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Chapter 141.

Nuisances.

Sec. 1. Common nuisances; jurisdiction to abate.—All places used as houses of ill fame, or for the illegal sale or keeping of intoxicating liquors, or resorted to for lewdness or gambling; all houses, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk or dispensed in any manner not provided for by law are common nuisances. The supreme judicial court and the superior court shall have jurisdiction in equity, upon information filed by the county attorney or upon petition of not less than 7 legal voters of his county setting forth any of the facts contained herein, to restrain, enjoin or abate the same, and an injunction for such purpose may be issued by said court or any justice thereof. Such injunction shall be recorded within 30 days in the registry of deeds in the county where said nuisance is located and shall forever run against the building or other place or structure in which said nuisance is committed. No dismissal of such information or complaint shall prevent action upon any information or complaint subsequently filed covering the same subject matter. (R. S. c. 128, § 1.)

Editor's note.—It is suggested that the notes to this section and § 2 be considered together, as many of the cases contained therein are applicable to both sections.

I. General Consideration.
II. Liquor Nuisances.

Cross References.

See c. 14, § 76, re bounds and limits of military camps; c. 25, § 215, re barber and beauty shops; c. 32, § 161, re European corn borer; c. 36, § 87, re portable mills established without license; c. 61, § 84, re premises where liquors unlawfully kept, etc., c. 68, §§ 29, 45, re buildings used in connection with narcotic drugs; c. 97, § 52, re fire safeguards.

I. GENERAL CONSIDERATION.

Section constitutional.—All the powers of a court, whether at common law or in chancery, may be called into action by the legislature in behalf of the whole people for the purpose of suppressing and preventing the continuance of common nuisances hurtful to the whole people. There is no express prohibition in the constitution of this state or of the United States against the allowance of remedies in equity to effectuate such a purpose. Given the duty of the state to protect its people from nuisances hurtful to their health, morals or peace, it would seem to follow that the state may use all the processes of law and all the powers of its courts to prevent the evil as well as to punish for it as a crime after its mischief has been suffered. Davis v. Auld, 96 Me. 559, 53 A. 118.

And a proceeding under it to restrain and enjoin a common nuisance is strictly according to "the law of the land." Davis v. Auld, 96 Me. 559, 53 A. 118. See Me. Const., Art. 1, § 6 and note.

Section increases power of court.—The legislature, by the passage of this section, intended to increase the power of the court, or at least to facilitate the exercise of such power as it already possessed in nuisance cases. Sterling v. Littlefield, 97 Me. 479, 54 A. 1108.

And it can act without prior action or indictment at law.—The legislature evidently intended to increase the power of the court in nuisance cases, or at least to facilitate the exercise of such power as it already possessed. The court is to have clear, indisputable jurisdiction in equity to restrain, enjoin or abate certain nuisances upon mere petition. No conditions or preliminaries are named. The court is authorized to exercise its amplest powers and procedure in the matter. It need not await the result of an action or indictment at law before preventing the threatened nuisance. Davis v. Auld, 96 Me. 559, 53 A. 118.

Proceeding under section is not criminal.—A proceeding under this section is not a criminal prosecution. A criminal prosecution is to punish the individual for the criminal part of an act already committed.

This procedure does not subject them to punishment nor seek to punish them for any past act. It does not subject the respondents to any fine, imprisonment or disability of any kind for anything they may have done prior to the filing of the petition. The record cannot be used against them as a conviction for any crime, even for the smallest misdemeanor. The procedure is purely civil in character as well as in name. It has none of the peculiar elements or consequences of a criminal prosecution. Davis v. Auld, 96 Me. 559, 53 A. 118.

And section gives no power to enjoin commitment of mere criminal acts.—This statute does not assume to confer upon the court power in equity to enjoin a person from committing mere criminal acts, not even such acts as unlawfully selling intoxicating liquors. Those are simple criminal acts to be dealt with by the courts under their criminal law procedure. However frequent and successive such acts, they are intermittent and each is a separate hurt. A nuisance, however, is one continuous, unintermittent hurt as long as it exists. Under this statute the state seeks not to punish for past criminal acts, nor even to enjoin future distinct and separate criminal acts, but to stop the continuance of a present existing hurt. Davis v. Auld, 96 Me. 559, 53 A. 118.

Nor are petitioners under this section seeking personal relief against a private wrong. The nuisance complained of is a public nuisance, a common nuisance. It is declared to be so by a statute. The proceeding is a statutory one. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

Petition regarded as bill in equity.—A proceeding under this section is a proceeding in equity, and it is doubtless true that it is to be governed by the general rules of equity procedure, though it may not be subject in every respect to the strictness of equity pleading. It is regarded as a bill in equity, though it is called a "petition" in the statute. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

But it is not subject to technical requirements of such bill.—That the legislature did not have in mind the technical requirements of a bill in equity at common law may be inferred, we think, from the use of the word "petition" in the statute, instead of "bill." "Petition" is a word of more common import and ordinarily is not subject to the niceties of pleading that a bill in equity is. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

And it need not allege intent to continue nuisance.—A proceeding under this section is maintainable, although it is not alleged in the bill, that the defendant intends to continue the illegal use complained of. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

Section declares what facts shall be alleged.—The statute not only defines what is a nuisance of this sort, but it declares precisely what facts shall be alleged in order to entitle the complainants to an injunction. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

The legislature unquestionably had the right to declare such places to be nuisances, it had the right to provide for their abatement by proceedings in equity, and it also had the right to prescribe the facts which it should be necessary to allege in a bill or "petition" for an injunction. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

The place must be habitually, commonly used for the purpose before it becomes a common nuisance. State v. Gastonguay, 118 Me. 31, 105 A. 402.

And a place not used in any manner provided for in this section, but intended or threatened to be so used, is not a nuisance. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

And injunction will not lie in such case.—The injunction may be to restrain, enjoin or abate the nuisance. It is intended not only to restrain or enjoin a future illegal use of the premises, but to abate a present existing illegal use. It is to stop a present use. It could not be employed to prevent a threatened illegal use, unless the present use were also illegal. Wright v. O'Brien, 98 Me. 196, 56 A. 647.

Right of county attorney to act is confined to forms of nuisance named.—The statutory right of the county attorney to proceed by information is confined to a process for the abatement of the particular forms of nuisance named. Withee v. Lane & Libby Fisheries Co., 120 Me. 121, 113 A. 22.

"Gambling" is used in its broadest sense.—The legislature has used the term "gambling" in its broadest, most generic sense, as comprehending every species of game or device of chance. Lang v. Merwin, 99 Me. 486, 59 A. 1021.

And it is not necessary that both parties stand to lose.—To constitute gambling in the statutory sense of the term it is not necessary that both parties should stand to lose as well as to win by the chance invoked. It is enough that one party stands to win only or to lose only. Lang v. Merwin, 99 Me. 486, 59 A. 1021.

House of ill fame is nuisance though it does not have that reputation.—The idea conveyed by the term "house of ill fame,"

or its synonym "bawdy house," is that of a house resorted to for the purposes of lewdness and prostitution. A house used as a house of ill fame is a house thus resorted to; it cannot be so used unless it is thus resorted to, and if it is resorted to for such purpose it is "a house used as a house of ill fame," in the purview of this section, though it may not have that reputation. State v. Boardman, 64 Me. 523.

But a single act of illicit intercourse in a house is not the keeping a house of ill fame within the meaning of this section. It may, with other circumstantial evidence be sufficient to satisfy a jury that it was kept for the purposes of lewdness and gambling. But it is entirely insufficient, in the absence of all other evidence, to show the house was "resorted to" for the purposes forbidden by the statute. State v. Garing, 74 Me. 152.

Applied in State v. Pierre, 65 Me. 293; State v. Stafford, 67 Me. 125; State v. Roach, 75 Me. 123; State v. Bennett, 75 Me. 590; State v. Dodge, 78 Me. 439, 6 A. 875; State v. Ryan, 81 Me. 107, 16 A. 406; State v. Gilmore, 81 Me. 405, 17 A. 316; State v. Burns, 82 Me. 558, 19 A. 913; State v. Farmer, 84 Me. 436, 24 A. 985; Small v. Clark, 97 Me. 304, 54 A. 758; State v. O'Connell, 99 Me. 61, 58 A. 59; State v. Sturgis, 110 Me. 96, 85 A. 474; State v. Albano, 119 Me. 472, 111 A. 753; State v. Cohen, 125 Me. 457, 134 A. 627; State v. Soucy, 125 Me. 505, 130 A. 874; Cote v. Cummings, 126 Me. 330, 138 A. 547.

