to Gray; that when Gray died, this assignment still remained in Soule, in trust for Gray but also in trust under the original agreement of Gray with Boyd that the proceeds, when realized, should be invested and transferred in security of the annuity; that Soule, being himself assignee of the mortgage, and administrator of Gray, when he received this money from a subsequent mortgagee, took the money in trust; because that construction would best accomplish the purpose of the original agreement, and that he holds it subject to the trust for the plaintiff. But he must so hold it as collateral security only for the payment of the annuity; and therefore, if not all needed for such security to the plaintiff, the residue already in the hands of the defendant as administrator he will hold as assets of the estate.

Decree accordingly.

JOSIAH W. FLAGG *vs.* PRIMUS P. MASON.

The declarations of an owner of land, not shown to be deceased, as to its boundaries, though made upon the land, are not competent evidence in favor of a person claiming under him.

ACTION OF TORT for breaking and entering the plaintiff's close. Answer, title in the defendant.

At the trial in the court of common pleas in Hampden, at March term 1857, it appeared that the parties owned contiguous lots, the boundary between which was in dispute. The defendant called a witness, who testified that in 1824 a person, whose title the defendant now had, while in possession of the land now owned by the defendant, purchased of the witness a dwelling-house, to be put upon that lot; and went with him upon the land, and showed him where the house was to be placed, and at the same time pointed out the boundaries of the lot.

Morris, J. permitted the witness, against the objection of the plaintiff, to testify what were the monuments thus pointed out.

The verdict was for the defendant, and the plaintiff alleged exceptions.

E. W. Bond & A. L. Soule, for the plaintiff.

R. A. Chapman, for the defendant.

BIGELOW, J. The admission of the declarations of third persons, not parties to a suit, in relation to boundaries of land, is an exception to the general rule of law which excludes hear say evidence. The limits of this exception, as understood in this commonwealth, were defined and stated with accuracy in *Daggett* v. *Shaw*, 5 Met. 223, and have been since steadfastly adhered to. *Bartlett* v. *Emerson*, 7 Gray, 174. *Ware* v. *Brookhouse*, 7 Gray, 454. The declarations admitted at the trial of this case do not come within the exception. The decisive objection to their competency is, that it does not appear that the person who made them was deceased. For aught that is shown he was still living, and might have been called as a witness to the nature and extent of his own occupation of the premises in dispute. His statements on the subject to third persons were clearly incompetent evidence.

Exceptions sustained

JACOB LOOMIS, Administrator, *vs.* HENRY B. WADHAMS & another.

After a general appearance and answer filed in behalf of two defendants, and one trial had without objection to any defect of service or jurisdiction, a defendant who has personally attended at a second trial cannot object that the court, in fact and by the record, has not acquired jurisdiction of his person.

A bond to give to the obligee "within twenty months from this date a good operative deed to five hundred and twenty five acres of land in T., from any land owned by W. at the time of his decease, except such land as may be sold at this date," *it seems*, contains an implied covenant that that amount of W.'s land remains unsold, and is broken if there is no such land at the date of the bond. And if the obligor owns such land at the date of the bond, it is the obligee's right and duty to select that number of acres in such reasonable time before the expiration of the twenty months as will enable the obligor within that time to prepare a deed of the land selected; but the obligee is not limited to a single tract, provided he does not divide more than one tract; nor required to make his selection in such time as to enable the obligor to repurchase lands sold since the date of the bond, or to free the lands from incumbrances, and upon a failure