go across the bridge to Lowell for his passengers, bring his passengers in his coach across the bridge back by the land he lived upon to Methuen, pass by said land to Lowell across the bridge, and deliver his passengers, and then return from Lowell across the bridge to the stable. It is admitted that if the defendant had not the right to pass the plaintiffs' bridge free of toll, the plaintiffs are entitled to recover.

I. W. Beard, for the defendant.

J. G. Abbott, for the plaintiffs.

FLETCHER, J. There really is no question in this case which will bear an argument. The contract was made while the statute of 1832 was in force, which gave to the corporation, in express terms, the power to compound, or make agreements in regard to, these tolls, in all cases in which the corporation might deem it expedient for their own benefit and the public convenience. There can, therefore, be no valid objection to the power of the corporation to make the contract, and, in fact, it is understood that all objection to the power to make the contract was ultimately waived on the part of the corporation.

The only remaining question is, whether the contract embraces the case of a stage running between Methuen and Lowell in the manner set out in the agreed statement. Upon this question there can be no doubt, as stages used in the manner in which these were used are clearly exempted by the terms of the contract from all obligation to pay tolls.

Judgment for the defendant.

WINTHROP W. CHENERY & others *vs.* THE INHABITANTS OF WALTHAM.

The legislature, in an act dividing a town into two precincts, described the dividing line as "a straight line," and appointed a surveyor to run the line, which was done. One of the precincts was afterwards incorporated as a separate town, and the line run by the surveyor was perambulated from time to time by the select

men, and acquiesced in by the two towns for more than one hundred years. It was held, that the line run by the surveyor was the true dividing line between the towns, although not a perfectly straight line. It was held, also, that an entry on the records of the town, made four or five years after the passing of the act, and purporting to be a copy of the report of the surveyor, was admissible in evidence, the original report being lost, to prove the line actually run by the surveyor.

Where a dwelling-house is so divided by the boundary line between two towns, as to leave that portion of the house in which the occupant mainly and substantially performs those offices which characterize his home, (such as sleeping, eating, sitting and receiving visitors,) in one town, he is a citizen of that town, and has no right to elect to reside and be taxed for his personal property in the other town.

This was an action of assumpsit, to recover a tax for the year 1849, paid to the defendants by the plaintiffs under protest, on personal property held by them as executors and trustees under the will of the late Abel Phelps. The trial was before *Mellen*, J., in the court of common pleas.

It was admitted that the plaintiffs were entitled to recover, if they could show that Phelps was not in his lifetime a citizen of Waltham, the only question being whether he resided in Waltham or in Watertown.

An act of the legislature, passed on the 3d of December, 1720, divided the town of Watertown into two precincts, the eastern and the western, by a line, which by the words of the act is "to commence and take its beginning at Charles river and to be extended northeastward so as to run on the east side of Joshua Child's house, and on the same course (being a straight line) to run on the west side of Thomas Straight's house, and to be continued, a straight line, through said Watertown, till it intersects their north bounds." By the same act it was ordered that Samuel Thaxter, Esq., be desired to run said divisional line, at the expense of the town of Watertown. By a subsequent act passed on the 4th of January, 1737, the western precinct was incorporated as a town by the name of Waltham. This act describes the territory thereby incorporated as follows: "All those lands in Watertown aforesaid lying westward of that line sometime since settled by this court as the dividing line between the said east and west precincts, namely: beginning at Charles river and to be extended northeastward, so as to run on the east side of the

house of Caleb Ward, and on the same course, being a right line, to run on the west side of Thomas Straight's house, and thence to continue a straight line through said Watertown, till it intersect their north bounds."

It was proved by the plaintiffs that the line dividing said two towns, as indicated by the existing monuments, at the termini of the line, and by various intermediate monuments, had been perambulated according to law, at various times from 1741 to 1845, by the selectmen of both towns, as and for the true dividing line, and as a straight line, and that the line passed through the house occupied prior to his decease by Abel Phelps and his family, leaving the larger part of the house in Waltham, and it was also proved by them that a straight line from one terminus of the dividing line to the other terminus, as the termini are now indicated by the monuments, passed through the house, leaving the larger part of it in Watertown.

