

that would warrant any inference as to whether the saw that ran well or badly was in use. His evidence was valueless for either party. The testimony of the other witness was immaterial, so far as furnishing any proof that would aid the plaintiff in securing a verdict. On the other hand, it did tend to prove, as claimed by the defendants in their brief, that the saw which ran well was on the machine at the time of the accident. It cannot be asserted that this evidence was prejudicial to the defendants, for it furnished some proof to sustain their claim and none to support that of the plaintiff. This exception does not afford any ground for disturbing the verdict. *Parsons v. Wentworth*, 73 N. H. 122; *Bunker v. Company*, 75 N. H. 131; *Proctor v. Blanchard*, 75 N. H. 186.

An exception of the defendants, bearing upon the rights of the plaintiff, if he were found to be a volunteer at the work he was engaged in at the time of the accident, has not been referred to in the defendants' brief or oral argument, and is not understood to be relied upon.

Exceptions overruled.

All concurred.

Grafton,)
June 29, 1918. }

AUGUSTUS M. CLOUGH & a., *Ex'rs, Ap'ees, v. GEORGE WILTON,*
Adm'r.

Under P. S., c. 200, s. 2, an appeal from a probate decree allowing a will must be claimed within sixty days exclusive of the day on which the appeal is filed.

One who is prevented from claiming an appeal by a mistake of counsel may petition for relief under P. S., c. 200, ss. 7-9.

PROBATE APPEAL. The probate court allowed the will of Ella A. Higginson on March 3, 1917, and the defendant appealed from that decree on May 3 of that year. The plaintiffs moved to dismiss because the appeal was not claimed within sixty days after the decree appealed from was made. Transferred by *Sawyer, J.*, without a ruling, from the May term, 1918, of the superior court.

Drew, Shurtleff, Morris & Oakes, for the plaintiffs.

George W. Pike and *Lawrence F. Sherman* (of Massachusetts), for the defendant.

YOUNG, J. The fact P. S., c. 2, s. 34, provides that the day from which time is to be reckoned is to be excluded in computing the time within which an act must be done, tends to the conclusion that that is the only day to be excluded in making the computation. As there is nothing to rebut this conclusion it must be held that the appeal was not claimed within the time limited by P. S., c. 200, s. 2. It does not necessarily follow that the appellant is remediless, for ss. 7-9 of this chapter provide that one who is prevented from claiming an appeal by accident, mistake or misfortune may petition the court for relief, and it has been held that a mistake of counsel may be a misfortune within the meaning of s. 7. *Grout v. Cole*, 57 N. H. 547; *St. Pierre v. Foster*, 75 N. H. 10, 11.

Case discharged.

All concurred.

Coös, }
June 29, 1918. }

ALEXANDER D. KIER *v.* NORMAN PARKS.

Whether evidence which may be excluded for remoteness shall be excluded, is settled at the trial, and presents no exception.

CASE, for negligence. Trial by jury and verdict for the defendant. The plaintiff went to the defendant's garage to have repairs made on an automobile, and, while searching for a workman in the darkness, stepped between two cars, which were being repaired and were standing over an open pit, fell into the pit and was injured.

The following question, asked upon direct examination of a witness called by the plaintiff, was excluded subject to exception: "Now what is the practice in the garages where you have been employed and where you have seen pits, with reference to their being guarded or covered?"

Plaintiff's counsel then asked the following question: "Well, is there any practice or custom in the garages where you have worked, and where you have noted pits in the floors of garages, with reference to how they are taken care of?" This question was also excluded, no exception being taken, the court remarking that the question was not framed properly. Counsel then said he was asking whether or not there was such a custom; the court replying, "I don't think that is the form to put your question." The witness then was asked, "How are pits in garages where you have worked