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Chapter 113.

Proceedings in Court in Civil Actions.

Chapter applies only to proceedings in courts of this state.—This chapter relates to "proceedings in court." The "proceedings in court" are proceedings in the courts in this state, not in those of other states or of foreign nations. Like all legislation, this chapter has reference to what may arise within the jurisdictional limits of the state. Folan v. Lary, 60 Me. 545.

Procedure. General Provisions.

Sec. 1. Entry of actions; further service; orders of notice.—No action can be entered after the 1st day of the session of the superior court without special permission. When it appears that the defendant has not had sufficient notice, the court may order such further notice as it deems proper. Any justice of the supreme judicial court or of the superior court may order notice concerning any civil proceeding, in or out of term time, directing how it shall be given, and such order, when made in vacation, shall be indorsed on the process. Any order of notice that the court may grant may be ordered by a justice in vacation. (R. S. c. 100, § 1.)

Cross references.—See c. 112, § 23, re want or defect of service cured; c. 123, § 2, re order of notice on petitions for review.

History of section.—See McDonough v. Blossom, 111 Me. 66, 88 A. 89.

"First day of the session."—The first day of the session may fairly be construed to mean the first day on which the court is organized and ready to proceed to business. First Nat. Bank of Brunswick v. Lime Rock F. & M. Ins. Co., 56 Me. 424.

This section does not say that no action shall be entered after the first day of the term, as fixed by law, but "after the first day of the session of the court." When no justice appears "on the day for holding a court," no court can properly be said to be in session, for a session of a court implies the presence of a judge to hear and try. First Nat. Bank of Brunswick v. Lime Rock F. & M. Ins. Co., 56 Me. 424.

Second sentence does not apply where no service has been made.—The provisions in this section that the court may order "further notice" when the defendant has not had "sufficient notice" apply only in cases where service has been attempted, but is for some reason defective, and not in cases where no service at all has been made. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

And section does not change rule that writ without service or attachment cannot be entered.—This section does not in any way, in terms, relate to the entry of writs, or change by any direct expression the rule that a writ without attachment or service cannot be entered, and that if the writ is entered improperly, the court gets no jurisdiction to order notice, and if notice is ordered, the order is improvident and the notice ineffective. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

The power of the court to order notice

on writs does not extend to writs not properly in court, as writs on which no service has been made, and no property attached. McDonough v. Blossom, 111 Me. 66, 88 A. 89.

A petition for leave to enter and prosecute a probate appeal is a "civil proceeding" within this section, and in the absence of any other statute specifically directing how notice of it should be given, notice thereon may be ordered by a justice in vacation. Sproul v. Randell, 107 Me. 274, 78 A. 450.

The term civil proceeding or process as here employed does not embrace mere motions in a pending cause. Mitchell v. Emmons, 104 Me. 76, 71 A. 321. See Sproul v. Randell, 107 Me. 274, 78 A. 450.

An appeal in insolvency is not "an action" within this section. Tuttle v. Fletcher, 93 Me. 249, 44 A. 903.

Cited in Marston, Petitioner, 79 Me. 25, 8 A. 87; Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

Sec. 2. Auditor, surveyor and referee appointed in vacation.—In all civil cases pending in the supreme judicial court or in the superior court, any justice of either court in vacation may appoint and commission an auditor or surveyor and, upon the written agreement and request of the parties or their attorneys of record, such justice may in vacation appoint a referee and make any other order or decree, interlocutory or final, in any such case; and the clerk of said court in each county shall enter upon the docket, either in term time or vacation, all such appointments and orders in any pending case. (R. S. c. 100, § 2.)

Sec. 3. When default recorded; when taken off.—When service of the writ has been made and the defendant does not appear by himself or attorney within the first 3 days of the term, his default may be recorded and the charge in the declaration taken to be true. If the defendant, before the juries are dismissed for the term, enters his appearance and pays to the plaintiff such costs as the court orders, the default shall be taken off. The court may permit it to be taken off for sufficient cause. (R. S. c. 100, § 3.)

Cross reference.—See c. 112, § 17 et seq., re service of writs.

Effect of default judgment as admission.—By suffering judgment by default, a party may admit the justice of the claim, but he does not thereby admit the jurisdiction of the court, or the correctness of the proceedings to establish and enforce the claim. Jewell v. Brown, 33 Me. 250.

The second sentence of this section does not apply to justices of the peace. State v. Hall, 49 Me. 412.

Sec. 4. Continuance if defendant out of state.—When the defendant was an inhabitant of the state and absent from it at the time of service and it does not appear that he has returned or has had actual notice of the suit, the court may continue the action, not exceeding twice unless for special cause, or enter judgment on default. If the defendant was not an inhabitant of the state or within it and had actual notice of the suit, the court may order a continuance if he does not appear at the first term. (R. S. c. 100, § 4.)

Cross reference. — See c. 114, § 7, and note, re trustee process where principal defendant is absent from state.

History of section. — See Jackson v. Gould, 72 Me. 335.

This section applies to nonresident defendants, as well as to inhabitants temporarily absent. Jackson v. Gould, 72 Me. 335.

Nonresident personally and seasonably served within state.—If an inhabitant of another state against whom a writ has been sued out, and whose property has been thereon attached here, comes within the state and is here personally and seasonably served with an order of notice before the suit is defaulted, it is not necessary to have the case afterwards continued, or that the plaintiff should file a bond before taking out execution, if the defendant fails to appear. Emery v. Legro, 63 Me. 357.

Entry of default judgment or continuance is matter of discretion.—When a suggestion is made of the absence of a defendant, it is a matter of discretion to enter judgment on default, or to continue the action from term to term, not exceeding twice, unless for special cause. The exercise of this discretion is not a matter of error. Lovell v. Kelley, 48 Me. 263.

Cited in Drew v. Drew, 37 Me. 389; Penobscot R. R. v. Weeks, 52 Me. 456.

Sec. 5. Execution stayed 1 year unless bond given; continuance of attachment on original writ.—When judgment is rendered on default of an absent defendant in a personal action as provided in the preceding section, execution cannot be issued thereon within 1 year thereafter unless the plaintiff first gives bond to the defendant, with one or more sureties in double the amount of damages and costs, conditioned to repay the amount to the defendant if the judgment is reversed on review, to which he is entitled of right if brought within 1 year, or so much of the amount recovered as is recovered back on such review, and any attachment made on the original writ continues for 1 year and 30 days days after said judgment is so rendered when no bond is given; and when a bond is given, it continues for 30 days after said bond is filed with the clerk of said court. (R. S. c. 100, § 5.)

Cross references.—See c. 123, re petitions and actions of review; c. 171, § 51, re redemption of lands of defaulted defendants living out of the state.

History of section. — See Jackson v. Gould, 72 Me. 335.

This section applies to nonresident defendants, as well as to inhabitants temporarily absent. Jackson v. Gould, 72 Me. 335.

But not to defendants having actual notice of suit.—This section refers only to the first class of cases mentioned in the preceding section, including absent defendants who are not, as well as those who are, inhabitants of the state. It was not intended to give the review of right to the defendants mentioned in the last sentence of § 4, who have actual (legal) notice of the suit. Jackson v. Gould, 72 Me. 335.

Nonresident personally served within state.—See note to § 4.

Execution and levy in violation of section are absolutely void.—Where judgment is entered on default and execution issued within the year without filing the bond required by this section, the execution and the levy under it are not voidable merely, but absolutely void, and it is immaterial who the adverse party may be. Davis v. Stevens, 57 Me. 593. But see Gardiner Mfg. Co. v. Heald, 5 Me. 381, wherein it was held that if an execution is issued against an absent defendant, without the previous filing of a bond pursuant to this section, it cannot be avoided collaterally, but is good till superseded.

And judgment debtor may set aside execution returned satisfied by levy.—A judgment debtor who was absent from the state and not served with process may maintain audita querela to set aside an execution issued without giving the bond prescribed in this section, notwithstanding the execution has been returned satisfied by a levy on the debtor's real estate. Folan v. Folan, 59 Me. 566.

But violation of section is not cause for writ of error.—It is not a good cause for a writ of error to reverse a judgment that the plaintiff sued out his execution without giving the bond prescribed by this section when the defendant is without the state. Lovell v. Kelley, 48 Me. 263.

And remedy is by review. — Judgment should not be reversed because, at the time of the service of the writ on him, the defendant was absent from the state, had no actual notice of the pendency of the suit, and did not return till after judgment. In such case ample remedy is afforded by review, for which provision is made by this section and § 6. Lovell v. Kelley, 48 Me. 263.

The review under this section is a matter of right. Jones v. Eaton, 51 Me. 386. See Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

And will be issued under c. 123, § 7, without petition.—When judgment is rendered on default against an absent defendant, he is entitled "of right" to a review. If the defendant brings himself within this statute, a writ of review will be issued under c. 123, § 7 without petition. Leviston v. Standard Historical Society, 133 Me. 77, 173 A. 810.

Review should be brought within one year from rendition of judgment.—The action of review, when a matter of right under this section, should be brought within one year from the date of the rendition of judgment, not from the date of default. Jackson v. Gould, 72 Me. 335.

Applied in Viles v. Korty, 133 Me. 154, 174 A. 903.

Cited in Penobscot R. R. v. Weeks, 52 Me. 456; Cota v. Ross, 66 Me. 161; Thomaston v. Starrett, 128 Me. 328, 147 A. 427.

Sec. 6. Bond left with clerk; petition for review.—The bond shall be deposited with the clerk, who shall decide upon the sufficiency of the sureties, subject to an appeal to a justice of the court, and if the review of right is not so prosecuted, the defendant may, within 1 year after he first has notice of the judg-

ment, petition the court for a review and the court may grant it on such terms as it deems reasonable. (R. S. c. 100, § 6.)

Cross reference.—See c. 123, re review.

History of section. — See Jackson v. Gould, 72 Me. 335.

Section applies where party fails to bring review within time limited by § 5.—Where a party is entitled to a writ of review as a matter of right, and fails to bring it within the time limited by § 5, he may still be allowed the writ, in the discretion of the court, upon petition under this section. Jackson v. Gould, 72 Me. 335.

Cited in Lovell v. Kelley, 48 Me. 263.

Sec. 7. Executions issued upon judgment on default, without deposit of bond, valid after 1 year.—Whenever through accident, inadvertence or mistake an execution has been issued by the clerk, judge or recorder of any court in any county upon a judgment rendered on default of an absent defendant in a personal action, within 1 year after the rendition of such judgment, without deposit of the bond specified in sections 5 and 6, all proceedings upon or by virtue of such execution or judgment shall, after 1 year from the rendition of such judgment, have the same effect and validity as if the bond had been duly given, deposited and approved unless a petition for review has been brought within said year; and, in case such judgment is not reversed on review if brought within said year, all such proceedings shall be valid as aforesaid after final judgment for the defendant in review. (R. S. c. 100, § 7.)

See c. 123, re review.

Sec. 8. Court may allow entry of appeals at another term.—When an appeal is taken from a judgment of a trial justice or municipal court, and the action by mistake or accident is not entered and the judgment has not been affirmed, the court may, on petition of either party, allow the action or complaint to be entered at another term of the court, upon reasonable terms, with the same effect as if it had been entered at the proper term. (R. S. c. 100, § 8.)

