NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

IN FIVE VOLUMES

VOLUME 3

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 96.

Forests. Parks. Ways. Sewers and Drains. Fences.

National Forest Funds.

Sec. 1. National forest funds; use for schools and roads.—All sums received by this state from the United States on account of the national forests in this state established under the provision of the "Weeks Law," so called, being an act of congress approved March 1, 1911, and amendments thereto, shall be distributed as herein provided.

Said funds shall first be apportioned by the treasurer of state among the several organized towns and unorganized places in which such national forest is or may be situated, in proportion to the area of such national forest in each, as determined by the forest service of the United States department of agriculture.

The several sums so apportioned to each organized town shall be paid over by the treasurer of state, within 60 days after receipt thereof, to the treasurer of such town and shall be expended for the benefit of the public schools and public roads of such town, in addition to the sums required by law to be raised for such purposes, in such manner as may be determined by appropriations duly made by town meetings in such town.

All sums so apportioned to unorganized places shall be expended for the benefit of public schools and public roads in the counties in which such places are located, in such manner as the governor and council may from time to time determine. (R. S. c. 84, § 1.)

Public Parks, Squares, Playgrounds and Shade Trees.

Sec. 2. Park commissioners.—Cities and towns may choose by ballot 3 park commissioners, to hold office 1, 2 and 3 years, respectively, and after the first year choose annually a commissioner for 3 years in place of the one whose term expires; they shall have the care and superintendence of the public parks and direct the expenditure of all moneys appropriated for the improvement of the same. (R. S. c. 84, § 2.)

See c. 36, § 66, et seq., re licenses to work on or spray trees; white pine blister rust, etc.

Sec. 3. Devises and gifts for public parks and playgrounds. — Any town, as such, may receive, hold and manage devises, bequests or gifts for the

establishment, increase or maintenance of public parks and playgrounds in such town; and may accept by vote of the legal voters thereof any land in such town to be used as a public park or playground or both combined. When any plantation is incorporated into a town, such gifts and the proceeds thereof fully vest in such town. (R. S. c. 84, § 3.)

Wishes of doner to be honored. — The legislature, in permitting a municipality to accept gifts for public parks and playgrounds, surely intended that the wishes of the donor be honored. Bangor v. Merrill Trust Co., 149 Me. 160, 99 A. (2d) 298.

Sec. 4. Village corporations may hold land for park purposes. — Village corporations chartered by the legislature may take and hold lands by devise or gift, in trust for playground or park purposes, and may expend not exceeding 10% of the money apportioned such village corporation, under its charter, for the improvement and care of such land. (R. S. c. 84, § 4.)

Sec. 5. Land taken for parks, squares, public libraries and playgrounds.—Any city or town containing more than 1,000 inhabitants, upon petition in writing signed by at least 30 of its taxpaying citizens, directed to the municipal officers, describing the land to be taken as hereinafter provided, and the names of the owners thereof so far as they are known, may, at a meeting of such town or the city government, direct such municipal officers to take suitable lands for public parks, squares, playgrounds, buildings for municipal purposes or a public library building; and thereupon such officers may take such land for such purposes, but not without consent of the owner if at the time of filing such petition with such officers or in the office of the clerk of such town or city such land is occupied by a dwelling house wherein the owner or his family reside. When land is taken under the provisions of this section for a public park, the fee of such land may be taken and compensation assessed and paid accordingly. Land in any town so taken for a public park may by authority of a majority vote at a town meeting be transferred and conveyed to the federal government so as to become a part of a national park. Nothing herein shall be held to deprive the former landowners from proceeding to restrain the use of such land for other than public park purposes. (R. S. c. 84, § 5.)

Section establishes necessity of taking. —The legislature has not undertaken to say in this section that any specific piece of land may be taken but has declared that the public exigency, requiring that some private property may be taken for a public library building, exists. And thus the exigency or necessity is established by the enactment of this section authorizing the taking. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

And the municipal officers do not pass upon the question of necessity. That has already been done by the legislature before their duties begin. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

But such officers determine suitability of land.—This section prescribes the method of procedure for the condemnation of the particular piece of property required to meet the exigency and, among other things, delegates to the municipal officers authority to determine whether the land described in the petition of the thirty taxpaying citizens is suitable. Having determined that the land is suitable, a duty preliminary to the taking, the municipal officers are then directed and authorized to take the land described for a public library building. Hayford v. Bangor, 102 Me. 340, 66 A. 731.

And their act not reviewable.—The act of the municipal officers in the exercise of the authority conferred by this section to take the land is the exercise of a legislative function and not reviewable by the court. Hayford v. Bangor, 102 Me. 340, 66 A. 731. See note to Me. Const. Art. 1, § 21.

Applied in Hayford v. Bangor, 103 Me. 434, 69 A. 688; Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Cited in State v. Fuller, 105 Me. 571, 75 A. 315; Opinion of the Justices, 124 Me. 501, 507, 128 A. 181.

Sec. 6. Proceedings by municipal officers. — Whenever the municipal officers of such city or town are directed to take land as provided in the preceding section, they shall, within 10 days, give written notice of their intention to

take such land, describing the same and the time and place of hearing, by posting the same in 2 public places in the town where the land lies and in the vicinity thereof, and by publishing the same in a newspaper printed in such city or town, 7 days before the day of such hearing, if any, otherwise in a newspaper printed in the county where the land lies, 3 weeks successively, the last publication to be 7 days before such hearing. The municipal officers shall meet at the time and place specified in the notice, view the land to be taken, hear all parties interested and if they decide that the land is suitable for the purpose, they shall take the same and estimate the damages to be paid to each owner, so far as known, and make return of their doings in writing, signed by a majority of them, which return shall describe by metes and bounds the land so taken and state the purpose for which it is taken, the names of the owners so far as known, and the amount of damages awarded to each. The return shall be filed and recorded in the clerk's office of such city or town and a copy thereof, certified by such clerk, shall be recorded in the registry of deeds for said county. (R. S. c. 84, § 6.)

Section does not infringe upon owner's rights.—The property owner's right to have his damages assessed by some constituted tribunal upon due notice and hearing is a constitutional right, and is fully awarded to him by the provision of this section for an estimate by the municipal officers. Hayford v. Bangor, 103 Me. 434, 69 A. 688. See State v. Fuller, 105 Me. 571, 75 A. 315, wherein it was said that this statement in Hayford v. Bangor, 103 Me. 434, 69 A. 688, was unwarranted if it meant that the owner's rights were fully awarded without the right of appeal.

The municipal officers are constituted a court, in the first instance, to determine what is just compensation for the taking. The authority of the legislature to prescribe this method is not questioned. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Compliance with section condition precedent to ownership. — A full compliance with the method of giving just compensation prescribed by statute must be regarded as a condition precedent to the right of a municipality to assert legal ownership. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Burden on officers to make just compensation.—It is not incumbent upon the private owner to begin any kind of a proceeding to obtain just compensation. It is the bounden duty of municipal officers to make it before the city can acquire title. Although the owner, if dissatisfied, must take an appeal, yet the burden is still upon the taker to make just compensation. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

And the taking, although in all other respects regular, is not completed until just compensation is awarded. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Sec. 7. Estimate of damages, appeal.—Any person aggrieved by the estimate of damages may have them determined by written complaint to the superior court in the manner provided respecting damages for the establishment of town ways. When such damages are finally determined, they shall be certified to the clerk of such city or town and paid by the treasurer thereof. (R. S. c. 84, § 7.)

Cross reference.—See § 34, re damages for ways; note to c. 89, § 42, re question of title may be considered on appeal in so far as it respects the question of damages.

Right of appeal is part of method for determining compensation.—As a part of the method for determining just compensation, the owner has a right to appeal to the superior court and have just compensation determined by a jury. Peirce v. Bangor, 105 Me. 413, 74 A. 1039. See § 34 and c. 89, § 42.

And affords final hearing by disinterested tribunal. — The object, purpose and intention of the legislature in giving the right of appeal was that the appellant should be finally heard, if he so desired, by a disinterested tribunal. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

An appeal under this section is not a proceeding for the recovery of damages, nor to determine who is entitled to damages for the taking. It is simply and solely a proceeding in the nature of an appeal to procure an estimate of the damages by the court in review of the estimate made by the municipal officers. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

And the question of taking is not at all involved in an appeal. The statutory procedure of taking being legally accomplished, the constitutional duty of making compensation begins. The appeal brings up the question of compensation and noth-

ing else. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

"Any person" includes owners named or not named.—The words "any person," as used in this section, are sufficiently comprehensive to include owners named in the return or report as well as those not named. Wilson v. South Portland, 106 Me. 146, 76 A. 284.

Only a person having an estate or interest in the land at the time of the taking can be "aggrieved" by the estimate of the municipal officers. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

If a person had no estate or interest in the land at the time of the taking, and none until after the death of the owner, she was not a "person aggrieved" by the municipal officers' estimate of the damages, and hence has no right to maintain a petition for an increase of the damages under this section. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

Right to appeal ceases upon petitioner's death. — The right of appeal by petition for a revision of the estimate is purely statutory. The right being purely statutory can extend no further than the statute provides. There being no statutory provision for the continuance of the proceeding after the petitioner's death by his representatives, the right ceases upon his death. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

And the proceeding abates. Hayford v. Bangor, 103 Me. 434, 69 A. 688; Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

And becomes void ab initio. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

And cannot be prosecuted by representative.—While an administratrix of the estate of a deceased property owner may recover of the city the damages awarded to the latter in her lifetime, she cannot in that capacity further prosecute a petition for appeal. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

Cited in State v. Bangor, 98 Me. 114, 56 A. 589; State v. Fuller, 105 Me. 571, 75 A. 315; Hadlock, Petitioner, 142 Me. 116, 48 A. (2d) 628.

Sec. 8. Preservation of trees along public ways; parkways.—For the purpose of preserving and increasing the growth of trees on land abutting any public way or located on uplands adjoining any navigable river or other body of water, cities and towns and the municipal officers thereof, acting pursuant to the provisions of sections 5, 6 and 7, may set aside and define such land located as aforesaid, in width not exceeding 5 rods; and all trees and shrubs growing on said land shall be held as for park purposes under the exclusive care and control of park commissioners chosen as provided in section 2; and it shall be unlawful for the owner in fee of said land or any other person to injure, remove or destroy such trees or shrubs, except as hereinafter provided. All proceedings relating to estimating and awarding damages provided in sections 5, 6 and 7 are made applicable to proceedings hereunder; and such proceedings may also be commenced upon petition in writing signed by at least 30 taxpayers owning taxable real estate in said town or city. (R. S. c. 84, § 8.)

See § 12, re penalty.

Sec. 9. Land cleared for public ways; licenses to owners to make improvements.—The provisions of section 8 shall not prevent the taking and clearing of so much of said land as may be necessary for public ways, nor abridge the right of the owner or his tenant to lay out a private way across the same or to clear and improve so much thereof as may be necessary for actual building purposes, provided the written consent of the municipal officers to open such way or construct buildings thereon be first obtained; nor except as provided in section 8 shall the provisions thereof and of this section restrict the use and enjoyment of such land by the owner thereof or authorize any person to enter thereon, excepting municipal officers and park commissioners and their agents for the purposes of section 8. Whenever municipal officers refuse to give consent for laying out a private way or for cutting and clearing so much of said land as is necessary for immediate building purposes, when in writing requested to do so, such refusal shall be ground for a further award of damages to the owner as provided in section 8. Park commissioners may grant written license to the owner to do such cutting and clearing on said land as is consistent with the preservation and general improvement of the growth thereon. (R. S. c. 84, § 9.)

See § 12, re penalty.

Sec. 10. Failure to elect park commissioners; money raised for §§ 8 and 9.—If any city or town, having taken lands as herein provided, fails to elect a board of park commissioners, the municipal officers shall have and exercise all the powers and duties of such commissioners, except as hereinafter provided in section 11 and sections 13 to 20, inclusive. Every city and town, although containing less than 1,000 inhabitants, may appropriate money for the purposes of the 2 preceding sections. (R. S. c. 84, § 10.)

Sec. 11. Special park commissioners. — Notwithstanding the provisions of law relating to park commissioners, cities, towns and village corporations are authorized, empowered and directed on petition of a society organized for the purpose of beautifying and improving landscapes, parks and similar matters to appoint from a list of persons submitted to them by the said society, a park commissioner who shall be charged with the duties and have the powers of park commissioners or other officers whose duty it is to care for such public parks or to perform any acts relating to the beautification of the landscape and town rights-of-way. Such park commissioner shall serve without pay until his successor shall have been appointed and qualified and shall expend such money for the purposes herein specified as the city, town or village corporation may appropriate and such other sums as may be received from other sources, and is authorized to receive such sums as may be donated for such purposes. Whoever violates any of the provisions of this section shall be punished by the penalty provided in section 12. All fines received under the provisions of this section shall be paid over to the park commissioner of the city, town or village corporation within the city or town where the offense occurred, to be used for the purposes hereinbefore mentioned. The said park commissioner shall annually report to the city, town or village corporation at such time as other town officers report, a statement of the moneys received and expended by him and such other matters as he deems appropriate. (R. S. c. 84, § 11.)

Sec. 12. Violations of §§ 8 and 9.—Whoever violates any provisions of sections 8 and 9 shall be punished by a fine of not more than $100, to be recovered on complaint, and shall also be liable to an action on the case, brought by the park commissioners or by a taxpayer, in the name and for the benefit of the town or city wherein said offense is committed, for all damages sustained. (R. S. c. 84, § 12.)

Cited in Skowhegan v. Heselton, 117 Me. 17, 102 A. 772.

Sec. 13. Trees within highway limit public shade trees.—All trees within or upon the limits of any highway marked as provided in sections 13 to 20, inclusive, are declared to be public shade trees. The tree wardens in the several cities and towns, as soon as may be after they are appointed as hereinafter provided, shall carefully examine the trees along the highways under their jurisdiction and plainly mark such trees as they consider should be controlled by the municipality. The forest commissioner shall furnish to the municipal officers of the several cities and towns, at cost, galvanized iron disks not more than 1 inch in diameter, which disks shall have stamped on them the letter "M." Said disk shall be inserted in each tree selected as above provided, at a point not less than 3 feet nor more than 6 feet from the ground on the side toward the highway. It shall be the duty of the tree warden, if any tree marker shall be destroyed or defaced, to renew or replace the same. (R. S. c. 84, § 13.)

See § 18, re penalty.

Sec. 14. Park commissioners to have supervision of trees. — All public shade trees shall be under the care and control of park commissioners in cities and towns which now or hereafter may appoint such commissioners in accordance with the provisions of sections 2 to 12, inclusive. As to all such

trees said park commissioners shall have the powers and duties hereinafter conferred upon tree wardens. (R. S. c. 84, § 14.)

Sec. 15. Tree wardens, appointment and duties.—The municipal officers of cities and towns not having elected park commissioners as provided by sections 2 to 12, inclusive, may, at any annual meeting or meetings called for that purpose, appoint one or more tree wardens who shall have the care and control of all public shade trees upon and along such highways and in the parks thereof and all streets within any village limits and shall enforce all laws relative to the preservation of the same. (R. S. c. 84, § 15.)

Sec. 16. Powers of owners of soil and tree wardens as to removal of trees.—Public shade trees may be trimmed, cut down or removed by the owner of the soil only with the consent of a tree warden or park commissioner, but such trees shall not be trimmed, cut down or removed in any case by a tree warden or park commissioner except with the consent of such owner. Nothing in this section, however, shall be construed to prevent the trimming, cutting or removal of trees where such trimming, cutting or removal is ordered by proper authority to lay out, alter or widen the location of highways, to lessen the danger of travel on highways or to suppress tree pests or insects. (R. S. c. 84, § 16.)

Sec. 17. Compensation of tree wardens.—Cities and towns may appropriate at any annual or special town meeting money not exceeding 50¢ for each taxable poll in each year to be used in making compensation to tree wardens and in acquiring, planting, pruning and protecting shade trees. (R. S. c. 84, § 17.)

Sec. 18. Violation.—Whoever trims, cuts or otherwise defaces or destroys a public shade tree or injures, defaces or destroys any tree marker attached in accordance with the provisions of section 13 shall be punished by a fine of not less than $5 nor more than $25, to be paid to the city or town in which the offense is committed and expended by said city or town for the purposes specified in sections 13 to 20, inclusive. (R. S. c. 84, § 18.)

See § 20, re provisions of § 18 not applicable when wardens not appointed.

Sec. 19. Free distribution of trees for roadside planting. — The forest commissioner may provide and distribute free of charge at the state nursery, to the several cities and towns, trees for roadside planting. (R. S. c. 84, § 19.)

Sec. 20. Failure of municipalities to appoint wardens, provisions of § 18 not applicable.—When the municipal officers in any year fail to appoint tree wardens in accordance with the provisions of section 15, the provisions of section 18 shall not apply to trees previously marked in accordance with the provisions of section 13. (R. S. c. 84, § 20.)

Sec. 21. Trees planted.—A sum not exceeding 5% of the amount raised for repair of ways and bridges may be expended by a road commissioner, under the direction of the municipal officers, in planting trees about public burying grounds, squares and ways, if the town by vote authorizes it. (R. S. c. 84, § 21.)

See c. 91, § 86, sub-§ VII, re sidewalks.

Sec. 22. Appropriations for clearing away and beautifying roadsides.—Each city, town or plantation shall each year set aside 5% of the money raised and appropriated for ways and bridges, to be used in cutting and removing all trees, shrubs and useless fruit trees, bushes and weeds, except shade trees, timber trees, cared-for fruit trees and ornamental shrubs growing between the road limit and the wrought part of any highway or town way, until all the trees, shrubs and worthless fruit trees, bushes and weeds have been once removed

from the limits of such highway or town way, after which the owner of the land adjoining such highway or town way shall each year, before the 1st day of October, remove all bushes, weeds, worthless trees and grass from the roadside adjoining his cultivated or mowing fields. The city, town or plantation shall care for all land not included in the above, except wild land.

If any owner of such land fails to cut and remove said bushes, weeds, worthless trees and grass on or before the 1st day of October of each year, the mayor of any city, the selectmen of any town or the assessors of any plantation wherein said land may be located shall cause said bushes, weeds, worthless trees and grass to be cut and removed. The actual expense of such cutting and removal shall be a lien upon said land so adjoining said highway or town way and shall be assessed and collected as a tax thereon. (R. S. c. 84, § 22.)

Section strictly construed.—Such a statute as this section must be construed strictly and any doubts, if they exist, must be resolved in favor of him whose property is taken for public purposes. Brooks v. Bess, 135 Me. 290, 195 A. 361.

And it does not divest abutter of property rights.—Nowhere in this section is to be found anything that indicates that the abutter shall be divested of his property rights in the trees when cut and removed. Brooks v. Bess, 135 Me. 290, 195 A. 361.

In this section a duty is imposed upon the adjoining landowner, each year after the growth is once cut and removed by the town, to "remove all bushes, weeds, worthless trees and grass from the roadside adjoining his cultivated or mowing fields." If he does not do this, a lien is created upon his adjoining land to cover the actual expenses of such cutting and removal by the town. This provision indicates that the legislature considered the title to the trees to be cut and removed to be in him, for, if not so, why place upon him the burden to cut and remove, and create a lien upon his adjoining property, if he fails in the performance of his duty. Brooks v. Bess, 135 Me. 290, 195 A. 361.

Municipal Forests.

Sec. 23. Lands for forestry purposes; seedlings. — Cities and towns may acquire by purchase, gift or bequest lands for the purpose of forestation and may reclaim and plant such lands. The forest commissioner shall, upon application in such form as he may prescribe, furnish said cities and towns, at cost, with seedlings or transplants for the planting of town forest lands and shall be ready to offer advice as to the planting, management and protection of said forest lands. (R. S. c. 84, § 23.)

Sec. 24. Two-thirds vote to authorize purchase of land; purposes of forest.—A town, by a 2/3 vote at any annual town meeting, or a city, by a 2/3 vote of the city government, may determine to purchase lands which shall be known as the town or city forest and may appropriate money and accept gifts of money and land therefor. Such forest shall be devoted to the culture of forest trees or to the preservation of the water supply of such city or town. (R. S. c. 84, § 24.)

Sec. 25. Forester; duties.—In each city or town which has a town or city forest as defined hereinbefore, the town or city manager in such towns or cities as are under the manager system, or elsewhere the mayor or selectmen, may appoint a forester whose duty it shall be to make and enforce all necessary regulations and to perform such labor therein as may be necessary for the proper care and maintenance of such land as a forest producing area. Said forester need not be a resident of the town or city in which he is appointed, but he and such deputies as he may appoint shall have the powers of constables and police officers while in said forest. (R. S. c. 84, § 25.)

Sec. 26. Building leased or erected. — Any city or town owning such city or town forest area may lease any building thereon and may erect thereon any building for public instruction and recreation. (R. S. c. 84, § 26.)

Sec. 27. Payment of bills; disposition of revenue.—No expenditures shall be made or bills incurred under the provisions of sections 23 to 28, inclusive, above the amounts appropriated for said specific items, and all expenditures must have the approval of city or town officers appointing said forester. All receipts from said forest or buildings thereon shall go into the general revenue of the town or city owning said forest. (R. S. c. 84, § 27.)

Sec. 28. Lands acquired, sold or exchanged; highways located. — Whenever it shall be deemed of advantage to a city or town to sell or exchange city or town forest lands or any part thereof, or to locate thereon any public highway or footpath, such city by vote of its city government and such town by vote of its inhabitants at town meeting, after due notice given, may authorize such sale or exchange or the location of such way or path and may execute any conveyances or take any other steps necessary to carry the same into effect. Provided, however, that the power of sale or exchange herein granted shall not apply to lands held in trust by such city or town unless in accordance with the terms of such trust. (R. S. c. 84, § 28.)

Town and Private Ways. Public Landings. Bridle Paths.

Sec. 29. Power of municipal officers respecting town and private ways; notice; duty of officers laying out way.—The municipal officers of a town may on petition therefor, personally or by agency, lay out, alter or widen town ways and private ways for any inhabitant or for owners of cultivated land therein, if such inhabitant occupies or such owner has cultivated land in the town which such private way will connect with a town way or highway. They shall give written notice of their intentions, to be posted for 7 days in 2 public places in the town and in the vicinity of the way, describing it in such notice, and they shall determine whether it shall be a town way or a private way; and if a private way, whether it shall be subject to gates and bars. (R. S. c. 84, § 29.)

I. General Consideration.

II. Petition.

III. Notice.

Cross References.

See c. 36, § 33, re ways in state park, etc.; note to c. 89, § 61, re town way not same thing as county road and judgment denying former not bar to one establishing latter.

I. GENERAL CONSIDERATION.

Section constitutional. — See Browne v. Connor, 138 Me. 63, 21 A. (2d) 709.

To constitute a town way, it must appear that the proceedings were in conformity with law. Dennett v. Hopkinson, 14 Me. 341.

Town and private ways are wholly within the limits of the town, and are laid out by the municipal authorities. State v. Bunker, 59 Me. 366; Waterford v. Oxford County Com'rs, 59 Me. 450.

And the officers of the town have original jurisdiction over town ways. The jurisdiction of the county commissioners is appellate. Waterford v. Oxford County Com'rs, 59 Me. 450.

Municipal officers must be disinterested. —The municipal officers, before locating a private way, must determine its expediency or necessity and the damage thereby done to the land owner and what would be a reasonable compensation for such damage. These are judicial acts, requiring disinterestedness on the part of those making the adjudication. Lyon v. Hamor, 73 Me. 56, overruled on another point in Blaisdell v. York, 110 Me. 500, 87 A. 361.

Officers to determine if way town or private.—When municipal officers lay out a way, they are required to "determine whether it shall be a town way or a private way." Monson v. County Com'rs, 84 Me. 99, 24 A. 672.

Plan suggested by petitioners not conclusive on municipal officers.—The petitioners might suggest a plan for laying out or widening the way, but it would by no means be conclusive upon the city officials. The petitioners cannot supersede the discretion of the city officers by interposing their own. Cassidy v. Bangor, 61 Me. 434.

And officers need not conform to description in petition.—This section does not require the municipal officers in the location of highways to conform substantially to the description in the petition. Cassidy v. Bangor, 61 Me. 434.

A town way may be laid out on the petition of inhabitants whether land owners, or occupiers of land, or not; because a town way will be for all the inhabitants of a town who may have occasion to use it. Hall v. Lincoln County Com'rs, 62 Me. 325.

But a private way can only be laid out either for residents who occupy, or non-residents who own, cultivated land. Hall v. Lincoln County Com'rs, 62 Me. 325.

And private way must lead from such land to town or county way. — The private way, which is for the exclusive use of such occupiers or owners, must lead from land so occupied or owned to a town or county road. The very object of a private, in contradistinction from a town way, is to provide a communication into the general channels of passage in a town for those only whose lands are otherwise shut out from a connection therewith. Hall v. Lincoln County Com'rs, 62 Me. 325.

The private way authorized by this section is from the petitioner's land to a town way or highway. Lyon v. Hamor, 73 Me. 56, overruled on another point in Blaisdell v. York, 110 Me. 500, 87 A. 361.

An instruction which assumes that municipal officers may lay out a private way for an owner of cultivated land over his own land is erroneous. Such is not the law. A land owner may construct roads over his own land at his pleasure, and needs no action by municipal officers. York v. Parker, 109 Me. 414, 84 A. 939.

Way may be laid out for owner of cultivated land.—The municipal officers have authority to lay out town or private ways for the "inhabitants" of the town, or for the "owners of cultivated land therein." Orrington v. Penobscot County Com'rs, 51 Me. 570.

And he need not be personally in possession.—Under this section, it is not necessary for the owner to be personally in possession of the land. If the land is under improvement and he is the owner, he may petition the selectmen and, in case of their refusal, he may petition the county commissioners to locate a way from such land to a town way or highway. Orrington v. Penobscot County Com'rs, 51 Me. 570.

But if he is not inhabitant way must lead from land to town way or highway.— If a way is laid out "for the owners of cultivated land therein," who are not inhabitants, it must appear that the way leads from such land to a town way or highway. Orrington v. Penobscot County Com'rs, 51 Me. 570.

Cultivated land is land under improvement. Orrington v. Penobscot County Com'rs, 51 Me. 570.

And a mill lot upon which a mill is erected is cultivated or improved land within the letter and the spirit of this section. Lyon v. Hamor, 73 Me. 56.

The existence of a town way may be established by evidence other than the record of the laying out of the same by the municipal officers. State v. Bunker, 59 Me. 366.

And a way may be proved by prescription. It is immaterial whether the origin of the way be by grant or dedication and an acceptance by the town, or whether a legal laying out is to be inferred from the long-continued use and repair of the same by the public. Whether the road thus proved to exist is a highway or a town way may not always be so easy of ascertainment, but that does not affect the question. Either class of ways may be shown to exist by prescription. State v. Bunker, 59 Me. 366.

The purpose of the legislature in authorizing the town to determine whether a private way shall be subject to gates and bars was to provide a method by which the owners of the land affected could lessen the hazard of unwarranted or casual intrusion on their property due to it being opened to easy access from the main highway. In spite of the erection of gates and bars the public would still have the right to use the way in the same manner as the parties who are primarily interested in it. Browne v. Connor, 138 Me. 63, 21 A. (2d) 709.

Applied in State v. Pownal, 10 Me. 24; Goodwin v. Hollowell, 12 Me. 271; Inhabitants of Limerick, Petitioners, 18 Me. 183; North Berwick v. York County Com'rs, 25 Me. 69; Christ's Church v. Woodward, 26 Me. 172; State v. Beeman, 35 Me. 242; Williams, Petitioner, 59 Me. 517; Littlefield v. Rockland, 91 Me. 449, 40 A. 424; Connor v. Southport, 136 Me. 447, 12 A. (2d) 414.

Stated in part in True v. Freeman, 64 Me. 573.

Cited in Goodwin v. Merrill, 48 Me. 282; Tibbetts v. Penley, 83 Me. 118, 21 A. 838; Higgins v. Hamor, 88 Me. 25, 33 A. 655; Wilson v. Simmons, 89 Me. 242, 36 A. 380; State v. Bangor, 98 Me. 114, 56 A. 589; Graham v. Lowden, 137 Me. 48, 15

A. (2d) 69; Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

II. PETITION.

Petition necessary to jurisdiction.—A petition for a way is necessary to give the municipal officers jurisdiction to lay out a way under this section. Cushing v. Webb, 102 Me. 157, 66 A. 719.

For a case concerning the necessity of a petition prior to its inclusion in this section; see Howard v. Hutchinson, 10 Me. 335.

And it must describe way.—While this section does not in terms require the petition to describe the way, it does require the municipal officers to describe the way in their notice. And as their jurisdiction is based upon the petition, it is reasonably to be implied that the way must be described in the petition. For unless a way is described in the petition, there is no proposed way to be described in the notice, and the municipal officers would be without jurisdiction to give notice. Cushing v. Webb, 102 Me. 157, 66 A. 719.

Such a petition must be so definite that, when notice of it is given, the public and property owners will be apprised with reasonable certainty where the way is sought to be located. Cushing v. Webb, 102 Me. 157, 66 A. 719.

And state for whose benefit private way to be.—The petition for a private way should state in terms and truly, the person for whose benefit the way is to be, and the municipal officers, perhaps, might properly decline to proceed without such a statement in the petition. Fernald v. Palmer, 83 Me. 244, 22 A. 467.

Presumption as to sufficiency of petition.—When it appears by the return of municipal officers that they acted upon a petition for a way in a general course which they state, and that they stated in their notice "the termini thereof," meaning the termini of the way as asked for, and when the use of the way has been acquiesced in for many years, there is a prima facie presumption at least, that the petition was sufficient in form to give the officers jurisdiction to act. Cushing v. Webb, 102 Me. 157, 66 A. 719.

III. NOTICE.

Notices must be posted in vicinity of proposed way.—It should appear in the officers' return of their doings that the notices were posted up in the vicinity of the proposed way. Southard v. Ricker, 43 Me. 575.

Names of owners need not be included in notice.—This section does not require the names of the owners of the land that may be crossed by the proposed road to be included in the notice. Fernald v. Palmer, 83 Me. 244, 22 A. 467.

No notice required prior to determination to lay out or alter way.—From the terms used in this section, the notices required to be posted up are so to be posted after the municipal officers have so far deliberated upon the subject that they have intended to lay out or alter the road which may have been in contemplation. In coming to this stage of their proceedings, no notices to be given are referred to in the statute; and none can be presumed to have been designed. Preble v. Portland, 45 Me. 241.

Notice to appear before committee acting for city is sufficient.—Where a city ordinance authorizes the city council to refer all applications for the location or alteration of streets to a committee, to inquire into the matter and report, such committee, for this purpose, represents the city council. All notices to parties to appear and be heard before such committee are regarded as notices to appear and be heard before the city council, to whom every thing material may be expected to be reported. It is not necessary that parties should have notice to appear and be heard before the city council. Preble v. Portland, 45 Me. 241.

Owner of land is only party who can complain of insufficiency of notice.—The statute requirement of a description of the way in the notice is for the benefit of those persons whose land may be taken for the road. If the person whose land is taken does not complain of the insufficiency of the notice, the person who takes the land should not be heard to complain. Fernald v. Palmer, 83 Me. 244, 22 A. 467.

Return prima facie evidence of sufficiency of notice.—See note to § 31.

Former provisions as to notice.—For a consideration of the necessity of notice before this section specifically required it, see Cool v. Crommet, 13 Me. 250.

Under a former provision of this section it was held that notice had to be given to persons interested. See Harlow v. Pike, 3 Me. 438; Howard v. Hutchinson, 10 Me. 335.

For a case under a former provision of this section requiring reasonable notice; See Belfast Academy v. Salmond, 11 Me. 109.

Sec. 30. Winter roads.—The municipal officers may lay out a way as aforesaid for the hauling of merchandise, hay, wood or lumber, to be used only

when the ground is so covered with snow that such hauling shall not break the soil. When so laid out, they shall state in their return the purposes for which it is laid and that it shall be used only in the winter season, and shall order the persons for whose accommodation it is laid to pay into the town treasury an amount equal to the damages of such location for the benefit of the owner of the land over which it is laid and the expenses of such location, and it shall not be accepted by the town until such amount is so paid. No town shall be liable for damage to any person traveling on such way. (R. S. c. 84, § 30.)

Sec. 31. Way accepted by town.—A written return of the proceedings of the municipal officers under the provisions of sections 29 and 30, containing the bounds and admeasurements of the way and the damages allowed to each person for land taken, shall be made and filed with the town clerk in all cases. The way is not established until it has been accepted in a town meeting legally called, after the return has been filed, by a warrant containing an article for the purpose. (R. S. c. 84, § 31.)

Cross reference.—See note to § 42, re no failure of town to accept way unless return filed.

To constitute a town way, it must be accepted by the town. Dennett v. Hopkinson, 14 Me. 341.

This section does not provide for the conditional acceptance of a town or private way. Christ's Church v. Woodward, 26 Me. 172.

And a conditional acceptance of a town or private way is void. State v. Calais, 48 Me. 456.

Acceptance of committee's report held sufficient. — If the report of a committee "on laying out new streets," appointed by the municipal officers is accepted, this is to be regarded as "accepted", within the meaning of this section. Preble v. Portland, 45 Me. 241.

Warrant for meeting cannot issue prior to laying out of way.—This section contemplates a laying out by the municipal officers and then the calling of a meeting of the town for the purpose of considering their report. The officers may not issue their warrant for a meeting previous to the laying out. Howard v. Hutchinson, 10 Me. 335.

This section is to be so construed as to require the laying out to be completed previous to issuing the warrant for the meeting. Howard v. Hutchinson, 10 Me. 335.

The laying out of a town or private way must precede the issuing of the warrant calling the meeting for its approval. Jordan v. Eldridge, 16 Me. 301.

And warrant must contain article for purpose.—A road cannot be considered as a legal town way if it was never duly accepted by the town, because there was no article in the warrant for calling the meeting that could justify its acceptance. Rowell v. Montville, 4 Me. 270; Blaisdell v. Briggs, 23 Me. 123.

Article in warrant relating to acceptance of way held sufficent.—See State v. Beeman, 35 Me. 242.

Doings of officers need not be recorded prior to acceptance.—The statute does not require that the doings of the municipal officers in laying out a road should be recorded previous to its being offered to the town for acceptance. Cool v. Crommet, 13 Me. 250; Inhabitants of Limerick, Petitioners, 18 Me. 183.

When the town way has been duly accepted, the action of the town or its officers terminates. No appeal as such can be taken. Williams, Petitioner, 59 Me. 517.

Return must give requisite information.—A return which does not give the requisite information to the town, the citizens or the persons interested, as provided in this section, is insufficient. Lewiston v. Lincoln County Com'rs, 30 Me. 19.

And must state whether way is town or private.—Section 29 provides that the municipal officers shall determine the fact whether it be a town or a private way and the return of the proceedings of the officers should state whether the streets are laid out as town or as private ways. This is essential to enable the town to act understandingly respecting the acceptance or rejection of the ways. Christ's Church v. Woodward, 26 Me. 172.

The return of the proceedings of the municipal officers of a town in laying out a road or way, to be valid, must state whether the way laid out is a town way or a private way. And this should be distinctly stated in the return, and is not to be inferred from other facts. Christ's Church v. Woodward, 26 Me. 172.

The return must determine whether it is a town or private way. Lewiston v. Lincoln County Com'rs, 30 Me. 19.

But need not state for whose benefit town way laid out.—If the return of the

municipal officers of the laying out of a road describes it as "a town road," it will be sufficient though it does not state for whose benefit it was laid out. Mann v. Marston, 12 Me. 32.

Nor that way will be beneficial to town.—The municipal officers are not required to state in their report to the town that the way will be beneficial to the town or to some one or more of its inhabitants. Inhabitants of Limerick, Petitioners, 18 Me. 183.

Nor names of owners of land taken.—This section does not require the return to state the names of the owners of the land taken. Wilson v. Simmons, 89 Me. 242, 36 A. 380.

Return is prima facie evidence of sufficiency of notice.—The municipal officers' return is prima facie evidence of the fact that they gave notice on the petition of such facts as are required by law to be embraced in the notice, such as that the notice contained a description of the way, and what it was. Cushing v. Webb, 102 Me. 157, 66 A. 719. See Inhabitants of Limerick, Petitioners, 18 Me. 183.

Section inapplicable where lot laid out for school district.—See Cousens v. School District No. Four, 67 Me. 280.

Former provision of section.—For a consideration of a former provision of this section requiring that the laying out be "reported" to the town in addition to being filed with the clerk, see Guilford v. Piscataquis County Com'rs, 40 Me. 296.

Applied in Todd v. Rome, 2 Me. 55.

Applied in Belfast Academy v. Salmond, 11 Me. 109; Goodwin v. Hallowell, 12 Me. 271; Crommett v. Pearson, 18 Me. 344; True v. Freeman, 64 Me. 573.

Quoted in part in Williams, Petitioner, 59 Me. 517.

Cited in Goodwin v. Merrill, 48 Me. 282; State v. Bangor, 98 Me. 114, 56 A. 589; State v. Fuller, 105 Me. 571, 75 A. 315; Graham v. Lowden, 137 Me. 48, 15 A. (2d) 69.

Sec. 32. Highway equipment on private ways.—The inhabitants of any town or village corporation at a legal town or village corporation meeting may authorize the selectmen of the town or assessors of the village corporation to use its highway equipment on private ways within such town or village corporation whenever such selectmen or assessors deem it advisable in the best interests of the town or village corporation for fire and police protection. (1949, c. 433. 1951, c. 30.)

Sec. 33. Ways discontinued.—A town, at a meeting called by warrant containing an article for the purpose, may discontinue a town or private way; and the municipal officers shall estimate the damages suffered by any person thereby. (R. S. c. 84, § 32.)

Previous action by municipal officers not necessary to validity of discontinuance.—The inhabitants of a town are authorized by this section to discontinue a town way at a meeting legally called for that purpose. No previous action of the municipal officers is requisite to make such discontinuance effectual. State v. Brewer, 45 Me. 606.

Section not applicable to private way created by express grant.—The private ways referred to in this section are such only as the municipal officers are authorized, after due preliminary proceedings, to "lay out, alter or widen" by § 29, and not those which are created by express grant. Tibbetts v. Penley, 83 Me. 118, 21 A. 838.

Applied in Bigelow v. Hillman, 37 Me. 52; Larry v. Lunt, 37 Me. 69; Hicks v. Ward, 69 Me. 436.

Cited in Browne v. Connor, 138 Me. 63, 21 A. (2d) 709.

Sec. 34. Damages for ways; appeal.—The damages for a town way shall be paid by the town; for a private way, by those for whose benefit it is stated in the petition to be, or wholly or partly by the town, if under an article in the warrant to that effect it so votes at the meeting accepting such private way; or by cities, if it is proposed in the return laying out such way. Any person aggrieved by the estimate of such damages may have them determined as provided in section 42 of chapter 89, by written complaint to the superior court, returnable at the term thereof next to be held within the county where the land lies, after 60 days from the date of the establishment, alteration or discontinuance of such way by the town at its town meeting. The complaint shall be served at least 30 days before said term by delivering in hand an attested copy to the

clerk of the town where the land lies, and by posting attested copies in 2 public and conspicuous places within said town and in the vicinity of the way; but the final judgment shall be recorded in said court and shall not be certified to the county commissioners. When any person aggrieved by the estimate of damages for his land taken for a town or private way, honestly intended to appeal therefrom and has by accident or mistake omitted to take his appeal within the time provided by law, he may at any time within 6 months after the expiration of the time when said appeal might have been taken, apply to any justice of the court in term time or vacation, stating in his said application the facts of his case, and said justice, after due notice and hearing, may grant to such petitioner permission to take his said appeal to such term of said court as said justice shall direct and on such terms as said justice shall order, and the subsequent proceedings thereon shall be the same and with the same effect as if said appeal had been seasonably taken. (R. S. c. 84, § 33.)

Cross references.—See § 45, re discontinued town ways reinstated; § 46, re locations of streets vacated; § 81, re damages by raising or lowering streets; note to c. 89, § 42.

The land damages in town ways are to be paid by the town for the use and benefit of whose inhabitants it is laid out. Waterford v. Oxford County Com'rs, 59 Me. 450.

And damages for a private way shall be paid by the person for whose benefit the way is laid out, unless the town shall properly vote to assume the burden. This section does not enable such person to avoid that duty, by any allegations or omissions in his petition. Fernald v. Palmer, 83 Me. 244, 22 A. 467.

The provisions of this section are applicable only to ways laid out by virtue of the provisions of this chapter. Bangor v. Penobscot County Com'rs, 30 Me. 270.

And are not applicable to the location of a way under the provisions of a city charter providing for appeal to a different tribunal. Bangor v. Penobscot County Com'rs, 30 Me. 270.

"Any person" includes owners named or not named in return.—The words "any person," as used in this section, are sufficiently comprehensive to include owners named in the return or report as well as those not named. Wilson v. South Portland, 106 Me. 146, 76 A. 284.

But this section contemplates only an appeal by the land owner; the person who claims damages. Goodwin v. Merrill, 48 Me. 282.

And town cannot appeal.—The town cannot appeal from the estimate of damages made by its officers. The officers represent the town and the town way cannot be established, including the award of damages, until it has been accepted by a vote of the town under § 31. It would be a most unjust, as well as absurd construction, to hold that after a town had made its own estimate of damages, and accepted the road with such estimate, it could afterwards compel the individual land owner, whose land had been thus taken without any request or assent on his part, to appear before a jury where the damages would be re-assessed. Goodwin v. Merrill, 48 Me. 282.

Nor can petitioner for private way.—The petitioner who prays for the laying out of a private way is not entitled to an appeal under this section although he may be adjudged to pay the damages. See Goodwin v. Merrill, 48 Me. 282.

Section does not provide appeal from laying out of way.—While an appeal directly to the superior court is the proper procedure to present the question of damages for determination, yet it is not the proper course to take in order to appeal from the laying out of the way. The legislature expressly and definitely pointed out in § 40 the procedure to be followed in taking an appeal from the laying out of a way. Connor v. Southport, 136 Me. 447, 12 A. (2d) 414.

Existence of way must be finally determined before injured party entitled to damages.—The existence of a town or private way must be certainly and finally determined before a party injured can recover his damages, or sustain a process for their increase. Christ's Church v. Woodward, 26 Me. 172.

And jurisdiction of court dependent on laying out of way.—The jurisdiction of the superior court in a case under this section must depend upon the fact that a particular kind of way has been laid out. Their jurisdiction should not rest upon an inference, more or less urgent and conclusive. Christ's Church v. Woodward, 26 Me. 172.

Owner must pursue mode prescribed by section.—To recover for damage done to a land owner by the location of a town road, he must pursue the mode prescribed

by this section. Eastman v. Stowe, 37 Me. 86.

