

bring the suit at law, either on account of the subscription, or because the defendant had recognized his authority in the first suit and had not revoked it in the second. It was a question of fact whether the expenses of the lawsuit were incurred by the plaintiff, with a fair and reasonable dependence upon the subscription of the defendant and others; and the referee has found that the reliance upon the subscription was an unreasonable one. The plaintiff can recover nothing beyond the amount confessed.

The testimony of the defendant and of other witnesses, that they signed the subscription paper at the request of the plaintiff, that he promised to see them before suit should be brought, spoke of the case as his own, about the time of trial, and giving other evidence of the plaintiff's sole interest in and management of the case, was competent upon the question of the plaintiff's acting in good faith upon the strength of the subscription and upon the question of his authority to bring the suit at law. The exceptions are overruled, and there is judgment on the report for the amount confessed, with costs to the plaintiff to the time of confession, and subsequent costs to the defendant.

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

GOODWIN *v.* SCOTT.

61 112
66 546

61 112
70 150
70 250

61 112
71 509

In a case tried by a referee, the qualification of a witness to give his opinion of the value of property is a question of fact to be determined at the trial.

CASE, for kindling a fire at an improper time, whereby the plaintiff's sugar-place was damaged. The cause was heard by referees, who found the defendant guilty, and assessed the plaintiff's damages. The following testimony was admitted, subject to the defendant's exception:

Richard Lane testified: "I owned the Goodwin lot fifteen years ago. At that time I was over pretty much the whole of the lot: there were maple-trees upon it. The growth was rock-maple, beech, and spruce on the high ground, and a small growth of soft wood on the low land. I was on the lot the last of February or first of March last, so I could see most of the burnt district. Most of the hard-wood land was burned over. I can't tell what proportion of the standing trees was burned, but there was a pretty heavy growth when I saw it, and there was a large lot taken off. The growth on the burnt piece was pretty heavy—a good deal more hard wood than spruce. From my knowledge of the sale of other

wild land in the town of Whitesfield, I think the value of this lot, as I saw it after the fire, was \$300."

Wm. F. Dodge testified: "I did not notice whether most of the trees were killed. I should have considered the trees valuable if I had owned them. I got some wood and dry plank that were valuable."

The plaintiff testified: "The distance from the lot to my farm is one mile and a half round the road—one half mile across. I have no other sugar-lot. I have a small piece of wood-land that will cut about twenty-five cords."

The referees reported that they made personal examination upon the lot, and that the above testimony had no influence upon them in their assessment of damages. The court ordered judgment upon the report, and the defendant excepted.

Ladd & Fletcher, for the defendant. The fact that the plaintiff had or had not any other wood- or sugar-lot was not a proper element which the referees should consider in making up their award of damages. The action was case, founded on the defendant's negligence, and not on his wilful misconduct. This evidence was not only admitted but argued to the referees by the plaintiff's counsel, he claiming that for the reason that the plaintiff had no other sugar- or wood-lot, the damages should be enhanced from what they would otherwise be. If we look at the reason of the thing, the absurdity and injustice of such a rule is at once apparent. Scott, not exercising quite so much care as he ought under all the circumstances in kindling the fire, did an unintentional injury to Goodwin's only sugar- and wood-lot. Scott must pay \$137.50 damages to Goodwin as compensation for the damage done, because Goodwin had no other sugar- and wood-lot. If Goodwin had had another sugar- and wood-lot the damage would have been only \$50. This is not the legal rule of damages in such cases. The rule is, that the defendant should pay the plaintiff the actual damage done to his property;—nothing more, nothing less. The damages are compensation for the injury done, and are to be governed by the rules well established in the law, and founded on sound sense and equity. It is the amount which the lot is diminished by the act of the defendant. *McGuire v. Grant*, 25 N. J. Law 356; *Wood Mayne Dam.*, s. 569.

Such a rule as the plaintiff's counsel contended for would be varying, uncertain, and illogical. It was legal error to admit such testimony, and it is the duty of the court to correct the error. Nor is the matter winked out of sight by the referees' going outside of their duties and reporting what we submit they had no business to report, that this evidence had no influence upon their minds. The defendant stands on his legal rights; and he has a right to insist that when testimony of such a character is improperly admitted and he is cast in the suit, the court should revise

the ruling of the referees, and give him the benefit of an important exception upon a vital point in the case seasonably taken to evidence clearly inadmissible, and which, from the result of the suit, he has a right to presume improperly influenced the referees and exaggerated the damages given the plaintiff.