Sec. 9. Petition within 1 year; attachment or bail not revived.—Such petition must be presented to the court or filed in the clerk's office within 1 year after the term at which the action ought to have been entered; and no attachment or bail shall be revived or continued by such proceedings. (R. S. c. 100, § 9.)

Sec. 10. On appeals, original papers sent up, except writ and pleadings.—In cases carried from a trial justice or municipal court to a higher court, all depositions and original papers, except the process by which the suit was commenced, the return of service thereon and the pleadings shall be certified by the proper officer and carried up without leaving copies unless otherwise ordered by the court having original cognizance. (R. S. c. 100, § 10.)

Sec. 11. Proceedings not abated, etc., for want of form.—No process or proceeding in courts of justice shall be abated, arrested or reversed for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders. (R. S. c. 100, § 11.)

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H. Officer's Return.
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I. GENERAL CONSIDERATION.

Purpose of section. — Modern practice tends more and more to direct and speedy results. More and more it is required of suitors to be diligent in the pursuit of their rights, and more and more the failure to take timely advantage of such remedy as the law affords is deemed to be a waiver. The courts and the people alike realize that it is best that a lawsuit should have an end. This universal sentiment was voiced by the legislature when it declared that no proceeding shall be reversed for error that is by law amendable. Thompson v. Mason, 92 Me. 98, 42 A. 314.

This section applies on both civil and criminal sides. Miller v. Wiseman, 125 Me. 4, 130 A. 504.

And the section has been liberally construed.—This section, being remedial, has been liberally construed and applied in the furtherance of justice. South Thomaston v. Friendship, 95 Me. 201, 49 A. 1056.

The right of amendment is very broad. Doherty v. Bird, 116 Me. 416, 102 A. 229.

Courts are liberal in the allowance of amendments for the furtherance of justice. Solon v. Perry, 54 Me. 493. Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 A. 612.

When the parties are in court, latitude of discretion in allowing amendments is wide. But, until served, as the statute prescribes, initially, a party is not, either in contemplation of general principle, or the authority of legislatively conferred control, within the jurisdiction of the court; there is lack of due process. Dover-Foxcroft v. Lincoln, 135 Me. 184, 192 A. 700.

The granting or refusing to grant amendments is within the discretion of the trial court. Foster v. Haines, 13 Me. 307. See Herrick v. Osborne, 39 Me. 231; Solon v. Perry, 54 Me. 493; Place v. Brann, 77 Me. 342.

It is well settled that courts have power over their process, and, subject to the rule that there must be something by which to amend, nearly all formal defects and clerical errors may be amended, not without limitation, but in sound discretion. Collins v. Bugbee & Brown Co., 136 Me. 12, 1 A. (2d) 178.

And does not furnish matter for exceptions. Foster v. Haines, 13 Me. 307. See Cram v. Sherburne, 14 Me. 48; Place v. Brann, 77 Me. 342.

But exceptions will lie where judge rules against amendment as matter of law. — Where the judge rules against an amendment as a matter of discretion, it is conclusive. But if he rules as a matter of law, such ruling is open to exceptions. Rowell v. Small, 30 Me. 30.

And also where amendment is permitted which law does not authorize.—It is within the discretion of the judge to permit amendments in all cases where by law the writ or declaration is amendable; and the supreme judicial court does not revise that exercise of discretion. But if an amendment is permitted which the law does not authorize, the party has a right to except. Newall v. Hussey, 18 Me. 249. See Fairfield v. Paine, 23 Me. 498.

But amendments, unauthorized by law, cannot be taken advantage of by general demurrer, but may be by exceptions. Herrick v. Osborne, 39 Me. 231.

If amendments are prejudicial to other parties, reasonable terms are imposed.—The granting of amendments is a matter of discretion with the presiding judge, and if prejudicial to other parties, reasonable terms will be imposed, and the adverse party will be permitted to amend his pleadings as a matter of course. Herrick v. Osborne, 39 Me. 231.

But terms are likewise in discretion of trial judge.—The terms upon which an amendment is to be allowed are at the discretion of the presiding judge. Harvey v. Cutts, 51 Me. 604.

And will not be examined on exceptions. —The exercise of the judge's discretion as to terms will not be examined, on exceptions, by the supreme judicial court. Bolster v. China, 67 Me. 551. See Place v. Brann, 77 Me. 342.

And judge may dispense with terms entirely.—The whole matter is committed to the discretion of the presiding judge, and the power to allow amendments upon terms substantially includes a power to dispense with terms if, in the opinion of the presiding judge, justice requires it. Bolster v. China, 67 Me. 551. See Harvey v. Cutts, 51 Me. 604; Place v. Brann, 77 Me. 342.

Under this section the matter of imposing any terms is discretionary upon the court. Flint v. Comly, 95 Me. 251, 49 A. 1044.

Though terms are never refused when amendment is of substance. — Where courts have jurisdiction of the subject matter, the proceedings may be shaped and varied so as to reach the justice of the case. Such alterations, however, are not

always to be made but upon terms. These are to be imposed at the discretion of the court, but are never refused when the amendment allowed is in matter of substance. State v. Folsom, 26 Me. 209. See Matthews v. Blossom, 15 Me. 400.

Special demurrers are not practically set aside by this section. Bean v. Ayers, 67 Me. 482.

Suggestion in argument not considered motion to amend.—Where a case is submitted to the law court on report of the case, a suggestion in argument, of an amendment of the writ, will not be considered as a motion to amend. Thompson v. McIntire, 48 Me. 34.

Motion to amend denied as coming too late.—Motion to amend denied where defendants had been defaulted upon the declaration as it stood, plaintiff had been paid principal and legal interest, and the case had been argued upon the existing counts. Palmer v. York Bank, 18 Me. 166.

Amendments in form merely will not dissolve an attachment so as to let in subsequently attaching creditors, or discharge bail. To have this effect, the amendment must be such as may let in some new demand, or some new cause of action. Marston v. F. C. Tibbetts Mercantile Co., 110 Me. 533, 87 A. 220.

Applied in McLellan v. Codman, 22 Me. 308; Winslow v. Bank of Cumberland, 26 Me. 9; Simpson v. Norton, 45 Me. 281; Page v. Danforth, 53 Me. 174; Tukey v. Gerry, 63 Me. 151; Howard v. Kimball, 65 Me. 308; Boothby v. Woodman, 66 Me. 387; Bean v. Ayers, 69 Me. 122; Counce v. Studley, 75 Me. 47; Matthews v. Treat, 75 Me. 594; Lewiston Steam Mill Co. v. Merrill, 78 Me. 107, 2 A. 882; In re Brockway Mfg. Co., 87 Me. 477, 32 A. 1015.

Stated in Fuller v. Miller, 58 Me. 40.

Cited in Anderson v. Wetter, 103 Me. 257, 69 A. 105.

II. WHAT AMENDMENTS ALLOWED.

A. In General.

This section has respect only to circumstantial errors or mistakes. McLellan v. Crofton, 6 Me. 307.

Circumstantial errors or mistakes are those which are in matters not essential. McLellan v. Crofton, 6 Me. 307.

And does not permit an amendment which will add a new or different cause of action, and the court has in numerous cases held that such amendments are not allowable. Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 A. 612. See Newall v. Hussey, 18 Me. 249.

But declaration which exhibits no sufficient cause of action is amendable.—A declaration so defective that it would exhibit no sufficient cause of action may be cured by an amendment without introducing any new cause of action. This is often the very purpose of the law authorizing amendments. Pullen v. Hutchinson, 25 Me. 249.

The rule of law undoubtedly is that where an intended cause of action is defectively set forth, and yet so as clearly to be distinguished from any other cause of action, in the manner it would be if the declaration were perfect, then the amendment may properly be allowed. Annis v. Gilmore, 47 Me. 152.

When no new cause is introduced.—All that is required in amendments is, that the cause of action should remain the same. Within this limit, amendments, to reach the merits of the case, are most liberally allowed. A declaration so defective that it would exhibit no sufficient cause of action may be cured by an amendment without introducing any new cause of action. Conway Fire Ins. Co. v. Sewall, 54 Me. 352.

Amendments in matter of form, or for circumstantial errors or mistakes, are allowable by the provisions of this section. Such amendments are admissible, though the declaration be so defective that no sufficient cause of action be exhibited, when the intended cause of action may be clearly perceived, and no new cause of action is introduced. Herrick v. Osborne, 39 Me. 231.

B. As to Parties.

Cross reference.—As to striking out parties and inserting additional parties, see §§ 12, 14.

Misnomers are correctible by amendment under section.—Misnomers, a term applied where there is a mistake in the word or combination of words constituting a man's name, and distinguishing him from other individuals, are, within this section, correctible. Collins v. Bugbee & Brown Co., 136 Me. 12, 1 A. (2d) 178.

The misnomer in the Christian name of one of the defendants, not having been taken advantage of in abatement, was legally amendable. Fogg v. Greene, 16 Me. 282.

But this section does not cover a case involving change of parties. Surace v. Pio, 112 Me. 496, 92 A. 621.

Misnomer and change of parties distinguished. — Kinds of circumstantial errors and mistakes affecting the names of parties within the provision of this section are cases of misnomer, cases in which the writs state the wrong name of the right

party, as distinguished from those in which the writs state the right name of the wrong party. Surace v. Pio, 112 Me. 496, 92 A. 621.

Amendment striking out word "company" in name of corporation allowed.—See Berry v. Atlantic Ry., 109 Me. 330, 84 A. 740.

Amendment allowed where corporation erroneously described as organized under laws of Maine.—See Marston v. F. C. Tibbetts Mercantile Co., 110 Me. 533, 87 A. 220.

Docket entry in name of plaintiff in interest corrected.—Where a writ was duly served and returned into court, but erroneously entered upon the docket, in the name of the plaintiff in interest, to which the defendants answered, the court, at a subsequent term, may, under the provisions of this section, permit the docket entry to be corrected, so that it will conform to the writ upon such conditions, as will save the rights of the defendants to file any plea or motion required to be filed at the first term. Smith v. Wood, 48 Me. 252.

Writ erroneously describing plaintiff as executor amendable.—See Bragdon v. Harmon, 69 Me. 29.

Amendment setting forth that plaintiffs sued as deacons of religious society.—See Anderson v. Brock, 3 Me. 243.

Where statute requires that process shall abate. — Where a statute expressly provides that in suits on probate bonds, the name, place of abode and addition of the person for whose benefit it is instituted shall be inserted in the writ, otherwise the same shall abate, noncompliance with these requirements is not one of those circumstantial errors or mistakes for which, by this section, no process shall be abated, for the law is imperative that such shall be the effect of the deficiency. Fuller v. Wing, 17 Me. 222.

C. Supplying Omitted Facts and Correcting Misstatements in Declaration.

Day of alleged trespass may be changed by amendment.—In an action of trespass, where the trespass was alleged to have been committed on a certain day, subsequent to the date of the writ, the declaration may be amended by fixing the time prior to the date of the writ. Hammat v. Russ, 16 Me. 171. See Moore v. Boyd, 24 Me. 242.