Notice should be given inhabitants of pendency of complaint.—After entry of a complaint under this section, notice should be given the inhabitants of its pendency, that they may appear and protect their rights. Williams, Petitioner, 59 Me. 517.

Saving clause of section not retroactive.—There is no express command or necessary implication that the last sentence of this section should have a retroactive effect or that it should revive a right of appeal which had once been effectually barred by limitation of time, under the statute then in force. Dyer v. Belfast, 88 Me. 140, 33 A. 790.

The last sentence of this section does not apply to a case where the right of appeal had become barred by limitation prior to its passage, so as to allow a petitioner, after his right had once been barred, but within the six months' extension allowed by the act, to apply to a justice for permission to take an appeal. Dyer v. Belfast, 88 Me. 140, 33 A. 790.

Duty of appellant invoking saving clause.—When an appellant invokes the saving clause of this section and is granted permission to take his appeal, it is then the duty of the appellant to file notice of his appeal with the county commissioners and file a complaint in the superior court at the designated term, setting forth substantially the facts upon which the case should be tried, in accordance with the requirements of c. 89, § 42; Tuttle, Appellant, 131 Me. 475, 164 A. 541.

Former provision of section.—For cases under a former provision of this section requiring the petition to be filed within a year after the allowance of the way, see Lisbon v. Merrill, 12 Me. 210; Minot v. Cumberland County Com'rs, 28 Me. 121.

Applied in Proprietors of Kennebunk Toll Bridge, Petitioners, 11 Me. 263; Draper v. Orono, 11 Me. 422; Plummer v. Waterville, 32 Me. 566; Bethel v. Oxford County Com'rs, 60 Me. 535; Lancaster v. Richmond, 83 Me. 534, 22 A. 393; Monson v. County Com'rs, 84 Me. 99, 24 A. 672; Hussey v. Bryant, 95 Me. 49, 49 A. 56; Hayford v. Bangor, 103 Me. 434, 69 A. 688; Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Quoted in part in Browne v. Connor, 138 Me. 63, 21 A. (2d) 709.

Stated in part in Atlantic & St. Lawrence R. R. v. Cumberland County Com'rs, 28 Me. 112; Eden v. Hancock County Com'rs, 84 Me. 52, 24 A. 461.

Cited in Inhabitants of Limerick, Petitioners, 18 Me. 183.

Sec. 35. Bridle paths and trails; damages. — Bridle paths and trails may be laid out, altered or discontinued by any town or city within such town or city on petition therefor in the same manner as is provided by law for the laying out, altering or discontinuing of town ways in a town, or city streets in a city, except that no cultivated or improved land shall be taken without the consent of the owner and a 2/3 vote shall be required for the acceptance of such paths and trails by any town. All provisions now in force as to assessment of damages and appeal therefrom in cases of laying out, altering and discontinuing town ways in towns or city streets shall apply to laying out, altering and discontinuing bridle paths and trails except that the petitioners shall have no right of appeal. (R. S. c. 84, § 34.)

Sec. 36. Bridle paths and trails subject to town regulations.—Bridle paths and trails, when laid out and accepted under the provisions of section 35, shall be subject to such regulations as to use as may be established by the city or town laying them out. (R. S. c. 84, § 35.)

Sec. 37. No obligation to keep bridle paths open in winter; bridges in safe condition; signs erected.—Cities and towns maintaining bridle paths and trails mentioned in sections 35 and 36 shall not be under any obligation to keep them in repair or to break them out in winter; provided that if any city or town shall erect a bridge on such bridle path or trail, it shall be under the same obligation to keep such bridge in a safe condition for the use of horses and riders as it is now under to keep highway bridges in repair for the purposes for which they are used. Such city or town shall erect at the entrance of such bridle paths and trails suitable signs, signifying that they are bridle paths or trails, only, and not for use of vehicles, and that persons may use them at their own risk. (R. S. c. 84, § 36.)

Sec. 38. Public landings.—Towns may lay out public or common landings and may alter or discontinue said landings whether laid out under the provisions of this chapter or now or hereafter established by dedication or otherwise. All procedure shall be in substance the same as is provided by law in the case of town ways. (R. S. c. 84, § 37.)

See c. 141, § 6, re certain nuisances.

Sec. 39. Public parking places; damages.—Towns and cities may lay out land within their corporate limits for use as public parking places for motor and other vehicles and may alter or discontinue such use. All procedure including assessment of damages and appeal therefrom shall be the same as is provided by general law for laying out, altering and discontinuing town and city ways. (R. S. c. 84, § 38.)

Sec. 40. Town or private way, neglect or refusal of municipal officers to lay out or alter.—When the municipal officers unreasonably neglect or refuse to lay out or alter a town way, or a private way on petition of an inhabitant or of an owner of land therein for a way leading from such land under improvement to a town or highway, the petitioner may, within 1 year thereafter, present a petition stating the facts to the commissioners of the county at a regular session, who shall give notice thereof to all interested and act thereon as is provided respecting highways. When the decision of the municipal officers is in favor of such laying out or alteration, any owner or tenant of the land over or across which such way has been located shall have the same right of petition. When the decision of the commissioners is returned and placed on file, such owner or tenant or other party interested has the same right to appeal to the superior court as is provided in sections 59 to 62, inclusive, of chapter 89; and also to have his damages estimated as provided in section 42 of chapter 89. (R. S. c. 84, § 39.)

Cross reference.—See note to § 34, re presentation of petition at "regular session."

Commissioners' jurisdiction is appellate.—The jurisdiction of the commissioners under this section is of an appellate character only. It has no original jurisdiction in such cases. State v. Pownal, 10 Me. 24.

By this section the right to appeal is given to all cases within its purview. Inhabitants of Byron, Appellants, 57 Me. 340.

And section grants appeal from laying out of way as well as from refusal.—Under the provisions of this section, persons aggrieved by the action of the municipal officers in laying out a private way have the same right to petition the county commissioners for relief, as is afforded to those aggrieved by failure of the municipal officers to lay out a way. Connor v. Southport, 136 Me. 447, 12 A. (2d) 414.

But section not applicable when charter gives exclusive authority to city council.—Where the city council has exclusive authority under the charter to lay out new streets and ways, the action of such council in refusing to lay out a way cannot be reviewed or revised by the county commissioners under the provisions of this section. Biddeford v. York County Com'rs, 78 Me. 105, 3 A. 36.

Only original petitioners have right to appeal.—No one has a right to appeal from the refusal of the municipal officers of a town to alter a town way unless he is one of the petitioners who asked for the alteration. No one else can rightfully claim to have been aggrieved by the refusal. Newcastle v. Lincoln County Com'rs, 87 Me. 227, 32 A. 885.

The allegation in the record, "that the selectmen of Gray have unreasonably refused and neglected to lay out and locate the way, as set forth in the foregoing petition," is only one of the requisites necessary to give jurisdiction; it must further appear that some of the persons requesting the road to be laid out made their application in writing to the commissioners, who have no right to act upon the subject unless it is legally brought before them by some of those aggrieved. Small v. Pennell, 31 Me. 267.

Commisssioners may lay out way when officers unreasonably refuse.—The county commissioners have the power under this section to lay out a way for the general benefit of the town, when the municipal officers refuse to do it. Lisbon v. Merrill, 12 Me. 210.

And are not strictly bound by petition.—If the municipal officers unreasonably refuse to locate the way prayed for, the commissioners may locate the way upon

any route that substantially corresponds with the petition. That it may vary to some extent, either in the termini, or at intermediate points, and still be within the petition, there can be no doubt. Orrington v. Penobscot County Com'rs, 51 Me. 570.

But their jurisdiction is limited to cases where refusal or neglect is unreasonable.—The commissioners have no appellate jurisdiction in laying out town roads under this section except, when the municipal officers unreasonably delay or refuse to lay out such way. State v. Pownal, 10 Me. 24.

At time of refusal or neglect.—The delay or refusal may have been founded on good and substantial reasons, existing and operating at the time of such delay or refusal; or, in other words, the delay or refusal may have been perfectly reasonable and proper, instead of unreasonable; and yet at the time the commissioners undertake to lay out and establish the way, these reasons may have ceased to exist; and the road prayed for may be highly beneficial to the town; yet such facts would, of themselves, give no authority to the commissioners to lay out the road. State v. Pownal, 10 Me. 24.

And such jurisdiction cannot rest upon an inference.—The jurisdiction of the commissioners in a case under this section must depend upon the fact that the municipal officers have unreasonably refused to lay out the way. Their jurisdiction should not rest upon an inference, more or less urgent and conclusive. Christ's Church v. Woodward, 26 Me. 172.

Unreasonableness of officers' refusal must be adjudged and entered of record.—On an application to the county commissioners to lay out a town road, in the nature of an appeal, founded on the unreasonable refusal of the municipal officers the unreasonableness of their refusal should be adjudged by the commissioners, and entered of record, as the foundation of their jurisdiction, or it will be error. Ex parte Pownal, 8 Me. 271; Goodwin v. Sagadahoc County Com'rs, 60 Me. 328.

In cases under this section, the commissioners have only an appellate jurisdiction, arising from an application to the municipal officers in writing, and an unreasonable refusal or neglect by them to grant it. Then any of the persons, who have applied to the officers, may prefer their request, within one year, to the commissioners by petition in writing. And the record of the commissioners must disclose the facts upon which their jurisdiction is founded. Small v. Pennell, 31 Me. 267.

The commissioners must adjudge that the selectmen did unreasonably neglect or refuse to lay out the road in controversy. Irving v. Sagadahoc County Com'rs, 59 Me. 513.

And failure is fatal error.—If the commissioners are satisfied from an examination of the facts of the cause while under their consideration, that the municipal officers unreasonably delayed or refused to lay out the road, that fact should be stated by the commissioners as the evidence of their jurisdiction, and of the reason for exercising such jurisdiction and proceeding to lay out the road. The omission or absence of this record of evidence of jurisdiction is fatal. From the nature of the case, such evidence can only exist in the record of the opinion and adjudication of the commissioners. State v. Pownal, 10 Me. 24.

And adjudication of necessity and convenience is not sufficient.—On application to the county commissioners to lay out a town road, in the nature of an appeal, founded on the alleged unreasonable neglect or refusal of the municipal officers to lay it out, the unreasonableness of the neglect or refusal must be adjudged by the commissioners, and entered of record as the foundation of their jurisdiction, or their proceedings will be quashed on certiorari. An adjudication that the way is of "common convenience and necessity" is not sufficient. Pownal v. Cumberland County Com'rs, 63 Me. 102.

But record may be amended to show finding of unreasonableness.—Upon petition, although the record fails to show that the municipal officers unreasonably neglected or refused to lay out the road in question, yet evidence will be received to prove that the county commissioners found the existence of this essential jurisdictional fact and they will be authorized to amend their record accordingly. White v. Lincoln County Com'rs, 70 Me. 317.

Petition must be within 1 year after refusal.—The application must be made to the commissioners within one year from the neglect or refusal of the municipal officers. Small v. Pennell, 31 Me. 267. See Bethel v. Oxford County Com'rs, 42 Me. 478; Newcastle v. Lincoln County Com'rs, 87 Me. 227, 32 A. 885.

And it must state facts sufficient to give commissioners jurisdiction. — The petition to the county commissioners under this section must state directly such facts as are necessary to give them jurisdiction. Nothing can be left to inference. Whatever is necessary to give the county commissioners jurisdiction of the case, must

be stated clearly and distinctly. Goodwin v. Sagadahoc County Com'rs, 60 Me. 328.

The petition, when presented, must contain such a statement of facts as will give the county commissioners jurisdiction, or they will have no right to accept it, or to take any action upon it whatever. Newcastle v. Lincoln County Com'rs, 87 Me. 227, 32 A. 885.

Thus it must show parties' right to appeal.—The petition must show that the petitioners are parties who have a right to complain of the refusal of the selectmen. Newcastle v. Lincoln County Com'rs, 87 Me. 227, 32 A. 885.

And state that refusal was unreasonable.—If it is stated in the petition to the county commissioners that the municipal officers "had refused" to lay out the road prayed for, but it was not stated that they had "unreasonably" refused, the petition is insufficient. Goodwin v. Sagadahoc County Com'rs, 60 Me. 328.

Evidence admissible to show petition made within 1 year.—Upon the hearing on the petition, evidence will be received to show that the petition was made within one year as required by this section. White v. Lincoln County Com'rs, 70 Me. 317.

Applied in Pettengill v. Kennebec County Com'rs, 21 Me. 377; Strong v. County Com'rs, 31 Me. 578; Waterford v. Oxford County Com'rs, 59 Me. 450; Eden v. Hancock County Com'rs, 84 Me. 52, 24 A. 461; Higgins v. Hamor, 88 Me. 25, 33 A. 655.

Quoted in part in True v. Freeman, 64 Me. 573.

Stated in Atlantic & St. Lawrence R. R. v. Cumberland County Com'rs, 28 Me. 112.

Cited in Howard v. Hutchinson, 10 Me. 335; Lyon v. Hamor, 73 Me. 56, overruled in Blaisdell v. York, 110 Me. 500, 87 A. 361; Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

Sec. 41. When such way opened.—No such way described in section 40 shall be opened or used until after 60 days from its acceptance by the town, and if within that time notice of such appeal or petition is filed with the town clerk, such way shall not be opened or used until finally located by the appellant tribunal. (R. S. c. 84, § 40.)

Stated in State v. Fuller, 105 Me. 571, 75 A. 315.

Cited in Adams v. Ulmer, 91 Me. 47, 39 A. 347.

Sec. 42. Towns unreasonably refusing to accept or to discontinue.—When a town unreasonably refuses to discontinue a town or private way or to accept one laid out or altered by the selectmen, the parties aggrieved may, within the time and in the manner provided in section 40, present a petition to the county commissioners, who shall in like manner proceed and act thereon and cause their proceedings to be recorded by their own and by the town clerk; and the right of all parties may be preserved and determined as provided in the 2 preceding sections. (R. S. c. 84, § 41.)

Only "parties aggrieved" can proceed under this section.—As a prerequisite to action by the commissioners under this section there must not only be an unreasonable refusal on the part of the town, but "parties aggrieved" must present a petition. No other persons have the legal right to do so; no others have any claims for a hearing. There must then be a party to move, and that party must be aggrieved. To be a party entitled to a hearing, there must be an interest in the subject matter and some connection with the prior proceedings. Brown v. Sagadahoc County Com'rs, 68 Me. 537.

To give the county commissioners jurisdiction under this section, the petition must come from a person aggrieved in the manner described in the section, and also be presented within the time therein specified. Inhabitants of West Bath, Petitioners, 36 Me. 74.

And they must have been parties to original action.—Process under this section is in the nature of an appeal from the doings of the town. There must be a previous action of the town, and it is a party to that action only who has the legal right to present the petition. It is difficult to perceive how anyone not an inhabitant of, or the owner of taxable property in the town, can have any legal interest in the town roads. An inhabitant or owner of cultivated land therein must petition for a town or private way. Brown v. Sagadahoc County Com'rs, 68 Me. 537. See § 29 and note.

As it is not necessary to present to the town a written petition for the discontinuance of a way, it is perhaps a sufficient

connection with the prior proceedings that the petitioner was instrumental in bringing the matter before the town for its action, or that he was present and voted with the minority. Less than this cannot be a compliance with the language of the section, nor can less put any person in a position to be aggrieved in the legal sense. Unless he is to this extent a party, there can be no decision against him; and without such a decision he cannot in a legal sense be aggrieved. It is not the policy of the law in this class of cases to allow a person to take no part in a hearing before one tribunal, and after a hearing, appeal to another on the ground that he considers himself aggrieved. Brown v. Sagadahoc County Com'rs, 68 Me. 537.

Application to commissioners must be seasonable. — County commissioners have no authority to act on a petition representing that a town has unreasonably refused and delayed to allow and approve a town way legally laid out, and praying that the commissioners accept and approve it, unless the petition or the record of the court shows that the application was seasonably made to them. Bethel v. Oxford County Com'rs, 42 Me. 478.

Commissioners jurisdiction is appellate. —The jurisdiction of the commissioners under this section is of an appellate character only. It has no original jurisdiction in such cases. State v. Pownal, 10 Me. 24.

And records must show jurisdiction.— Where the commissioners proceed to view and adjudicate upon a town way laid out by the municipal officers which the town refused to approve and allow, their records must show that they had jurisdiction, or their proceedings may be avoided without any legal process for that purpose. Scarborough v. Cumberland County Com'rs, 41 Me. 604.

Commissioners must pass such judgment as the town should have done.—A road laid out by the municipal officers is still a town or private way, when brought before the commissioners by an appeal from the action of the town; and they are required to pass such judgment only as the town should have done. Inhabitants of Limerick, Petitioners, 18 Me. 183.

It is the road petitioned for that the commissioners are authorized to lay out under this section. Goodwin v. Hallowell, 12 Me. 271.

They may make any location that could have been made under original petition.— As a refusal to accept the way laid out by the municipal officers renders their proceedings upon the petition void, the legislature, by this section, intended that the commissioners should have power to make any location which, as in the case of highways, they could have made under the original petition. Orrington v. Penobscot County Com'rs, 51 Me. 570.

Whether way is town or private.—The commissioners, under this section have the power to approve and allow a way laid out by the municipal officers, when the town unreasonably refuses to accept the same. It is immaterial whether it is called town way or private way. Although denominated a private way it may be for the general benefit of the town and, as such, the town will be answerable for all damages occasioned by the laying out. Lisbon v. Merrill, 12 Me. 210.

Refusal to accept way must have been unreasonable. — The commissioners have no appellate jurisdiction in laying out town roads under this section except when the town unreasonably refuses to accept the way. State v. Pownal, 10 Me. 24.

At time of refusal.—The refusal to accept the way may have been founded on good and substantial reasons, existing and operating at the time of such refusal; or, in other words, the refusal may have been perfectly reasonable and proper, instead of unreasonable; and yet at the time the commissioners undertake to lay out and establish the way, these reasons may have ceased to exist; and the road prayed for may be highly beneficial to the town; yet such facts would, of themselves, give no authority to the commissioners to lay out the road. State v. Pownal, 10 Me. 24.

And town must have had opportunity of knowing fully upon what it was called upon to act.—To entitle the county commissioners to the appellate jurisdiction exercised by them under this section, it must appear that the town had the opportunity of knowing fully upon what it was called upon to act, in its corporate capacity, touching the acceptance of the way in question; and that with such knowledge, they unreasonably refused to approve and allow the town way or private way laid out by the officers. Guilford v. Piscataquis County Com'rs, 40 Me. 296.

Allegation of unreasonable refusal understood to be proved after final judgment.—When it is alleged in a petition to the county commissioners that the refusal of the town to confirm the doings of its officers was unreasonable, after final judgment, such allegations duly and necessarily made are understood to be satisfacto-

rily proved. Guilford v. Piscataquis County Com'rs, 40 Me. 296.

And adjudication of unreasonable refusal is final.—The adjudication of the commissioners that the town unreasonably refused to accept the way is final and conclusive upon that point. Goodwin v. Hallowell, 12 Me. 271.

No delay or refusal unless return filed. —There could not have been either delay or refusal on the part of the town to accept the proposed way, if a return as required by § 31 had not been filed. Lewiston v. Lincoln County Com'rs, 30 Me. 19.

Petition must be presented at a "regular session".—This section requires the petition to be presented within one year after the refusal "at a regular session." Bethel v. Oxford County Com'rs, 60 Me. 535.

A petition presented at any period of the session is presented "at a regular session," within the meaning of this section. Bethel v. Oxford County Com'rs, 60 Me. 535.

And it may be presented at session held by adjournment.—A petition presented at a session held by adjournment from a regular session, is a presentation "at a regular session," within the meaning of this section, although the cause of action set forth in the petition did not arise until after the time fixed by statute for the commencement of the "regular session." Bethel v. Oxford County Com'rs, 60 Me. 535.

Petition need not allege that original petitioners were inhabitants or owners of cultivated land.—If the petition to the commissioners under this section describes the petitioners as "parties aggrieved" by the refusal of the town, this language is sufficient without going on to assert that the original petitioners to the municipal officers were inhabitants or owners of cultivated land. True v. Freeman, 64 Me. 573.

Nor that the return of the municipal officers was filed with the town clerk. True v. Freeman, 64 Me. 573.

Nor that meeting at which way was refused was legal.—It is not necessary to allege in a petition under this section that the town meeting at which the town refused to accept the proposed way was a legal one, or that there was in the warrant an article for its acceptance. True v. Freeman, 64 Me. 573.

And it need not include all details of boundaries and admeasurements. — It is sufficient if a petition under this section gives a general description of the way respecting which action is proposed, sufficient to identify it and enable all parties interested, by reference to the return of the municipal officers filed under the provisions of § 31, to ascertain the particulars of it. It is not necessary to give in the petition all of the details of boundaries and admeasurements. True v. Freeman, 64 Me. 573.

Or statement of facts which make unreasonable refusal.—A petition under this section which alleges that the town "unreasonably refused" to accept the way is sufficient in this respect, without a specific statement of all the acts and facts which go to make up an "unreasonable refusal." True v. Freeman, 64 Me. 573.

And it need not state what kind of way was located by officers.—It is not fatal that a petition under this section does not state what kind of a way had been located by the municipal officers. The validity of that location, it not having been accepted, is not in question. If the petition sufficiently shows that it was either a town way or a private way, it is sufficient. In either case, upon the refusal of the town to accept it, the petitioners have the right to apply to the county commissioners. Orrington v. Penobscot County Com'rs, 51 Me. 570.

Former provision of section.—For consideration of this section when it provided for application by a party aggrieved to the county commissioners upon the unreasonable refusal of the town to accept the way, "if such way lead from land, under his possession and improvement, to any highway or town way," see North Berwick v. York County Com'rs, 25 Me. 69; Scarborough v. Cumberland County Com'rs, 41 Me. 604.

Stated in Atlantic & St. Lawrence R. R. v. Cumberland County Com'rs, 28 Me. 112.

Cited in Gray v. County Com'rs, 83 Me. 429, 22 A. 376; Conant's Appeal, 102 Me. 477, 67 A. 564.

Sec. 43. Town ways acted on by county commissioners cannot be acted on by towns for fixed time. — When a town way has been laid out, graded or altered by the commissioners, their proceedings cannot be affected by any action of the town within 5 years; and when one has been discontinued by them, it cannot be again laid out by the town within 2 years. The commissioners

have the same power to alter or discontinue such ways for 5 years as they have respecting highways. (R. S. c. 84, § 42.)

Section refers to final location.—This section, limiting the power of the town, refers to proceedings which terminate in a final location and legal establishment of a way. Adams v. Ulmer, 91 Me. 47, 39 A. 347.

And 5 years begins to run when proceedings affirmed by court.—The five years within which the town cannot affect by any action the location of a town way by county commissioners commences to run when the proceedings and judgment of the commissioners are affirmed by the court. Adams v. Ulmer, 91 Me. 47, 39 A. 347.

Sec. 44. County commissioners may fix amount of grading; half the expenses paid by county.—The county commissioners, in laying out new ways or altering or grading ways already laid out, may direct the amount of such grading, which shall be stated in their return; and they may order a portion of the expense of such altering or grading, not exceeding 50% thereof, to be paid to the town in which the altering or grading has been done from the county treasury. (R. S. c. 84, § 43.)

Cited in Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

Sec. 45. Towns may reinstate town ways discontinued by county commissioners; damages.—When a town has accepted a town way, and said town way is subsequently discontinued by the county commissioners on appeal before such road has been opened for travel, such town may, at its annual meeting held within 3 years thereafter, by a majority of the voters present and voting, reinstate and lay out such town way under an article for such purpose in the warrant. The damages shall be assessed and the owners of the land over which said way passes shall be notified thereof by the municipal officers within 20 days after said meeting; and any person aggrieved by the estimate of damages may have them determined in the manner provided in section 34 in case of town ways laid out on petition. A town way so reestablished and laid out shall not be discontinued for 5 years thereafter. (R. S. c. 84, § 44.)

Sec. 46. Municipal officers may vacate locations of streets; proceedings; damages; action on report of municipal officers recorded; fee.—When land has been plotted and a plan thereof made, whether recorded or not, showing the proposed location of streets thereon, and lots have been sold by reference to said plan, the municipal officers of the town or city where such land is situated may, on petition of owners of the fee in such of said proposed streets as are named in the petition, vacate in whole or in part the proposed location of any or all such streets as have not been accepted and located as public ways. The proceedings shall be the same as in case of the location of town ways. All damages thereby occasioned shall be paid by the petitioners, and parties aggrieved by the estimate of damages may have them determined in the manner provided respecting damages caused by the location of town ways and with the same right of appeal. The action on the report of the municipal officers of such town or city shall be filed within 10 days after the action on such report is taken, in the office of the town or city clerk and made a part of the record. Such clerk shall furnish an attested copy of such action on the report to anyone upon payment of a fee of 75¢ therefor, which attested copy may be recorded in the registry of deeds of the district or county where the land of said proposed streets is located, and such attested copy need not be acknowledged for the purpose of such record. The fee at the registry of deeds for such record shall be the same as fees for recording therein miscellaneous instruments. (R. S. c. 84, § 45.)

Sec. 47. Land not taken from a railroad for any way without notice and hearing.—No private way, town way, city street or highway taking land of any railroad corporation shall be located, unless a notice of the time and place of the hearing upon said location has been served upon the president, any vice-presi-

dent, any director, the treasurer or any assistant treasurer, the general manager or the clerk of said corporation at least 7 days before the time for such hearing. In case such corporation has no such officer within the state, service shall be made upon its duly authorized agent or attorney within the state. Service in like manner shall also be made upon any corporation which operates a railroad of another corporation under lease or other agreement. (R. S. c. 84, § 46.)

Notice not required unless land owned at time of petition.—The notice required by this section is only necessary when the railroad owns land at the time a petition for a way across it is entered and notice ordered. Monson v. County Com'rs, 84 Me. 99, 24 A. 672.

Applied in Weymouth v. County Com'rs, 86 Me. 391, 29 A. 1100.

Sec. 48. Location of ways crossing railroad tracks; expense; appeal.—Town ways and highways may be laid out across, over or under any railroad track or through or across any land or right-of-way of any railroad corporation used for station purposes, except that no such location shall be legal or effective, nor shall any such way be constructed, unless the public utilities commission, on application of the municipal officers of the city or town wherein such way is located, the state highway commission or the parties owning or operating the railroad shall, upon notice and hearing, determine that such way shall be permitted to cross such track or land or right-of-way of any railroad corporation used for station purposes. Said public utilities commission shall have the right to refuse its said permission or to grant the same upon such terms and conditions as it may prescribe, including the manner and conditions in accordance with which the way may cross such track or land or right-of-way of any railroad corporation used for station purposes and may determine whether the expense of building and maintaining so much of said way as is within the limits of such railroad corporation shall be borne by such railroad corporation, or by the city or town in which such way is located, or by this state, or said public utilities commission may apportion such expense equitably between such railroad corporation and the city, town or state. Said public utilities commission shall make a report in writing of its decision thereupon, file the same in its office and cause to be sent by mail or otherwise to each of the railroad corporations and the municipal officers of the city or town as the case may be, interested therein, and the state highway commission when interested, a copy of such decision. Such decision shall be final and binding upon all parties unless an appeal therefrom shall be taken and entered at the next succeeding term of the superior court, to be held in the county where the crossing is located, more than 30 days after the date of the filing of the report; and said public utilities commission shall be made a party defendant in such appeal and entitled to be heard in all subsequent proceedings had upon such appeal. The appellant shall within 14 days from the date of the filing of such report, file in the office of the public utilities commission its reasons for appeal, and 14 days at least before the sitting of the appellate court it shall cause to be served upon such other interested corporations or municipality or the state highway commission a copy of such reasons for appeal, certified by the clerk of the public utilities commission. The presiding justice at such term of court shall make such order or decree thereon as law and justice may require. Exceptions may be taken to such order or decree. The final adjudication shall be recorded as provided in section 50 and a copy of such final decision sent to the public utilities commission by the clerk of the court where such final adjudication is made. Costs may be taxed and allowed to either party at the discretion of the court. (R. S. c. 84, § 47.)

Cross references.—See c. 45, §§ 63, 64, re railroad crossings; c. 47, § 26, re street railroad crossings.

All crossings under control of commission.—This section contains no suggestion of a purpose to deviate from the uniform tendency of previous legislation to place all intersections of railroads and public ways under the control of the railroad commissioners (now public utilities commission). On the contrary, their authority over all such crossings is here reaffirmed and enlarged. In its literal terms the section confers jurisdiction over all such

crossings wherever situated. In re Railroad Com'rs, 87 Me. 247, 32 A. 863.

Including those in unincorporated places.—Unincorporated places are not expressly excepted from the operation of this section and no reason has been or can be assigned why the commission should not have control of crossings in unincorporated places as well as in cities and towns. In re Railroad Com'rs, 87 Me. 247, 32 A. 863.

This section refers to the tracks of railroad companies located under authority of eminent domain, either by the purchase of the right-of-way, or by the taking of it under statutory provisions, for, in either case, the lands are held, as for public use. In re Railroad Com'rs, 83 Me. 273, 22 A 168.

And there is no occasion to apply the section to railroad tracks not laid under charter authority, so as to be held in the exercise of eminent domain and become a railroad for public use, because they are a mere convenience, to be used or disused at pleasure; to be maintained or removed as the owner wills to do. They are exactly like private tramways or any other private estate, subject to be taken in the exercise of eminent domain. They, like other property, may be severed in two by the laying of a public way, and are protected by the same right of compensation. In re Railroad Com'rs, 83 Me. 273, 22 A. 168.

There is force in the argument that public safety requires that the intersection of railway tracks and roads should be under the control of the railroad (now public utilities) commission. But, unless both are public ways, that is, constructed and maintained under the authority of law, or for public use, the public has no rights to be affected. If either is wanting in its public quality, the conflict is between public and private rights; and as the former are paramount, the laws regulating private rights are ample in such case. In re Railroad Com'rs, 83 Me. 273, 22 A. 168.

Filing of decision and transmission of copy to railroad not conditions precedent to its validity.—The provisions concerning the filing of the commission's decision and sending a copy thereof to the railroads interested are directory, and do not constitute conditions precedent to the validity of the decision. Maine Central R. R. v. Bangor & Old Town Ry., 89 Me. 555, 36 A. 1050.

History of section.—See In re Railroad Com'rs, 87 Me. 247, 32 A. 863.

Former provision of section.—For a consideration of a former provision of this section requiring the railroad company, at its own expense, to build and maintain so much of the road as was within the limits of the railroad, see Portland & Rochester R. R. v. Deering, 78 Me. 61, 2 A. 670; Boston & Maine R. R. v. County Com'rs, 79 Me. 386, 10 A. 113.

Applied in In re Railroad Com'rs, 91 Me. 135, 39 A. 478; Bangor v. Maine Central R. R., 97 Me. 151, 53 A. 1105.

Cited in Lander v. Bath, 85 Me. 141, 29 A. 1019; Hadlock, Petitioner, 142 Me. 116, 48 A. (2d) 628.

Sec. 49. Maintenance of ways already laid out.—Notwithstanding the provisions of any section of chapter 45, in case of ways already laid out which cross over or under any railroad track or tracks and not at grade, the allocation of the expense of rebuilding, reconstructing and maintaining so much thereof as is within the limits of such railroad shall be determined, de novo, as provided by the preceding section, by the public utilities commission upon application to it by any corporation whose track is or tracks are so crossed, or upon application by the municipal officers of any town in which the crossing is located, or upon application by the state highway commission. (R. S. c. 84, § 48. 1945, c. 293, § 17. 1947, c. 22.)

See c. 47, § 26, re street railroad crossings.

Sec. 50. Adjudications recorded.—Adjudications of the public utilities commission relating to ways shall be recorded in the office in which the location of the way must be recorded. (R. S. c. 84, § 49.)

See c. 47, § 26, re street railroad crossings.

Abolishment of Grade Crossings.

Sec. 51. Petition to abolish grade crossings; damages; expenses; temporary ways.—Any railroad company, the state highway commission or the municipal officers of a city or town in which a public way crosses or is crossed by

a railroad, whether such crossing be at grade or otherwise, may file a petition in writing with the public utilities commission alleging that safety either to the traveling public or in the operation of the railroad requires the abolishment of or an alteration in such crossing or its approaches; or a change in the method of crossing a public way; or the closing of a crossing and the substitution of another therefor; or the removal of obstructions to the sight at such crossing, and praying that the same may be ordered; whereupon said commission shall appoint a time and place for a hearing thereon after notice of not less than 10 days to the petitioners, the state highway commission, the railroad corporation, the municipality in which such crossing is situated, the owners or occupants of the land adjoining such crossing or adjoining that part of way to be changed in grade, and to the attorney general of the state whose duty it shall be, by himself or through the county attorney of the county wherein the crossing is located, to represent the interests of the state at such hearing. After such notice and hearing the commission shall determine what abolishment, alteration, change or removal, if any, shall be made to insure safety as aforesaid and by whom such abolishment, alteration, change or removal shall be made. The jurisdiction and authority of said commission as conferred by this section shall exist whether the change or alteration in such crossing is within or without the located limits of a public way. To facilitate such abolishment, alterations, changes or removals, highways and other ways may be raised or lowered or the courses of the same may be altered to permit a railroad to pass at the side thereof. For the purpose aforesaid land may be taken and damages awarded as provided for laying out highways. The commission shall determine how much land may be taken and shall fix the damages sustained by any person whose land is taken and the special damages which the owner of land adjoining the public way may sustain by reason of any change in the grade of such way; appeal from any decision, order or award of the commission may be had as provided in section 53. The commission shall apportion such expenses and damages between the state, the town in which the crossing is located and the corporation operating the railroad which crosses such public way, and shall order 40% thereof to be paid by the state, 10% thereof to be paid by the town in which such crossing is located and the remainder thereof shall be paid by the corporation operating the railroad; provided, however, that as to the state highways, the commission shall apportion such expenses and damages between the state and the corporation operating the railroad on a basis of 50% to the state, to be paid by the state from the state highway department funds and 50% to such corporation. The commission may approve agreements made by the corporation or other parties interested, including the state, acting by and through the state highway commission, in respect to the work or varying the above percentages provided the amount to be paid by the town shall not exceed the 10% herein specified unless the town shall otherwise vote.

As to any elimination or alteration made under the provisions of this section, the commission may determine what work fairly and properly is a part of such elimination or alteration and what work fairly and properly should be regarded as highway construction. The commission may make such order relative to the maintenance of crossings at grade and of crossings where the highway is carried over the railroad, as it may deem necessary, and may determine whether such expense shall be borne by such railroad corporation, by the city or town in which any such crossing is located or by the state acting by or through the state highway commission; or said commission may apportion such expense equitably between such railroad corporation, such city or town, and the state acting by or through the state highway commission.

While the use of any way is obstructed in carrying out the foregoing provisions of this section, such temporary way shall be provided as the commission may order; provided, however, that the commission shall not make any order upon any petition filed under the provisions of this section until they are satisfied, by investigation or otherwise, that the financial condition of the corporation op-

erating the railroad in question will enable said corporation to comply with such order, and that the probable benefit to the public will warrant said order and the probable expense resulting therefrom, and that said order can be complied with without exceeding the state appropriation available therefor.

The county commissioners shall have the same right of petition under the provisions of this section, with respect to roads in unorganized places laid out by them under the provisions of section 55 of chapter 89, as have municipal officers of a city or town under the foregoing provisions of this section; and in case a petition is filed by them, all parties interested in the subject matter of the petition shall be notified by the public utilities commission of the filing of such petition and given opportunity to appear and be heard thereon. (R. S. c. 84, § 50. 1953, c. 13.)

Sec. 52. Public way crossing tracks of more than 1 railroad. — Whenever the public utilities commission, upon an application or petition brought under the provisions of the preceding section, finds that a public way crosses or is crossed by tracks of more than 1 railroad and the tracks of such railroads are so near together that public convenience requires the work of abolishment, alteration, change or removal to be done under and in compliance with 1 order, they shall give notice to all the corporations operating such railroads to appear before them and be heard upon the application; and after such notice and hearing said commission shall determine what abolishment, alteration, change or removal, if any, of said crossing shall be made and shall determine by whom such work shall be done and shall apportion the percentage of expense to be borne by the railroad corporations as hereinbefore provided between such corporations in such manner as said commission shall deem just and proper. (R. S. c. 84, § 51.)

Sec. 53. Public utilities commission's orders in writing; appeal.— The order of the public utilities commission relating to any matter upon which they may act under the authority of the 2 preceding sections shall be communicated in writing to the petitioners and to all persons to whom notice of the hearing on such petition was given; and any person aggrieved by such order, who was a party to such proceedings, may appeal from such order to the superior court within and for the county in which such way or crossing is located in the manner now provided by law for appeals from the findings of the public utilities commission. Any person aggrieved by the decision or judgment of the public utilities commission in relation to damages for land taken for the purposes of the 2 preceding sections may appeal from said decision in the manner provided in section 37 of chapter 45. (R. S. c. 84, § 52.)

Sec. 54. Amount paid by state or railroad corporation limited. — The amount to be paid in any year by the state under the provisions of the 3 preceding sections, except as herein provided, shall not exceed $15,000 for work in connection with state aid and 3rd class highways, and said amount shall be appropriated annually; the said appropriation shall be cumulative and any part of said sum of $15,000 not expended during the year for which it is appropriated shall be added, at the close of said year, to the sums subsequently appropriated and may be expended in any subsequent year or years. No railroad corporation shall be required to expend, under the provisions of the 3 preceding sections, more than $100,000 during any period of 3 consecutive calendar years, except that railroad corporations operating narrow-gauge railroads or standard gauge railroads of less than 50 miles of main track may not be required to expend more than $50,000 during any period of 6 consecutive calendar years; provided if any two or more railroad corporations are each using the facilities of any railroad terminal company, any sums expended by said terminal company under the provisions of the 3 preceding sections shall for the purposes hereof be regarded as expended by said railroad corporations and in the proportions in which said railroad corpora-

tions are at the time of such decree bound to pay the said terminal company for the use of its facilities. (R. S. c. 84, § 53.)

Sec. 55. Sections 51-54 do not apply to railroads of less than standard gauge.—The 4 preceding sections shall not apply to railroads of less than standard gauge or to street railroads, excepting, however, that in all cases where a street railroad has a right-of-way in a public way crossing a railroad, the commission shall apportion to such street railroad an equitable share of the damages and expenses of alteration which shall be paid by said street railroad, and the balance of such expenses and damages shall be apportioned as provided in section 51; and in all cases where a street railroad acquires the right to lay its tracks over a crossing which has been altered under the provisions of sections 51 or 52, the public utilities commission shall fix the amount which such railroad shall pay to the state before it shall exercise its right to lay its tracks over such crossing; and in either case the commission shall make such order for the apportionment of the expense of future maintenance of such crossing as they shall deem equitable. (R. S. c. 84, § 54.)

Assessments upon Abutters on City Streets.

Sections 56-60 held not to have repealed provisions of city charter. — See Bass v. Bangor, 111 Me. 390, 89 A. 309.

Sec. 56. Assessment of damages upon abutters.—Whenever the city government lays out any new street or public way, or widens or otherwise alters or discontinues any street or way in a city, and decides that any persons or corporations are entitled to damage therefor, and estimates the amount thereof to each in the manner provided by law, it may apportion the damages so estimated and allowed, or such part thereof as to it seems just, upon the lots adjacent to and bounded on such street or way, other than those for which damages are allowed, in such proportions as in its opinion such lots are benefited or made more valuable by such laying out or widening, alteration or discontinuance, not exceeding in case of any lot the amount of such benefit; but the whole assessment shall not exceed the damages so allowed. Before such assessment is made, notice shall be given to all persons interested of a hearing before said city government, at a time and place specified, which notice shall be published in some newspaper in said city at least 1 week before said hearing. (R. S. c. 84, § 55.)

Applied in Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Cited in Bass v. Bangor, 111 Me. 390, 89 A. 309.

Sec. 57. Owners notified of assessment.—After said assessment provided for in section 56 has been made upon such lots or parcels and the amount fixed on each, the same shall be recorded by the city clerk, and notice shall be given within 10 days after the assessment by delivering to each owner of said assessed lots resident in said city a certified copy of such recorded assessment, or by leaving it at his last and usual place of abode and by publishing the same 3 weeks successively in some newspaper published in said city, the first publication to be within said 10 days; and said clerk within 10 days shall deposit in the post office of said city, postage paid, a certified copy of such assessment directed to each owner or proprietor residing out of said city whose place of residence is known to said clerk, and the certificate of said clerk shall be sufficient evidence of these facts, and in the registry of deeds shall be the evidence of title in allowing or assessing damages and improvements, so far as notice is concerned. (R. S. c. 84, § 56.)

This section does not apply to proceedings to assess the benefits under the charter of the city. Bass v. Bangor, 111 Me. 390, 89 A. 309.

Necessity of notice.—An assessment upon land for benefits received by the widening of a street cannot be levied unless the notice prescribed by law is given. Bass v. Bangor, 111 Me. 390, 89 A. 309.

Stated in part in Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Sec. 58. Board of arbitration.—Any person not satisfied with the amount for which he is assessed under the provisions of section 56 may, within 10 days after service of the notice provided for by the preceding section in either manner therein provided, by request in writing given to the city clerk, have the assessment upon his lot or parcel of land determined by arbitration. The municipal officers shall nominate 6 persons who are residents of said city, two of whom selected by the applicant with a third resident person selected by said 2 persons shall fix the sum to be paid by him, and the report of such referees, made to the clerk of said city and recorded by him, shall be final and binding upon all parties. Said reference shall be had and their report made to said city clerk within 30 days from the time of hearing before the municipal officers as provided in section 56. (R. S. c. 84, § 57.)

Stated in part in Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Cited in Bass v. Bangor, 111 Me. 390, 89 A. 309.

Sec. 59. Assessments lien on land and buildings. — All assessments made under the provisions of section 56 shall create a lien upon each and every lot or parcel of land so assessed and the buildings upon the same, which lien shall take effect when the municipal officers file with the town clerk the completed assessment and shall continue 1 year thereafter; and within 10 days after they are made, the clerk of said city shall make out a list of all such assessments, the amount of each and the name of the person against whom the same is assessed, and he shall certify the list and deliver it to the treasurer of said city; if said assessments are not paid within 3 months from the date thereof, the treasurer shall sell, at public auction, such of said lots or parcels of land upon which such assessments remain unpaid, or so much thereof as is necessary to pay such assessments and all costs and incidental charges; he shall advertise and sell the same within 1 year from the time said assessments are made, as real estate is advertised and sold for taxes under the provisions of chapter 92, and upon such sale, shall make, execute and deliver his deed to the purchaser, which shall be good and effectual to pass the title of such real estate; the sum for which such sale shall be made shall be the amount of the assessment and all costs and incidental expenses. Any person to whom the right of law belongs may at any time within 1 year from the date of said sale redeem such real estate by paying to the purchaser or his assigns the sum for which the same was sold, with interest thereon at the rate of 20% a year, and the costs of reconveyance. (R. S. c. 84, § 58.)

