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Chapter 123.

Petitions and Actions of Review.

Petitions for Review.

Sec. 1. Review within 3 years after judgment. — Any justice of the superior court may grant 1 review in civil actions, including petitions for partition, and for certiorari, and proceedings for the location of lands reserved for public uses, when judgment has been rendered in any judicial tribunal in said county, if petition therefor is presented within 3 years after the rendition of judgment, and in the special cases following:

I. When a petition for a review of an action defaulted without appearance is presented within 3 years after an officer having the execution issued on the judgment therein demands its payment of the defendant or his legal representative.

This subsection is a remedial statute, designed to give the aggrieved party an opportunity to be heard after full knowledge has come to him of the rendition of the judgment. It should be liberally construed. McNamara v. Carr, 84 Me. 299, 24 A. 856.

A review under this subsection is predicated upon the fact that an adverse judgment has been rendered. Enoch C. Richards Co. v. Libby, 140 Me. 38, 33 A. (2d) 537.

Defendant need not wait until demand made.—The petitioner may delay his application for review under this subsection until knowledge of the judgment is brought home to him by a demand by an officer having the execution, but the fair construction of the subsection is, that the defendant against whom a judgment has been rendered in the manner named in the subsection, may apply for a review any time within three years after actual knowledge of the judgment against him. He need not wait until the knowledge is communicated to him in the manner named in the subsection. If he receives actual knowledge from any other source, he may apply for review any time within three years. McNamara v. Carr, 84 Me. 299, 24 A. 856.

Subsection not applicable to default due to absence from state.—Under this subsection, one review of an action defaulted without appearance may be granted when the petition therefor is presented within three years after an officer, having the execution issued on the judgment thereon, demands its payment of the defendant or his legal representatives. This special provision has reference to defendants who cannot excuse their default by proof of absence from the state, and does not apply to absent defendants who are given a review as a matter of right under c. 113, § 5. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

Party may prove by parol that appearance made for him without his knowledge. —In a petition for review under this subsection, the party for whom an appearance was made in the original action may prove by parol that it was without his knowledge or authority, and, if the fact is established, the appearance can in no way legally affect him. It is not an attempt on the part of the petitioner to impeach the judgment and show it void by parol evidence for the irregularity alleged; but he asks the court to exercise its discretion in permitting him to have an opportunity to be heard upon the matter in issue in the original suit; and for that purpose it is competent for him to show that judgment was rendered on default without service upon him, and without his knowledge. McNamara v. Carr, 84 Me. 299, 24 A. 856.

Applied in Sherman v. Ward, 73 Me. 29.

II. When the petitioner shows that a witness testified falsely to material facts against him in the trial of the action, whereby he was surprised and was then unable to prove the falsity but has since discovered evidence, which with that

before known is, in the opinion of the court, sufficient proof that the testimony was false; or if the witness has been convicted of perjury therefor.

By this subsection, a person is entitled to a review, as a matter of right, upon proof of three things: (1) that, upon the original trial, a witness testified falsely against him to material facts; (2) that he was thereby taken by surprise, so that he was unable then to produce evidence that it was false; (3) that such witness has been convicted of perjury in such testimony, or that the petitioner has discovered sufficient proof of its falsehood, in the opinion of the court. Whether these things appear, upon the evidence in support of the petition, must be determined by the presiding judge. If he should find them proved by the evidence, and should then refuse to grant a review, the petitioner would have a remedy by exceptions. Sturtevant v. Randall, 49 Me. 446; Potter's Inc. v. Virgin, 139 Me. 300, 30 A. (2d) 276.

The court should be satisfied of the fact of surprise, before it will grant a review under this subsection. Atkinson v. Conner, 56 Me. 546.

And that evidence of falsity could not have been discovered by diligent inquiry. —It is not sufficient that a petitioner for a review under this subsection affirms that, with all the diligence in his power, he could not have discovered the evidence to prove the falsity of the testimony. The court must be satisfied from the evidence in the case, that such evidence could not have been discovered by diligent inquiry, before it will disturb the verdict. Atkinson v. Conner, 56 Me. 546.

Review granted when witness convicted of perjury.—Where a witness, whose testimony was in favor of the prevailing party in a cause, is afterwards convicted of perjury in giving such testimony, the court, in the exercise of its discretion under this subsection, will grant a writ of review. Morrell v. Kimball, 1 Me. 322.

Under this subsection, a petitioner is entitled to a review of the action if he can show to the court that the testimony was false and that he was surprised by it at the trial, or by showing that the witness had been convicted of perjury therefor. Landers v. Smith, 78 Me. 212, 3 A. 463.

But review not granted merely to impeach testimony of witness.—It is not the practice of the court to grant a review on petition, where the object is merely to impeach the credibility of a witness who testified at the trial. Haskell v. Becket, 3 Me. 92.

The limitation of the remedy under this subsection is three years. Landers v. Smith, 78 Me. 212, 3 A. 463.

But time may be extended if petition begun within 3 years. — If the petition under this subsection is begun within three years, the time for the action may be extended, otherwise it ends with the three years. Landers v. Smith, 78 Me. 212, 3 A. 463. See c. 113, § 180, and note.

Cited in Cole v. Chellis, 122 Me. 262, 119 A. 623.

III. On the petition of a party in interest who was not a party to the record, setting forth the fact of such interest, and upon filing a bond with sufficient surety or sureties, approved by the presiding justice, to secure the party of record against any judgment recovered by the defendant in review.

The reason of the enactment of this subsection is apparent. If one is bound by a judgment in the original suit, it is just that he should be given the right to bring a petition for its review. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113; Vermeule v. Brazer, 128 Me. 437, 148 A. 566.

Not everyone interested in an action, or affected by its result, can be admitted to review it under this subsection. Only a party to an action should have leave to bring an action of review. He may be a party by record, or a party in interest, but he should be a party, having the care or responsibility of the action. Johnson v. Johnson, 81 Me. 202, 16 A. 661; Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113.