Cited in Eveleth v. Gill, 97 Me. 315, 54 A. 756; State v. Piche, 98 Me. 348, 56 A. 1052.

II. LIQUOR NUISANCES.

All places "used for" the illegal sale or keeping of intoxicating liquors are common nuisances. State v. Lang, 63 Me. 215; Wright v. O'Brien, 98 Me. 196, 56 A. 647.

The intention was to declare "all places" to be "common nuisances" whenever they should habitually and customarily be appropriated for, or converted to the purpose of the illegal sale of liquor. State v. Gastonguay, 118 Me. 31, 105 A. 402.

But such use must be habitual.—One or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitually, commonly used for the purpose before it becomes a common nuisance. State v. McIntosh, 98 Me. 397, 57 A. 83. See note to § 2, re single act may justify finding of custom or habit of keeping or selling.

The sale of a glass of liquor, in a dwelling house, on two different occasions, was not intended per se to constitute the house a "common nuisance." The word "common" strongly indicates such a construction to be erroneous. But the intention was to declare "all places" to be "common nuisances" whenever they should habitually or customarily be appropriated for, or converted to the purpose of the illegal sale of such liquor. Two sales would not as matter of law constitute it a nuisance. State v. Stanley, 84 Me. 555, 24 A. 983.

Section applicable to any place where liquor is sold for tippling purposes.—This section is applicable to any house, shop or place where intoxicating liquors are sold for "tippling purposes," that is, sold to be drunk on the premises. State v. McNamara, 69 Me. 133.

And it embraces all liquors which are intoxicating.—This section embraces all liquors which are intoxicating and sold for tippling purposes. It has no exceptions or exemptions. State v. Page, 66 Me. 418.

For a case concerning the applicability of a former section of the liquor law (R. S. 1903, c. 29, § 40), which declared certain enumerated beverages to be "intoxicating," to proceedings under this section, see State v. Frederickson, 101 Me. 37, 63 A. 535.

All places of resort where liquor is given away, drunk, etc., are nuisances.—It was obviously the intention of the legislature by this enactment to declare all places to be common nuisances whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk, or dispensed in any manner not provided for by law." State v. Kapicsky, 105 Me. 27, 73 A. 830.

It would seem that the legislature, having named certain specific conditions which would render a place of resort a nuisance, deemed it wise to add a sweeping clause to cover all contingencies, and to say that all places of resort where intoxicating liquors are "dispensed in any manner not provided for by law" are nuisances. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

Regardless of legality of use.—This section defines several species of the genus "nuisance." Two of these are all places used for the illegal sale or keeping of intoxicating liquors and all places of resort where intoxicating liquors are kept, sold, given away, drunk, or dispensed in any manner not provided for by law are com-

mon nuisances. The first relates to all places, the second only to places of resort. Illegal use is the important element in the first definition. Neither those words nor any tantamount to them are found in the second. Acts, innocent when done elsewhere, may make a place of resort a nuisance. Other places become nuisances only by reason of illegal acts. State v. Gastonguay, 118 Me. 31, 105 A. 402.

And whether liquor is sold or not.—A place of resort is a nuisance, even if liquor is not there sold, if it is given away, drunk or otherwise illegally dispensed. State v. Eastern Steamship Lines, 124 Me. 76, 126 A. 209.

Place of resort means a place to which persons commonly and habitually resort. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

The natural meaning of the word "resort" is "a place of frequent assembly." State v. Fogg, 107 Me. 177, 77 A. 714.

And club house may be a place of resort.—The statute is clear and plain. It does not say "all places of public resort." It says "all places of resort." It does not say "all places of resort, except those to which admission is limited to members of the corporation keeping them." It says "all places of resort." It would be a perversion of terms to say that a club house is not a place of resort, merely because it was resorted to only by members of the club owning and maintaining it. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

To constitute a place of resort it is not necessary that it be open to everyone. It is enough if it be resorted to by a limited class, as for instance, the members of a club, or by certain individuals not constituting a class. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

And a liquor nuisance. — A club house, where intoxicating liquors are given away, or drunk by individual members of the club, and which is commonly and habitually resorted to by the members for drinking or giving away such liquors is a liquor nuisance, within the meaning of this section, notwithstanding it is not unlawful to drink intoxicating liquors or to give them away. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

Whether liquor is sold or distributed to owners.—A place would be equally a nuisance under the statute if used by a club either to sell intoxicating liquor to its members, or to distribute among its members intoxicating liquor owned by them in common, or to procure for and dispense to its members intoxicating liquor which was bought for and belonged to them individually. If the club, by its agent, purchases and stores intoxicating liquors for its members, and deals out in portions to each member upon his order the liquor belonging to and kept for him, and keeps the place for that purpose, the place is a common nuisance under the statute. State v. Kapicsky, 105 Me. 127, 73 A. 830.

And even if each member drinks only his own liquor.—The evils which this section seeks to remedy are not those of merely drinking or giving away intoxicating liquors. They are rather the evils which may follow from drinking or giving away liquors at a place of resort, to which men commonly and habitually resort, where men socially inclined are apt to congregate for that purpose. Where, in the case of a club, if each member of such club drank his own liquor and only his own, the club house would still be a place of resort where intoxicating liquor was drunk. State v. Cumberland Club, 112 Me. 196, 91 A. 911.

Sec. 2. Penalty.—Whoever keeps or maintains such nuisance shall be punished by a fine of not less than $200 nor more than $1,000, and in addition thereto by imprisonment for not less than 60 days nor more than 11 months, and in default of payment of said fine shall be imprisoned for an additional term of not less than 60 days nor more than 11 months. (R. S. c. 128, § 2.)

Cross references.—See note to § 1; c. 96, § 142, re private drains.

This section covers but a single offense: a statutory nuisance which may be proved by a commission of any one of the various acts specified. State v. Stanley, 84 Me. 555, 24 A. 983.

And conviction for one kind of illegal keeping will bar another indictment covering same period.—A conviction for one kind of illegal keeping of the premises as a nuisance would be a bar to any other indictment for any or all the other kind described in the statute for the period of time covered by both indictments. State v. Arsenault, 106 Me. 192, 76 A. 410; State v. Trowbridge, 112 Me. 16, 90 A. 494.

Thus time of offense must be alleged with certainty.—In offenses like those provided for by this section it is necessary to allege the time with certainty. Since a conviction or acquittal of maintaining a nuisance during a given period of time operates as a bar to a second prosecution for the same offense during the same period, it is essential to the rights of the re-

spondent that the period be alleged with exactness. State v. Peloquin, 106 Me. 358, 76 A. 888.

But state need not prove illegal keeping during entire period alleged.—It is not incumbent upon the state to show that the place was used for such unlawful purposes during the entire period named in the indictment. Proof that the defendant kept and maintained a tenement for any one of such purposes during any part of the time comprised within the days named in the indictment, will warrant a conviction. State v. Kapicsky, 105 Me. 127, 73 A. 830.

If during any part of the time comprised within the days of the indictment the respondent's place were habitually used for the illegal sale, or the illegal keeping, of intoxicating liquor, or, if it were a place of resort where intoxicating liquors were kept, sold, given away, drunk, or dispensed illegally, it was a common nuisance under this section. State v. Shortwell, 126 Me. 484, 139 A. 677.

Same act may violate both this section and § 4.—The offenses provided for in §§ 2 and 4 are undoubtedly distinct, and a conviction of one of these would not bar an indictment for the other. They are statutory offenses and by legislative intent a person by the same act or group of acts may violate both and be punished for both. State v. Fogg, 107 Me. 177, 77 A. 714.

And two persons may be jointly indicted, one for maintaining a nuisance under this section, and the other for aiding in its maintenance, under § 4. State v. Ruby, 68 Me. 543.

Section applies to person having control of premises used illegally. — Whoever keeps or maintains will apply either to the one who controls the occupation and procures or permits the illegal use; or to one who engages in the illegal use and thus maintains or aids in maintaining the public nuisance. State v. Arsenault, 106 Me. 192, 76 A. 410.

