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Chapter 113.

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After a special demurrer for misjoinder, etc.

In accord with original. See Champlin v. Ryer, 151 Me. 415, 120 A. (2d) 228.

Sec. 38. Demurrers, when filed, joined and not withdrawn; amendments made.—A general demurrer to the declaration may be filed; and in any stage of the pleadings either party may demur and the demurrer must be joined, and it shall not be withdrawn without leave of court and of the opposite party; but the justice shall rule on it and the aggrieved party may except. The justice may allow the plaintiff to amend or the defendant to plead anew at any time. If the law court deems such exceptions frivolous, it shall award treble costs against the party excepting from the time the exceptions were filed. If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed. If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered. At the next term of the court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the law court to the clerk of such county and not before, judgment shall be entered on the demurrer unless the costs are paid and the amendment or new pleadings filed on the 2nd day of the term; but by leave of court the time therefor may be enlarged or further time may be granted by the court within which to pay said costs and to file such amendment or new pleadings. (R. S. c. 100, § 38. 1955, c. 239.)

I. GENERAL CONSIDERATION.

Effect of amendment.—The 1955 amendment rewrote the latter part of the first sentence to appear as the last five words thereof and as the second sentence.

III. RIGHT TO AMEND OR PLEAD ANEW.

A. After Demurrer Sustained.

After a special demurrer is sustained a case falls within this section and section 11 of this chapter relating to amendments. Champlin v. Ryer, 151 Me. 415, 120 A. (2d) 228.

Sec. 50. Burden of proof on defendant in certain cases of negligence; contributory negligence pleaded.

And where it is pleaded it must also be proved.

In accord with 1st paragraph in original. See Binette v. LePage, 152 Me. 98, 123 A. (2d) 771.

And burden of proof is on defendant.

In accord with 1st paragraph in original. See Binette v. LePage, 152 Me. 98, 123 A. (2d) 771.

If the plaintiff's evidence shows contributory negligence, on the part of the deceased, the defendant has sustained the burden of proof imposed by this section. Binette v. LePage, 152 Me. 98, 123 A. (2d) 771.

Applied in Hersum v. Kennebec Water Dist., 151 Me. 256, 117 A. (2d) 334.

Sec. 59. Motions to set aside verdicts on report to full court.

Misconduct of jurors may be reached by a motion addressed to the law court as provided by this section, but objections should be noted, immediately, at the time the act complained of occurred. Martin v. Atherton, 151 Me. 108, 116 A. (2d) 629.

Sec. 60. Verdict set aside by presiding justice.

Motion for new trial does not operate as waiver of exceptions.—Exceptions to rulings of the presiding justice pertaining to the admission of evidence and instructions to the jury are not waived by a motion for a new trial subsequently addressed to the presiding justice. Labbe v. Cyr, 150 Me. 342, 111 A. (2d) 330.

Setoff.

Sec. 76. What demands set off.—A demand originally payable to the defendant in his own right, founded on a judgment or contract express or implied, for the price of real or personal estate sold, for money paid or had and received, for services done, for a liquidated sum or for one ascertainable by calculation may be set off. A city or town in an action by a delinquent taxpayer may set off any unpaid taxes against any properly authorized payment to which the taxpayer is entitled, provided prior to trial the amount shall have been paid to the tax collector and a receipt in writing shall have been given to the person taxed, as prescribed in section 106 of chapter 91-A. (R. S. c. 100, § 77. 1957, c. 397, § 53.)

Effect of amendment. — The 1957 amendment substituted "section 106 of chapter 91-A" for "section 86 of chapter 92" at the end of this section.

Auditors.

Sec. 89. Auditors; fees.

An auditor is part of the court itself. Ouelette v. Pageau, 150 Me. 159, 107 A. (2d) 500.

Auditors empowered to settle facts, etc.

In accord with original. See Ouelette v. Pageau, 150 Me. 159, 107 A. (2d) 500.

Sec. 91. Report as evidence.

Auditor's report prima facie evidence, etc.

An auditor's report may be used as evidence by either party and is prima facie evidence, but it may be impeached, controlled or disproved by competent evidence. It is sufficient to warrant a verdict unless impeached or disproved. Ouelette v. Pageau, 150 Me. 159, 107 A. (2d) 500.

Referees.

Sec. 93. Referees.—In all cases in the supreme judicial or in the superior court in which the parties agree that the same may be tried by one or more persons as referees, the court may appoint the same, not exceeding 3, whose fees and necessary expenses, including stenographic services upon a per diem basis, shall be paid by the county on presentation of the proper certificate of the clerk

of courts for that county, and the amount thereof shall be fixed by the court upon the coming in of the report.

(1957, c. 182.)

Effect of amendment. — The 1957 amendment inserted "including stenographic services upon a per diem basis," in the first paragraph.

As the second paragraph was not changed by the amendment, it is not set out.

It is not given to supreme court of probate.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

And reference of equity case, etc.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Reference of disputes, etc.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Referees are special tribunal, etc.

