

through mistake, accident, or misfortune. Facts found by a referee.

*Edw. O. Cooke* (of Massachusetts) and *J. Kivel*, for the petitioners.

*T. J. Smith* and *J. G. Hall*, for the defendant.

ALLEN, J. The reasons assigned for leave to appeal from the defendant's settlement of his administration account are, that one inventory having been made and filed, other assets, of which no inventory was made, were discovered, and that neither at the settlement of the account, nor subsequently within the time for taking an appeal, did the administrator produce his books and vouchers for examination, and the petitioners were deprived of the opportunity of various errors and frauds, which it is claimed were made in the settlement.

The only errors in the account which the referee has found are a charge by the administrator of money paid for services by his attorney, thirteen dollars of which were for services rendered while the attorney was register of probate, and an excess—how much is not found—taken by the administrator, as commissions upon money collected and disbursed. These charges were examined and agreed to by the plaintiffs' attorneys, at the time the amount was settled. The assets, of which no appraisal was made, were accounted for at their value. At the time the vouchers were called for by the plaintiffs, the administrator could not find them, but they were subsequently discovered and produced before the referee, and corresponded with the items of the account. After the settlement the plaintiffs gave a receipt for the balance found, and a release, under seal, of all further claim against the administrator. There was no fraud or concealment on the part of the administrator, and there were no errors in the account, which, by reasonable diligence, might not have been discovered in season for correction or appeal. There being no fraud or concealment, and all matters having been open to examination, or so situated that by reasonable diligence they might have been examined, there is no such mistake, accident, or misfortune as warrants the granting of leave to appeal to prevent injustice.

*Petition dismissed.*

All concurred.

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JONES v. LANE.

Under G. L., c. 233, s. 5, the plaintiff cannot be allowed more costs than damages when the title to real estate is not in question and the damages recovered do not exceed thirteen dollars and thirty-three cents.

TRESPASS *qu. cl.* The title to real estate was not in question.

Damages were assessed by the court at twelve dollars. The defendant moved that the costs be limited to twelve dollars, claiming it as matter of right. The court denied the motion, and the defendant excepted.

*W. R. Burleigh* and *J. Kivel*, for the plaintiff.

*Copeland & Edgerly*, for the defendant.

BINGHAM, J. The costs should have been limited to the amount of the verdict, or a less sum.

"In actions of trespass to real estate commenced in the supreme court, where the title to real estate is not in question, the court shall allow so much costs as they think just, not exceeding the damages recovered in case they do not exceed thirteen dollars and thirty-three cents." G. L., c. 233, s. 5.

The construction given this statute is, that, when the damages in an action of trespass to real estate commenced in the supreme court are less than thirteen dollars and thirty-three cents, the court shall allow no more costs than damages. *Peavare v. Towne*, 57 N. H. 220; *Bachelor v. Green*, 38 N. H. 265; *Ward v. Bartlett*, 1 N. H. 14; *Brown v. Mathes*, 5 N. H. 229.

The title to real estate not being involved in this action, it comes within the statute.

*Exceptions sustained.*

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

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ROBERTS v. BARKER.

The report of a referee should state facts, and not the evidence on which they are found.

Where a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition, or to resist importunity or undue influence, equity will interfere.

BILL IN EQUITY to annul a mortgage, enjoin its foreclosure, and for an account. Facts found by a referee. December 27, 1871, the plaintiff owned an undivided half, in common with his brother Jeremiah, of 120 acres of land in Farmington, and on that day executed the mortgage in question to the defendant to secure the payment of certain promissory notes made by Jeremiah for money loaned to him by the defendant, and signed by the plaintiff as