Cross reference.—See § 134, re lien for assessments for sewers and drains.

Stated in part in Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Cited in Bass v. Bangor, 111 Me. 390, 89 A. 309.

Sec. 60. Action by city; amount recovered.—If said assessments under the provisions of section 56 are not paid, and said city does not proceed to collect said assessments by a sale of the lots or parcels of land upon which such assessments are made, or does not collect, or is in any manner delayed or defeated in collecting such assessments by a sale of the real estate so assessed, then the said city, in the name of said city, may maintain an action against the party so assessed for the amount of said assessment, as for money paid, laid out and expended, in any court competent to try the same, and in such action may recover the amount of such assessment with 12% interest on the same from the date of said assessment and costs. (R. S. c. 84, § 59.)

The right of action is against the person assessed personally and hence survives his death. Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Whether technically a debt or not, there is a personal duty to pay the assessment, not contractual to be sure, and only imposed by statute, but nevertheless a per-

sonal duty. Duties imposed by law are as much duties as those assumed by contract. If this duty is not performed in the debtor's lifetime, his estate must answer for his default. Bangor v. Peirce, 106 Me. 527, 76 A. 945.

And trustee is personally liable.—A party vested with the legal title to abutting property, though in trust only, is within this section and can be assessed and made personally liable for such benefits, since he has the right of reimbursement from the trust estate, even though no right of reimbursement is expressed in the statute. Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Constitution does not forbid imposition of personal liability.—There is no section or clause in either the state or federal constitution clearly forbidding the imposition of a personal liability upon the owner to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense. The imposition of a personal liability for special assessements is not under the power of eminent domain, but is under the taxing power of the legislature. Bangor v. Peirce, 106 Me. 527, 76 A. 945.

Cited in Bass v. Bangor, 111 Me. 390, 89 A. 309.

Sec. 61. Assessment of abutters for improvement of streets; 2/3 of cost assessed.—Whenever a majority of the abutters in number and value upon any street or road in the thickly settled portion of any city or town shall in writing petition the city government or municipal officers of the town to improve said street or road by grading, parking, curbing, graveling, macadamizing, paving or in any other way making a permanent street of the same, or any part thereof, and to provide for the making and reconstructing of such street improvements, and such improvements are made, 2/3 of the cost thereof may be assessed on the property adjacent to and bounded on said street or road in the manner and with the same right of appeal provided in the 5 preceding sections, which are made applicable to such assessments. (R. S. c. 84, § 60.)

Sec. 62. County commissioners notified when certain highways changed. — Whenever the location of any state aid or 3rd class highway is changed, added to, discontinued or a new location is established by a town or city, the municipal officers of said town or city shall notify the county commissioners of the county of which said town or city is a part, of such change with an accurate description of the courses and distances, within 3 months from such action. (R. S. c. 84, § 61.)

See c. 89, § 71, re county commissioners to notify state highway commission when location of certain highways is changed.

Liability for Repair of Ways and for Injuries.

Sec. 63. Ways kept open and in repair.—Highways, town ways and streets legally established shall be opened and kept in repair so as to be safe and convenient for travelers with motor vehicles, horses, teams and carriages. In default thereof, those liable may be indicted, convicted and a reasonable fine imposed therefor. (R. S. c. 84, § 62. 1949, c. 349, § 117.)

I. General Consideration.

II. Duty of Towns.
- A. In General.
- B. With Respect to Width of Ways.
- C. To Whom Duty Owed.

III. Prosecution for Failure to Keep Ways Safe and Convenient.
- A. In General.
- B. Evidence and Burden of Proof.

Cross References.

See note to § 70, re duty imposed by this section not conditioned on performance or

nonperformance of duty under § 70; note to § 90, re that section not applicable to indictment under this section; § 96, re one indictment only at same term of court.

I. GENERAL CONSIDERATION.

Section strictly construed.—This section, being somewhat of a penal nature, is not to be extended by construction. It has always been construed strictly. The court assumes that the legislature has expressed in terms all the duties it meant to impose. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

This section applies as well to obstructions placed upon as to defects inherent in the structure of the road. Davis v. Bangor, 42 Me. 522.

The town is liable criminally for defects in or upon the road, and for neglects in the performance of its statutory duties in reference to the highway. The defect or want of repair, is either inert matter left incumbering the street, upon or over it, or structural defects endangering the public travel. Davis v. Bangor, 42 Me. 522.

Section harmonious with provisions of § 89.—The provisions of this section and § 89 are harmonious and counterparts of the same enactment. The liability to indictment under this section attaches to those liable to repair, and the liability for damages provided in § 89 is predicated "of the town obliged by law to repair." State v. Madison, 63 Me. 546. See Cunningham v. Frankfort, 104 Me. 208, 70 A. 441. See also § 89 and note.

And liability under each section depends on same facts.—The party obliged by law to repair a public highway or toll bridge is liable criminally for neglecting to perform this duty, and civilly for damages caused by such neglect. The liability in both these respects depends, substantially, upon the same facts; in general an indictment lies where an action for damages lies in such cases, and vice versa. State v. Madison, 63 Me. 546.

The liability of a town to indictment by reason of defects or want of repair, depends upon proof of the same facts as would render it liable for damages. Davis v. Bangor, 42 Me. 522.

Town allowed reasonable time to make repairs.—The law imposes upon towns the duty of keeping the highways in a state of repair so as to be safe and convenient for travelers. From the pressure of this duty, there must be, by necessary implication, some exceptions. As where a road has sustained an injury by the operation of causes over which the town has no control, reasonable time must be afforded to put it in a convenient and safe condition. State v. Fryeburg, 15 Me. 405.

And if such work renders way impassable town is excused if public warned.—If a way is rendered impassable while necessary repairs are in progress under the authority of the town, or under an agent appointed by the court, towns are excused, if they use suitable precautions to put the public upon their guard. State v. Fryeburg, 15 Me. 405.

And town justified in closing way if nature of repairs requires it.—When a highway is defective, it becomes the duty of the town immediately to repair it. And if the repairs are of such a character as to require it to be wholly obstructed, the town would be justified in closing it until the repairs can be made. Jacobs v. Bangor, 16 Me. 187.

Burden of supporting bridge consisting of two structures over which way is laid.—When a toll bridge is so built that it consists of two distinct structures, one extending from the shore to an island, and the other extending from the island to the opposite shore, and a highway is laid out and established over one of these structures, so that the bridge company no longer has the right to exact toll for crossing it, the burden of supporting it is changed from the bridge company to the town within which that portion of the highway is situated. State v. Norridgewock Falls Bridge, 65 Me. 514.

Applied in State v. Kittery, 5 Me. 254; Lowell v. Moscow, 12 Me. 300; Johnson v. Whitefield, 18 Me. 286; State v. Bigelow, 34 Me. 243; Lawrence v. Mt. Vernon, 35 Me. 100; Peck v. Ellsworth, 36 Me. 393; Tripp v. Lyman, 37 Me. 250; State v. Bradbury, 40 Me. 154; State v. Brewer, 45 Me. 606; McCarthy v. Portland, 67 Me. 167; Bartlett v. Kittery, 68 Me. 358.

Quoted in State v. Fuller, 105 Me. 571, 75 A. 315; McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

Stated in Frost v. Portland, 11 Me. 271; Blaisdell v. Portland, 39 Me. 113.

Cited in Cyr v. Dufour, 68 Me. 492; Opinion of the Justices, 99 Me. 515, 60 A. 85; Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853; Quelette v. Miller, 134 Me. 162, 183 A. 341.

II. DUTY OF TOWNS.

A. In General.

Municipalities are compelled to keep their ways safe and convenient for travel. Bouchard v. Auburn, 133 Me. 439, 179 A. 718.

If a highway is legally located and es-

tablished in the town, it is the duty of the town to keep it "safe and convenient for travelers." State v. Madison, 63 Me. 546.

It is the duty of towns to keep the highways in good repair. Wellcome v. Leeds, 51 Me. 313.

Towns are not only authorized, but required by law to repair their public ways, including streets and sidewalks, so that they may be safe and convenient for those who may have occasion to pass and repass upon them. Kimball v. Bath, 38 Me. 219.

Towns are required to make their highways safe and convenient for travelers, and if they choose to make two tracks where one would be sufficient, or allow travelers to use either of two tracks for the purposes of travel within the limits of the highway, they are required to make both safe and convenient. Hall v. Unity, 57 Me. 529.

Roads are required to be kept in repair so that they are safe and convenient for travelers with motor vehicles, horses, teams and carriages. Card v. Ellsworth, 65 Me. 547.

And it is not enough that towns make their ways passable; they may be passable when they can only be used by the exercise of extraordinary care which is a higher degree of care than the law requires. Few ways are absolutely impassable at any season of the year. Highways are not only to be made and kept passable, but they must be so passable that travelers may use them with safety and convenience by the exercise of ordinary care. The terms "safe and convenient" and "passable" are not synonymous; it is obvious that a highway may be passable, and at the same time, not safe and convenient. Rogers v. Newport, 62 Me. 101.

But the obligation is imposed upon towns to keep in repair ways "legally established" and none other. Willey v. Ellsworth, 64 Me. 57.

And unless the town has a right to repair the road, it cannot be considered bound so to do. Rowell v. Montville, 4 Me. 270.

A town is not liable in any form for the deficiency of a road, unless it has acquired the right to enter upon the land, and make and repair the road. Todd v. Rome, 2 Me. 55.

And it cannot go outside located limits to make repairs.—It is the highway as located and laid out by the county commissioners or the municipal officers which the town is obliged to keep in repair. It has no right to go outside of the limits defined by the location in order to make the highway more safe and convenient for travel. Willey v. Ellsworth, 64 Me. 57.

Towns are not insurers against accident. — Towns are not made insurers against accident and injury on the highway. This section does not impose upon them the obligation to guarantee the safety of public travel within their limits. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

And only reasonable safety and convenience is required.—The words "safe and convenient" are not to be construed to mean entirely and absolutely safe and convenient but reasonably safe and convenient in view of the circumstances of each particular case. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

A condition of perfect safety beyond the possibility of an accident is unattainable; a condition of reasonable safety only is required. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

This section, which requires cities and towns to keep their ways safe and convenient for travelers, means reasonably, not absolutely safe. Morgan v. Lewiston, 91 Me. 566, 40 A. 545.

In construing this section, the supreme judicial court has uniformly held that the only standard of duty fixed, and the only test of liability created, is that the highways shall be constructed and maintained so as to be reasonably safe and convenient for travelers in view of the circumstances of each particular case, not that they shall be entirely and absolutely safe and convenient. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441; Wells v. Augusta, 135 Me. 314, 196 A. 638.

In view of circumstances of each case. —The words "safe and convenient" are considered to be relative terms and the question of safety and convenience must be determined with reference to the special facts and conditions existing in each case, such as the location of the way, the nature and extent of the travel to be accommodated and all the cirumstances which may reasonably influence the conclusion. A condition that might readily be accepted as reasonably safe and convenient on a crossroad in a country town, might be grossly unsafe for an important thoroughfare that is in constant use for public travel. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

And such casualties as might be reasonably expected.—In determining the question of whether a way is safe and convenient, it is enough that the way is safe and

convenient in view of such casualties as might reasonably be expected to happen to travelers. All possible accidents cannot be provided against. Perkins v. Fayette, 68 Me. 152; Morse v. Belfast, 77 Me. 44.

And town need not provide safe ingress and egress to and from ways.—It would be an unwarrantable extension of this section to hold that towns must provide safe ingress and egress to and from the roads they make. The section does not say they must, and there is no reason why they should. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

It is no part of the duty of towns to provide a safe and convenient access from the street to any man's house, lot or garden in a country village. Philbrick v. Pittston, 63 Me. 477.

Notwithstanding approaches within limits of way.—The fact that part of the approaches are within the limits of the location of the highway does not put their care upon the town. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

Nor are towns bound to make side roads to and from watering places established without their authority, for the accommodation of travelers. Hall v. Unity, 57 Me. 529.

But they must protect traveler against danger if such convenience allowed to remain within limits of way.—Towns are not required to provide watering places for the accommodation of travelers, or passageways to such as are provided without their authority, whether by name or nature; but, if they suffer such conveniences to remain within the limits of a highway, they are bound to take care that the passageway thereto shall not serve to allure the traveler into unforeseen and imperceptible danger. In such case the town is presumed, and it is its duty to foresee the danger, and guard the traveler against it. Hall v. Unity, 57 Me. 529.

Towns are under no obligation to maintain fences to prevent travelers from straying from the highway. Willey v. Ellsworth, 64 Me. 57.

Unless necessary to reasonable safety of travelers.—While towns are under no obligation to erect barriers of any description merely to prevent travelers, in the absence of any dangerous place in close proximity to highways, from straying therefrom, they are bound by the spirit of the statute of ways, to erect suitable railings upon causeways constructed five or six feet above the natural surface of the earth. It would seem almost self-evident that on such ways a railing is necessary to the reasonable security and safety of travelers, especially in the night. Haskell v. New Gloucester, 70 Me. 305.

B. With Respect to Width of Ways.

Width of traveled portion of way governed by circumstances of case.—The law imposes a duty upon municipal corporations to keep their roads and streets so that they shall be safe and convenient for travelers, under penalty of indictment and fine. That is their whole duty. The law requires no particular width for the traveled part of the way. That is governed by the necessities of travel in each particular case. Penley v. Auburn, 85 Me. 278, 27 A. 158.

This section, requiring towns to keep their ways safe and convenient for travelers, is to be reasonably construed, both with respect to the state of repair and the width of the way to be traveled. Both of these considerations depend, in a great degree, upon the amount of travel over the particular way. A broader width for travel and a higher state of repair are required in cities than in less populous places. Hall v. Unity, 57 Me. 529.

And entire width of way need not be made passable.—Towns are not required to render the road passable for the entire width of the whole located limits, and the duty of the town is accomplished by making a sufficient width of the road in a smooth condition so that it would be safe and convenient for travelers. Perkins v. Fayette, 68 Me. 152; Farrell v. Oldtown, 69 Me. 72; Morse v. Belfast, 77 Me. 44; Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

The road in its whole width, as located, need not be fitted for travel. It is enough if there be a well wrought road in good condition, and of sufficient width for all the needs of the public. The public are to travel over that portion prepared for that purpose, and not over that not so prepared. Farrell v. Oldtown, 69 Me. 72.

The duties of the town in relation to preparing the way for travel are distinct from and subsequent to the laying out. The law requires the town to make and keep in repair a traveled path, of suitable and sufficient width. It does not require the town, ordinarily, to make that traveled path the whole width of the road. Dickey v. Maine Tel. Co., 46 Me. 483.

This section requires that so much of the highway only shall be kept safe and convenient, as the safety and convenience of travelers demand. It is the right of towns, subject, however, to these condi-

tions, to prescribe, set apart and prepare the particular portion of the way to be kept in repair and used for travel, upon their responsibility. Hall v. Unity, 57 Me. 529.

Unless public convenience and necessity so require.—If public convenience and necessity require the street to be kept open its whole width, it is the duty of the city to keep it so. If not, the city is neither required to do it, nor can it execute a valid covenant to do it. Penley v. Auburn, 85 Me. 278, 27 A. 158.

But way too narrow may be considered defective.—This section imposes on every town and city the duty of so constructing and keeping in repair its highways that they shall be reasonably "safe and convenient for travelers with motor vehicles, horses, teams and carriages." And when they are made so narrow as to be unsafe or inconvenient for such teams to pass as have occasion to travel over them, they may well be considered defective. Haines v. Lewiston, 84 Me. 18, 24 A. 430.

C. To Whom Duty Owed.

Ways need be kept safe and convenient for travelers only.—This section requires cities and towns to keep their ways safe and convenient for travelers only; and when this is done they have no further duties or responsibilities in relation to them. Leslie v. Lewiston, 62 Me. 468.

It is the safety of travelers that towns are bound to secure, so far as it can be done, by good roads. Moulton v. Sanford, 51 Me. 127.

It is for travelers and their motor vehicles, horses, teams and carriages that highways are to be opened and kept in repair. And the statute has not provided that they shall be kept safe and convenient for any others. Stinson v. Gardiner, 42 Me. 248.

This section requires towns to open and keep their ways "safe and convenient for travelers." There is no provision requiring ways to be kept thus for any persons other than "travelers," this being the extent of the provision is the full measure of liability. O'Connell v. Lewiston, 65 Me. 34.

And not for those approaching or leaving ways.—The duty of the town is only to travelers upon its roads, not to those approaching or leaving its roads. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

When a man avails himself of such conveniences as the abutters have seen fit to furnish in order to pass to or from the wrought and traveled part of the street, he cannot be accounted a traveler for whose security the town is bound to make the way safe and convenient. Philbrick v. Pittston, 63 Me. 477.

Who are "travelers".—In general terms, ways are established and constructed at the public expense for the accommodation of all persons who, in performing the duties or prosecuting the general pursuits of life whether of business or pleasure, have occasion to pass and repass along and upon them on foot, with horses and carriages, or with teams for the transportation of property. And persons thus using a public way are "travelers" within this section. O'Connell v. Lewiston, 65 Me. 34.

III. PROSECUTION FOR FAILURE TO KEEP WAYS SAFE AND CONVENIENT.

A. In General.

All parties liable to repair are subject to indictment.—Under this section, railroad, bridge and turnpike corporations and private persons are subject to indictment, when liable to repair, as well as towns and plantations; in this respect all parties liable to repair stand upon the same footing. State v. Madison, 63 Me. 546.

For a consideration of this section when the liability to indictment was imposed on towns in express terms, see State v. Gorham, 37 Me. 451.

Question of safety and convenience one of fact.—Whether a town has failed to maintain a way in a manner reasonably safe and convenient for travelers by night as well as by day within the meaning of the statute is a question of fact. Morneault v. Hampden, 145 Me. 212, 74 A. (2d) 455.

The evidence of the condition of a road, for a defect in which an indictment is tried, must be submitted to a jury, who find whether there is or is not a defect. Merrill v. Hampden, 26 Me. 234.

Method of construction and repair determined by municipal officers.—It was obviously impracticable and impossible for the legislature to prescribe and define all of the structural conditions and the precise state of repair required to make a highway safe and convenient. The methods of constructing and repairing public ways are necessarily determined in the first instance by the officers of the town to whom that duty is committed; but whether the result fulfills the requirements of the statute is a question which must ultimately be passed upon by the court and jury, whenever it arises. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790;

Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

And liability not dependent on care used in construction and repair. — The question is not whether in a given case the town used ordinary care and diligence in the construction and repair of the way; but whether as a result the way as constructed and maintained was in fact reasonably safe and convenient for travelers. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

Town not liable to repair is not liable to indictment.—A town not liable to repair the way is not liable to indictment, either under this section or by the criminal law. State v. Madison, 63 Me. 546.

And a town is not indictable for public highways in consequence of the misconduct of persons upon and while in the use of the same. Davis v. Bangor, 42 Me. 522.

The duty of the municipality is commensurate with the necessities of public travel; when that is served and the way is made safe and convenient therefor, municipal liability ends. If the way is then incumbered to the nuisance of individuals or the public, remedies against others than the municipality must be sought. Penley v. Auburn, 85 Me. 278, 27 A. 158.

Thus it is not indictable for wagon under care of driver.—A wagon loaded with ornamental or other trees, standing for sale in a street, with the horses attached and under the care of the driver does not constitute a defect or want of repair for which the city would be indictable, the road being in other respects safe and convenient. Davis v. Bangor, 42 Me. 522.

It is not necessary to set forth the width of the highway in the indictment. If the length, direction and termini of the highway are distinctly alleged in the indictment, the defendants are sufficiently informed what highway is meant. An additional allegation of the width of the highway is not necessary to enable them to prepare their defense. State v. Madison, 63 Me. 546.

Nor is it necessary to allege in the indictment the authority by which the highway was laid out. State v. Madison, 63 Me. 546.

B. Evidence and Burden of Proof.

State must prove defect within limits of way.—It is incumbent on the state to show that the defects alleged existed within the limits of the highway, whether its width was alleged in the indictment or not. Failing in this prosecution cannot be sustained. State v. Madison, 63 Me. 546.

But notice of defect need not be proved. —The liability to indictment exists whenever the way is unsafe or inconvenient. No notice or knowledge of the defect need be proved. Bragg v. Bangor, 51 Me. 532.

Existence of such way as alleged must be proved. — To sustain an indictment charging neglect to keep in repair a public highway, there must be proof of the existence of such a way. It cannot be sustained by proof of the existence of a private or town way. State v. Strong, 25 Me. 297.

Prosecution fails if way not legally accepted.—See State v. Calais, 48 Me. 456.

Usage sufficient proof of establishment of way.—Indictments against towns for the omission to keep ways in proper repair may be sustained where there is no proof of their establishment excepting immemorial usage. State v. Wilson, 42 Me. 9.

The way might be established by proof of location in the mode pointed out by the statutes, or the public might acquire a right of way by the uninterrupted adverse use of the way continued for at least twenty years in succession, or by dedication of the owner and acceptance by the town. When ways have become public highways in either of these modes, towns are obliged to keep them in repair. Mayberry v. Standish, 56 Me. 342.

The existence of a town way may be established by evidence other than the record of the laying out of the same by the municipal officers. State v. Bunker, 59 Me. 366, overruling State v. Sturdivant, 18 Me. 66, and State v. Berry, 21 Me. 169.

General allegation of location sufficient to authorize evidence of location.—The general allegation that the highway was situated in the particular town, and was duly and legally laid out and established, is sufficient to authorize the admission of evidence of its location by the county commissioners or by the town. State v. Madison, 63 Me. 546.

Sec. 64. Towns neglecting to repair ways. — When a town liable to maintain a way unreasonably neglects to keep it in repair as provided in section 63, after one of the municipal officers has had 5 days' actual notice or knowledge of the defective condition, any 3 or more responsible persons may petition the county commissioners for the county, setting forth such facts, who, if satisfied that such petitioners are responsible for the costs of the proceedings, shall fix a time and place near such defective way for a hearing on such petition and cause

such notice thereof to be given to the town and petitioners as they may prescribe. At the time appointed, the commissioners shall view the way alleged to be out of repair and hear the parties interested, and if they adjudge the way to be unsafe and inconvenient for travelers, motor vehicles, horses, teams and carriages, they shall prescribe what repairs shall be made, fix the time in which the town shall make them, give notice thereof to the municipal officers and award the costs of the proceedings against the town. If they adjudge the way to be safe and convenient, they shall dismiss the petition and award the costs against the petitioners. If they find that the way was defective at the time of presentation of the petition, but has been repaired before the hearing, they may award the costs against the town, if in their judgment justice requires it. (R. S. c. 84, § 63. 1949, c. 349, § 118.)

Jurisdiction of commissioners must appear of record.—The jurisdiction of the court of county commissioners on a petition under this section cannot be presumed but must affirmatively appear of record. South Berwick v. York County Com'rs, 98 Me. 108, 56 A. 623.

In order to give the county commissioners jurisdiction to adjudge a way unsafe and inconvenient for travelers, on the petition mentioned in this section, it must appear that the way is one which the town is bound to maintain, and that the municipal officers have had the required five days' notice of the defective condition. South Berwick v. York County Com'rs, 98 Me. 108, 56 A. 623.

Section does not provide sufficient remedy for repair of bridge located in more than one county. — While this section vests the county commissioners with the power to compel a municipality to repair its neglected ways, such remedy is not adequate and sufficient to compel the repair of a bridge, where the middle of the bridge is the divisional line between two counties. The remedy would have to be pursued by separate petition in two counties, and not by any joint procedure in any one county alone. And the result might be one way in one county and another way in the other, and it would be very likely to be so if any local feeling or prejudice should affect the question. Such a legal remedy would be unsuitable and unsatisfactory, and in such a case mandamus will be granted. Brunswick v. Bath, 90 Me. 479, 38 A. 532.

Cited in State v. Bangor, 98 Me. 114, 56 A. 589; Opinion of the Justices, 99 Me. 515, 60 A. 85; Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

Sec. 65. Petition, presentation.—The petition provided for in section 64 may be presented to the county commissioners at any of their sessions, or in vacation to their chairman, who shall procure the concurrence of his associates in fixing the time and place in the order of notice and cause the petition to be entered at their next session. They shall make full return of their proceedings on the petition and cause the same to be recorded as of their next regular term after the proceedings are closed. (R. S. c. 84, § 64.)

Cited in Opinion of the Justices, 99 Me. 515, 60 A. 85.

Sec. 66. Towns neglect to make repairs ordered; warrant of distress.—If the town neglects to make the repairs prescribed by the commissioners under the provisions of section 64, within the time fixed therefor in such notice to the town, they may cause it to be done by an agent, not one of themselves. Such agent shall cause the repairs to be made forthwith and shall render to the commissioners his account of disbursements and services in making the same. His account shall not be allowed without such notice to the town as the commissioners deem reasonable. When the account is allowed, the town becomes liable therefor, with the agent's expenses in procuring the allowance of his account and interest after such allowance, and said commissioners shall render judgment therefor against the town in favor of the agent. If a town neglects to pay such judgment for 30 days after demand, a warrant of distress shall be issued by the commissioners to collect the same. (R. S. c. 84, § 65.)

This section is only declaratory of the sovereign power upon the subject, when not in conflict with any constitutional provision. The inherent power resides in the state to compel the maintenance and repair of legally located highways and

bridges. And it has given specific expression to this power, the constitutionality of which has never been questioned, in the summary method prescribed for executing it in this section. Opinions of the Justices, 99 Me. 515, 60 A. 85.

Cited in State v. Bangor, 98 Me. 114, 56 A. 589.

Sec. 67. Ways on line between towns; liability of towns.—When a way is established on a line between towns, their municipal officers shall divide it crosswise and assign to each town its portion thereof by metes and bounds, which, within 1 year thereafter, being accepted by each town at a legal meeting, shall render each town liable in the same manner as if the way were wholly within the town; when a division of it is not so made, the selectmen of either town may petition the county commissioners, who shall give notice by causing a copy of such application with their order thereon appointing a time and place of hearing to be served upon the clerk of each town 30 days, or by causing it to be published in some newspaper printed in the county for 3 weeks, previous to the time appointed; and after hearing the parties, they may make such division. (R. S. c. 84, § 66.)

Purpose of section.—As it is obvious that there might be great inconvenience in making repairs when the line between towns is in the center of a road, provision is made for a division crosswise by this section. State v. Thomaston, 74 Me. 198.

Divison must be made by municipal officers and approved within a year.—A division is not within the requirements of this section if it was not made by the municipal officers and not approved by the inhabitants of the respective towns to be thereby affected within a year. State v. Thomaston, 74 Me. 198.

That the division was made at the request of the municipal officers of both towns interested, and has been acquiesced in, without any vote of the town affirming the division, could not give jurisdiction. State v. Thomaston, 74 Me. 198.

Applied in Detroit v. Somerset County Com'rs, 52 Me. 210.

Sec. 68. Ways laid out between towns.—A highway may be laid out on the line between towns, part of its width being in each, and the commissioners may then make such division of it and enter the same of record, and each town shall be liable in all respects as if the way assigned to it were wholly in the town. (R. S. c. 84, § 67.)

Applied in Detroit v. Somerset County Com'rs, 52 Me. 210.

Cited in Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

Sec. 69. Bridge in highway crossing town line.—Whenever a highway located after the 1st day of January, 1906 crosses any river which divides towns, the expense of constructing, maintaining and repairing any bridge across such river shall be borne by such towns in proportion to their last state valuation prior to such location; provided, however, that the provisions of this section shall not apply to bridges built or rebuilt under the provisions of sections 108 to 112, 114, 115, 118 and 120 to 122, inclusive, of chapter 23. (R. S. c. 84, § 68.)

Sec. 70. Snow removed; repair; damage.—When any ways are blocked or encumbered with snow, the road commissioner shall forthwith cause so much of it to be removed or trodden down as will render them passable. The town may direct the manner of doing it. In case of sudden injury to ways or bridges, he shall, without delay, cause them to be repaired. All damage, accruing to a person in his business or property through neglect of such road commissioner or the municipal officers of such town to so render passable ways that are blocked or encumbered with snow, within a reasonable time, may be recovered of such town by a special action on the case. (R. S. c. 84, § 69.)

Cross reference.—See note to § 92, re duty to remove snow not affected by that section.

This section was enacted to meet what might perhaps be called emergencies. Lunney v. Shapleigh, 112 Me. 172, 90 A. 496.

Ways must be cleared within reasonable time.—This section requires that ways blocked or encumbered with snow shall be forthwith made passable; that is, in a reasonable time. Lunney v. Shapleigh, 112 Me. 172, 90 A. 496.

Duty to keep ways safe not conditioned

on performance of duty imposed by this section.—This section was not intended to operate as a substitute for, or a repeal of § 63 in the specified class of cases, nor to exempt towns from the liability imposed by § 89. The duty of towns to keep their highways safe and convenient is not conditioned upon the performance or nonperformance by the road commissioner of the duty imposed upon him by this section. Rogers v. Newport, 62 Me. 101.

The provision of this section is a precautionary measure to prevent travelers from being subjected to unnecessary inconvenience and delay by reason of the way remaining impassable from a specified cause; not to shield the town from liability when it allows the way, though "passable," to remain defective, unsafe and inconvenient. Rogers v. Newport, 62 Me. 101. See note to § 63.

Road commissioner to use discretion as to mode of removal in absence of direction by town.—If a town does not direct the way and manner in which obstructions caused by snow shall be removed, the road commissioner may use his own discretion as to the mode of effecting that object. His discretion is to be applied to the manner of making the highways passable. Field v. Towle, 34 Me. 405.

Evidence sufficient to support recovery of damages.—See Lunney v. Shapleigh, 112 Me. 172, 90 A. 496.

Applied in Smith v. Exeter, 110 Me. 553, 88 A. 542.

Cited in Ouelette v. Miller, 134 Me. 162, 183 A. 341.

Sec. 71. Mail routes; fences to prevent drifting.—There shall be furnished and kept in repair in each section of the town through which there is a mail route some effectual apparatus for opening ways obstructed by snow, to be used to break and keep open the way to the width of 10 feet, and the municipal officers of towns, or any road commissioner under their direction, may take down fences upon the line of public highways when they deem it necessary to prevent the drifting of snow therein; but they shall in due season be replaced, in as good condition as when taken down, without expense to the owner. (R. S. c. 84, § 70.)

Sec. 72. Materials taken from lands not enclosed or planted.—A road commissioner may remove any obstacle which obstructs or is likely to obstruct a way or render its passage dangerous. He may dig for stone, gravel or other material suitable for making or repairing ways in land not enclosed or planted and remove the same to the ways. If the land from which such materials were taken is not within the limits of the way, the owner of it shall be paid therefor in money by the town, to be recovered after demand and refusal by the road commissioner, in an action as on an implied promise. (R. S. c. 84, § 71.)

This section and § 101 relate to different things.—At the first glance this section and § 101 would seem to be much the same. But the two sections relate to entirely different matters. This section shows that in building or repairing highways the surveyor may remove any erection, natural or artificial, which narrows the way; while § 101 relates to things deposited on the way, which may be removed and sold. Bartlett v. Kittery, 68 Me. 358.

A commissioner taking stone, as authorized by this section, cannot be a trespasser in doing it. Keene v. Chapman, 25 Me. 126.

But commissioner has no power to dig upon cultivated land.—This section contemplates that only unenclosed and uncultivated land shall be subjected to the will of the commissioner. If the land is seeded, or in any way prepared and used for tillage, or for the production of crops or trees, useful or ornamental, the commissioner must not dig upon it; such land is "planted," that is, subjected to the uses of husbandry, reclaimed from a state of nature, so that it has become tillage or mowing land, the same as corn or meadow. Wellman v. Dickey, 78 Me. 29, 2 A. 133.

The power of removal is to be exercised by removing the obstruction off the traveled path of the road. Davis v. Bangor, 42 Me. 522.

Section does not give power to remove wagon and team.—In case of a wagon and team under the care of the owner, a power of removal is not given by this section. They may obstruct to the extent of the space they occupy, as does any man who passes over the street, but they are not likely to remain obstructing, for nobody supposes the horse and wagon, any more than the driver, are to be a fixture, or to remain permanently in the position in which they stand. Davis v. Bangor, 42 Me. 522.

Applied in Cool v. Crommet, 13 Me. 250; Plummer v. Sturtevant, 32 Me. 325; Wilson v. Simmons, 89 Me. 242, 36 A. 380.

Quoted in Cyr v. Dufour, 68 Me. 492; State v. Fuller, 105 Me. 571, 75 A. 315. **Stated** in part in Woodcock v. Calais, 66 Me. 234.

Sec. 73. Land taken for highway purposes; damages.—The municipal officers of any city, town or plantation may purchase, take over and hold for any city, town or plantation, for public use, such materials and land as may be necessary to provide a change of location or alignment of any highway, or to secure materials, including clay, gravel, sand and rock, with the necessary ways and access thereto, for the improvement, construction and maintenance of highways. If the municipal officers of any city, town or plantation are unable to purchase such materials or land with the necessary ways and access thereto, at what they deem a reasonable valuation, the county commissioners of the county wherein such material or land is located shall, on petition of the municipal officers or interested parties, ascertain and determine the damages in the same manner as provided by statute for land taken for highway purposes, and all parties aggrieved by the estimate of damages shall have like remedy as provided by statute for appraisal of damages for land taken by towns for highway purposes. (R. S. c. 84, § 72.)

Applied in Cassidy Case, 133 Me. 435, 179 A. 425.

Sec. 74. Duties of road commissioners.—Road commissioners shall go over the roads in their towns, or cause it to be done, in April, May, June, August, September, October and November in each year, remove the loose obstructions to the public travel and, whenever so directed by the selectmen, remove all shrubbery and bushes growing within the limits of highways, not planted or cultivated therein for the purpose of profit or ornamentation, having care for the proper preservation of shade trees, and repair such defects as may occur from time to time, rendering travel dangerous, or they shall give notice of such defects to the municipal officers under a penalty of $5 for neglect of such duty. (R. S. c. 84, § 73.)

Sec. 75. Repair of roads by road machines after August 10th.—Whenever a road commissioner, officer or employee of any city or town improves any highway with a road machine or any similar device after the 10th day of August in any year, except by light smoothing or maintenance work, a surface of gravel to the average depth of 6 inches shall be immediately placed on the section of the highway so improved. Whenever a road commissioner, official or employee of any city or town violates the provisions of this section, the state highway commission shall cause to be withheld all moneys due such city or town for such year for highway purposes under the provisions of chapter 23. This section shall not apply to such highways as are improved under the direction of the state highway commission. (R. S. c. 84, § 74.)

Sec. 76. Materials placed on land beside roads; removal.—If any city, town or plantation in the construction or repair of its highways places any stone, sod or other material upon land within the limit of any highway which the owner has cleared from stone and smoothed so that it is tillable land and so used, said city, town or plantation shall within 30 days remove the same from such land. Failing to do this, the owner of said land may remove such stone, sod or other material therefrom and be paid the same price per hour for such removal as is paid by said city, town or plantation for labor in the construction and repair of its roads. (R. S. c. 84, § 75.)

Sec. 77. Watercourses not made to injure; remedy.—No road commissioner, without written permission from the municipal officers, shall cause a watercourse to be so constructed by the side of a way as to incommode any person's house or other building or to obstruct anyone in the prosecution of his

business. Any person so aggrieved may complain to the municipal officers, who shall view the watercourse and may cause it to be altered as they direct. (R. S. c. 84, § 76.)

Cross reference.—See § 151, re construction of highway ditches, drains and culverts by towns.

Alteration of watercourse at town's expense.—The municipal officers are the agents of the town for the purpose of altering a watercourse under this section and may do the work at the town's expense. Getchell v. Oakland, 89 Me. 426, 36 A. 627.

Applied in Philbrick v. Pittston, 63 Me. 477.

Cited in Gardiner v. Camden, 86 Me. 377, 30 A. 13.

Sec. 78. Drainage of public way.—No person by himself, his agents or servants, other than a person having legal supervision of a public way, shall cultivate, in connection with the improvement of lands adjacent thereto, any portion of the wrought part of any public way in such manner as to change the drainage thereof or obstruct said way; nor shall any person by himself, his agents or servants, other than a person having legal supervision of a public way, turn teams, tractors, farm machinery or other equipment upon the wrought portion of a highway in such manner as to change the drainage thereof or obstruct said way; nor shall any person by himself, his agents or servants, other than a person having legal supervision of a public way, deposit within or along any ditch or drain in a public way any material that will obstruct the flow of water in such ditch or drain or otherwise obstruct said way; provided, however, that with the written consent and in accordance with specifications of the legal authorities having supervision of such ditch or drain, any person may, to provide egress and regress to and from lands occupied by him, lawfully construct and maintain a bridge across such ditch or drain. (R. S. c. 84, § 77. 1947, c. 219, § 1.)

Sec. 79. Violation of § 78; jurisdiction.—Whoever willfully violates any provision of the preceding section shall be punished, for the first offense by a fine of not more than $50 and costs, and for each subsequent offense by a fine of not more than $100 and costs, and shall be further liable for double the amount of the actual damage, to be recovered in an action on the case by the city, town or plantation, or, in behalf of any unorganized place, by the county where the offense is committed. All fines recovered under the provisions of this section, except in cases where the way involved was maintained by the state, shall be paid to the treasurer of the city, town or plantation, or, for an unorganized place, to the treasurer of the county where such offense is committed and shall thereafter be expended in the construction and maintenance of public ways or drains therein. In all prosecutions under the provisions of this section, trial justices within their county shall have, upon complaint, jurisdiction concurrent with municipal courts and the superior court. (R. S. c. 84, § 78. 1947, c. 219, § 2. 1951, c. 321, § 8.)

Sec. 80. Complaints for violation of § 78.—Every municipal officer of a city, town or plantation or, for an unorganized place, every county commissioner, when his attention is directed to any violation of the provisions of section 78, within his jurisdiction, shall enter complaint against the offender and prosecute the same to final judgment. (R. S. c. 84, § 79.)

Sec. 81. Damages by raising or lowering streets.—When a way or street is raised or lowered by a road commissioner or person authorized to the injury of an owner of adjoining land, he may within a year apply in writing to the municipal officers, and they shall view such way or street and assess the damages, if any have been occasioned thereby, to be paid by the town; and any person aggrieved by said assessment may have them determined, on complaint to the superior court, in the manner prescribed in section 34. Said complaint

shall be filed at the term of the superior court, next to be held within the county where the land is situated after 60 days from the date of assessment. (R. S. c. 84, § 80.)

I. When and by Whom Damages Recovered.

II. Amount of Damages.

III. Complaint to Superior Court.

I. WHEN AND BY WHOM DAMAGES RECOVERED.

Town must pay damages for injury caused by raising or lowering.—After a road has been built and a grade practically established, and when it may be presumed that the adjoining owners have adjusted their property, their fences, buildings, walks and so forth, to that grade, if a town raises or lowers the road to the injury of the adjoining owner, it must pay the damages. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

And is liable for change made by it in grade of state road.—Where the only change of grade has been made by the city, the city is liable for the damages arising therefrom, notwithstanding that the street had previously been designated a state road. Turner v. Portland, 114 Me. 454, 96 A. 742.

But damages recovered only when way raised or lowered.—Under this section, the complainant can recover damages only for the injury to his property by reason of the raising or lowering of the road. If it was not raised or lowered, he cannot recover. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

And restoration of matter scraped washed or worn away is not a raising.—If a road is raised only so far as to replace matter that had been scraped off, or had washed off by the action of the elements, or had been worn down by travel, it is not a raising of the street within the meaning of this section, and the complainant cannot recover. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

No damages unless change made by commissioner or "person authorized."—Under this section, no damages may be awarded unless the street was raised "by a road commissioner or person authorized." A person may be authorized to act for another by reason of agency, or by reason of operation of law. Starrett v. Thomaston, 126 Me. 205, 137 A. 67.

State highway commission is "person authorized."—Where the state highway commission is required to perform the work on a bridge, the town must be presumed to know the law and hence to know that the work, if done, must be done by the commission, not by a "person" to be sure, but by a legal agency which by reasonable interpretation is broad enough to be included within the meaning of a "person authorized." Hence, although the work was done by virtue of the provisions of the Bridge Act (C. 23, § 108, et seq.), yet the petition for and award of damages are properly presented under the provisions of this section. Starrett v. Thomaston, 126 Me. 205, 137 A. 67.

And grade established by municipal officers at request of railroad is by "person authorized".—This section and c. 47, § 25, relating to street railways, must be considered together as statutes in pari materia, and so construed that when the grade is established by the municipal officers at the request of the railroad company, by virtue of the latter section of the statute, it shall be deemed to have been done by a "person authorized" within the meaning of this section, and the town is liable for damages done. Hurley v. South Thomaston, 105 Me. 301, 74 A. 734.

Damages paid by town for such establishment recoverable from railroad.—This section provides that the damages shall be assessed by the municipal officers "to be paid by the town," while c. 47, § 25, declares that the alterations shall be made at the sole expense of the corporation with the assent and in accordance with the directions of the municipal officers. The word "expense" as used in this latter statute may include the damages to the landowners. Thus construed together with respect to the question of payment, the two statutes are easily reconciled by holding that the damages assessed by the municipal officers under this section, if paid by the town, become a part of the "expense" of the alterations by virtue of the railroad statute, and legally recoverable by the town against the railroad corporation. Hurley v. South Thomaston, 105 Me. 301, 74 A. 734.

Damages not recovered for physical injury to property caused by flowing water.—The rule of damages in an action under this section does not include damages for physical injuries that have occurred or that may hereafter occur to the property itself in consequence of the raising,

whether by surface water or otherwise. It does not include injuries which may result from insufficient catch basins, or from not keeping them cleaned and free. It does not include injuries resulting merely from surface water flowing down the street, and overflowing on to the land. A town is not liable in any form of proceeding for the consequences of some fault in the location, size, plan of construction or general design of its sewers. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

But they may be recovered for diminution in value caused by water.—If, before the work, the street was lower than the sidewalk and higher than the sidewalk after, that change, under some conditions, might afford ground for a recovery of damages. When the street was lower than the sidewalk, it served as a canal, and had a tendency to carry the water along in the street. But when the street is higher than the sidewalk, there is a greater likelihood that water will overflow the sidewalk and onto adjoining land. And that likelihood might, under some circumstances, diminish the value of the land. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

If likelihood that water will flow on land is increased by the change of grade.—Whatever may be the injurious effect upon the value of the plaintiff's premises, because of the liability that surface water will flow down the street and thence down across his land, if it cannot be said that the liability has been increased by raising the way, he cannot recover. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

A town is not liable under this section for the effect of the condition prior to the raising or lowering. It is not liable for any depreciation of the value of the complainant's property because of a likelihood then that surface water would flow from the street onto his land. It is liable only for such depreciation in value as has been caused by an increased likelihood, by reason of the raising, that surface water will flow from the street onto the complainant's land, doing injury. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

Only owner at time of injury can recover damages.—This section gives a claim to damages to the owner. This must necessarily be understood to mean the owner at the time of the injury. No other person is or can be injured. It is from that time the claim dates, and the statute of limitations begins to run. From that time the claim for damages and the land left are two separate and distinct things; a sale or conveyance of one would in no respect control or affect the other. In case of the decease of the owner after the claim accrues, so completely distinct are they, that, while the land subject to the easement acquired descends to the heir, the damages go to and may be recovered by the administrator as assets. Sargent v. Machias, 65 Me. 591.