A referee is not a court. Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Assessment appeals under the sales and use tax law are of statutory origin and must be construed strictly according to the statute. Jurisdiction is precisely and definitely granted to the superior court. There is no interpretation of the specific directions as to hearing that permits of reference. Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Juries.

Sec. 104. Judge to charge jury on matters of law but not to express opinion on issues of fact.

I. GENERAL CONSIDERATION.

When failure to note exceptions does not result in waiver of objections.—Where a jury has been given instructions which were plainly erroneous or which justified a belief that the jurors might have been misled as to the exact issue, or issues which were before them to be determined, the rule that failure to note exceptions results in waiver of objections will not be applied. Thompson v. Franckus, 150 Me. 196, 107 A. (2d) 485.

II. SUBSTANCE OF CHARGE TO JURY.

The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole. Dulac v. Bilodeau, 151 Me. 164, 116 A. (2d) 605.

Charge held good under section.

See Dulac v. Bilodeau, 151 Me. 164, 116 A. (2d) 605.

III. OPINIONS UPON ISSUES OF FACT.

Procedural remarks to counsel not opinions.

In accord with original. See Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

Expressions held not error.

The remark of the presiding justice that cross-examination designed to show interest was "a bit far fetched," if it could be considered as an expression of opinion, was not on an "issue of fact," such as is referred to in this section. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

The examination of a witness by the presiding judge must be conducted without prejudice to an accused, and in such a manner as to impress the jury that the judge is impartial and is not indicating his opinion on the facts. State v. Dipietrantonio, 152 Me. 41, 122 A. (2d) 414.

In prosecution for rape, it was held that there was no abuse of the right on the part of the presiding justice to ask questions, and no violation of the statutory prohibition relative to expressing an opinion. State v. Dipietrantonio, 152 Me. 41, 122 A. (2d) 414.

Witnesses and Evidence. Uniform Judicial Notice of Foreign Law Act.

Sec. 114. Parties, husbands, wives and others interested as witnesses.

Interest defined.—Interest signifies the specific inclination which is apt to be produced by the relation between the witness and cause at issue in the litigation. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238, holding that exclusion of cross-examination designed to show interest was not abuse of discretion and was not prejudicial.

And taken into consideration by jury.— Any motive which the witness may have, the manner in which the witness testifies and the temptation he might have to color his testimony should be taken into consideration by the jury. The jury has the right in both civil and criminal cases to consider the interest which the witness may have in the result of the litigation in which he is testifying. It is within the province of the jury to pass upon the weight of the testimony given by an interested witness. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

Sec. 128. Fees of witneses.—Witnesses in the supreme judicial court or the superior court or in the probate courts and before a trial justice or a municipal court shall receive $5 and before referees, auditors or commissioners specially appointed to take testimony or special commissioners on disputed claims appointed by probate courts $5, or before the county commissioners $5 for each day's attendance and 8¢ a mile for each mile's travel going and returning home; but the court in its discretion may allow at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court, a sum not exceeding $50 per day for the attendance of any expert witness or witnesses at said trial, in taxing the costs of the prevailing party, except that the expense of all expert witnesses for the state in murder cases shall be in such amounts as the presiding justice shall allow and shall be paid by the state and charged against the appropriation for the department of the attorney general; but such party or his attorney of record shall first file an affidavit during the term at which such trial is held and before the cause is settled stating the name, residence, number of days in attendance and the actual amount paid or to be paid each expert witness in attendance at such trial. No more than $5 per day shall be allowed or taxed by the clerk of courts in the costs of any suit for the per diem attendance of a witness, unless the affidavit herein provided is filed, and the per diem is determined and allowed by the presiding justice. (R. S. c. 100, § 129. 1947, c. 20. 1955, c. 412. § 2.)

Effect of amendment.—The 1955 amendment, which was made effective June 1, 1956, increased the fees throughout the section.

Sec. 132. Affidavit of plaintiff prima facie evidence.

Probative effect of affidavit of administrator, etc.

See also Wright v. Bubar, 151 Me. 85, 115 A. (2d) 722.

Where objections were made to statutory affidavit that plaintiff administrator did not have personal knowledge of the items charged and that there was no suppletory oath, it was held that the statute carefully provides for the evidential force of the affidavit and that the suppletory oath had no part in the evidence introduced into the case through the statutory affidavit. Wright v. Bubar, 151 Me. 85, 115 A. (2d) 722.

Applied in Cianchette v. Hanson, 152 Me. 84, 123 A. (2d) 772.

Sec. 133. Accounts not inadmissible because hearsay or self-serving.

A record account book copied from day to day from motel registration cards was properly admitted into evidence under this section, where the presiding justice could properly find that the entries were made in good faith in the regular course of business and before suit. Ouelette v. Pageau, 150 Me. 159, 107 A. (2d) 500.

