ment of the facts by the district judge in the practice of that court. It clearly appears that the ground upon which the judgment in the Supreme Court was given was the invalidity of the title of the plaintiff, because an older patent had been issued in favor of James Bell. We think this court has jurisdiction. (Armstrong *v.* Treasurer, &c., 16 Pet., 261; Grand Gulf R. R. and B. Co. *v.* Marshall, 12 How., 165; Almonester *v.* Kenton, 9 H., 1.)

Judgment reversed. Cause remanded.

THOMAS RICHARDSON, PLAINTIFF IN ERROR, *v.* THE CITY OF BOSTON.

In Massachusetts, a former verdict and judgment in an action on the case for a nuisance is not conclusive evidence of the plaintiff's right to recover in a subsequent action for the continuance of the same nuisance.

The plea of the general issue in actions of trespass or case does not necessarily put the title in issue.

But the former verdict, though not conclusive, is permitted to go to the jury as prima facie or persuasive evidence.

Where there is some evidence tending to establish a fact in issue, the jury must judge of its sufficiency.

It is the duty of the court to construe written documents, but the application of their provisions to external objects is the peculiar province of the jury.

[MR. JUSTICE CURTIS, HAVING BEEN OF COUNSEL, DID NOT SIT IN THIS CAUSE.]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Rhode Island, to which it had been removed from the district of Massachusetts.

It was an action of trespass on the case brought by Richardson against the city of Boston, for the continuance of a nuisance which is described in the case of the city of Boston *v.* Lecraw, (17 Howard, 426.) He was the owner of two wharves between which the drain in question was erected, whereby the access to his wharves by boats or vessels was very materially interrupted. The case was tried at June term, 1855, and resulted in a judgment for the defendants. The bill of exceptions taken by the counsel of Richardson will be mentioned hereafter.

As one of the important questions in the case was, whether or not the record of a former case between the same parties could be given in evidence, it is proper to see what that record was.

At June term, 1853, a case was tried between the same parties, having also been removed from the district of Massachusetts to Rhode Island. The opinion of the district judge

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(who tried the case) was, that the right of property could not be taken from Richardson without compensation, and that, under the circumstances of the case, he was entitled to recover against the city of Boston whatever damages he might prove under the sixth count of his declaration. That sixth count stated the occupancy of Price's wharf by Bullard as tenant, the reversionary interest being in Richardson, and the occupancy of the Bull wharf by Lecraw & Perkins, the reversionary interest being in Richardson, and averred that the dock in front of these wharves was, and had been for a long time, a public way, slip, or dock, so as to allow a free communication between the wharves and the channel of the sea. Under this instruction of the court, the jury found a verdict for the plaintiff, and assessed his damages at $1,209.69. It was this record of the case, tried in 1853, which the counsel of the plaintiff offered in evidence in the present suit, but the judge ruled that the judgment was not admissible in evidence for any purpose, and refused to admit the same to be put in evidence; to which refusal and ruling the plaintiff excepted.

The plaintiff then offered in evidence an agreed statement of facts contained in the record of the former suit, which the judge refused to admit, and to this ruling also the plaintiff excepted.

The plaintiff then gave in evidence all the documents enumerated in said agreed statement of facts, together with much parol testimony relative to the premises, which it is impossible to specify particularly.

The plaintiff then rested, whereupon the defendants offered the following:

ORDER OF MAYOR AND ALDERMEN, JUNE 18, 1849.

CITY OF BOSTON.

An Ordinance constituting the Board of Health for the City.

Be it ordained by the Mayor, Aldermen, and Common Council, of the City of Boston, in City Council assembled, as follows:

The Mayor and Aldermen shall constitute the Board of Health of the City, and shall exercise all the powers and perform all the duties now vested in the City Council as a Board of Health, with the right of carrying into execution such powers and duties through the agency of any persons whom they may select, or in any manner which they may prescribe.

In Common Council, June 14, 1849. Passed. Sent up for concurrence. BENJAMIN SEAVER, *President.*

In Board of Mayor and Aldermen, June 18, 1849. Passed.

JOHN P. BIGELOW, *Mayor.*

A true copy. Attest: S. F. MCCLEARY, *City Clerk.*

And without offering any further evidence on their part, did request the court to rule and instruct the jury that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff, and the violation of those rights by the defendants, such as to sustain the plaintiff's action. The plaintiff on his part did request the court to rule and instruct the jury as follows:

1. That there is evidence in the case competent to go to the jury, and to be judged and weighed by them, that, at the time of the grants by the town to Gridley & Baxter of their estates or possessions, there existed a town or public way between those possessions, for access to and from the sea in boats and vessels, upon which those possessions were bounded, and that the right to use and enjoy said way passed to said grantees by the grant of those possessions, and is an appurtenance thereto, and to their heirs and assigns.