Applied in Shepherd v. Camden, 82 Me. 535, 20 A. 91; Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

Cited in Briggs v. Lewiston & Auburn Horse R. R., 79 Me. 363, 10 A. 47; Boober v. Towne, 127 Me. 332, 143 A. 176; Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

II. AMOUNT OF DAMAGES.

Complainant entitled to exact equivalent for injury.—A person suffering damage from a change in the grade of a street is entitled to compensation for the net injury done him; he is entitled to an exact equivalent for the injury; he is to be made whole as far as money is a measure of compensation; no more and no less. Chase v. Portland, 86 Me. 367, 29 A. 1104.

Diminution in market value is measure of damages.—This section gives a remedy in damages when an adjoining land owner is injured by the raising or lowering of a way. The measure of damages is the diminution in market value of the property injured by reason of the raising. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

If the real value of property immediately before and after alteration of a way can be ascertained, the difference between these two sums would be the exact equivalent for damage, and constitute just compensation for net injury. Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853.

The diminution in the market value of the property injured is a correct measure of damages sustained in proceedings under this section. Chase v. Portland, 86 Me. 367, 29 A. 1104.

Improved condition of property to be considered.—The liability of the town for damages under this section must be considered with reference to any improved condition into which the complainant has put his property. Sherburne v. Sanford, 113 Me. 66, 92 A. 997.

And expense of putting property in proper relation with new grade may be considered.—In determining diminution in value of property as a consequence of raising a street, the jury may properly consider what expense a prudent man would reasonably incur in putting the property, in reference to the new grade, in as good

position as it was before. Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853.

It is permissible for a witness for the complainant to testify, as bearing upon the question of special and peculiar benefits to the land owner, resulting from the raising of the street, what it would cost to put the premises in a proper condition with relation to the higher surface. Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853.

The cost of the improvements and changes necessary to restore the premises to a proper condition in relation to the new grade of the street is admissible as evidence affecting the question of the benefit to the property, but not as a substantive cause of damage. Chase v. Portland, 86 Me. 367, 29 A. 1104.

Thus expense of raising house may be considered.—The jury was directed in reference to the law of the case that, if it was necessary for the complainant to raise his house to the new grade, "the expense of so doing might be regarded as an aid and a partial criterion of the loss that he had sustained." On reading the charge as a whole, it is plain that the instruction was free from prejudicial error. Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853.

Benefits special and peculiar to the petitioners resulting from the change of grade can be set off against the damages sustained. Chase v. Portland, 86 Me. 367, 29 A. 1104.

But not general benefit.—There is a well-recognized, general distinction between the two kinds of benefit which may accrue to an estate from the alteration of a street. There may be a special and peculiar benefit resulting from its position on the street, as distinguished from other estates not bounding on the same street; and second, the general benefit arising from the facilities and advantages afforded by the street, which affect equally all estates in the neighborhood and which are shared in common with all such estates. The special benefits might be set off against the damages, while the general benefits could not be. Chase v. Portland, 86 Me. 367, 29 A. 1104.

But benefit may be special although received by others. — Advantages which an abutter may receive from his location on a highway raised or lowered are none the less peculiar and special to him because other estates on the same street receive special and peculiar benefits of a similar kind. Chase v. Portland, 86 Me. 367, 29 A. 1104.

III. COMPLAINT TO SUPERIOR COURT.

Only those can complain to the court who are aggrieved by the action of the municipal officers on written application to them to assess the damages. Persson v. Bangor, 102 Me. 397, 66 A. 1019.

And a proceeding by complaint to the superior court is authorized only after written application to the municipal officers. Upon them alone, and not upon another body of which they form a part, the section has conferred the power to act in such cases; and their action must be separate. Persson v. Bangor, 102 Me. 397, 66 A. 1019.

And application to mayor and city council not sufficient.—An application addressed to the mayor and city council and not to the municipal officers as required by this section is not sufficient. The two are not the same. Persson v. Bangor, 102 Me. 397, 66 A. 1019.

Remedy by complaint available whether damages too small or none were assessed. —This section contemplates that an aggrieved party shall have this remedy by complaint whenever municipal officers shall have acted upon an application, and made a decision thereon. It makes no difference whether they have assessed damages in too small an amount, or whether they have refused to assess any. And in the latter case it makes no difference whether they refused because they thought that no damages were sustained in fact, or that there was no liability in law for damages in fact sustained, or that the facts as they found them did not bring the application within their jurisdiction. Their decision upon any of these matters is not final. It is reviewable upon complaint by an aggrieved party. The correctness of their decision, will be determined by the court, when the complaint is tried in the regular manner. Hurley v. South Thomaston, 101 Me. 538, 64 A. 1050.

Whether the way has been raised or lowered, with resulting injury, is a question for the jury to decide. Simoneau v. Livermore Falls, 131 Me. 165, 159 A. 853.

Sec. 82. When appropriation insufficient. — When the amount appropriated is not sufficient to repair the ways, a road commissioner may, with the written consent of the selectmen, employ inhabitants of the town to labor on

such ways, to an amount not exceeding 15% of the amount so appropriated and in addition thereto. (R. S. c. 84, § 81.)

The removal of snow by which ways are incumbered is considered as a "repairing" of them within the sense of this section. Field v. Towle, 34 Me. 405.

Commissioner must have consent of selectmen.—A road commissioner cannot, under this section, employ persons to labor at the expense of the town, without the consent of a majority of the selectmen. Haskell v. Knox, 3 Me. 445; Morrell v. Dixfield, 30 Me. 157.

In writing.—The commissioner, without the consent in writing of the selectmen, has no power to create a liability upon the town under this section. Field v. Towle, 34 Me. 405. See Morrell v. Dixfield, 30 Me. 157.

When the appropriation proves insufficient, and the commissioner has no funds, he cannot expend anything without the written consent of the selectmen, however urgent the necessity. Ingalls v. Auburn, 51 Me. 352.

Purpose of requirement that consent be in writing.—The change in the language of this section requiring the consent to be obtained in writing was doubtless introduced to prevent any dispute respecting the fact whether such consent had been obtained. It may also have been intended to protect the town against any inconsiderate action of the selectmen, and to make them more sensible of the responsibility incurred by giving such consent. Morrell v. Dixfield, 30 Me. 157.

Applied in Moor v. Cornville, 13 Me. 293; Getchell v. Wells, 55 Me. 433.

Cited in Haines v. Lewiston, 84 Me. 18, 24 A. 430.

Sec. 83. Money raised for ways and bridges. — Towns shall annually raise money to be expended on town ways and highways and for the repair of bridges; and the same shall be assessed and collected as other town taxes and expended for said purposes by a road commissioner or commissioners. (R. S. c. 84, § 82.)

Applied in Tufts v. Lexington, 72 Me. 516.

Stated in Hovey v. Mayo, 43 Me. 322.

Sec. 84. Expenditure of money. — Sixty-five per cent of the highway taxes assessed by a town shall be expended upon the highways prior to the 15th day of July, and the balance at such time as the road commissioner deems for the best good of the public. (R. S. c. 84, § 83.)

Sec. 85. Powers and duties of road commissioner.—The road commissioner, under the direction of the selectmen, shall have charge of the repairs of all highways and bridges within the towns and shall have authority to employ the necessary men and teams and purchase timber, plank and other material for the repair of highways and bridges. He shall give bond to the satisfaction of the selectmen and be responsible to them for the expenditure of money and discharge of his duties generally. His compensation shall be such sum as the towns shall annually vote therefor, which sum shall in no case be less than $1.50 a day for every day of actual service; and he shall render to the selectmen monthly statements of his expenditures and receive no money from the treasury except on the order of the selectmen. (R. S. c. 84, § 84.)

Cross references.—See c. 91, §§ 20, 21, 22, re election of road commissioner, vacancy.

This section limits the per diem compensation to days of actual service. Stephens v. Old Town, 102 Me. 21, 65 A. 115.

By a failure to give bond as prescribed by this section, a person is not road commissioner de jure. Willey v. Windham, 95 Me. 482, 50 A. 281.

But is commissioner de facto.—But, having performed the duties and exercised the functions of the office, exclusively, during its term under color of election and title, he must be regarded as an officer de facto. Willey v. Windham, 95 Me. 482, 50 A. 281.

Such a person can purchase material or employ labor on town's credit. — A road commissioner de facto may, by authority, express or implied, of the selectmen of his town, purchase materials or employ labor of men or teams for the repair of ways upon the credit of the town. Willey v. Windham, 95 Me. 482, 50 A. 281.

And may recover for labor or services of his own team.—A road commissioner de

facto may recover of the town for the labor or services of his own team employed by him in the repair of ways, by the direction or consent, express or implied, of the selectmen of the town. Willey v. Windham, 95 Me. 482, 50 A. 281.

But he cannot recover money paid out.—A person acting as road commissioner without giving the bond required by this section cannot recover for charges for money paid out by him. Willey v. Windham, 95 Me. 482, 50 A. 281.

Sec. 86. Commissioner to keep account of expenditures.—The road commissioner shall keep accurate accounts, showing in detail all moneys paid out by him, to whom and for what purpose; he shall settle his accounts on or before the 20th day of February, annually, and the same shall be reported in the annual town report in detail. (R. S. c. 84, § 85.)

Sec. 87. Wide wheels and watering troughs; public drinking troughs and fountains.—A town at its annual meeting may authorize its assessors to abate not exceeding $3 of the tax of any person, upon proof that he has owned and used on the ways during that year cart wheels having felloes not less than 6 inches wide. The said assessors shall abate $5 from the tax of any inhabitant who shall construct, and during the year keep in repair a watering trough beside the highway, well supplied with water, the surface of which shall be 2 feet or more above the level of the ground and easily accessible for horses and carriages, if the assessors think such watering trough for the public convenience; if more than 1 person in the same locality claims to furnish it, the municipal officers shall decide where it shall be located. Such officers may establish and maintain such public drinking troughs, wells and fountains within the public highways, squares and commons of their respective towns as in their judgment the public necessity and convenience require; and towns may raise and appropriate money to defray the expense thereof. (R. S. c. 84, § 86.)

Stated in Portland v. Portland Water Co., 67 Me. 135.

Sec. 88. Ways opened or repaired by contract.—Towns may authorize their road commissioners or other persons to make contracts for opening or repairing their ways. (R. S. c. 84, § 87.)

Applied in Chase v. Cochran, 102 Me. 431, 67 A. 320.

75 A. 315.

Cited in Cyr v. Dufour, 68 Me. 492.

Quoted in State v. Fuller, 105 Me. 571,

Sec. 89. Persons injured by highway defects; damages; notice.—Whoever receives any bodily injury or suffers damage in his property through any defect or want of repair or sufficient railing in any highway, town way, causeway or bridge may recover for the same in a special action on the case, to be commenced within 1 year from the date of receiving such injury or suffering damage, of the county or town obliged by law to repair the same, if the commissioners of such county or the municipal officers or road commissioners of such town or any person authorized by any commissioner of such county or any municipal officer or road commissioner of such town to act as a substitute for either of them had 24 hours' actual notice of the defect or want of repair; but not exceeding $4,000 in case of a town; and if the sufferer had notice of the condition of such way previous to the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way; and any person who sustains injury or damage as aforesaid or some person in his behalf shall, within 14 days thereafter, notify one of the county commissioners of such county or of the municipal officers of such town by letter or otherwise, in writing, setting forth his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury. If the life of any person is lost through such deficiency, his executors or administrators may recover of such county or town liable to

keep the same in repair, in an action on the case, brought for the benefit of the estate of the deceased, such sum as the jury may deem reasonable as damages, if the parties liable had said notice of the deficiency which caused the loss of life; at the trial of any such action the court may, on motion of either party, order a view of the premises where the defect or want of repair is alleged when it would materially aid in a clear understanding of the case. (R. S. c. 84, § 88. 1953, c. 344.)

I. General Consideration.

II. Twenty-Four Hours' Actual Notice of Defect.

- A. In General.
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III. Notice by Sufferer with Prior Knowledge of Defect.

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Cross references.

See § 91, re no liability if load exceeds 6 tons; note to § 103, re plaintiff in action under this section can establish limits of way by method prescribed in § 103; c. 23, § 35, re liability of state when cause of action relates to state or state aid highways.

I. GENERAL CONSIDERATION.

This section is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. Pearson v. Portland, 69 Me. 278.

And it is universal in its application. It protects everyone alike. Pearson v. Portland, 69 Me. 278, holding a former statute (Act 1872, c. 34) unconstitutional which denied the protection of this section to residents of a country not giving a similar protection to persons injured by defective ways.

This section is remedial, and to be construed and applied as such. Marcotte v. Lewiston, 94 Me. 233, 47 A. 137. But see Moulton v. Sanford, 51 Me. 127, wherein it was said that this section is, in its nature, penal, as well as remedial, and ought to be construed strictly. Moulton v. Sanford, 51 Me. 127.

The liability is a statute liability, and the remedy which this section furnishes must be pursued. Perkins v. Oxford, 66 Me. 545.

Towns are liable for damages suffered from defective public ways only when an action is given by statute. Frazer v. Lewiston, 76 Me. 531.

Rights and liabilities limited by scope of section.—An action under this section is not a common-law action of negligence against an individual or a corporation, but a statutory remedy against a municipality, and the rights of the traveling public and the liability of the municipality are limited by the scope of the section. McCarthy v. Leeds, 116 Me. 275, 101 A. 448; Wells v. Augusta, 135 Me. 314, 196 A. 638.

Independent of statute there is no liability whatever on the part of municipalities

for injuries caused by defective highways. The liability is a creature of the statute, and it does not extend beyond the express provisions. McCarthy v. Leeds, 116 Me. 275, 101 A. 448; Wells v. Augusta, 135 Me. 314, 196 A. 638.

And all conditions and limitations must be strictly observed.—The liability of cities and towns for damages sustained by travelers by reason of defects in highways is created solely by the legislature and all of the conditions and limitations upon which the remedy is granted must be strictly observed as prescribed by the statute. Huntington v. Calais, 105 Me. 144, 73 A. 829.

The remedy for injuries caused by a defective way is one given by statute alone. The legislature in affording a remedy has hedged it about with conditions, as it had a right to do. Joy v. York, 99 Me. 237, 58 A. 1059.

And the mayor of a town has no authority to waive any of the requirements of this section. Veazie v. Rockland, 68 Me. 511.

Town may compromise if real controversy exists.—When a real controversy exists between a man and a town in regard to the facts necessary to be shown to create a liability on the part of the town under this section, or the law that may arise upon the facts, the town may bind itself by its vote to compromise the existing controversy upon any question within its corporate powers. Clark v. Tremont, 83 Me. 426, 22 A. 378.

But not if such controversy does not exist.—Where no controversy exists between the town and an individual as to existing facts necessary to be shown to create a liability under this section, or upon the law involved, a town cannot by its vote bind itself by giving any particular sum to be raised by taxation upon its inhabitants, because it would be a mere gratuity, entirely outside of the power of the majority, and would have no binding force. Clark v. Tremont, 83 Me. 426, 22 A. 378.

History of section.—See Haines v. Lewiston, 84 Me. 18, 24 A. 430.

Former provision of section.—For cases concerning a former provision of this section calling for the forfeiture of a specific amount, recoverable by indictment, in the event of loss of life due to a defective way, see State v. Bangor, 30 Me. 341; State v. Bangor, 41 Me. 533.

Applied in Todd v. Rome, 2 Me. 55; Watson v. Lisbon Bridge, 14 Me. 201; Dennett v. Wellington, 15 Me. 27; Barstow v. Augusta, 17 Me. 199; Young v. Garland, 18 Me. 409; Farrar v. Greene, 32 Me. 574; Gilpatrick v. Biddeford, 51 Me. 182; Stover v. Bluehill, 51 Me. 439; Mayberry v. Standish, 56 Me. 342; Haskell v. New Gloucester, 70 Me. 305.

Stated in part in Ouelette v. Miller, 134 Me. 162, 183 A. 341; Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Cited in State v. Strong, 25 Me. 297; Norris v. Androscoggin R. R., 39 Me. 273; Orcutt v. Kittery Point Bridge Co., 53 Me. 500; Chase v. Litchfield, 134 Me. 122, 182 A. 921; Wilde v. Madison, 145 Me. 83, 72 A. (2d) 635.

II. TWENTY-FOUR HOURS' ACTUAL NOTICE OF DEFECT.

A. In General.

Municipal officers must have had 24 hours' actual notice of defect.—By this section, the plaintiff is required, to enable him to recover, to prove that the municipal officers, or street commissioner, of the city had at least twenty-four hours' actual notice, before he received his injuries, of the defect of which he complains. Ham v. Lewiston, 94 Me. 265, 47 A. 548.

It is provided by this section, as one of the essentials required to be shown, in order to maintain an action for damages for injuries received by reason of any defect or want of repair of a highway or town way, against the county or town required by law to keep the way in repair, that "the commissioners of such county, or the municipal officers or road commissioners of such town, or any person authorized by any commissioners of such county, or any municipal officer, or road commissioner of such town, to act as a substitute for either of them, had twenty-four hours' actual notice of the defect or want of repairs" before the accident. Radcliffe v. Lewiston, 109 Me. 368, 84 A. 639.

And such notice is condition precedent to right of recovery.—This section requires, as a condition precedent to recovery, that the municipal officers or road commissioner of the town shall have had twenty-four hours' actual notice of the defect or want of repairs. Gurney v. Rockport, 93 Me. 360, 45 A. 310; Abbott v. Rockland, 105 Me. 147, 73 A. 865.

No recovery can be had against a town or city for an injury received through a defect in one of its highways, unless some one of its municipal officers or road commissioners had twenty-four hours' actual notice of the defect. Smyth v. Bangor, 72 Me. 249. See Holmes v. Paris, 75 Me. 559.

And town will not be liable for an injury caused by a defect of which the municipal officers of the town had not twenty-four hours' actual notice. Spaulding v. Winslow, 74 Me. 528.

This section does not render the town liable, unless it had notice of the defect or want of repair. Tripp v. Lyman, 37 Me. 250.

The purpose of the provision of twenty-four hours' notice is to allow a town a reasonable opportunity to remove a defect after receiving information of its existence. Holmes v. Paris, 75 Me. 559; Barnes v. Rumford, 96 Me. 315, 52 A. 844.

By the provision requiring notice of the defect, it is apparent that the legislature did not intend to hold a town liable, unless there was some fault or neglect or failure in duty by the town or its officers. Bragg v. Bangor, 51 Me. 532.

A notice required to be given to the municipal officers, is sufficient if given to one of them. Rogers v. Shirley, 74 Me. 144.

And notice need not be to officers of year of accident.—The town is made chargeable with the consequences of the neglect of its officers to make the necessary repairs after receiving notice of the defect, and it is immaterial whether the notice is to one of the officers for the municipal year in which the accident occurred, or for some previous year, provided the defective condition of the way remained unchanged. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

The culpability of the town is precisely the same whether the failure to repair occurs under one administration or another, provided there is notice of the identical defect which caused the injury. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

But notice to police department is not sufficient.—Even where it is the custom in the police department to receive complaints about highway defects and report them to the road commissioner, if it was no part of their official duty to receive and report such complaints to the commissioner, there is no presumption that a notice given to them was by them communicated to the commissioner. Abbott v. Rockland, 105 Me. 147, 73 A. 865.

Notice must be of identical defect which caused injury.—The notice must be of the defect itself, of the identical defect which caused the injury. Notice of another defect, or of the existence of a cause likely to produce the defect, is not sufficient. Smyth v. Bangor, 72 Me. 249; Pendleton v. Northport, 80 Me. 598, 16 A. 253; Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72; Littlefield v. Webster, 90 Me. 213, 38 A. 141; Ham v. Lewiston, 94 Me. 265, 47 A. 548; Abbott v. Rockland, 105 Me. 147, 73 A. 865; Wells v. Augusta, 135 Me. 314, 196 A. 638.

To establish liability, there must be actual notice of the actual defect. Notice of the cause of the defect, or of some conditions which in some contingency might cause or create a defect, is not enough. Pendleton v. Northport, 80 Me. 598, 16 A. 253.

Notice to a town or city, of a cause outside of the way, which may produce a defect in the way, is no notice of the defect itself, if produced. Smyth v. Bangor, 72 Me. 249.

And must give both character and location of defect.—One cannot be said to have actual notice of the defect until both the character, and approximately the location upon the face of the earth, of that which constitutes the defect, are in some way made known to him, so as to distinguish it from parts of the road which are not thus defective, though it is not essential that he should appreciate the danger likely to arise therefrom. Rogers v. Shirley, 74 Me. 144; Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72.

But it is not necessary that those who have notice of the actual condition of the way should recognize it as a defect or themselves believe it to be such. Whether the road was unsafe and defective, in fact, is a question to be determined on trial. It is enough if the town has notice or knowledge of the exact condition of the road. Bragg v. Bangor, 51 Me. 532.

It is not necessary that the road commissioner be told that the obstruction is a defect in the street. Notice of the thing which constitutes the defect is notice of the defect. Cowan v. Bucksport, 98 Me. 305, 56 A. 901.

Opportunity to obtain notice by exercise of care and diligence is not "actual notice."—The words "actual notice" in this section signify something more than an opportunity to obtain notice by the exercise of due care and diligence. The facts and circumstances in a given case may justify the conclusion that he must have had actual notice unless grossly inattentive; but proof of gross inattention is not proof of actual notice. Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72; Littlefield v. Webster, 90 Me. 213, 38 A. 141.

It is not enough to find that the municipal officers might have seen the defect by the exercise of reasonable care, but the jury must be satisfied by the evidence that

it was seen. Radcliffe v. Lewiston, 109 Me. 368, 84 A. 639.

This section does not hold the town answerable, unless it has had notice. These words mean something more than that a town might have had notice, by diligence and care, or ought to have taken notice. The question still returns, did the town, in fact, have such notice? Bragg v. Bangor, 51 Me. 532.

One notice sufficient notwithstanding failure of agent to repair way.—If the commissioner is notified of an alleged defect and relies upon the judgment of another to repair it, and that other fails to make it safe and convenient, then the knowledge and act of such person are the knowledge and act of the commissioner precisely as if the latter had performed the work himself, and no further notice is necessary. McGown v. Washington, 108 Me. 541, 81 A. 1092.

Notice not required when defect created by officer to whom notice may be given.—When one of the officers of a town to whom notice of a defect may be given, himself creates a defect by placing some object dangerous to travelers within the limits of the highway and leaving it there, the statutory notice of twenty-four hours is unnecessary. Notice of a fact to a person who already knows the fact cannot be useful. Buck v. Biddeford, 82 Me. 433, 19 A. 912; Knowlton v. Augusta, 84 Me. 572, 24 A. 1039; Jones v. Deering, 94 Me. 165, 47 A. 140; Morneault v. Hampden, 145 Me. 212, 74 A. (2d) 455. See Holmes v. Paris, 75 Me. 559; Haines v. Lewiston, 84 Me. 18, 24 A. 430.

But creation of defect by servant not required to have notice is not notice.—That a servant of the city, not such officer of the city as the statute requires to have had at least twenty-four hours' notice of the defect before the accident, created the supposed defect is not in itself notice of the defect. Rich v. Rockland, 87 Me. 188, 32 A. 872.

A defect created in a street by a subordinate, even in the line of his general duty or employment, is not thereby created by his superior, the street commissioner. The doctrines of principal and agent, or master and servant, in this respect are not applicable. Within the purview of this section the act of the subordinate is not the act of the commissioner unless specifically directed by him. The subordinate's creation or knowledge of a defect is not notice to the commissioner of that defect. Emery v. Waterville, 90 Me. 485, 38 A. 534.

Whether officers had notice is question of fact.—Whether the municipal officers or the road commissioner had twenty-four hours' actual notice of the defect as required by this section is a question of fact. Spencer v. Kingsbury, 120 Me. 174, 113 A. 33.

For jury to determine.—It is for the jury to determine whether the municipal officers had the twenty-four hours' actual notice of the defect. Radcliffe v. Lewiston, 109 Me. 368, 84 A. 639.

When the communication is oral, or the proof of actual notice is circumstantial, the question whether there has been actual notice is for the jury. Rogers v. Shirley, 74 Me. 144; Ham v. Lewiston, 94 Me. 265, 47 A. 548.

Former provisions as to notice.—For a consideration of this section when it required "reasonable notice" of the defect, see Springer v. Bowdoinham, 7 Me. 442; French v. Brunswick, 21 Me. 29; Larrabee v. Searsport, 42 Me. 202; Bragg v. Bangor, 51 Me. 532; Holt v. Penobscot, 56 Me. 15; Bartlett v. Kittery, 68 Me. 358.

Under a former provision of this section, requiring merely notice of the defect to the town, it was held that notice to the inhabitants was sufficient. See Tuell v. Paris, 23 Me. 556; Mason v. Ellsworth, 32 Me. 271.

For cases under a former provision of this section providing for notice to the highway surveyor, see Rogers v. Shirley, 74 Me. 144; Bunker v. Gouldsboro, 81 Me. 188, 16 A. 543.

B. Proof of Notice.

Burden on plaintiff to prove notice.—The burden is upon the plaintiff to prove that the commissioner did have 24 hours' actual notice, not on the city to prove that he did not receive it. Abbott v. Rockland, 105 Me. 147, 73 A. 865.

The plaintiff must prove 24 hours' actual notice to one of the officials named in this section. Harmon v. South Portland, 121 Me. 1, 115 A. 419.

There is no liability attaching to the town in the absence of twenty-four hours' actual notice of the defect causing the injury for, by this section, that is a fact that must be established affirmatively before the plaintiff will be entitled to recover. It is a condition precedent to a right of recovery. Carleton v. Caribou, 88 Me. 461, 34 A. 269.

This section makes it incumbent upon the sufferer to prove, as a condition precedent to the maintenance of the action, that the municipal officers or road commissioners of the town had twenty-four hours' actual notice of the defect or want of repair. Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72.

Notice to the town of the defect is an essential and indispensable element in determining the liability. If the fact of due notice is not established, it is as fatal an objection as want of proof of an existing defect. Bragg v. Bangor, 51 Me. 532.

By evidence sufficient in law. — Notice of a fact implies knowledge of the existence of the fact, brought home to the party to be charged, either by his own observation, or by declarations made to him by those who have seen or known it. Mere neglect of duty in other particulars cannot supply the place of such notice or knowledge. Like any other distinct and substantive fact, required to charge a party, it must be affirmatively proved by evidence which the law deems sufficient. Bragg v. Bangor, 51 Me. 532.

And notice of the defect cannot be proved by the admissions of a town or city officer. Smyth v. Bangor, 72 Me. 249.

But actual notice is a conclusion of fact which may be established by all grades of competent evidence, circumstantial as well as direct. Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72; Littlefield v. Webster, 90 Me. 213, 38 A. 141; Barnes v. Rumford, 96 Me. 315, 52 A. 844.

Actual notice may be proved by direct or circumstantial evidence, that is by information of the existing facts conveyed to the party to be notified, or by circumstances showing personal knowledge on his part. Being a conclusion of fact it may be established by all grades of competent evidence, but established it must be before the injured party can maintain his action. Abbott v. Rockland, 105 Me. 147, 73 A. 865.

The call is for twenty-four hours' actual notice to the municipal officers, highway surveyors or road commissioners of the town, of the defect or want of repair, which is the cause of the accident, provable as in other cases where actual notice is required, by circumstances showing personal knowledge on the part of the party to be notified, or information conveyed to him by others, of the existing facts. Rogers v. Shirley, 74 Me. 144; Hurley v. Bowdoinham, 88 Me. 293, 34 A. 72.

When a street commissioner is informed that there is a defect on a certain street in his town, there is a presumption that he performs the duty of going or sending to look it up and remedy it. This presumption added to the information given him, may be sufficient to authorize the jury to find that he had actual notice of the particular defect. Welch v. Portland, 77 Me. 384.

III. NOTICE BY SUFFERER WITH PRIOR KNOWLEDGE OF DEFECT.

Section imposes personal duty on sufferer with prior knowledge of defect to notify municipal officers.—The section requires that the notice shall be given by the "sufferer" in case the "sufferer" had prior knowledge of the defect. This requirement of the section imposes upon the traveler a distinct personal duty as a condition precedent to his right to recover for injuries suffered on account of such defects. Harmon v. South Portland, 121 Me. 1, 115 A. 419, holding that notice given by the injured party's husband was not sufficient.

And performance of duty is condition precedent to right of recovery.—If the plaintiff had notice of the defect, it was then incumbent upon him, as a condition precedent to any right of action for injury against the city, to previously notify "one of the municipal officers" of the defective condition of the way. Harmon v. South Portland, 121 Me. 1, 115 A. 419.

This section says, "if the sufferer had notice of the condition of such way previous to the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way." This requirement imposes upon the traveler a distinct personal duty as a condition precedent to his right to recover for injuries suffered on account of such a defect. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

Assuming the way to have been defective; that the road commissioner, under whose direction it was so made and left several days before the accident had the twenty-four hours' actual notice of the defect "which caused the injury;" and that the "fourteen days'" notice in proper form was duly given after the injury, — still the plaintiff would not be entitled to recover, if he himself had notice of the condition of the way, unless he had previously notified some one of the municipal officers of the city of its defective condition. Haines v. Lewiston, 84 Me. 18, 24 A. 430.

One who, knowing the condition of a road, voluntarily drives over it, and receives an injury, cannot recover for it against the town or city, unless he had notified one of the municipal officers of its defective condition. And this is not the "twenty-four hours' actual notice of the defect," required to render the town or city liable. It is another and independent notice. And it is one that cannot be dispensed with. It is a condition precedent

to a right of recovery, and must be complied with. Knowlton v. Augusta, 84 Me. 572, 24 A. 1039.

And its breach defeats recovery independently of doctrine of contributory negligence.—A breach of this distinct statutory duty of the traveler to give to the municipal officers the benefit of any knowledge he may have of the existence of the defect, is sufficient to defeat his right to recover independently of the doctrine of contributory negligence or concurring causes. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

The express statutory duty of the sufferer to notify the municipal officers if he knows of a defect is clearly distinguishable from the obligation imposed by the doctrine of contributory negligence or concurring causes, which, under the construction placed upon this section, has uniformly been held specially applicable to this class of actions against towns for defective highways. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

But sufferer not chargeable with driver's knowledge.—The "sufferer" is not chargeable with the knowledge which the driver had, but which she did not have, and is not responsible for his failure to communicate it to the municipal officers. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

Notice must be given to municipal officers.—This section provides that "if the sufferer had notice of the condition of such way previous to the time of the injury he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way." It will be observed that this notice must be given by the "sufferer," plaintiff, to one of the municipal officers, not to "a municipal officer, the street commissioner or their substitute," as the other twenty-four hours' actual notice of the defect may be given. Harmon v. South Portland, 121 Me. 1, 115 A. 419.

IV. NOTICE OF ACCIDENT.

A. In General.

Plaintiff required to give notice within fourteen days after accident.—The plaintiff is required by this section to give the municipal officers a written notice of the accident within fourteen days thereafter "stating his claim for damages and specifying the nature of his injuries and the nature and location of the defect which caused such injury." Beverage v. Rockport, 106 Me. 223, 76 A. 677.

Which notice is to be in writing.—The notice to municipal officers is in all cases required to be in writing. Veazie v. Rockland, 68 Me. 511.

The notice of the claim upon the town to be given to the municipal officers within fourteen days after the accident is required to be in writing. Rogers v. Shirley, 74 Me. 144.

Formerly, this section simply required the notice of accident to be by "letter or otherwise." It was then held that a verbal notice was sufficient. See Sawyer v. Naples, 66 Me. 453.

This requirement is mandatory.—The statute requirement of notice within fourteen days is not directory merely, it is mandatory. Greenleaf v. Norridgwock, 82 Me. 62, 19 A. 91.

The duty imposed upon the person injured to notify one of the municipal officers within fourteen days thereafter is absolute and imperative. The statute is not merely directory; it is mandatory. Huntington v. Calais, 105 Me. 144, 73 A. 829.

And notice is condition precedent to right of recovery.—As a condition precedent to the plaintiff's right to recover this section declares that he shall, within fourteen days after the injury, notify the municipal officers of the town "by letter or otherwise, in writing," setting forth his claim for damages, and specifying the nature of his injury and the nature and location of the defect which caused such injury. Chase v. Surry, 88 Me. 468, 34 A. 270; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The liability of the town in this class of cases is created solely by statute and among the conditions precedent to the plaintiff's right of recovery prescribed by this section is the requirement respecting notice to the town after the injury. Spear v. Westbrook, 104 Me. 496, 72 A. 311.

The duty imposed by statute upon the party injured is to "notify" one of the municipal officers of the town, and this duty is imperative if he seeks to recover of such town. It is not directory, but mandatory. To "notify" is "to make known." Chase v. Surry, 88 Me. 468, 34 A. 270.

Regardless of municipal officers' knowledge.—The knowledge of the municipal officers is immaterial. The written statutory notice is an indispensible prerequisite to the right to maintain a suit. Rich v. Eastport, 110 Me. 537, 87 A. 374.

And the municipal officers cannot waive the requirement of written notice. Rich v. Eastport, 110 Me. 537, 87 A. 374.

Plaintiff must prove proper notice given.—To entitle the plaintiff to recover against the town in an action under this section it is incumbent on him to prove that he

notified the municipal officers of the town, or some of them within fourteen days after receiving the injury, by letter or otherwise in writing, setting forth his claim for damages, and specifying the nature of his injuries and the nature and location of the defect which caused them. Hubbard v. Fayette, 70 Me. 121; Clark v. Tremont, 83 Me. 426, 22 A. 378.

Notice must have been given, and the fact must be averred and proved by the plaintiff, to sustain the action. Low v. Windham, 75 Me. 113; Greenleaf v. Norridgwock, 82 Me. 62, 19 A. 91. See Harmon v. South Portland, 121 Me. 1, 115 A. 419.

And special pleading not required to raise issue of lack of notice. — Special pleading is not required in defense in order to raise the issue of lack of notice of injury within the required time. If proof of the notice is wanting, the plaintiff's case fails. Low v. Windham, 75 Me. 113.

Notice not required of administrator of person killed by reason of defective way. —This section does not require the administrator of a person instantly killed by reason of a defect in a highway to give the notice to the officers of the delinquent town, which one injured in his property or person is required to give, within 14 days after the occurrence of the accident. Perkins v. Oxford, 66 Me. 545.

Mere mailing of notice is not sufficient. —The mailing of the notice within fourteen days, and its reception after fourteen days, from the time of receiving the injury, is not a compliance with this section. Chase v. Surry, 88 Me. 468, 34 A. 270; Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

This section requires that the municipal officers should have information or knowledge within the time stated. It requires the party injured to communicate that information or knowledge; and it is not enough for him to write a notice, however formal; and it is not enough for him to mail it, even within the fourteen days. The writing and mailing a notice within the time are not a notification of the officers of the town as the statute requires. Chase v. Surry, 88 Me. 468, 34 A. 270.

Purpose of requirement for notice.— The manifest purpose of the requirement for fourteen days' notice is to afford opportunity to the town officers to examine the place, ascertain from persons having knowledge of the facts, while the recollection is fresh, all the attending circumstances, and determine as to the liability of the town, and prepare its defense, if the town officers decide to defend. Marcotte v. Lewiston, 94 Me. 233, 47 A. 137; Beverage v. Rockport, 106 Me. 223, 76 A. 677.

The object of the notice is to enable the town seasonably to investigate claims for injury before the proof of the facts shall become unattainable from lapse of time or loss of life or memory. It is for the benefit of the town. Notifying the town of an injury received enables its officers to proceed to ascertain the facts and contest or settle with the party claiming damages as they may deem expedient. Sawyer v. Naples, 66 Me. 453; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The main object of a notice is that the town may have an early opportunity of investigating the cause of an injury and the condition of the person injured before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess. Blackington v. Rockland, 66 Me. 332; Joy v. York, 99 Me. 237, 58 A. 1059; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

One object of the statute requiring notice within fourteen days after an injury is alleged to have been received is that the injured person shall thus early commit himself to a statement of his condition when he would be more likely to describe it frankly and fairly than at a later period. There is great temptation to magnify and exaggerate such personal injuries, and the town is entitled to as particular a notice as can reasonably be given. Goodwin v. Gardiner, 84 Me. 278, 24 A. 846; Joy v. York, 99 Me. 237, 58 A. 1059; Spear v. Westbrook, 104 Me. 496, 72 A. 311.

A minor purpose of the notice would be, perhaps, that the town should have a favorable chance to settle a claim before being sued for it, should they see fit to do so. Blackington v. Rockland, 66 Me. 332; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The right to the remedy accrues when the injury is received — but to protect towns against possible fraud and stale claims, where opportunity for investigation may be lost, and discovery of evidence difficult, this section requires the party, within fourteen days after its occurrence, to give written notice to the municipal officers, "setting forth his claim for damages, and specifying the nature of his injuries, and the nature and location of the defect which caused such injury." Marcotte v. Lewiston, 94 Me. 233, 47 A. 137.

It is for a wise purpose that the law requires a notice of injury upon the highway to be given the officers of the town. It is to enable the town to investigate the cir-

cumstances while the facts are yet fresh in the memory of witnesses, as well as to protest itself by providing for the enforcement of its rights against other parties who may be liable to the town for causing the defect. Chase v. Surry, 88 Me. 468, 34 A. 270.

The object of the requirement as to the subsequent notice is apparent. It is, that the municipal officers may be speedily informed of the nature and extent of a person's injuries, who claims to have sustained them by reason of a defective way, and that they may have an opportunity to examine into the facts, especially the alleged defective condition of the way, before changes have occurred, with a view, either of procuring testimony to contest the claim, or to settle it, if, after investigation, they deem such a course advisable. Kaherl v. Rockport, 87 Me. 527, 33 A. 20.

History of notice provision of section.—See Creedon v. Kittery, 117 Me. 541, 105 A. 124.

Effective date of amendment adding notice requirement.—See Jackman v. Garland, 64 Me. 133.

No set rule as to form of notice.—Kind, degree and causes of injury, or damage, arising from accidents upon defective ways, in the very nature of things, present so many different instances and circumstances, that it will readily occur to one possessing even ordinary powers of observation and reflection how difficult, if not impossible, it would be to establish a hard and fast rule, or precedent, as to form of notice required by the statute in this class of cases. Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The construction and sufficiency of the written notification should be passed upon by the presiding judge as matters of law. Rogers v. Shirley, 74 Me. 144.

The statute requiring the notice of injury within fourteen days requires that it shall be in writing and clearly defines what it shall contain. It is not to be varied by any extrinsic facts whatever. It is simply a question as to the meaning of the terms used and whether it is a compliance with the statute. It is therefore by the well settled rules of law of the duty of the court to construe it. Chapman v. Nobleboro, 76 Me. 427.

And a notice of injury is not to be strictly construed. Joy v. York, 99 Me. 237, 58 A. 1059.

Notices of the accident are not to be very strictly construed. They will often be given directly by the persons concerned and without the aid and intervention of counsel; and this section should not be so narrowly interpreted that they cannot ordinarily be given by such persons with safety to themselves, and at the same time be sufficient to protect the interests of the town. In many cases, too, the persons injured will not be able, at so early a date as required by the section, to define the precise nature or estimate accurately the probable extent of the injury received. Blackington v. Rockland, 66 Me. 332; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

In view of the limited time within which the notice of the accident must be served and the fact it is often necessarily prepared without the aid of a professional draftsman, its construction should not be strangled by technicalities nor distorted by captious criticism, but full effect should be given to its natural and obvious meaning. Beverage v. Rockport, 106 Me. 223, 76 A. 677; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The supreme judicial court has consistently maintained an interpretation of the object and requirements of the notice which has been fair and protective to municipalities, but at the same time favorable and equitable to parties suffering injuries to their persons or damages to their property through defective ways which municipalities, by law, are bound to keep in repair. Creedon v. Kittery, 117 Me. 541, 105 A. 124.

The requirement of the 14 days' notice has never been construed to impose upon the sufferer any unreasonable or burdensome duty. Spear v. Westbrook, 104 Me. 496, 72 A. 311; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

And the notice of injury should not be rejected, if it serves the purpose of conveying the information required by the statute. Its sufficiency must be determined from substance, rather than from any elegance. White v. Vassalborough, 82 Me. 67, 19 A. 99.

And it is sufficient if the town has such notice as will enable its officers to investigate the case and acquire a full knowledge of the facts. Bradbury v. Benton, 69 Me. 194.

A notice is sufficient which describes the facts substantially and in general terms, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case. Blackington v. Rockland, 66 Me. 332.

If a notice sets forth the plaintiff's "claim for damages," and specifies "the

nature of her injuries and the nature and location of the defect which caused the injury," it is sufficient. Cowan v. Bucksport, 98 Me. 305, 56 A. 901.

Date of accident need not be stated in notice.—It is immaterial on what day the accident occurred. Nothing in the section requires statement of the day in the notice. The notice must be given within fourteen days. If given within that limit, it will be sufficient, if no specific day is named. The plaintiff is allowed that time to ascertain the precise location and character of the defect, and the nature and extent of his injury, and to state them on paper, and the investigation of the town officers should cover the same range. The court would not be justified in importing into the notice a requirement, not in the section, which is not of the essence of the right and is unimportant of the town. Marcotte v. Lewiston, 94 Me. 233, 47 A. 139.

While the court has held that the notice should contain a particular description of the location and character of the defect in the way, and the nature of the injuries suffered, it has never held that it was necessary to state the day or the hour of the accident. To do so would impose upon the injured party a duty not imposed by the statute, nor within its reason and purpose, and might defeat a meritorious suit by a technicality not necessary or important to the rights of the parties. Marcotte v. Lewiston, 94 Me. 233, 47 A. 139.

B. To Whom Notice Given.

Notice must be given to municipal officers.—It must affirmatively appear that the plaintiff or someone in her behalf notified one of the municipal officers of her injury within fourteen days thereafter in the manner specified in the statute. Huntington v. Calais, 105 Me. 144, 73 A. 829.

But a notice to one of the municipal officers is a notice to all and is sufficient. Sawyer v. Naples, 66 Me. 453.

And notice may be served on mayor.—The mayor is the very person upon whom notice can be best served. He is the chief executive official of the municipality, entrusted with a general care over all its interests and with the faithful execution of its laws. Blackington v. Rockland, 66 Me. 332.