The defendants offered in evidence a book of records of the town of Watertown, in which, among the records for the year 1724 – 5, apparently in the handwriting of the then town clerk, and immediately following a copy of the act of December 3d, 1720, appears the following document: "Pursuant to the order of the general court, dated December the 7th, 1720, for running the dividing line of the two precincts in Watertown, I, the subscriber, went to said town on the 13th of December, current, and run the line agreeable to the report of the committee appointed for that affair, which line begins at Charles river and runs a north course forty-nine degrees east. In running said line, I past on the east side of Joshua Child's house, at five rods distance, and on the west side of Thomas Straight's house, at five rods distance, and so on a straight line until it intersects Watertown north bound, in which line I marked a white oak tree standing about twenty rods distance from Charles river, and caused several heaps of stones to be erected. Samuel Thaxter." It appeared by the same book of records that the town, at a former meeting, voted that the act of the legislature and the report of Col. Thaxter be recorded by the town clerk in the records of the town. It

was admitted that no original report of Col. Thaxter's was to be found by search among the papers of Watertown or Waltham, or in the office of secretary of the commonwealth, or any record of it other than the foregoing document. The plaintiffs objected to the admissibility of this record, but the presiding judge admitted it as explanatory of the line run by Col. Samuel Thaxter.

The defendants offered evidence to show, that the line now marked by the monuments was the same line described in Col. Thaxter's report, and contended that it approximated as near to a straight line as could be attained when it was run by Col. Thaxter. The plaintiffs offered evidence to show, that a line from one terminus of the dividing line to the other, as now indicated by monuments, testified to as straight, within three inches, in its length of 895½ rods, although not a geometrical straight line, would not touch any of the intermediate monuments, leaving them all except one on one side of the line, at various distances from it varying from forty-six feet to six feet and ten inches, and they contended that the two termini now indicated by the monuments were those adopted by Col. Thaxter. The plaintiffs then requested the judge to rule, that if the termini of the line of the monuments were now the same with those established at the original location of the line, then a straight line between these termini would be the true dividing line, inasmuch as the line was originally created a straight line by the legislature, and so intended to be run by Col. Thaxter, and so considered and declared to be by the selectmen of the two towns in several of their reports of their perambulations. The judge refused so to rule, and did rule that if the present line by the monuments was substantially the line run by Col. Thaxter, and was the line perambulated from 1741 to 1845, by the selectmen of the two towns, as the dividing line, and acquiesced in as such, it would now be the true dividing line between the two towns, which could be altered only by the action of the legislature.

The plaintiffs offered evidence to show, that they had paid a tax to the town of Watertown, for the year 1849, on the personal property in their hands, and that Phelps in his lifetime

had elected to reside in Watertown. They did not contend that any notice of such election had been given to the authorities of Waltham. They then asked the judge to rule that if the true dividing line between the two towns passed through an integral portion of the dwelling-house occupied by Phelps and his family, then he had a right to elect in which town he would be assessed on his personal property and become a citizen.

The judge refused so to rule, and did rule that if the house was so divided by the line as to leave that portion of it, in which the occupant mainly and substantially performed those acts and offices which characterized his home, (such as sleeping, eating, sitting and receiving visitors,) in one town, then that the occupant would be a citizen of that town, and that no right of election would exist; and that if the house was so divided by the line as to render it impossible to determine in which town the occupant mainly and substantially performed the acts and offices before referred to, then the occupant would have a right of election in which town he would be a citizen; that his election would be binding on both towns; and that the jury, in passing on this question of fact, must take into consideration the uses of the different rooms in the house, and of the different parts of the several rooms.

The jury found a verdict for the defendants. And the plaintiffs alleged exceptions to the several rulings of the court, above stated.

