

Hillsborough, }
Oct. 1, 1912. }

DEWEY v. NOYES, *Ex'x.*

Where the nature and amount of a claim against the estate of a deceased person have been fully explained to the executor, who flatly refuses to pay, the creditor may maintain an action thereon without the formal exhibition and demand required by section 1, chapter 191, Public Statutes.

ASSUMPSIT, to recover for board and nursing furnished to the defendant's testator. Transferred from the January term, 1912, of the superior court by *Chamberlin, J.*, on the plaintiff's exception to an order of nonsuit.

Thorp & Abbott (Mr. Thorp orally), for the plaintiff.

Jesse B. Pattee and Burnham, Brown, Jones & Warren (Robert L. Manning orally), for the defendant.

BINGHAM, J. This action is brought by the plaintiff to recover a sum claimed to be due her for boarding and nursing the defendant's testator. The questions presented arise on the plaintiff's exception to an order of the superior court directing a nonsuit, upon the ground that the evidence submitted by the plaintiff would not warrant a finding that payment of the claim had been demanded of the defendant before the suit was brought.

By section 1, chapter 191, Public Statutes, it is provided that "no action shall be sustained against an administrator . . . unless the demand has been exhibited to the administrator and payment has been demanded." Under this statute, it has been held that "a claim against the estate of a person deceased may be presented in any form which brings the nature and amount of it distinctly to the notice of the administrator"; that a written statement is not essential so long as the nature and amount of the claim are made known to him. *Ayer v. Chadwick*, 66 N. H. 385. And although the statute contemplates that before suit is brought the creditor or his authorized agent shall in person demand payment of the administrator, so that he may at once discharge the claim (*Cummings v. Farnham*, 75 N. H. 135; *Ross v. Knox*, 71 N. H. 249), still it is held that the demand may be waived by the administrator's denial of all liability when the claim is presented,

or by his absolute refusal to pay it at that or any other time. This is for the reason that no other reasonable deduction can be made from the conduct of the parties. *Jaffrey v. Smith, ante*, 168, 172, 174.

In this case there was evidence that shortly after the defendant's appointment as executrix she called at the office of the attorney for the plaintiff, who had charge of the claim in suit, and inquired what it was about; that the attorney explained fully to her the nature and amount of the claim, and received the reply that she would not pay the plaintiff for any claim or matter whatsoever and that it would do no good to put a statement of it in writing for her. In view of this evidence, it is unnecessary to consider the other evidence in the case, as this was of itself sufficient to entitle the plaintiff to go to the jury upon the issue in question.

Exception sustained.

All concurred.

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PARKER v. MUDGETT.

In an action for negligence against an employer, certain evidence deemed sufficient to warrant the finding that the plaintiff's injuries resulted from the negligence of a fellow-servant whose incompetency was, or ought to have been, known to the defendant.

CASE, for personal injuries. Trial by jury and verdict for the plaintiff. Transferred from the January term, 1912, of the superior court by *Pike, J.*, on the defendant's exceptions to the denial of motions for a nonsuit and the direction of a verdict in his favor.

The plaintiff's evidence tended to prove the following facts: October 18, 1907, the plaintiff, who had previously been employed as a chopper, was set at work taking away boards from the carriage of the defendant's sawmill. One Ouillette was the sawyer. On the afternoon of the first day of this employment, a glove on the plaintiff's right hand became entangled in the machinery, and when the carriage started to return to the saw the plaintiff was dragged with it. When he was fifteen or twenty feet from the