2. That if said way, so bounded on said possessions, existed at the time of the grant of those possessions, and the title to the land thereunder to high water was in the town, but not the title to the flats between said way at high-water mark, and the sea or low-water mark; and if said title rested in the town subsequently by the ordinance of 1641, then, by and after the said ordinance, said way became shaped and restricted over the flats to the interval between the flats annexed by said ordinance to the possessions of said Gridley & Baxter, and was and continued to be an appurtenance to the possessions so granted to Gridley & Baxter, their heirs and assigns.

3. That there is evidence competent to go to the jury, and be judged and weighed by them, that at the time of the grants of liberty to wharf to Gridley, Gill, & Bull, there existed a public or town way between the possessions of Gridley & Baxter, and bounding thereon for access of boats and vessels to the sea or low water, and that such liberties to wharf were bounded by said way, and thereby the right to use said way for access of boats and vessels to and from such wharves, one or both of them, became, by virtue of said respective grants, annexed or appurtenant to said grants, and to said possessions of Gridley & Baxter, their heirs or assigns.

4. That if the jury shall find that at the time of the staking out of said highway, October 31st, 1683, the same extended below high-water mark, and that the possessions of said Baxter bounded on said way, then by virtue of the liberty to wharf, granted at the same time to the proprietors of lands on Sea street, the right to use said way for access by boats and vessels to and from such wharf, became by virtue thereof an-

nexed or appurtenant to the possession of said Baxter, his heirs and assigns.

5. That there is evidence competent and proper to be submitted to the jury, to be judged and weighed by them, that a town way or highway was laid out by the selectmen, October 31st, 1683, to the sea or low-water mark; that the estates or wharves claimed by the plaintiff were bounded thereon; that said way was a way for boats and vessels, and that, at the time of the acts complained of, plaintiff was the owner and possessed of said wharves, as stated in the declaration; and if the jury shall so find, and that defendants while said way remained, and without a previous due and legal discontinuance thereof, erected the structure alleged in the declaration, and continued the same for the time and in the manner set forth therein, and that by reason thereof the plaintiff has been deprived of the use of said way for access to and from his wharves, with boats and vessels, then the plaintiff is entitled to recover.

6. That if the jury shall find that by reason of the acts of defendants complained of in the declaration, that part of plaintiff's wharf below low-water mark, held by him under a grant of the Legislature, has been injured in the manner set forth in the declaration, then the plaintiff is entitled to recover.

Thereupon his honor the judge did decline and refuse to make and give either of the said rulings and directions so prayed by the plaintiff, but did rule and instruct the jury as prayed by the defendants as aforesaid.

Whereupon the plaintiff excepted, and the jury found a verdict for the defendants.

The case came up to this court upon these several exceptions, and was argued by *Mr. Bartlett* for the plaintiff in error, and by *Mr. Chandler* and *Mr. Loring* for the defendants.

The reporter regrets that the limited space which must be allotted to the report of this case will not allow him to state the arguments of the respective counsel upon the various points which arose in the case.

Mr. Justice GRIER delivered the opinion of the court.

This is an action of trespass on the case brought by the plaintiff in error against the city of Boston, for the erection and maintenance of a drain at the foot of Summer street, which, it is alleged, is a nuisance, and injurious to the property of plaintiff. He is owner of two wharves, called the Price and the Bull wharf, which are extended from high to low-water mark, from the lots which adjoin Summer street on each side.

The nuisance, which is the subject of complaint in this case, is the same as that in the case of Boston *v.* Lecraw, decided in this court, and reported in 17 Howard, 426.

The declaration contains seven counts, in four of which the plaintiff, as owner of the several wharves, and having the seizin and possession, claims a right of way, as appurtenant to the same, over the "dock" or "way and dock," which constitutes the interval between the wharves; also, that his wharves are bounded on the "town dock," "town way or dock," which he alleges to have been long used as a "public dock, slip, or way."

The fifth and sixth counts are for injuries to the reversion, with like averments. A seventh count avers the wharves to be bounded, respectively, "by a highway, town way, or public way, to the sea, extending from the corner of Summer and Sea streets to the channel, or low-water mark, which was duly laid out and established pursuant to law."