But only those who took part in prosecution or defense of original suit. — By the "party in interest," who is permitted to bring a petition for review, is meant one who has taken part in the prosecution or defense of the original suit. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113.

The words "a party in interest" would seem to have a wide scope and to include any person who might be interested in the suit. But a "party in interest" is quite different from a "person in interest." The former phrase is far more limited in its application. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113.

If the petitioner, though interested, is not a party in interest, such as this subsection contemplates, he is not entitled

to review. Johnson v. Johnson, 81 Me. 202, 16 A. 661.

Thus, stranger to judgment not entitled to review.—In the case at bar, the indemnitor, who is the petitioner in review, took no part in the defense of the original suit against his indemnitee, was not requested to assume the defense, and knew nothing of it. It follows therefore that he has no standing under the statute to ask the review of a judgment to which he was and is a stranger. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113.

And a residuary legatee of a solvent testator is not such a party in interest in an action brought by the executor as to entitle him to petition for a review of the action under this subsection. Johnson v. Johnson, 81 Me. 202, 16 A. 661.

But party in interest need not have been original party to action.—One who is actually a party in interest, but who was not an original party to an action, may, as provided in this subsection become a petitioner for a review of the original action provided that his petition sets forth the fact of his interest, and upon filing of bond with sufficient surety or sureties, approved by the presiding justice, to secure the party of record against any judgment recovered by the defendant in review. Vermeule v. Brazer, 128 Me. 437, 148 A. 566.

Warrantor vouched in to defend suit against warrantee can bring petition for review. — It has been held that a warrantor who has been vouched in to defend a real action brought against his warrantee can bring a petition for review as a party in interest, because after such voucher the warrantor is bound by the judgment rendered therein even though he did not appear and defend the suit. Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113; Vermeule v. Brazer, 128 Me. 437, 148 A. 566.

History of subsection. — See Glovsky v. Maine Realty Bureau, 116 Me. 378, 102 A. 113.

Applied in Farnsworth v. Kimball, 112 Me. 238, 91 A. 954.

Cited in Douglass v. Gardner, 63 Me. 462.

IV. When a judgment has been rendered on the report of referees in an action referred by rule of court, if other matters in dispute between the parties were included in the rule of reference. The depositions used before the referees may be used on the hearing of such petition, and if review is granted, they may be used at the trial; and all matters embraced in the rule of reference, although not wholly contained in the writ, shall be included and tried in review.

This subsection was to enlarge, not to restrict the power of the court. It was doubted, as such a case was a "civil action" and something more, whether it would be included in the authority already given to grant reviews in all civil actions, in which judgment had been rendered in any judicial tribunal. It assumes that a review may be granted "in an action referred by rule of court," and extends the authority of the court to cases where "other matters in dispute between the parties were included in the rule of reference." Gooding v. Baker, 60 Me. 52.

And it does not preclude review where other matters not included in rule.—By authority of this subsection, any justice of the superior court may grant a review when a judgment has been rendered on the report of references in an action referred by rule of court, if other matters in dispute were included in the rule of reference. Review might be granted in such cases although no other matters in dispute between the parties were included in the rule. The statute is not one of limitation but in enlargement of a general rule already existing. Dobson v. Chapman, 131 Me. 336, 162 A. 793. See note to sub-§ VII.

V. When a material amendment of the declaration is made after entry of the action without actual notice thereof to the defendant and judgment is rendered on default, a review may be granted before execution of final process in the action or within 3 years thereafter.

VI. In cases mentioned in section 51 of chapter 171.

VII. A review may be granted in any case where it appears that through fraud, accident, mistake or misfortune justice has not been done and that a further hearing would be just and equitable, if a petition therefor is presented to the court within 6 years after judgment.

I. General Consideration.
II. What Constitutes "Accident, Mistake or Misfortune."

I. GENERAL CONSIDERATION.

This subsection confers upon the court a broad power and one the court should exercise freely to grant relief from unjust judgments. Pickering v. Cassidy, 93 Me. 139, 44 A. 683.

Subsection limited to civil actions.—The words "any case" in this subsection are limited by the words "civil actions" used at the beginning of the section. Stearns v. Ritchie, 128 Me. 368, 147 A. 703.

But it is applicable to judgment on report of referees.—The great object in view in enacting this subsection was the furtherance of justice and the prevention of injustice. These objects are equally desirable, whether the judgment is rendered upon the report of referees or on the verdict of the jury. Gooding v. Baker, 60 Me. 52.

Although no other matters in dispute were included in rule. — The court may grant a review under this subsection of a judgment rendered upon a report of referees in an action referred to them by rule of court, although no other matters in dispute between the parties were included in the rule as required by subsection IV. Gooding v. Baker, 60 Me. 52.

Each petition rests on its own proven facts. — Each petition for review under this subsection is addressed to the sound discretion of the court and must rest upon its own proven facts. Enoch C. Richards Co. v. Libby, 140 Me. 38, 33 A. (2d) 537.

Petitioner must establish 3 propositions. —Under this subsection the petitioner is not entitled to a review unless he proves to the satisfaction of the court at nisi prius three propositions: (1) that justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake or misfortune; and (3) that a further hearing would be just and equitable. Donnell v. Hodsdon, 102 Me. 420, 67 A. 143; McDonough v. Blossom, 109 Me. 141, 83 A. 323; Thomaston v. Starrett, 128 Me. 328, 147 A. 427; Thompson v. American Agricultural Chemical Co., 134 Me. 61, 181 A. 829; Dupont v. Labbe, 148 Me. 102, 89 A. (2d) 741.

The absence of which leaves the petition without judicial standing. Jason v. Goddard, 129 Me. 483, 149 A. 622.