Sec. 146. Photostatic and microfilm reproductions admissible.—If any business, institution, bank, trust company, member of a profession or calling, or any department or agency of government, in the regular course of his or its business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of his or its business or activity has caused any or all

of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, such reproduction, or copy, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction or copy is likewise admissible in evidence if the original reproduction or copy is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original. This section shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. (R. S. c. 100, § 146. 1955, c. 264.)

Effect of amendment.—The 1955 amendment rewrote this section.

Costs.

Sec. 170. Assignee of choses not negotiable, may sue in own name.

But failure to file assignment must be seasonably objected to.

In accord with 3rd paragraph in original. See Pyrofax Gas Corp. v. Consumers Gas Co., 151 Me. 172, 116 A. (2d) 661.

Failure of plaintiff, an assignee, in a suit for breach of contract to file with the writ the assignment, was waived where the defendant did not file his plea of abatement until after case was submitted to the law court. Pyrofax Gas Corp. v. Consumers Gas Co., 151 Me. 172, 116 A. (2d) 661.

Official Court Reporter.

Sec. 188. Official court reporters, their appointment, duties, salary and expenses.—The chief justice of the supreme judicial court may appoint not more than 11 official court reporters to serve for a term of 7 years who shall report the proceedings in the supreme judicial court and in the superior court and who shall be officials of the court to which they may from time to time be assigned by the chief justice, and be sworn to the faithful discharge of their duties, and each of whom shall receive from the state a salary of $6,500 per year. They shall take full notes of all oral testimony and other proceedings in the trial of causes, either at law or in equity, including the charge of the justice in all trials before a jury and all comments and rulings of said justice in the presence of the jury during the progress of the trial, as well as all statements and arguments of counsel addressed to the court, and during the trial furnish for the use of the court or either of the parties a transcript of so much of their notes as the presiding justice may direct. They shall also furnish a transcript of so much of the evidence and other proceedings taken by them as either party to the trial requires, on payment therefor by such party at the rate of 20¢ for every 100 words. One of said official court reporters designated for the purpose shall perform such clerical services as may be required of him by the chief justice who may allow him reasonable compensation for such clerical services for which he shall be reimbursed.

(1955, c. 480. 1957, c. 380, § 1.)

Effect of amendments. — The 1955 amendment increased the yearly salary of official court reporters, provided for in the first sentence of the first paragraph, from $5,000 to $5,750.

The 1957 amendment increased the salary of court reporters from $5,750 to $6,500 in the first paragraph.

As the rest of the section was not changed by the amendments, only the first paragraph is set out.

Editor's note.—P. L. 1957, c. 380, which amended this section, provided in § 2 thereof as follows: "There is hereby appropriated from the general fund of the state the sum of $6,875 for the fiscal year 1957-58 and $7,500 for the fiscal year 1958-59, to carry out the purposes of this act."

Judicial Council.

Sec. 197. Expenses.—No member of said council shall receive any compensation for his services; but said council and the several members thereof shall be allowed, out of any appropriation made for the purpose, such expenses for clerical and other services, travel and incidentals as the chief justice shall approve. The chief justice shall be ex officio chairman of said council, and said council may appoint one of its members or some other suitable person to act as secretary for said council. (R. S. c. 100, § 194. 1957, c. 50.)

Effect of amendment. — Prior to the 1957 amendment the expenses were approved by the governor and council instead of the chief justice.

Chapter 113-A.

Interpleader Compact.

Sec. 1. Approval of compact.—The following interpleader compact is hereby approved, ratified, adopted and entered into by this state as a party state to take effect between this state and any other state or states as defined in said compact when entered into in accordance with the terms of said compact by said other state or states and not disapproved by the governor ot this state under subsection III ot article 7 of such compact:

The contracting states solemnly agree:

Article 1.

Purpose. The aims of this compact are to promote comity and judicial cooperation among the states party thereto; and to relieve from undue risk and uncertainty, a person who may be subject to double or multiple liability because of the existence of adverse claimants, one or more of whom in the absence of this compact may not be subject to the jurisdiction of the adjudicating court, when such person makes all reasonable efforts to secure judicial determination and discharge of his liability.

Article 2.

Definitions. For the purpose of this compact the following definitions shall apply:

I. A state shall mean

A. A state of the United States or any territory or possession of the United States and the District of Columbia acting under article I, section 10, clause 3, of the constitution of the United States in entering this compact with an American or a foreign jurisdiction, or

B. A state of the community of nations and any component governmental unit of such a state which under the laws thereof may validly become party to this compact.

II. A person shall include any entity capable of suing or being sued in the state in which the interpleader is pending.

III. Interpleader shall mean a judicial procedure by which two or more persons who have adverse claims on account of the same debt or duty against a third person may be required to litigate these claims in one proceeding.

Article 3.

Service of process.

I. Service of process sufficient to acquire personal jurisdiction may be made within a state party to this compact, by a person who institutes an interpleader proceeding in another state, party to this compact, provided that such service shall fulfill the requirements for service of process of the state in which the