the estate afterwards became absolute in Kittredge.

*276] *In 1789, Kittredge entered upon the property mortgaged, for condition broken, and on the 17th of April, 1789, leased the property to Melvin for one year, and on the 17th of April, 1793, renewed the lease for a year.

In 1794, Kittredge brought an action against Melvin to recover the premises, in which suit judgment was rendered by the Supreme Judicial Court of Massachusetts in favor of the plaintiff, and an *habere facias possessionem* issued on the 19th of April, 1796.

It is not necessary to state the vast number of leases and deeds, and other evidence, introduced into the cause by both sides, to show that the mortgage did or did not include the

demanded premises; because it will be perceived, by referring to the opinion of this court, that they considered the question to be one appropriately falling within the province of a jury, and not one of construction of a deed to be settled by the court.

The tenants also took defence upon another ground, namely, that if the demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseizin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever Farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin, and their wives, would be barred.

The title of those claiming under Melvin (as Reed, the present plaintiff in error, is already stated to have done) was brought formerly before the Massachusetts courts, as appeared by the following agreement, which was filed in the cause:—

"It is also admitted by the tenants, that the heirs of Benjamin and Joanna Melvin entered into the demanded premises in July, A. D., 1832, claiming the same; and in May, A D., 1833, commenced writs of entry upon their own seizin for the recovery of the same; and that they prosecuted the same suits until the April term of the Supreme Judicial Court, Middlesex county, A. D., 1835, when they became nonsuit; and thereupon commenced a writ of right, in which they joined, and prosecuted the same until the October term, Supreme Judicial Court, 1836, *when Rufus Melvin, one of the [*277
heirs, executed a release of said action to the tenant.

(Signed,) JOHN P. ROBINSON,
"*October* 31*st*, 1845. *Attorney for the Tenants.*"

In October, 1845, the cause came on for trial in the Circuit Court, when the jury found a verdict for the tenants. The court, however, gave certain instructions to the jury, which were excepted to, and are thus stated in the record.

"Upon this evidence the court gave full instructions to

the jury; and among them the demandant excepts to the following:—

"1st. That if they believed, from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants.

"2d. That the verdict of a former jury introduced by the tenants was not evidence to control this case or the issue.

"3d. But if they should believe the testimony of James Melvin, that Doctor Jacob Kittredge pointed out on the land of his father certain monuments as the southern boundary of his mortgage, it would be strong evidence that the parties to the mortgage intended originally to limit the mortgage to the line from these monuments; and that this evidence was strengthened and supported by the other testimony concerning the boundary south on Jonathan Williams.

"4th. That if the tenants under their respective leases from Kittredge occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseizin, it would in law enure to the benefit of Kittredge and his heirs, and would be the disseizin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissell, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to
*278] the entry of the heirs of Melvin and wife, in 1832, it constituted *in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises, by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardians discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby

be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if the tenants, who held leases from Jacob Kittredge, and entered under them, remained in possession after his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence to be weighed by the jury of a continued occupation by the lessees for and in behalf of those entitled in law to the rights which Kittredge claimed when alive.

"To which instructions of the court, given as aforesaid, the said plaintiff at the trial excepted, and prayed this, his bill of exceptions, to be signed and sealed by the court. All which, being found true, the same is accordingly signed and sealed.

"In testimony whereof, I have hereunto set my hand and seal.

[SEAL.]

"LEVI WOODBURY,
Ass't Justice of Supreme Court."

Upon these exceptions, the case came up to this court.

It was argued by *Mr. Parker* and *Mr. Jones*, for the plaintiff in error, and *Mr. Robinson* and *Mr. Webster*, for the tenants.

The points made by the counsel for the plaintiff in error were the following:

As to the first instruction. That the presiding judge erred *in submitting the question of the extent of land [*279 embraced in the mortgage from Melvin and wife to Dr. Kittredge, to the jury, as he did.

1. Because the mortgage and deed of the same date from Kittredge and wife to Melvin, senior, constituted in law one transaction, and the mortgage, viewed in this connection, called for some limit short of the whole land described in the deed from Kittredge and wife, which fact the tenants were estopped

to deny; and if the jury were satisfied that the town bridle-road existed at the date of the transaction, at the place contended for by the plaintiff, and that it constituted as much of a division as the bridle-road expressly accepted by the parties as making a division,—the evidence showing no other division answering the call of the mortgage,—the town bridle-road became the southern boundary of the mortgage by intendment of law and legal construction, and the jury were bound to find it so; and the presiding judge should so have instructed them, instead of leaving to their decision the meaning of the language of the mortgage.

2. Because, if the jury believed the testimony of James Melvin,—viz., "That his father and Dr. Kittredge, just before the making of the first lease between them, went upon the land and established the stake and stones and black oak stump with stones on it, at the place testified to by him as the southern boundary of the land claimed by Kittredge,"—then this fact, with the subsequent indentures of leases between them, recognizing these monuments and the Williams land as the southern boundary of the land claimed by Kittredge, and the writ and judgment thereon, with the solemn and repeated recitals and statements contained in them, the admission of the tenants that the Williams land extended as far north as these monuments, and included the demanded premises, and the fact that Melvin subsequently, in November, 1794, repurchased the demanded premises of Williams for a valuable consideration, constitute in law a conclusive presumption, against Kittredge and all claiming under him, of the extent of the land then owned by Kittredge, aud that both Kittredge and all claiming under him were thereby estopped to say that Kittredge at that time owned the demanded premises, or that his mortgage included them. And the presiding judge should have so instructed the jury on the evidence.