And the decision of the presiding justice as to these is final.—If the presiding justice is satisfied with all three of these propositions and grants the petition or is not satisfied of some one of them and denies the petition, his decision is final and not subject to review upon exceptions. Donnell v. Hodsdon, 102 Me. 420, 67 A. 143; Grant v. Spear, 105 Me. 508, 74 A. 1130; Thomaston v. Starrett, 128 Me. 328, 147 A. 427; Thompson v. American Agricultural Chemical Co., 134 Me. 61, 181 A. 829; Dupont v. Labbe, 148 Me. 102, 89 A. 741.

The mere order of dismissal by itself is in legal effect a determination by the sitting justice that at least one of the three requisite propositions as a matter of fact or of law, so far as either fact or law or both are involved, has not been proved to his satisfaction. Exceptions to such an order of dismissal cannot be sustained where it does not appear that the sitting justice expressed any opinion or gave any direction or judgment on any matter of law or gave any specific ruling in relation to any matter of fact or law, or that upon the record the order raised only a question or questions of law. Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

Injustice must have been done. — It must be shown that injustice has been done before a review can be granted under this subsection. Booth Bros. v. Smith, 115 Me. 89, 97 A. 826.

If it is shown that there has been accident or mistake, it must also appear "that justice has not been done" by reason thereof. Pierce v. Bent, 67 Me. 404.

If injustice was not done a review under this subsection is not available. Todd v. Chipman, 62 Me. 189.

In the case sought to be reviewed.—It is the failure of justice actually experienced in the case sought to be reviewed, and not future conjectural inconvenience or loss in another case, that this subsection contemplates. In other words, it is a mischief accomplished and not one apprehended that this provision of the statute affords a remedy for. Pierce v. Bent, 67 Me. 404.

Through fraud, accident, mistake or misfortune.—If there is no suggestion of any failure of justice through fraud, the only question for the court under this subsection is whether it appears from the evidence that there has been any such failure of justice "through accident, mistake or misfortune" that "a further hearing would be just and equitable." Pickering v. Cassidy, 93 Me. 139, 44 A. 683; Levis-ton v. Standard Historical Society, 133 Me. 77, 173 A. 810.

If there was no "accident or mistake" in the purview of this subsection, of course it does not appear that justice has not been done through accident or mistake. Pierce v. Bent, 67 Me. 404.

Which may be proved by showing trial before jury disqualified by law. — That justice has not been done and that the consequent injustice was through fraud, accident, mistake or misfortune are proved by showing that the petitioner was compelled to proceed to trial before a jury disqualified by law from sitting in his case. McDonough v. Blossom, 109 Me. 141, 83 A. 323.

But a judgment erroneous because based upon too few data is not unjust within the meaning of this subsection. It is the duty of litigants to supply the data, to adduce evidence and argument. It is their duty to be diligent in this work. If judgment goes against a litigant by reason of his neglect to appear, or by reason of the insufficiency of his evidence or argument, he has not thereby suffered an injustice, but rather the natural consequences of his own neglect. Pickering v. Cassidy, 93 Me. 139, 44 A. 683.

Review erroneously granted if further hearing would not be just and equitable. —Where the presiding justice rules in effect that it is enough to show the negligent omission of the attorney to notify the client of the day set for trial, and that he, the presiding justice, need not be satisfied of anything else, such ruling is subject to exception and is erroneous. It grants a review although there may not be any defense to the action, and although a further hearing would not be just nor equitable. Donnell v. Hodsdon, 102 Me. 420, 67 A. 143; Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

And review not granted to give petitioner time to recover judgment against plaintiff. — If the petition asks for a review, not because the verdict is wrong, or is expected to be reversed by the review prayed for, but to give the petitioner time to recover a judgment against the plaintiff with which to satisfy, wholly or in part, the judgment the plaintiff now holds against him, the petition should be denied. Pierce v. Bent, 67 Me. 404.

Cited in Lourie v. Melnick, 128 Me. 148, 146 A. 84.

II. WHAT CONSTITUTES "ACCIDENT, MISTAKE OR MISFORTUNE."

The remedy for a mistake in casting interest is by petition for review under this subsection. Starbird v. Eaton, 42 Me. 569.

Subsection not applicable to mistakes in opinion or judgment. — Every mistake, either of the tribunal or the party, is not such a mistake as this subsection contemplates. Mere mistakes in opinion or judgment are outside of the statute. Pickering v. Cassidy, 93 Me. 139, 44 A. 683.

Mere mistakes in opinion or judgment do not bring a case within the meaning of this subsection. Farnsworth v. Kimball, 112 Me. 238, 91 A. 954.

The word "mistake" does not mean an error in judgment either upon the facts or the law, but some unintentional error as for instance in a mathematical computation. Perry v. Ames, 112 Me. 202, 91 A. 931.

"Accident, mistake or misfortune" import something outside petitioner's control. — The words "accident, mistake or misfortune," used in this subsection to describe the source of the injustice which would make a further hearing just and equitable, ordinarily import something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for. Pickering v. Cassidy, 93 Me. 139, 44 A. 683; Farnsworth v. Kimball, 112 Me. 238, 91 A. 954; Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

And a review will be denied when it appears that the petitioner's predicament is due to his own fault, and want of reasonable diligence. Farnsworth v. Kimball, 112 Me. 238, 91 A. 954; Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

If the failure of the petitioner to act was due to his own personal, palpable neglect, this subsection affords no remedy. Farnsworth v. Kimball, 112 Me. 238, 91 A. 954.

If the petitioner himself, by his negligence, with full knowledge of the situation, permitted the judgment to be entered he is not entitled to review under this subsection. Thompson v. American Agricultural Chemical Co., 134 Me. 61, 181 A. 829.

Thus review not available to put in testimony negligently omitted.—A review will not be granted to enable a party to put in testimony, which either was or might with reasonable diligence have been within his knowledge and reach at the trial of the original cause, and was either

wilfully suppressed or negligently omitted. Todd v. Chipman, 62 Me. 189.

