

Rockingham, }
 June 29, 1918. }

CALVIN PAGE & a., *Ex'rs*, v. PORTSMOUTH HOSPITAL & a.

PETITION, for the construction of a will. The question is whether two houses and the land on which they stand are devised by a certain clause of the will. Transferred by *Allen, J.*, without a ruling from the October term, 1917, of the superior court.

Calvin Page, for the plaintiffs.

John H. Bartlett, for the defendants.

Per Curiam. In the absence of briefs or arguments for the parties, the executors are advised that the two houses mentioned are not included in the description of real estate devised by the clause of the will or codicil referred to.

Case discharged.

Belknap, }
 June 29, 1918. }

HAROLD E. HAYWOOD, *Adm'r*, v. BOSTON & MAINE
 RAILROAD.

CASE, for negligently killing the plaintiff's intestate, William E. Pickard, as he was passing on foot over a level crossing on Main street, Tilton. Trial by jury and verdict for the plaintiff. Transferred from the March term, 1917, of the superior court by *Sawyer, J.*, upon the defendant's exceptions to the denial of its motions for a nonsuit and for a directed verdict.

Shannon & Tilton, Frank M. Beckford and *Charles B. Hibbard* (*Mr. Beckford* and *Mr. Hibbard* orally), for the plaintiff.

Jewett & Jewett (*Mr. Theo S. Jewett* orally), for the defendant.

PEASLEE, J. The evidence in this case is somewhat conflicting, and presents opportunity for widely differing conclusions as to what Pickard's conduct was at and just before the time of the acci-

dent. The question argued is whether a finding could be made which would be consistent with the exercise of due care on his part. He was thirteen years old. It could be found that he was familiar with the crossing, that it was the defendant's rule to limit the speed of trains at that point to fifteen miles an hour, while on this occasion the speed was thirty-five miles, that as Pickard walked across the track he looked at the approaching train, and had no idea that he was in danger, and that another step would have put him in a place of safety. The plaintiff's case is thus brought within the rule that due care can be found from the party's reliance upon the customary conduct of others. *Minot v. Railroad*, 73 N. H. 317; s. c., 74 N. H. 230.

No question is made as to the sufficiency of the evidence of the defendant's fault, and the case was properly submitted to the jury.

Exceptions overruled.

All concurred.

Cōs, }
June 29, 1918. }

ELLEN D. HOLDEN v. MEYER LOVERIN.

ASSUMPSIT, for breach of an alleged contract to clear the plaintiff's land of brush and bushes. At the close of the plaintiff's evidence the court (*Kivel*, C. J.) ordered a nonsuit, and transferred the case upon the plaintiff's exception from the September term, 1917, of the superior court.

The plaintiff was the owner of land in Colebrook and Columbia, and in July, 1912, conveyed to the defendant "all of the fir, spruce, poplar and cedar standing and growing" thereon, with the right to cut and remove the same from the land in Colebrook until May 1, 1915, and from the land in Columbia until May 1, 1918, with certain reservations. In April, 1915, the defendant had not completed his operations in Colebrook, and he then made an additional contract with the plaintiff as follows:

"This is to certify that I, Ellen D. Holden, have this day received from M. Loverin one hundred dollars for the extension of time in the town of Colebrook from May 1st, 1915, to May 1st, 1916, provided he, M. Loverin, cuts all trees of fir, spruce, poplar and cedar, except cedar as mentioned in deed of sale to M. Loverin