3. Because the law gives a preference to actual monuments, over length of lines, quantities, &c.; and the presiding judge ought to have so instructed the jury.

4. The burden being upon the tenants to satisfy the jury *280] *that the mortgage from Melvin and wife to Kittredge included the demanded premises, the instruction of the presiding judge,—"That if, from the evidence, looking to monuments, length of lines, quantities, actual occupation, &c., the jury should believe that it was *more probable* that the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants,"—was wrong, and did not in law satisfy the burden of proof resting upon the tenants.

To Point No. 1:—*Levy* v. *Gadsby*, 3 Cranch., 180; *McCoy* v. *Lightner*, 2 Watts (Pa.), 347; *Welsh* v. *Dusar*, 3 Binn. (Pa.) 337; *Dennison* v. *Wertz*, 7 Serg. & R. (Pa.), 372; *Roth* v. *Miller*, 15 Id., 100; 4 Id., 279; *Fowle* v. *Bigelow*, 10 Mass., 384; *Adams* v. *Betz*, 1 Watts (Pa.), 425; *Poage* v. *Bell*, 3 Rand. (Va.), 586; *Doe* v. *Paine*, 4 Hawks. (N. C.) 64; *Cockrell* v. *McQuin*, 4 Mon. (Ky.), 69; *Hurley* v. *Morgan*, 1 Dev. & B. (N. C.), 425; *Waterman* v. *Johnson*, 13 Pick. (Mass.), 261; *Peyton* v. *Dixon*, Peck (Tenn.), 148; *Hart* v. *Johnson*, 6 Ohio, 87; *Etting* v. *Bank of United States*, 11 Wheat., 59; *Cherry* v. *Slade*, 3 Murphy (N. C.), 82; *Carroll* v. *Norwood*, 5 Har. & J. (Md.), 163; *Penington* v. *Bordley*, 4 Id., 458.

To Point No. 2, under the first instruction, we cite the following authorities:—*Boyd* v. *Graves*, 4 Wheat., 513; *Commonwealth* v. *Pejepscutt Proprietors*, 10 Mass., 155; *Houston* v. *Mathews*, 1 Yerg. (Tenn.), 116; *Wilson* v. *Hudson*, 8 Id., 398; 1 U. S. Dig. by Met. & Perkins, 474; *Carroll* v. *Norwood*, 5 Har. & J. (Md.), 163; *Smith* v. *Murphy*, 1 Tayl. (N. C.), 303; *Penington* v. *Bordley*, 4 Har. & J. (Md.), 457; *Bates* v. *Tymason*, 13 Wend. (N. Y.), 300; *Flagg* v. *Thurston*, 13 Pick. (Mass.), 145; *Cherry* v. *Slade*, 3 Murph. (N. C.), 82; *Clark* v. *Munyan*, 22 Pick. (Mass.), 410; *Slater* v. *Rawson*, 1 Met. (Mass.), 450; *Crosby* v. *Parker*, 4 Mass., 110; *Houston* v. *Pillow*, 1 Yerg. (Tenn.), 481; *Davis* v. *Smith*, Id., 496; 1 Greenl. on Ev., 18, 19, 25, 26; 4 Stark. on Ev., 30; *Braman* v. *Taylor*, 2 Ad. & Ell., 278, 289, 291; *Loinson* v. *Tremere*, 1 Id., 792; *Peletreau* v. *Jackson*, 11 Wend. (N. Y.), 117; 4 Kent Com., 261, *n*; *Carver* v. *Jackson*, 4 Pet., 83; *Shelly* v. *Wright*, Willes, 9; *Crane* v. *Morris*, 6 Pet., 598; *Stowe* v. *Wyse*, 7 Conn., 214; *McDonald* v. *King*, Cox, 432; *Henrick* v. *Johnson*, 11 Metc. (Mass.), 26; *Willison* v. *Watkins*, 3 Pet., 43; *Denn* v. *Brewer*, Cox, 182; *Kinsell* v. *Daggett*, 2 Fairf. (Me.), 309; *Dewey* v. *Bordwell*, 9 Wend. (N. Y.), 65; *Parker* v. *Smith*, 17 Mass., 413; *Gerrish* v. *Bearce*, 11 Id., 193; *Jackson* v. *Hasbrook*, 3 Johns. (N. Y.), 331; *Adams* v. *Barnes*, 17 Mass., 365; *Howard* v. *Mitchel*, 14 Id., 241; *Shelton* v. *Alcox*, 11 Conn., 290; *Howe* v. *Strode*, 3 Wils., 269; *Poole* v. *Fleger*, 11 Pet., 209; *Root* v. *Crock*, 7 Pa. St., 378; *Fitch* v. *Baldwin*, 17 Johns. (N. Y.), 161; *Singleton* v. *Whitesides*, 5 Yerg. (Tenn)., 18.