Amendment correcting description of locus in trespass quare clausum is allowable. — In an action of trespass quare clausum fregit, if any part of the locus is misdescribed in the declaration, an amendment describing it correctly is clearly allowable. It introduces no new cause of action, but only corrects an error in the description of the close on which the trespass is alleged to have been committed. Haynes v. Jackson, 66 Me. 93.

But amendment embracing different piece of land sets forth new cause of action.—In real actions, an amendment embracing a different piece of land from that described in the declaration is inadmissible, as setting forth a new cause of action. It is otherwise, if the amendment merely gives a more particular and certain description of the land originally sued for. Wyman v. Kilgore, 47 Me. 184.

Demandant in writ of entry may diminish amount of his claim.—See Plummer v. Walker, 24 Me. 14.

Allegation of seizin and disseizin supplied in declaration in writ of entry.—See Rowell v. Small, 30 Me. 30.

Declaration amendable by inserting averment of assignment. — See Fleming v. Courtenay, 95 Me. 128, 49 A. 611.

Omission to include in declaration portion of original recognizance.—The omission through clerical error to include in the declaration a portion of the original recognizance is a defect of form and therefore by this section amendable. State v. Parent, 132 Me. 433, 172 A. 442.

Plaintiff may be allowed to strike out items in account.—A plaintiff may be allowed, in the discretion of the court, to amend his declaration by striking out items contained in his account, or any portion of the claim sued. South Thomaston v. Friendship, 95 Me. 201, 49 A. 1056.

An amendment of a writ, by striking out of the account annexed, a part of the charges and credits, is within the discretion of the court, and is not a subject for revision on exceptions. Wight v. Stiles, 29 Me. 164.

Adding to number of dollars in description of bill of exchange sued on.—See Green v. Jackson, 15 Me. 136.

"Common highway" substituted for "county road."—See Young v. Garland, 18 Me. 409.

"Birch lumber" substituted for "ash lumber."—See Walker v. Fletcher, 74 Me. 142.

Amendment to declaration allowed after verdict.—See Kendall v. White, 13 Me. 245.

D. New Counts.

New count may be inserted if for same cause of action.—Under this section, when the court has jurisdiction of the persons, and the subject matter, an amendment of a declaration in a writ can be made, by

inserting a new count, if it shall appear that it is for the same cause of action. Bluehill Academy v. Ellis, 32 Me. 260.

The new count offered must be consistent with the former count or counts; that is, it must be of the like kind of action, subject to the same plea, and such as might have been originally joined with others. It must be for the same cause of action; that is, the subject matter of the new count must be the same as that of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing. Bluehill Academy v. Ellis, 32 Me. 260.

Adding count for money had and received.—In an action of assumpsit against the drawer of an order for the payment of money, where the only count in the declaration is one setting forth the order, and averring presentment and notice, a judge has power to permit an amendment during the trial and after the argument of the defendant's counsel to the jury, by inserting another count for money had and received. Cram v. Sherburne, 14 Me. 48.

New count presumed to be for same cause of action.—In an action for boomage of logs, on an account annexed to the writ, if an amendment be allowed at the court permitting the filing of a count for money had and received, it will be presumed to be for the same cause of action, unless the exceptions show to the contrary. Penobscot Boom Corp. v. Baker, 16 Me. 233.

Adding count in trespass de bonis to declaration in trespass quare clausum. — See Duncan v. Sylvester, 13 Me. 417; Hill v. Penny, 17 Me. 409.

Addition of new counts allowed.—See Loring v. Proctor, 26 Me. 18; Perrin v. Keene, 19 Me. 355.

New counts held to introduce new cause of action.—See Bartlett v. Perkins, 13 Me. 87; Newall v. Hussey, 18 Me. 249; Lambard v. Fowler, 25 Me. 308; Annis v. Gilmore, 47 Me. 152; Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 A. 612.

E. Ad Damnum.

The ad damnum of a writ is amendable. Converse v. Damariscotta Bank, 15 Me. 431.

Ad damnum may be inserted where totally omitted.—An amendment of the writ by inserting the ad damnum, which has been inadvertently omitted, is clearly allowable. Hare v. Dean, 90 Me. 308, 38 A. 227.

And may be increased to correspond to amount of verdict.—See McLellan v. Crofton, 6 Me. 307; Morse v. Sleeper, 58 Me. 329; Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

Before rendition of judgment.—The total omission, or the smallness of the ad damnum in a writ, cannot be considered as merely a circumstantial error, within this section, after the rendition of judgment. But until judgment it may be so considered. And therefore where no damages have been laid in the writ, the plaintiff, after verdict and before judgment, may have leave to amend by inserting a sufficient sum. McLellan v. Crofton, 6 Me. 307. See Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504. But see Morse v. Sleeper, 58 Me. 329.

But new trial will be granted unless amendment is for circumstantial error or formal matter.—An amendment of a declaration after verdict by increasing the damages claimed to correspond to a verdict will not as a general rule be permitted without setting aside the verdict and granting a new trial to enable the defendant to make his defense to the enlarged demand unless the amendment is for the correction of a circumstantial error or a matter of form. Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

Failure to set ad damnum in amount equal to treble damages.—Where the failure to set the ad damnum clause in an amount sufficient to equal the treble damages allowed by statute is but a formal matter, an amendment after verdict may be allowed by the trial court. Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

Ad damnum below minimum jurisdictional amount may be increased.—And if an entire ad damnum can be lawfully supplied, one which is below the amount fixed by the statute as the minimum limit of the jurisdiction of the court may also on the same principle be increased. Merrill v. Curtis, 57 Me. 152.

Ad damnum reduced.—If a writ be directed and served by a constable, wherein the damage demanded exceeds one hundred dollars, the writ may be amended by reducing the ad damnum to that amount. Converse v. Damariscotta Bank, 15 Me. 431.

F. Changing Form of Writ.

Writ of original summons may be changed to writ of attachment.—The court has power to grant an amendment, permitting a writ of original summons to be changed to a writ of attachment. However, such amendment is not to be considered a matter of form, but of substance, and to be granted on terms. Matthews v. Blossom, 15 Me. 400.

The court has power to grant an amendment, permitting a writ of original summons, directing the attachment of property, to be changed into a regular writ of attachment. Ordway v. Wilbur, 16 Me. 263.

A writ of summons and attachment is amendable by striking out the command to attach. Ripley v. Harmony, 111 Me. 91, 88 A. 161.

Inserting direction to attach in writ of original summons.—The refusal of a judge to permit an amendment of a writ of original summons, by inserting a direction to attach property, is but an exercise of discretionary power; and the judge is under no obligations to grant such amendment. Carter v. Thompson, 15 Me. 464.

A capias writ may be amended under this section to change its form to capias or attachment, in the discretion of the presiding judge, with or without terms, and exceptions do not lie to the exercise of such discretion. Cameron v. Tyler, 71 Me. 27.

If a writ erroneously contains a direction to arrest the defendant, but is served by summons, it may be amended, even without terms, at the discretion of the presiding judge. Harvey v. Cutts, 51 Me. 604.

G. Date of Writ and Return Day.

A judge has power to allow an amendment of a writ by altering its date to a subsequent day, although prior to such amendment, the action appeared to have been commenced before the cause of action had accrued. Bragg v. Greenleaf, 14 Me. 395.

An amendment substitutng the real for the apparent date of a writ may be allowed in the discretion of the court. Gardiner v. Gardiner, 71 Me. 266.

A defect as to the time and place, at and to which a writ is made returnable, may be amended on motion, after a general appearance by the defendant and the expiration of the time for filing pleas in abatement. Lawrence v. Chase, 54 Me. 196.

The return day of a writ may be amended according to the evident original intention. Guptill v. Horne, 63 Me. 405.

Where the writ was made returnable on the right day, but not with so much particularity as the statute form required, and the parties, the cause and the court were so plainly indicated that they could not be misunderstood, the case came within the power of amendment expressly given to the court by this section. Ames v. Weston, 16 Me. 266.

Where defendant is not misled thereby.—The time of holding the court, next after the date of the writ, is fixed by law; and if there is a misrecital of the time in the writ, and the defendant is not deceived or misled, but appears at the next court and there is a continuance, without any saving of exceptions, the error may be corrected by amendment. Barker v. Norton, 17 Me. 416. See Burtchell v. Willey, 147 Me. 339, 87 A. (2d) 658.

But amendment is not allowed where defendant has not entered general appearance.—Where the writ named as return day a day already past, the summons was insufficient to bring the defendant within the jurisdiction of the court, and, defendant, not having entered a general appearance, amendment of the writ to name a proper return day was erroneous. Dover-Foxcroft v. Lincoln, 135 Me. 184, 192 A. 700.

Omission of return day in writ.—See Pattee v. Lowe, 35 Me. 121.

H. Officer's Return.

When amendment of officer's return not allowed.—When judgment has been rendered in the suit, the officer making service of the writ ought not to be permitted to amend his return, unless the record discloses something from which the addition can be made. Fairfield v. Paine, 23 Me. 498.

Nor should an amendment of an officer's return be permitted, or allowed to have effect, when such amendment would destroy or lessen the rights of third persons previously acquired, bona fide, and without notice by the record, or otherwise. Fairfield v. Paine, 23 Me. 498.

Amendment of return of officer making levy refused.—See Pierce v. Strickland, 26 Me. 277.

I. Seals.

The seal of the court is matter of substance and not amendable. Bailey v. Smith, 12 Me. 196; Tibbetts v. Shaw, 19 Me. 204.

An original writ, without the seal of the proper court, is defective, and the defect is not amendable. Witherel v. Randall, 30 Me. 168.

And process is void in absence of seal.—A process issuing from a court, the authentication of which rests upon the court seal, is void in absence of a seal, notwithstanding this section. Miller v. Wiseman, 125 Me. 4, 130 A. 504.

This section does not include an amendment to a bond in a probate appeal by permitting the addition of seals. Carter, Appellant, 111 Me. 186, 88 A. 475.

Execution amended by affixing seal.—If the clerk omits to affix the seal of the court to an execution, it may be amended, even

after the execution has been extended on lands, and the extent recorded. Sawyer v. Baker, 3 Me. 29.

J. Miscellaneous Illustrative Cases.

A writ of scire facias is amendable in the same manner as declarations in other cases. Marsh Bros. & Co. v. Bellefleur, 108 Me. 354, 81 A. 79; State v. Parent, 132 Me. 433, 172 A. 442.

Declaration in debt setting out facts in manner appropriate to scire facias.—See State v. Folsom, 26 Me. 209.

After a special demurrer for misjoinder is sustained the declaration may be amended under this section. Hudson v. McNear, 99 Me. 406, 59 A. 546.

Teste of writ is amendable. — The teste of a writ is matter of form, and is amendable. Converse v. Damariscotta Bank, 15 Me. 431.

A verdict will not be set aside for trivial faults, such as an error in the title of the case, when the identification of the finding is complete, and the merits and intelligibleness of the proceedings are not affected. Methodist Episcopal Parish v. Clarke, 74 Me. 110.

