

the action is tried shall cause a certificate thereof to be made on the back of the execution." P. S., c. 236, s. 12.

As the court found the plaintiff's cause of action did not arise from the wilful and malicious act or neglect of the defendant but was founded in contract, the plaintiff was not entitled to the certificate.

Exception overruled.

Coös, }
Dec. 2, 1919. }

JOHN T. QUINN, *Adm'r*, v. GORHAM.

CASE, transferred from the April term, 1919, of the superior court by *Branch, J.*, on an agreed statement of facts.

Sullivan & Daley and *Harry G. Noyes* (*Mr. Sullivan* orally), for the plaintiff.

Drew, Shurtleff, Morris & Oakes, Alfred R. Evans and *Jesse F. Libby* (*Mr. Oakes* orally), for the defendant.

Per Curiam. This is an action for the death of the plaintiff's intestate caused by his being thrown over a defectively railed embankment while a traveler upon a state-aided highway. The accident occurred in August, 1914. The court dismissed the action, and the plaintiff excepted. In view of the decisions in *Grace v. Belmont*, 78 N. H. 112 and in *Kelsea v. Stratford*, *ante*, 273, the exception must be overruled.

Carroll, }
Jan. 6, 1920. }

STEPHEN BROCK v. ELLSWORTH H. ROLLINS.

TROVER, for certain articles of personal property sold as a part of the farm in controversy in *Rollins v. Brock*, 78 N. H. 456. Trial by the court and verdict for the defendant. Transferred from the May term, 1918, of the superior court by *Marble, J.*, on the plaintiff's exception to the verdict.

William Wright and Henry D. Yeaton, for the plaintiff.

Snow, Snow & Cooper, for the defendant.

YOUNG, J. As the case is understood, the court found that the chattels in question belonged to the defendant, and as the evidence warrants that finding, the plaintiff's exception raises no question for this court.

Exception overruled.

All concurred.

Grafton, }
April 6, 1920. }

SMITH SHOOK & LUMBER CO. v. FRED PERKINS.

ASSUMPSIT. Trial by jury, verdict for the plaintiffs. Their evidence tended to prove that one Patten, the defendant's father-in-law, spoke to them in March, 1917, about buying a lot of lumber belonging to the defendant, and that they offered him twenty dollars a thousand for it delivered to their mill and subsequently wrote the defendant to that effect. They could not agree, however, on the details of the trade and the matter dropped until the following November, when Patten asked them if they still wanted the lumber. They said they did, and the next week he delivered two loads and refused to deliver any more because their measure was unsatisfactory. Transferred from the May term, 1919, of the superior court by *Branch, J.*, on the defendant's exception to the denial of his motion for a directed verdict.

Alvin F. Wentworth and Walter M. Flint, for the plaintiffs.

Nathaniel E. Martin and William W. Thayer, for the defendant.

YOUNG, J. The evidence warrants the jury's finding that Patten sold the lumber in question to the plaintiffs. The only question, therefore, for this court is whether the evidence warrants a finding that Patten was authorized to sell it. The evidence relevant to that issue all comes from him and from the defendant, and is in substance that the defendant asked him sometime in October, 1917, if he thought the plaintiffs still wanted the lumber and told him