The defendant pleaded the general issue, and on the trial the plaintiff offered in evidence the record of a former verdict and judgment rendered in his favor in an action against defendant for the erection of the same nuisance, the continuance of which is the subject of the present suit. The rejection of this evidence by the court is the subject of the first bill of exceptions.

It is contended that this record was not only evidence, but conclusive of the right of the plaintiff, and prima facie evidence of the continuance of such right; and that plaintiff, having no opportunity to plead it as an estoppel, may exhibit it as matter of evidence.

It may be admitted that numerous decisions may be found in many of the State courts affirming this proposition; nevertheless, it has not been universally adopted. The leading case of Outram *v.* Morewood (2 East., 174) establishes the following proposition, in which all concur: "That if a verdict be found on any fact or title distinctly put in issue in any action of trespass, such verdict may be pleaded, by way of estoppel, in another action between the same parties or their privies, in respect to the same fact or title." But estoppels, which preclude the party from showing the truth, are not favored. To give the verdict the effect of an estoppel, the facts must be distinctly put in issue.

The plea of the general issue, in actions of trespass, or case, does not necessarily put the title in issue; and, although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in another action for a different trespass. The judgment can

only give the plaintiff an ascertained right to his damages, and the means of obtaining them. These principles seem to have been adopted by the courts of Massachusetts, and applied to cases like the present. In the decision of this point, we must be guided by the decisions of the courts of that State.

In the case of Standish *v.* Parker, (2 Pick., 20,) which was an action for a nuisance, the court say: "We think it very clearly settled that nothing is conclusively determined by the verdict but the damages for the interruption covered by the declaration. In actions for torts, nothing is conclusively settled but the point or points put directly in issue. By the plea of the general issue, the title is not concluded, because it cannot be made to appear upon the general issue that the title ever came in question." (See also 15 Pick., 564.)

Nevertheless, though a verdict in such case is not conclusive, it is permitted to go to the jury as prima facie, or persuasive, evidence. (3 Pick., 288.) If the evidence of the facts involved in the first trial are still doubtful, if witnesses were then examined whose testimony cannot now be obtained, for these and many other reasons the former verdict may have the effect of highly-persuasive evidence on another trial of the same question. But if on the last trial new evidence has been discovered, or if the question of title submitted on the first trial was connected with instructions in law which have since been found to be erroneous; or if a different verdict on the same evidence would have resulted from the different instructions given on the last, it is plain that the first verdict could have but little or no persuasive effect. Title is often a question of mixed law and fact—and a party is not concluded by an erroneous opinion of the court, pronounced in a former case.

We are of opinion, therefore, that the court erred in not permitting the record of the former suit to be given in evidence to the jury.

2. At the conclusion of the trial, the court, at the request of defendant's counsel, instructed the jury "that there was not sufficient evidence in the cause to authorize the jury to find the rights claimed by the plaintiff."

As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province. The jury cannot assume the truth of any material averment without some evidence; and it is error in the court to instruct the jury that they may find a material fact of which there is no evidence. An instruction like this is imperative on a jury; it has taken the place, in practice, of a demurrer to evidence, and must be governed by the same rules. If there be "*no evidence* whatever," as in the case of

Parks *v.* Ross, (11 How., 393,) to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions.

The court below seem to have considered the decision of this court, in the case of Boston *v.* Lecraw, as requiring them to give the instruction demanded by the defendant. The action in that case was for the same alleged nuisance by a tenant of the present plaintiff. But the plaintiff in that case claimed no other right of way over the lands of defendant, save the public right of navigation; and this court decided that the public right of navigation, between high and low-water mark, was defeasible at any time by the owner of the subjacent land. That, as the space between the plaintiff's wharves had been converted into a dock by the accident of its position, so long as it remained unreclaimed, every person had a right to pass and repass over it. The exercise of this public right, for any length of time whatever, would therefore form no grounds of presumption either of a public dedication or a private grant to the owners of the adjoining wharves. While it remains unreclaimed, it is a public highway or dock, by a paramount but defeasible title. The adjoining wharves may receive much more advantage than others from the use of it, but they cannot convert it to a private use, under color of a public right.

The public officers of a town have no right to lay out a town way between high water and the channel of a navigable river, or appropriate the shore or flats to the use of the inhabitants of a town in the form of a way or road. (1 Pick., 179; 5 Pick., 494.) But in the present case the city of Boston is owner of the land, and has the same right to reclaim their flats which other owners have. Before they are so reclaimed, the public and the adjoiners may exercise their paramount right of navigation. But if the city elects to reclaim its portion of the shore, and extend Summer street to low water, it has a right so to do. And if the street should be less beneficial to the adjoiners in this form, than when they could use it as a dock under the public right of navigation, they cannot complain. The absence of these advantages may be a loss to them but if incurred by the defendants' exercise of their own rights, it is no wrong to them.