But notice to city clerk is insufficient.—Under the provisions of c. 10, § 22, Rule XXVI, the mayor and aldermen constitute the municipal officers of cities. And, if a city charter makes the city clerk the clerk of the board of mayor and aldermen, the city clerk does not thereby become one of the municipal officers of the city within the meaning of this section and notice to him is insufficient. Huntington v. Calais, 105 Me. 144, 73 A. 829.

It is true that the city clerk is the proper custodian of all papers requiring the consideration of the mayor and aldermen at their regular meetings, but inasmuch as the notice in question must be delivered to one of the municipal officers within fourteen days, and that portion of the time remaining after the receipt of the notice by the city clerk would probably expire in a majority of instances before the next regular meeting of the mayor and aldermen, there is no presumption either of law or fact that such a notice would be brought to the attention of the municipal officers or any one of them within the time stated. The statute requires that the information therein specified should be actually communicated to one of the municipal officers within the period named. Evidence that the information was given to the city clerk obviously falls short of this requirement. Huntington v. Calais, 105 Me. 144, 73 A. 829.

C. Contents of Notice.

1. Claim for Damages.

Notice, must set forth injured party's claim for damages.—The notice to the municipal officers of a town, required by this section, must state not only the nature and location of the defect, and the nature of the injuries received, but it must also set forth the injured person's claim for damages, or it will not be sufficient. Wagner v. Camden, 73 Me. 485.

This section requires that the claim of the plaintiff in the action for damages should be set forth in the notice preliminary to the action. Keller v. Winslow, 84 Me. 147, 24 A. 796; Morgan v. Lewiston, 91 Me. 566, 40 A. 545.

And a notice which makes no claim for damages is insufficient. Rich v. Eastport, 110 Me. 537, 87 A. 374.

But it is not necessary that the amount of damages should be stated in dollars and cents. Morgan v. Lewiston, 91 Me. 566, 40 A. 545.

Where the statute requires a person injured to set forth his claim for damages, it does not mean that the damages must be specified or that the amount claimed must necessarily be stated. The notice is sufficient in this respect if the sufferer sets forth in his notice that he makes claim for damages. Morgan v. Lewiston, 91 Me. 566, 40 A. 545. See Marcotte v. Lewiston, 94 Me. 233, 47 A. 139.

It is not necessary that the extent of damages should be stated in dollars and cents in the notice. The party injured may not know the extent of the injury received. It may be greater than is at first supposed or it may be less. What the legislature deemed important was that towns should be notified that damages are claimed, not what sum of money would be sufficient to compensate the party injured. Sawyer v. Naples, 66 Me. 453.

In Lord v. Saco, 87 Me. 231, 32 A. 887, the court said: "We think the notice should contain a statement of the amount of damages claimed. We think the language of the statute fairly implies this." However, in Morgan v. Lewiston, 91 Me. 566, 40 A. 545, it was pointed out that in Lord v. Saco, the notice was clearly insufficient in other respects, there was no description whatever of the nature of the defect, nor was there any specification, as required by statute, of the nature of the injury and the court then said that it believed that the justice who prepared the opinion in Lord v. Saco did not have in his mind the earlier case holding it unnecessary to state the amount of damages claimed.

Claim for husband's damages does not support action by wife.—Where the wife is injured and her husband gives written notice thereof, and that he claims damages, saying nothing of the wife's claim for damages, an action by the wife cannot be maintained. Keller v. Winslow, 84 Me. 147, 24 A. 796.

A notice which does not purport to come from the plaintiff or to be given in her behalf, and does not set forth her claim for damages; but sets forth the claim of her husband for damages by reason of the injury to his wife, is not sufficient. And proof that her husband was authorized to act for her does not aid the notice; because by it he does not purport to act for her and sets forth no claim in her behalf. Hubbard v. Fayette, 70 Me. 121.

2. Specification of Nature of Injuries.

The injured party is required to give a notice "specifying the nature of his injuries." Wadleigh v. Mount Vernon, 75 Me. 79; Lord v. Saco, 87 Me. 231, 32 A. 887, overruled on another point in Morgan v. Lewiston, 91 Me. 566, 40 A. 545; Joy v. York, 99 Me. 237, 58 A. 1059.

When the main advantage which the town derives from the notice, namely, an early opportunity to investigate the case, is considered, the specification of the nature of the injuries may not be so important as that of the nature and location of the defect, but it is as positive a requirement of the statute and cannot be ignored. Low v. Windham, 75 Me. 113.

And a notice which does not specify the nature of the injuries is insufficient. Rich v Eastport, 110 Me. 537, 87 A. 374.

Description of injuries must be specific.—This section requires the notice to give a specific description of the bodily injuries claimed to have been received. A general description even is not regarded as sufficient. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

And this section requires more than a bare statement that a bodily injury was received. The nature of the injury must be stated. Goodwin v. Gardiner, 84 Me. 278, 24 A. 846; Spear v. Westbrook, 104 Me. 496, 72 A. 311.

The statutory requirement of a notice, "specifying the nature of his injuries," is not fulfilled by a notice to the town that the plaintiff has been injured in his person. Low v. Windham, 75 Me. 113.

It is impossible to hold that the words, "I shall claim damage for injuries which I received," contain a specification of the nature of the plaintiff's injuries. Low v. Windham, 75 Me. 113.

One of the conditions precedent to a recovery is the giving of a written notice specifying the nature of the injuries. It is not enough for the injured party to state that he has been injured. It is not enough to say that he has been greatly injured. It is not enough to state that he received "severe bodily injuries." He must state the nature of his injuries. Joy v. York, 99 Me. 237, 58 A. 1059; Spear v. Westbrook, 104 Me. 496, 72 A. 311; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

As to the physical injuries alleged to have been sustained the notice contains only this specification, "that her body was badly bruised." Under our decisions it is too well settled to admit of discussion that this specification does not contain such a description of physical injury as the statutory notice requires. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

And notice not specifying location of injuries is insufficient.—A notice which fails to specify upon what part of the body the injuries were received, whether upon the head or back, the arms or legs or to state in what manner and to what extent the injuries affected the plaintiff is insufficient. The severity and critical nature of an injury obviously depend largely upon its locality, and it is important for the municipal officers to be informed whether the injuries are upon a vital or other less vulnerable part of the body. Spear v. Westbrook, 104 Me. 496, 72 A. 311.

And a notice, otherwise valid, describing only mental suffering is not sufficient to authorize proof of physical injury, not as a basis of damages, but as a basis of proof of mental suffering. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

A physical injury, being insufficiently described in the notice, cannot be proved as the foundation for admitting evidence of mental injury, under that part of the notice in which the latter is properly described. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

The plaintiff cannot prove the fact of physical injury, without notice, as a basis upon which to prove the fact of mental injury, with notice. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

Separate and distinct injuries and sources of suffering and damage should be specified in the notice to authorize the plaintiff to introduce evidence to prove them and to entitle him to recover damages for them. Beverage v. Rockport, 106 Me. 223, 76 A. 677.

And recovery cannot be had for injury not specified.—Where the notice designated a particular injury, it is not competent for the plaintiff to prove or recover damages for an injury the nature of which was not specified. He must be limited by his notice. Joy v. York, 99 Me. 237, 58 A. 1059.

The plaintiff can only recover damages arising from such injuries as are specified in her notice to the town. Joy v. York, 99 Me. 237, 58 A. 1059.

But notice sufficient if it enables town to ascertain condition of sufferer.—A notice is sufficient which describes the nature of the injury with sufficient particularity to enable the town to inquire into and ascertain the true condition of the sufferer. Joy v. York, 99 Me. 237, 58 A. 1059; Creedon v. Kittery, 117 Me. 541, 105 A. 124.

A notice is sufficient, which describes the facts substantially and in general terms, so that thereby a town may have statements and intimations that would be likely to lead them, acting reasonably, into such inquiry and investigation as would result in their acquiring a full knowledge of the facts of the case. Creedon v. Kittery, 117 Me. 541, 105 A. 124.

And all results of injuries need not be specified.—The sufferer can recover damages arising from such injuries as are specified in his notice and for the results actually flowing from such injuries, although those results may not be anticipated or described in the notice. A sufficient specification of the nature of the injuries themselves is a sufficient notice of the results which actually flow from them. Spear v. Westbrook, 104 Me. 496, 72 A. 311; Beverage v. Rockport, 106 Me. 223, 76 A. 677.

The sufferer is only required to give the defendant town the benefit of all the information he possesses relating to the bodily injuries for which he claims damages. He is not compelled to specify or predict the effects and consequences which may or may not flow from such injuries. The results may be neither known nor anticipated at the time of preparing the notice. But he may reasonably be required to describe the physical conditions caused by his injuries fully and frankly according to the best of his knowledge and information. Spear v. Westbrook, 104 Me. 496, 72 A. 311.

It is not necessary to detail all the results thence accruing in the notice. Wadleigh v. Mount Vernon, 75 Me. 79.

It is not necessary in the notice to describe with particularity all of the injuries upon which the plaintiff may rely. It frequently would be impossible to do so within the limited time which a notice must be given. Unknown and even unexpected results may flow from a personal injury received by one through a defect in a way. Joy v. York, 99 Me. 237, 58 A. 1059.

And plaintiff not confined to statement of injuries contained in notice.—Upon a reasonable construction of the phrase "specifying the nature of his injuries" in this section, requiring a notice to be given by one injured by reason of a defect in a highway, the plaintiff is not confined in his declaration and proof to the precise statement of his injuries contained in his notice. Results may have followed, not anticipated at the time the notice was given. Wadleigh v. Mount Vernon, 75 Me. 79.

The plaintiff is not confined and limited to the precise statement of his injuries contained in his notice. The true nature and extent of the injuries may not be developed so as to be known to the plaintiff until after the time in which the notice is required to be given. Bradbury v. Benton, 69 Me. 194.

Nor is he precluded from recovering for injuries not known at date of notice.—Full and exact details of the personal injury are not required, and the plaintiff is not precluded from recovering for injuries which are not known, and, therefore, cannot be specified at the date of the notice, but which manifest themselves later. The object of the notice in this respect is not to limit the plaintiff's right of recovery, but to give information to the town, by a general statement such as it is practicable for

the plaintiff to make at the time, of the nature of the injuries for which he claims to recover damages. Low v. Windham, 75 Me. 113; Beverage v. Rockport, 106 Me. 223, 76 A. 677.

Defendant must object to proof of injuries not specified.—If the notice, as a notice, was sufficient to recover for the injuries therein alleged, if the defendant wished to defeat recovery for other and distinct injuries, not specified therein, but covered by the same accident, it was bound to object to proof of them when offered. Bean v. Portland, 109 Me. 467, 84 A. 981.

The sufficiency or insufficiency of the notice of injury is a question of law to be passed upon by the presiding justice. Spencer v. Kingsbury, 120 Me. 174, 113 A. 33.

Notice need not specify nature of damages to property. — The party suffering damage to personal property must make claim for damage, but he is not required in his statutory notice to the town, to specify the nature of the damages to that personal property. Creedon v. Kittery, 117 Me. 541, 105 A. 124.

Right of recovery is given to anyone who "receives any bodily injury, or suffers damage in his property." Two distinct and different things are provided for. When the recovery sought is for bodily injuries it is later provided that his notice must specify the nature of those injuries, not so as to damage personal property. The reason for the difference readily occurs to the thinking mind. The frequent tendency to depend upon subjective symptoms, and to exaggerate injuries to the person were well known to the legislature. A man may be able to practice an imposition as to his own personal injury, but would find it difficult to do so in respect to damage to his personal property. Creedon v. Kittery, 117 Me. 541, 105 A. 124. But see Spear v. Westbrook, 104 Me. 496, 72 A. 311, wherein it was said: "In Lord v. Saco, 87 Me. 231, 32 A. 887 (overruled on another point in Morgan v. Lewiston, 91 Me. 566, 40 A. 545), the plaintiff's notice stating that his horse was 'greatly injured by reason of the defect,' was declared to be defective because it 'fails utterly to state the nature of his injuries:' thus in effect overruling Blackington v. Rockland, 66 Me. 332."

3. Specification of Nature and Location of Defect.

The notice required by this section must include a notice of the nature and location of the defect causing the injury. Wadleigh v. Mount Vernon, 75 Me. 79.

And omission renders notice insufficient.—If the notice does not describe the location of the defect which caused the injury it is insufficient. Kaherl v. Rockport, 87 Me. 527, 33 A. 20.

This section requires that the "nature" of the defect should be described in the notice, and if the notice fails to state the nature of the defect it is insufficient. Lord v. Saco, 87 Me. 231, 32 A. 887, overruled on another point in Morgan v. Lewiston, 91 Me. 566, 40 A. 545.

And fatally defective.—If the notice does not specify the nature or the location of the defect, it is fatally defective. Greenleaf v. Norridgwock, 82 Me. 62, 19 A. 91.

The notice should be sufficiently specific to call the attention of the municipal officers to the particular defect complained of. Hubbard v. Fayette, 70 Me. 121.

The legislature, in requiring the party to be notified of the place, intended such notice of the locality as to enable the precise spot where the injury was received to be ascertained with substantial or reasonable certainty. Chapman v. Nobleboro, 76 Me. 427.

Whether the notice was enough to lead the town to such investigation as would result in their learning the facts of the case is not the test of the sufficiency of the notice required. The notice might accomplish that without stating "the nature and location of the defect." Rogers v. Shirley, 74 Me. 144.

But if notice prevents danger of defect being overlooked it is sufficient.—If the exact location of the defect was stated approximately enough to prevent any danger of the defect being overlooked by an officer acting in good faith upon the notice, the notice, in this respect, is sufficient. Welch v. Portland, 77 Me. 384.

And obstruction need not be characterized as defect.—Even if the notice does not expressly characterize the alleged obstruction as a defect, it is sufficient if it plainly states that the plaintiff was injured on the highway by reason of a collision with the obstruction and describes a condition which the jury might find to be dangerous and defective. Beverage v. Rockport, 106 Me. 223, 76 A. 677.

Notice sufficiently indicating location of defect.—See Hutchings v. Sullivan, 90 Me. 131, 37 A. 883; Cowan v. Bucksport, 98 Me. 305, 56 A. 901.

V. LIABILITY OF TOWNS FOR INJURIES.

A. In General.

Towns are not to be regarded as insur-

ers under this section. Nichols v. Athens, 66 Me. 402.

Towns are not made insurers against accidents and injuries on the highways. The statute does not impose upon them the obligation to guarantee the safety of public travel within their limits. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

The legislature has not imposed on towns the liability of insurers, or that of common carriers of passengers for hire. Bragg v. Bangor, 51 Me. 532.

And the liability of a town for damages depends upon the same proof as would render it liable for indictment under § 63. Willey v. Ellsworth, 64 Me. 57. See Davis v. Bangor, 42 Me. 522; State v. Madison, 63 Me. 546. See also note to § 63.

Thus, if the way is reasonably safe and convenient, there can be no recovery. Wells v. Augusta, 135 Me. 314, 196 A. 638.

This section and § 63 were clearly intended to be in harmony with each other and counterparts of the same enactment. They have always been construed to mean that a plaintiff is entitled to recover damages only when he suffers it through any defect or want of repair that will prevent the way from being reasonably safe and convenient for travel. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441. See State v. Madison, 63 Me. 546.

Such a construction of this section must be made, that when considered in connection with § 63, they may be in harmony, as they were clearly intended to be, with each other and counterparts of the same enactment. Peck v. Ellsworth, 36 Me. 393.

Section 63 requires the ways named to be kept in repair, so that they may be safe and convenient for travel. When this section provides for the recovery of damage suffered "through any defect or want of repair" of the ways, the meaning is, when he shall suffer it, through any defect or want of repair, that will prevent the way from being safe and convenient for travel. It was not intended to render towns liable in that mode for damages occasioned by the construction of ways or bridges, which were in a safe and convenient condition for travel, nor for damages occasioned by any subsequent defect or want of repair, while the ways continued to be safe and convenient for travel. Peck v. Ellsworth, 36 Me. 393.

Such a state of repair in a road, as would free a town from exposure to an indictment and conviction under § 63 would protect it also against a claim of damages for an injury sustained by an individual, while traveling on the same. That the road be "safe and convenient" is all that is required. Merrill v. Hampden, 26 Me. 234.

For ways need not be absolutely safe and convenient. — In construing this section, the supreme judicial court has uniformly held that the only standard of duty fixed, and the only test of liability created, is that the highways shall be constructed and maintained so as to be reasonably safe and convenient for travelers in view of the circumstances of each particular case, not that they shall be entirely and absolutely safe and convenient. Wells v. Augusta, 135 Me. 314, 196 A. 638.

But town liable if way not reasonably safe.—If through structural defects or want of repair the way is not reasonably safe and convenient and an injury is received through the defect alone, the sufferer is entitled to recover upon the conditions specified in this section. Moriarty v. Lewiston, 98 Me. 482, 57 A. 590.

Regardless of cause of defect.—If a way is not reasonably safe and convenient, the town, upon proper notice, is liable for injuries caused thereby, whatever and whoever may have caused the defect. Wells v. Augusta, 135 Me. 314, 196 A. 638.

Under this section the question of liability is not one of negligence and whether in a given case the officers of the town have used ordinary or reasonable care and diligence in constructing and maintaining the way. Regardless of the cause of the defect, if in fact the way is not reasonably safe and convenient, the town is liable to the traveler who is injured thereby in his person or property, and it is immaterial whether the defect arises from the negligence of the town or city officials or from causes which could not be avoided or controlled by them in the exercise of ordinary care and diligence, including the acts or omissions of others. Wells v. Augusta, 135 Me. 314, 196 A. 638. See Moriarty v. Lewiston, 98 Me. 482, 57 A. 590.

Whether an obstruction in the road has happened by the unauthorized act of individuals, or by the falling of trees uprooted by the wind, the public convenience equally requires that the necessary amendment and repairs should be speedily made and a town is liable for injuries received from such obstruction. Frost v. Portland, 11 Me. 271.

Thus town may be liable for defects caused by negligence of third person.—Where towns or other municipal corporations are declared by statute to be liable for defects in their highways, such as in this section, it is of no consequence that such defects were caused by third persons, so long as the highway is thereby rendered defective within the meaning of the statute.

The mere fact that they were created by third persons without its consent is no defense to the corporation. Hutchings v. Sullivan, 90 Me. 131, 37 A. 883.

Or by negligence of officers of another town.—Towns are severally responsible under this section, for injuries suffered by reason of defects that are within their limits. The negligence of the officers of one town, if it produces any effect within the boundaries of another town, is the negligence of the latter also; and the latter must answer for injuries caused by a defect on its own side of the line. Perkins v. Oxford, 66 Me. 545.

And town may be liable for defective watering place within the way.—Towns are not obliged to provide watering places for the public convenience; but when they are provided by nature in the highway, they ought not to be suffered to become pitfalls, first to allure and then to destroy horses or other animals, turned aside to partake the refreshment, to which they are thus invited. Cobb v. Standish, 14 Me. 198.

Or for defective sidewalk not built by it.—When a sidewalk has been built, no matter by whom or by what authority, and the municipal authorities have notice that it has become defective and dangerous to public travel, the municipality will be liable as though the sidewalk had been built by its express authority. Hutchings v. Sullivan, 90 Me. 131, 37 A. 883.

When private parties construct a sidewalk within the limits of a highway, which has the character and general appearance of a public walk, so that thereby the public is justified in believing that they are invited to walk upon it as a part of the public way, and it is thus used for a series of years by the public, the town will be liable for defects in it the same as if the town had constructed it in the first place. Hutchings v. Sullivan, 90 Me. 131, 37 A. 883.

Or for highway established by long-continued user.—When there is a long-continued user of a highway which the town or city has repaired, or there is a dedication made and accepted, the town or city is liable for injuries arising from its defects, when the person injured is without fault. McCann v. Bangor, 58 Me. 348.

But occasional user does not establish town's liability.—The occasional user of a road not located legally does not impose on the town the obligation to pay damages occasioned by its neglect to keep the road in repair. Willey v. Ellsworth, 64 Me. 57.

And town not liable where it has no duty to repair.—If the alleged injury was not sustained on any highway or town way which the defendants were liable to repair, an action under this section is not maintainable. Estes v. Troy, 5 Me. 368. See Rowell v. Montville, 4 Me. 270. See also note to § 63.

Nor where way has not been completed.—It would be most unreasonable that a town should be held answerable for all injuries that might occur to those who see fit to pass over a road before it is completed, and while the proper authorities are in the progress of making it. People who will thus travel must do it at their peril, and if they suffer injury they have no ground for redress against the town, either in justice or in law. Lowell v. Moscow, 12 Me. 300.

Where one year was allowed to a town in which to open a new road, constituting an alteration of an old one, said town was held not to be liable for injuries happening on said new road, through defects therein, before the expiration of the year, though the town had opened and partially made the road. Lowell v. Moscow, 12 Me. 300.

The mere fact of establishing a highway by judicial action, does not of itself so open it to the public as to render towns liable for accidents that may occur to travelers thereon. After it is thus legally established, it is to be prepared for public use. Labor is to be performed upon it. Bridges are to be built, hills cut down, and valleys filled up; obstructions are to be removed and rough places to be made smooth. To do this, time is required. Blaisdell v. Portland, 39 Me. 113.

But liability may attach prior to lapse of time allowed for building way.—A town may be liable for an injury arising from a defective way after it is constructed and opened for travelers, although the time in which they were allowed to build it after its acceptance has not elapsed. Blaisdell v. Portland, 39 Me. 113.

Provision in railroad's charter as to crossings does not relieve town of liability for defect.—A provision in the charter of a railroad company, that "the railroad shall be so constructed as not to obstruct the safe and convenient use of the highway," is a continuing obligation, requiring the company to keep the railroad so constructed at all times. But a town is not thereby absolved from its obligations to see that the highways therein are not rendered unsafe by the crossing of a railroad. If the highway at a railroad crossing is defective and the town has notice of it, it is no defense that the particular defect was one which the railroad company ought to have repaired. Wellcome v. Leeds, 51 Me. 313.

And the mere recovery of judgment against a railway company without satisfaction is no bar to a suit against the city under this section. Cleveland v. Bangor, 87 Me. 259, 32 A. 892.

B. For What Injuries Towns Liable.

1. Personal Injuries.

No one but person injured can recover damages for personal injury.—Under the provisions of this section, no one but the person injured can recover damages for the personal injury. Sanford v. Augusta, 32 Me. 536.

And section gives no right of action to husband for injury to wife.—There is no legal foundation under this section for a suit brought by the husband to recover for loss of his wife's services and the expenses connected with her injuries and recovery. He neither "received any bodily injury" nor "suffered damage in his property," which are the statutory prerequisites for the maintenance of this form of action. Sanford v. Augusta, 32 Me. 536; Bean v. Portland, 109 Me. 467, 84 A. 981.

Nor to father for injury to son.—A father cannot by virtue of this section, maintain an action against a town for the loss of services of a minor son in his employ, or for expenses paid for medical attendance, occasioned by an injury sustained by such son in consequence of a defect in a highway for which the town was responsible, over which he was passing. Reed v. Belfast, 20 Me. 246; Sanford v. Augusta, 32 Me. 536.

This section, gives an action to the executor or administrator of the person whose life has been lost through such defect, but does not give the father such remedy, nor does the action accrue or survive to him, either at common law, or by statute. Frazer v. Lewiston, 76 Me. 531.

The right which a father has to the future earnings of his minor children does not constitute "property" within the meaning of this section. Reed v. Belfast, 20 Me. 246.

One having a right of action for bodily injuries may have damages for all of the natural consequences, such as loss of earnings, physical pain, and mental suffering. But the suffering is not the injury for which a recovery may be had under the statutory notice, but the consequence of it. Colby v. Pittsfield, 113 Me. 507, 95 A. 1.

And compensation may be allowed for loss of time and expenses incurred.—In an action under this section to recover for "bodily injury," suffered through a defect in the highway, the jury, in order to give to the section the beneficial effect for which it was designed, may also allow compensation for loss of time resulting from the injury, and for expenses suitably incurred to obtain a cure. Sanford v. Augusta, 32 Me. 536.

And for pain.—The section allows a recovery for "bodily injury." Pain is part of a bodily injury, inherent in it. Though difficult to admeasure and assess, the injured party is entitled to recover for it. It must be confided to the sound discretion of the jury. Verrill v. Minot, 31 Me. 299.

2. Injuries to Property.

The injury to the property contemplated by this section, must be to the property in rem, as distinct from an injury to business, or a detriment, causing a diminution of the general amount of property. State v. Hewett, 31 Me. 396.

To authorize the maintenance of a suit for an injury to property under this section, such injury must be occasioned to present property in specie. Sanford v. Augusta, 32 Me. 536.

And damages not recoverable for diminution of amount, increased expenses, etc.—Damages resulting to property by causing a general diminution of the amount, by increasing expenditures, or causing delays and inconvenience, are not recoverable under this section. Sanford v. Augusta, 32 Me. 536.

By "damage in one's property" through a defect in a highway, within the meaning of this section, is intended some injury to an article, by which its value is destroyed or diminished. A mere loss of one's time, or an addition to his expenses, is not within the statute. Weeks v. Shirley, 33 Me. 271.

The value of the property before the accident and after is a material matter in ascertaining the amount of damage done in an action under this section. Whiteley v. China, 61 Me. 199.

If the plaintiff's horse was rendered unkind and timid by the accident, it was a "damage in his property" within the meaning of this section and the plaintiff should be allowed to show the fact. Whiteley v. China, 61 Me. 199.

And one in possession of a hired horse can recover damages for the loss of him, occasioned by defects in a highway. The hirer acquires a special property in the article hired, and is regarded as the owner of it for the purpose of recovering damages. Littlefield v. Biddeford, 29 Me. 310.

C. What Constitutes Defect.

Defect must impair safety and conven-

ience of way.—A defect, such as this section contemplates, must be something which unlawfully impairs the reasonable safety and convenience of the way. Bartlett v. Kittery, 68 Me. 358; Moriarty v. Lewiston, 98 Me. 482, 57 A. 590; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

A party can recover of a town damages for an injury received on the highway, only when the defect or want of repair will prevent the way from being safe and convenient for travel. Stinson v. Gardiner, 42 Me. 248.

Safety and convenience for travelers is the rule by which it is to be determined, whether or not there be any defect or want of repair, or sufficient railing upon highways. Stinson v. Gardiner, 42 Me. 248.

The law has not prescribed what imperfections in a road will constitute the defect referred to in this section. Merrill v. Hampden, 26 Me. 234; Lawrence v. Mt. Vernon, 35 Me. 100; Morse v. Belfast, 77 Me. 44.

And determination of such question is matter of opinion or judgment.—What obstructions or other inconveniences will render a highway defective, so as to make the town liable, if an injury is thereby occasioned, are to a considerable extent a matter of opinion or judgment. And it is one in relation to which persons of ordinarily good judgment are liable to differ. Weeks v. Parsonsfield, 65 Me. 285; Moriarty v. Lewiston, 98 Me. 482, 57 A. 590; Wells v. Augusta, 135 Me. 314, 196 A. 638.

Which should ordinarily be submitted to jury.—What is a defect and whether any defect however slight exists are to be submitted to the jury. Merrill v. Hampden, 26 Me. 234; Lawrence v. Mt. Vernon, 35 Me. 100.

The evidence of the condition of a road, for a defect in which a civil action is tried, must be submitted to a jury, who find whether there is or is not a defect. Merrill v. Hampden, 26 Me. 234.

If the requirements of this section are properly met by the plaintiff, he is entitled to have the jury determine whether or not a defect existed in fact. Morneault v. Hampden, 145 Me. 212, 74 A. (2d) 455.

Whether a road is or is not out of repair is generally for the jury to decide. Card v. Ellsworth, 65 Me. 547.

It is not for the road commissioner to determine whether the actual condition which he saw or ought to have seen was a defect, but a question of fact for the jury. McGown v. Washington, 108 Me. 541, 81 A. 1092.

It is for the jury to ascertain from the evidence whether a sidewalk was defective within the meaning of this section. Radcliffe v. Lewiston, 109 Me. 368, 84 A. 639.

It should be borne in mind that the location of the defect in the notice and in the writ are two separate and distinct things. A proper notice is undoubtedly a condition precedent to recovery. When that is offered in proof the court must pass upon its sufficiency. If found wanting the case can make no further progress. If found sufficient the plaintiff proceeds with the testimony. If the testimony fails to show that the injury was caused by the same defect described in the notice the suit must fail. Upon this as upon other points in the case the burden is upon the plaintiff and this question is clearly one of fact to be submitted to the jury. Chapman v. Nobleboro, 76 Me. 427.

The statute does not render the liability of the town dependent upon the causes which produced the defect in the road; nor does it prescribe or define what imperfections in a road would render it defective. It is the proper business of the jury to determine whether or not the road was safe and convenient, as the statute requires. Tripp v. Lyman, 37 Me. 250.

But it may be question of law.—It is difficult to determine what would be and what would not be a defect that would render a town responsible in damages for an injury received upon a highway. It may be a question of law or of fact, or of law and fact combined, according to circumstances. If the evidence is clear and undoubted, it may be so palpable a case that the law can easily settle it one way or the other. The doubtful cases belong usually to the jury, for decision. Nichols v. Athens, 66 Me. 402.

And there are certain conditions of a road which cannot legally be regarded as defects; such as because the road is hilly; or not all wrought; or because crowded with persons or teams. Card v. Ellsworth, 65 Me. 547.

This section applies as well to obstructions placed upon as to defects inherent in the structure of the road. Davis v. Bangor, 42 Me. 522.

The defect or want of repair is either inert matter left incumbering the street, upon or over it, or structural defects endangering the public travel. For injuries arising from any or all of these causes towns are made civilly responsible by this section. Davis v. Bangor, 42 Me. 522.

Towns are liable, within the meaning of this section, as well for injuries received in consequence of obstructions placed or deposited in the highway as for

inherent defects. Frost v. Portland, 11 Me. 271.

But a town is not to be held liable under this section for temporary obstructions placed in the way by persons using the way. Davis v. Bangor, 42 Me. 522, holding that a wagon loaded with ornamental or other trees, standing for sale in a street, with the horses attached and under the care of the driver does not constitute a defect or want of repair for which the city would be liable for damages resulting therefrom, the road being in other respects safe and convenient.

And obstructions created in repairing way are not defects.—Towns are not liable for injuries occasioned by such obstructions as are necessarily created in highways in order to repair them, provided reasonable measures are taken to notify travelers of their existence. Such obstructions are not in any proper sense defects. They are the necessary means to a lawful end — means necessary to the performance of a duty imposed by law — and when reasonable notice of their existence is given, create no liabilities on the part of towns for injuries occasioned by them. To hold towns liable in such cases would be to impose a penalty, not on their negligence, but on the means necessary to the performance of a legal duty. Morton v. Frankfort, 55 Me. 46.

This section must receive a reasonable construction; and time and opportunity must be afforded to towns to fulfill their duty. Thus, although highways are to be kept in repair at all seasons of the year, yet if they become defective, as they often do, by reason of causes not under their control, parts of them are often necessarily impassable, while undergoing repairs. All that can then be required is, that travelers should be warned of their danger, by a railing, or by something else which may answer the same purpose. Frost v. Portland, 11 Me. 271.

But travelers must be warned of such obstructions.—While, for the purpose of repairs, towns may break up and temporarily obstruct the passage over their public ways and sidewalks, they are not authorized to leave their streets or sidewalks, while undergoing repairs, in such a condition as unnecessarily to expose those who may pass upon them to inconvenience or danger. At such times, ways should not be left during the night without some temporary railing, or other means of protection, or some beacon to warn passengers against such uncommon danger. By neglecting to adopt such reasonable precautionary measures for the safety of citizens and travelers, towns are equally culpable, and as liable as they are when their ways are permitted to become unsafe from want of repairs. Kimball v. Bath, 38 Me. 219.

When the town concludes that the repairs can be made without interrupting the travel, and proceeds to repair without making known that the way is not in a condition to be used, or that there is danger in using it, its liability for injuries, as in other cases, must be regarded as continuing; although it may not have been guilty of any other neglect, than that or permitting the way to be out of repair. Its general liability under the statute is not in such cases suspended. Jacobs v. Bangor, 16 Me. 187; Morton v. Frankfort, 55 Me. 46.

Mere slipperiness does not constitute defect.—Mere slipperiness of the surface of a highway or sidewalk, caused by either ice or snow, is not a defect for which towns and cities are liable. Smyth v. Bangor, 72 Me. 249. See now § 92, re no liability for slippery sidewalk.

In the absence of a statutory defect in the way, liability cannot be predicated on the negligent failure of the street commissioner or other municipal officer to remove, guard or give public notice of the ice formation. Wells v. Augusta, 135 Me. 314, 196 A. 638.

As a matter of law, mere slipperiness of the surface of a way caused by either ice or snow is not a defect or want of repair within the meaning of this section, and towns and cites are not liable for personal injuries or property damage resulting therefrom. Wells v. Augusta, 135 Me. 314, 196 A. 638.

Whether caused by artificial means or by rain or snow.—This section does not impose a different standard of responsibility on municipalities when ice is formed in the highways from artificial causes and not by the natural fall of rain or snow. Wells v. Augusta, 135 Me. 314, 196 A. 638.

And this not altered by existence of small bridges in ice or snow.—The strictness of the rule that mere slipperiness caused by ice or snow is not a defect within the meaning of this section is not relaxed because small ridges, waves or irregularities exist in the ice or snow which in themselves would not render the way unsafe if it were not slippery. Wells v. Augusta, 135 Me. 314, 196 A. 638.

Properly constructed ditches not defects.—Our statutes require that highways shall be made reasonably safe and convenient for travelers. But in the construction of such ways it often becomes

necessary, as well as proper, to construct ditches along their sides, and when this is properly done it is not the province of the court to declare them defects. Morse v. Belfast, 77 Me. 44.

Nor are cross-walks.—A cross-walk in itself is not a defect. Emery v. Waterville, 90 Me. 485, 38 A. 534.

Where a railing is necessary to the security and safety of travelers, the want of such railing is a defect. Willey v. Ellsworth, 64 Me. 57.

The liability of a city does not end with the constructed portion of the way. Its duty is to use due care in protecting the travelers on the way from perils beyond. Bean v. Portland, 109 Me. 467, 84 A. 981, holding that where the way in question bordered on the land of a railroad where a pit was located, the city was liable for an injury resulting from a fall due to its failure to erect a railing along the way.

Town may be liable for defect which frightens horse.—If the defect described in a writ for the recovery of damages for an alleged injury by reason of such supposed defect, and attempted to be shown by evidence, is one which to a human mind is purely imaginary, but from its character is calculated to terrify horses, trained so as to be suitable for ordinary use, and, without any want of common care and skill in the driver, he is injured in consequence of such defect, the town might be liable, if it were seasonably notified. Merrill v. Hampden, 26 Me. 234.

Even though ultimate injury occurs on spot not defective.—If a defect in a highway causes such a breaking and derangement of a safe and proper vehicle that the direct and natural consequence is the frightening of a kind and well broken horse, and putting him beyond the control of a reasonably skillful and careful driver, the town liable to repair the highway and having notice of the defect must answer for the consequences, although the ultimate injury occurs on a spot where the way may be smooth and not defective. The stumbling of a safe, gentle, and well-broken horse running violently down hill, in consequence of an accident caused by a defect in the highway, cannot be reckoned as a contributory cause. Willey v. Belfast, 61 Me. 569.

But a town is not accountable for every obstruction upon its highways which would produce fright in horses. Card v. Ellsworth, 65 Me. 547.

And such obstruction must be likely to frighten horse, etc.—A plaintiff injured when his horse became frightened cannot recover unless the object of fright presents an appearance that would be likely to frighten ordinary horses; nor unless the appearance of the object is such that it should reasonably be expected by the town that it naturally might have that effect; nor unless the horse was, at least, an ordinarily kind, gentle and safe animal, and well broken for traveling upon our public roads. Card v. Ellsworth, 65 Me. 547; Nichols v. Athens, 66 Me. 402.

When grade stake considered a defect.—As one of a line of grade stakes and necessary to the purpose of construction of a walk, a stake cannot be regarded as a defect while temporarily there, during the continuance of the work. But when allowed to remain long after its necessary use and purpose has been accomplished, it renders the walk defective. Jones v. Deering, 94 Me. 165, 47 A. 140.

Way held defective.—See Holt v. Penobscot, 56 Me. 15; Whitney v. Cumberland, 64 Me. 541; Buck v. Biddeford, 82 Me. 433, 19 A. 912.

Way held not defective.—See Farrell v. Oldtown, 69 Me. 72; Witham v. Portland, 72 Me. 539; Morgan v. Lewiston, 91 Me. 566, 40 A. 545; Haggerty v. Lewiston, 95 Me. 374, 50 A. 55.

D. Defect Must Have Been within Traveled Portion of Way.

Town not liable unless defect is within limits of way.—The defect or want of repair must be in the way in controversy, not outside of the same. The statute imposes no liabiliy for defects which the town is under no obligation to repair. Willey v. Ellsworth, 64 Me. 57.

Where an injury is caused by a snow-drift outside the public highway and which the town cannot rightfully remove, it is not responsible for an injury occasioned thereby. Its liability for non-repair is only commensurate with its right and duty to repair. The town is liable for injuries occasioned by defects in the road and for those alone. Willey v. Ellsworth, 64 Me. 57.

A town is not liable for injuries occurring without the limits of the road legally located or legally existing. Doyle v. Vinalhaven, 66 Me. 348.

If individuals build the sidewalk of their own motion outside the limits of the road, they could not thereby render the town liable for its defect, though they might render themselves liable. Doyle v. Vinalhaven, 66 Me. 348.

And no liability unless it is within traveled portion of way.—Towns will not be liable for obstructions on the portion of the highway not constituting the traveled

path, and not so connected with it as to affect the safety of the traveled portion. Dickey v. Maine Tel. Co., 46 Me. 483; Blake v. Newfield, 68 Me. 365.

Where the injury occurred before the plaintiff reached that part of the street which was appropriated to public travel or prepared by the town for the purpose, he cannot recover. Philbrick v. Pittston, 63 Me. 477; Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

Towns are not obliged to keep the whole of a highway free from obstructions (see note to § 63) and they are not responsible for injuries occasioned by stones outside of the wrought portion of the road and beyond the ditches. Blake v. Newfield, 68 Me. 365.

Notwithstanding defect is within located limits.—Even though there be a defect or obstruction within the limits of the highway as located, if it is not in the traveled part of the road, nor so connected with it as to affect the safety or convenience of those using the traveled path, the town is not responsible for an injury sustained by one using the road for the purpose of passing to or from a private way, or his own land. Morgan v. Hallowell, 57 Me. 375; Philbrick v. Pittston, 63 Me. 477.

A person traveling upon the highway and voluntarily turning therefrom to enter upon his own premises, or private way, ceases to be under the protection of the law as soon as he leaves the traveled or wrought part of the way, though an injury happens from a defect within its located limits. Leslie v. Lewiston, 62 Me. 468.

A person not having reached the wrought part and suffering damages by a defect within the located limits of the road, is not allowed to recover of the town. Leslie v. Lewiston, 62 Me. 468.

A town is not liable where an injury is received by one in passing to or from the highway, although it is caused by a defect within the limits of the highway as located by law, but outside of the way used for public travel. Blake v. Newfield, 68 Me. 365.

When one voluntarily leaves the highway for any purpose, and in going out of it or returning into it, at a point which the town has not prepared for travel, receives an injury from an obstacle outside of the traveled path, the town is not responsible. It can make no difference whether the obstacle is without or within the limits of the way as located, provided it is so situated as not to create a danger or an inconvenience to travelers who keep within that portion of the way which is prepared for travel. Blake v. Newfield, 68 Me. 365.

A town is not liable to a traveler injured by his wagon striking a rock within the limits of the highway, but outside of the part purposely fitted for travel. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

Thus town is not liable for injury on platform leading to private land.—Towns are not legally responsible for injuries received by persons going to and from the highways over platforms that lead across the gutters to their own or their neighbor's premises because those structures have been suffered to exist within the located limits of the highway. Philbrick v. Pittston, 63 Me. 477.

The fact that the city authorities licensed the exhibition of a circus within the city does not lay the city under any obligation to furnish a safe and convenient access to the place of exhibition over private property, nor subject it to any liability for defects in the way of approach that might be selected by the circus or its patrons. Morgan v. Hallowell, 57 Me. 375.

Nor is town liable if injury occurs after traveler has passed beyond limits of way.—There can be no pretense of claim under this section where the traveler has intentionally passed beyond the limits of the street before he receives the injury. Morgan v. Hallowell, 57 Me. 375.

Railings may be necessary to prevent the wayfarer from accidentally getting off the line of safe travel in darkness or daytime, but the statute which requires cities and towns to provide them when necessary for the safety and convenience of travelers cannot be made to enure to the benefit of one who, in pursuit of his own pleasure or business, designedly leaves the street to go upon adjoining land. Morgan v. Hallowell, 57 Me. 375.

If one voluntarily leaves the highway because he finds it obstructed and impassable, and goes upon the adjoining land and there receives an injury, the town is not responsible. Blake v. Newfield, 68 Me. 365.

Unless something connected with way lures him into concealed danger.—Towns will not be liable for injuries sustained by travelers in departing from the path prescribed for travel, unless there is something connected with such way, calculated to allure, deceive, or entrap the travelers into concealed or imperceptible danger or difficulty. Hall v. Unity, 57 Me. 529.

If a passage is permitted to exist leading from the traveled part of the road

across a natural stream, or by a watering trough, made or erected without authority of the town, to enable travelers to water their animals, within the limits of the highway, the town will not be liable for an injury to a traveler in using such passageway for this purpose, if its actual condition is obviously such as it appears to be, though it would be liable if such sideway contained concealed dangers, pitfalls, or man-traps, into which the traveler had been allured by the desire and prospect of refreshing his horse. Hall v. Unity, 57 Me. 529.

E. Defect Must Have Been Sole Cause of Injury.

Town not liable unless defect was sole cause of injury.—The town is not liable unless the accident occurred, and the injury was occasioned, by the defect in the way or bridge alone. Moulton v. Sanford, 51 Me. 127.

In an action against a city under this section it must appear that the defect in the street was the sole cause of the injury. If any other cause for which the plaintiff was responsible, or any other independent cause for which neither the plaintiff nor the city was responsible, proximately contributed to the injury, he cannot recover. Cleveland v. Bangor, 87 Me. 259, 32 A. 892; Carleton v. Caribou, 88 Me. 461, 34 A. 269; Barnes v. Rumford, 96 Me. 315, 52 A. 844; Whitman v. Lewiston, 97 Me. 519, 55 A. 414; Morneault v. Hampden, 145 Me. 212, 74 A. (2d) 435.

