

Coö's, }  
Dec. 4, 1906. }

HESS & a. v. SHURTLEFF.

Whether a witness offered as an expert is qualified to testify in that capacity is a question of fact determinable by the trial court.

In an action to recover the price of goods sold, the plaintiff is not entitled to a verdict if he fails to establish the contract of sale alleged by him, although the evidence may be insufficient to support the defendant's contention that he received the merchandise on consignment.

ASSUMPSIT, for goods sold. Trial at the April term, 1906, of the superior court by *Wallace, C. J.*, who ordered a verdict for the defendant, subject to the plaintiffs' exception.

The plaintiffs are wholesale fur dealers in New York. June 11, 1904, their salesman made a contract with the defendant, a retail dealer in Whitefield, by the terms of which goods of the value of \$320.50 were to be shipped to him on consignment, the defendant to sell what he could and return the balance before the holidays, payment for the goods sold to be made December 1-10, 1904. The salesman had authority only to solicit orders for the sale of goods and to transmit them to the plaintiffs for acceptance or rejection. He informed the defendant that he was a traveling salesman for the plaintiffs, but the defendant had no knowledge of his want of authority to agree to consign goods. The salesman sent the order to the plaintiffs as an order for unconditional purchase. September 1, the plaintiffs shipped the goods to the defendant and sent him a bill of them as though sold outright, calling for payment December 1-10. In November, the defendant, having sold goods amounting to \$134.16, shipped the unsold balance to the plaintiffs by express and notified them that the merchandise was returned in accordance with the agreement upon which it had been consigned to him. The plaintiffs refused to receive the goods and demanded payment for the whole. The defendant subsequently paid for the goods sold by him.

The contract set up by the defendant is not an unusual one in the wholesale fur trade, nor is it unusual in such a case for a bill of the goods to be sent as though they were bought absolutely. Such contract and action is in accord with the ordinary usages of business in the fur trade. These facts were found upon the testimony of several retail dealers in furs of many years' experience, who were found to be qualified to testify as to the ordinary usages of business between wholesale and retail fur dealers. The plaintiffs excepted to the evidence, claiming "that the merchants who testified to having several transactions with fur dealers, in which

they sometimes bought goods and at other times took them upon consignment, and had no further knowledge as to the ordinary usages and customs in the wholesale fur trade, were incompetent witnesses by whom to prove what were the ordinary usages and customs in the wholesale fur business." The plaintiffs further claimed "that the witnesses were not legally qualified to testify as to the usages, etc., but that the facts testified to do not furnish a legal basis from which it can be legally found that it was the ordinary usage and custom to consign goods or authorize their agents to consign them."

*Kellogg & Bowker*, for the plaintiffs.

*Drew, Jordan, Shurtleff & Morris*, for the defendant.

PARSONS, C. J. Whether the witnesses who were permitted to testify to the usage of business in the fur trade possessed the requisite qualifications to authorize the admission of their testimony was a question of fact for the trial court. *Pattee v. Whitcomb*, 72 N. H. 249, 253; *Stewart v. Stearns*, 63 N. H. 99, 107. As neither the evidence upon which they were found qualified nor the facts testified to by them are reported, the only question as to the sufficiency of the evidence to authorize the findings made arises from the fact that the witnesses were all retail dealers. It is obvious that knowledge of the usage of trade between wholesale and retail dealers would not be confined to wholesale dealers, but must be equally known to the other parties to the contracts to which the usage relates. It cannot, therefore, be held as matter of law that retail dealers might not have such knowledge of the usage in question as would qualify them to testify, or that their testimony might not be sufficient to authorize the conclusion as to the existence of the usage found by the court.

It does not appear that the plaintiffs' claim as to the ground of their exceptions correctly states the evidence. But if it be assumed that the evidence did not establish the plaintiffs' knowledge of the usage, and that it was insufficient as matter of law to bind them by a contract or consignment such as the defendant set up, the verdict for him will not be affected. The plaintiffs alleged a contract of sale, and could recover only by showing that the defendant agreed, expressly or by implication, to buy the goods. Whether the evidence authorized a finding that the plaintiffs were bound by the contract set up by the defendant was immaterial, and no such finding was made. The failure of the plaintiffs to establish the contract set up by them requires the verdict which was rendered, without regard to the insufficiency of the evidence

to establish the contract set up by the defendant. If there was in fact no contract, no agreement as to sale or consignment, the plaintiffs could not recover.

*Exceptions overruled.*

All concurred.

Cos., }  
Dec. 4, 1906. }

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HOBBS, *Adm'r*, v. GEORGE W. BLANCHARD & SONS CO.

It is the duty of the owner of premises to so conduct his business as not to actively render unreasonably dangerous the situation of trespassers or bare licensees whose presence is known to him.

Evidence that a servant in charge of dynamite placed sticks of the explosive in an exposed situation, where strangers unacquainted with its properties and unaware of its presence were liable to walk, may warrant a finding that the master's business was conducted in an unnecessarily dangerous manner.

A trespasser who is justifiably ignorant of a dangerous situation caused by the landowner's active intervention is not guilty of contributory negligence for not conducting himself as though he knew of the danger.

**CASE**, for negligence. At the April term, 1906, of the superior court, a nonsuit was ordered upon the defendants' motion by *Wallace*, C. J., subject to exception, at the close of an opening statement in substance as follows:

Tommy Corbin, the deceased, was a bright, active boy nearly fourteen years old. December 26, 1904, he was killed by an explosion of dynamite at Camp 38, on the premises of the defendants in the unincorporated town of Success, near Berlin. The defendant corporation conducted extensive lumbering operations in Success, covering thousands of acres, and in the course of their business saw fit to have entire families living there, many of them with children. There was no highway for horses to the lumber camps, and the company's railroad furnished the only means of access to the premises. It was the practice for friends to visit at the various camps and ride thereto on the company's trains without paying fare. The company knew of this practice and made no objection thereto. About four years before the accident the Corbin family lived on this same property, and their friends visited them without objection. Only a week before Tommy's death his parents walked up the track and took dinner at one of the camps. The superintendent in charge of the lumbering operations, called