

**REPORT OF THE CASE OF  
EZRA A. BOURNE VERSUS  
THE CITY OF BOSTON**

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649375776

Report of the case of Ezra A. Bourne versus the city of Boston by William Rogers

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**WILLIAM ROGERS**

**REPORT OF THE CASE OF  
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REPORT

OF THE CASE OF

EZRA A. BOURNE

VERSUS

THE CITY OF BOSTON,

TRIED IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS,

AT DEDHAM, MARCH, 1853.

REPORTED BY

WILLIAM ROGERS,

COUNSELLOR AT LAW.

BOSTON:

1853.

EASTBURN'S PRESS.

#### NOTE.

A report of this case, involving as it does the subject of taxation, and the law of domicile applicable thereto, was thought likely to be of much interest to the public. The reporter attended the trial, and took full minutes; and this report is believed to present an accurate statement of the case. The importance of the practical points decided, both of law and evidence, seemed to render it desirable to make a more minute report of the whole proceedings than is usual.



# SUPREME JUDICIAL COURT.

NORFOLK SS.

FEBRUARY TERM, 1853.

BEFORE HON. B. F. THOMAS, JUSTICE.

EZRA A. BOURNE v. CITY OF BOSTON.

EDWARD D. SOHIER, }  
CHARLES A. WELCH, } *Counsel for the Plaintiff.*

P. W. CHANDLER, *City Solicitor, for the Defendant.*

THIS was an action of contract, brought by Ezra A. Bourne, described as of Newport, in the State of Rhode Island, gentleman, against the City of Boston, wherein the plaintiff alleged that the defendant owed him \$3,571.50, for money received by the defendants to the plaintiff's use. The writ was dated November 29, 1851, and was made returnable to the Court of Common Pleas for the County of Norfolk, on the third Tuesday of February, 1852. The case was removed to the Supreme Judicial Court, upon the defendant's affidavit, in the usual form, April 29, 1852.

The plaintiff's bill of particulars was as follows :



"City of Boston to E. A. Bourne, Dr.

"1st. To amount of taxes upon personal property and poll tax illegally assessed upon him and paid by him under protest, November 29, 1851, by the hand of E. D. Schier, \$3,571.50."

The answer of the city admitted that the said sum had been received by the city, and was paid under protest; but denied that the city owed the plaintiff the same or any part thereof; or that the city received the same or any part thereof to the plaintiff's use; or that the same or any part thereof was paid for taxes illegally assessed to him; and it alleged that the said money was paid by the plaintiff to the defendant for city of Boston and county of Suffolk taxes, legally assessed to him upon his personal property and for his poll tax.

The trial of the case commenced at Dedham, in Norfolk county, on the 2d day of March, 1853.

Mr. WELCH opened the case for the plaintiff. He stated to the jury, that the tax which Mr. Bourne sought to recover back, consisted of three classes; 1st, his poll tax and the tax upon his own personal property; 2d, the tax upon the personal property of his wife, held by him in trust; and 3d, the tax assessed upon him as guardian and trustee for the Miss Thorndikes, the daughters of his wife by her former husband. The taxes upon real estate situated in Boston were, of course, properly assessed in Boston. But in relation to the taxes upon his own personal property and that of his wife, those could only be assessed to him in the town where he was an inhabitant on the first day of May, 1851; and the same rule applied to the tax upon the personal property held by him as guardian of the younger Miss Thorndike. In relation to the personal property held by Mr. Bourne as trustee of the young lady who was of age on the 1st day of May, a still further question arose; and he should maintain that for the portion of the tax assessed thereon, Mr. Bourne was not

legally taxed, wherever his residence might have been. The personal property of a minor under guardianship was, by the Revised Statutes, to be assessed to the guardian, in the town of which he was an inhabitant; but personal property held in trust, for the benefit of a person who was not a married woman or a minor, was to be assessed to the person for whose benefit the property was held in trust, in the place where such person resided. This part of the tax should not have been assessed to Mr. Bourne in any event.

These taxes having been, as the counsel contended, illegally assessed upon Mr. Bourne, he was compelled to pay them, to avoid having his person arrested or his property taken by process of law; and he did pay the same under protest. He now brought this action to recover back the amount. The main question for the jury now to determine would be, was Mr. Bourne an inhabitant of Boston, for the purpose of taxation, on the 1st day of May, 1851. The question where he did reside was of secondary importance. If he was not an inhabitant of Boston, if that was not his legal domicil, he was certainly not taxable in Boston. But if he was an inhabitant of any other place, he could not be an inhabitant of Boston. A person can have but one such residence, at any particular time, as will render him liable to taxation. Our courts have decided that, in a doubtful case upon a question of residence, a mere declaration of an intention to reside in one town rather than in another, will be sufficient to turn the scale. An election to be taxed in one town rather than in another, has the same effect. If a person has a domicil in one place, that domicil continues until he has acquired a domicil in some new place. He should maintain that another place, and not Boston, was the place of Mr. Bourne's residence on the 1st day of May, 1851. This would appear from the facts of the case, which he would briefly state.

In 1847, and for many years previous, Mr. Bourne resided in Boston, in the house of his wife in Pemberton Square, the year round, except for a portion of the year, which he spent in a visit to his farm on the Eastern shore of Maryland. In

1848, he moved to Brookline in this county, in the latter part of April, and remained until November of the same year. When he removed, he gave notice to the assessors of Boston and of Brookline, that he had changed his place of residence from the former to the latter place. He was taxed in Brookline that year, and paid his tax; and he was not taxed in Boston. In 1849, he again went to Brookline in April, and returned in October or November; was taxed and paid his tax in Brookline, and was not taxed in Boston. In 1849, he hired a house in Newport, on a lease of five years. In April, 1850, he removed to Newport, in the State of Rhode Island, and notified the assessors of Newport. He was taxed that year in Newport, paid his taxes there, and was not taxed in Boston. He returned to Boston in the fall. During his absence, he left his house in Boston under the charge of his domestics. He left orders with his trades-people to supply his domestics with provisions and groceries. He had property invested in Boston, and he did not change his investments when he removed. In April, 1851, he again removed to Newport. His daughter-in-law, Mrs. Rice, came on from Maryland, where she resided, to Boston, in the spring of 1851, and Mr. Bourne gave her the use of his house while she was here. She was about to be confined, and was anxious to be under the care of Dr. Warren, who had always been the family physician. Mr. Bourne left his carriage in Boston, and allowed Mrs. Rice to make use of it when she wished to ride out, and did everything in his power to make her comfortable. He and Mrs. Bourne then paid their usual spring visit to their farm on the Eastern shore of Maryland. Mrs. Bourne returned first, and was with her daughter during the most dangerous period of her illness. Mr. Bourne afterwards came on from Maryland, and resided at Newport, where Mrs. Rice and the rest of the family joined him when she had sufficiently recovered, and they spent the summer there. He was taxed that year in Newport, and paid his taxes there.

Mr. WELCH then put into the case what were supposed to