

the jury to balance evidence, weigh probabilities, determine the credibility of witnesses, and draw inferences and conclusions from facts proved. To have limited the instruction according to the request would have been a usurpation of the prerogative of the jury as well as a misstatement of the law.

The complaint of the instruction as given, made at the argument, need only be adverted to in view of the numerous and uniform decisions in like cases. There certainly was no error in instructing the jury that they were at liberty to consider the plaintiff's truthfulness; and if he had cause to apprehend that other than legal evidence could be considered by them upon this point, he had the opportunity, and it was his duty as well, to move the court for proper additional instructions. Having failed to do this seasonably, it is now too late for him to remedy his error, and the possible effect of it upon the verdict cannot be considered.

*Exception overruled.*

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

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LARNED v. BEAL & a.

A corporation *de facto* is liable in an action of assumpsit for hired money, notwithstanding a failure to comply with the law in its organization, and its members are not individually liable in such an action if they acted in good faith, believing themselves to be a corporation *de jure*.

ASSUMPSIT, for money had and received, against "copartners doing business in the name of The Mendocino Flume and Mining Company." Facts found by a referee. The defendants are members of a company which Mann and others undertook to organize as a corporation of that name under Gen. Laws, c. 152, and which is a corporation *de facto*. The company hired money of the plaintiff, both parties believing the borrower to be a corporation *de jure*, and understanding that the money was loaned to the company in its corporate capacity.

*J. W. Fellows*, for the plaintiff.

*B. Wadleigh*, for Beal, cited *Fay v. Noble*, 7 Cush. 188; *Trowbridge v. Scudder*, 11 Cush. 83; *Ward v. Brigham*, 127 Mass. 24.

DOE, C. J. It is not material in this case whether the corporation *de facto* was a corporation *de jure* or not. A want of

regularity in its organization would not affect the validity of its contract with the plaintiff, and would not give him, against its members, as unincorporated persons, an action on a contract which he made with them as a corporation. *S. F. Bridge v. Fisk*, 23 N. H. 171, 178; *Ossipee Manf'g Co. v. Canney*, 54 N. H. 295, 312, 313; *Saunders v. Farmer*, 62 N. H. 572; *Jewell v. Gilbert*, 64 N. H. 13, 18; *Case v. Kelly*, 133 U. S. 21, 28; *Mor. Corp.*, ss. 744-755.

*Judgment for the defendants.*

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

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SAWYER & a. v. RICHARDS.

When husband and wife live apart and he has a cause of divorce, he is not bound to support her.

ASSUMPSIT, for goods sold and delivered to the defendant's wife. Facts agreed. Before the delivery of the goods the defendant had separated from his wife, leaving her at his house without providing for her support, and had filed a libel for divorce alleging extreme cruelty. The goods were groceries of which the wife was in need, and were delivered by the plaintiffs without authority from the defendant, and with notice that he had separated from his wife and had commenced a suit for a divorce. A divorce was afterwards decreed for the cause alleged.

*J. H. Andrews*, for the plaintiffs.

*D. Cross*, for the defendant.

DOE, C. J. If the defendant had a cause of divorce when he left his wife and when the goods were delivered, action cannot be maintained. By their living apart, public notice was given of the actual state of things. By extreme cruelty in violation of her marital duty, she would give him a cause of divorce; and during their separation he would be released from the duty of supporting her. The rule does not depend upon a distinction between such causes of divorce as adultery and extreme cruelty.

*Case discharged.*

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