

plied the law. *Cummings v. Centre Harbor*, 57 N. H. 17. The referee finds that the articles were used as the parties intended at the time of the sale, and that they have become a part of the house, so that the statutory lien attaches. In this we discover no error.

*Judgment on the report.*

DOE, C. J., did not sit: the others concurred.

MCINTIRE v. EVANS.

When a chattel is purchased by one of two persons, the buyer holds the title against those claiming under the other, although the vendor supposed he was selling to the latter.

REPLEVIN, for four oxen. The plaintiff claimed that he purchased the oxen of one Rogers, and let one Callahan take them. The defendant claimed that he bought them of Callahan. Subject to the plaintiff's exception, the court instructed the jury that if Rogers understood he was selling to Callahan, the plaintiff could not recover.

*Ray, Drew & Jordan*, for the plaintiff.

*Twitchell & Evans* and *Ladd & Fletcher*, for the defendant.

BINGHAM, J. If the plaintiff acquired a title from Rogers, he can recover, even though Rogers did not know he was the purchaser. If Callahan purchased the oxen as agent, the title vested in the plaintiff, although Callahan did not disclose his agency, and Rogers supposed he bought them for himself.

*Verdict set aside.*

STANLEY, J., did not sit: the others concurred.

DODGE v. CARROLL.

Motive may be shown, when material.

Admission of testimony not rebutting is within the discretion of the judge at the trial term, which will not be revised unless specially reserved.

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Testimony of jurors as to what happened in the jury-room is admissible to sustain a verdict, but not to impeach it.

A verdict may be sustained, although the damages were first computed as the average judgment of the jury, if afterwards they fairly agreed on the amount.

CASE, for damages from defective highway. The plaintiff's evidence tended to show that the wheel of his wagon struck a stone in the highway, the defect complained of, and he was thrown out and injured. The defendants' evidence tended to show that he jumped out. It appeared, on cross-examination of Pennock, the defendants' witness, that, at the request of the plaintiff, he had made a statement somewhat different from his testimony. The plaintiff was permitted to testify, subject to exception, that he caused the statement to be taken because he had heard that citizens of Carroll said he jumped out. Congdon, the plaintiff's witness in rebuttal, was permitted to testify, subject to exception, that the plaintiff was thrown out.

Having decided for the plaintiff, the jury ascertained the average judgment of the panel as to the amount of damages, and that amount, slightly changed, they afterwards agreed to. The defendants moved to set aside the verdict. The court ruled that testimony of jurors might be received to sustain the verdict, but not to set it aside, and the defendants excepted.

*Ray, Drew & Jordan*, for the defendants.

*Ladd & Fletcher*, for the plaintiff. It might be argued that taking a statement to disprove an anticipated defence showed that the plaintiff knew the defence to be true. It was proper to show his motive. Congdon's evidence was rebutting. In putting in his case, the plaintiff was not bound to anticipate defences. As to the conduct of the jury, see *Dana v. Tucker*, 4 Johns. 487; *Grinnell v. Phillips*, 1 Mass. 541; *Shobe v. Bell*, 1 Rand. (Va.) 39; *Cowperthwaite v. Jones*, 2 Dall. (Pa.) 55; Proff. Jury Trial, s. 407; *Thompson v. Com.*, 8 Gratt. 637; *Crabtree v. State*, 3 Sneed (Tenn.) 302.

BINGHAM, J. It was competent for the plaintiff to explain why he took Pennock's statement. The motive of an act may be shown when it is in question. *Carter v. Beals*, 44 N. H. 408. The admission of Congdon's testimony was within the discretion of the judge at the trial term, which will not be revised unless specially reserved. *York v. Pease*, 2 Gray 282; 1 Gr. Ev., ss. 74, 431.

The affidavits of jurors are admissible to sustain a verdict, but not to impeach it. *State v. Ayer*, 23 N. H. 301, 321; *Tenney v. Evans*, 13 N. H. 362, 465; *Leighton v. Sargent*, 31 N. H. 119. The final

agreement of the jury on the question of damages having been apparently fair, the verdict is not invalidated by the preliminary ascertainment of their average judgment. *Grinnell v. Phillips*, 1 Mass. 530, 542.

*Judgment on the verdict.*

STANLEY, J., did not sit: the others concurred.

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PASSUMPSIC SAVINGS-BANK v. WEEKS and WILLIAMS.

The defendant Williams held mortgages from B. and H., each of an undivided half of real estate, to secure the note of each. B. and H. by one deed conveyed the whole estate to M., who gave them a mortgage of the whole to secure his separate note to each for his share of the purchase-money unpaid. B. and H. each transferred by indorsement to Williams his note from M., and Williams in exchange gave up to them respectively their notes, and discharged the mortgages held by him against them. The plaintiffs hold the note transferred by B. to Williams, and the defendant Weeks the note transferred by H. to Williams. On a bill to equitably apply the proceeds of M.'s mortgage to Williams, the plaintiffs are entitled to priority in payment to the extent of one half the proceeds.

BILL IN EQUITY, for priority in the proceeds of a mortgage given to secure two notes, one held by the plaintiffs and one by the defendant. The facts are stated in the opinion.

*Ray, Drew & Jordan*, for the plaintiffs.

*W. & H. Heywood and Ladd & Fletcher*, for the defendants.

ALLEN, J. The plaintiffs have a note of \$1,375 given by Morrill to Bullard, and by him transferred to the defendant Williams, from whom it passed through others to the plaintiffs. The defendant Weeks has a note of \$2,600 given by Morrill to Hovey, and by him transferred to Williams, who has pledged it to Weeks as collateral security. Both notes are secured by the same mortgage from Morrill to Bullard and Hovey. The mortgage has been foreclosed, and the property, not being sufficient to pay both notes, is to be sold, and the proceeds applied according to the rights of the parties under the mortgage. The plaintiffs claim precedence to the extent of one half the property; Weeks claims a proportionate division of the proceeds between the notes.