If a person having control of a place knowingly allows it, permits it to be used as a place of resort, and if he has authority over it to prevent that use or to permit that use and he permits it, then in the eye of the law he maintains it. State v. Fogg, 107 Me. 177, 77 A. 714.

The words "did keep and maintain," used in the indictment in reference to the respondent, apply either to one who occupies or to one who controls the occupation and procures or permits the illegal use of the place. State v. Fogg, 107 Me. 177, 77 A. 714.

But mere ownership of premises does not establish liability.—Ownership and possession of a vessel, building or other place, so used as to be a nuisance, does not necessarily prove liability to criminal prosecution under this section. It is "whoever keeps and maintains such nuisance" that is so liable. State v. Eastern Steamship Lines, 124 Me. 76, 126 A. 209.

An owner, even though he is in possession, does not keep and maintain the nuisance and is not criminally liable unless he uses the property for the illegal keeping or sale of intoxicants, or unless he knowingly permits such use of his property to be made. State v. Eastern Steamship Lines, 124 Me. 76, 126 A. 209.

Offense charged in language of statute is sufficient.—If the offense of keeping and maintaining a nuisance is charged in the language of the statute, it is sufficient. State v. Trowbridge, 112 Me. 16, 90 A. 494. See State v. Osgood, 85 Me. 288, 27 A. 154.

And all mala prohibita need not be alleged.—The statute declares that all places used for certain purposes or where certain acts are done and conditions exist, are common nuisances. All mala prohibita specified in the statute need not be alleged or proved to constitute a nuisance. If the indictment alleges any one of these causes, and charges the respondent with keeping and maintaining such a place, it is sufficient. State v. Arsenault, 106 Me. 192, 76 A. 410.

But if alleged indictment not bad for duplicity.—Under this section an allegation of the various different purposes for which the premises were used, constituting the means by which the nuisance was created, is mere matter of description; and although each of them might be criminal in its nature, yet they are not charged as distinct offenses, but only as forming the elements which make up the single offense of a nuisance, and an indictment so drawn is not bad for duplicity. State v. Trowbridge, 112 Me. 16, 90 A. 494.

Only one offense is charged in an indictment under this section, that of keeping a statutory nuisance, although several causes constituting it are set out. If the respondent kept a place used for the illegal sale of intoxicating liquors, a place used for the illegal keeping of intoxicating liquors, or if he kept a place affected by all the prohibited acts and conditions mentioned in the indictment, he kept a common nuisance. The penalty is no less for keeping a place for one of these illegal purposes than for all. State v. Arsenault, 106 Me. 192, 76 A. 410.

Defendant's knowledge of illegal prac-

tices need not be alleged.—The indictment need not allege in terms that the illegal practices mentioned were carried on with the knowledge or consent of the defendant. If, after setting out the different acts and conditions which, by the statute, constitute a common nuisance, the indictment alleges that the defendant kept and maintained such a nuisance, it is sufficient. State v. Stanley, 84 Me. 555, 24 A. 983; State v. Arsenault, 106 Me. 192, 76 A. 410.

The statute does not require the state to allege or prove knowledge of the law, knowledge on the part of the respondents, nor their knowledge that the acts and conditions charged made their tenements common nuisances. Their knowledge of these matters is presumed. The state would not need to prove their knowledge of the unlawfulness of their conduct, and hence the indictment need not allege it. State v. Ryan, 81 Me. 107, 16 A. 406.

State must prove defendant kept house of ill fame.—In order to make out the offense charged in an indictment under this section, it is necessary to establish two things: first, that the house was used as a house of ill fame; and, second, that the defendant kept it. State v. Boardman, 64 Me. 523.

And evidence of reputation of house is not admissible.—The gist of the offense consists in the use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it had any. The reputation of the house makes no part of the issue. Testimony as to its reputation has a tendency to establish the issue that it was in fact used as a house of ill fame, and is inadmissible as mere hearsay evidence. State v. Boardman, 64 Me. 523.

But evidence of reputation of women frequenting it is admissible.—Evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is competent in a prosecution for nuisance. State v. Boardman, 64 Me. 523.

Keeper of premises or person unlawfully selling liquor is liable.—The unlawful selling of intoxicating liquors is sufficient to render premises a nuisance under § 1 and the keeper or person selling liable under this section. State v. Fletcher, 126 Me. 153, 136 A. 908.

But no allegation of sales of intoxicating liquor is required in an indictment under this section. The offense described in this nuisance statute is not selling liquors, but the keeping and using a place for the purpose of selling. The keeping the place is the gist of the offense. Selling in the place, without keeping it, is not the offense complained of. State v. Lang, 63 Me. 215; State v. Dorr, 82 Me. 157, 19 A. 157.

Whether beverage sold was intoxicating is for jury to determine.—Under this section, one may be indicted for a nuisance for selling cider and wine made from fruit grown in this state for tippling purposes, provided they are intoxicating liquors. Whether they are such it is for the jury to determine. If they are, the seller is manifestly within the statute. State v. Page, 66 Me. 418.

And whether the respondent habitually kept or sold intoxicating liquor is jury question. State v. Shortwell, 126 Me. 484, 139 A. 677.

Which may be decided from circumstances of single sale.—From the circumstances of a single act of keeping or selling, a jury may be justified in finding a custom or habit of keeping or selling. State v. Gastonguay, 118 Me. 31, 105 A. 402; State v. Shortwell, 126 Me. 484, 139 A. 677. See State v. Stanley, 84 Me. 555, 24 A. 983.

Applied in State v. Pierre, 65 Me. 293; State v. Dodge, 78 Me. 439, 6 A. 875; State v. Dorr, 82 Me. 157, 19 A. 157; State v. Sturgis, 110 Me. 96, 85 A. 474; Cote v. Cummings, 126 Me. 330, 138 A. 547.

Cited in State v. Frederickson, 101 Me. 37, 63 A. 535.

Sec. 3. Lease void; remedy of owner.—If any tenant or occupant, under any lawful title, of any building or tenement not owned by him uses it or any part thereof for any purpose named in section 1, he forfeits his right thereto, and the owner thereof may make immediate entry, without process of law, or may avail himself of the remedy provided in chapter 122. (R. S. c. 128, § 3.)

Cross reference.—See c. 122, § 11, re lease of tenant of house of ill fame void at option of landlord.

One purpose of this section undoubtedly was to enable the landlord to dispossess his liquor-dealing tenant immediately upon discovery, and thereby avoid the risk of prosecution himself. Small v. Clark, 97 Me. 304, 54 A. 758.

Section is addition to c. 122.—The effect of the language of this section is to make the section an addition to chapter 122. By

the section thus added, the process is authorized upon another state of facts different from all those before specified. Eveleth v. Gill, 97 Me. 315, 54 A. 756.

Full particularity of allegation required in proceedings to enforce forfeiture.—This section is highly penal. It works a forfeiture of possibly valuable rights purchased by large expenditure. There should, therefore, be full particularity and certainty of allegation in all legal proceedings to enforce it. The statutory case should be fully and clearly stated. Want of allegations necessary to show a case within the terms of the statute is as fatal as want of evidence of such a case. Eveleth v. Gill, 97 Me. 315, 54 A. 756, holding that a declaration containing no allegation that the defendant is a "tenant," or "occupant," no allegation of what particular purpose named in § 1 he had used the building for, and no allegation that he had used it for any of those purposes is not sufficient.

And the plaintiff must state, as well as prove, a case within the terms of the statute. Eveleth v. Gill, 97 Me. 315, 54 A. 756.

In resorting to the legal process, authorized only by this section, the plaintiff in such a process should allege in his declaration the facts declared by this section to be an occasion where the process may be used. Karahalies v. Dukais, 108 Me. 527, 81 A. 1011.

Only the owner at time of forfeiture is given remedy.—It is the owner who may make immediate entry or may have the alternative remedy of forcible entry and detainer. The statute does not read that the "owner" may make immediate entry or his grantee may resort to forcible entry and detainer. It is the owner at the time of forfeiture all the way through. Small v. Clark, 97 Me. 304, 54 A. 758.

It is the "owner" who may make immediate entry,—entry immediately upon the forfeiture, that is, when the forfeiture becomes effective; it is the "owner" at the time of the forfeiture, not his subsequent grantee. Small v. Clark, 97 Me. 304, 54 A. 758.

