

*McNevins v. Lowe*, 40 Ill. 209. On the other hand, if the advice to the wife is treated as a part of the performance of the contract with the husband, the defendant still owed her the non-contractual duty to use care in the performance of such of his services as concerned her personally. *Harriott v. Plimpton, supra.*

It is urged that there would have been no danger but for pricks in the plaintiff's fingers, of which the defendant was ignorant. There was danger unless the plaintiff's hands were free from the slightest wounds. It cannot be said, as a matter of law, that a perfect physical condition is so common that the defendant could reasonably rely upon it in giving advice; or that the plaintiff ought, as a reasonable person, to have understood that he was acting upon the assumption that such was the fact.

*Demurrer overruled.*

All concurred.

Belknap, }  
June, 1899. }

HUNT, Receiver, v. O'SHEA, Assignee.

HUNT, Receiver, Ap't, v. Same.

A stockholder of an insolvent corporation will not be preferred over general creditors for the amount of uncollected dividends upon his shares when no specific sum of money has been set apart for their payment.

ASSUMPSIT and PROBATE APPEAL, to recover for the same cause of action. Facts agreed. The plaintiff is the receiver of the People's Fire Insurance Company, and as such, on July 1, 1894, was the holder of one hundred and fifty shares of the capital stock of the Laconia Car Company, as collateral for a note which has not been paid. The Car Company before that time had legally declared a dividend payable on that date, which on this particular stock has not been paid.

January 25, 1897, proceedings were instituted upon which the Car Company were decreed insolvent debtors, and the defendant was appointed their assignee. The plaintiff's claim for this dividend was allowed in the probate court, but that court denied his motion to order it paid in full.

*Jewett & Plummer*, for the plaintiff.

*Jewell, Owen & Veazey*, for the defendant.

YOUNG, J. This court has no original jurisdiction of claims against the estate of an insolvent debtor (P. S., c. 201, s. 1), so the action of assumpsit must be dismissed; for the defendant has no money in his hands which equitably belongs to the plaintiff. Simply declaring a dividend does not create a trust fund. *Lowne v. Insurance Co.*, 6 Pai. 482. To create such a fund, some specific sum of money must be set apart for the purpose of paying the dividend. Until this is done, the relation of the corporation to its stockholders in respect to dividends is that of debtor and creditor. *King v. Railroad*, 29 N. J. Law 82; 1 Mor. Corp., s. 445. No sum of money having been set apart to pay this dividend, and the claim not being one of those named in s. 32, c. 201, P. S., the appeal should be dismissed, and judgment entered for the defendant in the action at law.

*Case discharged.*

All concurred.

Carroll, }  
June, 1899. }

REMICK v. RUMERY, *Adm'r, Ap't.*

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174	253

In an action against an administrator, entries in the plaintiff's diaries, made as a daily and original record of his transactions, are competent evidence as to items of labor performed and money expended for and loaned to the intestate, in sums not exceeding \$6.67, in the absence of evidence that they were not kept with honesty and accuracy.

Such entries are sufficient evidence of an intention to charge the intestate with a debt, although not kept in the usual form of book accounts, nor with the prices for labor carried out.

In an action against an administrator, evidence of the plaintiff is not admissible to explain and interpret entries in his diary which charge the deceased with a debt.

APPEAL, from the report of the commissioner upon the estate of William A. Malcham, allowing the plaintiff's claim. Facts found by a referee.

In April, 1891, the deceased made a contract with the plaintiff by which the latter was to become a member of his family and work for him when wanted. The plaintiff's claim is for labor performed under this contract, and for money loaned to and goods bought for the deceased.

The plaintiff offered in evidence his diaries for the years 1891 to 1896, inclusive, verified by his suppletory oath. They contain