

of the side line, and no contradiction in the evidence as to the width of the lots furnished by the plan.

The finding of fact upon which the evidence was excluded thus appears, upon the only ground urged in its support, to have been a plain mistake. No other ground being suggested or appearing upon which the finding can be sustained, it must be set aside. *Norris v. Clark*, 72 N. H. 442. The evidence furnished by the plan, no objection being made to the authenticity of the original or of the copy, was competent and it appears to have been material. Its exclusion was due to a mistake of fact and was error. This result is reached without considering whether the fact found, if sustainable, would have authorized as matter of law the entire exclusion of the evidence furnished by the plan, or whether the printed matter on the plan was as matter of law immaterial. Nothing appears in the case from which it could be found that the exclusion of material, competent evidence was not prejudicial to the objecting party. The verdict against the party objecting must therefore be set aside.

Exception sustained.

All concurred.

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DAME v. WOOD.

The fact that a litigant's failure to act was due to a mistake of his counsel warrants a finding that he was prevented by accident, mistake, or misfortune.

MOTION, by the plaintiff, to be relieved from the agreement on which this case was submitted when it was previously before the court (73 N. H. 222, 391). Hearing before *Stone, J.*, by whom the case was transferred from the November term, 1906, of the superior court.

Although both the plaintiff and his counsel knew of the facts which they say show that "the parties understood that the plaintiff's performance of the contract was accepted from day to day as the work progressed," the plaintiff acted by advice of counsel, and neither of them knew, or ought to have known, that those facts were material to a recovery. Subject to the defendant's exception, the court ordered that the plaintiff be relieved from the agreement.

George B. Cox and *Walter S. Peaslee*, for the plaintiff.

Jewett & Plummer, for the defendant.

YOUNG, J. It can be found from the fact that a person fails to act because of a mistake of his counsel, that he was prevented from acting by accident, mistake, or misfortune (*Grout v. Cole*, 57 N. H. 547; *Bolles v. Dalton*, 59 N. H. 479, 480; *Kelsea v. Manchester*, 64 N. H. 570; *Harvey v. Northwood*, 65 N. H. 117; *Coscar v. Truesdale*, 69 N. H. 490; *Parsons v. Durham*, 70 N. H. 44; *Gunnison v. Abbott*, 73 N. H. 590, 592); so there was evidence to sustain the court's finding, which is the only question of law raised by the defendant's exception.

Exception overruled.

All concurred.

April 2, }
1907. }

PETITION OF HENRY E. MŒBUS.

A question determined adversely to the petitioner by a judgment rendered in *habeas corpus* proceedings cannot be again litigated as a matter of right upon his subsequent application.

An escaped convict is not entitled to a trial after recapture, except upon the issue of his identity; and his refusal to litigate this question when opportunity is afforded him is an admission that he is the person the state alleges him to be.

Repeated applications for a writ of *habeas corpus* introducing no new facts material to the issue will ordinarily be summarily disposed of.

PETITION, for a writ of *habeas corpus*, filed December 28, 1906. It alleges substantially the same facts set forth in *Petition of Mæbus*, 73 N. H. 350, and claims (1) "that under the extradition laws of the states of New York and New Hampshire, I was entitled to a hearing before my committal to the state prison, no matter on what charge my extradition had been obtained, and no matter on what other ground or for what other reason the authorities of the state of New Hampshire purposed to hold me, and no matter whether or not I was the individual named in the extradition papers"; (2) "that having been extradited on the charge of breaking prison (P. S., c. 285, s. 13), I was entitled to a hearing on that charge, and no hearing having been had, I am entitled to