And lease is voidable only at his option.—The word "forfeits" in this section has the same meaning and effect which the common law gives the same word in leases. Hence, if a lessee "forfeits" his lease under this section, the lease is not ipso facto absolutely void, but is voidable at the option of the lessor or owner. Small v. Clark, 97 Me. 304, 54 A. 758.

Thus tenant's occupation is lawful until owner acts.—Although the lease is forfeited or annulled and made void by the act of the tenant, the owner is not compelled to take advantage of it. He is not compelled to act. He is not obliged to make immediate entry. He may never resort to the remedy by forcible entry and detainer. He may waive the forfeiture, and waive the privilege of ousting the tenant. He may be content that the tenant shall remain, and if he is content, no one else can complain. And if he permits the tenant to remain, the tenant's occupation is lawful. The tenant's occupation is at no time unlawful, unless and until the "owner" determines the right of occupation. Small v. Clark, 97 Me. 304, 54 A. 758.

And subsequent grantee cannot maintain forcible entry and detainer.—If the forfeiture of a lease by using the premises for the unlawful sale or keeping of intoxicating liquors, as provided by this section is not taken advantage of by the lessor, the lessee's continued occupation is lawful, and the subsequent grantee of the lessor cannot maintain forcible entry and detainer based upon such forfeiture. Small v. Clark, 97 Me. 304, 54 A. 758.

Applied in Machias Hotel Co. v. Fisher, 56 Me. 321.

Sec. 4. Liability of owner.—Whoever knowingly lets any building or tenement owned by him, or under his control, for any purpose named in section 1, or knowingly permits the same or part thereof to be so used, or who, after being notified in writing of such illegal use by an officer or citizen of the county in which the building or tenement is located, omits to take all proper measures either to abate said nuisance or, failing therein, to eject therefrom the person or persons maintaining such nuisance is guilty of aiding in the maintenance of a nuisance and shall be punished by a fine of not less than $200 nor more than $1,000, and in addition thereto by imprisonment for not less than 60 days nor more than 11 months, and in default of payment of said fine shall be imprisoned for an additional term of not less than 60 days nor more than 11 months. (R. S. c. 128, § 4.)

The phrase, "knowingly permits," implies consent as well as knowledge. State v. Stafford, 67 Me. 125.

And mere knowledge without permission is not sufficient. To constitute the offense provided for by this section, there must be permission or consent as well as knowledge. State v. Stafford, 67 Me. 125.

To constitute an offense under this section, it must appear that the tenement was either let for the illegal use, or that the illegal use was permitted. State v. Frazier, 79 Me. 95, 8 A. 347.

Nor does the mere fact that the defendant has control of the tenement make him liable. He must be proved to consent to the illegal use; and if such use if known to him, and he takes no measures to prevent it, his inaction may be evidence of his consent to such use, or that he permitted it; but his permission of the use must be proved to charge him under the statute. State v. Frazier, 79 Me. 95, 8 A. 347.

Question of consent to be determined by jury.—The owner is not guilty of a violation of the statute, unless he permitted the use, that is consented to it. Whether he did so consent is a fact to be determined by the jury. State v. Frazier, 79 Me. 95, 8 A. 347.

One who has authority to let a tenement and receive the rents has control of it within the meaning of this section, and if he knowingly permits the illegal use, that is, consents to it, he becomes liable for aiding in maintaining a nuisance. State v. Frazier, 79 Me. 95, 8 A. 347.

Same act may violate both this section and § 2.—The offenses provided for in this section and § 2 are undoubtedly distinct, and a conviction of one of these would not bar an indictment for the other. They are statutory offenses and by legislative intent a person by the same act or group of acts may violate both and be punished for both. State v. Fogg, 107 Me. 177, 77 A. 714.

And persons violating these sections may be jointly indicted.—Two persons may be jointly indicted, one for maintaining a liquor nuisance under § 2, and the other for aiding in its maintenance under this section. State v. Ruby, 68 Me. 543.

Applied in State v. Wiseman, 97 Me. 90, 53 A. 875.

Sec. 5. Fence maliciously kept.—Any fence or other structure in the nature of a fence, unnecessarily exceeding 6 feet in height, maliciously kept and maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance. (R. S. c. 128, § 6.)

No liability if height above 6 feet was necessary.—If the height above 6 feet is shown to be necessary, there can be no liability under this section, no matter what may be the motive of the owner in erecting it. Lord v. Langdon, 91 Me. 221, 39 A. 552.

And malice must have been dominant motive in keeping fence.—The gist of an action under this section consists in the fact that the structure is "maliciously kept and maintained." To entitle the plaintiff to recover, it must be shown that malice was the dominant motive, and without which the fence would not have been built or maintained. Lord v. Langdon, 91 Me. 221, 39 A. 552.

But it need not have been sole motive.—It is not necessary for the plaintiff to prove that malice, the purpose to annoy, was the sole motive for building the fence. It is only necessary to prove that such was the dominant motive. Healey v. Spaulding, 104 Me. 122, 71 A. 472.

Sec. 6. Certain nuisances described.—The erection, continuance or use of any building or place for the exercise of a trade, employment or manufacture which, by noxious exhalations, offensive smells or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals, or of the public; causing or permitting abandoned wells or tin mining shafts to remain unfilled or uncovered to the injury or prejudice of others; causing or suffering any offal, filth or noisome substance to collect, or to remain in any place to the prejudice of others; obstructing or impeding, without legal authority, the passage of any navigable river, harbor or collection of water; corrupting or rendering unwholesome or impure the water of a river, stream or pond; unlawfully diverting it from its natural course or state, to the injury or prejudice of others; and the obstructing or encumbering by fences, buildings or otherwise, of highways, private ways, streets, alleys, commons, common landing places or burying grounds are nuisances within the limitations and exceptions hereafter mentioned; and all automobile dumps or automobile graveyards, so called, where old, discarded, worn out or junked automobiles, or parts thereof, are gathered together, kept, deposited or allowed to accumulate, in such manner or in such location or situation, either within or without the limits of any highway, as to be unsightly, detracting from the natural scenery and injurious to the comfort

and happiness of individuals and the public, and injurious to property rights, are declared to be public nuisances. (R. S. c. 128, § 7. 1949, c. 379.)

Cross references.—See c. 24, § 17, re abandoned airports; c. 25, §§ 48, 98, re duties of local health officers; c. 25, § 87, re depositing carcass of dead animal where it may cause nuisance; c. 32, § 171, re bees infected with American Foulbrood; c. 36, § 87, re erection of portable sawmills without licenses; c. 45, § 63, re railroad crossings made without consent of mayor and aldermen; c. 50, §§ 19-24, re permits for digging into and opening streets and highways; c. 100, § 144, re automobile junk yards.

This section is but declaratory of the common law. State v. Goldberg, 131 Me. 1, 158 A. 364.

Section does not require destruction of buildings and machinery used in business which is nuisance.—Even though a factory is a nuisance within the provisions of this section due to noxious exhalations, offensive smells and stench arising from its operations, the manufacture is not, in and of itself, unlawful. It is not prohibited. It is sanctioned, if carried on in a place which has been duly assigned for such manufacture. The statute does not require the destruction of the buildings or of the machinery used in its operations, but that the business should not be carried on at a place, where from its location it would be a nuisance. Brightman v. Bristol, 65 Me. 426.

And town may be liable to indemnify owner of property destroyed by mob. —Buildings, the erection of which under conditions prohibited by this section, are still, not being nuisances per se, within the protection of the law, and when destroyed by a mob, the town is liable to indemnify the owner for three-fourths the loss of injury sustained under c. 136, § 8. Brightman v. Bristol, 65 Me. 426.

All hindrances or obstructions to navigation, without direct authority from the legislature, are public nuisances. Knox v. Chaloner, 42 Me. 150.

Thus obstruction beyond that authorized is a nuisance.—When the legislature gives an individual the right of erecting and maintaining a dam upon navigable waters, if the dam is so constructed as to impede the navigation beyond what the act authorizes, this renders the erection pro tanto a nuisance. Knox v. Chaloner, 42 Me. 150.