Insertion in execution of direction to constable. — The court had authority to allow the insertion in an execution of a direction to the constable; although the levy had been previously recorded, and, as it seems, although the land had been conveyed by the debtor to a third person after the attachment and before the levy. Morrell v. Cook, 31 Me. 120.

Amendments allowed in action to recover pauper supplies.—See South Thomaston v. Friendship, 95 Me. 201, 49 A. 1056.

Amendment refused in action for damages to leased premises.—See Willoughby v. Atkinson Furnishing Co., 93 Me. 185, 44 A. 612.

Amendment held consistent with original declaration, and for same cause of action.—See Warren v. Ocean Ins. Co., 16 Me. 439.

Amendments adding new cause of action refused.—See Eaton v. Ogier, 2 Me. 46; Bishop v. Williamson, 11 Me. 495.

Sec. 12. Writs amended.—In all civil actions the writ may be amended by inserting additional plaintiffs or by striking out one or more plaintiffs when there are two or more, and the court may impose reasonable terms. (R. S. c. 100, § 12.)

Purpose of section. — With the purpose of obviating the rigorous rule of the common law as to parties plaintiff, the legislature of 1874 enacted this section. Surace v. Pio, 112 Me. 496, 92 A. 621.

This section has been construed with strictness, and its scope has not been extended beyond the plain and natural meaning of its terms. Surace v. Pio, 112 Me. 496, 92 A. 621.

It does not apply where bringing in a new plaintiff would make a misjoinder. Clark v. Anderson, 103 Me. 134, 68 A. 633.

And it applies only where a party is to be added to or joined with the existing plaintiff, or plaintiffs, with a bona fide intention that the action is to be prosecuted by all the plaintiffs, the original as well as the additional ones. Clark v. Anderson, 103 Me. 134, 68 A. 633.

And does not permit the substitution of one sole plaintiff for another. Surace v. Pio, 112 Me. 496, 92 A. 621. See Fleming v. Courtenay, 98 Me. 401; Clark v. Anderson, 103 Me. 134, 68 A. 633.

The statutes of this State providing for amendments as to plaintiffs do not allow an amendment the effect of which would be to strike out the sole plaintiff in the writ and substitute in his place a new plaintiff. Clark v. Anderson, 103 Me. 134, 68 A. 633.

A writ which contains the name of no plaintiff cannot be amended by inserting a name, because this section presupposes a writ with one or more plaintiffs and permits the number to be increased or diminished, but does sanction an amendment by inserting a plaintiff where none existed before. Jones v. Sutherland, 73 Me. 157; Surace v. Pio, 112 Me. 496, 92 A. 621.

Writ brought in name of city treasurer not amendable by substituting or joining city.—A writ brought in the name of the treasurer of a city was not amendable either by adding the City of Rockland as a plaintiff and thereby creating a misjoinder, or by striking out the sole plaintiff and substituting the city in his place. Clark v. Anderson, 103 Me. 134, 68 A. 633.

An action brought by the plaintiff in her individual capacity and for her own benefit could not be amended by making her plaintiff as executrix. Surace v. Pio, 112 Me. 496, 92 A. 621, citing Fleming v. Courtenay, 98 Me. 401, 57 A. 592.

Where single individual is both plaintiff and defendant. — While a single individual may not be both plaintiff and defendant in an action at law, process which

violates that principle may be amended by striking out a person so named as a plaintiff. United Feldspar & Minerals Corp. v. Bumpus, 141 Me. 7, 38 A. (2d) 164.

Striking out party as copartner and plaintiff. — On the motion one plaintiff to amend by striking out the name of another as a copartner and as a plaintiff on the ground that there was no partnership, but a tenancy in common, the proposed amendment did not introduce a new cause of action, the parties in the case could be rightly understood, and the amendment came within the purview of this section. Doherty v. Bird, 116 Me. 416, 102 A. 229.

Striking out on motion to discontinue made by parties eliminated.—A plaintiff may be stricken out by amendment, and it cannot be material that the striking out originated in a motion of the parties eliminated to discontinue as plaintiffs rather than in a motion to amend filed by the parties who continued the prosecution of the claim. United Feldspar & Minerals Corp. v. Bumpus, 141 Me. 7, 38 A. (2d) 164.

Applied in McGee v. McCann, 69 Me. 79; Stinson v. Fernald, 77 Me. 576, 1 A. 742; Coombs v. Hogan, 114 Me. 123, 95 A. 512.

Cited in Blodgett v. Sleeper, 67 Me. 499.

Sec. 13. Writ or process lost after service, new one filed.—When in an action pending, the loss or destruction of a writ or process after service is proved by affidavit or otherwise, the court may allow a new one to be filed, corresponding thereto as nearly as may be, with the same effect as the one lost or destroyed. (R. S. c. 100, § 13.)

Sec. 14. Names of defendants struck out on terms or new ones inserted; service.—When there are two or more defendants, the writ may be amended by striking out one or more of them on payment of costs to him to that time. A writ founded on contract, express or implied, may be amended by inserting additional defendants; and the court may order service to be made on them and their property to be attached as in case of original writs; and on return of due service, they become parties to the suit but are not liable to costs before service. (R. S. c. 100, § 14.)

Cross reference.—See c. 112, § 24, et seq., re attachment.

History of section.—See Fuller v. Miller, 58 Me. 40; Surace v. Pio, 112 Me. 496, 92 A. 621.

Section changes common law.—The court was not authorized to allow the amendment by striking out the defendant's name, or discontinuing against him at common law. The authority is by statute, and by that it is allowable only on payment of costs to the party whose name is stricken from the writ by a discontinuance. Fuller v. Miller, 58 Me. 40. See Ayer v. Gleason, 60 Me. 207; William H. Glover Co. v. Rollins, 87 Me. 434, 32 A. 999; Surace v. Pio, 112 Me. 496, 92 A. 621.

And has been strictly construed. Surace v. Pio, 112 Me. 496, 92 A. 621.

It does not apply where bringing in new parties would make a misjoinder. Duly v. Hogan, 60 Me. 351.

Nor does it authorize the substitution of a new defendant for the only one originally named in the writ. William H. Glover Co. v. Rollins, 87 Me. 434, 32 A. 999; See Fleming v. Courtenay, 98 Me. 401; Clark v. Anderson, 103 Me. 134, 68 A. 633; Surace v. Pio, 112 Me. 496, 92 A. 621.

Or joinder of new defendants where prosecution of suit against original defendant not intended.—This section ought not to be perverted into a means of conjuring a fresh set of defendants into a suit, already commenced, which is not intended to be prosecuted against the party originally sued. That is not a summoning in of additional defendants, but an entire change of the parties defendant, a substitution of one defendant for another. Duly v. Hogan, 60 Me. 351. See William H. Glover Co. v. Rollins, 87 Me. 434, 32 A. 999.

In an action founded on contract against a sold defendant, the plaintiff cannot, under this section, summon in, as additional defendants, joint promisors unless he intends to prosecute his action against the party originally sued, or in case of his death, then against his personal representative. Duly v. Hogan, 60 Me. 351. See Treat v. Dwinel, 59 Me. 341.

The right to amend by this section exists irrespective of the death of a party. Treat v. Dwinel, 59 Me. 341.

Bringing in surviving joint promisors.—Surviving joint promisors cannot be summoned in as additional defendants with the executor or administrator on an insolvent estate, against which the joint execution, provided for in c. 165, § 113, could not

issue without contravening c. 157, §§ 18, 19. Duly v. Hogan, 60 Me. 351. See Treat v. Dwinel, 59 Me. 341.

A new description of a defendant is inserting a new defendant within the mischief to be remedied by this statute. Patten v. Starrett, 20 Me. 145.

Thus when the place of residence of a defendant has been mis-described and the officer in consequence thereof has returned non est inventus, the writ may be amended by inserting his proper place of residence. Patten v. Starrett, 20 Me. 145.

Defendants may be struck out after issue joined and case opened. — It is not too late for plaintiff to amend by striking out the names of certain defendants, on payment of their costs, to be taxed severally, after issue has been joined and the case has been opened for trial. Beaman v. Whitney, 20 Me. 413.

Discontinuance as to defaulted defendant.—Where at a certain term, one of two defendants was defaulted, and, at a subsequent term, the plaintiff discontinued as to the defaulted defendant, and recovered judgment against the other, the former was held entitled to costs to the time of discontinuance. Fuller v. Miller, 58 Me. 40.

Applied in Coburn v. Ware, 25 Me. 330; Thomas v. Dow, 33 Me. 390; Cutts v. Haynes, 41 Me. 560; Gordon v. Lee, 133 Me. 361, 178 A. 353.

Stated in Roach v. Randall, 45 Me. 438.

Cited in Moulton v. Chapin, 28 Me. 505; Adams v. Ware, 33 Me. 228; McAllester v. Sprague, 34 Me. 296; White v. Curtis, 35 Me. 534; Goodhue v. Luce, 82 Me. 222, 19 A. 440; Look v. C. A. Watson & Sons, 117 Me. 476, 104 A. 850.

Sec. 15. In actions of law, court may require parties to plead in equity.—When in an action at law in the superior court it appears that the rights of the parties can be better determined and enforced by a judgment and decree in equity, the court may, upon reasonable terms, strike out the pleadings at law and require the parties to plead in equity in the same cause and may hear and determine the cause in equity. (R. S. c. 100, § 15.)

This is the first section of the so-called "Law and Equity Act," §§ 15-21 of this chapter. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

This section does not enlarge the jurisdiction of a court of equity. It merely provides a new method of placing a case, which a court of equity has the power to consider, before it for determination. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Power to transfer action at law to equity court is purely statutory.—At common law a justice at nisi prius had no power to transfer an action at law to the equity court. Such power and authority as such justice now possesses must depend solely upon statutory provision. Such power and authority as he has in this respect is derived from this section. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And depends on nature of cause, not defense alleged.—The power and authority to transfer an action at law to the equity court depends upon the nature of the cause of action, not upon the nature of the defense alleged thereto. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Wherefore pleading of equitable defense does not authorize transfer.—The fact that the defendant may have pleaded an equitable defense to an action of law under § 18 of this chapter does not authorize a transfer from law to equity since the power to transfer depends upon the nature of the cause of action, not the nature of the defense alleged thereto. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Only causes within jurisdiction of equity court may be transferred.—The power of a justice at nisi prius to act under this section of the law and equity act is limited to those cases only in which the plaintiff's cause of action may be stated as a cause of action within the jurisdiction of an equity court to hear and determine. Unless the cause of action is of this nature, a justice of the superior court has no power nor authority to order its transfer to equity under such section of the statute. Such order in excess of his power and authority would be legal error, and would confer no jurisdiction on the equity court to hear and determine the cause. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Such jurisdiction is condition precedent to transfer.—If it is only when the rights of the parties can be "better" determined in equity that the justice may act; it is clear that it is a condition precedent to such action on his part that the rights of the parties can be determined in equity. Before the rights of the parties can be determined in equity, there must be a cause of action within the jurisdiction of the equity court to hear and determine. Then and only then can the court in the words of the statute "strike out the pleadings at

law and require the parties to plead in equity in the same cause and hear and determine the cause in equity." American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

For equity jurisdiction over legal causes cannot be conferred by transfer.—Equity jurisdiction cannot be conferred upon the court by the transfer of an action at law, purely legal as distinguished from equitable in its nature, by the action of a presiding justice at nisi prius purporting to act under this section of the law and equity act. Only cases involving questions cognizable in equity, and in which equitable relief can be granted, can be so transferred. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And if legal remedy is adequate, transfer is error.—Where the plaintiff has a plain, adequate, and complete remedy at law, subject to certain exceptions, there can be no remedy in equity; and transfer of such case to the equity court is error. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

A justice of the superior court has not a discretion unrestrained and absolute, and which is subject to no power of review, whereby he can transfer any case at law to the equity court, which court must retain and decide the cause even where there is no vestige of equitable jurisdiction over the cause or jurisdiction to grant equitable relief. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And abuse of judicial discretion is subject to exceptions.—When it is said that cases may be transferred from law to equity under the provisions of this section in the discretion of the presiding justice, judicial discretion is meant. The exercise of discretion in this matter if abused, within the legal meaning of the word abused, that is, exercised nonjudicially, may be attacked by exceptions. When so transferred in such abuse of judicial discretion, the transfer confers no jurisdiction on the equity court. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

But cause improperly transferred should be restored to law docket.—Where a cause was improperly transferred by a justice of the superior court from the law docket to the equity docket, the case should not be dismissed, but restored to the law docket of the superior court. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Sections 15-21 applied in Hooper v. Bail, 133 Me. 412, 179 A. 404.