Neglect of attorney is not "accident, mistake or misfortune".—An admission of inexcusable neglect on the attorney's part does not establish "accident, mistake or misfortune" under this subsection. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

Nor is attorney's failure to give good advice. — That the petitioner's attorney did not give him good advice is not such a mistake or misfortune as this subsection contemplates. The subsection certainly does not mean that when a lawyer gives poor advice it is a cause for review. Farnsworth v. Kimball, 112 Me. 238, 91 A. 954.

Nor his failure to defend. — That the petitioner employed an attorney to defend the suit and the attorney failed to do so is not adequate proof to give the petitioner relief under this subsection. Taylor v. Morgan & Co., 107 Me. 334, 78 A. 377.

Thus default through negligence of attorney is not subject to review. — The mere fact that the default of the petitioner in the action sought to be reviewed occurred through the negligence of his attorney is not such accident, mistake or misfortune on his part as would entitle him to a review. Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

The negligence of an attorney is the negligence of the party he represents. If an attorney permits a judgment to be entered against his client on default through apparent neglect which arises from a mistaken belief as to what has been done in the cause, it may bring the case within this subsection, but, if the neglect and resulting default are without valid excuse or justification, it is not error to refuse to allow a review of the action. Such inexcusable and culpable neglect is not accident, mistake, or misfortune as those words are used in the subsection. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

Nor is dismissal through such negligence.—If the petition under this subsection is to review a dismissal, it must affirmatively appear that the dismissal of the case was made without negligence on the part of the petitioner's attorney. Enoch C. Richards Co. v. Libby, 140 Me. 38, 33 A. (2d) 537.

But review may be had if apparent neglect arises from mistake as to what has been done.—Apparent neglect on the part of the attorney may arise through such a mistaken belief as to what has been done by himself or others as to bring a given case within the terms of this subsection. Taylor v. Morgan & Co., 107 Me. 334, 78 A. 377; Enoch C. Richards Co. v. Libby, 140 Me. 38, 33 A. (2d) 537.

A review will be granted, that a discharge in bankruptcy may be pleaded, where the petitioner's counsel in the original action failed to appear for him in defense, though requested so to do, through a mistaken supposition that the counsel who had been employed by another defendant also represented the petitioner, and would protect his interests. Shurtleff v. Thompson, 63 Me. 118.

And attorney not negligent in relying on court's assurance.—An attorney who has received assurance from the court that he would receive notice to enable him to protect his rights, is not chargeable with negligence in his reliance upon such assurance. Enoch C. Richards Co. v. Libby, 140 Me. 38, 33 A. (2d) 537.

Petitioner has burden of negativing his negligence and that of attorney. — This clause casts upon the petitioner the burden of negativing negligence on the part of himself and of his attorney and if that burden is not sustained he is not entitled to review. Taylor v. Morgan & Co., 107 Me. 334, 78 A. 377.

VIII. Any defendant in the original judgment may petition in the name of all, by furnishing to each of his codefendants requiring it such security against all liability therefrom as the court deems reasonable; and the court, on motion of any original codefendant, shall require such security in any stage of the proceedings. (R. S. c. 110, § 1.)

History of section.—See Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

Reviews are granted to prevent injustice. Brooks v. Belfast & Moosehead Lake R. R., 72 Me. 365.

A review is not a writ of error, by which a judgment is reversed, nullified and rendered void ab inito. It is remedial process to enable the party to correct wholly or in part, a former judgment by means of a new one. The whole statute on the subject of reviews proceeds upon this view. Dyer v. Wilbur, 48 Me. 287.

In our practice a petition for a review is not, in itself, a review, when granted and is not in the nature of a writ of error to reverse a judgment for errors in the record of law or fact. It assumes that the for-

mer judgment is to stand, but allows the party to review the action, and to obtain, if he can, a new judgment in his favor, equal to the former judgment against him, or to some part of it. Bradstreet v. Partridge, 59 Me. 155.

And a petition for review cannot serve the purpose of a rehearing. It will not lie for the purpose of seeking a revision by the court of its considered conclusions, either of fact or of law. Booth Bros. v. Smith, 115 Me. 89, 97 A. 826.

Superior court cannot review final adjudication of supreme court.—Under this section, the superior court has exclusive original jurisdiction over petitions for review. But the authority thus given does not extend to cases which have been finally adjudicated in the supreme judicial court sitting as a law court. Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254, disapproving Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A. 22 and Booth Bros. v. Smith, 115 Me. 89, 97 A. 826, in which cases it was suggested that the failure of the law court to consider or to erroneously disallow a just claim might be cause for a review.

Review limited to cases specified in section.—The right to a review is created by statute, and is limited to the causes specified in the statute. Booth Bros. v. Smith, 115 Me. 89, 97 A. 826; Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254.

A petition for a review of a civil action is a statutory remedy to be granted only in the special cases named in this section. Donnell v. Hodsdon, 102 Me. 420, 67 A. 143.

Thus the section applies only to civil cases. Wells' Case, 2 Me. 322.

And it does not apply to a judgment rendered upon demurrer, from which an appeal is claimed, but by mistake is not entered, the remedy, if any, being by writ of error. Elden v. Cole, 8 Me. 211.

But the words "civil actions" include prosecutions for the maintenance of bastard children. Eaton v. Elliot, 28 Me. 436.

And review will lie in such proceedings.—A bastardy complaint is a civil action within the meaning of this section and review will lie in bastardy proceedings. Stearns v. Ritchie, 128 Me. 368, 147 A. 703.

A review can be granted only upon petition of a party to the judgment, or someone representing his interest. Taylor v. Sewall, 69 Me. 148.

Thus administrator not entitled to review of judgment against predecessor.—An administrator de bonis non cannot maintain a petition to review a judgment recovered against his predecessor for any cause. He is neither a party to such judgment, nor in privity with anyone who is. Taylor v. Sewall, 69 Me. 148.

And only party to partition proceedings entitled to review.—A review of the judgment and proceedings on a petition for partition can be granted only upon the application of a party to the former process, or of one representing the interest of a party. There is no provision in the statutes authorizing a person, interested in the estate divided, to be first admitted to become a party to the proceedings after the partition has been ordered, and the proceedings have been finally closed. Elwell v. Sylvester, 27 Me. 536.