But indictment must allege excessive obstruction.—Where the charter of a railroad corporation authorizes the erection of a bridge across navigable rivers, "provided said bridge shall be so constructed as not to prevent the navigating said waters," an indictment against the corporation for erecting a bridge across a navigable river named, which does not directly allege that the bridge prevents navigating the waters of the river, is not good. State v. Portland & Kennebec R. R., 57 Me. 402.

Obstruction of public way is nuisance.—Any obstruction placed within the limits of a public way is a nuisance at common law, as well as by statute. Corthell v. Holmes, 88 Me. 376, 34 A. 173; Smith v. Preston, 104 Me. 156, 71 A. 653; Yates v. Tiffiny, 126 Me. 128, 136 A. 668.

As is obstruction of private way.—Obstruction of a private way under this section constitutes a nuisance equally with like obstruction of a public one. Burnham v. Holmes, 137 Me. 183, 16 A. (2d) 476.

Established under c. 96.—It is the obstruction of a private way established under c. 96, § 29, et seq., which is a statutory nuisance. Graham v. Lowden, 137 Me. 48, 15 A. (2d) 69.

And question of nuisance not dependent on interruption of travel.—The easement of the public is coextensive with the exterior limits of the way, and the question of nuisance does not depend upon the interruption of travel. Corthell v. Holmes, 88 Me. 376, 34 A. 173.

Railroad track may be nuisance.—A railroad track not legally laid across a public way may be a nuisance within the meaning of this section. In re Railroad Com'rs, 83 Me. 273, 22 A. 168.

As may be a building.—Encumbering a public way by buildings is, within certain limitations and exceptions, an indictable nuisance. State v. Goldberg, 131 Me. 1, 158 A. 364.

Person creating obstruction not relieved from liability by another's neglect of duty. —He who creates an obstruction in the public way is not relieved from liability for damages to travelers resulting therefrom, notwithstanding that some other person has neglected his duty to remove the obstruction. Smith v. Preston, 104 Me. 156, 71 A. 653.

Act of incorporation may modify section. —An act of incorporation, which modifies a general statute declaring the obstruction or encumbering of a highway to constitute a nuisance, is equivalent to an exception reserved in the clause of the statute which defines the crime. State v. Webb's River Improvement Co., 97 Me. 559, 55 A. 495.

And indictment must negative compliance with charter.—An indictment for a

nuisance by overflowing a highway, against a corporation whose charter authorizes the maintenance of dams, etc., at the outlet of a pond, should contain a negative averment to the effect that the dam complained of is not erected and maintained in accordance with the charter. State v. Webb's River Improvement Co., 97 Me. 559, 55 A. 495.

Indictment need not describe termini and width of way.—It is not necessary to describe the termini and width of a highway in indictments for erecting nuisances thereon; nor otherwise to describe its location, than by alleging it to be in some known place, within the county. State v. Sturdivant, 21 Me. 9.

Co-owner of easement of passage may make repairs which do not interfere with existing or potential use.—It is not a nuisance under this section for one co-owner of an easement of passage to make repairs or improvements in a private way which do not obstruct or interfere with any existing use thereof, or any potential use to which the way is susceptible or may be made susceptible. Hultzen v. Witham, 146 Me. 118, 78 A. (2d) 342.

Owners in common of an easement such as a right of way may make all reasonable repairs which do not affect their co-owners injuriously but cannot alter the grade or surface of such way as will make it appreciably less convenient and useful to a co-owner having equal rights therein. Hultzen v. Witham, 146 Me. 118, 78 A. (2d) 342.

The reasonableness of which is question of fact.—The reasonableness of the improvements or repairs made by the owner of an easement of way is largely a question of fact. Hultzen v. Witham, 146 Me. 118, 78 A. (2d) 342.

To be determined by consideration of actualities.—As between co-owners in an easement of passage, in determining whether or not a way is, or may be made, susceptible for a particular use asserted by another co-owner, a jury should deal with actualities and not mere theories. Jurors may consider the practicability of subjecting a way to any proposed use, taking into consideration all existing factual questions. Hultzen v. Witham, 146 Me. 118, 78 A. (2d) 342.

Applied in State v. Hart, 34 Me. 36; State v. Payson, 37 Me. 361; Brown v. Watson, 47 Me. 161; Lyons v. Woodward, 49 Me. 29; State v. Bunker, 59 Me. 366; Browne v. Connor, 138 Me. 63, 21 A. (2d) 709.

Quoted in part in Varney v. Pope, 60 Me. 192.

Stated in part in Davis v. Weymouth, 80 Me. 307, 14 A. 199.

Cited in State v. Portland, Saco & Portsmouth R. R., 58 Me. 46; Penley v. Auburn, 85 Me. 278, 27 A. 158; Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935; Whitmore v. Brown, 102 Me. 47, 65 A. 516.

Sec. 7. Town officers may assign places for unwholesome employments.—The municipal officers of a town, when they judge it necessary, may assign places therein for the exercise of any trades, employments or manufactures described in section 6, and may forbid their exercise in other places, under penalty of being deemed public or common nuisances and the liability to be dealt with as such. All such assignments shall be entered in the records of the town and may be revoked when said officers judge proper. (R. S. c. 128, § 8.)

Cross reference.—See c. 97, § 32, re regulation of certain occupations in maritime towns.

Municipal officers need not act unless they judge it necessary.—This section provides that the municipal officer may, "when they judge it necessary," make such an assignment. They are not required to do it, unless they judge it necessary. State v. Hart, 34 Me. 36.

And offense not dependent on exercise of power given officers.—Persons are not allowed to exercise a trade which is a nuisance under § 6 in any place they may choose, merely because it has not been thought necessary to assign a particular place for it. The offense is not made to depend upon the exercise of that power by the municipal officers. The obvious intent of § 6 is to prohibit such nuisances. This section, by authorizing the assignment of places, even before the evils have occurred, rather accumulates the power to prevent such offenses. State v. Hart, 34 Me. 36.

Stated in Brightman v. Bristol, 65 Me. 426.

Sec. 8. When places so assigned become offensive.—When a place or building so assigned becomes a nuisance, offensive to the neighborhood or injurious to the public health, any person may complain thereof to the superior court and if, after notice to the party complained of, the truth of the complaint is admitted

by default or made to appear to a jury on trial, the court may revoke such assignment and prohibit the further use of such place or building for such purposes, under a penalty of not more than $100 for each month's continuance after such prohibition, to the use of said town; and may order it to be abated and issue a warrant therefor, or stay it as hereinafter provided; but if the jury acquit the defendant, he shall recover costs of the complainant. (R. S. c. 128, § 9.)

See c. 96, § 101, re logs, etc., left on ways.

Sec. 9. Buildings for manufacture of powder. — If any person manufactures gunpowder, or mixes or grinds the composition therefor, in any building within 80 rods of any valuable building not owned by such person or his lessor, which was erected when such business was commenced, the former building shall be deemed a public nuisance; and such person may be prosecuted accordingly. (R. S. c. 128, § 10.)

See c. 97, § 43, re regulations by insurance commissioner respecting explosives.

Sec. 10. Burning of bricks. — A town, at its annual meeting, may prohibit the burning of bricks or the erecting of brickkilns within such parts thereof as they deem for the safety of the citizens or their property. If any person, by himself or others, violates such prohibition, the municipal officers shall cause said bricks or brickkiln to be forthwith removed, at the expense of the owner thereof; and the offender forfeits not more than $200 to the town; and if said bricks or brickkiln are not removed before conviction, the court may issue a warrant for the removal thereof, or stay it as hereinafter provided. (R. S. c. 128, § 11.)

Sec. 11. Dumping of domestic waste. — Solid domestic waste such as rubbish, refuse, debris, trash and garbage shall not be placed or deposited directly into or on the banks of any river, stream, lake or pond or similar watercourse or tidal waters or on the ice thereof where such waste material may fall or be washed into said watercourse or tidal waters. Whoever violates the provisions of this section shall be punished by a fine of not less than $25 nor more than $100, and costs, for each offense. (1949, c. 387. 1953, c. 308, § 103.)

Sec. 12. Possession of poisonous snakes.—The possession of poisonous snakes shall be a public nuisance except where poisonous snakes shall be continuously confined in such type of enclosure as may be determined to be escape proof. (1951, c. 388. 1953, c. 308, § 103.)