Applied in Poland v. Loud, 113 Me. 260, 93 A. 549; Wilder v. Butler, 116 Me. 389, 102 A. 110.

Sections 15-21 cited in Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935.

Sec. 16. In equity proceedings, court may require parties to plead at law.—When in any equity proceeding in the supreme judicial court or in the superior court it appears that the remedy at law is plain, adequate and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, the court may, upon reasonable terms, strike out the pleadings in equity and require the parties to plead at law in the same cause in the superior court, which court may hear and determine the cause at law. (R. S. c. 100, § 16.)

Cross references.—See note to § 15; c. 107, § 2, et seq., re pleadings in equity.

Section applies to all cases in equity where court has jurisdiction.—This section applies to all cases pending in equity, and the order may be made by the court under the conditions named, whenever the court has jurisdiction of the subject matter of the cause and over the persons of the defendants. Flint v. Comly, 95 Me. 251, 49 A. 1044.

Nonresident defendants submitting to jurisdiction subject to power of transfer.—Nonresident defendants, having voluntarily submitted themselves to the jurisdiction of the court, must be held to have done so subject to the method of procedure in this state and to all statutory provisions in relation to procedure, including, among other things, the power of the court under this section, in an equity proceeding, to strike out the pleadings in equity and require the parties to plead at law in the same cause. Flint v. Comly, 95 Me. 251, 49 A. 1044.

The cause is the same notwithstanding it has been converted from a cause in equity to an action at law. Flint v. Comly, 95 Me. 251, 49 A. 1044.

An order of the court under this section need not be made at the instance or request of either party. It may be made by the court without the motion of either party during the progress of the hearing, if it appears to the court that the conditions named in the act exist. Whatever the form of the motion in any case, or if there is no motion, these facts must be made to

appear to the court before an order of this kind is made. Flint v. Comly, 95 Me. 251, 49 A. 1044.

And it need not necessarily impose terms.—This act provides that the order may be made "upon reasonable terms." But it does not make it obligatory upon the court to impose terms; any terms might be unreasonable in a given case. Flint v. Comly, 95 Me. 251, 49 A. 1044.

Motion for transfer should follow language of section, though written motion not necessary. — Where plaintiff's motion did not contain an averment "that the remedy at law is plain, adequate and complete, and that the rights of the parties can be fully determined and enforced by a judgment and execution at law," but simply said "that the matter in controversy may be adequately and completely determined in a suit at law, and that the issues presented may be more conveniently tried according to the course of the common law than in equity"; it would have been better practice if the motion had followed the language of this section, although no written motion was necessary. Flint v. Comly, 95 Me. 251, 49 A. 1044.

And order merely granting motion to convert held sufficient.—Where the sitting justice did not use the language of the statute in his order, but caused this entry to be made upon the docket: "Motion to convert cause into an action at law granted," it must be assumed that, before the justice made the order to convert the cause in equity into an action at law, it was made to appear to him that the remedy at law was plain, adequate and complete and that the rights of the parties could be fully determined and enforced by a judgment and execution at law. And although the court in terms did not order that the pleadings in equity be stricken out and that the parties should plead at law in the same cause, this was the precise effect of the order to convert the cause in equity into an action at law, and was in substance and effect what was authorized by the statute. Flint v. Comly, 95 Me. 251, 49 A. 1044.

If case improvidently transferred to equity court, it should be transferred back or dismissed.—If a justice of the superior court at nisi prius orders the transfer of a case to the equity court, and it is made to appear that such cause in equity is not within the jurisdiction of the equity court, it is the duty of the court in equity to either dismiss it or to order it transferred to the law docket for disposition at law as provided in this section. It cannot retain it to afford relief which may be had at law. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Applied in Stetson v. Parks, 133 Me. 511, 173 A. 555.

Sec. 17. In actions at law pending in law court, court may require parties to plead in equity.—When, in an action at law commenced in the superior court and pending in the supreme judicial court, sitting as a law court, it appears that the rights of the parties can be better determined and enforced by a judgment and decree in equity, the supreme judicial court may, upon reasonable terms, strike out the pleadings at law and require the parties to plead in equity in the same cause; and thereupon the action shall be transferred to the equity docket for the same county and be heard and determined in equity. (R. S. c. 100, § 17.)

Cross reference.—See note to § 15.

This section applies only to the rights of the parties which are made the subject matter of the action at law, not to other and independent rights. Martin v. Smith, 102 Me. 27, 65 A. 257.

And law case cannot be transferred to equity in order to seek new relief.—An action to recover possession of real estate, where the only right in question is that of the plaintiffs to the possession of the demanded land, and that right, if it exists, is a pure legal right to be enforced by judgment and execution at law, cannot be transformed into a suit in equity in order to have the deed under which plaintiff claims reformed. Martin v. Smith, 102 Me. 27, 65 A. 257.

This section does not authorize a transfer to equity after verdict has been recorded and after refusal to set it aside. Toothaker v. Pennell, 106 Me. 188, 76 A. 488.

Power to transfer case from law to equity not conferred upon supreme judicial court. — While the law court has power under this section to transfer an action at law, commenced in the superior court and pending in the supreme judicial court as a law court, to the equity court, yet no such right is conferred upon the supreme judicial court to make such transfer from equity to law. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Applied in Ridley v. Ridley, 87 Me. 445, 32 A. 1005; Wilder v. Butler, 116 Me. 389,

102 A. 110; Thomaston Savings Bank v. Hurley, 117 Me. 211, 103 A. 234; Waldo Lumber Co. v. Metcalf, 132 Me. 374, 171 A. 395; Estabrook v. Hughes, 133 Me. 408, 178 A. 842.

Cited in Smith v. Loomis, 72 Me. 51.

Sec. 18. Defendant in action at law may plead equitable defense; plaintiff may reply with equitable relief.—Any defendant may plead, in defense to any action at law in the superior court, any matter which would be ground for relief in equity and shall receive such relief as he would be entitled to receive in equity against the claims of the plaintiff; such matter of defense shall be pleaded in the form of a brief statement under the general issue. By counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court and shall receive such relief as he would be entitled to receive in equity against such claim of the defendant. (R. S. c. 100, § 18.)

Cross reference. — See note to § 15; c. 107, § 1 et seq., re relief in equity.

This section was designed to declare the enlarged powers of the court, rather than to prescribe a limited procedure. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

It is intended to simplify and speed procedure.—In permitting equitable pleas and equitable orders and decrees in an action at law, the legislature did not intend to change the character of the action, or to import into it the peculiar formalities and technicalities of a suit in equity. The general purpose of the law and equity act is to simplify and speed procedure. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

And it does not contemplate transfer to equity court. — This section, unlike § 15, does not contemplate pleading in equity and a transfer to the equity court and the hearing and determining of the case in equity. Under this section the equitable defense is to be pleaded at law. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Court exercises equity power directly in action at law.—Since 1893, at least, when what is known as the law and equity act was passed, the court can exercise equity powers directly in an action at law, can give effect in them to mere equitable defenses, and can also give effect to equitable answers to defenses based on strict law. Clark v. Chase, 101 Me. 270, 64 A. 493.

And section makes any equitable defense matter of right.—This statute does not in the least abridge or limit the equity powers of the court, but it does provide how and when those powers may be exercised. It commands the court to afford equitable relief to a defendant when asked for in an action at law as a defense to that action, if the relief can be thus afforded. The statute makes the grounds for such relief available as matters of right in defense in an action at law. Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A. 22.

In any action at law.—While the common law rule was that a defendant in forcible entry and detainer could not prevail on equitable grounds, now a defendant in any action at law is permitted to defend by pleading any matter which would be ground for relief in equity. This right is sufficiently broad to include actions of forcible entry, where protection was from forfeiture because of delay in the payment of rent. Rancourt v. Nichols, 139 Me. 339, 31 A. (2d) 410.

But defendant cannot delay action by witholding legal defenses till after equitable defenses.—The law and equity act was not enacted to permit defendants to delay actions at law by withholding legal defenses until supposed equitable defenses were disposed of. Successive adjudications upon equitable and legal defenses were not contemplated. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

For he must rely upon legal defenses, if any.—The purpose of this section was to permit a defendant, who otherwise would be obliged to resort to a suit in equity for a defense, to interpose the facts constituting that defense directly in bar of the action. It gives him no other privilege or advantage. Since this statute, he must, as before, rely upon his legal defenses if he has any, and it is only when he has no adequate legal defense that he can properly ask the court to consider his equitable defenses. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

If nature of defenses is doubtful, defenses may be submitted in full.—If a defendant is in doubt whether the facts constitute a legal or equitable defense, or any defense, he may set them out in full under the statute and submit them to the court. If it then appears to the court that the matter so set out constitutes no defense, either at law or in equity, then the defendant

should submit to judgment. He must be supposed to have stated his whole case. He cannot afterward be heard to say that there are other facts which he has not stated and which are a legal bar to the action. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

A statement of claim for equitable relief under this section should contain all the facts relied upon as grounds for such relief, including those facts showing the absence of any remedy at law as required in a bill in equity for the same purpose. If all these facts are insufficient for equitable relief, and are inconsistent with the law plea filed, final judgment should be at once awarded to the plaintiff. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

Defendant should present equitable with legal defenses.—It is the duty of the defendant in an action at law to present in that action all the defenses he can and desires to make, whether legal or equitable in their nature. It follows that a defendant cannot withhold an available defense, even though equitable in its nature, in the trial of an action at law, and after judgment against him bring forward that defense in a new suit, and require the court to give it effect by amending or modifying its former judgment. One purpose of this statute was not only to remove the necessity of, but to prevent, such procedure. Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A. 22.

