

he struck the bridge, the guard, from its defective construction, would have given him no notice. So far as the accident itself was in controversy, the main question of fact in dispute was whether Hardy got on to the car before or after passing the guard; and while it was said that "the evidence bearing upon it is not so positive and convincing as to remove all doubt," the conclusion was that fair-minded men might come to different conclusions in regard to it. In the present case, it is clear that fair-minded men cannot with reason conclude that a bare possibility is established as a fact by evidence tending equally to support different conclusions of equal, if not greater, inherent probability.

Verdict set aside : judgment for the defendants.

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

Cheshire, }
Dec., 1897. }

MORSE v. WHEELER.

HERRICK v. SAME.

The laying out of a highway by selectmen is vacated by an appeal; and during the pendency thereof, one who travels the way is liable to the landowner in an action of trespass.

TRESPASS, *quare clausum*. Facts found by a referee. The defendant petitioned for a highway which was laid out by the selectmen over lands of the plaintiffs. From the laying out each plaintiff appealed. The trespass complained of in each case consisted in opening and traveling the way during the pendency of the appeal which, at the hearing before the county commissioners, was abandoned. The court ordered judgment on the report for the plaintiffs, and the defendant excepted.

Batchelder & Faulkner, for the plaintiffs.

Hiram Blake and Don H. Woodward, for the defendant.

CARPENTER, C. J. The laying out of a highway by the selectmen is vacated by an appeal. P. S., c. 68, ss. 2, 8; *Wallace v. Brown*, 25 N. H. 216, 220, 221; *Stalbird v. Beattie*, 36 N. H. 455,

456. If the law were otherwise, it might in some cases make the right of appeal practically useless to the landowner; and in all cases where the road is not finally established, might compel towns to pay damages to the landowner and perhaps other expenses, without any corresponding benefit to the public.

Exception overruled.

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

Cheshire, }
Dec., 1897. }

STARKEY v. KINGSLEY.

A decree of distribution of the estate of a person deceased, made by the probate court after notice by publication to all parties interested, conclusively establishes the identity and title of the distributees.

Where distribution has been made in accordance with such decree, an heir who is not named therein cannot maintain assumpsit against the distributees for the recovery of a share of the estate.

In such case, the erroneous decree can only be attacked in a direct proceeding for its reformation.

ASSUMPSIT. Facts agreed. Daniel P. Kingsley of Springfield, Hampden county, Massachusetts, died October 23, 1886, leaving a will which was duly proved in that county, and by which he gave to the executor a portion of his estate in trust, to be paid under certain circumstances to his legal heirs. July 3, 1895, the circumstances having occurred and the executor's account having been settled, the probate court for the county, upon the petition of an heir, decreed that the balance in the executor's hands should be distributed in equal shares among the ten persons named in the decree, it appearing that they were entitled thereto. Notice of the hearing upon the petition was given, in accordance with the order of the court, "to the heirs-at-law, next of kin, and all other persons interested in the estate," by publishing the citation once a week for three successive weeks in a Springfield newspaper and by mailing a copy of it to all who were known. The plaintiff claims to be an heir and entitled to the same share of the fund as each of the other heirs. She resided in Connecticut and had no knowledge of the will or any of the proceedings in the probate court relating to the estate until after the decree of distribution had been made and complied with. No copy of the citation was mailed to her because