

disclosing the plaintiffs' conduct in the management of the cars was presented; and as we have held that it would not support the verdict of the jury in favor of the defendant, a verdict should have been directed for the plaintiffs. *State v. Harrington*, 69 N. H. 496.

With reference to the second count, the instructions to the jury upon the question of the plaintiffs' exercise of care were general—that the railroad could not recover if its negligence contributed to the destruction of the cars. An exception was taken to this instruction, and a charge requested to the effect that the railroad could not be found to be negligent for not investigating the interior of the potato car before leaving the car where it did, unless the jury should find that the railroad or its employees knew the stove or the fire in it was unsafe, or that there was something in the appearance of the car which indicated that an unsafe fire was being maintained in it. This instruction should have been given for the reasons above stated, and the verdict as to this count is also set aside.

4. The burden of proof upon all the issues raised by both counts was upon the plaintiffs. The fact that the defendant had the exclusive control of the interior of the potato car did not alter the situation in this respect. *Hart v. Lockwood*, 66 N. H. 541, 542.

In view of the conclusions reached, it is unnecessary to consider the other questions in the case.

Verdict set aside as to the first count, and judgment for the plaintiffs: new trial granted upon the second count.

PARSONS, C. J., and WALKER, J., did not sit: the others concurred.

Hillsborough, }
March 1, 1904. }

FELLOWS v. JUDGE.

A purchaser who rescinds a contract of sale for fraud on the part of the vendor, returns the property, and brings an action for deceit, may amend the writ by adding a count for money had and received, and recover the amount he has paid.

CASE, for deceit in the sale of a cow. Trial before *Young, J.*, at the May term, 1903, of the superior court, and verdict for the plaintiff for \$45 and interest from the date of the writ.

To induce the plaintiff to purchase and for the purpose of deceiving her, the defendant, knowing the representation to be false, told the plaintiff the cow was a new milch cow and was giving sixteen quarts of milk a day. The plaintiff believed the representation, and in reliance upon it bought the cow and paid the defendant \$45 therefor. Upon discovery of the falsity of the representation, the plaintiff rescinded the trade, returned the cow to the defendant, and demanded the money paid by her. The defendant refused to return the money and sent the cow back to the plaintiff, who immediately notified the defendant that she was keeping her at his expense.

The cow was worth \$30 when purchased by the plaintiff; and if the measure of damages is the loss the plaintiff would have suffered if she had sold the cow upon discovery of the fraud, there should be judgment for the plaintiff for \$15 and interest.

Andrews & Andrews, for the plaintiff.

Henry N. Hurd, for the defendant.

PARSONS, C. J. Upon the facts found, the plaintiff, having rescinded the contract of sale, had the right to sue and recover the amount she had paid. *Noyes v. Patrick*, 58 N. H. 618; *Manahan v. Noyes*, 52 N. H. 232, 237. This is conceded; but it is urged that she cannot recover at all upon the count in deceit, because it is said that action is an affirmation of the contract, and hence to enable the plaintiff to recover at all it must be held as matter of law, contrary to the facts found, that she did not rescind the contract and return the property, but still retains it. But the difficulty cannot be solved by adjusting the facts to the form of action chosen. The legal rights of the parties were settled once for all by the plaintiff's disaffirmance of the contract with knowledge of the facts. *Connihan v. Thompson*, 111 Mass. 270, 272. The question presented is whether, upon the rescission of a contract of sale by the purchaser for fraud in the vendor and his refusal to return the price paid after return of the subject of the sale to him, the action of deceit is the proper remedy for the vendee's redress. But the solution of this question would serve no useful purpose. If upon examination it should be found that the proper action is *assumpsit*, the plaintiff would be permitted to amend. It is not the practice in this jurisdiction, where the parties have had a full and fair trial of the facts, to take time to consider whether the remedy chosen is appropriate. Without consideration of that question, the difficulty is solved by amendment. *Morse v. Glover*, 68 N. H. 119, 120; *Peaslee v. Dudley*, 63 N. H.

220. The course of the trial would have been no different if the action had been upon the implied promise of the defendant to return the money to which he had no title because of his fraud and the plaintiff's rescission and return of the property. It is not therefore material to inquire whether in an action for deceit in the sale of property the rule of damages is the same where the property is returned to the seller as it is where it is retained by the purchaser (*Noyes v. Blodgett*, 58 N. H. 502; *Fisk v. Hicks*, 31 N. H. 535, 538; *Nash v. Company*, 163 Mass. 574, 581; *Caswell v. Coare*, 1 Taunt. 566), or whether after a disaffirmance of the contract the action of deceit is maintainable. 1 Ch. Pl. 140; *Barney v. Dewey*, 13 Johns. 224; *Wardell v. Fosdick*, 13 Johns. 325, 327. If the contention of the defendant is correct in either particular, the action of deceit was not an appropriate remedy to enforce the plaintiff's right, and its adoption was merely a misconception as to the proper remedy and not an election between inconsistent remedies. *Noyes v. Edgerly*, 71 N. H. 500; *Gould v. Blodgett*, 61 N. H. 115; *Snow v. Alley*, 156 Mass. 193, 195. The plaintiff may amend by adding a count for money had and received, and thereupon there will be

Judgment on the verdict.

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

Hillsborough, }
March 1, 1904. }

CONGDON v. NASHUA.

The board of health of the city of Nashua have no authority to contract with the city physician for the payment of compensation in addition to the salary prescribed by ordinance, as remuneration for attendance upon small-pox patients who have been quarantined by order of the board.

ASSUMPSIT, to recover a balance of account for medical attendance upon small-pox patients quarantined by the board of health of the city of Nashua.

The plaintiff was city physician in 1902 and 1903, and as such received a salary of \$400 per year. He was at the same time chairman and member of the board of health, at a salary of \$100 per year. The board consisted of three members. After September 18, 1902, one of the members declined to act. On that day, the other member of the board agreed with the plaintiff that the