Since judgment for plaintiff concludes defendant as to all possible defenses.—A judgment for the plaintiff in an action at law concludes the defendant not only as to defenses actually made, but also as to defenses which could have been made and were not. The court cannot afterwards afford relief in equity against a judgment at law because of matter which was a defense to the action and could have been interposed therein. By this section equitable as well as strict legal defenses may be pleaded in an action at law. Hence if equitable defenses are not so pleaded they cannot afterward be invoked as causes for relief in equity against the judgment. Aetna Life Ins. Co. v. Tremblay, 101 Me. 585, 65 A. 22.

Equitable defense met as in other pleading at law.—A defendant's pleading under this section is not in equity. It is a pleading in an action at law expressly authorized by statute, and can be met like any other pleading at law by a demurrer, traverse, or replication, and can be further met under the statute with a counter brief statement of matter of equitable relief against the defense thus set up. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

Equitable plea not necessarily waiver of general issue, or indicative of no legal defense.—It does not necessarily follow that every equitable plea filed under the law and equity statute is a waiver of the general issue; or that it is always to be inferred from such a plea that there is no legal defense. The inference should be from the matter of the plea, rather than from its form. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

Equitable plea may be reformed or treated as legal defense if subject matter requires.—If the circumstances alleged in the defendant's equitable plea constitute a legal defense and he has only mistaken the proper form of pleading, then his plea may be reformed, or treated as a plea of legal matter in bar; but if those circumstances do not show any defense, either legal or equitable, the plain inference usually is that there is no defense. Miller v. Waldoborough Packing Co., 88 Me. 605, 34 A. 527.

But relief may be granted only against claims of plaintiff.—This statute declares that the defendant may plead in defense "any matter which would be ground for relief in equity," but the context shows that the only relief to be granted is "against the claims of the plaintiff," that is, the claims made in the action. Martin v. Smith, 102 Me. 27, 65 A. 257.

For section does not authorize determination of legal and equitable rights separately and distinctly.—This statute does not go so far as to provide for the separate determination of a legal right and of a distinct, independent, equitable right in the same action at law, and then for setting off the judgment upon the equitable right against the judgment upon the legal right. The equitable matter to be pleaded in the action at law must be a matter of defense to the plaintiff's claim, not a matter of setoff, nor matter constituting ground for relief in equity apart from and independent of the action at law. Martin v. Smith, 102 Me. 27, 65 A. 257; Rancourt v. Nichols, 139 Me. 339, 31 A. (2d) 410.

Mistake may be pleaded by brief statement.—The equitable defense of mistake is open to the defendant under this section. Such defense must be pleaded by brief statement. Hibbard v. Collins, 127 Me. 383, 143 A. 600.

But right of reformation of instrument is affirmative equitable remedy.—The right

of reformation of a written instrument is not a mere matter of defense to an action in which the instrument is set up as the basis or source of a right. It is an independent affirmative right arising as soon as the instrument is delivered. Being independent of any action at law requiring decrees in equity for its enforcement, it should be enforced by a separate suit in equity and not interposed as an equitable defense to an action at law. Martin v. Smith, 102 Me. 27, 65 A. 257.

Though equitable defense thereupon may be interposed. — Reformation of a written contract on the ground of mistake, is an equitable, not a legal, remedy and an equitable answer to a legal defense, as authorized by this section, must be set up in order to take advantage of it in an action at law. Johnson v. Burnham, 120 Me. 491, 115 A. 261.

Defendants setting up equitable defense may properly ask for decree in equity.— Where the defendants, by way of brief statement, set up facts claiming an equitable defense under §§ 17 and 18, they may properly ask that the rights of the parties be determined and enforced by a decree in equity rather than by a judgment at law. Thomaston Savings Bank v. Hurley, 117 Me. 211, 103 A. 234.

Sections 17-21 applied in Hurd v. Chase, 100 Me. 561, 62 A. 660.

Applied in Hussey v. Fisher, 94 Me. 301, 47 A. 525; Bradley Land & Lumber Co. v. Eastern Mfg. Co., 104 Me. 203, 71 A. 710; Vermeule v. Hover, 113 Me. 74, 93 A. 37; Poland v. Loud, 113 Me. 260, 93 A. 549; McIver v. Bell, 117 Me. 495, 105 A. 105; Abbott v. Clark, 124 Me. 185, 126 A. 828; Turner v. Burnell, 126 Me. 192, 137 A. 56.

Sec. 19. Court may make necessary decrees to preserve equitable rights.—Whenever in any action at law any matter which would be ground for relief in equity is so pleaded by any party, the court may make such decrees and restraining orders as may be necessary to protect and preserve such equitable rights and may issue injunctions according to the usual practice of courts of equity. (R. S. c. 100, § 19.)

Cross references.—See note to § 15; c. 107, § 34, re issue of injunctions.

Equity powers of court enlarged.—While in this state the dividing wall between law and equity has not been wholly removed, the equity powers of the court have been so enlarged by legislation and by natural growth that practically no case properly brought before the court in either form of procedure, legal or equitable, is exempt from their exercise. Clark v. Chase, 101 Me. 270, 64 A. 493.

And court may treat absolute conveyance as instrument for security if such is the fact.—The court now having full equity powers has the power to treat a conveyance or a reservation in a conveyance absolute in terms, as made solely for security for some obligation, if it finds such to be the fact from extrinsic evidence. These equity powers of the court can now be exercised in an action at law for the possession of the estate thus conveyed or reserved. A separate bill in equity is not now necessary for that purpose. Hurd v. Chase, 100 Me. 561, 62 A. 660.

Applied in Poland v. Loud, 113 Me. 260, 93 A. 549.

Quoted in American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Sec. 20. Attachments not affected; order for attachment of property.—No attachments shall be affected by proceedings under the 5 preceding sections. Either party to a cause may, upon petition, obtain from the court an order for the attachment of property of a party to the suit to secure any judgment which may be obtained, to be made on such precept as the court may order and to be recorded as in case of other attachments. (R. S. c. 100, § 20.)

See note to § 15; c. 112, § 24 et seq., re attachments.

Sec. 21. Rules and principles of equity to prevail in all proceedings. —In all proceedings under the 6 preceding sections, when there appears to be any conflict or variance between the principles of law and those of equity as to the same subject matter, the rules and principles of equity shall prevail. At the hearing of all equity causes, oral testimony shall be received as in trials at common law. (R. S. c. 100, § 21.)

Cross reference.—See note to § 15.

Rules of statutory interpretation as to rights same for equity and law.—In determining whether a given case or person is

within the scope or meaning of a statute, there is no difference between the rules of equity and those of law. The rules for statutory interpretation as to rights apart from remedy are the same in either procedure. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581.

Case determined under rules of equity becomes essentially a cause in equity.—If the court has determined and decreed that the case is to be determined under the rules of equity, the case becomes to all intents and purposes a cause in equity, save in matters of form in pleading and procedure. Poland v. Loud, 113 Me. 260, 93 A. 549.

Until a lien claimant shows that he is within the lien statute, there is no occasion to apply the principles of equity as opposed to those of law. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581.

Action under lien statute not convertible into equity suit to reach donated funds.—An action at law brought under the lien statute to enforce a lien on a public building will not be converted, even under the law and equity statute, into a suit in equity to reach donated funds remaining in the treasury of the town. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581.

Plaintiff cannot now escape equity powers of court by resorting to law.—A plaintiff, who would be refused a decree in a suit in equity because of his laches or other inequitable conduct handicapping the defense, cannot now escape the equity powers of the court and the consequences of his laches by resorting to an action at law. When the defendant in an action at law has, without fault of his, been seriously handicapped in his defense by the laches or other inequitable conduct of the plaintiff, the court can in the exercise of its equity powers enjoin the plaintiff from prosecuting the action at law. Clark v. Chase, 101 Me. 270, 64 A. 493.

Applied in Shaw v. Young, 87 Me. 271, 32 A. 897; Hussey v. Fisher, 94 Me. 301, 47 A. 525; Haslam v. Jordan, 104 Me. 49, 70 A. 1066.

Sec. 22. Either party may file any document material to issue and give notice to other party; no denial, genuineness admitted.—A party to any action in the supreme judicial court or the superior court may file, in the clerk's office of the court in the county where such action is pending, any document which he may deem material to the issue and give to the adverse party notice of such filing and that he desires the execution of said document to be admitted. If within 7 days after such notice, unless the time is enlarged by the court or a justice thereof, the adverse party shall not file in said clerk's office a denial of the genuineness of the execution of said document, he shall be held to have admitted the same. (R. S. c. 100, § 22.)

Cited in Mitchell v. Emmons, 101 Me. 76, 71 A. 321.

Sec. 23. Production of books, papers or written instruments.—Where books, papers or written instruments material to the issue in any action at law pending in the superior court are in the possession of the opposite party and access thereto refused, the court upon motion, notice and hearing may require their production for inspection. In case of unreasonable delay or refusal in complying with such requirement, the court may order a nonsuit or default as the case may require. (R. S. c. 100, § 23.)

Applied in Fidelity & Casualty Co. v. Bodwell Granite Co., 102 Me. 148, 66 A. 314.

Sec. 24. Change of venue.—Any justice of the superior court while holding a nisi prius term, on motion of either party, shall, for cause shown, order the transfer of any civil action or criminal case pending in said court to the docket thereof in any other county for trial, preserving all attachments. (R. S. c. 100, § 24.)

This section is declaratory of the common law power of courts of general jurisdiction to transfer cases from one county to another, when it was necessary to do so in order to procure an impartial trial. State v. Bobb, 138 Me. 242, 25 A. (2d) 229.

The matter of change of venue rests in the sound discretion of the trial court and

the decision is final unless there is abuse of discretion. State v. Bobb, 138 Me. 242, 25 A. (2d) 229.

Section authorizes transfer only "while holding a nisi prius term."—The power of a justice to transfer a civil action from the docket of one county to that of another county is derived solely from statute, and by this section that power for sufficient cause is conferred only "while holding a nisi prius term" for the trial of civil and criminal causes. After the close of a term by final adjournment, whether an action be continued, or continued nisi, an action cannot be transferred because not done by a judge then holding a nisi prius term. Powers v. Mitchell, 75 Me. 364; State v. Donnell, 126 Me. 505, 140 A. 186.

And only to another superior court.—A case pending in the superior court may be transferred "to the docket thereof in any other county." No authority is given to transfer a case to the docket of another and independent court. State v. Donnell, 126 Me. 505, 140 A. 186.

Probate appeal held "civil action."—It has been held that a probate appeal is a "civil action" within the purview of this section, authorizing the transfer of "any civil action" from one county to another for trial. Sproul v. Randell, 107 Me. 274, 78 A. 450.

A probate appeal, when it has assumed the character of, and is to be conducted as an action at law, is subject to the provision of this section. Backus v. Cheney, 80 Me. 17, 12 A. 636.

Sec. 25. Minors excluded from courtroom.—Any court or trial justice may exclude minors as spectators from the courtroom during the trial of any cause, civil or criminal, when their presence is not necessary as witnesses or parties. (R. S. c. 100, § 25.)

Sec. 26. Trespass and case.—The distinction between actions of trespass and trespass on the case is abolished. A declaration in either form is good. (R. S. c. 100, § 26.)