The burden of establishing the essential requisites of review is on the petitioner. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

Review is not matter of right.—The legislature was aware that cases would arise where a writ of error would not enable the party to obtain right and justice, and also that after final judgment, with or without satisfaction, it would be too late to grant a new trial in that action or under that entry on the docket. The provision was, therefore, made for a review, in the discretion of the court, within a limited time. But this is not now a matter of right. A party cannot sue out a writ of review at his own motion, as he can an original writ. Bradstreet v. Partridge, 59 Me. 155. See c. 113, § 5, re review as matter of right.

A petitioner has no valid claim to a writ of review, as a matter of right under this section, as the words "civil actions" are limited by the subsequent words, "and in the special cases following." Pierce v. Bent, 67 Me. 404.

And a petition for review is addressed to the discretion of the court. Thomaston v. Starrett, 128 Me. 328, 147 A. 427; Dupont v. Labbe, 148 Me. 102, 89 A. (2d) 741.

It is a matter of discretion with the court to grant or to refuse reviews. Scruton v. Moulton, 45 Me. 417. See Jones v. Eaton, 51 Me. 386.

The allowance or denial of a petition rests wholly in the discretion of the court. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810; Thompson v. American Agricultural Chemical Co., 134 Me. 61, 181 A. 829.

Each petition for review is addressed to the sound discretion of the court and must rest upon its own proven facts. Taylor v.

Morgan & Co., 107 Me. 334, 78 A. 377. See Moody v. Larrabee, 39 Me. 282.

The question presented on a petition for review is simply whether an existing adjudication shall stand or be set aside It is addressed to the discretion of the court as much as a motion to set aside a verdict, or for the continuance of a suit. The decision of the judge or court upon it determines nothing finally between the parties. York & Cumberland R. R. v. Clark, 45 Me. 151.

In the exercise of which the court is not limited by technical rules.—The statute regulating reviews gives the court great discretionary powers in relation to granting them or not. They are not limited by technical rules, but whenever it is satisfactorily made to appear that injustice has been done, the power is given them to remedy that injustice by granting the party injured his writ of review. Holmes v. Fox, 19 Me. 107.

Court's decision on petition can only be revised upon exceptions to erroneous rulings in law.—A petition for review is addressed to the discretion of the court by which it is heard, and its decision can only be revised upon exceptions to erroneous rulings in matters of law. Thomaston v. Starrett, 128 Me. 328, 147 A. 427; Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254; Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810; Thompson v. American Agricultural Chemical Co., 134 Me. 61, 181 A. 829. See note to c. 106, § 14.

Exceptions will not lie to the denial of a review by a judge at nisi prius, in the exercise of his discretion, and where there is no direction, opinion or judgment given in a matter of law. Scruton v. Moulton, 45 Me. 417.

Care ought always to be taken in the granting of reviews to impose such conditions as will prevent pertinacious litigants from taking advantage of their own laches to oppress their adversaries with costs; but these are questions and considerations to be addressed to the judge who hears the petition for review, and when he has settled them as matters of discretion, his conclusions cannot be revised by this court on exceptions. Lunt v. Stimpson, 73 Me. 245.

And a decree simply denying or dismissing the petition reveals no error of law and exceptions thereto do not lie. Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254.

But exceptions do lie to the erroneous ruling of the court below that the petition would not lie as a matter of law. Dobson v. Chapman, 131 Me. 336, 162 A. 793.

Former provision of section. — For a consideration of this section when it provided that reviews could be granted in all civil actions whenever the court deemed it "reasonable, and for the advancement of justice, without being limited to particular cases," see Wilbur v. Dyer, 39 Me. 169.

For a case concerning the right of one of several defendants to petition for review prior to the enactment of subsection VIII, see Nowell v. Sanborn, 44 Me. 80.

Applied in Hobbs v. Burns, 33 Me. 233.

Sec. 2. Signature to petition by attorney; attachment; notice. — A petition for review may be signed by the petitioner's attorney when the facts therein stated are known to him and the petitioner is out of the state at the time of filing it; and the petition may be inserted in a writ of attachment and property may be attached thereon, the same as on other writs. Notice thereon may be ordered by any justice of the superior court in term time or vacation, returnable in the county where the judgment was rendered, and it must be given accordingly. (R. S. c. 110, § 2.)

Cross reference. — See c. 113, § 1, re entry of actions and orders of notice.

Proceedings begin with filing petition.— Proceedings in review, under our present statute, begin with the filing of a petition in the superior court reciting the cause for the request. Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254.

And the petition for review is to be served and entered as an independent proceeding. Bradstreet v. Partridge, 59 Me. 155.

And heard in the county where the judgment to be reviewed was rendered, and the trial, if a review is granted, must be there had. Tracy v. Rome, 64 Me. 201. See § 7.

Quoted in part in Mitchell v. Emmons, 104 Me. 76, 71 A. 321.

Sec. 3. Evidence discovered pending petition.—When a petitioner discovers new and important testimony during the pendency of his petition, he may avail himself of it at the hearing by serving notice thereof on the adverse party

14 days at least before court, stating the names of the witnesses and in substance what he expects to prove by them. (R. S. c. 110, § 3.)

Sec. 4. New evidence and names of witnesses stated on oath. — When the discovery of new evidence is alleged in the petition, the names of the witnesses to prove it and what each is expected to testify must be stated under oath. Newly discovered cumulative evidence is admissible and shall have the same effect as other newly discovered evidence. (R. S. c. 110, § 4.)

Only evidence stated in petition may be offered on hearing.—On hearing upon a petition for review, the petitioner will not be permitted to offer testimony as to any newly-discovered evidence, except that which is stated in the petition. Warren v. Hope, 6 Me. 479.