In regard to the testimony of Richard Lane, we say two tenable exceptions are apparent: (1) The witness was not qualified to judge of the value of the property. G. L., c. 228, s. 23. (2) From his own testimony it appears that he had not been over the lot for fifteen years, but was on it in February, 1880, so as to see most of the burned piece. It is therefore entirely apparent that the witness had not sufficient knowledge to judge of its value. His knowledge of the lot was at a remote date; and when he was on it in February, 1880, he only saw most of the burnt piece. It was therefore clearly wrong to allow him to testify as to the value of the lot after the fire. His testimony as to the value of the lot was on a material point in the case, and one of the elements which entered into the judgment of the referees in making up their minds as to the amount of the plaintiff's damage; and the fact that they had a view of the premises has nothing to do with the question, for the point was, What was the lot diminished in value as real estate in the town of Whitefield by the defendant's act? A knowledge of sales of real estate in Whitefield was essential, and a view could not give such knowledge.

B. F. Whidden, for the plaintiff. A perfect answer to the defendant's exceptions is found in the report. The referees made personal examination upon the lot, and the testimony excepted to had no influence upon them in their assessment of damages. *Eastman v. Amoskeag Co.*, 44 N. H. 143; *Deerfield v. Northwood*, 10 N. H. 269; *Hamblett v. Hamblett*, 6 N. H. 334.

SMITH, J. Opinions of witnesses as to value may be received as evidence thereof when it appears to the court that they are qualified to judge of such value. G. L., c. 228, s. 23. Whether a witness is qualified to judge of the value of property in litigation, is a question of fact to be determined at the trial. *Jones v. Tucker*, 41 N. H. 546; *Taylor v. Ins. Co.*, 51 N. H. 50. The question is one that can be most conveniently and satisfactorily determined at the trial, upon personal examination of the witness, and generally can be determined in no other way. *Dole v. Johnson*, 50 N. H. 452, 459. Upon an appeal from the assessment of a tax, the question whether a witness is qualified to testify as to value is determined by the commissioners to whom the appeal is referred. For the same reasons the question is determined by referees in trials before them.

It is an answer to the defendant's exceptions, however, that the evidence excepted to was ruled out and disregarded by the ref-

erees. When evidence is ruled out in jury trials, the jury are instructed to disregard it. In such cases its admission furnishes no ground for a new trial, unless there is reason to believe that the evidence improperly influenced the verdict. *Deerfield v. Northwood*, 10 N. H. 269; *Hamblett v. Hamblett*, 6 N. H. 334; *Eastman v. Amoskeag Co.*, 44 N. H. 143; *Judge of Probate v. Stone*, 44 N. H. 593, 607; *Zollar v. Janvrin*, 47 N. H. 324, 326; *Burnham v. Butler*, 58 N. H. 568. It was not found as a fact, at the trial term, that injustice was done by the evidence admitted by the referees, and it is not necessary to inquire whether the evidence was competent.

Exceptions overruled.

All concurred.

GOULD v. BLODGETT.

If an agent, for the sale of a chattel, delivers it to his creditor in payment of his own preëxisting debt, the owner may maintain trover against the creditor without a previous demand.

The unauthorized delivery of the property by the agent to his creditor in payment of his own debt is not a sale; and bringing an action of assumpsit against the creditor for the value of the property by the owner is not a ratification of the unauthorized delivery, nor a conclusive election of remedy.

Bringing an action of assumpsit in such a case is a misconception of the remedy, and not an election of remedies such as will bar a subsequent action.

A ratification of an unauthorized act of an agent, to be binding upon the principal, must be made or founded upon a knowledge of all the material facts and circumstances affecting the interests of the principal.

ASSUMPSIT, for the price of a horse-rake. The plaintiff asked leave to amend, by filing a count in trover for the rake. Facts found by a referee. The plaintiff was agent of Stoddard & Co., of Dayton, Ohio, for the sale of rakes, which were billed to him at \$24 each, at Boston, to be sold by him at such prices as he could get above cost; and all rakes were to remain the property of Stoddard & Co. until paid for by the plaintiff, in cash or guaranteed notes; and all notes and accounts for the sale of the rakes were to be the property of Stoddard & Co. until paid. In June, 1879, the plaintiff made one Quimby his agent to sell rakes, under a verbal contract that he should have one half of what the rakes sold for above what they cost the plaintiff, and should not sell for less than \$30 each; and might sell on credit, taking good notes running to Stoddard & Co., which were to be turned over to the plaintiff

61	115
70	88
70	525
61	115
71	252
71	505
61	115
72	431
72	468