Action in trespass or case may be declared in either form, or both.—Wherever either trespass or case will lie, the other will also, and being thus made of the same nature, no objection can arise to their joinder. If the state of facts show a party entitled to recover in trespass or case, his declaration may be framed in either form, or both, the distinction between them having been very clearly abolished by this section. Moulton v. Smith, 32 Me. 406.

But section abolishes distinction between trespass and case only in form of declaration.—The design of the legislature in this section was to abolish the distinction between two classes of cases in the form only of declaring in the writ; so that proof, which should make out a case of one class, should not fail of effect on account of the writ being appropriate for the other class. But in cases where the distinction is really of substance, the provision is inapplicable. Sawyer v. Goodwin, 34 Me. 419.

And is not applicable to distinction of substance.—This section has abolished the distinction between actions of trespass and trespass on the case. This relates to the distinction in form only. In cases where the distinction is really of substance, the provision of the section is inapplicable. Place v. Brann, 77 Me. 342.

Trespass quaere clausum and trespass de bonis held distinguishable in substance.—An allegation of breaking and entering into land is of substance and not of form merely. Thus, a count containing no such allegation, but framed technically in case, for injuries done to land, or in trespass de bonis for goods taken from it, cannot be sustained by merely proving an unlawful entry. Sawyer v. Goodwin, 34 Me. 419.

Applied in Welch v. Whittemore, 25 Me. 86; Hathorn v. Eaton, 70 Me. 219; Holmes v. Corthell, 80 Me. 31, 12 A. 730.

Sec. 27. Action of assumpsit; plea of nonassumpsit.—The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now maintainable; under the plea of nonassumpsit, the defenses available under the plea of general issue in either of said actions shall be available. (R. S. c. 100, § 27.)

Applied in U. S. Realty & Investment Co. v. F. A. Rumery Co., 132 Me. 176, 168 A. 809.

Cited in Alropa Corp. v. Britton, 135 Me. 41, 188 A. 722.

Sec. 28. Declarations upon a contract in writing; declarations founded upon negligence.—No declaration in an action at law upon any con-

tract in writing shall be adjudged insufficient if it sets forth the making of said contract, the full contract relied upon with an allegation that the plaintiff has complied with all the terms and conditions thereof, and the further allegation of the specific breach or breaches upon which the plaintiff relies and that the plaintiff is thereby damaged.

No declaration in an action at law founded upon negligence shall be adjudged insufficient or defective solely by reason of the plaintiff's setting forth or alleging in a single count thereof more than one act of negligence of a defendant. (R. S. c. 100, § 28.)

Sec. 29. Treasurers may sue in their own names.—Treasurers of state, counties, towns and corporations may maintain suits in their own names as treasurers on contracts given to them or their predecessors and prosecute suits pending in the names of their predecessors. (R. S. c. 100, § 29.)

Section does not deprive towns themselves of right to sue.—This statute, empowering the treasurers of towns, etc., to maintain suits in their own names upon the securities therein mentioned does not take away the right of the towns, etc., to sue as before. Newcastle v. Bellard, 3 Me. 369.

And successors of treasurer may sue on notes payable personally to treasurer.—A note payable personally to the treasurer of a county may, under this section, be enforced by suit in the name of his successor though not expressly made payable to the successors of the payee. Rollins v. Lashus, 74 Me. 218.

Applied in Abbott v. Chase, 75 Me. 83.

Sec. 30. Actions by unincorporated societies.—Any organized unincorporated society or association may sue in the name of its trustees for the time being and may maintain an action at law though the defendant or defendants or some of them are members of the same society or association. (R. S. c. 100, § 30.)

Applied in Elm City Club v. Howes, 92 Me. 211, 42 A. 392.

Cited in Coombs v. Harford, 99 Me. 426, 59 A. 529; Pushor v. Hilton, 123 Me. 225, 122 A. 673.

Sec. 31. Action of debt for penalties.—Penalties may be recovered by action of debt when no other mode of recovery is provided. (R. S. c. 100, § 31.)

Cross reference. — See note to c. 92, § 120, re action of debt to recover penalty from tax collector for failure to account.

Action for penalty lies in name of persons to whom given.—When a penalty is given to one or more persons, an action will lie for it in the name of those persons, although no express authority to sue for it is contained in the statute. This section affirms this common-law rule. Rockland v. Farnsworth, 87 Me. 473, 32 A. 1012.

A civil action of debt may be maintained by towns to recover the forfeiture imposed by statute for refusing to remove filth or other cause of sickness. Rockland v. Farnsworth, 87 Me. 473, 32 A. 1012.

Applied in Cumberland & Oxford Canal Corp. v. Portland, 56 Me. 77.

Cited in Bragdon v. Freedom, 84 Me. 431, 24 A. 895.

Sec. 32. Assignee of grantee may sue on real covenants of first grantor.—The assignee of a grantee or his executor or administrator after eviction by an older and better title may maintain an action on a covenant of seizin or freedom from encumbrance contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might have recovered on eviction, upon filing, at the first term in court, for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon. The prior grantee cannot, in such case, release the covenants of the first grantor to the prejudice of his grantee. (R. S. c. 100, § 32.)

Section modifies common law as to action by assignee for breach of personal covenants.—It is a principle of the common law that the covenants in a deed, made by one who has not seizin, and has not good right and lawful authority to sell, are broken as soon as made, and that a right of action for a breach of them does

not pass to the assignee of the grantee. But by this section a right of action for a breach of the covenant of seizin, as well as that against encumbrances, is given to the assignee of the grantee. Prescott v. Hobbs, 30 Me. 345.

This statute is a modification of the rules of the common law by which assignees may, in certain specified cases, maintain actions in their own names for breaches of covenant, where formerly such actions could only be maintained in the name of the original covenantee. But like other changes in established rules of law, it cannot be extended beyond its express terms. Ballard v. Child, 34 Me. 355; Littlefield v. Pinkham, 72 Me. 369.

And must be strictly construed.—This provision is in derogation of the common law, and must receive a strict construction, although manifestly intended to avoid circuity of action. Trask v. Wilder, 50 Me. 450.

Covenants of seizin and those against encumbrances are personal covenants in praesenti which do not run with the land and are not assignable by the general law. Thompson v. Richmond, 102 Me. 335, 66 A. 649.

And assignee cannot maintain action on them until release filed.—This section requires that the plaintiff shall file in court, at the first term, for the use of his grantor, a release of the covenants in his grantor's deed, and all causes of action on any such covenants. If the plaintiff has not made any such release, the action cannot be maintained. Prescott v. Hobbs, 30 Me. 345.

But section does not apply to real covenants.—This section applies only to actions on "covenants of seizin or freedom from encumbrance," and not to those which run with the land. The object of this statute is to give an assignee a right of action on the personal covenants, which before he did not have. It leaves the common law in force as to covenants real, which run with the land. Wilson v. Widenham, 51 Me. 566.

Wherefore action for breach of general warranty is independent of section.—One to whom the grantee has released all his title may maintain an action on the covenant of general warranty independently of this section, which now gives to an assignee a right to recover on the covenants of seizin or freedom from encumbrance, upon filing a release to his grantor. Formerly an assignee could not recover on such covenants, because they do not run with the land. But the covenant of general warranty has always been held to be thus attached to the land. Wilson v. Widenham, 51 Me. 566.

This section extends only to cases in which an eviction has occurred. Ballard v. Child, 34 Me. 355; Thompson v. Richmond, 102 Me. 335, 66 A. 649.

Where there has been no seizin, no possession, there can have been no eviction.—Where the contingency contemplated by the statute has not occurred, its provisions do not apply. Ballard v. Child, 34 Me. 355.

And mortgagee who acquires mortgagor's right of redemption cannot plead eviction by mortgage title.—The holder of a mortgage of a lot of land, who subsequently takes a warranty deed of the same lot from one who has, through intervening conveyance, the mortgagor's right of redemption, will not, in an action against one of the intermediate grantors for breach of covenant of warranty, be sustained in pleading that he has been evicted by the mortgage title which he holds himself, nor in a claim for damages on account of the encumbrance. Trask v. Wilder, 50 Me. 450.

Defendant cannot waive release by assignee-plaintiff.—The release is not for the benefit of the defendant but for the "use of the defendant's grantee." Hence the principle of waiver, as in cases of want of an indorser of a writ, or of defective replevin bond cannot apply. Littlefield v. Pinkham, 72 Me. 369.

Applied in Stowell v. Bennett, 34 Me. 422; Dinsmore v. Savage, 68 Me. 191; Stephens v. Maine Lumber Products Corp., 147 Me. 135, 83 A. (2d) 925.

Sec. 33. Grantee may defend suit.—Grantees may appear and defend in suits against their grantors in which the real estate conveyed is attached. (R. S. c. 100, § 33.)

Section authorizes intervention upon attachment in suit for fraud in conveyance.—Under this section intervention is authorized when real estate of the intervenor is specially attached in a suit against the grantor on the ground of fraud in the conveyance. Patridge v. Marston, 127 Me. 380, 143 A. 599.

But not for allegation of fraudulent conveyance in direction to officer on writ.—Under this section, intervention is authorized to enable the intervenor to defend

against the allegations in the declaration, but not to defend against an allegation of fraudulent conveyance contained in the direction to the officer indorsed on the writ. Patridge v. Marston, 127 Me. 380, 143 A. 599.

Nor does this section give a grantee a vested right to appear and defend without any petition. No one can appear in an action who is not a party thereto, unless he brings himself within some statutory provision and shows that his case is one contemplated by the statute. Sprague v. A. & W. Sprague Mfg. Co., 76 Me. 417.

Moreover, if an attachment has been legally discharged, the case is no longer within this section, whereupon a grantee petitioning to defend stands the same as if no attachment had been made. Sprague v. A. & W. Sprague Mfg. Co., 76 Me. 417.

And if petitioner's recorded deed takes precedence of attachment, he cannot intervene.—This provision is applicable only to grantees whose conveyances were subsequent to the attachment; otherwise their duly recorded deeds would take precedence of the attachment, and they would have no occasion to defend. Sprague v. A. & W. Sprague Mfg. Co., 76 Me. 417. See Patridge v. Marston, 127 Me. 380, 143 A. 599, which says that if the petitioner's "duly recorded deed (takes) precedence of the attachment" and therefore the petitioner has "no occasion to defend," he plainly should not be permitted to intervene. This is what the Sprague case holds.

Cited in Abbott v. Abbott, 106 Me. 113, 75 A. 323.

Sec. 34. Assignment of breaches; pleadings.—In actions on contract in a penal sum for performance of covenants or agreements and in actions of covenant several breaches may be assigned, and in defense, performance generally, both in affirmative and negative covenants, may be alleged. (R. S. c. 100, § 34.)

Bond held within section.—A bond was held a "contract in a penal sum for performance of covenants and agreements," and therefore subject to the rules prescribed in this section. State v. Peck, 58 Me. 123.

Replication to a plea of general performance of condition of bond held to state breach with sufficient particularity. State v. Peck, 58 Me. 123.

Stated in Machiasport v. Small, 77 Me. 109.

Cited in Brett v. Murphy, 80 Me. 358, 14 A. 934.