Sec. 13. Mills and dams on streams, and fences and buildings fronting on public ways.—The erection and maintenance of watermills and dams to raise water for working them upon or across streams not navigable as provided in chapter 180 shall not be deemed a nuisance, unless they become offensive to the neighborhood, or injurious to the public health, or unless they occasion injuries or annoyances of a kind not authorized by said chapter. Fences and buildings fronting on public ways, commons or lands appropriated to public use shall not be deemed nuisances when erected for the times and in the manner provided in section 103 of chapter 96, unless the owner of the same shall be estopped as therein provided from justifying his occupation within the limits of said way. (R. S. c. 128, § 12.)

Sec. 14. Bulldozing of rivers, streams and brooks.—The bulldozing between the banks of a river, stream or brook in unorganized territory in excess of 1,000 feet in length in any one mile, measured along the thread of the stream, is prohibited unless permission is first obtained from the commissioner of inland fisheries and game.

Whoever violates the provisions of this section shall be punished by a fine of not less than $100 nor more than $500. (1951, c. 333.)

Sec. 15. Penalty and abatement of nuisance.—Whoever erects, causes or continues a public or common nuisance, as herein described or at common law, where no other punishment is specially provided, shall be punished by a fine of not more than $100; and the court with or without such fine may order such nuisance to be discontinued or abated, and issue a warrant therefor as hereinafter provided. (R. S. c. 128, § 13.)

Cross reference.—See note to § 19, re abatement is within discretion of court.

Indictment need not allege nuisance continuing.—An allegation that the nuisance is continuing is not necessary in order to charge the defendant effectually with a violation of the law. One may be guilty of erecting or causing a nuisance, which he does not continue. State v. Hull, 21 Me. 84.

Applied in State v. Haines, 30 Me. 65.

Cited in Penley v. Auburn, 85 Me. 278, 27 A. 158; State v. Beal, 94 Me. 520, 48 A. 124.

Sec. 16. Bushes, trees and stumps removed from area flowed by dam erected on public water. — Whoever hereafter erects a dam on any of the public waters of this state shall, within 3 years after a head of water is held and flowage created thereby, remove from the flowed area all trees, bushes and stumps that he can legally remove therefrom, to such an extent that the tops of all trees, bushes and stumps left thereon shall be at least 5 feet below the surface of the mean low-water level maintained during the period beginning June 1st and ending December 1st next following of each year and shall within said 3-year period remove such growth as he can legally remove from the edge of the flowed area to such an extent that no dry-ki and debris shall form to be carried away by the water; and for the purpose of protecting the right of the public in the navigation of the waters over said flowed area the owner of such dam shall, after the creation of flowage thereby, have the right to cut and remove from the flowed area all trees, bushes and stumps remaining thereon, and the damage to the owner thereof caused by such removal shall be ascertained in the same manner as is provided for the ascertainment of the damages caused by the flowage.

Any dam erected hereafter which is maintained in violation of the provisions of this section shall constitute a public nuisance, and be subject to the provisions of section 15.

This section shall not apply to dams which are created solely for log driving purposes where the water is stored for not exceeding 3 months of each year, nor shall the same be interpreted in any instance to require the removal of stumps below the swell of the roots. (R. S. c. 128, § 14.)

Sec. 17. Motorboats equipped with suitable mufflers.—All motorboats run or operated in any tidal or other waters within the state shall be provided or equipped with proper and suitable mufflers or other devices which shall effectually deaden sound. Said muffler shall be used all the time the engine of the motorboat is in operation; provided that it shall be allowable to cut out said mufflers, in case of boats while entered and competing in boat races held under the auspices of some regularly organized club, between the hours of 8 o'clock in the morning and sunset following.

Any muffling device approved by the United States inspectors having jurisdiction of the tidal waters of this state shall, in case of motorboats run or operated on such tidal or other waters in the state, be deemed to be a compliance with the provisions of this section, provided such defense shall be set up and proved by the defendant.

Whoever violates any provision of this section between 8 o'clock in the forenoon and 8 o'clock at night shall be punished by a fine of not less than $5 nor more than $25; whoever violates any provision of this section between 8 o'clock in the afternoon and 8 o'clock in the forenoon shall be subject to a double penalty; and any such violation shall be deemed a common nuisance within the meaning of section 15. (R. S. c. 128, § 15.)

Sec. 18. Action for damages caused by nuisance. — Any person injured in his comfort, property or the enjoyment of his estate by a common and public or a private nuisance may maintain against the offender an action on the case for his damages, unless otherwise specially provided. (R. S. c. 128, § 16.)

I. General Consideration.

II. Injury from Common Nuisance.

I. GENERAL CONSIDERATION.

This section was intended to apply to injuries arising from a violation of § 6. Lyons v. Woodward, 49 Me. 29.

And person injured by nuisance may recover his damages.—That one injured in his "comfort, property, or the enjoyment of his estate by a common and public or a private nuisance" may recover his damages against the person responsible therefor is the express mandate of this section. Hultzen v. Witham, 146 Me. 118, 78 A. (2d) 342.

However ancient, useful, or necessary the business constituting the nuisance may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy. Norcross v. Thoms, 51 Me. 503.

But the hurt to the plaintiff must come, qua nuisance, to give a cause of action. Foley v. H. F. Farnham Co., 135 Me. 29, 188 A. 708.

The hurt to the plaintiff must come from the structure, qua nuisance, to give him a cause of action for maintaining it. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

And he must prove damage caused by element rendering structure nuisance.—The plaintiff must prove that his damage was caused by the particular element in the character or use of the structure which renders it a nuisance. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

An action may be maintained for continuing a nuisance erected by another. Pillsbury v. Moore, 44 Me. 154.

But grantee of person erecting nuisance not liable until requested to remove same.—When he who erects a nuisance conveys the land, he does not transfer the liability for the erection to the grantee, for the grantee is not liable until, upon request, he refuses to remove the nuisance, for the reason that he cannot know, until such request, that the nuisance was not rightfully erected. Pillsbury v. Moore, 44 Me. 154.

The law is well settled that a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove it. Pillsbury v. Moore, 44 Me. 154.

And special request must be proved.—If the action is not brought against the original erecter of the nuisance, it is necessary to prove a special request to the defendant to remove the nuisance. Pillsbury v. Moore, 44 Me. 154.

Applied in Morgan v. Hallowell, 57 Me. 375; Cole v. Banton, 106 Me. 418, 76 A. 907; Browne v. Connor, 138 Me. 63, 21 A. (2d) 709; Larson v. New England Tel. & Tel. Co., 141 Me. 326, 44 A. (2d) 1; O'Connor v. Beale, 143 Me. 387, 62 A. (2d) 870.

Stated in Davis v. Weymouth, 80 Me. 307, 14 A. 199.

Cited in Burbank v. Bethel Steam Mill Co., 75 Me. 373; Penley v. Auburn, 85 Me. 278, 27 A. 158.

II. INJURY FROM COMMON NUISANCE.

Person suffering special injury from common nuisance may recover.—One who suffers special injury, no matter how inconsiderable, from a common nuisance, may recover damages in an action at law from the person creating it, and from the person maintaining it, after request to abate it. Holmes v. Corthell, 80 Me. 31, 12 A. 730; Smith v. Preston, 104 Me. 156, 71 A. 653; Yates v. Tiffiny, 126 Me. 128, 136 A. 668.

Though the nuisance be public, rendering the guilty party liable to indictment, the sufferer may recover compensation in a civil suit, proving special and peculiar damage to himself. Norcross v. Thoms, 51 Me. 503.

But only if injury is special.—Structures which only infringe public rights can be dealt with only by the public, that is, by proceedings in the name of the state or some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. It is only when the structures inflict upon him some special legal injury different in kind as well as degree from that suffered by others that he has an individual right of action against them. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

Which must be alleged.—When the declaration in a case of a public nuisance fails to show that the plaintiff has suffered

any special damage for which the defendant is responsible it will be adjudged bad on demurrer. Holmes v. Corthell, 80 Me. 31, 12 A. 730.

And proved.—If the way was a public one, so that its obstruction would be a public nuisance for which an indictment would lie, the plaintiff can sustain no action without proof of particular and special damages not common to others. Sutherland v. Jackson, 32 Me. 80.

It must be shown by the plaintiff that, by the acts of the defendant, he has sustained damages not suffered by the community at large. As generally expressed, he must prove special damages resulting from the public nuisance to entitle him to a private action. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527.

