

*Fling*, for defendant.

*Pike & Barnard*, for plaintiff.

BARTLETT, J. The affidavit of Spaulding tends to show conduct of the jury that was in most gross violation of their duty; and, although the testimony of the jurors in exculpation of themselves would have been competent, *Tenney v. Evans*, 13 N. H. 464, yet no attempt has been made to deny or explain the statements in the affidavit. The facts stated by Spaulding, unexplained as they are, warrant us in concluding that the jury agreed to fix the damages by each marking a sum and then dividing the aggregate of the highest and the lowest sums marked by two for their verdict; that this was done and the sum of \$5.21 thus obtained was, according to the arrangement and without any further deliberation, set down and returned as the damages. However much we may be surprised at the circumstances under which these facts come before us, and however manifest may be the impropriety of the officer's presence in the jury-room during the deliberations of the jury, yet, as the facts are in evidence, we cannot disregard them because of the circumstances under which they have been shown in this case, *State v. Flynn*, 36 N. H. 70, and a verdict thus made up cannot be sustained. *Dorr v. Fenno*, 12 Pick. 527; *Harvey v. Rickett*, 15 Johns. 87; *Smith v. Cheatham*, 3 Caines, 57; *Tyler v. Stevens*, 4 N. H. 116. As the verdict must be set aside, it is unnecessary to inquire whether the defendant's objection on account of the mode in which the jury arrived at their verdict in his favor on another part of the case, is open to him. It, however, seems to us proper to remark, that, in finally determining the question upon that branch of the case, the jury seem to have acted in utter disregard of the obligations of their oaths. The verdict must be set aside and a new trial granted.

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### CUSHMAN v. WOOSTER.

The requisition of our statute, that, in taking depositions, when the adverse party does not attend, a copy of the notice left with him, &c., shall be annexed to the certificate of the taking thereof, is intended to be peremptory.

Hence when such notice, instead of being annexed to the certificate, was folded up with it, and both enclosed with the deposition, in an envelope properly directed to the court—*held* that the evidence of notice was insufficient and the deposition must be rejected.

When it appeared that the magistrate who took a deposition, not being a ready penman, called in a third person, who was indifferent, who wrote the answers of the witness, the magistrate being present and supervising,—*held* that the deposition might answer the requirements of the statute; but that such a practice might be liable to abuse, and should not be encouraged.

Where the submission to a referee is general, yet if he state in his report what questions of law arose before him, and his ruling upon them, and refer these matters to the court for revision, and it is found that he mistook the law, his report will be set aside.

It appeared that Parker Cushman on one side and John Wooster and Theodore Wooster upon the other, had a controversy, that there was a civil suit and a prosecution for assault and battery on each side, and that the parties entered into an agreement in writing to submit all these matters and all costs in all suits and prosecutions to the determination of Hon. Abel Underwood. They agreed upon a time and place of hearing, and that the report of said referee be made as soon as may be to the Supreme Judicial Court, &c., and that judgment entered thereon should be final.

Said referee reported to said court, that he had heard the parties, and dismissed the complaints on each side, allowing no costs to either; that the civil suit, *John Wooster v. Parker Cushman*, be discontinued without costs, and that said Cushman, in his suit against both the Woosters, receive damages in the sum of \$65.00, with costs of reference, &c.

The referee further reports as follows :

"Upon the hearing of said matters in controversy (which were embraced in said two suits), said Cushman's counsel offered in evidence the two depositions, herewith returned, of T. B. Dyke and Emily J. Dyke, to which said Wooster's counsel objected, for reasons assigned in his exceptions hereto annexed. It appeared the magistrate who took the depositions, not being a ready penman, called in a third person to write the answers of the witnesses, being an indifferent person, who did write them, the magistrate being present, supervising.

As to notice to the adverse party, it appeared that the copy of notice was not annexed to the certificate of taking by any adhesive matter, but the caption, copy of notice, and depositions were folded together, and returned by the magistrate in the sealed yellow envelope herewith returned. Said caption, copy and depositions are annexed. The referee overruled said objections, and received the depositions."

To the admission of the depositions of Taylor B. Dyke and Emily J. Dyke, the defendants excepted in the following words :

"1st. That it was admitted by the counsel who attended the caption on the part of the said Cushman that the answers were not written by the magistrate who purported to have taken the depositions."

"2nd. It does not appear by the caption how the adverse party was notified; it does not refer to any notice, and no notice is annexed, and the adverse party was not present."

Annexed to the report was the following affidavit, duly subscribed and sworn to :

"I, A. Underwood, depose and say that I was referee in case of *Parker Cushman v. John Wooster and Theodore Wooster*, and made my report, returnable to the March Term of the Supreme Judicial Court, Grafton County, N. H. 1864. I decided the case upon the facts by me

reported, according to law, as I understood it, and presented the facts in my report, with my ruling thereon, under the expectation that the court would review the questions there decided, and sustain or set aside the report, as they might consider the questions of law decided by me right or wrong.

I further say, the questions of law, decided by me, were presented and argued by counsel before me, and decided by me at the hearing, according to my best judgment of the law."

Other questions as to the admissibility of testimony were raised, which are not important to be considered. The questions thus arising were reserved for the consideration of the whole court.

*H. & G. A. Bingham*, for Cushman.

*Farr*, for Woosters.

SARGENT, J. There was no literal compliance with the provisions of the statute in regard to the notice. The magistrate is required to certify in the caption that the adverse party was or was not notified, was or was not present, &c. ; and when the adverse party does not attend it is provided that "a copy of the notice left with the adverse party, his agent or attorney, with the return of the officer or affidavit of the person leaving such notice thereon, stating the time of leaving the same, shall be annexed to the certificate of the taking thereof." Rev. Stats. chap. 188, sec. 21 ; Comp. Stats. 486.