And failure to state names of witnesses under oath is fatal.—This section requires that, "when the discovery of new evidence is alleged in the petition, the names of the witnesses to prove it and what each is expected to testify must be stated under oath." If this condition is not complied with and there are no names of witnesses and no oath administered, the error is fatal. Merrill v. Shattuck, 55 Me. 374.

Provision as to cumulative evidence affects such evidence on motion for new trial.—The provision of this section that "newly discovered cumulative evidence is admissible and shall have the same effect as other newly discovered evidence," should have some effect upon the value of such testimony upon a motion for a new trial; otherwise, a party who had lost a verdict would have greater rights upon a petition for review after judgment than upon a motion for a new trial before. Parsons v. Lewiston, Brunswick & Bath Street Ry., 96 Me. 503, 52 A. 1006.

Applied in Dwinel v. Godfrey, 44 Me. 65; Berry v. Lisherness, 50 Me. 118.

Cited in Trask v. Unity, 74 Me. 208; Shalit v. Shalit, 126 Me. 291, 138 A. 70.

Sec. 5. Stay of execution or supersedeas on filing bond.—On presentation of a petition for review, any justice of said court may in term time or in vacation stay execution on the judgment complained of, or grant a supersedeas, upon a bond filed with sureties approved by him or by such person as he appoints, in double the amount of the damages and costs, conditioned to pay said amount if the petition is denied or the amount of the final judgment on review if it is granted, with interest thereon at the rate of 12% from the date of the bond to the time of final judgment. (R. S. c. 110, § 5.)

A supersedeas of the execution can be granted only upon condition that the petitioner file in court the statute bond. Nowell v. Sanborn, 44 Me. 80.

As a petition for a review does not of itself supersede or stay execution of the first judgment. This is only effected by the filing of the bond, if the party chooses so to do. Dyer v. Wilbur, 48 Me. 287.

And this section seems to require a bond which shall cover both the original and final judgment on review. Crehore v. Pike, 47 Me. 435.

Interest not allowed on costs of review. —A bond given on review under this section is discharged upon payment of the original judgment, (including debts and costs) and interest at twelve per cent from the date of the bond to that of final judgment in review, and taxable costs. Interest is not to be allowed on the costs of the review. Whittaker v. Berry, 64 Me. 236.

Bond required only when petitioner seeks delay in execution. — The original plaintiff obtains a judgment. He is entitled to the fruits of that judgment, an immediate issue of an execution to enforce without delay the payment of the amount which that final judgment has awarded to him. The defendant petitions for a review. This he may do, and obtain it, if he shows good cause, without filing any bond. The bond is required, when he asks that the payment may be delayed until the termination of the proceedings in review. Crehore v. Pike, 47 Me. 435.

Bond held good statute bond. — See Stearns v. Ritchie, 128 Me. 368, 147 A. 703.

Quoted in part in Mitchell v. Emmons, 104 Me. 76, 71 A. 321.

Second Review.

Sec. 6. Second review.—A second review may be granted on a petition filed within 3 years after judgment on the first, when the court thinks that jus-

tice manifestly requires it, and on such terms as it imposes; but no second review shall be granted, except by the law court, in a case in which more than 1 verdict has been rendered against the petitioner. (R. S. c. 110, § 6.)

Applied in Trask v. Unity, 74 Me. 208.

Actions of Review.

Sec. 7. Issue and entry of writ; copies produced.—When a review is a matter of right as provided by section 5 of chapter 113 or when it is granted on petition, a writ of review shall be issued and the trial shall take place in the superior court in the county in which the judgment was rendered. It shall be entered at the next term after the review is granted unless leave is granted to enter it at the second term; and the plaintiff in review shall produce and file an attested copy of the writ, judgment, proceedings and depositions or their originals in the former suit. (R. S. c. 110, § 7.)

Writ cannot issue until final disposition of petition.—The writ of review is "to be entered the next term after the review is granted unless leave is granted to enter it at the second term." But there can be no judgment granting a review while the petition remains continued upon the docket. Both actions cannot remain together upon the docket. There must be a final disposition of the petition for review before the writ can issue. Bradstreet v. Partridge, 61 Me. 335.

The writ of review cannot be legally sued out, until final judgment is rendered and the case, under the petition, ended. The entry of the writ of review is erroneous if no final judgment of the court has authorized it. Bradstreet v. Partridge, 59 Me. 155.

Case in order for trial only after this section complied with.—When a review is granted a writ is issued and must be entered in court, and attested copies of the former proceedings must be produced. It is only after these proceedings that the case is in order for trial and subsequent judgment. Knowlton v. Wing, 107 Me. 484, 78 A. 870.

This section permits an entry at the second term by leave of a court. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

The provisions of this section that the writ "shall be entered at the next term after the review is granted, unless leave is granted to enter it at the second term," was enacted soon after the decision of Hobart v. Tilton, 1 Me. 399, in which the court held that, when a review is granted, the writ must be entered at the next following term, unless otherwise specially provided in the order of court by which the review is granted. The legislature, having this decision before it, intended to change the rule as held therein, by giving the court power to allow the entry at the second term, if the plaintiff fails to enter it at the next term after the review is granted. The language is plain and admits of no other construction. Look v. Ramsdell, 68 Me. 479.

Case determined on writ of review.—A writ of review is a new and independent action, and is to be regarded as the foundation of the action, and the case is to be entered, heard and determined on that writ. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Under the old pleadings. — It being a new and independent action, the writ of review is to be regarded as the foundation of the action, and the case is to be entered, heard and determined on that writ, under the old pleadings, generally, as provided by the statute. It is not in court by the bringing forward of the old action, to be tried anew. Nor is it, properly speaking, a new trial granted, as in a case before final judgment. Bradstreet v. Partridge, 59 Me. 155.

Writ issued without petition when defendant entitled to review as of right. — When judgment is rendered on default against an absent defendant, he is entitled of right to a review under the provisions of c. 113, § 5. If the defendant brings himself within that statute, a writ of review will be issued under this section without petition. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

History of section.—See Look v. Ramsdell, 68 Me. 479.

