

Neither the plaintiff nor any of the assenting creditors knew of these mortgages when they assented to the assignment. The court found that the property was not subject to either of them and Woodsome excepted. Transferred from the January term, 1917, of the superior court by *Sawyer, J.*

*Eastman, Scammon & Gardner*, for the plaintiff.

*Mathews & Stevens*, for the defendant.

YOUNG, J. It can serve no useful purpose to consider what Woodsome's rights would have been if the plaintiff had taken the property with knowledge of his claims or if he were not a purchaser for value, for the court has found that neither the plaintiff nor any of the assenting creditors knew of these mortgages on February 21, 1914; and at that time the plaintiff was a purchaser for value. *Kenefick v. Perry*, 61 N. H. 362. Woodsome's mortgages, therefore, are invalid in so far as the plaintiff is concerned (P. S., c. 140, s. 12) for the possession of the property was not delivered to and retained by him, and he failed to comply with the provisions of s. 2 in respect to recording his mortgages.

*Exception overruled.*

All concurred.

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Hillsborough, }  
Nov. 6, 1917. }

DESIRE C. LABONTÉ & a v. WILLIAM LACASSE.

WILLIAM LACASSE v. DESIRE C. LABONTÉ & a.

A decree cannot be entered upon a mere draft for a decree and a statement of the case, which were drawn by a deceased justice of the superior court but remained unsigned by him.

In covenant broken, neither the fact that the plaintiff knew the covenant was false nor the fact that the actual agreement differed from the covenant is a bar.

COVENANT BROKEN, and BILL IN EQUITY for the reformation of the deed relied upon in the action of covenant. The cases were heard together at the September term, 1916, of the superior court by *Pike, C.J.*, who entered a verdict for the defendant in the action at law

but made no order in the equity suit. After the death of the chief justice, an unsigned statement of the facts in the case drawn up by him was filed in court and the presiding justice found from an examination of the notes of the testimony taken at the trial by Judge *Pike* that the facts were as set forth in the unsigned statement. The substance of the statement was that the covenant sued upon was broken by the defendant's lack of title to a portion of the property conveyed without reservation, but that it was not intended to convey such portion of the premises and that the deed should be reformed by inserting an exception of the property which the grantor did not own at the time of the deed because of a prior conveyance of the same to another party.

At the January term, 1917, the plaintiff's motion for a new trial was denied subject to exception, and the court ordered the entry of a decree reforming the deed which had been drawn up but left unsigned by Judge *Pike*. The question whether the facts stated sustained this decree was transferred by *Branch, J.*, from the January term, 1917, of the superior court.

*Walter E. Kittredge and Frederick J. Gaffney, for Labonté.*

*Henri A. Burque, for Lacasse.*

PARSONS, C. J. As the issue raised by the bill in equity was left undetermined by the trier of fact, a new trial must be had unless the plaintiff abandons the proceeding. From the evidence considered by the court, the draft of a decree and a statement of the case and the notes of testimony and the fact that both decree and statement were unsigned, different conclusions might be reached as to what the trial judge intended to do, but it cannot be found that he did what he did not do. Report of an oral statement of the trial judge as to the finding he proposed to make would be evidence of the same character as the written memoranda left in this case, but it would hardly be contended that a *post mortem* judgment could be rendered upon the statement of a trier of fact as to what he intended to find.

The verdict ordered in the suit at law is also evidence of the orders intended to be made in the equity suit. But as such orders were not made, the verdict cannot stand. Knowledge by the plaintiff that the covenants were false when made would be no answer to the action at law. *Foster v. Foster*, 62 N. H. 532; *Fletcher v. Chamberlin*, 61 N. H. 438, 480-482; *Chamberlain v. Meader*, 16 N. H. 381, 384.

Neither could it be shown in that action that the contract differed from that contained in the writing.

The plaintiff's exception to the denial of his motion for a new trial is sustained.

*Decree set aside: new trial granted.*

All concurred.

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Sullivan, }  
Nov. 6, 1917. }

JOHN ROBERTS & a. v. CLAREMONT POWER COMPANY.

In an action for polluting a stream and thereby injuring the product of the plaintiff's mill, an amendment, adding as plaintiff the administrator of the plaintiff's predecessor in the title and business, was properly granted, it appearing that the intestate owned the business for a part of the period covered by the declaration, specification and evidence.

It is presumed, in the absence of contrary evidence, that in the trial and decision of a case a referee or commissioner correctly applied the law.

The refusal of commissioners to make a requested finding, which would be inconclusive on any issue, is not ground to set aside their report.

The objection that commissioners to assess damages were not sworn, is not made seasonably, if not taken until after the filing of their report.

A witness in testifying to the quantity and prices he received for damaged goods, which he sold through factors, may assist his memory by referring to written statements thereof regularly prepared by their employees, and containing the discount from regular prices at which the goods were sold and accounted for to the witness, though the employees did not testify, being either dead or beyond the jurisdiction.

CASE, for polluting the waters of Sugar river. After default the damages by agreement of parties were assessed by commissioners. The damage consisted of injury to cloth made in the mill of the plaintiff, John. During the hearing before the referees it appeared that his father, Alexander Roberts, owned the business for a part of the time covered by the declaration, the specification of damages and the evidence. Thereupon the plaintiff moved that the administrator of Alexander's estate be added as a party plaintiff. The motion was granted by *Sawyer, J.*, and the defendant excepted upon the ground that the amendment brought in a new and separate cause of action.

The commissioners were not sworn. The defendant requested