To prevent multiplicity of suits.—The reason for the rule which denies an action to an individual for a common nuisance is that it would cause such a multiplicity of suits as to be itself an intolerable nuisance. Smart v. Aroostock Lumber Co., 103 Me. 37, 68 A. 527.

And greater interest than others does not change public right to private right.—The plaintiff may have a greater interest than others in the right and a greater need of its enforcement, but that does not change the public right into a private right. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

However, a private action is not to be defeated by the fact that others suffer a similar injury. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527.

Delay by obstruction of way does not necessarily constitute special injury.—The mere fact that a person is delayed, or compelled to take a circuitous route by an obstruction in a highway, does not necessarily constitute special damages. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527.

But it may under certain circumstances.—Where an individual suffers expensive delay or substantial pecuniary loss, in traveling or transporting goods, it may be a particular damage for which he has a right of action. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527.

As may interference with access to private property.—When a plaintiff is an owner of land on a navigable stream and has a summer residence thereon, and no highway other than such stream affords him access thereto, and such stream has been unreasonably obstructed with logs and lumber by a defendant mill company, such obstruction not only obstructs the right of such plaintiff in common with others to pass up and down such stream, but also cuts off his right of access to his private property which is a private right appurtenant to his land and such plaintiff in a legal sense has suffered special damages and is entitled to recover therefor. Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527.

Sec. 19. Abatement of nuisance.—When on indictment, complaint or action any person is adjudged guilty of a nuisance, the court, in addition to the fine imposed, if any, or to the judgment for damages and costs for which a separate execution shall issue, may order the nuisance abated or removed at the expense of the defendant; and after inquiring into and estimating, as nearly as may be, the sum necessary to defray the expense thereof, the court may issue a warrant therefor substantially in the form following:

"STATE OF MAINE

....., ss. To the sheriff of our county of ....., or either of his deputies, Greetings.

Whereas, by the consideration of our honorable ..... court, at a term begun and held at ....., within and for said county, upon indictment," (or "complaint," or "action in favor of A. B.," as the case may be,) "C. D., of ....., &c., was adjudged guilty of erecting," ["causing," or "continuing,"] "a certain nuisance, being a building in ....., in said county," (or "fence," or other thing, describing particularly the nuisance and the place,) "which nuisance was ordered by said court to be abated and removed: We therefore command you forthwith to cause said nuisance to be abated and removed; also that you levy of the materials by you so removed, and of the goods, chattels and lands of said C. D., a sum sufficient to defray the expense of removing and abating the same, not to exceed ..... dollars," (the sum estimated by the court,) "together with your lawful fees, and thirty-three cents more for this writ. And, for want

of such goods and estate to satisfy said sums, we command you to take the body of said C. D., and him commit unto our jail in ....., in said county, and there detain until he pays such sums or is legally discharged. And make return of this warrant, with your doings thereon, within thirty days. Witness, A. B., Esq., at ....., this ..... day of ....., in the year of our Lord 19...

J. S., Clerk."

When the conviction is upon an action before a trial justice and no appeal is made, the justice, after estimating the sum necessary to defray the expense of removing or abating the nuisance, may issue a like warrant, making corresponding alterations in its form. (R. S. c. 128, § 17.)

Abatement rests with discretion of court.—The court is not required to order an abatement, if for any reason it cannot properly or lawfully be carried into effect. Whether there shall be an abatement or not rests in the legal discretion of the court. The judge, to whom application is made for judgment of abatement, must hear and decide this question like all others. State v. Beal, 94 Me. 520, 48 A. 124.

Is distinct from trial of issue of guilt before jury.—The matter of abatement, and the hearing and decision thereon, are entirely distinct from the trial of the main issue of guilt before the jury; and the decision is only to be made when the question arises. State v. Beal, 94 Me. 520, 48 A. 124.

And must be by proper authority.—The statute, giving the power of abatement after conviction upon due process, does not in addition confer upon an irresponsible public the right to enforce the penalties it establishes, without process of law. A lawful business may so be carried on as to become a nuisance. Undoubtedly in certain cases and under certain limitations, nuisances may be abated by those specially aggrieved thereby. But when the subject matter of complaint is lawful per se, and the nuisance consists not in the business itself, but in the unsuitable place in which it is carried on, its abatement must be by the judgment of the court, and by the officers of the law carrying into effect such judgment, and not by the blind fury of a tumultuous mob. Brightman v. Bristol, 65 Me. 426.

And only so much be abated as constitutes the nuisance. If it consists in the use of a building, such use must be prohibited and punished. If the location is what constitutes the nuisance, it must be removed. Brightman v. Bristol, 65 Me. 426.

Destruction of building constituting nuisance may be necessary.—When an erection itself constitutes a nuisance, as a building in a public street obstructing its safe passage, its removal or destruction may be necessary for the abatement of such nuisance. Brightman v. Bristol, 65 Me. 426.

But, when the nuisance consists in the wrongful use of a building harmless in itself, the remedy is to stop the use. Brightman v. Bristol, 65 Me. 426.

When it is the use of the building which constitutes the nuisance, the abatement consists in putting a stop to such use. The law allows its officers, in execution of its sentence, only to do what is necessary to abate the nuisance and nothing more. Brightman v. Bristol, 65 Me. 426.

And destruction of building will not be ordered.—When the act done or the thing complained of is only a nuisance by reason of its location and not in and of itself, the court will not order the destruction of what constitutes the nuisance, but will require its removal or cause its use, so far as such use is a nuisance, to cease. Brightman v. Bristol, 65 Me. 426.

Abatement not required if strangers improperly affected.—Upon conviction of a nuisance, the court may punish by a fine only. Or they may also cause the nuisance to be abated (see § 15). But such abatement will not be required when strangers to the proceedings might be improperly affected. State v. Haines, 30 Me. 65.

Applied in Davis v. Weymouth, 80 Me. 307, 14 A. 199.

Cited in Penley v. Auburn, 85 Me. 278, 27 A. 158.

Sec. 20. Warrant stayed, if defendant gives security to discontinue nuisance.—Instead of issuing the warrant required by the preceding section, the court or trial justice may order it to be stayed on motion of the defendant, and on his entering into recognizance in such sum and with such surety as the court or justice directs, in case of an indictment, to the state, or in case of a complaint or action, to the plaintiff, conditioned that the defendant will either discontinue

said nuisance, or that within a time limited by the court and not exceeding 6 months, he will cause it to be abated and removed, as may be directed by the court; and on failing to perform such condition, the recognizance shall be deemed forfeited, and the court, or any justice thereof, in term time or in vacation, or said trial justice on being satisfied of such default, may forthwith issue the warrant and scire facias on the recognizance. (R. S. c. 128, § 18.)

Sec. 21. Expenses of abatement defrayed; defendant entitled to poor debtor's oath.—The expense of abating a nuisance by virtue of a warrant shall be collected by the officer as damages and costs are collected on execution; except that the materials of buildings, fences or other things removed as a nuisance may be first levied upon and sold by the officer, and the proceeds, if any remain after paying the expense of removal, shall be paid by him, on demand, to the defendant or the owner of such property; and if said proceeds are not sufficient to satisfy the expenses, the officer shall collect the residue as aforesaid. A person committed to jail on such warrant may avail himself of the poor debtor's oath, as if he had been committed on execution. If said expense cannot be collected of the defendant, it shall be paid as costs in criminal prosecutions. (R. S. c. 128, § 19.)

Sec. 22. Jurisdiction by injunction.—Any court of record before which an indictment, complaint or action for a nuisance is pending may, in any county, issue an injunction to stay or prevent such nuisance, and make such orders and decrees for enforcing or dissolving it as justice and equity require. (R. S. c. 128, § 20.)

Plaintiff may obtain injunction pending action.—Pending the action, the plaintiff may, in proper cases, obtain from the court an injunction to stay or prevent the nuisance. Davis v. Weymouth, 80 Me. 307, 14 A. 199.

But bill must allege such pending.—The bill for an injunction must allege the pendency of an indictment, complaint, or action for a nuisance, without which the injunction contemplated by this section cannot issue. Varney v. Pope, 60 Me. 192.

Cited in York Harbor Village Corp. v. Libby, 126 Me. 537, 140 A. 382.