Applied in Jackson v. Gould, 72 Me. 335.

Cited in Jones v. Eaton, 51 Me. 386.

Sec. 8. Recitals of writ; service. — In the writ of review, it is sufficient to describe the former action and judgment so as to identify it. The writ shall contain a summons to appear and answer to the plaintiff in review and it may

be served as other writs; and when the party is not an inhabitant of or found within the state, it may be served on his attorney in the original suit. (R. S. c. 110, § 8.)

A writ of review, like other writs, is sued out of court, under the seal of the court, with the teste of a justice of the court. The statute requires that it contain a summons to the defendant to appear and answer. And it must be served. There is no ground on which such a writ, which must be served "as other writs," can be taken out of the category of writs in general, as to service and entry, unless it can be deemed to be a part of previous proceedings, as the original writ or the petition for a review, and that those proceedings in some way are still in court. If such were the case, it might perhaps be argued that the court retained jurisdiction, and could order notice in the new proceeding. But such an argument would seem to be counter to the provisions of the statute that the defendant be summoned to appear and answer, and that the writ be served. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Requirement for service is not technical rule.—Whatever may be said of the petition for a review, the review, when granted, is a strict legal remedy regulated by statute, and the requirement for service is not a technical rule, but a plain statutory provision. The statute requires service before entry, even in case of a nonresident defendant, for it provides that service in such case may be made on the defendant's attorney in the original suit. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

And writ must be served before entry.—If writs of review, which must be served "as other writs," follow the analogy of other writs, it would seem that they must be served before entry in court. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Otherwise motion to dismiss should be granted.—If the writ was not served before entry "as other writs" without attachment, a motion to dismiss should be granted. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Sec. 9. When original plaintiff is plaintiff in review, attachment.—When the original plaintiff is plaintiff in review, the property of the defendant may be attached as it might have been in the original suit and the form of the writ shall be varied accordingly; but no attachment made or bail taken in the original action shall be held to satisfy the judgment on review. (R. S. c. 110, § 9.)

Cited in McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Sec. 10. Pleadings.—The proper pleadings shall be made on review, when no issue has been joined before judgment in the original action; when issue has been so joined, the cause shall be tried thereon; but amendments, brief statements and other issues may be made by leave of court and the cause tried and disposed of as if it were an original suit. (R. S. c. 110, § 10.)

Cited in Summit Thread Co. v. Corthell, 132 Me. 336, 171 A. 254.

Sec. 11. Judgment.—Judgment in the suit reviewed shall be given without regard to the former judgment, except as follows. When the original plaintiff recovers on review as debt or damage a sum exceeding that recovered by the first judgment, he shall have judgment for the debt or damage recovered on review or for so much thereof as remains unsatisfied and for costs on review. (R. S. c. 110, § 11.)

Judgment on review will be rendered as law and justice may require, without any regard to the former judgment, except as provided in the statute. Dyer v. Wilbur, 48 Me. 287.

Judgment on the review shall be given, as the merits of the cause upon law and evidence shall require, without any regard to the former judgment, excepting where the damages of the former judgment are reduced to a smaller, or increased to a larger sum, than that awarded on the review. Dunlap v. Burnham, 38 Me. 112.

The law distinctly provides that the original judgment in cases of review shall generally be given without any regard to the former judgment, except in the two cases named:—1st, where the sum originally recovered is reduced, and 2nd, where it is increased; and in each of these cases the original judgment remains, the judgment in review being for the amount of

the excess or diminution. In case of diminution, and when the former judgment has not been satisfied, there may be a setoff of one judgment against the other. But both are distinct judgments. If the plaintiff in review obtains a verdict and judgment in his favor, and thus establishes the fact that the former judgment was entirely unjust, and ought not to have been rendered, the court will regard the first judgment, if it has not been paid, as nullified; or rather, will, in effect, cancel it, or regard one judgment as practically set off against the other, to prevent circuity of action. Crehore v. Pike, 47 Me. 435.

Judgment rendered so as to do final justice.—This section and § 12 provide the manner in which judgments shall be rendered, or set off, so as to do final and complete justice between the parties. Dunlap v. Burnham, 38 Me. 112.

The costs which are given by this section are to be treated as costs only. The party entitled thereto is to recover only the taxable fee without any addition thereto of twelve per cent interest. They exist only upon and by the rendition of judgment. Whittaker v. Berry, 64 Me. 236.

If the original plaintiff recovers more than his first judgment, he does not have judgment for the whole amount as a matter of course, but only for what remains unsatisfied. Dyer v. Wilbur, 48 Me. 287.

Applied in Church v. Church, 122 Me. 459, 120 A. 428.

Cited in Lunt v. Stimpson, 73 Me. 245.

Sec. 12. When sum first recovered reduced, judgment; and when wholly reversed; costs.—When the sum first recovered is reduced, the original defendant shall have judgment for the difference, with costs on review; and if the former judgment has not been satisfied, one judgment may be set off against the other and execution be issued for the balance. When the original judgment is wholly reversed, judgment shall be entered in review for the amount of the former judgment and costs, with interest thereon, and for such further sum as the prevailing party would have been entitled to recover as costs in the original action, if, in the opinion of the court, justice requires it. In such case, if the original judgment remains unpaid, it shall be canceled by a setoff entered of record in the judgment on review and execution shall issue for the balance only; otherwise for the amount of the latter judgment. (R. S. c. 110, § 12.)

Judgment rendered so as to do final justice.—This section and § 11 provide the manner in which judgments shall be rendered, or set off, so as to do final and complete justice between the parties. Dunlap v. Burnham, 38 Me. 112.

If the plaintiff in review is successful he obtains a judgment which may be set off against the old judgment, or if that has been paid, the new judgment stands and is to be collected as any original judgment may be. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

Reduction of original judgment does not reverse it.—If the judgment of the original plaintiff is reduced and judgment rendered for the original defendant for that sum, the statute provides, not that the former judgment shall be reversed, or annulled, but that, "if the former judgment has not been satisfied, one judgment may be set off against the other." Curtis v. Curtis, 47 Me. 525.

