

From this the defendant argues that there is nothing in the case for the plaintiff upon the issue of appreciating the danger. But on the question of what the average man would appreciate, the millwright of long experience is not an expert who can inform a jury so as to preclude them from using their own knowledge on the subject. On the contrary, they are the true experts on this subject; while he, because of his familiarity therewith, is not qualified as they are to accurately gauge the average capacity to comprehend strange appliances and unknown forces. But if the expert's testimony is to be taken at its face value, it is not fatal to the plaintiff's case. In answer to an inquiry by the court as to whether he meant a man ought to understand he might be caught and dragged, or merely caught, he answered, "might be caught." Again, when asked if all that was needed was that the men be careful, he said they "must be using care and on their guard." This is the crux of the matter. Something beyond the care of the ordinary man was needed—something the ordinary man would not know was needed. Plainly enough, he was seeking to describe a situation which might well be found to call for warning or instruction to the men set at the work in question.

Rehearing denied.

All concurred.

Sullivan, }
June 2, 1908. }

WHITE RIVER LUMBER CO. v. CLARK, *Trustee, & a.*

BILL IN EQUITY, praying for the appointment of a trustee to carry into effect a trust in land created by Franklin Pierce in 1863. The original trustee is dead, and the plaintiff claims to be the owner of an interest in the beneficial estate. A trustee was appointed, and Maxfield, claimant of an adverse title to the land, excepted. Transferred from the November term, 1907, of the superior court by *Chamberlin, J.*

Jesse M. Barton and *Edwin G. Eastman*, for the plaintiff.

George R. Brown, for Maxfield.

PEASLEE, J. The adverse claimant has no such interest in the trust estate as to entitle him to be heard upon the question of the

appointment of a trustee. If, as he claims, he has title to the real estate in question, that fact can be shown when the trustee proceeds against him, or he against the trustee. It is not now in issue.

Exception overruled.

All concurred.

Hillsborough, }
Oct. 9, 1908. }

STEVENS, *Trustee, Ap't, v. STEVENS & a.*

PROBATE APPEAL, heard by *Peaslee, J.* The appellant received the fund in controversy as trustee under the will of William Stevens. He did not invest the fund, but commingled it with his own estate and paid over from time to time various sums to the *cestuis que trustent*, who were entitled to the income. The sums so paid exceeded six per cent interest on the fund, for which the trustee consented to be charged. It was found that the excess was a gift from the trustee to the beneficiaries. The trustee excepted to this finding, upon the ground that there was no evidence to support it. As such evidence was found in the manner in which the trust was conducted for a long period and from the relations of the parties, and in letters and oral admissions of the the trustee, the order was,

Exception overruled.

PEASLEE, J., did not sit.

George D. Beattys (of New York), for the plaintiff.

George B. French, for the defendants.

Merrimack, }
Nov. 4, 1908. }

DRISCOLL v. ROLFE & a.

CASE, for negligence. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1907, of the superior court by *Pike, J.*, upon the defendants' exceptions to the denial of their motions for a nonsuit and the direction of a verdict in their favor.

The evidence tended to prove that the plaintiff, a boy twelve