*And to the point that, as the tenants now hold under and are privy in estate with all the parties who established the boundary and dividing line as aforesaid, they are estopped to deny the line so established by the respective parties, the following:—Cox, 431; 6 How., 88; 2 Murph. (N. C.), 251; 2 Serg. & R. (Pa.), 44. [*281

To point No. 3, under the first instruction, we cite Graham on New Trial, 278, and cases there cited.

To point No. 4, under the same instruction, 1 Greenl. on Ev., 4; 1 Stark. on Ev., 14; Jackson on Real Actions, 157, 161.

As regards the second instruction. The presiding judge erred, because the verdict of a former jury introduced by the tenants was evidence to control this case and the issue.

We contend that the verdict of a former jury put in by the tenants, rendered against them in favor of a party under whom the present demandant claims, is evidence for the demandant in the present case; as it appears from the record, also put in by them, affirmatively, that such verdict was in all respects conformable to law. Such verdict is competent evidence. See *Filler* v. *Milliner*, 2 Johns. (N. Y.), 181; 4 Com. Dig., 89; *Outram* v. *Morewood*, 3 East, 446.

It is equivalent to an award of arbitrators upon a submission by the parties under a rule of court, which concludes the parties, and all claiming under them, by estoppel, as to boundary at least. *Goodridge* v. *Dustin*, 5 Metc. (Mass.), 363; *Shelton* v. *Alcox*, 11 Conn., 240, and the cases there cited.

That it inures to the present demandant. *Carver* v. *Jackson*, 4 Pet., 83; *Somes* v. *Skinner*, 3 Pick. (Mass.), 52.

As regards the third instruction. The demandant contends it was wrong, because, if the jury believed the testimony of James Melvin, then the monuments established by his father and Dr. Kittredge, with the Williams land, there being no evidence of any others answering the calls in the subsequent leases, writ, and judgment, were to be regarded by them as the southern line of the land embraced in the lease, writ, and judgment: and by the solemn recitals and statements made in them by Kittredge, the admission of the tenants that the Williams land included the demanded premises, and the subsequent repurchase of Williams by Melvin of the demanded premises, with the balance of the Williams lot, which the tenants now claim, and hold under that purchase, both Kittredge and all claiming under him were concluded and estopped to say that Kittredge at the time of these transactions owned any of the land recited and recognized in said
*282] leases, writ, and judgment as belonging to Jonathan Williams, and which lies immediately *south of the monuments aforesaid, or that his mortgage originally included it, and if it had, the fact was immaterial.

See cases cited to the first and second points under the first instruction.

But the tenants contend further, that, if the mortgage from Melvin and wife does not include the demanded premises,

they have acquired a title thereto by disseizin and the statute of limitations; that they and those under whom they claim have had the actual, open, notorious, and exclusive possession of the demanded premises under claim of title, with such legal privity of title between the successive occupants as will constitute a bar.

This position the demandant denies, and contends that the evidence, all of which touching this point appears upon the record, is entirely insufficient in law to constitute such a disseizin as to bar. (The counsel then went into an examination of the evidence.)

As regards the fourth instruction. The demandant will contend it was wrong,—1. Because the question submitted to the jury to decide necessarily involved a construction of the leases, which was matter of law, and should have been determined by the court. 2. Because such an occupation by the tenants, under their respective leases from Kittredge for the space of thirty years, would not necessarily constitute a bar to the demandant's right to recover in this case, even if a sufficient legal continuity of title in the lessors had been shown, especially the moiety derived from Mrs. Melvin, she having been under coverture. 3. Because there was no sufficient legal continuity of title shown to have existed in the lessors, through whom the tenants claim to derive their title, and because it assumed the existence of facts which the whole evidence in the case expressly negatived, was foreign and did not conform to the evidence in the case, and tended to mislead the jury.

As regards the fifth instruction. The demandant contends it was wrong, because the presiding judge assumed to tell the jury, "that Kittredge claimed to have a deed which included the demanded premises, and had turned Melvin out of possession," of which facts there was no evidence, but evidence showing directly the reverse; and that if there had been any evidence tending to show these facts, it was for the jury to pass upon; and that, without the existence of these facts, the possession of the demanded premises by the lessees under the lease was not the possession of Kittredge or his heirs, so as to constitute them disseizors except at the election of the true owner. And that even if these facts had been shown to have existed, they would not have operated a disseizin of Mrs. Melvin *during her coverture. And because the [*283 court left it to the jury to decide what facts constitute in law a disseizin.

As regards the sixth instruction. The demandant contends it was wrong,—1. Because the question submitted to the

decision of the jury involved a construction of the written leases, which was matter of law, to be determined by the court. 2. Because the evidence did not tend to show that *the same* possession, or any possession, possessing the same legal elements, or having the same legal effect, had been continued by the subsequent lessees, down to the entry of the heirs of Melvin and wife in 1832, or for any time sufficient to bar, and would not constitute in law such a continuity of possession as would bar the demandant's right to recover. 3. Because the question of legal continuity of title and possession submitted to the jury to decide was matter of law, and should have been decided by the court.

As regards the seventh instruction. The demandant contends it was wrong,—1. Because there was no evidence in the case from which the jury could properly infer the fact that Mrs. Kittredge ever settled with the heirs of Dr. Kittredge for, or paid, the rents which she had received from the tenant, or that the tenant repaid the rents to the heirs.

