

Whether or not the plaintiff might have a partial remedy by means of a real action against Swan, there is abundant matter in the case for the proper consideration of a court of equity. The jurisdiction of a court of equity to remove a cloud from the title to real estate has been long established. *Downing v. Wherrin*, 19 N. H. 9, 92; *Brooks v. Howland*, 58 N. H. 98.

There is no reason why Mrs. Stowe should be made a party to these proceedings. Her interests will not be affected by any decree that may be made.

The demurrer is overruled, and the

Case discharged.

BINGHAM, J., did not sit.

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69	477

LYMAN v. THE BOSTON & MAINE RAILROAD.

A tenant in common, without joining his co-tenant in the action, may recover of a purchaser the price of his undivided part of the common property.

The declarations of an agent authorized to purchase property, made by him while acting as agent of the vendee in negotiations for a settlement with the vendor, are regarded as connected with and as forming a part of the business of his agency, and will bind his principal.

ASSUMPSIT, for the price of 284 cords of wood sold and delivered. The plaintiff and one Nutter owning, as tenants in common, the wood on a certain wood lot, the plaintiff sold to the defendants his portion. The whole quantity was cut, and drawn to one of the defendants' depots, where the greater part of it was divided. The defendants took away all they had purchased of the plaintiff, being 254 cords, and also about 30 cords which had not been divided, supposing that it all belonged to the plaintiff and was included within their purchase. None of the wood belonging to Nutter was sold, by him or by the plaintiff, to the defendants, and they did not understand that they were purchasing any undivided interest in the wood. The defendants requested the court to instruct the jury that the plaintiff could not recover for any portion of the undivided wood. The court denied this request, and instructed the jury that the plaintiff might recover for his undivided half of the 30 cords, and that Nutter need not be joined in the suit. The defendants excepted.

The plaintiff introduced evidence tending to show that one Perkins was the fuel agent of the defendants, and as such had the charge of purchasing the fuel for them; and, subject to the defendants' exception, the plaintiff was permitted to introduce a letter, written by Perkins, in relation to the wood in suit, some time after its purchase, and

also to put in evidence a conversation between him and Perkins, in relation to the amount of wood taken by the defendants, and where it was located, which conversation was some time after the purchase. The letter was written and the conversation had during negotiations for an adjustment of the account for the wood embraced in this suit; and the plaintiff contended, and the evidence tended to show, that in the letter and in conversation Perkins admitted certain facts material to the plaintiff's case. There was no evidence of the authority of Perkins to make any admissions in behalf of the defendants, except the fact that he was fuel agent.

The jury returned a verdict for the plaintiff, including in their assessment of damages the price of the plaintiff's undivided half of the excess above 254 cords.

Wiggin & Fernald, for the plaintiff.

A. R. Hatch and John Hatch, for the defendants.

FOSTER, J. The plaintiff contracted with the defendants for the sale of his own property in all the wood upon a certain lot of land; and for all the property and interest of the plaintiff thus acquired by the defendants, they are liable under the contract. They purchased the plaintiff's half, as well that which was undivided as that which had been separated, at an agreed price by the cord, for the quantity, when ascertained.

A tenant in common may convey title, by sale, to so much of the common property as he owns. Without the authority of his co-tenant he can sell no more.

Nutter did not sell his undivided half to the defendants, and need not be joined as plaintiff. By the defendants' purchase of the plaintiff's undivided half, they became liable to him alone for the price of that half (*White v. Brooks*, 43 N. H. 402, 407), although they supposed they bought the whole of him.

The letter and statements of Perkins were declarations made by him while acting as agent of the defendants in negotiations for a settlement with the plaintiff.

"The ground upon which the acts or declarations of an agent are admitted in evidence to bind his principal is, that the agent has, directly or by reasonable implication from the nature of the business he is charged with, the instructions of his principal to perform those acts or to make those declarations; that they form a part of the business he is employed to transact:—as, where an agent is employed to settle with laborers, his admission that a sum is due to one of them is evidence against his principal that such is the fact. 2 Stark. Ev. 57. Such an admission results fairly from the exigencies of the business the agent is employed to transact, and is clearly a part of it, and, to every intent, the act of the principal himself." *Batchelder v. Emery*

20 N. H. 165, 166; *Glidden v. Unity*, 33 N. H. 571, 578, 579; *Morse v. Conn. R. R. Co.*, 6 Gray 450; Story on Agency, s. 138.

Judgment on the verdict.

STANLEY, J. did not sit.

58 386
68 451

HITCHINS & a. v. PETTINGILL & a.

When reformation is sought of a deed, which, through fraud or mistake, conveys less land than was orally bought and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed.

IN EQUITY. The plaintiffs asked for the reformation of a deed. Facts found by the court: The plaintiffs, by oral agreement, bought a farm of the defendants for \$2,500, paid the price, and took the deed of which they seek reformation. A part of the farm containing ten acres, included in the bargain and paid for, was, by the fraud of the defendants, omitted in the deed. After receiving the deed, the plaintiffs moved into the farm buildings which were on the land described in the deed, occupied that land, and made valuable improvements upon it, but made no improvements upon, and did not take possession of, the ten acres. The defendants continued in possession of that lot, and paid the taxes on it.

Wiggin & Fernald and *Hobbs*, for the plaintiffs.

Bartlett, for the defendants.

The only written evidence of the contract to convey was the deed of which the plaintiffs seek reformation. The court permitted the plaintiffs to introduce parol evidence of a verbal contract made prior to the deed, for the sale of all the lands described in the bill. This was error, because it was in conflict with the statute which says, "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized by writing." *Gen. Stat., c. 201, s. 12*. The contract having been reduced to writing, verbal evidence of the prior conversations in regard to the same ought not to have been admitted, especially when the case finds that the evidence upon