The fault of the town must be the sole cause of the injury. Mosher v. Smithfield, 84 Me. 334, 24 A. 876.

The language imposing the liability does not fairly embrace any case in which any other efficient cause, besides the defect in the way, contributes to produce the injury. Moulton v. Sanford, 51 Me. 127.

Towns are liable for injuries to travelers only when they are received "through a defect" in the way. When any other efficient, independent cause contributes directly to produce the injury, it cannot with certainty be said to have been received through the defect. For, in such case, the other cause might have produced the injury if there had been no defect; and the damages caused by both jointly cannot be apportioned between them. Moulton v. Sanford, 51 Me. 127.

Even though injured party was not at fault.—A town is not liable if the defective way is not the sole cause of the injury even though the co-operating and contributing cause is nothing for which the person injured is at all in fault and over which he could exercise no agency or control. Perkins v. Fayette, 68 Me. 152.

If there are two efficient, independent, proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received "through such defect;" and the town is not liable therefor. And it makes no difference that the traveler himself was in no fault. Moulton v. Sanford, 51 Me. 127. See Coombs v. Topham, 38 Me. 204; Anderson v. Bath, 42 Me. 346.

Persons may suffer injury while traveling upon highways which are not safe and convenient and the injury may not be occasioned by the want of repair, or by their own want of ordinary care to avoid it. In such case, they cannot recover damages of those who were in fault by neglecting to keep the way safe and convenient. This section was not designed to relieve them from damages thus occasioned by making those responsible whose duty it was to have repaired the ways. Moore v. Abbot, 32 Me. 46.

But remote contributing cause will not preclude liability.—As a defect in the way, when it is only a remote cause of the injury, will not render the town liable, so if the defect is a proximate cause, a remote contributing cause will not prevent the town from being liable. All discussion of remote causes is therefore out of place. For the rule goes to this extent only—that if, besides the defect in the way, there is also another proximate cause of the injury, contributing directly to the result, for which neither of the parties is in fault, the town is not liable. Moulton v. Sanford, 51 Me. 127.

Party injured must have exercised ordinary care.—The liability imposed by this section has been qualified by holding it necessary that the party injured should have been in the exercise of ordinary care. Crumpton v. Solon, 11 Me. 335.

The traveler has duties as well as the town, and one of the most obvious is to use his eyes to see what is before him on the road or on its sides, which may require care in passing. Gleason v. Bremen, 50 Me. 222.

Commensurate with the circumstances.—The traveler cannot, when he perceives that a way is under repair and much incumbered for that purpose, and that but a narrow and difficult passage is open for him, claim to drive with the same rapidity, and to exercise only the same attention, which would be allowable in a

smooth and unincumbered way. He is bound to exercise that degree of watchfulness and caution which men of ordinary prudence would under such circumstances. If he does that, the town will be responsible, whether it has or not unnecessarily obstructed the way. Jacobs v. Bangor, 16 Me. 187.

And town not liable if accident happens through his neglect or fault.—If the accident happens through the neglect or fault of the plaintiff, he cannot recover. Johnson v. Whitefield, 18 Me. 286.

Nor is the town liable if the accident was due to the negligence of the driver of the vehicle in which the plaintiff was riding. Winchester v. Perry, 122 Me. 1, 118, A. 515.

In ordinary actions at common law, the negligence of a driver is not to be imputed to a passenger who exercises no control over the team, but actions against towns for injuries caused by defective highways, being statutory actions, stand upon a ground of their own, unaffected by this rule. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

The driver of a vehicle should be on the lookout for such temporary obstructions as are liable to exist at any time through the necessity of making repairs upon the streets and of making excavations for various purposes. Whitman v. Lewiston, 97 Me. 519, 55 A. 414.

But contributory fault must be an efficient and proximate cause of accident.—The contributory fault which will bar a recovery against a town for a defective highway must be one of the efficient and proximate causes of the accident, and not a mere condition or occasion of it. Cleveland v. Bangor, 87 Me. 259, 32 A. 892.

And a traveler has a right to presume that the streets are safe and convenient for travel. Bean v. Portland, 109 Me. 467, 84 A. 981.

The traveler has a right to presume that the way is as it obviously appears to be, free from hidden snares or pitfalls, and if it proves otherwise, and he is injured thereby, without fault on his part, the town will be liable. Hall v. Unity, 57 Me. 529.

Pedestrians have a right to assume that an apparently well constructed brick sidewalk on a prominent residential street would have a continuously smooth and level surface free from any obstruction. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790.

Defective way held cause of injury.—See Page v. Bucksport, 64 Me. 51.

F. Liability Extends Only to Lawful Travelers.

A town is not liable for injuries to a person not a "traveler" upon the street within the purview of this section. Philbrick v. Pittston, 63 Me. 477. See § 63 and note.

This section, providing a remedy for any person injured through any defect or want of repair in any public way, relates to those only for whom ways are established, to wit, "travelers." O'Connell v. Lewiston, 65 Me. 34. See § 63 and note.

To enable the plaintiff to recover in an action under this section, he must have been "a traveler." McCarthy v. Portland, 67 Me. 167; McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

Nor one for whose use and safety way was not established.—When this section provides that any person who suffers damage through any defect in a way, shall have a remedy, it necessarily refers to that class of persons who were, not only in the lawful use of it, but for whose use and whose safety and convenience it was established. Leslie v. Lewiston, 62 Me. 468.

And liability exists only when travel was lawful.—In order to be within the protection of this section, one must be a lawful traveler. One who is traveling in defiance of a statutory prohibition is unlawfully upon the highway. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

It is only lawful travelers on the highway who have a cause of action against the municipality to recover damages for injuries received through defects in the highways. Blanchard v. Portland, 120 Me. 142, 113 A. 18.

Thus, where the injured person was traveling in an unregistered automobile, there can be no recovery under this section. And all of the occupants are under the same disability. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

Neither the owner of nor the passengers in an unregistered motor vehicle can recover damages from a town for injuries received on account of a defective highway while operating or riding in such unregistered motor vehicle. Blanchard v. Portland, 120 Me. 142, 113 A. 18.

If the automobile in which the plaintiffs were riding was not registered according to the requirements of law, it was unlawfully upon the way; those who were using it were not travelers but trespassers; and they cannot maintain an action under this section. And it would not help the individual plaintiffs that they may not have known that the automobile was not duly registered. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

The liability of a town for defects in its ways and bridges is purely statutory and the duty owed by the town is only to lawful travelers. The occupants of an unregistered automobile are not lawful travelers so far as the town is concerned, and therefore no duty is owed to them by the town except to refrain from wilful injury. Blanchard v. Portland, 120 Me. 142, 113 A. 18.

And it was formerly held that there could be no recovery for an injury received while unlawfully traveling on the Lord's day. See O'Connell v. Lewiston, 65 Me. 34; Buck v. Biddeford, 82 Me. 43, 19 A. 912. But see now c. 113, § 154.

And question of causal connection is not involved.—Where the person injured is traveling in violation of law, it is not a question of causal connection between the violation of the statute and the happening of the accident. The decision does not rest upon the common-law principle of casual conection. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

In actions against towns to enforce a statutory liability for defects in the highways, it is not a question of causal connection in either case between the violation of the statute and the happening of the accident; the unregistered car and the unlicensed operator are alike expressly forbidden by the statute to pass along the highway (see c. 22, §§ 13, 65). So far as a town is concerned the unlicensed operator is not a lawful traveler unless in any particular case he is within the exception found in c. 22, § 65. Blanchard v. Portland, 120 Me. 142, 113 A. 18.

Travel must be consistent with purpose of street.—The person injured must have been traveling for some purpose or other for which streets are required to be constructed and kept in repair. A person may be a traveler, but not such within the contemplation of the statute, which gives compensation for an injury occasioned by a defect in a highway. He may be within or without the protection of the statute, and still be a traveler. McCarthy v. Portland, 67 Me. 167; McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

When persons cease to use a way for the substantial purposes for which it is established and appropriate it to uses foreign thereto, they can no longer claim to be "travelers" or be entitled to the remedies provided in behalf of "travelers." O'Connell v. Lewiston, 65 Me. 34.

Thus, children using a street as a playground cannot be regarded as travelers. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

And towns are not liable for injuries to them.—If the plaintiff was using the road as a playground, and not as a traveler, the use thereof for purposes of travel must be regarded as entirely suspended, and she was using the ground for an object altogether different from that contemplated by the statute, and the town is not liable. Stinson v. Gardiner, 42 Me. 248.

A boy may be within the protection of this section while running upon a street, if going to or returning from school, but not if participating at the time in a game of ball being carried on in the highway. McCarthy v. Portland, 67 Me. 167.

When children appropriate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road. Stinson v. Gardiner, 42 Me. 248.

Nor are they liable for injuries to persons using highway for racing.—A plaintiff cannot recover, if he was using the highway at the time of the accident for the purpose of racing; not because racing horses is an unlawful thing, but because it was a purpose for which the streets were not designed to be used. McCarthy v. Portland, 67 Me. 167.

Where a person uses a highway wholly for the purpose of horse racing and meets with disaster, he cannot recover of a town merely because the town has not afforded him and his horse a safer and more perfect track. McCarthy v. Portland, 67 Me. 167.

One who uses the highway for the express purpose of horse racing is not a traveler to whom the municipality owes the statutory duty of keeping its streets in repair. McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

G. Evidence and Burden of Proof.

Plaintiff must prove highway not safe and convenient.—To maintain his action against the defendant town, it is incumbent upon the plaintiff, after proving the notices required by statute, to prove affirmatively that the highway was not reasonably safe and convenient for travelers at the point where the accident occurred. Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

And fact of injury is not sufficient.—The fact that a traveler sustains an injury upon a public way is competent to be considered in determining the question of the

reasonable safety of the way, but it is obviously insufficient to establish the proposition that the way was not reasonably safe. The injury may have been caused by the traveler's own carelessness, or may have been the result of a simple and unfortunate accident, and not of any defect or want of repair in the way. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790.

And evidence of other injury is not admissible.—Evidence that another person, not a party to the action; met with accident because of the same defect is not admissible. Bremner v. Newcastle, 83 Me. 415, 22 A. 382.

It is immaterial whether another person, not a party to the action, met with an accident at the place and it is immaterial whether another person thinks he would have met with one, even under the same circumstances. Bunker v. Gouldsboro, 81 Me. 188, 16 A. 543.

In an action under this section, evidence is not admissible to prove that a person, other than a party to the action, has either passed safely over the alleged defect, or has received an injury from it. Bunker v. Gouldsboro, 81 Me. 188, 16 A. 543.

The plaintiff must prove that he was traveling upon the road. Brown v. Skowhegan, 82 Me. 273, 19 A. 399.

And he must prove existence of defect.—The burden is upon the plaintiff to prove, not the cause, but the existence of the defect. Rogers v. Newport, 62 Me. 101.

And that such defect was sole cause of injury.—Among the matters which it is incumbent upon the plaintiff to establish, in order to entitle her to a verdict, is that the injury was occasioned solely by the defect in the highway. Willey v. Belfast, 61 Me. 569; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

The plaintiff must prove that the injury was occasioned by the default of the defendant alone, and not by that default and some other cause, for which the defendant is not responsible. Moore v. Abbot, 32 Me. 46.

An injury may be occasioned by the united effect of a defect in the way and of some other cause, and in such case the party injured cannot recover of those whose duty it was to keep the way in repair because he does not prove that the injury was occasioned through or by reason of such want of repair. To enable him to recover he should prove that the injury was thus occasioned, that is, that it was entirely occasioned through such want of repair. This section was not intended to impose upon towns the burden of making compensation for injuries not occasioned by their own neglect of duty. It was not intended to make them assume any portion of the risk of traveling not occasioned by their neglect. An injury cannot be determined to have been occasioned by a defect in the way so long as it remains certain that some other cause contributed to produce that injury. Moore v. Abbot, 32 Me. 46.

To enable the plaintiff to recover by virtue of the provisions of this section, he must prove an injury, and that it was occasioned by a defect or want of necessary repair of the highway. Libbey v. Greenbush, 20 Me. 47.

It is incumbent on the plaintiff to establish the fact that the driver of the vehicle was driving with due care. Mosher v. Smithfield, 84 Me. 334, 24 A. 876.

It is not only incumbent upon the plaintiff to prove that she herself was in the exercise of ordinary care, but that she must go further and show that the driver of the team was also in the exercise of due care. Barnes v. Rumford, 96 Me. 315, 52 A. 844.

And that he himself exercised ordinary care.—Among other allegations which the plaintiff must support by proof, in order to entitle him to recover under this section, is that of ordinary care. It is an affirmative fact to be established by him as an essential part of his case. Mosher v. Smithfield, 84 Me. 334, 24 A. 876; Cunningham v. Frankfort, 104 Me. 208, 70 A. 441.

The law is clear and unquestioned that the plaintiff must satisfy the jury, as an affirmative fact to be established by him as a necessary part of his case, that, at the time of the accident, the plaintiff was in the exercise of ordinary care. Gleason v. Bremen, 50 Me. 222; Morse v. Belfast, 77 Me. 44.

The burden of proof is on the plaintiff, not only to show defects in the highway, but that he was free from negligence, or in other words, using due care and skill. Merrill v. Hampden, 26 Me. 234.

And defendants are not bound to prove lack of care.—The plaintiff in an action under this section is bound to prove that he was in the use of ordinary care at the time of the accident, or he is not entitled to a verdict. The defendants are not bound to prove that his carelessness was the cause of the injury, to be relieved from liability. Merrill v. Hampden, 26 Me. 234.

The defendants are not bound to show that plaintiff's carelessness or want of

ordinary care was the cause of the injury. It must affirmatively appear that ordinary care was exercised in passing over the highway, or that the injury was in no degree attributable to any want of care on the plaintiff's part. Mosher v. Smithfield, 84 Me. 334, 24 A. 876.

In an action under this section the burden of proof is upon the plaintiff to show due care on the part of the deceased. Merrill v. North Yarmouth, 78 Me. 200, 3 A. 575.

Question of ordinary care is for jury.—The question of ordinary care on the part of the person driving must depend upon the facts as they may be developed in each case, and is one entirely for the determination of the jury. Lawrence v. Mt. Vernon, 35 Me. 100. See Crumpton v. Solon, 11 Me. 335.

And such care may be inferred from evidence.—In an action against a town for an injury alleged to have been sustained by reason of a defect in a bridge, direct and positive proof of due care on the part of the person injured is not essential, but it may be inferred by the jury from facts in evidence. Foster v. Dixfield, 18 Me. 380.

Sec. 90. Repair within 6 years, proof of way.—When on trial of any such action or indictment as provided for in section 89, it appears that the defendant county or town has made repairs on the way or bridge within 6 years before the injury, it shall not deny the location of such way or bridge. (R. S. c. 84, § 89.)

Purpose of section.—The object of this section was to obviate the necessity of strict proof of location of a way and to estop the town from denying such location, however defective, if it had made repairs thereon, and that this estoppel should be binding upon it for the term of six years. Gilpatrick v. Biddeford, 54 Me. 93.

City estopped from denying location.—The repairing of a way or bridge within six years before the cause of action accrued estops the town to deny the location of the way or bridge on which the injury occurred. The same principle applies to a sidewalk as to a way. McCann v. Bangor, 58 Me. 348.

But not from denying that way repaired and way where injury occurred are the same.—A town cannot "deny the location" of the way where the repairs are made. It may deny that the way where the injury occurred is the same way. Gilpatrick v. Biddeford, 51 Me. 182.

Determination of whether injury and repairs were on same way.—The fact that a way is "continuous" is not the only fact to be taken into consideration, in deciding whether the injury and the repairs are both upon the same way. No definite rule can be given for determining this question. It is one of fact, for the jury. The statute must be applied reasonably according to the circumstances of each case. The continuity, or apparent oneness of the way, from the place of the injury to the place of repairs, is one element to be considered. The length of time during which it has been so used is another. The distance between the two points is another, and generally a more important one. But the importance of this will depend upon the locality, whether in a city, or in the country; and whether there are intermediate crossing or intersecting roads or streets. Gilpatrick v. Biddeford, 51 Me. 182.

This section assumes the existence of a way or bridge in actual use for travel. It relates not to the original making of the road, but to its subsequent reparation. Gilpatrick v. Biddeford, 54 Me. 93.

The street commissioners entering upon land reserved by private individuals for a way and constructing or partially constructing a road or way where none existed before would not be making repairs upon a way within the meaning of the statute. Gilpatrick v. Biddeford, 54 Me. 93.

Work must have been intended for repairs.—In order to have the effect of estopping the city from denying the location of the street under this section, what was done must have been intended for repairs. Gilpatrick v. Biddeford, 51 Me. 182.

And must have been done by authority of city.—If the plaintiff would bring his case within the provisions of this section, the burden of proof was on him to show, not only that the repairs were made, but that they were made either by express authority of the city, or by its duly authorized agents, acting within the scope of their authority. Gilpatrick v. Biddeford, 51 Me. 182.

This section gave no new powers to the officers of the town in regard to the location of highways. It assuredly was not the intention of this section to authorize highway surveyors or street commissioners, on their own motion, to bind the town or city by which they were elected, by constructing a way in whole or in part

where none previously existed. Gilpatrick v. Biddeford, 54 Me. 93.

On a way de facto.—This section assumes the existence of a way de facto, in actual use at the place of the injury. The repairs must be shown to have been made upon such way. Gilpatrick v. Biddeford, 51 Me. 182.

Repairs by commissioner presumed to have been by city.—Repairs made upon streets in actual public use, by a street commissioner of a city, may well be presumed, in the absence of any evidence to the contrary, to have been made by the city. His acts, upon matters within the scope of the trust committed to him, are, prima facie, the acts of the city. Whether they are within the general authority conferred upon him, is a question for the jury. Gilpatrick v. Biddeford, 51 Me. 182.

Section not applicable to indictment under § 63.—This section cannot be considered as preventing a town from denying the existence of a highway, when indicted for neglecting to repair it under § 63. The section has reference to actions to recover damages for injuries received by reason of any neglect to repair the way. State v. Strong, 25 Me. 297.

The word "injury" in this section clearly refers to a private one suffered by some person, and not to the public inconvenience occasioned by the neglect to repair. State v. Strong, 25 Me. 297.

This section does not prevent the town, when indicted for neglecting to repair a highway, from denying its existence. State v. Bradbury, 40 Me. 154.

Nor to suit for damages for defective ditches under § 151.—This section expressly refers to § 89, which section creates the well-known cause of action for a defective way when a defect in the highway is the sole cause of any injury, upon previous notice of defect and notice of claim. It is not applicable to a suit claiming damage alleged to be due to a defective ditch or ditches under § 151. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Applied in Willey v. Ellsworth, 64 Me. 57; Doyle v. Vinalhaven, 66 Me. 348.

Stated in State v. Wilson, 42 Me. 9.

Cited in Mayberry v. Standish, 56 Me. 342.

Sec. 91. No liability if load exceeds 6 tons.—No town is liable for such an injury described in section 89 when the weight of the load, exclusive of the carriage, exceeds 6 tons. Proof of its weight must be made by the plaintiff. (R. S. c. 84, § 90.)

See c. 22, § 97, re special permits.

Sec. 92. Slippery sidewalk no cause of action.—No town is liable to an action for damages to any person on foot on account of snow or ice on any sidewalk or crosswalk nor on account of the slippery condition of any sidewalk or crosswalk. (R. S. c. 84, § 91.)

Section does not relieve town from duty to remove snow and ice.—While municipalities are exempted from liability under the conditions set forth in this section, their obligation to remove accumulations of snow and ice still remains. Ouelette v. Miller, 134 Me. 162, 183 A. 341. See § 70.

Sec. 93. Railroad company notified of suit against town for defective crossing.—In an action against a town for damages alleged to have occurred by reason of a defect in a railroad crossing constituting part of a highway which said town is obliged to keep in repair, the railroad company owning or occupying such crossing may be notified of the pendency of the suit and take upon itself the defense of the same. (R. S. c. 84, § 92.)

Sec. 94. Liability of railroad company.—In such trial described in section 93, after notice as provided therein, if the plaintiff recovers and the jury finds specially that the damage was occasioned by the fault of such company, it shall be liable to the defendants in said suit in an action of debt for all damage and costs paid by them. (R. S. c. 84, § 93.)

Cross reference.—See c. 23, § 35, re defects in state and state aid highways.

Section does not take away common-law remedy.—This section does not expressly or by implication take away any remedy which might have been available to the plaintiffs at common law. The statute remedy is simply cumulative; and the party may pursue either. Portland v. Atlantic & St. Lawrence R. R., 66 Me. 485.

Sec. 95. Notice to company.—The notice required in section 93 shall be by copy of the writ served upon the company at least 30 days before the sitting of the court in which it is returnable or by such notice as the court may order after entry. (R. S. c. 84, § 94.)

Sec. 96. One indictment only at a term. — One indictment only for neglect to open ways or to keep them in repair shall be presented against a town at the same term of court; but it may contain as many counts as are necessary to describe all portions of ways alleged to be defective. The word "highway" used therein includes town ways, causeways and bridges. (R. S. c. 84, § 95.)

Cross reference.—See c. 10, § 22, sub-§ VI, re definition of "highway".

Quoted in part in Waterford v. Oxford County Com'rs, 59 Me. 450.

Sec. 97. Agents appointed to expend fines; duties.—All fines imposed under the provisions of sections 93 to 96, inclusive, shall be appropriated to the repair of such ways. The court imposing them shall appoint one or more agents to superintend their collection and application. Within 3 months after collection, they shall make return of their doings to the clerk of the court, to remain on file for the inspection of those interested, and subject on their motion to be audited and corrected by the court. If an agent is guilty of gross neglect of duty or fraudulently misapplies or retains the fine, he forfeits to the town double its amount, to be recovered by indictment. (R. S. c. 84, § 96.)

An agent need not be appointed at the same term at which the fine was imposed.
State v. Oxford, 65 Me. 210.

Sec. 98. Clerk of court to certify fines to assessors; collected and paid.—When a fine is imposed on a town under the provisions of sections 93 to 96, inclusive, the clerk of the court shall certify it forthwith to the assessors; who shall assess the amount thereof as other town taxes, certify the same to said clerk and cause the amount to be collected by their collector, who shall pay the same to such agent at such time as the court orders. If not paid by that time, the clerk on application of such agent shall issue a warrant for its collection, as the treasurer of state may do for the collection of a state tax. (R. S. c. 84, § 97.)

Certification not condition precedent to assessment of amount of fine.—This section requires that when a fine is imposed the clerk is to certify it "forthwith" to the assessors. This provision, however, is not a condition precedent to the assessment of the amount, but is merely directory to the clerk. State v. Oxford, 65 Me. 210.

Assessors need not be notified until fine becomes absolute.—When a fine is imposed upon a condition to be complied with at a future time, it is sufficient to notify the assessors "forthwith" after the fine has become absolute by the failure of the town to comply with the condition. State v. Oxford, 65 Me. 210.

Notice to assessors not defective for failure to state term at which fine imposed.—When a fine is imposed upon a town convicted under an indictment for a defective way, a notice of such fine from the clerk to the assessors is not defective merely from an omission to state the term at which such fine was imposed. State v. Oxford, 65 Me. 210.

Sec. 99. If way not repaired in 4 months, fine collected. — If the assessors neglect to make such assessment provided for in section 98 and to certify it to the clerk and the defective way is not repaired to the acceptance of such agent within 4 months after notice of the fine, the court may issue a warrant to collect of the town the fine and costs or the unpaid part thereof. (R. S. c. 84, § 98.)

Sec. 100. When gates, bars and fences on ways removed.—Any person may take down and remove gates, bars or fences upon or across any highway or town way, unless they are there to prevent the spread of infectious disease

or were placed there by license of the county commissioners or municipal officers of the town. To those granting such license, a person aggrieved by such removal may apply and, on proof that such erections were made by their license, they may order them to be replaced by the person who removed them. (R. S. c. 84, § 99.)

Stated in State v. Strong, 25 Me. 297.

Sec. 101. Logs, lumber, obstructions removed; sale; nuisance.—When logs, lumber or other obstructions without necessity are left on such ways described in section 100, any road commissioner or municipal officer may remove them; and he shall not be liable for loss or damage thereof unless occasioned by design or gross negligence. When no one appears to pay the expense and trouble of removal, he may sell at public auction so much thereof as is sufficient for the purpose, which charges of sale, posting notice of the time and place of sale in 2 public places in the town 7 days prior thereto. The person through whose neglect or willful default they were left may be prosecuted as for a nuisance. (R. S. c. 84, § 100.)

Cross reference.—See c. 141, §§ 1, 2, re nuisances.

No private person has a right to place or cause any obstruction which interferes with the right of the public on any part of the highway, within its exterior limits. Dickey v. Maine Tel. Co., 46 Me. 483.

Obstruction must have been unnecessarily left on way.—Where the obstruction is of value, the right of removal exists, not when merely left, but only when unnecessarily left on the highway. Davis v. Bangor, 42 Me. 522.

The section impliedly assumes that articles of value may be necessarily left in the street; but when so left, they must not unnecessarily remain. Davis v. Bangor, 42 Me. 522.

This section relates to obstructions caused by valuable property left unnecessarily upon the highway. They must possess value, else they would not be the subject of sale. Davis v. Bangor, 42 Me. 522.

And commissioner cannot dispossess person in possession of team and wagon.—If a loaded team is standing in the highway, under charge of the owner or driver, or if the owner is sitting in his wagon, the team or wagon stationary in the street for temporary purposes, the commissioner cannot, under the provisions of this section, forcibly dispossess the person in possession of the team or wagon, and sell the horses and wagon or other vehicle, as obstructions left, when they were not left, but were under the charge of the owner, and temporarily stationary for purposes lawful in themselves. Davis v. Bangor, 42 Me. 522.

Obstruction to be removed from traveled portion of way.—The removal under this section is to be of the obstruction, whatever its character, from off the traveled part of the road. Davis v. Bangor, 42 Me. 522.

This section and § 72 relate to different things.—At the first glance this section and § 72 would seem to be much the same. But the two sections relate to entirely different matters. Section 72 shows that in building or repairing highways the surveyor may remove any erection, natural or artificial, which narrows the way; while this section relates to things deposited on the way, which may be removed and sold. Bartlett v. Kittery, 68 Me. 358.

Sec. 102. Persons convicted of nuisance to pay, if materials not sufficient.—When anything has been adjudged to be a nuisance and to be abated under the provisions of section 101, and the materials of which it is composed do not, on sale as aforesaid, produce sufficient to pay the charges of prosecution, removal and sale, the court may order the deficiency to be raised by levy on the personal property of the person convicted of causing such nuisance. (R. S. c. 84, § 101.)

Sec. 103. When buildings and fences on a street or way become bounds; estoppel created by writing under seal.—When buildings or fences have existed more than 20 years fronting upon any way, street, lane or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. When the bounds can be so made certain, no time less than 40 years will

justify their continuance thereon, and on indictment and conviction they may be removed. Persons owning lands beside a highway or town way on which are buildings or fences that encroach within the limits of said way may, by a writing under seal by them signed and acknowledged and recorded in the registry of deeds for the county or registry district in which the land lies, admit to the municipal officers of the town in which said way exists the true bounds or limits of said way and the extent of their wrongful occupancy thereof. Thereafter such persons, and all claiming title under or through them, shall be estopped from asserting any right to the continuance of such buildings or fences within said limits for the full term of 40 years from the date of such deed. (R. S. c. 84, § 102.)

Cross reference.—See c. 141, § 13, re fences and buildings fronting on public ways may not be nuisances.

The statute is the only one in this state which in this respect limits the common-law force of the maxim, nullum tempus occurrit regi. Stetson v. Bangor, 73 Me. 357; Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 A. 902.

The effect of this section is to invest in the abutting landowner a prescriptive right to continue his building within the street limits, without liability for interfering with the public easement. State v. Goldberg, 131 Me. 1, 158 A. 364.

The adverse possession of land by maintaining buildings thereon for forty years gives title to the occupants to the extent of such occupancy. Kelley v. Jones, 110 Me. 360, 86 A. 252.

This section gives title to the land so occupied only to the extent of the occupation. Phinney v. Gardner, 121 Me. 44, 115 A. 523.

And rights-of-way may be lost by such possession.—Under this section rights-of-way in streets which have been actually laid out and the damages for which have been paid by the municipality may be lost by adverse possession arising from the erection and maintenance of buildings or fences for more than forty years. Harris v. South Portland, 118 Me. 356, 108 A. 326.

Buildings and fences only erections which may be deemed true boundaries.—Buildings or fences fronting upon such land are the only erections mentioned in this section which will be deemed the true boundaries, even to give an adverse right of possession, as against records or monuments. Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 A. 902.

And no adverse rights acquired unless they have existed for at least 20 years.—No adverse rights can be acquired, as against the public, in such ways or lands where the boundaries thereof cannot be made certain by records or monuments, without such erections existing for a period of at least twenty years. Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 A. 902.

And if limits can be made certain they must have existed for 40 years.—Where the limits of land dedicated to public use can be made certain by records or monuments, under this section, a period of at least forty years must elapse to give any adverse right of possession. Even buildings or fences fronting on such land will not be deemed the true boundaries, as against records or monuments, unless they have been there so long. Stetson v. Bangor, 73 Me. 357. See Whittier v. McIntyre, 59 Me. 143.

And the way must have existed for a like period.—A forty years' continuance of a fence is not to dictate the line of a road laid out less than forty years ago. Such cannot be the policy or implication of this section. Heald v. Moore, 79 Me. 271, 9 A. 734.

Plaintiff in action under § 89 can establish limits of way in manner referred to in this section.—This section declares that when buildings or fences have existed more than twenty years fronting upon any way, street, lane, or land appropriated to public use, the bounds of which cannot be made certain by records or monuments, such buildings or fences shall be deemed the true bounds thereof. In an action to recover damages caused by a defect in the highway under § 89, the plaintiff can establish the limits of the way in the manner referred to in this section. Hutchings v. Sullivan, 90 Me. 131, 37 A. 883.

Only portion of building on ground can be deemed bounds of way.—When this section declares that buildings which have for more than twenty years fronted upon a public way or street shall be deemed the bounds thereof, it means that portion of the building which rests upon the ground and does in fact bound and limit the way, and not the cornices or other projections which, far above the heads of travelers, may happen to overhang the sidewalk.

Farnsworth v. Rockland, 83 Me. 508, 22 A. 394.

Outside stairway held part of building.—Structures such as outside stairways, designed to furnish necessary access from a street to buildings adjacent the stairways, have been held to be a part of the "building" within the meaning of this section. State v. Goldberg, 131 Me. 1, 158 A. 364.

Indictment and conviction not exclusive method of removal.—See Whittier v. McIntyre, 59 Me. 143.

Applied in Pillsbury v. Rockland, 85 Me. 419, 27 A. 267; Bradford v. Hume, 90 Me. 233, 38 A. 143.

Cited in State v. Beal, 94 Me. 520, 48 A. 124; Burnham v. Holmes, 137 Me. 183, 16 A. (2d) 476; Baker v. Petrim, 148 Me. 473, 95 A. (2d) 806.

Sec. 104. Towns to maintain guide-posts at crossings of ways.—Towns shall erect and maintain at all crossings of highways, and where one public highway enters another, substantial guide-posts not less than 8 feet high, and fasten to the upper end of each a board on which shall be plainly printed in black letters on white ground the name of the next town on the route and of such other place as the municipal officers direct, with the number of miles thereto, and a figure of a hand with the forefinger pointing thereto. If erected on state or state aid highways, such guide-posts and guideboards shall be of such reasonable form, height and design as the state highway commission may direct; and for any neglect hereof towns are subject to a fine of not less than $10 nor more than $50, to be recovered by complaint or indictment. Trial justices within their county shall have jurisdiction concurrent with municipal courts and the superior court; and of all fines provided for by this section, and recovered on complaint, ½ shall go to the prosecutor and ½ to the county where the town committing the offense is situated. (R. S. c. 84, § 103.)

Cross references.—See c. 23, § 27, re powers of state highway commission; c. 23, § 150, re regulation of advertising signs; c. 131, § 21, re malicious injuries to monuments, guideboards, etc.

The duty to erect and maintain guide-posts devolves primarily on the town. Studley v. Geyer, 72 Me. 286.

Section not applicable to local roads.—Statutory "highways" are those leading from town to town. Local or cross roads wholly within one town are not within that term, and this section is not applicable to such roads. State v. Swanville, 100 Me. 402, 61 A. 833.

Sec. 105. Neglect by town or plantation officers.—If the municipal officers of any town unreasonably neglect to cause a guide-post to be erected in their town as provided by law, they forfeit $5 for each month's neglect, to be recovered in an action on the case by any person suing therefor. Plantations assessed in state or county taxes and their officers are under the same obligations and subject to the same penalties in these respects as towns. (R. S. c. 84, § 104.)

Cross reference.—See c. 101, § 10, re return of inventory of polls and estates for basis of taxation.

Officers not required to furnish funds for erection of guide-posts.—The liability of the officers arises only upon and after their own neglect. But the municipal officers of a town are not required to furnish funds for the performance of any duty imposed on the town by § 104. Studley v. Geyer, 72 Me. 286.

And they are not liable for neglect unless town furnishes funds.—The town must raise the needed funds to erect the guide-posts and if this is not done, the officers have been guilty of no neglect whatever. Studley v. Geyer, 72 Me. 286.

Sec. 106. Excavations near ways; responsibilities.—Persons desiring to make an excavation near a street or public way may make written application to the municipal officers, setting forth its nature and extent and requesting their direction thereon. Such officers shall in writing direct whether it may or may not be made and, if permitted, the manner of making it; and when so made, no liability is incurred thereby. If not so made, the person making it is liable to the town, in an action on the case for all damages occasioned by the repair of

the way or paid to persons injured by defects therein caused by such excavation. (R. S. c. 84, § 105.)

Cross reference.—See § 128, re highways not to be opened without consent.

The object of this section is two-fold: 1. To guard the streets and public ways from injury by excavations, improperly made by the abuttors, by requiring them to call the attention of municipal officers to their work, and to conduct it in a manner deliberately prescribed by such officers; and, 2. To determine under what circumstances a city or town, which is compelled to pay damages under § 89, on account of a defect in its streets or ways thus caused, may have a remedy over against the person making the excavation. Morgan v. Hallowell, 57 Me. 375.

Verdict and judgment in action against town conclusive evidence in action under this section.—In an action by the town against those by whom the excavation was made, after notice, the verdict and judgment in the action by the party injured against the town are conclusive evidence of the existence of the defect in the highway, the injury to the individual while he was in exercise of due care, and the amount of the injury. Portland v. Richardson, 54 Me. 46.

Sec. 107. Ice bridges; injuring.—Ice bridges may be constructed and maintained by persons for their own and the public use across any river or body of water when its ordinary navigation is obstructed by ice. Whoever willfully destroys such bridge to prevent its use forfeits not less than $5 nor more than $20, to be recovered by complaint, ½ to the complainant and ½ to the state. No person shall take down or injure any fence or occupy any land for the construction or use of such a bridge without consent of the owner first obtained. (R. S. c. 84, § 106.)

Sec. 108. Removal of trees at or near railroad crossings.—Whenever the state highway commission deems that trees, bushes or other encroachments within the limits of a public way obstruct the view at railroad crossings or where one public way enters another and thereby renders such way dangerous to travelers, it shall cause the removal of such obstructions. (R. S. c. 84, § 107.)

See c. 46, §§ 89-92, re railroad crossings.

Sec. 109. Placing of turf in streets, etc.—Placing turf in the traveled part of any highway, street or town way by any municipality, its employees or contractors is prohibited, unless said turf is cut fine or covered up. Upon violation of the provisions of this section, the state highway commission shall cause payment of state money for highways to such municipality to be withheld until such turf is removed at the expense of the municipality and the way restored to the satisfaction of the state highway commission. (R. S. c. 84, § 108.)

Sec. 110. Contracts for construction of bridges.—Whenever any bridge within the state is to be constructed or repaired at a cost of $1,000 or more and the cost of such construction or repairs is to be paid wholly or in part by the state, the contract for the same shall be awarded as follows: the state highway commission, county commissioners or municipal officers within the county where said new construction or repairs are to be made shall advertise for sealed proposals not less than 2 weeks in such papers as the state highway commission may direct, the last advertisement to be at least 1 week before the time named therein for the closing of such bids. Sealed proposals submitted in accordance with said advertisement shall be addressed to the state highway commission or county commissioners having the construction in charge and shall remain sealed until opened in the presence of said commission or commissioners at such times as the state highway commission may direct.

Whenever, in the judgment of the state highway commission, county commissioners or municipal officers, concrete may be used in repairing or building of bridges or the substructure thereof, Maine granite shall be set up as an alternate competitive construction material and said officials shall require alternate bids

to be presented, one based on the use of concrete and the other on use of granite on all or such part of the project as may be deemed feasible from an engineering standpoint. (R. S. c. 84, § 110.)

Sec. 111. Bond for performance of contract. — No contract shall be awarded unless its faithful performance shall be secured to the state by a bond in penal sum of not less than 20% of the amount of the contract. (R. S. c. 84, § 111.)

Applied in Foster v. Kerr & Houston, 133 Me. 389, 179 A. 297.

Excavations in City Streets.

Cross Reference.—See c. 23, § 30, re enforcement by the state highway commission whenever highways maintained by the state are affected.

Sec. 112. Opening of streets in cities.—Whenever the paving or repairing of any street or public highway shall have been ordered by the city government, the commissioner of public works or such officer as the city government may appoint shall duly serve upon owners of property abutting on such street or highway and upon all corporations, persons, firms and bridge or water districts occupying such street or highway, a notice directing such owners, corporations, persons, firms and bridge or water districts to make such sewer, water and conduit connections or other work as may be designated, within 60 days from date of such notice. At the expiration of the time fixed and after such street has been paved or repaired, no permit shall be granted to open such street for a period of 5 years except as hereinafter provided. (R. S. c. 84, § 112.)

Sec. 113. Permits for digging or making excavations in emergency. —If the owners, corporations, persons, firms or bridge or water districts comply with the notice given under the provisions of the preceding section, the commissioner of public works or such officer as the city government may appoint may, in the case of an emergency, grant and renew permits for digging or making excavations in the driveways of any of the public highways of the city for the laying of gas, water, steam, oil, gasoline, petroleum or any other liquid, or ammonia pipes or conduits or for any other lawful purpose. Every permit shall specify the time prescribed by resolution or ordinance or, when no time is prescribed, the commissioner of public works or such officer as the city government may appoint shall specify a time during which said excavation may remain open, the place where such excavation may be made and the number of square yards of surface which may be disturbed. (R. S. c. 84, § 113.)

Sec. 114. Penalty.—Any person or persons, firm, corporation or bridge or water district, who shall dig or make an excavation in the driveway of any public highway without first obtaining such permit as provided for in the preceding section or who having obtained such permit shall disturb a greater area of surface than specified in such permit, may be punished by a fine of $25 for each offense. (R. S. c. 84, § 114. 1945, c. 250, § 1.)

Sec. 115. Record of permits kept; fees for excavation permits.— The commissioner of public works or such officer as the city government may appoint shall keep a record of all permits granted by him, work done by the city employees excepted. The applicant shall pay to the city treasurer for every permit for making an excavation within the driveways of any public highway paved with broken stone, concrete, bitulithic, granite block, brick, wood block, sheet asphalt or other pavements such fees as shall be established by the municipal officers, such fees not to exceed the reasonable cost of replacement of the excavated pavement. All such fees paid to the city treasurer shall be regularly accounted for by him in his report to the city government and shall constitute a special fund

for the repaving of said cuts; when such cuts are repaired by the street department, the cost thereof shall be charged to said fund. (R. S. c. 84, § 115. 1945, c. 250, § 2. 1947, c. 252, § 1. 1949, c. 196, § 2.)

See c. 50, § 19, re permits specifying time and place of opening streets.

Sec. 116. Trench or excavation left open; filling; paving protected on either side of opening. — It shall be unlawful for any person or persons, firm, corporation or bridge or water district having the right of opening or making excavations within the driveways of public highways in the city to leave open at any time any trench or excavation of a greater length than 200 feet, except by permission of the officer granting such permit; and such person or persons, firm, corporation or bridge or water district shall fully and completely fill up such trench to the surface of the roadway before making any further trench or excavation; such filling shall be puddled or rammed as the nature of the soil may require and shall be done and completed within the time designated in the permit for completing such trench or excavation; any person or persons, firm, corporation or bridge or water district failing to comply with the requirements or infringing on the prohibitions of this section may be punished by a fine of $50 for each offense; provided that these requirements, prohibitions and penalties shall not apply to excavations in grading, building or repairing any of the public highways under the supervision of the city authorities. Such person or persons, firm, corporation or bridge or water district shall protect the paving on either side of the opening by the use of sheet piling or such other means as will prevent the escape of sand from underneath it; and in determining the number of square yards of paving disturbed, there shall be included such area of paving adjoining the trench actually opened as will, in the opinion of the commissioner of public works or such officer as the city government may appoint, be required to be taken up and relaid by reason of such failure to properly protect the same. (R. S. c. 84, § 116. 1945, c. 250, § 3.)

Sec. 117. Repairing or filling trenches skillfully done.—If the work or any part thereof mentioned in the preceding sections of repairing or filling the trenches or excavations aforesaid shall be unskillfully or improperly done, the commissioner of public works or such officer as the city government may appoint may forthwith cause the same to be skillfully and properly done and shall keep an account of the expense thereof; and in such case, such person or persons, firm, corporation or bridge or water district in default as aforesaid shall forfeit and pay a penalty equal to the whole of said expense incurred by said commissioner of public works or such officer as the city government may appoint, with an addition of 50%; and thereafter, upon the completion of the work and the determination of the costs thereof, the said commissioner of public works or such officer as the city government may appoint shall issue no further or new permit to any person or persons, firm, corporation or bridge or water district so in default until he shall receive, in addition to the fees hereinabove provided, the amount of the penalty as by this section provided and determined. (R. S. c. 84, § 117.)

Sec. 118. Relaying of pavements.—When any excavation shall be made in any paved public highway and the trench shall have been filled as required by the 2 preceding sections, the commissioner of public works or such officer as the city government may appoint shall relay the pavement; the cost thereof, including materials, labor and inspection, shall be paid out of any moneys in the city treasury standing to the credit of the regular fund for this purpose. (R. S. c. 84, § 118.)

Quoted in Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1.

Sec. 119. Map or sketch of location filed.—The party applying for a permit for said excavation under the provisions of section 112 to 119, inclusive, must file a map or sketch with the commissioner of public works or such officer as the city government may appoint, showing the location and size of cuts to be made. (R. S. c. 84, § 119.)

