

tain a verdict rendered without evidence upon an essential point. As the evidence stands in the record, there was no concealed danger in the operation. The defendants could not have told the plaintiff anything about the danger which he did not learn from his observation, or would not have learned if he had exercised ordinary care. The machine itself, by the character and motion of its parts, continuously warned him of the dangers to which it exposed him, as fully and forcibly as human language could have done. The plaintiff, by his contract of service with the defendants, took upon himself the risk of injury from these dangers, and consequently has no right of action against them for the injury he has suffered therefrom. The defendants' motion should have been granted.

Exceptions sustained: verdict set aside.

YOUNG, J., dissented: the others concurred.

Sullivan, }
Feb. 5, 1907. }

MAXFIELD v. WHITE RIVER LUMBER CO & a.

Actual possession of land under an invalid tax collector's deed is sufficient to support an action of trespass *quare clausum*, as against one who has no legal title and cannot prove prior possession of the premises by himself or those under whom he claims.

TRESPASS, for breaking and entering the plaintiff's close situated in the town of Goshen. Trial by the court and verdict for the defendants. Transferred from the May term, 1906, of the superior court by Wallace, C. J.

George R. Brown and Hosea W. Parker, for the plaintiff.

Jesse M. Barton and Edwin G. Eastman, for the defendants.

BINGHAM, J. This is an action of trespass *quare clausum fregit*. The plaintiff's claim of title rests upon a collector's deed for the tax assessed upon the land for the year 1894, and upon his entry into the possession of the land under his deed in 1896. The defendants' claim of ownership is based upon the following facts: Franklin Pierce owned the land in 1863. In December of that year he conveyed it to one Clark, upon trust to hold, manage, and

improve the same and pay nine fiftieths of the income to Andrew Pierce, Jr., three fiftieths to Thomas W. Pierce, three fiftieths to George Bacon, and the balance in various proportions to some twelve other persons. There was supposed to be a lead mine upon the land, and it was worked by Clark for a short time after the conveyance was made to him. February 25, 1890, Andrew Pierce quitclaimed to one Page all the interest he had in the land, either individually or as surviving partner of a firm composed of Thomas W. Pierce, George Bacon, and himself. On the same day he quitclaimed to Page all the interest of the firm in the land, in pursuance of a power of attorney from Horace and Olivia Bacon authorizing him to close up its affairs and sell its real estate. In the summer of 1904, Page's interest in the land came through mesne conveyances to the defendants; and in the fall of that year, and while the plaintiff was in possession under his tax deed, the defendants entered, claiming to own the land, and committed the acts of trespass for which this suit was brought. There was a verdict for the defendants, and the plaintiff excepted upon the ground that the evidence failed to show that the defendants had any title to the land.

The plaintiff recognizes that in order to prevail in this suit he must rely upon the strength of his own title and not upon the weakness of the defendants'. His position is that he has the better title, even if his tax deed is for some reason invalid; that his entry upon and possession of the land under his deed gave him title sufficient to maintain an action against a trespasser; and that the defendants at the time of their entry were trespassers—that they had neither the legal title nor a prior possession. This contention, so far as it involves a statement of law, is undoubtedly correct. All title rests on possession, actual or presumed. No possession is presumed in favor of any person but the state; and when a person does not trace his title from the state, he must either show actual possession in himself, or in some person through whom he claims. *Newcastle v. Haywood*, 68 N. H. 179; *Bell v. Peabody*, 63 N. H. 233, 239; *Cushing v. Miller*, 62 N. H. 517, 525; *Tilton v. Stanyan*, 57 N. H. 489; *Graves v. Company*, 44 N. H. 462; *Richardson v. Palmer*, 38 N. H. 212; *Woods v. Banks*, 14 N. H. 101.

The case finds that the plaintiff was in the actual possession of the land at the time of the defendants' entry in 1904; and according to the foregoing principles of law, unless the defendants owned the legal title with an immediate right of possession, or unless they or those under whom they claim had a prior possession, the verdict in their favor cannot be sustained. There is no finding that the defendants, or those under whom they claim, ever had actual possession of the land prior to the plaintiff, and the facts reported

show that they never had the legal title. Their title does not start with Franklin Pierce, but with Andrew Pierce; and if he is the "Andrew Pierce, Jr.," who is mentioned as one of the beneficiaries in the deed to Clark, neither he nor the others there named owned the legal title to the land. The deed to Clark only gave these parties the income of the property. It did not vest the legal title in them, but in Clark, in whom it still remains so far as this case discloses. As the plaintiff has the better title, his exception is sustained. The verdict for the defendants is set aside.

Verdict and judgment for the plaintiff.

All concurred.

Rockingham, }
March 5, 1907. }

74 160
74 406

KIDD *g* a. v. NEW HAMPSHIRE TRACTION CO. *g* a.

Officers appointed by a board of directors to execute a written contract in behalf of a corporation are representatives of the company, and not agents of the directors; and their authority is not *ipso facto* abrogated by the election of new directors prior to the signing of the agreement.

Where the directors of a corporation dispose of all its property in accordance with the terms of a written agreement which the officers of the company are instructed to execute and deliver, the transaction is not void on the ground of constructive fraud merely because persons under the control of the vendee are substituted for the original directors prior to the manual execution of the contract.

A sealed contract of sale and a contemporaneous parol agreement binding the vendor to make additional expenditures as a consideration for the vendee's execution of the deed do not together constitute a single indivisible contract; and the fact that the parol agreement is void, or voidable at the option of the vendor, does not affect the validity of the vendee's title under the deed.

An issue of intentional fraud raised by bill and answer, but not passed upon by the superior court, will not be determined by the supreme court upon the reversal of a decree based entirely upon constructive fraud.

A motion to dismiss a bill in equity for lack of sufficient evidence to support its allegations should be made at the close of the plaintiff's evidence, before the issues are submitted upon their merits.

The relation existing between common stockholders who have entire control of the corporation and preferred shareholders without voting power is that of trustee and *cestui que trust*.