

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.

Cheshire, }  
June 26, 1909. }

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

is that the property be distributed in equal shares "to my children, . . . and also to my grandchildren." There is no satisfactory evidence that the testator intended the grandchildren to take only the statutory share of their deceased parent. In the provision relating to survivorship he treats all alike. The shares of deceased beneficiaries go to the survivors. If one of the grandchildren had died, its share would have been distributed to all the survivors equally. Had the testator had in mind the statute of distribution, and intended that the two grandchildren should take only their father's share, he would also have provided that in the event of the death of one grandchild its half of its father's share in the estate should go to the other grandchild, to the exclusion of its uncles and aunts.

A will is made to avoid—not to carry into effect—the statute of distribution. If, as the appellees argue, the testator had intended to divide his estate as the statute would cause it to be divided, he could have omitted all of this clause of his will except the provision that the grandchildren's shares should be held in trust. If he had had the suggested familiarity with the statute, it could well be argued that he would not uselessly insert its provisions in the will. There is more ground for arguing that the children constitute a class taking one share, while the grandchildren as a class take the other share, than there is for the contention that the children take as individuals and the grandchildren as a class. But neither construction would carry out the intent expressed in the will. As was said in *Farmer v. Kimball*, 46 N. H. 435, 440, "any inference of an intention to divide the residue by classes is merely conjectural and quite too uncertain to prevent the application of the well settled general rule; . . . individuals falling within the description of the devisees in the residuary clause take *per capita*." The persons named and described in the residuary clause all stand alike, and each is entitled to one sixth of the residue of the estate.

*Appeal sustained.*

All concurred.