Sec. 120. Duty of commissioner of public works.—When any excavation shall be made in any paved public highway and said pavement is repaired by a contractor or the commissioner of public works or such officer as the city government may appoint, the commissioner of public works or such officer as the city government may appoint, where said pavements are laid on a concrete base, shall have the concrete cut back on each side of the ditch a distance of 8 inches, and in issuing the permits for cutting the pavements this extra width shall be charged to the person applying for the same. (R. S. c. 84, § 120.)

See c. 23, § 30, re enforcement of provisions of §§ 112-120 by the state highway commission wherever highways maintained by state are affected.

Repair of Private Ways Owned in Common.

Sec. 121. Owners of private ways and bridges may call meetings.—When four or more persons are owners and occupants of a private way or bridge, any three of them may make written application to a justice of the peace to call a meeting, who may issue his warrant setting forth the time, place and purpose thereof, a copy of which shall be posted at some public place in the town 7 days before such time. When so assembled, they may choose a clerk and a surveyor, to be sworn, and they may determine what repairs are necessary and the materials to be furnished or amount of money to be paid by each owner therefor and the manner of calling future meetings. (R. S. c. 84, § 121.)

Sec. 122. Surveyor's duties; neglect of owners to pay.—The surveyor chosen under the provisions of section 121, with respect to such way or bridge, has the powers of a road commissioner. For refusing to accept the trust or to take the oath he forfeits $4, to be recovered as provided in section 124. If any owner or occupant, on requirement of the surveyor, neglects to furnish his proportion of labor, materials or money, the same may be furnished by the other owners and occupants and recovered of him in an action on the case. (R. S. c. 84, § 122.)

Sec. 123. Owners may contract for repair and cause money assessed and collected.—The owners, at such meeting held under the provisions of section 121, may authorize a contract to be made for making and keeping such way or bridge in repair by the year or for a less time; may raise money for that purpose and choose assessors to assess it on such owners and occupants in proportion to their interests, who shall deliver their assessment with a warrant for its collection to the surveyor. Such warrant shall be in substance such as is prescribed for collection of town taxes. The surveyor shall collect the same as town taxes are collected; and be liable for neglect of duty as town collectors are for similar neglects. (R. S. c. 84, § 123.)

See c. 92, § 74, re warrant for collection of state taxes.

Sec. 124. Penalties and process.—Money recovered under the provisions of the 2 preceding sections is for the use of such owners. In any process for its recovery, a description of them in general terms as proprietors and occupants of the way or bridge, clearly describing it therein, is sufficient. Such process is not abated by the death of any owner or by the transfer of his interest. (R. S. c. 84, § 124.)

See c. 50, § 17, et seq., re permits for digging into and opening streets and highways; c. 50, § 37, re damages occasioned thereby; c. 54, § 33, re raising of money for

roads by owners of unincorporated tracts of land; c. 131, § 34, re penalty for advertising upon rocks or other natural objects in highway; c. 131, § 21, re penalty for injuring guideboards; c. 180, §§ 40-45, re protection of ways from overflow.

Closing of Ways in Winter.

Sec. 125. Roads closed by county commissioners for part of winter months; notices; effect of order.—The municipal officers of any city, town or plantation or any 7 legal voters in any such city, town or plantation may, at any time between the 1st day of July and the 1st day of December of any year, petition the county commissioners of the county in which such city, town or plantation is located, setting forth that any road or roads in such city, town or plantation are so located with reference to population, use and travel thereon, that it is unnecessary to keep said road or roads broken out and open for travel during the months of December, January, February, March and April or any part of such months and praying said commissioners, after notice and hearing on such petition, to decide whether such road or roads shall be kept open or closed during such period or part thereof and for how many years not to exceed 10, such closing order, if made as prayed for, shall be operative.

The commissioners, upon receipt of such petition, shall fix a time and place in said city, town or plantation for a public hearing thereon and shall give notice thereof by causing attested copies of such petition and order of notice thereon to be posted in 2 public places in such city, town or plantation and published in some newspaper printed in the county at least 7 days before the time of such hearing. The commissioners, at the time and place fixed by such notice, shall hear and consider such evidence as may be offered as to the necessity of closing such road or roads to travel or directing that such road or roads be not broken out during such period, or any part thereof, and if satisfied of the necessity thereof, they may make such orders relating thereto as in their judgment the facts warrant.

Any road or roads closed or in regard to which the commissioners have made an order as to their use shall be marked by notices posted at both ends thereof, showing in substance such order or regulation, which notices shall be signed by the commissioners.

The order of the commissioners, after proceedings under the provisions of this section, shall relieve such city, town or plantation of any obligation to keep said road or roads open or broken out during the period fixed by such order; but the order of said commissioners shall not prevent any city, town or plantation from keeping said roads open if said city, town or plantation shall at any time desire to do so.

Said commissioners shall retain jurisdiction of said cause, and upon a petition by the municipal officers of said city, town or plantation or of any 7 legal voters thereof, praying for a modification or annulment of any orders promulgated by the county commissioners, filed with said commissioners, at any time subsequent to 1 year from the date of any such order, the commissioners shall give a similar notice to that above provided and fix a time for hearing thereon, within 20 days following such filing. After hearing, the commissioners may annul, alter or modify their original orders. (R. S. c. 84, § 125.)

Street Sliding.

Sec. 126. Streets for sliding.—Municipal officers may designate by appropriate signs public streets, roads or sidewalks whereon persons may slide with any vehicle. They may restrict any traffic on such public streets, roads or sidewalks and anyone violating such restrictions shall be punished by a fine of $5 for each offense. Police officers and constables shall enforce the provisions of this section. (R. S. c. 84, § 131. 1945, c. 96, § 1; c. 378, § 70.)

Sec. 127. Record of restriction made.—When streets, roads or sidewalks have been so designated under the provisions of section 126, the municipal officers shall cause such designation and such reasonable restrictions as they may adopt to be recorded in the records of the town and their action shall be in force until modified or annulled by like authority. (R. S. c. 84, § 132. 1945, c. 96, § 2; c. 378, § 71.)

Sewers and Drains.

Sec. 128. Highways not opened without consent.—Whoever digs up the ground in a highway or street to lay or repair any drain or common sewer without the written consent of the municipal officers forfeits for each offense $4 to the town. (R. S. c. 84, § 133.)

See § 106, re excavations near ways.

Sec. 129. Construction of drains; expense and control; notice; damages. — The municipal officers of a town or a committee duly chosen by the town may, at the expense of the town, construct public drains or sewers along or across any public way therein and through any lands of persons or corporations when they deem it necessary for public convenience or health; but neither the municipal officers of the town nor such committee shall construct any public sewer therein until the same shall be authorized by vote of said town and an appropriation made for the purpose, and when constructed, such sewers shall be under the control of the municipal officers.

Before the land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways. (R. S. c. 84, § 134.)

Cities and towns are only authorized not required to construct public drains. Bangor v. Lansil, 51 Me. 521.

This section is not to be construed as authorizing an unnecessary infringement of existing rights and privileges. It is the duty of the municipal officers to exercise the power thus conferred in accordance with this rule. Franklin Wharf Co. v. Portland, 67 Me. 46.

Where a power is expressly conferred by statute upon a public corporation as it is in the matter of sewers by this section, it carries with it by implication the powers necessary for its proper performance and also the corresponding duties and obligations which grow out of the exercise of the power. State v. Portland, 74 Me. 268.

Authority to lay out and construct sewers is in municipal officers.—The authority conferred by this section, instead of being placed in the power of the city council, is expressly conferred upon the municipal officers, an entirely distinct tribunal, although the municipal officers in a city, composed of the mayor and alderman, may be a constituent part of the city council. But their action, to be of any avail, must be separate. Atwood v. Biddeford, 99 Me. 78, 58 A. 417.

And not in city as corporation.—By virtue of this section, the authority to lay out and construct public drains and sewers, as well as the subsequent control over them, is clearly vested, not in the city or town as a corporation, but in the "municipal officers," as representatives of the general government. There is no statute in this state conferring such authority upon the city or town, or upon any officials as agents of the city or town. Nor is such authority necessarily incident to the exercise of its corporate powers or the discharge of its corporate duties. Gilpatrick v. Biddeford, 86 Me. 534, 30 A. 99; Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100; Atwood v. Biddeford, 99 Me. 78, 58 A. 417.

This section requires the exercise of judicial discretion and judgment on the part, not of the town or its inhabitants, but of the particular officers mentioned. Estes v. China, 56 Me. 407.

Provision being made by general statute law for the laying out and construction of public drains and sewers by the municipal officers, no such authority can properly be claimed as necessarily incident to the town in the exercise of its corporate powers, or the performance of its corporate duties. Bulger v. Eden, 82 Me. 352, 19 A. 829; Atwood v. Biddeford, 99 Me. 78, 58 A. 417.

As to the determination of the question of the necessity of a public sewer, and as to its location, size and plan of construction, a town in its corporate capacity has no voice, duty or responsibility. These duties are imposed by this section, upon

the municipal officers of a city or town, that is, in the case of a city, the mayor and aldermen. Keeley v. Portland, 100 Me. 260, 61 A. 180.

This section imposes no duty upon a town as such to build sewers. The construction of sewers is not within the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers at the expense of a town. Brunswick Gas Light Co. v. Brunswick Village Corp., 92 Me. 493, 43 A. 104.

There is no general statute authorizing towns in their corporate capacity to lay out or construct drains or sewers. It is only when such drains have been constructed and persons have paid for connecting with them, as provided in § 143, that the town becomes responsible in regard to maintaining and keeping the same in repair, and assumes responsibilities in reference thereto. Bulger v. Eden, 82 Me. 352, 19 A. 829; Atwood v. Biddeford, 99 Me. 78, 58 A. 417. See § 143 and note.

And action by city is ultra vires.—The act of the city, in its corporate capacity, in laying out and constructing sewers which created a nuisance upon the plaintiff's land as alleged in his writ, was ultra vires, and therefore void. The city cannot be made liable for such an unauthorized act. Atwood v. Biddeford, 99 Me. 78, 58 A. 417.

But officers may confer with council.—By virtue of this section, the authority to lay out and construct public drains is vested in the municipal officers, and the exercise of their authority does not require the assent of the other branch of the city government, but the work must be done at the expense of the city, and the act of appropriating and raising the money required to defray this expense does involve the co-operation of both branches of the city council. In making their adjudication upon the necessity of a given sewer, the mayor and aldermen are not subject to the direction or control of the city council, but in performing such judicial functions it would not be illegal, but often highly proper and necessary, to confer with the other branch of the council respecting the amount of the appropriation reasonably available for that purpose. Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100.

And order by officers not invalidated by assent of council.—An order of the mayor and aldermen for the construction of a common sewer is within the power conferred upon them by this section and is not invalidated by the superfluous assent of the common council. Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100.

The action of municipal officers, as a judicial board, must be taken with formality and entered of record. Parol evidence cannot supply a record, and parol evidence is inadmissible to prove the action of the board, unless the record is incomplete, incorrect, or lost. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

And construction must be authorized by vote of town.—Under this section, the authority to construct public drains or sewers along or across any public way is vested, not in the city or town of their location, but in the municipal officers. Authority for such construction must be authorized by the vote of the town and an appropriation made for the purpose. Obviously the construction of sewer extensions falls within these provisions. Arsenault v. Anson, 129 Me. 447, 152 A. 627.

Municipal officers do not act as agents of town.—The municipal officers, in the performance of the duties and in the exercise of the authority conferred by this section, act not as agents of the town but as public officers, deriving their power from the sovereign authority. They act upon their own responsibility and are not subject either to the control or direction of the inhabitants of the town, but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction, and performing duties imposed by general law. Bulger v. Eden, 82 Me. 352, 19 A. 829; Gilpatrick v. Biddeford, 86 Me. 534, 30 A. 99; Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100; Atwood v. Biddeford, 99 Me. 78, 58 A. 417.

Though chosen and paid by the town, and for many purposes its agents, yet the officers do not sustain this relation in reference to the duties imposed by this section. In this respect they are a part of the municipal government, in the performance of their public duties, and are not servants or agents of the municipality by whom they are chosen and paid, rendering their principals liable for their acts. Bulger v. Eden, 82 Me. 352, 19 A. 829.

As the municipal officers act judicially under authority given them by the state to lay out public drains and sewers, they are in no sense agents of the city; and the city or its agents subsequently in charge of the maintenance and repair of such drains and sewers are not in a legal sense continuing the same work commenced by the municipal officers. Such officers and such city agents are accountable to different

authorities and no privity exists between them. Kidson v. Bangor, 99 Me. 139, 58 A. 900.

But as public officers of the state.—In the performance of all of the duties of locating sewers, determining as to their size, grades, connections and outlets, the municipal officers do not act as representatives or agents of the municipality by which they were chosen, but as public officers of the general state government, entrusted with discretionary powers which are to be exercised by them in a quasi judicial capacity. Keeley v. Portland, 100 Me. 260, 61 A. 180; Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

For whose acts town is not responsible.—In the exercise of the power conferred by this section, municipal officers constitute a special governmental tribunal for the exercise of a special governmental function and, for their doings their mistakes, their lack of good judgment in laying out and constructing a sewer, their town is not responsible. Googin v. Lewiston, 103 Me. 119, 68 A. 694.

Municipal officers, constructing a sewer pursuant to the authority conferred upon them by this section, act not as agents of the city or town but as public officers, for whose torts the municipality is not liable. Arsenault v. Anson, 129 Me. 447, 152 A. 627.

Third persons, injured either by negligence, carelessness or unskilfulness of the officers while in the performance of duties imposed upon them by this section cannot invoke against their municipality the rule of respondent superior. Bulger v. Eden, 82 Me. 352, 19 A. 829.

By simply electing municipal officers to perform the duties required by this section, and appropriating and expending money therefor, the town incurs no liability for damages caused by the misconduct of such officers. It has only performed its functions as a public agency of the state in obedience to general law. Gilpatrick v. Biddeford, 86 Me. 534, 30 A. 19.

The town has no duty whatever in relation to the construction of public drains or sewers which renders it liable in an action for damages growing out of such construction. The municipal officers of towns are constituted a tribunal by this section, whose duty it is, whenever they deem it necessary for public convenience or health, to construct public drains or sewers along or across any public way at the expense of the town, and to have control of the same. Bulger v. Eden, 82 Me. 352, 19 A. 829.

Payment for construction to be made from municipal treasury.—A proper system of drainage so directly concerns the public health that the legislature has deemed it just and right to equalize the burden of constructing sewers by requiring payment to be made from the municipal treasury. Gilpatrick v. Biddeford, 86 Me. 534, 30 A. 19.

Sewer may be extended across flats of river to point below low water mark.—A city has a right under this section to extend its sewer across the flats of a river to a point below low water mark. Attwood v. Bangor, 83 Me. 582, 22 A. 466.

And officers have right to construct outfall for sewer in public dock.—Under the general authority conferred by this section upon the municipal officers of towns and cities to improve the public drainage and sewerage in their municipalities, they have the right to construct a suitable outfall for a sewer in the public dock below low water mark, whenever they deem it necessary for "public convenience or health." Franklin Wharf Co. v. Portland, 67 Me. 46.

The power of the municipal officers is limited in this section by the demands of "public convenience or health," which obviously require that the refuse matter and impurities in large cities should be deposited and dissipated in the sea, which is the great receptacle provided by nature for the offscourings of the land. Franklin Wharf Co. v. Portland, 67 Me. 46.

But such right strictly construed.—The right to build the sewer and outlet implies the right to use them for the purposes for which they were intended, to wit, for the collection and discharge of the debris of that part of the city, where they should be constructed, into the dock below low water mark. But it is to be borne in mind that the right to do this being in contravention of the right of the public, at common law, to use the sea as a public highway, should be construed strictly and made to harmonize, as nearly as may be, with this paramount right of the public; for the right of navigation is not subordinate to the right of sewerage. Franklin Wharf Co. v. Portland, 67 Me. 46.

And this section does not authorize the municipal officers to transfer a nuisance from the city to low water mark, or to create one there, but it does enable them to conduct the rubbish and impurities from a particular portion of the city to a point in the sea where they would ordinarily be so distributed and dissipated as not to create a nuisance. Franklin Wharf Co. v. Portland, 67 Me. 46.

Nor to permanently obstruct navigation.—The right of the city to construct an outfall for its sewer in the sea does not include the right to create a nuisance, public or private; it is a right to make deposits temporarily, and not a right to obstruct navigation permanently. Franklin Wharf Co. v. Portland, 67 Me. 46.

And officers must remove deposits obstructing navigation and becoming injurious to public health.—The municipal officers under this section have the right to construct sewers opening into the public docks of the city, and to use them in a reasonable manner for conducting and depositing therein refuse matter and impurities, but it is their duty to cause such docks to be cleared of such deposits, whenever they become an obstruction to navigation, or injurious to the public health. If they neglect to do this within a reasonable time, they are guilty of creating a public nuisance and are liable to an indictment; and if such obstruction causes damage to the owners of wharves by diminishing the depth of water about them and thereby impairs their use for the purposes for which they were constructed and have been used, causing inconvenience and injury not common to the public, they are guilty of imposing a nuisance upon the wharf owners, and become liable to an action of tort therefor. If the injury to the wharf owners is merely an injury to the right of navigation in common with the public, the defendants will not be liable in a civil suit. Franklin Wharf Co. v. Portland, 67 Me. 46.

Stated in part in Auburn v. Paul, 110 Me. 192, 85 A. 571; Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Cited in Davis v. Bangor, 101 Me. 311, 64 A. 617.

Sec. 130. Public sewer or drain crossing right-of-way of railroad. —Whenever a public drain or sewer is located and about to be constructed under the general provisions of law across the right-of-way of any railroad, unless the municipal officers or committee of the city or town which located the drain or sewer shall agree with the corporation operating such railroad as to the place, manner and conditions of the crossing, the public utilities commission upon petition of either party, after notice and hearing, shall determine the place, manner and conditions of such crossing; all the work within the limits of such railroad location shall be done under the supervision of the officers of the corporation operating said railroad and to the satisfaction of the commission, and the expense thereof shall be borne by the city or town in which said drain or sewer is located; provided, however, that any additional expense in the construction of that part of the sewer or drain within the limits of the right-of-way of said railroad occasioned by the determination of said commission shall be borne by said railroad company or by the city or town in which said drain or sewer is located, or shall be apportioned between such company and the city or town as may be determined by said commission. Said commission shall make report of their decision in the same manner as in the case of highways located across railroads and subject to the same right of appeal. (R. S. c. 84, § 135.)

Sec. 131. Expense of construction of drains, etc. — When any town has constructed and completed a public drain or common sewer, the municipal officers shall determine what lots or parcels of land are benefited by such drain or sewer, and shall estimate and assess upon such lots and parcels of land and against the owner thereof or person in possession, or against whom the taxes thereon shall be assessed, whether said person to whom the assessment is so made shall be the owner, tenant, lessee or agent and whether the same is occupied or not, such sum not exceeding such benefit as they may deem just and equitable towards defraying the expenses of constructing and completing such drain or sewer, together with such sewage disposal units and appurtenances as may be necessary, and constructed after August 13, 1947, the whole of such assessments not to exceed ½ the cost of such drain or sewer and sewage disposal units, and such drain or sewer shall forever thereafter be maintained and kept in repair by such town. The municipal officers shall file with the clerk of the town the location of such drain or sewer and sewage disposal unit, with a profile description of the same, and a statement of the amount assessed upon each lot or parcel of land so assessed, and the name of the owner of such lots or parcels of land

or person against whom said assessment shall be made, and the clerk of such town shall record the same in a book kept for that purpose, and within 10 days after filing such notice, each person so assessed shall be notified of such assessment by having an authentic copy of said assessment, with an order of notice signed by the clerk of said town, stating the time and place for a hearing upon the subject matter of said assessments, given to each person so assessed or left at his usual place of abode in said town; if he has no place of abode in said town, then such notice shall be given or left at the abode of his tenant or lessee if he has one in said town; if he has no such tenant or lessee in said town, then by posting the same notice in some conspicuous place in the vicinity of the lot or parcel of land so assessed, at least 30 days before said hearing, or such notice may be given by publishing the same 3 weeks successively in any newspaper published in said town, the 1st publication to be at least 30 days before said hearing; a return made upon a copy of such notice by any constable in said town or the production of the paper containing such notice shall be conclusive evidence that said notice has been given, and upon such hearing the municipal officers shall have power to revise, increase or diminish any of such assessments, and all such revisions, increase or diminution shall be in writing and recorded by such clerk. (R. S. c. 84, § 136. 1947, c. 223. 1949, c. 349, § 119.)

This section applies to both towns and cities. Auburn v. Paul, 84 Me. 212, 24 A. 817.

Personal service need not be 30 days before hearing.—The section provides for the contingency of not being able to obtain personal service upon all the persons assessed by substituting therefor notice by publication or posting thirty days before the day of hearing; but it does not require personal service or its specified equivalent to be thirty days before the hearing. Upon that subject it is silent and reasonable notice is required. Auburn v. Paul, 84 Me. 212, 24 A. 817, holding 10 days' notice was sufficient.

Board created by special act must be granted special power to assess.—Where a board of public works is created by special act and it is to have and exercise all the powers, and be charged with all the duties relating to the construction, maintenance, care and control of drains and sewers, the grant of the power of taxation is not implied or incident to the power expressly granted. The board does not need the power of taxation to construct, maintain and keep in repair sewers. And, if the legislature has not granted to the board the power of taxation, i. e., the power to assess land and the owners for the benefits received by the sewer, such assessment is invalid. Auburn v. Paul, 110 Me. 192, 85 A. 571.

Validity of assessment determined by same rules as other assessments.—Where this section has been complied with, the validity of the assessment must be judged and determined by the same rules of law as those by which other assessments are judged and determined. Auburn v. Paul, 110 Me. 192, 85 A. 571.

No set time within which assessment must be made.—Examination of the statutes regulating the making of assessments discloses no limitation of time within which the assessment must be made. The legislature having failed to fix a limit, the court is without power to impose one. Auburn v. Paul, 113 Me. 207, 93 A. 289.

Assessments to be according to benefits received.—This section should be construed to mean that the municipal officers shall determine what land, or parcels of land, are benefited by the sewer or drain, and that they shall assess upon such lots or parcels, according to the benefits received by such lots or parcels, such sums as they deem just and equitable, that is, equitable and proportionate. The fair implication of the language is that the assessments are to be according to the benefits received by the lots or parcels, as compared with the benefits received by the other lots or parcels. Auburn v. Paul, 110 Me. 192, 85 A. 571.

And section not subject to objection that it prescribes no rule of assessment.—Statutes authorizing assessments according to the benefits conferred upon the property assessed, are not subject to the objection that they prescribe no rule or standard of assessment, because the property to be assessed is designated, and the standard of assessment is fixed. The burden is to be borne by the property benefited, according to the benefits received. Auburn v. Paul, 110 Me. 192, 85 A. 571.

No appeal to jury need be provided.—This section merely imposes a tax for benefits, involving no question arising under the exercise of eminent domain, and

no appeal to a jury need be provided for. Auburn v. Paul, 84 Me. 212, 24 A. 817.

Cited in Gardiner v. Camden, 86 Me. 377, 30 A. 13.

Sec. 132. Hearing; assessment; arbitration.—Any person not satisfied with the amount for which he is assessed under the provisions of the preceding section may, within 10 days after such hearing, by request in writing given to such clerk, have the assessment upon his lot or parcel of land determined by arbitration. The municipal officers shall nominate 6 persons who are residents of said town, two of whom selected by the applicant with a third resident person selected by said 2 persons shall fix the sum to be paid by him, and the report of such referees made to the clerk of said town and recorded by him shall be final and binding upon all parties. Said reference shall be had and their report made to said clerk within 30 days from the time of hearing before the municipal officers as provided in section 131. (R. S. c. 84, § 137.)

This section is not invalid because the owner of the land is not given the right of appeal. When the statute merely imposes a tax for benefits involving no question arising under the exercise of eminent domain, no appeal need be provided. Auburn v. Paul, 110 Me. 192, 85 A. 571.

The assessment for sewers is the same as any tax assessed by the legislature, within its constitutional limits, the exercise of the sovereign power, from which no appeal lies, except when given by statute. Auburn v. Paul, 110 Me. 192, 85 A. 571.

Section gives right to hearing before disinterested tribunal.—This section, by giving a party aggrieved the right to have the amount of his assessment determined by arbitration, gives him a right to a hearing before a disinterested court or board, according to the rules of law and the procedure of our courts. Auburn v. Paul, 110 Me. 192, 85 A. 571.

And there can be no legal assessment until opportunity is had for such hearing.—The award of arbitrators made without notice of hearing and hearing, in the absence of waiver by the party claiming to be thus aggrieved, is a nullity. In such a case, the party has not had the benefit of the right, in the nature of an appeal, accorded him by statute. Until he has had an opportunity to be heard before unprejudiced arbitrators and they have duly made their report, there is no legal assessment upon which proceedings for the enforcement of an assessment can rest. Auburn v. Paul, 113 Me. 207, 93 A. 289.

Referees act judicially.—It was the evident intent of the legislature, by this section, to provide a tribunal before which a party assessed for the construction of a sewer might have determined, by proceedings in the nature of an appeal, the amount that he should be assessed for the expense of the construction of the sewer, by reason of the benefit received by his land, which tribunal should act judicially in determining the amount of his assessment. Auburn v. Paul, 110 Me. 192, 85 A. 571.

Interest of general taxpayer removed by section.—The legislature, by providing that the board of arbitration to fix the assessment should be citizens of the town in which the sewer was constructed, considered that the interest of the general taxpayer of the town was too minute or remote to warp or influence their judgment, and the disqualification by reason of that interest was removed by the section. Auburn v. Paul, 110 Me. 192, 85 A. 571.

But not other interest.—If the interest of any of the parties named as arbiters was more than the interest of the general taxpayer, that interest would not be removed, and they would not be competent to act. Auburn v. Paul, 110 Me. 192, 85 A. 571.

And officers must name citizens not interested except as general taxpayers.—It is the duty of the town to name six citizens of the town, who are not interested in the benefits or assessments other than a general taxpayer's, to act as arbiters, and a board selected as provided by this section is a competent and disinterested board to act judicially in determining the amount of the assessment for the construction of sewers. Auburn v. Paul, 110 Me. 192, 85 A. 571.

Sec. 133. Private drains entered into public drains. — Any person may enter his private drain into any public drain or common sewer while the same is under construction and before the same is completed and before the assessments are made, on obtaining a permit in writing from the municipal officers or the sewer board having the construction of the same in charge; but after the same is completed and the assessments made, no person shall enter his pri-

vate drain into the same until he has paid his assessment and obtained a permit in writing from the town treasurer, by authority of the municipal officers. All permits given to enter any such drain or sewer shall be recorded by the clerk of said town before the same are issued. (R. S. c. 84, § 138.)

Stated in part in Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 134. Lien on lots for payment of assessments; sale for nonpayment; redemption.—All assessments made under the provisions of section 131 shall create a lien upon each and every lot or parcel of land so assessed and the buildings upon the same, which lien shall take effect when the municipal officers file with the town clerk the completed assessment and shall continue 1 year thereafter; and within 10 days after the date of hearing on said assessment the town clerk shall make out a list of all such assessments, the amount of each and the name of the person against whom the same is assessed, and he shall certify the list and deliver it to the treasurer of said town; if said assessments are not paid within 3 months from the date thereof, the treasurer shall sell, at public auction, such of said lots or parcels of land upon which such assessments remain unpaid, or so much thereof as is necessary to pay such assessments and all costs and incidental charges. He shall advertise and sell the same within 2 years from the time said assessments are made, as real estate is advertised and sold for taxes under the provisions of chapter 92, and upon such sale, shall make, execute and deliver his deed to the purchaser, which shall be good and effectual to pass the title of such real estate; the sum for which such sale shall be made shall be the amount of the assessment and all costs and incidental expenses.

Any person to whom the right by law belongs may, at any time within 1 year from the date of said sale, redeem such real estate by paying to the purchaser or his assigns the sum for which the same was sold, with interest thereon at the rate of 20% a year and the costs of reconveyance. (R. S. c. 84, § 139. 1951, c. 343.)

Cross reference.—See c. 92, §§ 155-162, re sale of land for taxes in incorporated places.

Stated in part in Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 135. Actions for collection.—If assessments under the provisions of section 131 are not paid, and said town does not proceed to collect said assessments by a sale of the lots or parcels of land upon which such assessments are made, or does not collect or is in any manner delayed or defeated in collecting such assessments by a sale of the real estate so assessed, then the said town, in the name of said town, may maintain an action against the party so assessed for the amount of said assessment, as for money paid, laid out and expended, in any court competent to try the same, and in such suit may recover the amount of such assessment with 12% interest on the same from the date of said assessments and costs. (R. S. c. 84, § 140.)

Overassessment no defense. — Overassessment in this case, like overvaluation in other cases, cannot be interposed in the defense of a suit for a tax. Auburn v. Paul, 84 Me. 212, 24 A. 817.

Applied in Auburn v. Paul, 110 Me. 192, 85 A. 571; Auburn v. Paul, 113 Me. 207, 93 A. 289.

Sec. 136. Persons paying assessment to have lien on lot and buildings; enforcement.—When any such assessment under the provisions of section 131 shall be paid by any person against whom such assessment has been made, who is not the owner of such lot or parcel of land, then the person so paying the same shall have a lien upon such lot or parcel of land with the buildings thereon for the amount of said assessment so paid by said person, and incidental charges, which lien may be enforced in an action of assumpsit as for money paid, laid out and expended, and by attachment in the way and manner provided for the enforcement of liens upon buildings and lots under the provisions of chapter

178, which lien shall continue 1 year after said assessment is paid. (R. S. c. 84, § 141.)

Sec. 137. Application of §§ 131-136.—The provisions of the 6 preceding sections shall not apply to any city or town until they shall have been accepted by the inhabitants of such town or the city government of such city at a meeting legally called therefor. (R. S. c. 84, § 142.)

Sec. 138. Private drains, application for permits; regulations. — Abutters upon the line of a public drain existing in any city or town which has not accepted the provisions of the 7 preceding sections, and abutters upon the line of a public drain constructed prior to such acceptance, and the owner of contiguous private drains may enter and connect with such public drain on written application to the municipal officers distinctly describing the land to which it applies and paying therefor what they determine. They shall then give the applicants written permits so to enter, which shall be available to the owner of the land so described, his heirs and assigns, and shall run with the land without any other or subsequent charge or payment. Said officers shall establish such other regulations and conditions for entering public drains as they deem expedient. (R. S. c. 84, § 143.)

Under this section, abutters have in fact no absolute contract but merely a permit or license and exercise their rights with the realization that the legislature can change the law. Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

No claim can be made under permit granted stranger to title. — The permit granted under this section is to be available to the owner, his heirs and assigns, and is to run with the land. A plaintiff cannot claim under a permit granted to one who was a stranger to the title at the time it was given. Evans v. Portland, 97 Me. 509, 54 A. 1107.

This section requires that both the permit and application be in writing. Estes v. China, 56 Me. 407.

And the town cannot be liable under § 143 unless the application and permit are in writing. Estes v. China, 56 Me. 407.

To sustain an action against a town for damages caused by the want of repair of a drain, it must be affirmatively alleged and proved that the municipal officers constructed the drain; that the plaintiff, or his predecessor in title made written application to the municipal officers to enter and connect with it; and that the municipal officers gave the applicant written permit so to do. Estes v. China, 56 Me. 407.

And unless the permit is in writing, it does not run with the land. Estes v. China, 56 Me. 407.

The application must distinctly describe the land to which it applies. Estes v. China, 56 Me. 407.

Application in writing distinctly describing the land is an essential prerequisite of the municipal officers to grant the permit. The object of such a provision is manifest; to preserve a definite description of the land to which the permit applies. Evans v. Portland, 97 Me. 509, 54 A. 1107.

Stated in Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100; Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 139. Amount paid for permits adjusted.—If any person is dissatisfied with the sum which he is required to pay to enter a public drain, and within 10 days after notice thereof requests in writing to have it determined by arbitration, said municipal officers shall nominate 6 persons, any two of whom selected by the applicant with a third person selected by himself may fix the sum to be paid; and by paying it and the fees of the arbitrators, the applicant shall be entitled to a permit. (R. S. c. 84, § 144.)

Stated in part in Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 140. Drains heretofore laid.—All drains heretofore made at the expense of a town shall be maintained, managed, controlled and entered the same as if made under the provisions of sections 128 to 151, inclusive, subject to the rights of private persons therein. (R. S. c. 84, § 145.)

Cited in State v. Portland, 74 Me. 268.

Sec. 141. Connecting private drains with public, without permission.—If any person connects a private drain with a public drain or enters it by a side drain without a permit, the municipal officers may forthwith destroy such connection; and such person forfeits to the town where the offense is committed not more than $200, to be recovered by indictment or action of debt. (R. S. c. 84, § 146.)

Stated in part in Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 142. Violation of permit; nuisances.—If any person willfully or negligently violates any condition or regulation prescribed in his permit, said officers may forthwith disconnect his drain from the public drain and declare his permit forfeited; and such person, his heirs and assigns shall not be allowed to enter it again without a new permit. Whoever by the construction or use of a private drain commits a nuisance is liable therefor notwithstanding anything herein contained. (R. S. c. 84, § 147.)

Stated in part in Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Sec. 143. Drains kept in repair.—After a public drain has been constucted and any person has paid for connecting with it, it shall be constantly maintained and kept in repair by the town so as to afford sufficient and suitable flow for all drainage entitled to pass through it; but its course may be altered or other sufficient and suitable drains may be substituted therefor. If such town does not so maintain and keep it in repair, any person entitled to drainage through it may have an action against the town for his damages thereby sustained. (R. S. c. 84, § 148.)

I. General Consideration.

II. Pleading and Practice.

I. GENERAL CONSIDERATION.

The word "town", as used in this section, includes cities. Blood v. Bangor, 66 Me. 154.

This section deals explicitly with public drains and sewers. These are such as are established and constructed by the direction and in accordance with the formal action of the board of municipal officers. No subsequent ratification or acquiescence of the city can cure a substantial defect, or omission in the acts of this board. Kidson v. Bangor, 99 Me. 139, 58 A. 900.

Provision for liability is exclusive.—Whether the maintenance and repair of sewers lawfully constructed is strictly a municipal and public duty or not, there is no liability upon a town for a failure to perform this duty when a liability is fixed by statute, except such as is given by the statute. The statutory provision for liability must be regarded as exclusive of others. The legislature intended to cover the whole subject. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

City has duty to maintain and keep sewer in repair.—While the sewer continues to be used for the flow of the drainage designed to pass through it, it is the duty of the city to maintain and keep it in repair. Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100.

When an abutter has paid an assessment, or has received a permit and has connected with the sewer, he is entitled to have his drainage pass through it, and the town is bound to keep the sewer in such repair, up to its limit of capacity, that his drainage so entitled may pass through it. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

When duty is ministerial. — Although no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion under powers specially conferred by statute, the duty of keeping the common sewers in repair and free from obstructions after they have been constructed and have become the property of the city under such authority is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties, whether the city has acquired the right to maintain the

sewer by prescription, or has laid it under the statute. Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100.

And liability imposed for breach is that of insurer.—The duty imposed by this section is imperative, and the liability for its nonperformance is equivalent to that of an insurer. The section admits of no excuse. Blood v. Bangor, 66 Me. 154.

The drain must not only be constantly maintained and kept in repair, but it must be so maintained and kept in repair that it will at all times afford a sufficient flow for all drainage entitled to pass through it, or the town or city must pay the damage. To this extent the section makes the town or city an insurer. Blood v. Bangor, 66 Me. 154.

If a city has not maintained and kept in repair the sewer so as to afford sufficient and suitable flow for all drainage entitled to pass through it, that fact, in and of itself, unquestionably makes the city liable under the express provisions of this section. Keeley v. Portland, 100 Me. 260, 61 A. 180.

Whether city acts for itself or through council or board elected by council.—The statute is positive that towns and cities shall be answerable in damages for injuries caused by the want of proper maintenance or repair of public sewers. There is no limitation of liability in the statute. They are liable whether, as towns, the people administer their affairs for themselves, or whether as cities, they elect a city council to act for them. And we are unable to perceive any valid reason why they should not be liable when the care and maintenance of sewers are entrusted by law to a board elected by the city council, which is itself elected by the people. Googin v. Lewiston, 103 Me. 119, 68 A. 694.

City liable if connecting pipe stopped up in process of repairing public sewer.—This section is broad enough to reach a case where the want of repair complained of consists, not in the condition of the structure of the public sewer itself at the time of the injury, but rather in the fact that the city authorizes, in the process of repairing the public sewer, stopped up the pipe of one who has lawfully connected with the sewer. Googin v. Lewiston, 103 Me. 119, 68 A. 694.

The city must keep the main sewer open and it may not, in doing so, destroy at the point of junction the connection with an abutter's pipe and thereby render the sewer itself of no use to him. That is not keeping it "so as to afford a sufficient and suitable flow for all drainage entitled to pass through it." Googin v. Lewiston, 103 Me. 119, 68 A. 694.

But the section does not say that the town must maintain the sewer so as to afford passage to all drainage, but only to such drainage as is "entitled" to pass through it. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

By the use of the phrase "all drainage entitled to pass through it," the legislature meant, merely, all drainage which was entitled to passage through the sewer upon compliance with the provisions of the preceding sections respecting permits, connections and payments. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

And towns need not keep catch basins in such condition that surface water can pass through them. — The legislature did not mean to make towns which have catch basins liable for failure to keep them in such condition that surface water can pass through them into the sewer, but merely for failure to keep the sewer proper, within the limits of its capacity, in such condition that drainage or sewage from lands of persons who have paid to connect with it may pass through it. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

The fact that the construction of a catch basin is lawful and authorized does not necessarily lead to the conclusion that the town, by constructing it, comes under a duty to owners of land connected with the sewer to keep it open for surface water. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

A town is not liable under this section for damages caused by surface water, which is prevented from entering a sewer by the clogged and obstructed condition of catch basins, and which in consequence flows upon adjoining land and does damage. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

And catch basin may be removed. — When a catch basin has once been constructed, the town may disconnect it from the sewer, and remove it. Dyer v. South Portland, 111 Me. 119, 88 A. 398.

Municipality not liable for injury resulting from fault in original location or plan of construction.—A municipal corporation is not responsible in damages for injuries caused to a person's property by the flowing back of water and sewage from a public sewer with which the property is connected, where this injury results entirely from some fault in the location or plan of construction of the sewer, or in the general

design of the sewer system, and not at all because of any want of repair or failure of the municipality to maintain the sewer to the standard of efficiency of its original plan of construction. Keeley v. Portland, 100 Me. 260, 61 A. 180; Davis v. Bangor, 101 Me. 311, 64 A. 617.

The city is made liable by statute for a failure to perform its ministerial duty of maintaining and keeping in repair the sewer after its construction, but for fault in design or plan of construction it is not made liable by statute. Keeley v. Portland, 100 Me. 260, 61 A. 180.

Thus it is not liable for injuries caused by insufficient size of sewer.—In an action under this section there can be no recovery if there was no failure upon the part of the city to properly maintain and keep in repair the sewer in question, and it is fairly to be inferred from the evidence that the injury to the plaintiff was entirely caused by reason of the insufficient size of the sewer, and of its outlet, to take care of the drainage and surface water during and after a heavy rain. Keeley v. Portland, 100 Me. 260, 61 A. 180.

Applied in Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Quoted in part in Bulger v. Eden, 82 Me. 352, 19 A. 829; Baxter v. Waterville Sewerage District, 146 Me. 211, 79 A. (2d) 585.

Cited in Wilde v. Madison, 145 Me. 83, 72 A. (2d) 635.

II. PLEADING AND PRACTICE.

All facts necessary to constitute guilt must be affirmatively alleged and proved.—An action under this section sounds in tort, and the defendants cannot be found guilty until all the facts necessary to constitute their guilt have been affirmatively alleged and proved. Estes v. China, 56 Me. 407.

A right of action is given by this section only to those who have a right to connect with the sewer. Evans v. Portland, 97 Me. 509, 54 A. 1107.

And the plaintiff must show that he was a person entitled to drainage through the sewer; not a mere trespasser, but one who had fulfilled the requirements of law which were conditions precedent to the enjoyment of the right of drainage. Kidson v. Bangor, 99 Me. 139, 58 A. 900.

Thus he must prove that written application made and permit granted.—The plaintiff, among other things, must prove that she, or her predecessor in title, made written application to the municipal officers to enter and connect with the sewer, and that the municipal officers gave the applicant a written permit so to do. Evans v. Portland, 97 Me. 509, 54 A. 1107. See § 138 and note.

Plaintiff must prove failure to maintain or keep sewer in repair.—In an action under this section, the plaintiff must establish that the defendant failed to maintain the sewer or to keep it in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it. Kidson v. Bangor, 99 Me. 139, 58 A. 900; Keeley v. Portland, 100 Me. 260, 61 A. 180.

And that defect was not in original system.—It must be shown that the defect complained of was not in the original system established by the judicial act of the municipal officers, but that there was an actual failure on the part of the city to maintain and keep the drain in repair after its construction. Kidson v. Bangor, 99 Me. 139, 58 A. 900; Keeley v. Portland, 100 Me. 260, 61 A. 180.

And that he suffered injury by such failure.—The plaintiff must show that he suffered injury from the neglect of the city to properly repair and maintain the sewer. Kidson v. Bangor, 99 Me. 139, 58 A. 900.

Plaintiff must show drain or sewer legally established.—To entitle the plaintiff to a verdict he must establish that the drain in question was a public drain or sewer, one legally established by act of the municipal officers of the city. Kidson v. Bangor, 99 Me. 139, 58 A. 900. See Estes v. China, 56 Me. 407.

And constructed by municipal officers.—If the plaintiff is to recover by virtue of the provisions of this section, it is incumbent upon him to show that the sewer in question was constructed by the municipal officers of the city, acting not as agents of the corporation, but as public officers in obedience to general law; that the city thereby became bound to maintain and keep it in repair "so as to afford suitable flow for all drainage entitled to pass through it;" and that by reason of its failure to keep it in repair, it became liable in action for the damages sustained by the plaintiff. Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100. See § 129 and note.

The plaintiff must establish as one of the elements of his right of action, the formal and legal laying out and construction of the sewer by the municipal officers as a public drain or sewer. Kidson v. Bangor, 99 Me. 139, 58 A. 900.

Since the city is not liable for the want of repair of any sewers except such as are legally laid out, it is incumbent on the

plaintiff to show that the sewer in question was legally laid out and constructed by the city. Googin v. Lewiston, 103 Me. 119, 68 A. 694.

Sec. 144. Proceedings recorded; prosecutions. — All proceedings of municipal officers under the provisions of sections 128 to 143, inclusive, shall be at their legal meetings. A suitable record shall be made of all such permits, exhibiting the persons and lands to which they apply. Said officers have exclusive direction, on behalf of their town, of all prosecutions under the provisions of this chapter. (R. S. c. 84, § 149.)

Stated in Hamlin v. Biddeford, 95 Me. 308, 49 A. 1100.

