

Cheshire, }
June 26, 1909. }

FINKELSTEIN v. KEENE ELECTRIC RAILWAY CO.

Where the servant of a street railway company testifies on cross-examination that he made a written report to his employers of a transaction which is the subject of inquiry, the report is not thereby rendered competent as affirmative evidence for the defendant corporation; and its erroneous admission furnishes sufficient cause for setting aside a verdict, if the facts stated therein are prejudicial to the plaintiff.

In such case, the subsequent cross-examination of a witness as to his recollection of the contents of the report does not amount to a waiver of the exception to its admission.

CASE, for personal injuries. Trial by jury and verdict for the defendants. Transferred from the April term, 1908, of the superior court by *Stone, J.*

The plaintiff was injured while, or just after, alighting from the defendants' car. The conductor of the car was called by the defendants and testified in regard to what occurred at the time the plaintiff was injured. On cross-examination, he testified that some days afterward he made a written report to the company at the request of the company's superintendent. On redirect examination, the report was ruled in, subject to the plaintiff's exception. Among other things, the report stated that the accident was due to want of care of the plaintiff alone.

Joseph Madden, for the plaintiff.

Charles H. Hersey and *John E. Allen*, for the defendants.

WALKER, J. The report should have been excluded. The fact that upon the plaintiff's cross-examination of the defendant's conductor it appeared that he made a report of the accident to the defendant, did not render the report competent as affirmative evidence for the defendant of the truth of the facts stated therein. Because one party proved the fact that a report was made did not authorize the other party to prove the contents of the report. The plaintiff did not offer any part of the report as evidence, and the question whether the defendant might then use other parts of it or the whole of it as explanatory evidence (*Wentworth v. McDuffie*, 48 N. H. 402; *Whitman v. Morey*, 63 N. H. 448; *Page v. Hazleton*, 74 N. H. 252, 254) did not arise. Nor can it be said that the contents of the report were not prejudicial to the plaintiff. The

statement that the accident was wholly due to the plaintiff's want of care is sufficient to show that the admission of the report furnished the jury with incompetent evidence of a most damaging character to the plaintiff.

The plaintiff's cross-examination of the defendant's motorman, who had testified that the report stated the truth, as to his recollection of the report, did not amount to a waiver of the exception to its admission. The witness' credibility was properly tested in this way after the report had been admitted as evidence before the jury. Clearly, there was no waiver of the exception.

Exception sustained: verdict set aside.

YOUNG, J., dissented: the others concurred.

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CUTHBERT & a., Ap'ts, v. LAING & a., Ex'rs, & a.

Where a will bequeaths the residue of an estate in equal shares to the surviving children of the testator and the children of a deceased son, and provides that in case of the death of any of the legatees their shares shall go to the survivors, the beneficiaries take *per capita*, in the absence of satisfactory evidence of an intent to divide between the grandchildren the statutory share of their deceased parent.

PROBATE APPEAL, from a decree of distribution. The testator bequeathed the residue of his estate "in equal shares" to his four children and two children of a deceased son, naming the legatees, and directed his executors to pay the shares of the grandchildren to them when they arrived at the age of twenty-one years. In case of the death of any of the legatees named, their shares were given to the survivors. The probate court decreed one fifth of the residue to each of the testator's four children and one tenth to each of the two grandchildren. Upon appeal the decree was affirmed *pro forma*, and the grandchildren excepted. Transferred from the October term, 1908, of the superior court by *Chamberlin, J.*

Joseph Madden, for the plaintiffs.

Charles H. Hersey, for the defendants.

PEASLEE, J. The claim that the grandchildren take but one share in the estate cannot be sustained. The direction of the will