

But it is argued that the risk was an open and visible one and therefore assumed by the plaintiff. That the pile would fall if left unsupported was known to him; but on the evidence it could be found that he did not understand that the removal of a shell some distance in front of the second pile would cause a shifting of position of the shells in the same pile behind the one removed. It cannot be determined upon the evidence just how the shifting came about, save that it was induced by the removal of a shell from the bottom layer. A pile so constructed would be secure as long as the bottom layer was full, and was triggered at each end. But as soon as the obstruction at either end was removed the weight of the upper layers would start the lower ones to rolling outward, and the pile would collapse. A like result, in part at least, would follow when a shell was removed from the lower layer at any point. While it would be manifest to one experienced in such work that such a result was likely to occur, it might not be so to one without experience. Being told to remove this pile, the plaintiff was justified in proceeding upon the assumption that it was a reasonably proper and safe course to pursue.

The case was argued for the defendant upon the theory that the plaintiff removed the shell which manifestly supported the second tier. But the evidence is that he did not do so. The shell he removed was two feet from the pile and its removal set in motion the train of events which resulted as before described. It is on the ground that the plaintiff might be found to have been justifiably ignorant of the imminence of these consequences, and that the foreman was negligent in directing the work, that the case should have been submitted to the jury.

*Exception sustained.*

All concurred.

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Hillsborough, }  
Dec. 7, 1920. }

GEORGE DASKALOPOULOS v. JOHN J. MULVANITY.

ASSUMPSIT, for money had and received. The plaintiff sought to recover the sum of \$517, paid on account of the purchase price of an automobile which he bought of the defendant and which the defendant afterwards took from the plaintiff. Trial by the court

and verdict for the plaintiff. At the close of the evidence the defendant moved for a verdict. This motion was denied subject to exception.

Transferred from the September term, 1919, of the superior court by *Marble, J.*

*Lucier & Lucier*, for the plaintiff.

*Cobleigh & Cobleigh*, for the defendant.

PEASLEE, J. There was evidence from which it could be found that after a contract of conditional sale was made and while the plaintiff was not in default, the defendant wrongfully took the car from the plaintiff's possession, and refused to return it until the plaintiff paid the balance of the purchase price, which was not then due. The plaintiff was willing to pay if he could have the car, but the defendant insisted upon retaining possession. Upon these facts the plaintiff had an undoubted right to treat the contract as rescinded and recover the money he had paid. *Dow v. Harkin*, 67 N. H. 383, and cases cited.

The defendant's argument is based upon the assumption that his testimony is to be believed rather than the plaintiff's, and wholly disregards the elementary rule governing the disposition of a motion for a directed verdict.

*Exception overruled.*

All concurred.

Hillsborough, }  
Dec. 7, 1920. }

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HIRAM B. CURRIER v. FRED SILKEY.

THE case was transferred from the May term, 1920, of the superior court upon an agreed statement of facts by *Marble, J.* The facts being considered insufficiently stated to raise the questions of law argued, the order was

*Case discharged.*

*Holman & Smith*, for the plaintiff.

*Nathaniel E. Martin*, for the defendant.