

*Emerson*, 58 N. H. 413. It is not necessary to consider whether the merits of the whole or any part of the controversy between the plaintiffs and Cummings can be determined in a defence to this action made by him in Moore's name. Whether as between the plaintiffs and Cummings, either of his mortgages is paid or in any way extinguished, and whether, as between them and him, he is entitled to any preference in the foreclosure of partnership or separate property, are questions that should be tried on a bill in equity brought by him for the foreclosure of his mortgages, or in some other appropriate suit between him and them, rather than in this suit at law in which he is not a party, and in which Moore, being protected by a stipulation of Cummings, has no interest. The contentions of the plaintiffs and Cummings should be settled on their merits, in a suit between the contending parties, without any unnecessary question of what defence Moore could make in this suit, without any question of jurisdiction at law, and without any doubt as to the effect of the judgment, or the parties to be bound by it. Cummings's leave to appear as defendant in interest in this action should be revoked. But as one of his mortgages is younger than that of the plaintiffs, and the case shows that the plaintiffs' conclusive foreclosure, without a settlement of their controversy with him, would be inequitable, judgment of foreclosure, if rendered for the plaintiffs, should be without prejudice to his rights as holder of two mortgages. His claims as holder of both mortgages should be tried in one suit, during the speedy adjustment of which the plaintiffs' foreclosure should not be completed. Such a judgment can be rendered in favor of the plaintiffs against Moore as will not affect their contentions with Cummings. In the plaintiffs' judgment can be inserted a clause stating in substance that "This judgment is rendered without prejudice to the claims of William H. Cummings under two mortgages, which claims are not adjudicated in this action, and are to stand as if this judgment had not been rendered." If justice requires a stay of the plaintiffs' writ of possession, it may be stayed.

*Case discharged.*

SMITH and CARPENTER, JJ., did not sit: the others concurred.

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PAGE v. CAMPTON.

Whether a claimant of damages for a defective highway was unavoidably prevented by accident, mistake, or misfortune from filing his claim in ten days, or whether his omission was caused by his own fault, is a question of fact to be determined at the trial term.

PETITION, upon Gen. Laws, c. 75, s. 9, for leave to file a claim against the defendants for damages caused by a defective highway.

*Page & Story*, for the plaintiff.

*Burleigh & Adams*, for the defendants.

STANLEY, J. It was a question of fact whether the plaintiff was unavoidably prevented by accident, mistake, or misfortune from filing his claim in ten days, or whether his omission was caused by his own fault. *Sewell v. Webster*, 59 N. H. 586; *Gitchell v. Andover*, 59 N. H. 363, 364; *Bolles v. Dalton*, 59 N. H. 479; *French's Petition*, 17 N. H. 472; *Buffum v. Sparhawk*, 20 N. H. 81, 83. And that question having been decided against the plaintiff at the trial term, the petition should be denied.

*Case discharged.*

SMITH, J., did not sit: the others concurred.

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CUMMINGS & a. v. PARKER & a.

A final decree in equity is not reopened and changed on motion, when it appears that the facts upon which the motion is based existed and were known to the party making it at the time of the original hearing in the cause before a referee, and were not shown by the report of the referee, nor brought to the attention of the court at any subsequent stage of the litigation before the decree was entered up.

If the party is entitled to any relief in such case, it must be by application for a new trial on the ground of accident, mistake, or misfortune.

IN EQUITY. Motion to modify a final decree.

*Bingham, Mitchells & Batchellor* and *Bingham, Aldrich & Remick*, for the defendants.

*Rand & Morse*, for the plaintiffs.

ALLEN, J. The defendants claim that the decree entered at the March term, 1882, does not follow the opinions of the court heretofore given in the case, inasmuch as it restricts them in the use of water to an amount not exceeding the "trip-hammer privilege," and to be taken from the surplus after the mills on the east side of the river should draw whatever is necessary for their use through the canal as it now is. They move that the decree be modified so