And it stands against defendant.—If the original defendant on review succeeds in reducing the sum recovered in the first judgment, he has judgment and execution for the difference; and the former judgment stands against him. If not paid, it may be set off. Dyer v. Wilbur, 48 Me. 287.

If the judgment is wholly reversed, the defendant, as plaintiff in review, is entitled to judgment for the full amount of the original judgment against him for debt and costs, with interest thereon. Brown v. Cousens, 51 Me. 301.

The costs which are given by this section are to be treated as costs only. The party entitled thereto is to recover only the taxable fees without any addition thereto of twelve per cent interest. They exist only upon and by the rendition of judgment. Whittaker v. Berry, 64 Me. 236.

Plaintiff entitled to costs of review as matter of law.—This section provides that "when the sum first recovered is reduced, the original defendant shall have judgment for the difference, with costs on review." If this statute applies to the case, the plaintiff in review is entitled to his costs as a matter of law and not as a matter of discretion. Knowlton v. Wing, 107 Me. 484, 78 A. 870.

But he cannot recover further costs as in original action unless justice not done.—This section provides that, where the judgment is reversed, judgment may be entered also "for such further sum as the prevailing party would have been entitled to recover as costs in the original action, if, in the opinion of the court, justice re-

quires it." The court cannot know that justice requires such a judgment, unless it is made to appear how it happened that justice was not done in the original suit. Brown v. Cousens, 51 Me. 301.

And unless judge specifically orders it. —The provisions touching the matter of costs in this section and § 15, taken together, mean that the judge in ordering judgment for the successful party in review shall inquire and determine whether such party ought in justice to have costs in the original action, but, unless he otherwise orders, it shall be taken for granted that in his opinion justice does require it. Lunt v. Stimpson, 73 Me. 245.

Applied in Crehore v. Pike, 47 Me. 435.

Sec. 13. In replevin and setoff, plaintiff is as defendant.—When actions of replevin and actions in which a claim in setoff was filed are reviewed, the defendant is in the position of a plaintiff, so far as it respects the damages awarded to him. (R. S. c. 110, § 13.)

Sec. 14. When levy void.—If, on a petition for review commenced within 1 year after an execution issued on the original judgment is levied on real estate, such judgment is finally reversed, the levy is void and a copy of the final judgment in review, duly certified by the clerk of courts in the county where such judgment is rendered, shall be recorded within 30 days from the rendition thereof in the registry of deeds where such levy is recorded. (R. S. c. 110, § 14.)

Applied in Curtis v. Curtis, 47 Me. 525.

Sec. 15. Party prevailing has costs; court may impose terms.—In all actions of review the party prevailing recovers costs and shall also recover the costs to which he would have been entitled if he had prevailed in the original action unless the court otherwise orders; but the court granting a review may impose terms respecting costs. (R. S. c. 110, § 15.)

If error in former verdict corrected, plaintiff in review entitled to costs.—If the plaintiff in review succeeds in correcting an error in the former verdict against him when he was the original defendant, he is entitled to a judgment for the costs of the review, as the party prevailing, under this section though the accumulation of interest may have rendered the last verdict larger than the first. Kavanagh v. Askins, 2 Me. 397.

It has been the immemorial usage in reviews of actions, in which debts, or damages, or lands, have been demanded, if the plaintiff has failed in recovering his just demand, or has recovered more in the original suit, to consider the party, in whose favor the error has been corrected, the prevailing party, and entitled to his costs. Dodge v. Reed, 40 Me. 331.

But if the objects of the suit wholly fail, the plaintiff cannot be the prevailing party, merely by reason of being holden for less damages on the review than in the original action. Dodge v. Reed, 40 Me. 331.

Defendant in replevin is prevailing party if damages reduced.—The action of replevin being a remedy as well for the loss arising from the caption and detention of the goods, as to obtain possession of them, if the defendant, against whom judgment was rendered in the original action, shall review, and a less sum in damages be recovered, he is equally the prevailing party, as he would be if the reduction in the amount was in an action of assumpsit. Dodge v. Reed, 40 Me. 331.

Justice's opinion as to costs in original action is conclusive. — The question of whether justice requires that the prevailing party recover costs is for the presiding justice and his opinion on that question must be regarded as conclusive. The mandate of this section is that they shall be recovered "unless the court otherwise orders." Lunt v. Stimpson, 73 Me. 245.

Court granting review may impose terms respecting costs.—The language of this section, that "the court granting a review may impose terms respecting costs," must be construed to mean precisely what it says and cannot be held to define "the court" in a jurisdictional sense, but "the court" adjudicating the particular act of "granting a review," which involves an entirely different judicial determination from that of entering a judgment in review. Knowlton v. Wing, 107 Me. 481, 78 A. 870.

When review granted.—The granting of a review is the initial step is the point at which the court may impose terms respecting costs. Knowlton v. Wing, 107 Me. 484, 78 A. 870.

But not after verdict.—The authority to impose terms as to costs must be exercised at the time of granting review, and not after verdict in the action of review. Knowlton v. Wing, 107 Me. 484, 78 A. 870.

As the court, upon the hearing for re-

view, is apprised of all the facts upon which a review may or may not be granted, and upon which costs should be allowed or denied, it would seem to have been the necessary intention of the legislature in enacting this section to limit the discretion of the court respecting the terms of costs to the time of granting the review, thereby informing both parties in advance of their situation upon this question. Knowlton v. Wing, 107 Me. 484, 78 A. 870.

And it cannot impose terms as to damages.—The provision of this section refers to the subject matter of costs, and does not authorize the court to impose terms as to the increase of damages. Nowell v. Sanborn, 44 Me. 80.

Cited in Whittaker v. Berry, 64 Me. 236.