

Carroll, }
May 5, 1942. } No. 3327.

EDITH F. PERLEY *v.* FRANK W. ROBERTS.

Edith F. Perley, pro se (by brief and orally).

William N. Rogers (by brief and orally), for the defendant.

PAGE, J. Upon recommendation of the master who heard the merits of the case, the Superior Court ordered the bill dismissed without costs. The order as to costs was admittedly unconditional. It does not appear that either the parties or the court had in mind an implied condition that the plaintiff should suffer prior costs if she should exercise her right to appeal to this court.

The plaintiff subsequently brought the case here upon exceptions to the decree on the merits, and those exceptions were overruled. 91 N. H. 254. Thereafter the defendant moved in Superior Court that the order of "no costs" be modified and that the defendant be allowed to collect his costs prior to decree. This motion was granted, and the plaintiff excepted.

If the trial court had discretion to modify the order for costs (*Redlon Company v. Corporation*, 91 N. H. 502), it must be because good cause was shown. The only cause suggested is the recital in the preamble of the motion that "the record shows that said plaintiff was not content to abide by the order of said Court, but transferred certain exceptions to the Supreme Court, thereby putting the defendant to further costs and expense." That will not serve, since such a "cause" would penalize the plaintiff for exercising her legal right of appeal. Consequently the order of modification was not within the sound discretion of the court.

Exception sustained.

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