

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

*Exceptions sustained.*

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

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BELKNAP.

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DURRELL & a. v. EMERY.

64 223  
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An action of assumpsit for use and occupation cannot be maintained when there is no contract or promise, express or implied, to pay for the occupation.

ASSUMPSIT, for use and occupation from October 1, 1883, to July 1, 1885. Thomas Durrell devised the premises to the plaintiffs, and died May 9, 1883, at the age of eighty-five years. The plaintiffs introduced evidence tending to show that July 1, 1885, the defendant was, and for a year or two had been, in occupation of the premises, and that on that day they demanded rent, which the defendant refused to pay. The defendant moved for a nonsuit. It appearing that the principal question of fact in dispute was whether G. Burleigh paid to Thomas Durrell, November 7, 1882, \$300 for five years' rent in advance, the motion was denied for the purpose of trying that question, and the defendant excepted.

Burleigh owned a building on the land, and for many years paid to Thomas Durrell a monthly ground rent of \$1.50 to \$4 until 1882, and of \$5 during that year until November 7. The defendant introduced evidence tending to show that on that day Burleigh paid to Durrell \$300 for the ground rent for five years from that date, and took his receipt for the same. Whether Burleigh paid that sum to Durrell was the only question submitted to the jury, who found for the plaintiffs. Burleigh occupied the premises until the fall of 1883, when the defendant took possession under a contract with Burleigh (the particulars of which did not appear), of whom, April 10, 1884, he bought the building, together with the right to occupy the premises free of ground rent until November 7, 1887. There was no evidence of any contract or of any communication whatever between the plaintiffs and the defendant except as before stated.

*Jewell & Stone*, for the plaintiffs.

*E. A. Hibbard*, for the defendant.

CLARK, J. There being no evidence of any contract, express or implied, between the plaintiffs and the defendant to pay for the occupation of the premises, or that the relation of landlord and tenant ever existed between them, the action cannot be maintained, and the motion for a nonsuit should have been granted.

*Exception sustained.*

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

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ADAMS, *Ap t*, v. ADAMS & a.

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64	221
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A petition to the probate court for the appointment of a trustee will not be dismissed for want of service, because the original petition, instead of a copy, was left with the defendant.

The conduct of one who is appointed in a will to an active trust concerning property and incomes may amount to a declination of the trust without words; and in such a case the probate court may appoint another to fill the vacancy.

In a petition, which asks generally for the appointment of some suitable person or persons to a trust, one who has appeared in the probate court to oppose the granting of the petition need not have formal notice of a further application, in the form of a petition which names the trustees desired.

An objection that the petitioners are not jointly entitled to maintain the proceeding, if available at all, must be interposed at the earliest opportunity.

APPEAL from a decree of the probate court appointing Charles F. Stone and John B. Garland trustees under the will of Isaac Adams, upon the petition of the defendants, beneficiaries of an active trust thereby created, respecting the management of a large amount of property, real and personal, and the distribution of the income to minor children.

The trustees named in the will were Anna R. Adams, the testator's widow, and this appellant, Julius Adams, his son. The widow died without entering upon the duties of the trust. The appellant contested the will in a suit which lasted about two years, and was finally determined in favor of sustaining the will; and he never undertook or offered to perform any of the duties of the trust with respect to the control, care, and management of the trust estate, or the rights of the beneficiaries under the will, up to the filing of this petition. Facts found by the court.