2. Because the possession and claim of Mrs. Kittredge, the widow, whether under a mistake or not, and express disclaimer on the part of the heirs, as disclosed by the evidence, which was uncontradicted, did interrupt and disturb the continuity of adverse possession, if any existed before.

3. Because the evidence shows that the last written lease from Kittredge to Cheever, the tenant, terminated in April, 1812, more than a year before Kittredge died, and if Cheever was tenant at all to Kittredge of the demanded premises, which the plaintiff denies, it was only a tenancy at will, which terminated by the death of Kittredge in 1813, and Cheever's remaining in possession afterwards, under the claim of the widow, and paying the rent to her,—the heirs of Kittredge, as appears, expressly disclaiming any title,—would not, against their wish and consent, make Cheever tenant at will or sufferance to them, or establish any other relation which should involuntarily enforce on the innocent heirs the character of wrong-doers and disseizors, and that the law would not properly regard them as such.

4. Because the whole transaction of the widow's claim and receipt of the rent, and express disclaimer on the part of the heirs, as shown by the evidence, was not evidence, to be *284] weighed by the jury, of a continued occupation by the lessees *for and in behalf of those entitled by law to the rights which Kittredge claimed when alive.

The demandant will further contend that the instructions aforesaid were unwarranted by the evidence, and misled the

jury, and that their verdict was against law and the evidence in the case, doing great injustice to the plaintiff.

To the second ground of the tenant's defence, the plaintiff cites in support of his exceptions to the fourth, fifth, sixth, and seventh instructions, the following authorities:—

To the point of submitting the construction of the leases to the jury. *Commonwealth* v. *Porter*, 10 Metc. (Mass.), 263, Graham on New Trial, 288; *McCormick* v. *Sisson*, 7 Cow. (N. Y.), 715; *Pangborn* v. *Bull*, 1 Wend. (N. Y.), 345; *Hill et ux.* v. *Yates*, 8 Taunt., 182; and cases cited to point No. 1, under the first instruction.

What constitutes an actual ouster and disseizin, so that the statute begins to run? Mass. Stat. 1786, ch. 13, § 4; Mass. Rev. Stat., ch. 119, § 3; 2 Greenl. Ev., § 430; *Taylor* v. *Hord*, 1 Burr., 60; Cowp., 689; *Jerritt* v. *Weare*, 3 Price, 575; 4 Kent Com. (1st ed.), 482, 489; *Proprietors of Kennebec Purchase* v. *Springer*, 4 Mass., 416; *Same* v. *Laboree*, 2 Me., 275; *Little* v. *Libby*, Id., 242; *Same* v. *Megquire*, Id., 176; *Norcross* v. *Widgery*, 2 Mass., 506; *Coburn* v. *Hollis*, 3 Metc. (Mass.), 125; *Bates* v. *Norcross*, 14 Pick. (Mass.), 224; *Prescott* v. *Nevers*, 4 Mason, 326; *Poignard* v. *Smith*, 6 Pick. (Mass.), 172; *Brown* v. *Gay*, 3 Me., 126; *Gale* v. *Butler*, 3 Murph. (N. C.), 447; *Ross* v. *Gould*, 5 Me., 204; *Blood* v. *Wood*, 1 Metc. (Mass.), 528; 1 Roll., 663, L. 27; 6 Com. Dig., 27, *Seizin*, F. 4; Stearns on Real Actions, 6; *Ricord* v. *Williams*, 7 Wheat., 107; *Blunden* v. *Baugh*, Cro. Car., 302; *Goodright* v. *Forrester*, 1 Taunt., 578; *Doe* v. *Lynes*, 3 Barn. & C., 388; *Podger's* case, 9 Coke, 104; 5 Cow. (N. Y.), 374; 6 Johns. (N. Y.), 118.

That Melvin had acquired a life estate in his wife's half, and the statute would begin to run only as to him. 2 Bl. Com., 127; Co. Litt., 670. *Melvin* v. *Locks and Canals*, 16 Pick. (Mass.), 137; *Babb* v. *Perley*, 1 Me., 6; 15 Pick. (Mass.), 23; 22 Id., 565; 2 Cow. (N. Y.), 439.

There cannot be an actual ouster of the reversion, so that the statute will run during the continuance of the life estate. Stearns on Real Actions (2d ed.), 323; 1 Preston's Ab., 266; *Doe* v. *Elliot*, 1 Barn. & Ald., 86; 2 Kent. Com. (2d ed.), 110; *Tilson* v. *Thompson*, 10 Pick. (Mass.), 357; *Stevens* v. *Winship*, 1 Id., 238; *Jackson* v. *Schoonmaker*, 4 Johns. (N. Y.), 402; *Jackson* v. *Johnson*, 5 Cow. (N. Y.), 74; *Wallingford* v. *Hearl*, 15 Mass., 472; *Wells* v. *Prince*, 9 Id., 508; *Jackson* v. *Sellick*, 8 Johns. (N. Y.), 262; Starkie on Ev., 886, 887; Co. Litt., 39 *a*, 246 *a*, 246 *b*, 350 *a*, 351 *a*, 352 *a*, 356 *b*.

