JOHN LEISHMAN *vs.* JOSEPH B. WHITE & another.

Eviction of a tenant by his landlord from a part of the premises demised by a written lease for one entire rent, is a bar to any claim for rent under the lease, or for use and occupation of the demised premises.

CONTRACT. The first count was for use and occupation of a tenement hired of the plaintiff by the defendants. The second count was for one quarter's rent of the same tenement. Another count afterwards filed set forth a lease by the plaintiff to the defendants of a hotel in Medford, near Spot Pond, with the lands adjoining, and an island in the pond, for five years, at the yearly rent of two hundred and fifty dollars, payable quarterly. The answer, among other defences, set forth an eviction of the defendants by the lessor from a portion of the premises.

At the trial in the superior court, the defendants offered evidence to prove that the plaintiff had evicted the defendants from a portion of the premises; but *Vose*, J. ruled that such eviction, if proved, would only bar the plaintiff's claim *pro tanto*, and that he might still recover a proportionate share of the rent, according to the ratable value of the portion of the premises from which the defendants were not evicted; and a verdict was accordingly returned for the plaintiff, and the defendants alleged exceptions.

C. M. Ellis, for the defendants.

A. V. Lynde, for the plaintiff.

BIGELOW, C. J. This action cannot be maintained if the defendant proves that he has been evicted from a part of the demised premises by the plaintiff. In such case, no recovery can be had on the covenant to pay rent, because the defendant has been deprived of the beneficial enjoyment of a portion of the estate by the tortious act of the lessor, and the covenant being entire cannot be severed or apportioned so as to allow the plaintiff to recover a part of the rent reserved by the lease. *Shumway* v. *Collins*, 6 Gray, 232.

Nor can an action for use and occupation of the premises be

maintained against the defendant. The lease is not terminated by the unlawful eviction of the lessee. He still continues to occupy that part of the estate from which he has not been evicted, under and by virtue of the demise under seal. No implied promise arises to pay for such occupation and enjoyment. The case therefore stands thus: to the claim on the covenant, the answer is the eviction; to the demand for use and occupation, the answer is that the defendant holds under his lease; so that, in neither aspect of the case, can the plaintiff maintain his action. *Fuller* v. *Ruby*, 10 Gray, .

Verdict set aside.

Betsey Pollard *vs.* Luther F. Pollard.

A widow to whom a legacy is given in lieu of dower is entitled to be paid in full, in case of a deficiency of assets, in preference to legatees who are mere volunteers; and to receive interest thereon from the death of the testator, if he has provided no other means for her support during the first year after his death.

Contract against the executor of the will of Jacob Pollard, to recover a legacy. The following facts were agreed in the superior court.

The will of the late Jacob Pollard was admitted to probate on the 30th of June 1857, in which he appointed the defendant as executor thereof, and directed him to convert all his real estate and personal property into money; and bequeathed to the plaintiff, who was his widow, the sum of $3800 in lieu of dower, or any distributive share in his estate, and on the express condition that she should release all her right and title thereto; and made various other specific bequests. The provisions of the will were accepted by the plaintiff, but the estate proved insufficient to pay all the specific legacies in full.

The case was submitted with the agreement that, if the plaintiff was entitled to receive her legacy in full, judgment should be so entered; but, if she was only entitled to share with the