

Rockingham, }
May 4, 1915. }

DAVID URCH v. MARIA RAND.

TRESPASS *quare clausum*. Trial by the court. Transferred from the October term, 1913, of the superior court by *Branch, J.*, on the plaintiff's exception to an order of nonsuit.

Thomas H. Simes and *William E. Marvin*, for the plaintiff.

Kelley & Hatch and *Page, Bartlett & Mitchell*, for the defendant.

PARSONS, C. J. The plaintiff's evidence tends to prove his possession of the tract of flats upon which the defendant trespassed. Possession is sufficient evidence of the right of possession in issue in trespass *quare clausum*, in the absence of proof of title in the defendant. The facts, if established, that the premises may be entirely covered by tidewater and that the plaintiff does not own the adjoining upland, do not conclusively controvert the plaintiff's possession or establish the defendant's title.

Exception sustained.

All concurred.

Grafton, }
May 4, 1915. }

FRED L. PATTEE v. JOHN MOORE.

BILL IN EQUITY, to determine the location of a divisional line. The case was originally heard in the superior court before *Mitchell, J.*, and on October 31, 1911, a decree was filed establishing the boundary. February 9, 1912, the plaintiff filed a motion for a modification of the decree, and a hearing was had thereon before Mr. Justice *Mitchell*, who died before taking any action. At the October term, 1914, of the superior court, there was a hearing on the motion before *Sawyer, J.*, who entered up a new decree in accordance with the prayer, and the defendant excepted.

John H. Noonan, for the plaintiff.

Hugh Moore and *David F. Dudley* (both by brief and orally), for the defendant.

YOUNG, J. Whether the decree should be modified was a question of fact; consequently the only question of law raised by the defendant's exception is whether there was any evidence to sustain the court's finding. Instead of there being no evidence to sustain the court's conclusion, it is the only conclusion that can be drawn from the evidence.

Exception overruled.

All concurred.

Hillsborough, }
June 1, 1915. }

MARY L. COYLE v. BOSTON & MAINE RAILROAD.

CASE, for personal injuries. Trial by jury. Transferred from the September term, 1914, of the superior court by *Chamberlin, J.*, on the plaintiff's exception to an order of nonsuit.

July 9, 1913, the plaintiff was injured at the Massabesic-street crossing of the defendants' railroad. She entered on the defendants' right of way at Taylor street, walked beside the track and over the platform of the East Manchester station to Massabesic street, and thence along the street and over the crossing until she was struck by the end of the buffer beam of an approaching locomotive, which was drawing a freight train at a speed of five or six miles an hour and was making considerable noise. When the plaintiff was opposite the station she noticed that the crossing gates were up; and thinking that no train was approaching, she walked slowly toward the crossing, absorbed in her own affairs.

James A. Broderick and *Patrick H. Sullivan* (*Mr. Broderick* orally), for the plaintiff.

Branch & Branch (*Frederick W. Branch* orally), for the defendants.

YOUNG, J. It does not necessarily follow from the fact that the plaintiff noticed the gates were up when she was opposite the station that it can be found she was in the exercise of ordinary care, for it was her duty to do what the average person would have done in her situation. All fair-minded men will agree that such a person is not accustomed to walk upon a railroad crossing which he knows is in use, without thinking of where he is, or of the dangers peculiar to such crossings. *Gibson v. Railroad*, 75 N. H. 342.

Exception overruled.

All concurred.