*That there must be a legal privity of title between successive occupants, so the one legally enters upon his [*285

predecessor, and not as a trespasser. Angell on Limitation, 88; *Potts* v. *Gilbert*, 3 C. C. R., 475; *Ward* v. *Bartholomew*, 6 Pick. (Mass.), 415; *Jackson* v. *Leonard*, 9 Cow. (N. Y.), 654; *Brandt* v. *Ogden*, 1 Johns. (N. Y.), 156; *Doe* v. *Hall*, Dowl. & Ry., 38; *Sargeant* v. *Ballard*, 9 Pick. (Mass.), 251; *Allen* v. *Holton*, 20 Id., 465; *Melvin* v. *Locks and Canals*, 5 Metc. (Mass.), 115; *Wade* v. *Lindsay*, 6 Id., 407.

That it is error for the court to instruct the jury that they may make inferences which the evidence does not warrant. Graham on New Trial, 271; *Harris* v. *Wilson*, 7 Wend. (N. Y.), 57; *Hollister* v. *Johnson*, 4 Id., 639; *Levingsworth* v. *Fox*, 2 Bay (S. C.), 520.

That on Kittredge's death Cheever's tenancy ceased, and he became tenant at sufferance. *Rising* v. *Stannard*, 17 Mass., 282; *Ellis* v. *Page*, 1 Pick. (Mass.), 42.

That between Cheever and the heirs at law there was no privity of title. Co. Litt., 170 *b*; 1 Cruise on Real Property. 288. That upon the heirs abandoning any prior dissezin by Kittredge became purged. *Small* v. *Procter*, 15 Mass., 495.

If the widow entered, she would be a new disseizor, as she had no right to enter as the successor of her husband. *Gibson* v. *Crehore*, 5 Pick. (Mass.), 146, 149; *Parker* v. *Obear*, 7 Metc. (Mass.), 24. That neither married women, nor minors, nor a *non compos mentis*, can become disseizors by adopting and consenting to the acts of others. 6 Com. Dig., 271, *Seizin*, F., 4; 1 Roll., 160, 161.

That the deeds, through which the tenants claim to derive title from the Kittredge heirs, did not include the demanded premises. 2 Bl. Com., 388; 6 Rules for Construing Deeds; *Ognel's case*, 4 Co., 50; Sheph. Touch., 248, 249; *Roe* v. *Vernon et al.*, 5 East, 51; *Doe* v. *Greatherd*, 8 East, 91; *Gascoyn* v. *Barber*, 3 Atk., 9; *Wilson* v. *Mowitt*, 3 Ves., 191; *Worthington* v. *Hylyer et al.*, 4 Mass., 191; *Barnard* v. *Martin*, 5 N. H., 536; *Woodman* v. *Lane*, 7 Id., 241; *Allen* v. *Allen*, 14 Me., 430; *Thorndike* v. *Richards*, 13 Id., 430; *Field* v. *Huston*, 21 Id., 69; *Jameson* v. *Balmer*, 20 Id., 425; *Low* v. *Hampstead*, 10 Conn., 23; *Benedict* v. *Gaylord*, 11 Id., 60; *Stearns* v. *Rice*, 14 Pick. (Mass.), 411, 412.

That the verdict of the jury was against law and the evidence in the case. *Bryant* v. *Commonwealth Ins. Co.*, 13 Pick. (Mass.), 543.

(The argument of the counsel for the tenants, tending to show from other leases and evidence, that the demanded premises were included in the mortgage, is omitted.)

II. The second position of the tenants is, that if the *demanded premises were not included in the mortgage of Melvin and his wife, dated April 27th, 1782, nor in the leases of 1789 and 1793, from Kittredge to Melvin, nor in the judgment of Kittredge against Melvin of 1796, yet the entry of Kittredge in 1796, and his ejectment of Melvin, his wife and family, operated as a disseizin of Melvin and his wife, and that, from the continued possession of Kittredge and his lessees, and their occupation and improvement of the demanded premises as a part of the Cheever farm, and from the fact that every successive grantee occupied and improved them in the same manner, they would pass by the description contained in any of the deeds from the Kittredge heirs, or any of the subsequent deeds under which the tenants claim, and the heirs of both Kittredge and Melvin and their wives would be barred.

It is the settled law of Massachusetts, that a married woman, by joining with her husband in a deed, may pass the lands of which the husband and wife are jointly seized, in her right. *Fowler* v. *Shearer*, 7 Mass., 14.

It is also the settled law of Massachusetts that the right of a married woman and her heirs to make an entry upon lands of which she has been disseized jointly with her husband, is absolutely barred after thirty years' adverse possession. Stat. of Mass., 1786, ch. 13, § 4; *Melvin* v. *Propr. of Locks and Canals*, 16 Pick. (Mass.), 161; *Same* v. *Same*, 5 Metc. (Mass.), 15; *Kittredge* v. *Same*, 17 Pick. (Mass.), 246.

A married woman may be disseized at the same time with her husband. *Podger's case*, 9 Co., 104; Runnington on Eject., 60; Adams on Eject., 48, 49, note; Jackson on Real Actions, 25; *Polyblank* v. *Hawkins*, 1 Doug., 329; *Registrum Brevium*, 197; Rastell's Entries, 318; Co. Litt., 30 *a*; 2 Inst., 342; *Langdon* v. *Potter*, 3 Mass., 219; Rolle's Abr., *Assize*, E. O., 13.