Sec. 145. Payment for permit in 60 days; fees of arbitrators. — If any person, after the sum to be paid by him for a permit under the provisions of sections 128 to 144, inclusive, has been determined by arbitration, neglects to pay it within 60 days after notice thereof with the fees of the arbitrators, he shall have no benefit of such determination or of his permit. The municipal officers may determine the fees of the arbitrators, which shall be paid in advance, if required; and their award shall be returned by them to the town clerk and recorded with the proceedings of said officers in establishing such drains. (R. S. c. 84, § 150.)

Sec. 146. Private drain repaired, in case of owner's neglect.—If a private drain becomes so obstructed or out of repair as to injure any street or highway, and the persons using it, after notice by the road commissioner, unreasonably neglect to repair such injury, it shall be repaired by the town and the expense thereof may be recovered to the town in an action on the case against any one or more of the persons using such drain. (R. S. c. 84, § 151.)

This section applies only to a "private drain," made strictly for private use, which the owners may keep open, or fill up, at their option, leaving the street in good repair. Bangor v. Lansil, 51 Me. 521.

And the action given by this section for the expense of repairing cannot be applied to a watercourse, even if it is used for a drain. The language is clearly applicable only to drains and sewers which are strictly private property. Bangor v. Lansil, 51 Me. 521.

Sec. 147. Willfully or carelessly injuring public drains.—Whoever willfully or carlessly injures or obstructs such public drain or its outlet, or any street or highway culvert leading into it, is liable to the town where it is located in an action on the case for double the amount of injury and damages thereby caused, in addition to all other legal penalties therefor. (R. S. c. 84, § 152.)

Sec. 148. All who enter a private drain must pay their proportion. —When a person, at his own expense, lays a common drain or sewer, all who join or enter it shall pay him their proportion of such expense; and the expense of opening and repairing shall be paid by all benefited, to be determined in each case by the municipal officers, subject to appeal to the county commissioners. (R. S. c. 84, § 153.)

Section supersedes common law.—This and the following sections provide entire regulation for relief and they supersede the common law, and furnish the exclusive method of procedure. Jameson v. Cunningham, 134 Me. 134, 183 A. 131.

History of section. — See Jameson v. Cunningham, 134 Me. 134, 183 A. 131.

Sec. 149. Payment in 10 days after notice. — The municipal officers shall notify each person of the amount which he is to pay under the provisions of the preceding section, and to whom; and if not paid in 10 days, he shall pay double the amount with cost. (R. S. c. 84, § 154.)

Sec. 150. Notice given before opening for repairs. — Before such drain is opened for repairs under the provisions of section 148, all persons in-

terested shall have 7 days' notice thereof, given as the municipal officers direct; and if anyone objects and said officers think his objection reasonable, he shall not be liable to any expense therefor; if not thought reasonable or if no objection is made within 3 days, they may give written permission to proceed. (R. S. c. 84, § 155.)

Highway Ditches and Drains.

Sec. 151. Ditches, drains and culverts constructed to drain highways; control; damages.—The municipal officers of a town may at the expense of the town construct ditches, drains and culverts to carry water away from any highway or road therein, and over or through any lands of persons or corporations when they deem it necessary for public convenience or for the proper care of such highway or road, provided that no such ditch, drain or culvert shall pass under or within 20 feet of any dwelling house without the consent of the owner thereof. Such ditches, drains and culverts may be constructed under such highways or roads. Such ditches, drains or culverts shall be under the control of said municipal officers and interference therewith may be punished by a fine of not more than $500 or by imprisonment for not more than 3 months, or by both such fine and imprisonment. If such town does not maintain and keep in repair such ditches, drains and culverts, the owner or occupant of the lands through or over which they pass may have his action against the town for damages thereby sustained.

Before land is so taken, notice shall be given and damages assessed and paid therefor as is provided for the location of town ways. (R. S. c. 84, § 156. 1945, c. 219.)

Cross references.—See note to § 90, re that section not applicable to action under this section; c. 23, § 14, re location of highways filed by public utilities commission with county commissioners; c. 137, § 29, re penalty for obstructing traveled road.

This section is permissible, not compulsory. It authorizes, but does not require, the municipal officers to build ditches and drains. And they are authorized to do so only when they deem it necessary for public convenience, or for the proper care of the road. Peaks v. Piscataquis County Com'rs, 112 Me. 318, 92 A. 175.

This section gives authority to the municipal officers to construct ditches, in a similar manner to authority to construct drains and sewers in §§ 129 and 143 of this chapter. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

The action of municipal officers as a judicial board must be taken with formality and entered of record. Parol evidence cannot supply a record, and parol evidence is inadmissible to prove the action of the board unless the record is incomplete, incorrect, or lost. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32; Depositors Trust Co. v. Bruneau, 144 Me. 142, 66 A. (2d) 86.

Officers do not act as agents of town.—In the performance of their duties under this section, including location, size, outlets, and type of construction, the municipal officers do not act as agents of the town, but they act as public officers of the state in a quasi judicial capacity. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32; Depositors Trust Co. v. Bruneau, 144 Me. 142, 66 A. (2d) 86.

And town not liable for fault in original construction.—If a ditch is constructed by legal act of the municipal officers of the town, and it is not large enough to care for the water, there is no remedy under this section. It is only through failure to maintain and keep in repair such ditch, as it was constructed by the municipal officers, that the resulting damage can be recovered. The municipal officers do not act under the statute as agents, and if damage results from insufficient size of a ditch, or other fault in original plan of construction, the town is not liable. When the municipal officers act judicially as a statutory board, the town is not liable for its honest errors of judgment. There must be a failure to repair, or maintain, to the standard of efficiency of its original plan of construction. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Proceedings under this section are in the nature of eminent domain. Depositors Trust Co. v. Bruneau, 144 Me. 142, 66 A. (2d) 86.

Section affords no remedy for damages by depreciation.—This section affords no

remedy to the owner of land which is taken for a highway, for damages by depreciation in value of the tract on account of the probability that surface water collected in the road ditches will be returned onto the land below in streams. Peakes v. Piscataquis County Com'rs, 112 Me. 318, 92 A. 175.

In an action under this section, the status of the road is not the issue. The question is whether there was a statutory ditch or ditches out of repair. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Proof must show construction by municipal officers and damage from failure to repair.—This section is not violated unless there is proof by record or other evidence to show that municipal officers constructed the drain or ditch and damage resulted from a failure to maintain and repair. Austin v. St. Albans, 144 Me. 111, 65 A. (2d) 32.

Ditches on Salt Marshes.

Sec. 152. Ditches subject to jurisdiction of fence-viewers. — The owners or occupants of salt marsh in any town, enclosed by ditches for drainage and partition, shall maintain such ditches between their own and the adjoining enclosures while they continue to improve them, in proportion to the benefits accruing to each by such drainage in the judgment of the fence-viewers in such town, who shall have jurisdiction thereof the same as they have of fences; and all the duties, obligations and liabilities of adjoining owners or occupants of such marsh as to making, repairing and maintaining such ditches, and the powers, duties, penalties and fees of fence-viewers in relation thereto shall be the same as prescribed in sections 183 to 198, inclusive, in relation to partition fences. (R. S. c. 84, § 157.)

See c. 91, § 12, re appointment of fence-viewers.

Sec. 153. Width and depth of ditches; complainant to recover of delinquent owners expense of making.—Said fence-viewers shall determine the width and depth of the ditch, neither to exceed 3 feet, and the time to be allowed for making it, not exceeding 60 days; notice thereof shall be given to the delinquent proprietor and if he neglects to make or repair his portion of such ditch, it may be done by the complainant, to be adjudged sufficient by two or more fence-viewers who shall make a certificate thereof and of its value and their fees. If such a delinquent owner or proprietor neglects payment of said value and fees for 1 month after demand, the complainant may recover of him double the amount thereof with interest at the rate of 1% a month in an action on the case. (R. S. c. 84, § 158.)

Sec. 154. Improved lands; exemption from maintenance of ditches, while lands lie common.—When a ditch between improved lands of different owners is divided by fence-viewers or by the written agreement of the parties recorded in the town clerk's office where the land lies, the owners shall make and maintain it accordingly; but if any person lays his lands common, determines not to improve any part of them adjoining such ditch and gives 6 months' notice to all occupants of adjoining lands, he shall not be required to maintain such ditch while his lands so lie common and unimproved. (R. S. c. 84, § 159.)

Improvement of Marshes, Meadows and Swamps.

Sec. 155. Improvement of lands owned by several proprietors. — When any meadow, swamp, marsh, beach or other low land is held by several proprietors and it becomes necessary or useful to drain or flow the same, or to remove obstructions in rivers or streams leading therefrom, such improvements may be effected under the direction of commissioners in the manner hereinafter provided. (R. S. c. 84, § 160.)

Sec. 156. Application to superior court; notice.—The proprietors, or a majority of them in interest, may apply by petition to the superior court sitting

in the county where the lands or any part of them lie, setting forth the proposed improvements and the reasons therefor, and the court shall cause notice of the petition to be given in such manner as it may judge proper to any proprietors who have not joined in the petition, that they may appear and answer thereto. (R. S. c. 84, § 161.)

Sec. 157. Appointment of commissioners.—If upon hearing, it appears that the proposed improvements will be for the general advantage of the proprietors, the court may appoint 3 suitable persons as commissioners who shall be sworn to the faithful discharge of their duties; view the premises, notify parties concerned, hear them as to the best manner of making the improvements and prescribe the measures to be adopted for that purpose. (R. S. c. 84, § 162.)

Sec. 158. Commissioners to make improvements.—The commissioners shall, according to the tenor of the petition and order of court, cause dams or dikes to be erected on the premises at such places and in such manner as they direct; may order the land to be flowed thereby for such periods of each year as they deem most beneficial; and cause ditches to be opened on the premises and obstructions in any rivers or streams leading therefrom to be removed; and they shall meet from time to time as may be necessary to cause the works to be completed according to their directions. (R. S. c. 84, § 163.)

Sec. 159. May employ workmen, unless proprietors do the work.—The commissioners may employ suitable persons to erect the dams or dikes or to perform the other work, under their direction, for such reasonable wages as they may agree upon, unless the proprietors do the same in such time and manner as the commissioners direct. (R. S. c. 84, § 164.)

Sec. 160. Expenses apportioned among proprietors.—The commissioners shall apportion the whole charge and expense of the improvements and of executing the commission among the proprietors of the lands, having regard to the quantity, quality and situation of each proprietor's part thereof and the benefit that he will derive from the improvements, and shall assess the same upon the proprietors. (R. S. c. 84, § 165.)

Sec. 161. Collector appointed; duties and powers.—The commissioners may appoint a collector of the moneys assessed and shall give him a warrant to collect, pay over and account for the same to such person as they appoint. The collector shall have the same power and proceed in like manner in collecting the assessment as is provided for collecting town taxes. (R. S. c. 84, § 166.)

See c. 92, §§ 66-146, re collection of taxes in incorporated places.

Sec. 162. Liability of collectors.—If the collector neglects for 20 days after being thereto required by the commissioners to account for and pay over the money collected, the commissioners may recover of him the whole amount committed to him for collection which, after deducting the expense of recovery, shall be applied and accounted for by the commissioners as if it had been collected and paid over by the collector pursuant to his warrant. (R. S. c. 84, § 167.)

Sec. 163. Pay of collector and commissioners.—The collector shall be allowed such compensation for his services as may be agreed upon between him and the commissioners; and the commissioners shall be allowed such compensation as may be ordered by the court. (R. S. c. 84, § 168.)

Sec. 164. Commissioners to make return to court.—The commissioners shall, as soon as may be after the completion of the business, make a return to court of their doings under the commission, including an account of all money assessed and collected by their order, and of the disbursement thereof. (R. S. c. 84, § 169.)

Sec. 165. Commissioners to determine the amount paid by life tenant and by landlord.—When it appears to the commissioners that part of the land is held by a tenant for life, or years, they shall determine how much of the sum apportioned on that part of the premises shall be paid by such tenant and how much by the landlord or reversioner; and shall assess the same accordingly, unless the parties concerned agree to an apportionment; and every such tenant, landlord and reversioner shall be considered a proprietor. (R. S. c. 84, § 170.)

Sec. 166. Possessor of mortgaged property considered proprietor.—If any part of the land is mortgaged, the mortgagor or mortgagee in possession shall be considered the proprietor; and all sums paid by the mortgagee by order of the commissioners shall be allowed to him, as like sums paid by him for improvements. (R. S. c. 84, § 171.)

Sec. 167. Commissioners may enter premises of third parties, open floodgates and build temporary dams; damages.—When the commissioners find it necessary or expedient to reduce or raise the water for the purpose of obtaining a view of the premises or for more convenient or expeditious removal of obstructions, they may open the floodgates of a mill or make other needful passages through or around the dam thereof, or erect a temporary dam on the land of any person not a party to the proceedings and may maintain such dam or passages for the water so long as may be necessary for the purposes aforesaid.

All damages thus occasioned shall be estimated and determined by the commissioners, unless agreed upon between them and the parties concerned; and shall be paid by the commissioners out of the money to be assessed and collected by them as hereinbefore provided. (R. S. c. 84, § 172.)

Sec. 168. Appeal. — Any person, whether a party to the proceedings or otherwise interested therein or affected thereby, aggrieved by the doings of the commissioners, may appeal to the court at any time after their appointment and before the end of the term following that at which the return is made. (R. S. c. 84, § 173.)

Sec. 169. Court may affirm, reverse or alter commissioners' order; jury.—The court, upon such appeal, may affirm, reverse or alter any adjudication or order of the commissioners and make such order therein as law and justice require. All questions of fact arising upon the hearing of the appeal shall, on motion of either party, be tried by a jury in such manner as the court directs. (R. S. c. 84, § 174.)

Sec. 170. Notice required before entering upon premises of a third party; appeal.—The commissioners, before proceeding to open floodgates, or to make other passages for water through or around any dam, or to erect a dam on the land of any person not a party to the proceedings, shall give him seasonable notice in writing of their intention, to enable him to appear before them and object thereto; and if he appeals from their determination and gives notice in writing of his appeal to the commissioners or any of them, they shall suspend all proceedings upon his land until the appeal is determined; provided that the appeal is entered at the court held next after the expiration of 7 days from the time of claiming the same. (R. S. c. 84, § 175.)

Sec. 171. Exceptions.—Any person aggrieved by any opinion, direction or judgment of the court in any matter of law may allege exceptions thereto, which shall be reduced to writing; and when found to be true and not deemed frivolous, shall be signed by the presiding justice and thereupon the questions of law arising therein shall be determined as in other actions. (R. S. c. 84, § 176.)

Sec. 172. After completion of improvements, repairs made at expense of occupying proprietors.—After dams, dikes and removal of obstructions have been completed in pursuance of the provisions of sections 155 to 171,

inclusive, repairs thereon may be made on petition to the court and the proceedings shall be similar to those required for the construction of the original improvements, but such repairs shall be made at the expense of such proprietors only as occupy their lands, take crops therefrom and are actually benefited by such improvements. (R. S. c. 84, § 177.)

Sec. 173. Proprietors of low lands may hold meetings and make rules for maintenance of dikes.—In addition to the foregoing provisions for repairing dikes and dams contained in sections 155 to 172, inclusive, the proprietors of any meadow, swamp, marsh, beach or other low lands, after the completion of the dams, dikes and removal of obstructions as hereinbefore provided, may hold regular meetings when they adjudge proper and make such rules for the maintenance and preservation of such dikes and dams as their common interest require. (R. S. c. 84, § 178.)

Sec. 174. Meetings.—Upon written application of any three or more of said proprietors to any justice of the peace, he shall issue his warrant to one of the applicants requiring him to call a meeting of the proprietors, expressing in said warrant the time, place and purposes thereof. (R. S. c. 84, § 179.)

Sec. 175. Notice of meetings.—Notice of said meeting shall be served at least 14 days previous to the time appointed therefor, when all the proprietors reside in the town where the land lies, by reading the warrant to each proprietor, or giving him a copy in hand, or by leaving a copy at his usual place of abode; and in case one or more of the proprietors reside without the town or plantation, notice of such meeting shall be given them by publishing a copy of such warrant in some newspaper printed in the county or in the state paper 3 weeks successively, the last publication to be at least 14 days before the time appointed for said meeting. (R. S. c. 84, § 180.)

Sec. 176. Votes of each proprietor. — At such meeting and all other meetings of said proprietors, each shall have 1 vote for every acre owned by him and 1 vote for a fraction of an acre greater than one-half. Absent proprietors may vote by written proxy. (R. S. c. 84, § 181.)

Sec. 177. Officers; election and qualification.—At such meeting said proprietors may by ballot elect a clerk, 3 or 5 assessors, a collector and such other officers and committees as may be deemed needful and may adopt such needful by-laws and standing regulations as are not inconsistent with law; and may determine the manner of calling and notifying future meetings. The clerk, assessors and collector shall each be sworn. The clerk may be sworn by the moderator presiding at the meeting of his election. Officers elected at the annual or other meetings shall continue in office until others are chosen and qualified in their stead. (R. S. c. 84, § 182.)

Sec. 178. Record of proprietors.—At or immediately after the first meeting, the clerk shall enter in a suitable book the names of the several proprietors and the number of acres owned by each, and any subsequent transfer of interest shall also be entered by him within 3 months after it is made, if known to him. (R. S. c. 84, § 183.)

Sec. 179. Committee chosen to ascertain needed repairs. — At any meeting called for the purpose, a committee of not less than three may be chosen to investigate the condition of such dikes and dams, to ascertain what repairs are needful and report at an adjourned meeting, at which meeting the same or any other committee chosen therefor may be authorized to make needful repairs and report the expense thereof at an adjourned or other meeting. (R. S. c. 84, § 184.)

Sec. 180. Proprietors may raise money and assess same. — At any meeting called for that purpose, said proprietors may raise money for defraying common charges and for the payment of cost and expenses of such repairs as may

have been incurred under the provisions of the preceding section, which shall be assessed upon the proprietors by the assessors in proportion to their several interests and which they shall commit to the collector for collection by an appropriate warrant for its collection, directing him to pay it over to the clerk or other proper officer designated by vote of the proprietors, and the collector shall have the same power and shall collect the same as collectors of towns are authorized to collect town taxes. (R. S. c. 84, § 185.)

Sec. 181. Proprietor, declining to use land, exempt from payment of taxes.—If any proprietor declines to cultivate, use or take profit from his portion of such lands and gives written notice of his intentions to do so to the clerk of the proprietors, he shall not be regarded as liable to pay any tax or assessment on account of his portion thereof while he neglects to cultivate, use and take profit therefrom nor shall he be entitled to vote at the meetings of said proprietors. (R. S. c. 84, § 186.)

Sec. 182. Discontinuance of association.—A 2/3 part in interest of the proprietors entitled to vote at any legal meeting called for that purpose may discontinue their association, but not to take effect until 6 months after the vote for that purpose. (R. S. c. 84, § 187.)

Fences.

Sec. 183. Legal fences.—All fences 4 feet high and in good repair, consisting of rails, timber, stone walls, iron or wire, and brooks, rivers, ponds, creeks, ditches and hedges, or other things which in the judgment of the fence-viewers having jurisdiction thereof are equivalent thereto, are legal and sufficient fences; provided, however, that no barbed wire fence shall be accounted legal and sufficient unless it is protected by an upper rail or board of wood, and no division fence built after the 26th day of March, 1897, within 30 rods of any dwelling house in the construction of which barbed wire is used, shall be accounted legal and sufficient except by mutual written consent of the adjoining owners. (R. S. c. 84, § 188.)

Cross references.—See note to c. 46, § 22, re that section construed in pari materia with this section; c. 141, §§ 5, 6, re fences as nuisances.

Sufficiency of fence to be determined with reference to its purpose.—The section does not say, and therefore does not fully define, what constitutes a "legal and sufficient" fence. In the very nature of the case it could not, for what might be "legal and sufficient" for one purpose might not be for another. A fence that would be sufficient against oxen might not be effective against sheep, but it might be unreasonable to require a fence against oxen to be sheep tight. All these matters were, therefore, wisely left to the discretion of the fence-viewers so that the sufficiency of each particular line of fence could be determined with reference to the purpose which it was intended to serve. If the parties disagree as to whether a piece of fence is "legal and sufficient" to effect the result expected of it, then the fence-viewers are the tribunal designated to settle that question. They can undoubtedly determine whether the material prescribed by statute as suitable is so put together as to constitute, in the particular case upon which they are called to pass, a "legal and sufficient" fence. That is, the legality and sufficiency of a fence is determined, not upon the number of rails or wires it contains, but with reference to the particular office it is intended to serve. Cotton v. Wiscasset, Waterville & Farmington R. R., 98 Me. 511, 57 A. 785.

Barbed wire fence properly protected is legal fence.—A fence made of barbed wire "protected by an upper rail or board of wood," may, under the proviso attached to this section, be deemed a legal and sufficient fence. Gould v. Bangor & Piscataquis R. R., 82 Me. 122, 19 A. 84.

Applied in Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Sec. 184. Maintenance.—The occupants of lands enclosed with fences shall maintain partition fences between their own and the adjoining enclosures, in equal shares, while both parties continue to improve them. (R. S. c. 84, § 189.)

Applied in Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Sec. 185. If either neglects, proceedings of fence-viewers on application.—If any party neglects or refuses to repair or rebuild any such fence, which he is legally required to maintain, the aggrieved party may complain to two or more fence-viewers of the town where the land is situated, who, after due notice to such delinquent, shall proceed to survey it, and if they determine that it is insufficient, they shall signify it in writing to the delinquent occupant and direct him to repair or rebuild it within such time as they judge reasonable not exceeding 30 days. If the fence is not repaired or rebuilt accordingly, the complainant may make or repair it. (R. S. c. 84, § 190.)

This section specifies the method of compelling a delinquent to repair or rebuild his legal part of the fence, and is based upon a presupposed division between the parties; that each knows the portion he is required to build. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Delinquent must have actual notice to repair.—See note to § 186.

Applied in Eames v. Patterson, 8 Me. 81; Abbott v. Wood, 22 Me. 541; Webber v. Closson, 35 Me. 26; James v. Tibbetts, 60 Me. 557; Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

Cited in Knox v. Tucker, 48 Me. 373.

Sec. 186. Double compensation for building fence.—When the complainant has completed such fence and, after notice given, it has been adjudged sufficient by two or more of the fence-viewers, and the value thereof, with the fence-viewers' fees, certified under their hands, he may demand of the occupant or owner of the land where the fence was deficient double the value and fees thus ascertained; in case of neglect or refusal for 1 month after demand, he may recover the same by an action on the case, with interest at the rate of 1% a month, and if the delinquent owner or occupant repairs or rebuilds such fence without paying the fees of the fence-viewers, certified by them, double the amount thereof may be recovered by the complainant as herein provided. (R. S. c. 84, § 191.)

Section does not affect common-law remedy.—The remedy given by this section is cumulative, and does not affect the common-law remedy which an aggrieved party may have for damages sustained by neglect of the owner of fences to keep them in such repair as the statute requires. Eames v. Patterson, 8 Me. 81.

But indebitatus assumpsit will not lie to recover the value of a fence built. There was no promise, express or implied. It should have been an action of the case, setting forth all the facts necessary to establish a legal obligation to build the fence, a neglect to do it, the construction of it by the plaintiff, the adjudication of its sufficiency, and the neglect of the defendants to pay therefor within one month after demand. Sanford v. Haskell, 50 Me. 86.

Section strictly construed.—Being for a penalty as well as remedial, this section must be strictly construed. Abbott v. Wood, 22 Me. 541.

And plaintiff must prove compliance with all its requirements.—The plaintiff's action under this section is under a penal statute, and it is incumbent upon him to prove that all the requirements of that statute have been complied with. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

If one month has not expired after demand, a suit under this section is prematurely brought. Sanford v. Haskell, 50 Me. 86.

Deliquent must have had written notice to repair or rebuild. — Under this section it is necessary that the portion of fence belonging to a delinquent owner should first be adjudged by the fence-viewers insufficient or defective, and that the owner should have written notice from them of that fact, and be requested in writing to repair or rebuild it within 30 days as required by § 185, in order to entitle the adjoining owner to charge him with the expenses of rebuilding or repairing it himself. Eames v. Patterson, 8 Me. 81.

And actual notice is essential to recovery.—No recovery can be had unless actual notice of the adjudication to repair was given to the defendant at the time it was made. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

The necessity for actual notice to a delinquent that the fence-viewers have directed him to rebuild his portion of a partition fence, within a specified time, is so inherent in the very purpose and spirit of this section that its requirement would be implied if it was not expressed, for, without such requirement, that which was intended to do justice becomes the very means of doing injustice. But we think this statute does express such a require-

ment in the words, "They shall signify it in writing to the delinquent occupant." To "signify" is "to make known." Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

Thus no recovery if notice not received prior to expiration of time fixed for making repairs.—There can be no recovery under this section, when it only appears that the notice to repair was sent by mail within the time, but not in fact received until after the time had expired for making the repairs. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

The mailing of notice which was not in fact received by the defendant until long after the time fixed in it for building the fence had passed, is not a sufficient compliance with the statute requirement as to notice. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

But mailing may raise presumption of receipt.—If the adjudication of the fence-viewers is sent to the delinquent by mail, within such time that in the ordinary course of the mail it would reach him in time for him to comply with their directions, the fact that he did so receive it, nothing being shown to the contrary, might be presumed therefrom. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

Parol evidence as to contents of notice not admissible absent notice to produce it.—In an action brought to recover double the value of a fence built by one occupant for the other on account of his neglect, under the provisions of this section, the plaintiff cannot, on the trial, give parol evidence of the contents of the writing given by the fence-viewers to the defendant, directing him to repair or rebuild his part of the fence, without having given the regular previous notice to produce it. Abbott v. Wood, 22 Me. 541.

Complainant must have completed fence.—One of the prerequisites to a recovery under this section is that the party complaining has "completed" the fence. Cobb v. Corbitt, 78 Me. 242, 3 A. 732.

And it must have been adjudged sufficient.—An action founded on this section, to recover double the value of a fence built by order of the fence-viewers cannot be sustained, unless the fence-viewers adjudge that the fence, built by the plaintiff, is sufficient, and give notice thereof, and of the value of the fence, as ascertained by them, to the occupant so neglecting to repair or build. Abbott v. Wood, 22 Me. 541.

If the fence-viewers do not in their adjudication declare the fence built to be "sufficient," the proceedings are void. Emery v. Maguire, 87 Me. 116, 32 A. 781.

After notice to delinquent party.—The adjudication by fence-viewers, as to the sufficiency and value of a fence built by one party, is invalid, unless previous notice to the other party is given, of the time and place of their meeting, to examine into the subject, that he may have opportunity to appear before them, to present his views and protect his rights. Harris v. Sturdivant, 29 Me. 366.

The defendant must have been notified of the adjudication of the fence-viewers that the fence built by the plaintiff was sufficient, and of their appraisal thereof. He is entitled to notice of these facts before a legal demand can be made on her. Briggs v. Haynes, 68 Me. 535.

Applied in Fernald v. Garvin, 55 Me. 414; Conant v. Norris, 58 Me. 451; James v. Tibbetts, 60 Me. 557; Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Sec. 187. Division of partition fences; record of assignments by fence-viewers; fees.—When the occupants or owners of adjacent lands disagree respecting their rights in partition fences and their obligation to maintain them, on application of either party, two or more fence-viewers of the town where the lands lie, after reasonable notice to each party, may in writing under their hands assign to each his share thereof and limit the time in which each shall build or repair his part of the fence, not exceeding 30 days. Such assignment and all other assignments of proprietors of partition fences herein provided for, recorded in the town clerk's office, shall be binding upon the parties and they shall thereafter maintain their part of said fence. If such fence has been built and maintained by the parties in unequal proportions and the fence-viewers adjudge it to be good and sufficient, they may, after notice as aforesaid in writing under their hands, award to the party who built and maintained the larger portion the value of such excess, to be recovered in an action on the case against the other party if not paid within 6 months after demand. Parties to assignments under the provisions hereof shall pay the fees of the fence-viewers certified under their hands in equal proportions, and if either party neglects to pay his proportion within 1 month

after demand, the party applying to the fence-viewers may pay the same and recover of said delinquent party, in an action on the case, double the amount of his said proportion thereof. (R. S. c. 84, § 192.)

This section is entirely independent of the four preceding sections, assuming the application of § 184, and prescribes the method to be pursued by a complainant when no legal division of the partition fence exists and the parties disagree respecting their rights, namely: (1) An application of one of the parties to the fence-viewers. (2) Notice to each party. (3) Assignment of part to be built by each. (4) Limit of time in which to build. (5) Record of assignment. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Purpose of section.—The sole object of this section is to establish a method of proceeding by which a duty already existing may be legally divided, so that each may know the part he is to perform. James v. Tibbetts, 60 Me. 557.

The main object of this section is to divide the fence made or to be erected, and assign to each party his share; after which the rights and duties of the parties are to be regulated by the other parts of the statute. Eames v. Patterson, 8 Me. 81.

An adjoining owner could not be compelled by common law to build any part of a division fence. He had, however, to keep his cattle upon his own land at his peril. Accordingly, an adjoining owner could not build the entire fence and make the other pay for one-half, or any part of it. But this condition of neutrality was not satisfactory and this section was enacted to relieve it, so that if one owner refused or neglected to build his share of the fence, he could be made to do so or have it built for him. But the procedure by which this could be done was prescribed wholly by the statute. The scheme of the statute was to give a tribunal, called fence-viewers, jurisdiction over the division of fences of adjoining owners, to the extent of compelling the delinquent owner either to build his part of the fence or pay his neighbor for building it for him. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Fence-viewers must stand indifferent between the parties.—The duties of a fence-viewer under this section require a careful exercise of judgment, and are essentially judicial in their character, and there is no reason why he should not stand as indifferent between the parties, and be as free from prejudice and bias as a judge, or a juror, or a justice of the peace. Conant v. Norris, 58 Me. 451.

And fence-viewer related to party is disqualified.—A fence-viewer who is related to one of the parties within the fourth degree, by consanguinity or affinity, is disqualified to act. Conant v. Norris, 58 Me. 451.

And proceedings are void.—The fact that one of the fence-viewers who made the assignment was a brother-in-law of the plaintiff in an action to recover double the value of the fence built by him is such a disqualification as renders the proceedings void, and defects the plaintiff's right to recover. Conant v. Norris, 58 Me. 451.

Two or more owners cannot join in application to fence-viewers.—Two or more several owners and occupants of lands adjoining the land of another cannot legally join in an application to fence-viewers for a division of the partition fences. Briggs v. Haynes, 68 Me. 535.

The very language of this section presupposes a division before either party is authorized to build the whole fence. "Such fence" refers to the fence immediately alluded to in the prior part of the section. The fence there alluded to is a divided fence, and none other. The phraseology "assigning each his share thereof;" "each shall build or repair his part of the fence:" and "they shall thereafter maintain their part of said fence:" expresses the clear intent that the meaning of the phrase "such fence" is a divided fence. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

To make each party build "his share" is the primary purpose of this section. But he cannot be so required until he knows what his share is; and he cannot know this until his part is first determined, either by the fence-viewers, by agreement of the parties, or by prescription. Accordingly, to permit one party to build the entire fence before any division would be an act without the pale of the statute, and consequently void. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

Every person who may, by law, be required to build a part of a division fence, should first be given an opportunity to build it himself. Such opportunity cannot be given until by some division he is informed of what his part is. And if no such division appears, the fence-viewers had no jurisdiction. Megquier v. Bachelder, 112 Me. 340, 92 A. 187.

The notices of the fence-viewers should be unqualified and unconditional. Emery v. Maguire, 87 Me. 116, 32 A. 781.

All requirements of section must be complied with.—The right to compel an ad-

joining proprietor or occupant to build and maintain a portion of the partition fence, or to pay for such portion, if built by a coterminous proprietor, is derived from this section. Before such right can be enforced, all the requirements of the section must be complied with. Ellis v. Ellis, 39 Me. 526.

This section gives a new right and prescribes the remedy, and that remedy, to be available, must be strictly pursued. Ellis v. Ellis, 39 Me. 526.

Thus, assignments must be recorded.—To make the assignments of proprietors of partition fences binding, they must be recorded in the town clerk's office. Ellis v. Ellis, 39 Me. 526.

And delivered to parties when made.—To make valid the division, and impose upon a party the burden of building the part assigned to him within the time fixed by the fence-viewers, it must appear that they delivered to such party their assignment in writing at the time it was made, so that he may know the part he is required to build, and have the whole time limited by them in which to build it. It is not sufficient if they keep it until the last day before the time expires and then deliver it to him, or that it be recorded some days after it is made. Briggs v. Haynes, 68 Me. 535; Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

Under the provisions of this section, no recovery can be had unless actual notice of the adjudication to repair was given to the defendant at the time it was made. Goodwin v. Hodgkins, 107 Me. 170, 77 A. 711.

And provision as to time must be complied with.—This section requires the fence-viewers in writing to assign to each his share thereof, "and limit the time in which each shall build or repair his part of the fence, not exceeding thirty days." It is evident that this provision as to time must be strictly complied with, in order to lay the foundation of an action to recover double the value of the fence, under § 188. James v. Tibbetts, 60 Me. 557.

And the time limited for the completion of the fence must be definite. James v. Tibbetts, 60 Me. 557.

In the division of the line and the order for the erection or repair of the fence thereon, this section contains the whole power of the fence-viewers. Longley v. Hilton, 34 Me. 332.

And adjudication beyond that has no force.—As all the powers of the fence-viewers are conferred upon them by statute, their adjudication beyond the matters for their consideration therein found can have no force whatever. James v. Tibbetts, 60 Me. 557.

Fence-viewers not to determine right to partition fence.—Under this section the only duty imposed upon the fence-viewers, is to assign to each party his share in partition fences about which disagreement has arisen, and limit the time in which such fence shall be built. Whether or not the parties, or either of them, are entitled to a partition fence to be supported equally, is a matter which the fence-viewers are not called upon to consider, but must be settled, in the absence of any agreement or right by prescription, by the provisions of the statute applicable to the facts of each case. James v. Tibbetts, 60 Me. 557.

This section does not determine the right of either party to a division of the fence. Such was not the purpose of the legislature in enacting it. James v. Tibbetts, 60 Me. 557.

And, unless there is a legal right to a partition fence already existing, this section is not applicable, and the tribunal established by it has no duties to perform. In such a case there would be no "rights in partition fences, and their obligations to maintain them," respecting which to disagree. James v. Tibbetts, 60 Me. 557.

Nor are they authorized to make any direction beyond that to build or repair within time specified.—After assignment of the several parts of the line the fence-viewers have no authority to impose upon one party the burden of making or repairing a fence upon the line assigned to the other, nor can they excuse him in any respect from the full performance of his duty in making the fence upon the part of the line falling to him. The statute has pointed out what each is bound to do after the assignment of the several portions of the line; and the fence-viewers in this respect have only the further power to limit the time for the completion of the fence. Any direction to the owners or occupants beyond that to build or repair the fence within the time specified by law, incorporated into the assignment, would be entirely foreign to their duty as officers, and the parties would not be bound thereby. Longley v. Hilton, 34 Me. 332.

But unauthorized direction does not relieve parties from compliance with valid part of assignment.—If the assignment contains everything contemplated by the statute, expressed so clearly that the parties cannot mistake the part of the line upon which each is to build or repair, and maintain the fence, and the time is fixed when the fence is to be built or repaired, the adjoining occupants or owners are not re-

lieved from the performance of the duty required by the statute, by reason of a further requirement in the assignment wholly unauthorized. Longley v. Hilton, 34 Me. 332.

When the assignment indicates to the party clearly all that the statute demands that he should do, after an apportionment of the line, other requirements of the fence-viewers therein, distinct from those which are binding on him, will not be a protection for the omission of his legal duties, and his neglect to perform them will be at his peril. Longley v. Hilton, 34 Me. 332.

Applied in Little v. Lathrop, 5 Me. 356; Harris v. Sturdivant, 29 Me. 366; Webber v. Closson, 35 Me. 26; Cobb v. Corbitt, 78 Me. 242, 3 A. 732.

Cited in Knox v. Tucker, 48 Me. 373.

Sec. 188. Each party to build part assigned; if not, remedy for either party.—If any party refuses or neglects to build and maintain the part thus assigned to him, it may be done by the aggrieved party who is entitled to double the value and expenses, to be ascertained and recovered as provided in section 186, and shall have a lien therefor on the land owned or occupied by the party neglecting or refusing to build or maintain the partition fence assigned to him by the fence-viewers, to be enforced by attachment made within 1 year from the day of division by them. (R. S. c. 84, § 193.)

This section adopting the mode pointed out in § 186, and referring to that, the preliminary measures therein prescribed must first be pursued in order to entitle the plaintiff to recover. Eames v. Patterson, 8 Me. 81.

Remedy not to be extended by implication.—The remedy of this section being one afforded by statute, the plaintiff, to entitle himself to a recovery, must show a compliance with its provisions. Such remedy is penal as well as remedial, and will not be extended by implication to cases not clearly embraced within the provisions of the statute which the plaintiff invokes in his own behalf. Cobb v. Corbitt, 78 Me. 242, 3 A. 732.

Plaintiff must have built "part thus assigned."—The plaintiff, before he can be entitled to recover, must show that he has complied with the statute and built, of the fence in question, "the part thus assigned" to the defendant. The building of a moiety of such part is not the building of the part contemplated by the section; and a multiplicity of suits is not to be favored where one is all that was intended to be given. Cobb v. Corbitt, 78 Me. 242, 3 A. 732.

It is "the part thus assigned" which the aggrieved party is authorized to build upon refusal or neglect of the other party—and not any fraction of such part. Cobb v. Corbitt, 78 Me. 242, 3 A. 732.

Fence-viewers must have been qualified to act.—An action cannot be maintained under this section if the fence-viewers who assumed jurisdiction of the matter were not legally qualified to act. Bradford v. Hawkins, 96 Me. 484, 52 A. 1019.

Applied in Harris v. Sturdivant, 29 Me. 366; Conant v. Norris, 58 Me. 451; Briggs v. Haynes, 68 Me. 535; Emery v. Maguire, 887 Me. 116, 32 A. 781.

Sec. 189. Repair.—All division fences shall be kept in good repair throughout the year, unless the occupants of adjacent lands otherwise agree. (R. S. c. 84, § 194.)

Sec. 190. Fences may vary from the dividing line. — When in the opinion of the fence-viewers having jurisdiction of the case it is, by reason of natural impediments, impracticable or unreasonably expensive to build a fence on the true line between adjacent lands and the occupants disagree respecting its position, on application of either party as provided in section 187, and after notice to both parties and a view of the premises, they may determine by a certificate under their hands communicated to each party on which side of the true line and at what distance, or whether partly on one side and partly on the other and at what distances, the fence shall be built and maintained and in what proportion by each party; and either party may have the same remedy against the other as if the fence were on the true line. (R. S. c. 84, § 195.)

Sec. 191. Assignment of parts before fence is built.—When adjacent lands have been occupied in common without a partition fence and either party desires to occupy his in severalty or when it is necessary to make a fence running

into the water and the parties liable to build and maintain it disagree, either party may apply to the fence-viewers of the town, who shall proceed as in section 187; except that the fence-viewers may allow longer than 30 days for building the fence, having regard to the season of the year. In other respects the remedy shall be as there provided. (R. S. c. 84, § 196.)

Sec. 192. Occupant ceasing to improve, not to remove his fence if other will buy.—When one party ceases to improve his land or lays open his enclosure, he shall not take away any part of his partition fence adjoining the next enclosure improved if the owner or occupant thereof will pay therefor what two or more fence-viewers, on due notice to both parties, determine to be its reasonable value. (R. S. c. 84, § 197.)

Stated in part in James v. Tibbetts, 60 Me. 557.

Sec. 193. Liability of owner beginning to improve land lying in common.—When any land which has been unenclosed is afterwards enclosed or used for pasturing, its occupant or owner shall pay for ½ of each partition fence on the line between his land and the enclosure of any other occupant or owner and its value shall be ascertained in writing; if the parties do not agree, by two or more of the fence-viewers of the town where such fence stands; and after the value is so ascertained, on notice to such occupant or owner, if he neglects or refuses for 30 days after demand to pay it, the proprietor of the fence may have an action on the case for such value and the cost of ascertaining it. (R. S. c. 84, § 198.)

Stated in part in James v. Tibbetts, 60 Me. 557.

Sec. 194. If fence is on town line.—If the line on which a partition fence is to be made or to be divided is the boundary between two or more towns, or partly in one town and partly in another, a fence-viewer shall be taken from each town. (R. S. c. 84, § 199.)

Cited in James v. Tibbetts, 60 Me. 557.

Sec. 195. Division of fences; notice; verbal agreements.—When a fence between owners of improved lands is divided either by fence-viewers or by the written agreement of the parties recorded in the town clerk's office where the land lies, the owners shall erect and support it accordingly; but if any person lays his lands common, and determines not to improve any part of them adjoining such fence, and gives 6 months' notice to all occupants of adjoining lands, he shall not be required to maintain such fence while his land so lies common and unimproved; but all partition fences divided by parol agreement and actually built in pursuance of such agreement, including fences so built heretofore, shall be deemed legal fences as if divided by fence-viewers or written agreement, and the adjoining owners shall support their respective portions of fence under such agreement until otherwise ordered by the fence-viewers on application to them by either party. When a party has constructed his part of a fence in pursuance of a parol or written agreement or assignment of fence-viewers, no assignment shall thereafter be made by fence-viewers depriving him of the full value of such fence or any part thereof. (R. S. c. 84, § 200.)

An owner of improved lands must maintain fences according to a legal division, but, by giving notice as therein required, shall not be required to maintain such fence while his lands so lie common and unimproved. James v. Tibbetts, 60 Me. 557.

To give any party a statute right to a partition fence, the land of the adjacent owner must be either enclosed with fences or improved. James v. Tibbetts, 60 Me. 557.

Sec. 196. Foregoing provisions not applicable to house lots nor to agreements.—Nothing herein extends to house lots, the contents of which do not exceed half an acre; but if the owner of such lot improves it, the owner of the adjacent land shall make and maintain ½ of the fence between them whether he improves or not; nor do the provisions of sections 183 to 198, inclusive, make void any written agreement respecting partition fences. (R. S. c. 84, § 201.)

Sec. 197. Neglect of duty by fence-viewers.—Any fence-viewer who, when requested, unreasonably neglects to view any fence or to perform any other duties herein required of him forfeits $3 to any person suing therefor within 40 days after such neglect and is liable for all damages to the party injured. (R. S. c. 84, § 202.)

Sec. 198. Compensation; recovery.—Each fence-viewer shall be paid by the person employing him at the rate of $3 a day for the time employed. If the party liable neglects to pay the same for 30 days after demand, each fence-viewer may recover double the amount in an action on the case. (R. S. c. 84, § 203.)