But if the city has determined to reclaim this land, and has laid out a street thereon, or continued Summer street to low-water mark, the right to use it as a street or highway on land

becomes appurtenant to the property of the adjoiners. It may be the duty of the city to make drains along or under the streets, but they cannot construct them so as to hinder the public use of them as streets, or erect thereon a nuisance to the adjoiners. If Summer street be extended to low water, the plaintiff has a right to pass along and across the same, and anything which obstructs such passage is a nuisance, and injurious to his rights.

The seventh count of plaintiff's declaration claims a right of way as appurtenant to his land or wharves, on the ground that Summer street extends to low water. In support of this allegation, the following entry in the town records was given in evidence: "October 31, 1683. The selectmen all met this day, staked out a highway for the town's use, on the southerly side of the land belonging to the late John Gill, deceased, being thirty foot in breadth from the lower corner of said Gill's wharf next the sea."

It is the duty of the court to construe written instruments; but the application of their provisions to external objects described therein is the peculiar province of the jury. Whether this document describes Summer street as it was afterwards laid out from high-water mark; whether "the lower corner of Gill's wharf next the sea" was at *that time* (in 1683) at low-water mark; whether this street was staked out to low water, were questions which should have been submitted to the jury. The fact that the learned counsel differ so widely as to the situation of the points called for as the boundary of the street next the sea, shows conclusively that it is a question for the jury, and not for the court.

Moreover, the court were requested by plaintiff's counsel to instruct the jury, "that if the jury shall find that, by reason of the acts of defendants complained of in the declaration, that part of plaintiff's wharf below low-water mark, held by him under a grant of the Legislature, has been injured in the manner set forth in the declaration, then the plaintiff is entitled to recover."

There was some evidence that the drain constructed by defendant was not carried out sufficiently to discharge its contents so as to be swept off by the tides; but that it caused an accumulation of matter at the outer end of the plaintiff's wharves, insomuch that vessels could not approach them with the same depth of water as formerly. If this be so, it was an injury to the plaintiff, for which he was entitled to recover damages.

This question should have been submitted to the jury, and this instruction given, as requested by plaintiff's counsel. The

others are disposed of by the opinion of this court in Boston *v.* Lecraw.

For these reasons, the judgment is reversed, and *venire de novo* awarded.

FELICITÉ FLETCHER HIPP, AND MARIA ANTONIO FLETCHER HIPP, ALIENS, AND RESIDING, THE FORMER IN VERA CRUZ, MEXICO, THE LATTER IN THE CITY OF MADRID, SPAIN, FOR THEMSELVES AND ON BEHALF AND FOR THE USE OF AUGUSTIN CUESTA, JAVIERA CUESTA, AND FELICITAS CUESTA, ALIENS, THE FORCED HEIRS OF ADELAIDE FLETCHER HIPP, DECEASED, *v.* CELINE BABIN, WIDOW OF URSIN JOLY, AND OTHERS.

A court of equity will not entertain a bill, where the complainants seek to enforce a merely legal title to land; and in the present case, in the absence of allegations that the plaintiffs are seeking a partition, or a discovery, or an account, or to avoid a multiplicity of suits, the bill cannot be maintained.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in equity.

The facts of the case are stated in the opinion.

It was argued by *Mr. Smiley* and *Mr. Perin* in a printed argument for the appellants, and orally by *Mr. Taylor* for the appellees.

The manner in which the counsel for the appellants sought to sustain the equity jurisdiction of the court in the case was as follows:

In the opinion of the judge of the Circuit Court, the cause was not one over which the equity side of the court had any jurisdiction. The title being merely legal, and the documents upon which the title rested being accessible to all parties, there was "a case where plain, adequate, and complete remedy may be had at law." Several cases were cited and relied upon to sustain this opinion. But without referring to them, we may observe that this case is distinguished from all those cited, in this: that no objection is raised in this case by the defendants to the jurisdiction, neither in the pleadings nor upon the argument. It was not raised in the Circuit Court, and we are assured by the opposite counsel that it will not be in this. The objection was raised in some form, either by demurrer or in argument upon final hearing in all the others.

In the case of United States *v.* Sturges et al., (1 Paine C. C. R., 525,) it was objected, at the hearing for the first time, (not