With respect to the Williams mortgage, and the testimony of James Melvin, as mentioned in the third instruction, the instruction of the judge was right, if it was not too favorable to the demandant, because Williams's mortgage was subsequent to Kittredge's, and could not be set up against it, if it included a portion of the same lands, as the tenants contend; and the testimony of James Melvin as to the southern boundary is totally inconsistent with the written documents made by the parties themselves at the time. This relates to the first and third instruction.

As to the second instruction, that the verdict of a former jury in the state court was not evidence to control this case,

the *tenants contend it was correct, because the judgment of the state court which contained this verdict was in favor of the tenants, notwithstanding this verdict.

In support of the fourth, fifth, and sixth instructions, the tenants will take the positions and rely upon the authorities cited before, under the second general head of this abstract, to which the court are referred.

As to the seventh instruction, the tenants make the following points:—That by the death of Kittredge, in 1813, the land descended to his heirs at law; that he died seized, the possession being in his tenant, Cheever; that Cheever continued in possession till after the death of Mrs. Kittredge, in 1818; that there was no evidence that Mrs. Kittredge was ever on the land after the death of her husband; that she was entitled to a life estate in one third part of the farm, and was, therefore, legally entitled to one third part of the rents; that she cannot be considered as an abator, because an abatement is an entry by a stranger, nor as a disseizor, because she did no act which can be construed as a disseizin of the heirs; that there was no evidence of any disclaimer of the heirs, nor any evidence of an adverse possession on the part of Mrs. Kittredge, but that the legal seizin remained in the heirs as it descended from their father. 5 Metc. (Mass.), 23–35.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff in error was demandant below in a writ of entry, in which he claimed about eight acres of land in the city of Lowell.

The demandant claimed under Benjamin Melvin, who, it is admitted, was seized of the land in dispute, as part of a larger tract, in 1782. One undivided moiety of this tract Melvin held in right of his wife, and the other in his own right.

The tenants claimed under a mortgage given by Benjamin Melvin and wife to Jacob Kittredge, on the 27th day of April, 1782. In 1789, Kittredge entered under his mortgage, and leased the premises to Melvin. In 1796, Kittredge recovered the possession from Melvin on an action of ejectment, and had possession delivered to him by writ of *habere facias*.

From that time Kittredge and those claiming under him, now represented by the tenants or defendants in this action, claim to have had the peaceable possession of the demanded premises; and there is no evidence of any occupation by Melvin or his heirs, or claim thereto, till 1832, although they lived in the immediate neighborhood. On the trial below, the tenants relied on two grounds of defence, both of which they claim to have established by the evidence:—

*1. That the demanded premises were included in the mortgage given by Melvin and wife to Kittredge, in 1782.

2. That even if the land in controversy was not embraced within the deed of mortgage, yet that the entry of Kittredge in 1796, and the ouster of Melvin and wife, operated as a disseizin, and that by the uninterrupted and adverse possession of the tenants, and those under whom they claim, for more than thirty years before the entry of demandant, or those under whom he claims, his right of entry was barred by the statute of Massachusetts of 1786, ch. 13, § 4; which limits the right of any person under no disability to make an entry into lands, &c., to twenty years next after his right or title first descended or accrued, with a saving to femes covert, &c., of a right to make such entry at any time within ten years after the expiration of said twenty years, and not afterwards.

The court gave "full instructions to the jury" on the principles of law applicable to the complicated facts and somewhat contradictory testimony submitted to them on the trial; to certain portions of which the demandant's counsel excepted, and has here assigned as error.

We shall proceed to examine them in their order.

I. "That if the jury believed from the evidence, looking to the monuments, length of lines, and quantities, actual occupation, &c., that it was more probable the parties to the mortgage of 1782 intended to include therein the demanded premises than otherwise, they should return their verdict for the tenants."

It is objected to this instruction, that it submits the construction of the deed to the jury; and permits them to conjecture the probable intention of the parties from facts and circumstances not contained in the deed. Whereas the intention of the parties is to be found in their deed alone, which it is the duty of the court to construe.

Taking this sentence of the charge as it stands, without reference to the facts of the case, it may be admitted that it affords some color to this objection. But when we look to the issue submitted to the jury, and the testimony exhibited by the record, the exception will be seen to be without foundation.

It is true, that it was the duty of the court to give a construction to the deed in question, so far as the intention of the parties could be elicited therefrom, and we are bound to presume that, in the "full instructions" which the record states were "given to the jury," and not contained in the bill, because no objection was made to them, the court performed that duty correctly. But after all this is done, it is still a question *of fact to be discovered from evidence [*289

dehors the deed, whether the lines, monuments, and boundaries called for include the premises in controversy or not. A deed may be vague, ambiguous, and uncertain in its description of boundary; and even when it carefully sets forth the lines and monuments, disputes often occur as to where those lines and monuments are situated on the ground; and it necessarily becomes a fact for the jury to decide, whether the land in controversy is included therein, or, in other words, was *intended* by the parties so to be.