Sec. 23. Stationary, internal combustion or steam engine not used without license from town officers.—No stationary, internal combustion or steam engine shall be erected in a town until the municipal officers have granted license therefor, designating the place where the buildings therefor shall be erected, the materials and mode of construction, the size of the boiler and furnace, and such provision as to height of chimney or flues, and protection against fire and explosion, as they judge proper for the safety of the neighborhood. Such license shall be granted on written application, recorded in the town records and a certified copy of it furnished, without charge, to the applicant.

When application is made for such license, said officers shall assign a time and place for its consideration, and give at least 14 days' public notice thereof, in such manner as they think proper, at the expense of the applicant. Any person aggrieved by the decision of the selectmen of towns in granting or refusing such license may appeal therefrom to the next term of the superior court held in said county, which court may appoint a committee of 3 disinterested persons, as is provided in relation to appeals from location of highways. Said committee shall be sworn and give 14 days' notice of the time and place of their hearing to the parties interested, view the premises, hear the parties, and affirm, reverse or annul the decision of said selectmen, and their decision shall be final. Pending such appeal from granting such license, the supreme judicial court in equity or the superior court in equity may enjoin the erection of such building and engine.

Any such engine erected without a license shall be deemed a common nuisance without other proof than its use.

Said officers shall have the same authority to abate and remove an engine,

erected without license, as is given to the local health officer in chapter 25. (R. S. c. 128, § 21.)

Cross reference.—See c. 25, § 86, re removal of private nuisances.

Use of engine is nuisance only when unlicensed.—It is not the use of a stationary steam engine that makes it a nuisance. Its use for any proper purpose is lawful. It is only when it is unlicensed that it is to be deemed a nuisance without any other proof than its use. Burbank v. Bethel Steam Mill Co., 75 Me. 373.

And use and want of license must exist at same time.—The use and want of license must exist at the same point of time to make the engine a common nuisance. State v. Davis, 80 Me. 488, 15 A. 41.

And this must be alleged.—The use and the want of a license must concur. Both facts are material and traversable. Hence, both must be alleged and as of a certain specified time and place. State v. Davis, 80 Me. 488, 15 A. 41.

Whether person using is same as person erecting is immaterial.—The erection of an engine without the prescribed license, though prohibited, is not legally a nuisance, but the use of it is. It would therefore seem to be immaterial whether the person using is the same as the person erecting, or otherwise. State v. Davis, 80 Me. 488, 15 A. 41.

Applied in Brightman v. Bristol, 65 Me. 426; Kimball v. Davis, 117 Me. 187, 103 A. 154.

Sec. 24. Blasting rocks, notice given.—Persons engaged in blasting limerock or other rocks shall before each explosion give seasonable notice thereof, so that all persons or teams approaching shall have time to retire to a safe distance from the place of said explosion; and no such explosion shall be made after sunset.

Whoever violates any provision of this section forfeits to the prosecutor $5 for each offense, to be recovered in an action of debt, and is liable for all damages caused by any explosion; and if the persons engaged in blasting rocks are unable to pay or, after judgment and execution, avoid payment of the fine, damages and costs by the poor debtor's oath, the owners of the quarry in whose employment they were are liable for the same. (R. S. c. 128, § 22.)

Section is reiteration of common law.—Both law and sound reason concur in the proposition that a negligent party is liable for injuries caused by his own negligence to a person who is not guilty of negligence which contributes to the injury, and not otherwise. The statute, affording this remedy to an injured party, is little more than a reiteration of the common law. The only difference being that the failure to give notice of an explosion is made negligence per se, and is not excused by any amount of care in other respects. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

And defendant not liable in absence of omission or neglect.—An action under this section is based upon the omission and neglect of the defendant. If he had given the notice as required, and had not been guilty of any other fault, no liability would have arisen, even if the plaintiff had suffered an injury. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

Under this section, the ground of liability is an omission or neglect to give the seasonable notice required. Boston Excelsior Co. v. Bangor & Aroostook R. R., 93 Me. 52, 44 A. 138.

Or in case plaintiff contributorily negligent.—The action under this section is remedial. The defendant is liable for the consequences of his negligence, if no negligence of the plaintiff contributed to the injury. If it did, the plaintiff cannot recover. The established doctrine of contributory negligence, as a defense, applies to this class of actions. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

The rule of contributory negligence on the part of the plaintiff is applicable to an action under this section. Boston Excelsior Co. v. Bangor & Aroostook R. R., 93 Me. 52, 44 A. 138.

The section requires seasonable notice of an explosion. Failure to give it is negligence, which subjects the delinquent to the payment of damages caused by his negligence. But it does not follow that the injured party is thereby relieved of all obligation to exercise due care on his part. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

Provision as to damages is remedial.—While this section affixes a penalty to its violation, and is so far penal in character, the damages to be recovered by an injured party are only the actual damages suffered, and in this, the provision is

remedial, and to be construed as such. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

And includes all damages caused by explosion.—The remedy given by this section, is for "all damages caused by any explosion." Whether the damage is caused by the noise of the explosion, or by flying substances, is immaterial. Whatever damage may be caused by the explosion, whether by noise and its effect on horses, or otherwise, is within the statute protection, and the basis of liability. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

Including those to persons receding from point of explosion.—The statute protection is not limited to those "approaching" the point of explosion, but also includes those who have passed the point nearest the blast, and are receding from it, in near proximity and not "a safe distance from the place." Wadsworth v. Marshall, 88 Me. 263, 34 A. 30.

But section gives no remedy to workmen in quarries.—This statutory remedy is not intended to apply to workmen in quarries. A literal construction of the words "all persons" would doubtless include them, but persons that may be approaching seem rather intended to apply to these only who are not engaged in and about the quarry, and who, therefore, being ignorant of their proximity to danger, are seen coming within the danger line, instead of including with them such persons also as are constantly engaged there and have personal knowledge of what is taking place there. That clause apparently limits the remedy to such outsiders as might unsuspectingly be approaching within the possible range of the blast, and the object of the "seasonable notice" to them is so that they and their teams may have a reasonable time to retire to a safe distance. Hare v. McIntire, 82 Me. 240, 19 A. 453.

Sec. 25. Dangerous buildings.—When the municipal officers of a town, after personal notice in writing to the owner of any burnt, dilapidated or dangerous building, or by publication in a newspaper in the same county, if any, 3 weeks successively, otherwise in the state paper, and after a hearing of the matter, adjudge the same to be a nuisance or dangerous, they may make and record an order prescribing what disposal shall be made thereof, and thereupon the town clerk shall deliver a copy of such order to a constable, who shall serve such owner, if a resident of the state, with an attested copy thereof, and make return of his doings thereon to said clerk forthwith. If the owner, or part owner, is unknown or resides without the state, such notice shall be given by publication in the state paper, or in a paper published in the county, 3 weeks successively. (R. S. c. 128, § 23.)

See § 29, re vote of town required; c. 91, § 86, sub-§ IX, re buildings constructed, repaired, etc., contrary to by-laws; c. 97, § 19, re entrance to buildings by officers for examination.

Sec. 26. Town officers may order nuisance abated.—If no application is made to a justice of the supreme judicial court or the superior court, as is hereafter provided, the municipal officers of such town shall cause said nuisance to be abated, removed or altered in compliance with their order, and all expenses thereof shall be repaid to the town within 30 days after demand, or may be recovered of such person by an action for money paid. (R. S. c. 128, § 24.)

See § 29, re vote of town required.

Sec. 27. Owner may apply to supreme judicial or superior court.—Any owner aggrieved by such order may, within 30 days after said order is so made and filed, apply to a justice of the supreme judicial or superior court, in term time or vacation, who shall forthwith, after notice and hearing, affirm, annul or alter such order. If the court is not in session, the action shall be entered on the docket of the preceding term. (R. S. c. 128, § 25. 1947, c. 27.)

See § 29, re vote of town required.

Sec. 28. Costs.—If the court affirms such order, costs shall be recovered by the town. If it wholly annuls such order, costs shall be recovered by the ap-

plicant; and if it alters it in part, the court may render such judgment as to costs as justice requires. (R. S. c. 128, § 26.)

See § 29, re vote of town required.

Sec. 29. Sections 25-28 require vote of town.—The 4 preceding sections shall not be in force in any town unless adopted at a legal meeting thereof. (R. S. c. 128, § 27.)