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THE LEGISLATURE

OF THE

STATE OF MAINE.

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1861.

FORTIETH LEGISLATURE.

HOUSE. No. 68.

STATE OF MAINE.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND SIXTY-ONE.

AN ACT in relation to evidence.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

SECTION 1. Representations falsely and fraudulently made, with intent to deceive and injure, as to the character, conduct, credit, ability, trade or dealings of another, may in all cases be proved by parol testimony, and a party injured by such false and fraudulent representations, may in all cases be a witness in the case.

SECT. 2. In case of the death of a person who may have made such false and fraudulent representations, if the party injured shall not have established his

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claim against the executors or administrators within the four years allowed by law for the settlement of estates, he may, at any time within three years from the end of said four years, institute and maintain suit against either or all of the heirs of said deceased, upon said claim, and recover judgment thereon to the just and rightful amount of his demand, not, however, to exceed the amount by such heir inherited.

STATEMENT.

By the fourth section of chapter 111 of the revised statutes, "no action shall be maintained to charge any person by reason of any representation or assurance, concerning the character, conduct, credit, ability, trade or dealings of another, unless made in writing, and signed by the party to be charged thereby, or by some person by him legally authorized."

At common law, the representation of a man respecting the credit, ability, &c., of another, whether in writing or not, implied a contract on his part, that such a representation is true; and if not true, the party making such representations was held to make such contract good though not fraudulently made. The above quoted statute changes the common law, and prescribes that in all cases these representations must be made in writing and signed by the party to be charged. This change of the common law may be *well* where the representations are honestly and innocently made, but the hardship is, that a man cannot be held under this statute for *false* and *fraudulent* representations, though *purposely* and *designedly* made to *deceive* and *injure* another, unless he gives a written proof of his *fraud.*

The idea is perfectly ridiculous, and the doctrine *most dangerous*, that a man can perpetrate as many frauds as he chooses under the sanction of the statute, upon confiding and unsuspecting men, as to the credit and ability of another to pay. At the very moment that he is making these false and fraudulent representations of the pecuniary ability of a poor debtor, this same poor debtor may be in *failing circumstances*, indebted to himself even in large amounts, and the property obtained by the poor debtor by these false and fraudulent representations, may, by previous arrangement, be applied in payment of his own debts. No remedy exists under the law for this honest creditor, provided the other party is shrewd

enough not to put the evidence of his fraud in writing. Is it not clearly the duty of the legislature to change the mode of proof for frauds of this kind? Clearly so, unless the legislature intends to *allow* a *premium* for such false and fraudulent representations when not solemnized by writing.

Verbal slanders, as well as written libels, are actionable. If my neighbor falsely and fraudulently *undermines* and *pulls down* my character, and *I* receive an injury thereby, I can maintain my action, although these representations are not in writing. Why not apply the same rule of evidence, when my neighbor falsely and fraudulently *bolsters* it up, and *another* is injured? Explain the difference. It may be apparent to those who can

"With a hair divide,
The northern from the north-east side,"

but not to honest legislators.

It may be well, in this connection, to bear in mind that the burden of proof would always be upon the plaintiff, in order to entitle him to recover, to show to the satisfaction of a jury,

First—That the representations were made.

Second—That they were untrue.

Third—That the party making them knew them to be untrue.

Fourth—That his motives were *fraudulent.*

Fifth—That the plaintiff received an injury in consequence of these fraudulent representations.

Would it be possible to establish the *affirmative* of these propositions to the satisfaction of a jury by *perjured* testimony? Could they be established by *human testimony*, unless such testimony was *corroborated* by a *pre-existing condition of facts*, by the tracing and condition of the property parted with, and by the *relations* and *business connections* of the parties implicated in the fraud? It would be an utter impossibility to establish such a fraud, unless it really existed.

The first section of this bill proposes to change the existing statute as it now stands, in order that complete justice may be done to all. It also proposes to change the statute and allow parties to be witnesses in all cases when injured by such false and fraudulent representations.

By the existing statute a person is not excluded from being a

witness on account of interest in the event of a suit. This is a change in the common law, for by that no person could be a witness, however small his interest might be. It is unnecessary in this connection to give the reason why this change has been made. It has been made in the mother country, and by the statutes of many of the states of this Union, and the testimony of the bench and bar has been that the rule has operated well. There is an exception in our statute to this rule, when one of the parties is an executor or administrator, or made a party as heir to a deceased party. Why this exception? By the English law there is no exception, and the same is true of the State of Vermont, Connecticut, Ohio and Minnesota.

The law which renders parties and other interested persons competent witnesses, is understood to proceed on the assumption that important information may be derived from them—that the tribunal which is to decide, is entitled to have the whole truth, all the light which can be reflected on the subject to be investigated. Now one party to a transaction does not know less about it because the other has deceased; and it does not seem quite philosophical for the Legislature to close one of the windows, through which light may find its way to the jury, simply because death has closed the other. But it is said there would be danger of perjury. This is the suggestion that for hundreds of years prevented interested persons from testifying, no matter how small the interest.

It is said, if one party be dead and the other allowed to swear, he has an undue advantage, that is to say, he be allowed the opportunity to commit perjury, of which the other is denied. Two *may* commit perjury—one *shall not.*

But even as the law now stands, one may testify, while the other is effectually excluded, as by insanity, idiocy, &c.

Take this case. A, through his agent B, who is to have half of the profits, makes a contract with C. A dies; he never knew anything about the contract; his administrator sues C. The agent B, though interested, is a competent witness. C, who knows *all*, as well as B, is excluded.

Again. A party can answer to a bill in equity brought by the representatives of a deceased party, and is to all intents a witness

in his own case; and no serious difficulty has been known to grow out of it. Why not then at common law?

B. is induced to part with his property to C., from the false and fraudulent representations of D., who is C's. dishonest creditor. B. takes C's. notes, and before they become due, B. endorses these notes to A. C. fails; D. dies and leaves an ample estate, enlarged by this very fraud. B. is liable to pay the notes as endorser to A. B. brings his suit against the estate of D., agreeably to the provisions of the first part of this section, but cannot be a witness. A., who is equally interested, can be a witness but knows nothing of the original transaction.

To justify the exclusion of parties as the law now stands, and which the first section of this bill would remedy in certain cases, is to adopt the principle that *perjury* is the *general rule*, and *truth* the exception. For the honor of human nature, *reverse* the rule. The arguments used by the judiciary committee of 1856, in their printed report, are equally applicable here, and although the exception referred to was incorporated into the bill reported, yet not *one word* was said in the report in favor of such exception.

The report of the committee is adopted as a part of this report. Report of judiciary committee, 1856.

Section 2 of this bill provides a remedy for that class of cases where the party injured has had no remedy under the law as it now exists, and simply extends the time that such remedy may be applied. A constitutional right has clearly existed in the class of cases under consideration—a remedy to enforce that right has never been given. To afford a remedy for the enforcement of the rights of the people, is certainly the highest duty of those who govern to those who are governed. A failure in the performance of this duty, subjects a government to the just reproach of the world.

A statute of limitation begins to run from the time a remedy *accrues*. If you grant the remedy for the class of wrongs specified in this bill, will you deny the citizens of this State the application of such remedy?

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
March 11, 1861.

Beported by Mr. McCRILLIS from a minority of the Committee on the Judiciary, laid on the table and 350 copies ordered to be printed for the use of the Legislature.

CHARLES A. MILLER, *Clerk.*