The mortgage referred to by the court describes the land as follows:—"A certain tract or parcel of land lying and being in Chelmsford, on Chelmsford Neck, so called, in said county of Middlesex, containing by estimation one hundred acres, be the same more or less, lying altogether in one piece without any division, except only one county bridle-road, which runs through the northerly part of said farm or tract of land, and being a part of the real estate of Mr. Thomas Fletcher, late of said Chelmsford, deceased."

The description of the land conveyed by this deed is of the most vague and indefinite character; it sets forth no monuments to indicate the line which divides it from the remainder of the tract owned by the mortgagor, and not intended to be included in the deed.

Hence, the demandant, in order to show what land was intended by the parties to be included, produced witnesses to prove the existence in former times of another "bridle-road," which he contended was the southern boundary of the mortgaged land, because a hundred acres lay north of this road, and the land was described as intersected but by "*one* county bridle-road," which ran through the northerly part of the farm. He produced a witness, also, to prove that Kittredge, the grantee, had pointed out a certain monument near this road as marking his boundary.

The tenants contended that the deed was uncertain as to quantity, and did not call for the road as its southern boundary. They also gave evidence to show the actual practical location by the parties of the land included in the mortgage, as early as 1789, which included the eight acres in controversy. For this purpose they produced the leases from Kittredge to Melvin, the mortgagor, dated in 1789 and 1793, and subsequently to the other tenants of Kittredge, setting forth courses and distances which included the demanded premises, as they contended, and proved by witnesses a possession held accordingly since 1796.

It cannot be doubted, that, where a deed is indefinite, uncertain, or ambiguous in the description of the boundaries

of the *land conveyed, the construction given by the parties themselves, as shown by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown. The difficulty in the application of the descriptive portion of a deed to external objects, usually arises from what is called a latent ambiguity, which has its origin in parol testimony, and must necessarily be solved in the same way. It therefore becomes a question to be decided by a jury, what was the intention of the parties to the deed.

From this view of the case, as exhibited by the record, it clearly appears that the question, whether the demanded premises were included within the limits of the mortgage, or intended so to be, was submitted by the parties, and by the nature of the case, to the jury; and that, in order to a correct decision of the issue, the jury should be instructed to weigh the testimony as to the "monuments, length of lines, and quantities, actual occupation, &c.," and decide according to the weight of evidence. And such is the meaning, and no more, of the language of the court now under consideration. We can perceive no error in it.

II. The second matter of exception is to the instruction,—"That the verdict of a former jury, introduced by the tenants, was not evidence to control this case or the issue."

On the trial, the tenants gave in evidence the record of a former writ of entry, brought by Benjamin Melvin, Jr., against them in 1833, for this same land, on which a judgment was rendered in favor of the tenants. In the trial of that case, the question had been submitted to the jury "whether the demanded premises were intended by the parties to be conveyed by the deed of mortgage," and the verdict was in favor of demandant; the court, nevertheless, on other points reserved, gave judgment for the tenants.

We understand the principle asserted by the court in this instruction to be, that this verdict in favor of Melvin was not conclusive upon the defendants in this suit, and did not operate by way of estoppel as to the facts stated therein.

The correctness of this instruction cannot be questioned. For, assuming that a verdict and judgment in a writ of *entry sur disseizin* to be conclusive between parties and privies in Massachusetts, and that they operate by way of estoppel, yet the record in this case would have no such effect;—1st. Because it was neither pleaded nor given in evidence by the demandant for that purpose. 2d. All estoppels are mutual; the demandant was not party to the suit, nor privy except as to one fourteenth of the premises, and would not therefore have been *estopped as to the remainder; so, nei- [*291

ther could the tenants. 3d. There was no judgment of the court upon the verdict, which alone could give it the force or effect of *res judicata.*

III. The third exception is to an instruction in favor of the demandant,—and ought not to have been taken or urged here.

IV. The fourth, fifth, sixth and seventh instructions excepted to have reference to the statute of limitations, and may be considered together. They are as follows:—

"4th. That if the tenants, under their respective leases from Kittredge, occupied and cultivated to the Tyler line, in such a manner as the owners of such land would ordinarily occupy and cultivate, and such an occupation had continued for the period of thirty years, it would constitute such an adverse possession as would bar the demandant's right to recover.

"5th. That the possession of the premises by said lessees, under the lease, was the possession of Kittredge, the lessor, and his heirs, he claiming to have a deed which included them, and having turned Melvin out of possession; if it was of such a character as amounted to a disseizin, it would in law inure to the benefit of Kittredge and his heirs, and would be the disseizin and adverse possession of the lessor.

"6th. That if the possession of Cheever and Thissell, in 1796, under Kittredge, included the demanded premises, and the same possession had been continued by the subsequent lessees, as the evidence tended to show it had been, down to the entry of the heirs of Melvin and wife, in 1832, it constituted in law such a continuity of possession as would bar the demandant's right to recover.