This provision is peremptory, and we may as well dispense with any other provision of the statute in regard to the taking of the depositions, as with this which requires a copy of the notice to be *annexed* to the certificate. If it is an unimportant provision, the statute which requires it should be modified. But we consider it by no means an unimportant provision, but think that the statute has wisely made this requirement and that it must be observed. If this requirement were relaxed, there would be no limit beyond which we might not be required to go in admitting proof that such notice was properly served. Upon this point the ruling of the referee was erroneous.

Our statute authorizes justices of the peace and notaries public in this State, to take depositions. Rev. Stats. chap. 188, sec. 14 ; Comp. Stats. 486. There is no provision in the statute or in any rule of court on that subject that has any reference to the manner in which this shall be done, only that the questions shall be written by the magistrate or counsel and read to the witness by the magistrate, who shall write the answers thereto without the interference of either party.

But the case finds that the person called in to write the answers in this case, was an indifferent person who wrote the answers of the witnesses, the magistrate being present, supervising. Was that a compliance with the provisions of the statute and of the rule of court?

It is stated in *Kidder v. Prescott*, 24 N. H. 267, as a well settled principle, "that an act done by one in the presence and under the control

of another, for that other, is regarded not as the exercise of a delegated authority, but as the personal act of the party in whose behalf it was performed." This is recognized in *The People v. Smith*, 20 Johns. 62; 2 Greenl. Evi. 295; *Rex v. Longnor*, 4 B. & Ad. 647.

Therefore, if the signature of the obligor's name is made upon a deed or obligation by a stranger in his presence and at his request it is a sufficient signing. And so it was held that a writ, which the statute requires to be signed by a justice of the peace, cannot be properly signed by another for him even though expressly authorized to sign writs generally, or even to sign that particular writ in question, unless it is so signed in the presence and by the direction of the magistrate. But when thus signed in his presence and by his direction it would be a good signing by the magistrate.

So it might be, if the magistrate were present all the time, superintending and controlling the caption of a deposition, deciding all questions that required the exercise of any discretion, he might have a clerk to do just the manual labor of writing down the answers to the questions as read to the witness, or who should read the questions to the witness by the magistrate's direction and in his presence, and if any question arose as to what the witness said, the magistrate deciding that question and directing his clerk what to write, and have the deposition so taken as to meet the requirements of the law.

But such a practice would be attended with inconvenience, and would be liable to great abuse, could not often be necessary, and should not be encouraged.

But we are asked to sustain the award in this case on the ground that the submission is general, and because in such cases the referee has authority to decide all questions of law and of fact, and that when he thus decides upon questions that are raised and discussed before him, his decision is final and conclusive, and we are referred by plaintiff's counsel to *White Mountains Railroad v. Beane*, 39 N. H. 107, as an authority.

There is no doubt but that this is good authority, but it does not apply to the case before us. Where the submission is general, and the referee undertakes to decide all matters of law and of fact without saving any exceptions or referring any question to the court for their revision, then, though the referee may have made a mistake either of law or of fact, if it was a question which was discussed before him and considered by him, and one which he deliberately undertook to decide, his decision will be final. *Bean v. Wendell*, 22 N. H. 582.

But this is not in conflict with the well settled doctrine, that, if the referees intending to decide according to law, mistake the law and refer the same to the court for revision, by an express reference, or impliedly, by stating specially the principles upon which they have acted, the award will be set aside, not for want of authority in the referees to decide against law, but for the reason that the award is not such as the referee intended to make. *Johnson v. Noble*, 13 N. H. 286, and cases cited; *Severance v. Hilton*, 32 N. H. 289.

In the case before us, notwithstanding the question was discussed, the

referee did not undertake to decide it conclusively, settling both the law and the fact, as he might have done; but, in the affidavit annexed to the report, he expressly refers the whole matter to the court, and says that he presents the facts in his report and his ruling thereon, "expecting that the court would review the questions there decided, and sustain or set aside the report as they might consider the questions of law decided by me right or wrong." A plainer case could not well be stated.

The award is therefore set aside.

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RICHEY v. COOPER.

When the defendant confesses the plaintiff's action, or part thereof, he is not required to specify the particular items in the plaintiff's specification to which his confession is to be applied.

Defendant confessed the plaintiff's action and that plaintiff was entitled to recover a certain amount of debt or damages, and pleaded an off-set to the residue of plaintiff's claim. Plaintiff recovered more upon his specification than the sum confessed, but not so much as the amount confessed together with the amount allowed the defendant on his off-set: *Held* that defendant was entitled to his costs from the time of the confession.

ASSUMPSIT. Plaintiff's specification contained a promissory note for \$48.60, and an account of \$115.00, composed of some six items; and also contained a credit of four items, amounting to \$35.00. At the first term the defendant filed a confession that "plaintiff is entitled to recover damages upon the causes of action in the plaintiff's specification mentioned, the amount of one hundred and thirteen dollars, and no more." He also filed a set-off of \$9.00, which he claimed to have allowed him over and above the credits in the plaintiff's specification.

The action was referred to an auditor, who reported as due the plaintiff on note, including interest to date of confession, the sum of

	\$53.12
And upon plaintiff's account with interest to same time	95.74
Making in all,	\$148.86

He allowed the defendant, upon the credits given him in the plaintiff's specification, and upon his off-set, including interest to date of confession, the sum of

	\$39.48
Leaving the balance due the plaintiff at date of confession,	\$109.38

The amount allowed on the plaintiff's specification, deducting the credits he gave, was larger by some \$4.00 than the sum confessed, but enough was allowed upon the defendant's off-set to reduce the whole balance allowed the plaintiff to some \$3.00 less than the amount confessed.