

were bound to litigate and bring to a decision, as an incident to or essentially connected with the subject-matter of litigation, and every matter coming within the legitimate province of the original action, both in respect of claim and defence." *Ib.* 411, and authorities cited. It was a judgment final and conclusive until vacated or reversed for error. The record shows no error. If the alleged fact of the enlargement of the canal in 1833, or thereabouts, would, if proved, have the effect of changing the result and modifying the decree, it can only be shown upon a new trial of the case upon that point, granted on motion or petition, by reason of injustice done through accident, mistake, or misfortune. Whatever might be the result of such an application, justice does not require that the case should now be opened for the purpose of giving the defendants an opportunity to litigate a matter which they ought to have known and by reasonable diligence might have known, and one which they had ample opportunity to prove. *Railroad v. Railroad, supra*; *Crafts v. Insurance Co.*, 36 N. H. 44; *Handy v. Davis*, 38 N. H. 411; *Heath v. Marshall*, 46 N. H. 40.

*Motion denied.*

SMITH and CARPENTER, JJ., did not sit: the others concurred.

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WHITNEY v. KENDALL.

One tenant in common of land holding his share under a deed from his co-tenant is not barred from having partition by a condition in the deed that the grantee shall not dispose of the premises, or permit them to be occupied by any person but himself, during the life of the grantor.

PETITION for partition. The plaintiff claims title to one undivided half of the premises, by virtue of a deed from the defendant to her, which contains a condition as follows:

"The condition of this deed is that the said grantee, during the lifetime of the said grantor, shall not sell, lease or otherwise alienate or dispose of the above described premises or permit the same to be occupied or held by any other person or party than herself and said grantor without his license or permission which must be given by deed to an authorization within the meaning of this condition."

The defendant claims that under this condition the plaintiff is not entitled to partition.

*Bingham, Aldrich & Remick*, for the plaintiff.

*Bingham, Mitchells & Batchellor*, for the defendant.

SMITH, J. The condition will cease at the defendant's death. Its object is to secure some protection during his lifetime. He reserved the right of excluding everybody but the plaintiff from occupation. The deed shows no purpose of prohibiting anything except the admission of any other person than the plaintiff to the use, possession, or control of the land. After partition, the condition will be as effective as before. *Sawyer v. Sawyer*, 61 N. H. —. It will still protect the defendant as much as it does now against the presence of any other occupant than the plaintiff. He will still have, as he now has, the right of alienating his own, and of introducing occupants and neighbors disagreeable to her; while her disability to introduce occupants and neighbors disagreeable to him will continue. The condition is wholly negative. It does not require her to occupy the land, or any part of it. She can withdraw from actual possession without any loss of title or right of possession. His right of excluding others from the occupation and control of the land is the only right he reserved. The extent of that right, and the operation of the condition in that direction, are questions not raised by this petition. His reserved right of excluding others from use, possession, and control, whatever that right may be, will not be affected by partition.

*Case discharged.*

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

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SCHOOL-DISTRICT v. CARR & a.

It is not the duty or right of selectmen to inquire into the legality of the vote of a school-district to raise money; but when such vote is certified to them by the district clerk, they should assess the tax, and a *mandamus* lies to enforce performance of that duty.

PETITION, by school-district No. 6, in Orford, for a *mandamus* to compel the defendants, who are selectmen of Orford, to assess certain taxes in accordance with votes of the district to raise money, passed at meetings held June 4, 1881, January 14, 1882, and January 27, 1883, which votes were duly certified by the clerk of the district to the selectmen. The defendants claimed, and offered evidence tending to show, that said votes were all illegal. The evidence was excluded, and the defendants excepted.

*Shirley & Stone*, for the defendants. In *Rogers v. Bowen*, 42 N. H. 108, the court say,—“It is the duty of selectmen, before making an assessment, to ascertain whether or not the proceedings of the meeting at which the tax was voted were regular and legal;