S. E. Guild, for the plaintiffs.

P. H. Sears, (with whom was *J. G. Abbott*,) for the defendants. 1. By a "straight line," in the act of the legislature of 1720, is meant a straight line in the ordinary and popular acceptation of the term, being as near straight, as could be made by the surveyors of that day, with the instruments and methods then in use. 1 Bl. Com. 59, 60; 1 Story on the Constitution, §§ 400, 405, 451, 453. The actual location by the locating committee appointed by the legislature, the perambulations of the selectmen for more than one hundred years, and the acquiescence of the two towns for the same period, fix the present line by the contemporaneous and continued

construction of the act of the legislature, which must prevail over its mere technical sense, and which no power but the legislature can alter. *Williams* v. *Raynham*, 17 Pick. 344; *Bosworth* v. *Ripley*, 17 Pick. 348, note; *Rogers* v. *Goodwin*, 2 Mass. 475; *Cobb* v. *Kingsman*, 15 Mass. 197; *Capen* v. *Glover*, 4 Mass. 305; *Blankley* v. *Winstanley*, 3 T. R. 279, 288; *Gape* v. *Handley*, 3 T. R. 288, note; *Packard* v. *Richardson*, 17 Mass. 144; *Freeman* v. *Kenney*, 15 Pick. 44. And by Rev. Sts. *c.* 15, § 1, "the boundary lines of every town shall remain as now established." See also *St.* 1785, *c.* 75, § 1.

2. The original report of Col. Thaxter being lost, the copy on the records of the town of Watertown, by whose order the record was made, and in whose rightful possession the original was, (for there was no provision of law requiring it to be returned to the legislature,) was rightly admitted in evidence. 1 Greenl. Ev. §§ 483, 484, 485; *Abington* v. *North Bridgewater*, 23 Pick. 174.

3. The ruling as to the testator's right of election of a residence was at least sufficiently favorable to the plaintiffs. The fact that the testator slept in Waltham of itself fixed his residence in that town. *Abington* v. *North Bridgewater*, 23 Pick. 170; *Parishes of St. Mary Colechurch & Radcliffe*, 1 Stra. 59; 2 Const's Poor Laws, (5th ed.) 386, 387, 388. Where the actual residence is not left doubtful upon the facts, there is no room for election. *Lyman* v. *Fiske*, 17 Pick. 231; Story Confl. §§ 46, 47.

Fletcher, J. The principle of law involved in the first ruling has recently been very fully considered by this court, so that an extended examination of it is not necessary in this case. In *Kellogg* v. *Smith*, 7 Cush. 375, 382, it was held to be a settled rule of law that, "when, in a deed or grant, a line is described as running a particular course, from a given point, and this line is afterwards run out and located and marked upon the earth by the parties in interest, and is afterwards recognized and acted on as the true line, the line thus actually marked out and acted on is conclusive and must be adhered to, though it may be subsequently ascertained that it varies

from the course given in the deed or grant. The line thus actually marked out on the earth's surface controls the course put down on the paper. The instrument of conveyance is not understood as requiring that the line to be run shall necessarily be absolutely and precisely according to the course described, which would probably be quite impracticable, but that the line shall be fairly run, in a skilful and proper manner, and that the actual, practical result adopted and acted on shall be conclusive upon the parties in interest." The decision in the above case fully sustains the first ruling in the present case.

The ancient record was properly left to the jury, with other facts and circumstances, from which they might infer that the present line dividing said towns as indicated by the monuments was the line actually run and marked out by Col. Thaxter in pursuance of the act of the legislature of December 3d, 1720.

The other ruling of the court was surely sufficiently favorable to the plaintiff. It might, perhaps, be difficult to maintain the entire accuracy of the ruling in regard to the right of a party to elect where he would be assessed, in the general and unqualified terms in which it is stated, but if there be any error it is in favor of the plaintiffs, and is one to which they cannot except. *Exceptions overruled.*

JOHN A. KNOWLES *vs.* SAMUEL C. SHAPLEIGH & another.

S. & Co. agreed in writing with C., that if he would build a shop on land held by him under a five years' lease from the owner thereof, and would assign to them his interest in certain under-leases of parts of the same land made by him for the same term, which leases had been assigned by the lessees to S. & Co., and if S. & Co. should be permitted to occupy the land, without paying rent, for three years, they would then reassign the under-leases to C. A few months after the making of this agreement, and after S. & Co. had entered upon the land, a difference respecting the land and the buildings thereon arose between the parties, who thereupon agreed that such difference should be referred to arbitrators, and that