"7th. That there was evidence, not contradicted, of a claim to the premises by Mrs. Kittredge, after the death of her husband, and of rents being paid to her; but if Mrs. Kittredge, after the death of her husband, forgetting she had signed the original deed, claimed said premises, and received the rent therefor by mistake, till the heirs or their guardians discovered she had signed the deed, and the rents were then settled with them, the continuity of adverse possession would not thereby be disturbed; but there was no evidence of those rents which were paid to Mrs. Kittredge going to the heirs, or being repaid to them, except what is to be inferred from her will, and the tenants recognizing the title of the heirs of Kittredge after the widow's death, and taking deeds of them. That, on the death of Kittredge, his rights descended to his heirs at law, some of whom were minors; that they became entitled to them, and the rents and profits paid by the lessees; that if

*292] the tenants, *who held leases from Jacob Kittredge, and entered under them, remained in possession after

his death, they should properly in law be regarded as tenants holding at will, or by sufferance of or under his heirs; and if the tenants saw fit, for any part of the time, to pay rent to Mrs. Kittredge, the mother, or did it by mistake, and afterwards paid it to the heirs, or their guardians, and took deeds from them, such payments to her ought not to impair the rights of the heirs, or those claiming under them; but the whole transaction was evidence to be weighed by the jury of a continued occupation by the lessees, for and in behalf of those entitled in law to the rights which Kittredge claimed when alive."

We can perceive no error in these instructions, when taken in connection with the evidence exhibited by the record.

It cannot be denied, that an adverse possession may be kept up without a personal residence where the disseizor gives leases to tenants, puts them in possession, and receives the rents, claiming the land as his own.

The law is also well settled by the courts of Massachusetts, that the entry of a married woman is barred by the statute of limitations of that state, after thirty years, notwithstanding her coverture. Also that by the marriage the husband and wife become jointly seized of her real estate in her right, and their title must be so stated in pleading; and therefore, if a stranger enters and ousts them, it is a disseizin of both, and a right of entry immediately accrues to both or either of them. (See *Melvin* v. *Proprietors, &c.*, 16 Pick. (Mass.) 161; also 5 Metc. (Mass.), 15; and cases there cited.)

Nor can we discover any thing in the evidence in this case, that could entitle the demandant to maintain that the continuity of the adverse possession has been broken by the death of Kittredge, and the fact that the widow may have received the rents without objection for some time after his death.

There was no abatement by a stranger after the death of Kittredge, nor entry or disseizin of his heirs by the widow.

"If a guardian by nurture makes a lease by indenture to one who is already in under title of the infant, rendering rent to the guardian, which is paid accordingly, this is no disseizin; for there is no actual ouster consequent on such demise, and the rent paid to the guardian must be accounted for to the infant." (Roll. Abr., 659; Bac. Abr. tit. *Disseizin*, A.)

So if the mother, by mistake of her rights, and without objection, receives the rents jointly due to herself and children; this constitutes no ouster of them, she being liable to account to them.

*The judgment of the Circuit Court is therefore affirmed, with costs. [*293

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

AMÉDÉE MENARD'S HEIRS, PLAINTIFFS IN ERROR, *v.* SAMUEL MASSEY.

A concession, having no defined boundaries, made by the Lieutenant-Governor of Upper Louisiana in 1799, but not surveyed, cannot be considered as "property," and, as such, protected by the courts of justice, without a sanction by the political power, under the third article of the treaty with France made in 1803.

The Lieutenant-Governor of Upper Louisiana had the authority, as a subdelegate, to grant concessions, direct surveys, and place grantees in possession; but no perfect title to the land passed until the concession and a copy of the survey were delivered to the Intendant-General at New Orleans, and also a proces-verbal attesting the fact that the survey was made in the presence of the commandant, or in that of a syndic and two neighbors. On these the legal title was founded, and then perfected and recorded.[1]

Upon the transfer of Louisiana, the United States succeeded to all the powers of the Intendant-Generals, and could give or withhold the completion of all imperfect titles at their pleasure. In order to exercise this power with discretion, Boards of Commissioners were established in order to enlighten the judgment of Congress, and special courts were organized in which claimants might prosecute their claims.

But in all the legislation upon the subject, the claimants were never considered as possessing a legal title, until the final assent of Congress was expressed in some mode or other to that effect.[2]

*294] *The date of such legal title commences with the ratification by Congress, and does not extend back to the date of the imperfect title.

Therefore, the title of Cerré, being confirmed in 1836, must give way to patents for the same land, issued before that time, unless Congress had, by some law, protected the land from the location of patents.[3]

But the acts of Congress did not so protect it, because the concession of Cerré called for no boundaries, and had never been surveyed. Before land could be reserved from sale, it was necessary to know where the land was.[4]

The confirming act of 1836 declared that it should convey no title to any part of the land which had previously been surveyed and sold by the United States. This the United States had a right to do, because, having the plenary power of confirmation, they could annex such conditions to it as they chose.

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[1] APPLIED. *United States* v. *Hartnell's Ex'rs*, 22 How., 289.

[2] CITED. *Glenn et al.* v. *United States*, 13 How., 258.

[3] CITED. *Carondelet* v. *St. Louis*, 1 Black, 189; *Dent* v. *Emmeger*, 14 Wall., 313.

[4] FOLLOWED. *Ledoux et al.* v. *Black et al.*, 18 How., 475; *Hall* v. *Papin*, 24 Id., 144. CITED. *Cousin* v. *Blanc's Exec.*, 19 Id., 210.