

N. H. 456. The fact that this proceeding is in the form of a writ of entry is no obstacle to granting such relief as the facts in the case call for.

Exceptions taken by the defendants have not been argued by them and are understood to be waived.

As there must be further proceedings in the superior court to determine the form of the judgment or decree, the order is

Case discharged.

PARSONS, C. J., and PLUMMER, J., dissented: the others concurred.

Belknap, }
Feb. 3, 1920. }

WILLIAM C. MARSHALL *v.* JOSEPH P. MORIN & *a.*

Though the evidence may warrant the submission of a case to the jury, a finding by the trial justice that the verdict rendered was against the weight of the evidence cannot be revised by the supreme court unless there is no evidence to support the finding or it clearly appears to involve a plain mistake.

ASSUMPSIT, trial by jury and verdict for the plaintiff for \$8,144.67, which the court ordered set aside unless the plaintiff filed a *remittitur* in the sum of \$5,870.13. The plaintiff refused to do so; and excepted to the order setting aside the verdict upon the ground that the action was properly submitted to the jury and that competent evidence was introduced by the plaintiff to sustain the verdict; and filed this bill of exceptions which was duly allowed by *Kivel*, C. J., at the March term, 1918, of the superior court.

Jewett & Jewett and *Owen & Veazey* (*Mr. Theo S. Jewett* orally), for the plaintiff:

It is plain that the superior court cannot substitute its views for those of the jury even though the court might have found otherwise; as that would be a violation of the constitutional right of a trial by jury. The superior court in a trial where the evidence is conflicting and where the credibility of witnesses occupies a prominent position should not abuse its legal discretion, and set the verdict aside, for the discretion is not an absolute one. The verdict of the jury should stand where it is apparent that there was some evidence upon which

the conclusion might have reasonably been reached. *Colburn v. Groton*, 66 N. H. at page 154; *Burr v. Harty*, 75 Conn. 127; *Schleifenbaum v. Rundbaken*, 81 Conn. 623; *Cables v. Company*, 86 Conn. 223.

Charles B. Hibbard, Martin & Howe and Cox & Fowler (Mr. Hibbard orally), for the defendants:

The question whether a verdict ought to be set aside as against evidence is a question of fact, to be decided by the judge presiding at the trial. *Fuller v. Bailey*, 58 N. H. 71; *Lefavor v. Smith*, 58 N. H. 125; *Kelley v. Woodward*, 58 N. H. 153; *Daniels v. Lebanon*, 58 N. H. 284; *Laurence v. Towle*, 59 N. H. 28; *Hovey v. Brown*, 59 N. H. 114; *Merrill v. Perkins*, 61 N. H. 262; *Paine v. Railway*, 63 N. H. 623; *Little v. Upham*, 64 N. H. 279; *Clark v. Manchester*, 64 N. H. 471; *Lucier v. Larose*, 66 N. H. 141; *Abbott v. Railroad*, 69 N. H. 176; *Pitman v. Mauran*, 69 N. H. 230; *Wilbur v. Berry*, 71 N. H. 619; *Lyman v. Brown*, 73 N. H. 411; *Lally v. Insurance Co.*, 75 N. H. 188; *Chabot v. Company*, 79 N. H. 230. It is a question "which the court at the trial term would not ordinarily reserve, and which the court at the law term would refuse to consider if it were reserved." *State v. Wren*, 77 N. H. 361, 367; *Hansen v. Railway*, 78 N. H. 518, 523.

PARSONS, C. J. Assuming the grounds of exception assigned are well founded, that the action was properly submitted to the jury and that there was competent evidence tending to support the verdict, it does not follow that the presiding judge was in error in finding the verdict rendered was against the weight of the evidence.

Whether it was or not was a question of fact to be determined at the trial and as there was evidence tending to support the conclusion there reached, this court has no power to revise the finding. *Nawn v. Railroad*, 77 N. H. 299, 304, and cases cited in defendants' brief. This court has no jurisdiction of questions of fact determined in the superior court by the presiding judge. The only questions that can be raised here are (1) whether there was any evidence in support of the finding, and (2) whether the finding clearly appears to involve a plain mistake. "The verdict of a jury or the conclusions of a referee can only be set aside on this ground [as against the weight of the evidence] where it conclusively appears that the trier of fact unwittingly fell into a plain mistake, or that the verdict was produced by passion, partiality, or corruption. The same rule applies when a finding of fact made by the presiding judge . . . is attacked as against the evidence." *State v. Wren*, 77 N. H. 361, 367.

In *Twombly v. Lord*, 74 N. H. 211, an ancient plan was excluded on the ground that it was self-contradictory. An examination of the plan showed there was no conflict, and the finding of fact upon which the exclusion was based was set aside as a plain mistake. Upon this ground alone could the finding in this case be set aside. The plaintiff having failed to make such a mistake plainly apparent, the finding cannot be disturbed.

Exception overruled.

All concurred.

Merrimack, }
Feb. 3, 1920. }

CHARLES B. ENSIGN *v.* MARTIN CHRISTIANSEN & *a.*

In an action upon negotiable paper, when it is shown that the title of any person who has negotiated the paper was defective, the burden is on the holder to prove that he or some person under whom he claims acquired title as holder in due course.

An indorsee for value before maturity does not stand in any better position than the payee in so far as defences of which the indorsee had notice are concerned.

The payee of a note, an unregistered foreign corporation incapable by Laws 1913, c. 187, s. 3, to bring suit in this state, transferred it to the plaintiff for value before maturity. The burden was upon the plaintiff to prove that he had no notice at the time he took the note that the payee could not maintain action thereon in the state court, and whether under the circumstances the plaintiff was a purchaser in good faith was a question of fact for the jury.

Knowledge of facts which would cause the ordinary man to make inquiry and failure to take such action warrant the finding that the purchase of negotiable paper was not in good faith.

Failure to collect of the indorser, from whom the plaintiff took negotiable paper and with whom he customarily did business, and resorting to a suit against the maker resident in a distant state, taken in connection with other evidence, warranted the conclusion that the plaintiff had not sustained the burden of proof.

ASSUMPSIT, by the indorsee of a note which the defendants gave the Night Commander Lighting Company, a Michigan corporation, in payment for a lighting plant which it installed on their premises in the town of Bow.

Trial by jury and verdict for the plaintiff. Transferred from the October term, 1918, of the superior court by *Sawyer, J.*, on the