

Hillsborough, }
March 1, 1910. }

HEAD & DOWST CO. v. NEW ENGLAND BREEDERS' CLUB.

A general verdict includes the finding of every fact necessary to sustain it of which there is evidence.

The objection that evidence adduced by the adverse party is insufficient to warrant a verdict in his favor cannot be first interposed after a submission of the case upon its merits, unless the facts presented by the record disclose that the deficiency is incapable of being supplied.

Statements by the president of a corporation with reference to business entrusted to him are admissible in evidence against the company.

ASSUMPSIT, to enforce a builder's lien. Trial by the court and verdict for the plaintiffs. Transferred from the September term, 1907, of the superior court by *Peaslee, J.*

Burnham, Brown, Jones & Warren (Robert L. Manning orally), for the plaintiffs.

Henry F. Hollis (by brief and orally), for the defendants.

BINGHAM, J. This is an action of assumpsit brought to enforce a builder's lien, under sections 10, 16, and 17, chapter 141, of the Public Statutes, for labor performed and materials furnished in the construction of certain buildings and appurtenances. In the superior court a general verdict was found for the plaintiffs, and a judgment *in rem* was ordered against all the land described in a certain deed to the defendants, including the buildings and appurtenances constructed thereon by the plaintiffs. The verdict being general, it is to be assumed that the trial court found that the plaintiffs performed labor and furnished materials in the construction of buildings and appurtenances on the defendants' land under a contract, that the defendants were owing them therefor at the time the suit was brought the sum awarded, that the attachment was made within ninety days from the last rendition of services or furnishing of materials under the contract, and that such other facts were found as were essential to the creation and preservation of the lien. *Noyes v. Patrick*, 58 N. H. 618.

The defendants did not move in the superior court for a nonsuit or a verdict before the case was submitted to the trial judge for decision, or at any other time. They made no requests for special findings of fact or rulings thereon, either before the case was submitted or before it was transferred to this court, and no such find-

ings or rulings were made or reserved for consideration here. They did, however, except to the verdict and judgment, and to the admission of certain evidence. The questions raised by these exceptions were transferred to this court and were in order for argument at the May session, 1908; but as no one appeared to support them, and as it was suggested that the defendants were in bankruptcy and that a trustee had been appointed, the court declined to proceed with the case until the trustee was notified, and of its own motion ordered notice to the trustee of the pendency of the suit. Thereafter, the trustee declining to appear, the exceptions were overruled as upon default. *Head & Dowst Co. v. Breeders' Club*, 74 N. H. 605. At the February session, 1910, the trustee appeared, moved to have the order made at the May session, 1908, stricken off, and asked to be heard upon the exceptions taken to the admission of evidence and upon certain questions relating to the sufficiency of the evidence to support the verdict, on the assumption that they were raised by the exception taken to the verdict and judgment. The order was stricken off, and he was heard upon the questions raised by the record the same as the original defendants would have been. This was the extent of his legal right. *Cogswell v. Railroad*, 68 N. H. 192, 195.

The question which we will first consider is whether it would have been open to the defendants to question the legal sufficiency of the evidence to support the verdict, under the general exception taken thereto. It is well settled in this state that a party cannot question the sufficiency of evidence to support a verdict or material issue in a case by a motion after the case has been submitted to the court or jury, or by an exception to the verdict; that after the evidence is closed and the case has been submitted, the presumption is that any deficiency in the evidence is capable of being supplied, unless the facts presented by the record disclose that it cannot be; that a party cannot lie by until after his adversary has lost the opportunity of supplying the omission, and then for the first time call it in question by motion or exception, and that if he does, he waives the objection. *Tilton v. Tilton*, 74 N. H. 602; *Coles v. Railroad*, 74 N. H. 425; *Farnham v. Anderson*, 74 N. H. 405. The defendants therefore take nothing by this exception.

Futhermore, as all facts essential to the creation and preservation of the lien have been found for the plaintiffs, the questions which the defendants seek to raise relating to the validity of the lien are eliminated; for the premises upon which they are based are wholly wanting.

It is conceded that Miller was the president of the defendants,

the Breeders' Club. Certain statements made by him with reference to transactions between the plaintiffs and the defendants were admitted in evidence as admissions of the defendants, and they excepted. Their exception was based upon the ground that it did not appear that Miller had any authority in the premises; but the record discloses that there was evidence from which it could have been found that the entire management of the business relations between the plaintiffs and the defendants had been given over to Miller, and that as respects them he was the club.

Exceptions overruled.

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

Grafton,
March 1, 1910. }

WEBSTER v. STEARNS.

A secret trust arising from the vendor's retention of goods sold does not render the sale voidable by his creditors or by his receiver in bankruptcy, if the vendee takes possession of the property prior to its attachment or seizure.

TROVER, for a stock of merchandise contained in a store. Trial by the court. Facts found, and case transferred from the April term, 1909, of the superior court, by *Chamberlin, J.*

December 14, 1904, the plaintiff and one Jenney signed a contract which provided as follows:

"1st. Said Webster agrees to place or cause to be placed in said Jenney's place of business at said Enfield five hundred dollars' (\$500) worth of groceries and provisions.

"2d. Said groceries and provisions, or others of equal value, to be the property of said Webster at all times.

"3d. Said Jenney to have the right to sell or exchange said goods for profit, provided they are replaced by others of equal value.

"4th. For the above privilege said Jenney is to pay said Webster the sum of twenty dollars (\$20) each year, also to pay all taxes on said goods and to keep them insured for their value at all times."

At the date of the agreement Jenney had about \$150 in money. This sum, together with the plaintiff's \$500, was used to purchase a stock of goods which was put into Jenney's store, and there-