Sec. 35. In actions of covenant, if encumbrance right of dower, it may be assigned and be measure of damages.—In an action for breach of covenant against encumbrances contained in a deed of real estate, when the encumbrance is a right of dower, if such dower has been assigned and not released, the value thereof shall be the measure of damages; but if it has been demanded and not assigned, the court, on application of the plaintiff, shall cite the claimant of dower to appear and become a party by personal service made 14 days before the term of court to which it is returnable; if she does not appear or if she appears and refuses to release such right, the court shall appoint 3 commissioners to assign the same, who shall proceed in the manner provided for commissioners appointed under the provisions of chapter 176 to make partition; and when their report is made and accepted by the court, it is a legal assignment of dower and the value thereof is the measure of damages in said action. (R. S. c. 100, § 35.)

Sec. 36. General issue pleaded with brief statement. — The general issue may be pleaded in all cases and a brief statement of special matter of defense, or a special plea or double pleas in bar, may be filed. The plaintiff must join a general issue and may file a counter brief statement. (R. S. c. 100, § 36.)

One of the important purposes designed to be accomplished by allowing brief statements to be used instead of pleas and replications was to relieve the parties from that exactness of allegation and denial by which parties were sometimes so entangled as to prevent a trial upon the merits. Trask v. Patterson, 29 Me. 502; Day v. Frye, 41 Me. 326; Moore v. Knowles, 65 Me. 493.

This section is limited to pleas in bar and was not intended to apply to, or to affect, pleas in abatement. Gordan v. Peirce, 11 Me. 213.

This section does not apply to pleas in abatement or demurrers. Potter v. Titcomb, 13 Me. 36.

A brief statement does not take the place of a plea in abatement, a demurrer, a motion to dismiss or other dilatory plea.

Nor may irrelevant matter not constituting a defense be set out in a brief statement. Leonard Advertising Co. v. Flagg, 128 Me. 433, 148 A. 561.

This section does not restrict the right of the defendant to plead specially in all cases at common law. It extends rather than restricts the defendant's rights in pleading specially. Frost v. Tibbetts, 30 Me. 188. See Wells v. Brackett, 30 Me. 61.

No particular form of a brief statement is prescribed, nor is it required to be subscribed by the defendant or his attorney. Ministerial & School Fund v. Rowell, 49 Me. 330.

And the rules applicable to special pleading can rarely be applied to brief statements and counter brief statements. Day v. Frye, 41 Me. 326.

By our practice, brief statements are intended to embrace a general exhibition of what the party making them expects to prove, without a precise and formal statement of all the particular facts, necessary to be proved, to establish his positions. They are not, therefore, to be governed by the technical rules, applicable to special pleading. Wells v. Brackett, 30 Me. 61.

Formal words may be omitted, and if the special matter is so indicated that it can be readily apprehended, it is sufficient. Ministerial & School Fund v. Rowell, 49 Me. 330.

But statement should be certain and precise to a common intent.—Brief statements should contain a specification of matters relied upon in defense, aside from such as would come under the general issue, and be certain and precise to a common intent. Washburn v. Mosely, 22 Me. 163; Day v. Frye, 41 Me. 326; Corthell v. Holmes, 87 Me. 24, 32 A. 715; Leonard Advertising Co. v. Flagg, 128 Me. 433, 148 A. 561.

The general issue and brief statement are not to be confounded together as parts of one and the same plea. Moore v. Knowles, 65 Me. 493.

The general issue and the brief statement are distinct and separate. Special matters of defense are confined to what is contained in the brief statement. McMullen v. Corkum, 142 Me. 393, 53 A. (2d) 699.

Purpose of section. — To divest legal proceedings of all abstruse technicalities has been a favorite object of modern legislation; hence, the substitution of the proceeding by brief statement for special pleading. It was to render simple, plain and certain, that which before, to the common mind, at least, was dark, complicated and uncertain. Day v. Frye, 41 Me. 326.

A well drawn brief statement, filed with the general issue, is equivalent to a special plea in bar setting out the matter alleged therein. Moore v. Knowles, 65 Me. 493.

The points in a brief statement are equivalent to one or more special pleas in bar, under leave to plead double; and the final judgment depends upon what the law, as applied to the case, may require after the facts in controversy shall have been settled. Potter v. Titcomb, 16 Me. 423; Moore v. Knowles, 65 Me. 493. See Chase v. Fish, 16 Me. 132.

And is not vitiated by defective plea of general issue.—The law cannot regard a good and sufficient brief statement vitiated, because it accompanies a plea of the general issue which, of itself, would be unavailing by reason of defect in form or substance, or for want of support in proof. Moore v. Knowles, 65 Me. 493.

If the brief statement alleges facts upon proof of which the defendant would be entitled to judgment, the plaintiff cannot have judgment in his favor upon a demurrer to what might be a defective and demurrable plea of the general issue, if it stood alone. Moore v. Knowles, 65 Me. 493.

A brief statement does not have the effect of limiting defenses that may be set up under the general issue. Gilman v. F. O. Bailey Carriage Co., 125 Me. 108, 131 A. 138. See Trask v. Patterson, 29 Me. 499.

But matter not admissible under general issue must be set forth in brief statement.—By this section a brief statement is substituted for special pleading, where such pleading was formerly necessary. If, therefore, a defendant would make a matter which could not be shown under the general issue at common law available in his defense, he should set it forth in his brief statement. Not having done so, it is a point from which he is precluded. Williams College v. Mallett, 16 Me. 84.

No proof is admissible, except in support of the brief statement, or of the defense under the general issue. Day v. Frye, 41 Me. 326.

Grounds of defense need not be consistent.—See Granite State Bank v. Otis, 53 Me. 133.

And if defendant obtains verdict on any issue, he is entitled to judgment.—Where the defendant, under the general issue, in virtue of this section, places his defense

on several distinct grounds relied on; if he obtains a verdict on any one issue, or on any one of such distinct grounds, he will be entitled to judgment, though the other issues are found, or other grounds of defense are decided in favor of the plaintiff. Pejepscot Proprietors v. Nichols, 10 Me. 256; Moore v. Knowles, 65 Me. 493. See Potter v. Titcomb, 16 Me. 423.

Joinder of issue.—If there has been a joinder of the general issue, and the facts alleged in the brief statement have been directly controverted by a counter statement, no other formal joining of the issue can be required. Potter v. Titcomb, 16 Me. 423.

Under this section, where the defendant in a writ of entry has filed a plea of the general issue and a brief statement and the plaintiff has filed a replication, it is not error to refuse to direct the defendant to join the replication. Lancaster v. Augusta Water District, 108 Me. 137, 79 A. 463.

Demurrer to a brief statement will lie when such a statement sets up a defense which may properly be made under the general issue or contains matter in justification but fails to state enough to afford justification. Corthell v. Holmes, 87 Me. 24, 32 A. 715; Leonard Advertising Co. v. Flagg, 128 Me. 433, 148 A. 561.

A demurrer to the "plea," eo nomine, does not cover the brief statement. Stevens v. Doherty, 65 Me. 94.

Withdrawal of brief statement.—It is within the discretion of the presiding justice to allow the withdrawal of the brief statement. Barden v. Douglass, 71 Me. 400.

Brief statement as admission of allegations in declaration.—See McMullen v. Corkum, 142 Me. 393, 53 A. (2d) 699.

Plea to declaration in dower.—See Freeman v. Freeman, 39 Me. 426.

Applied in Potter v. Titcomb, 11 Me. 157; Taylor v. Robinson, 29 Me. 323; Pratt v. Knight, 29 Me. 471; Hart v. Hardy, 42 Me. 196; Clough v. Crossman, 47 Me. 349; Maxwell v. Potter, 47 Me. 487; Clement v. Garland, 53 Me. 427.

Cited in Palmer v. Dougherty, 33 Me. 502; Shelden v. Cail, 55 Me. 159; Judkins v. Buckland, 149 Me. 59, 98 A. (2d) 538.

Sec. 37. When plea in abatement overruled, defendant may answer over on merits.—When a plea or motion in abatement or to the jurisdiction has been overruled, the defendant shall have the right to answer over on the merits. Nothing herein contained shall be construed as affecting the provisions of existing law relative to the filing of appearances. (R. S. c. 100, § 37.)

Exceptions to overruling of plea in abatement not waived by pleading to merits.—From the provisions of this section and c. 106, § 19, it appears that on the overruling of a plea in abatement or other dilatory plea a defendant has the right to answer over on the merits if he so desires. On doing so he may proceed to trial and at the close bring forward to the law court his exceptions to the overruling of the plea. The entry of a general appearance and the filing of a plea to the merits will not constitute a waiver of defects. Estabrook v. Ford Motor Co., 136 Me. 367, 10 A. (2d) 715.

Applied in Klopot v. Scuik, 131 Me. 499, 162 A. 782; Jordan v. McKay, 132 Me. 55, 165 A. 902.

Sec. 38. Demurrers, when filed, joined and not withdrawn; amendments made.—A general demurrer to the declaration may be filed; and in any stage of the pleadings either party may demur and the demurrer must be joined, and it shall not be withdrawn without leave of court and of the opposite party; but the justice shall rule on it and his ruling shall be final unless the party aggrieved excepts; and before exceptions are filed and allowed, he has the same power as the full court to allow the plaintiff to amend or the defendant to plead anew. If the law court deems such exceptions frivolous, it shall award treble costs against the party excepting from the time the exceptions were filed. If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed. If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered. At the next term of the court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the law court to the clerk of such county and not before, judgment shall be entered on the demurrer unless the costs are paid and the amendment or new pleadings filed on the 2nd day of the

term; but by leave of court the time therefor may be enlarged or further time may be granted by the court within which to pay said costs and to file such amendment or new pleadings. (R. S. c. 100, § 38.)

I. General Consideration.
II. Exceptions to Ruling on Demurrer.
III. Right to Amend or Plead Anew.
A. After Demurrer Sustained.
B. After Demurrer Overruled.
C. Time and Manner of Filing Amendments or New Pleadings.

I. GENERAL CONSIDERATION.

History of section.—See Tibbetts v. Dr. D. P. Ordway Plaster Co., 117 Me. 423, 104 A. 809; Tripp v. Park Street Motor Corp., 122 Me. 59, 118 A. 793; Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433.

Application to general and special demurrers.—See State v. Peck, 60 Me. 498; Bean v. Ayers, 67 Me. 482.

Time for filing demurrer.—This section does not contemplate the filing of a demurrer to the declaration "at any stage of the pleadings;" but only that either party may, within the time allowed by law and the rules of the court, where the process is pending, thus test the sufficiency of his adversary's next previous pleadings. Tukey v. Gerry, 63 Me. 151.

Demurrer to declaration filed after plea of general issue.—See Tukey v. Gerry, 63 Me. 151.

This section expressly prohibits a civil suit from being removed to the law court by force of demurrer, for, while it authorizes either party to demur in any stage of the proceedings, it at the same time requires the judge to rule on it, subject to exceptions. State v. Dresser, 54 Me. 569.

Order sustaining demurrer not final without entry of judgment.—The order of a trial judge sustaining defendant's general demurrer was not final and judgment for the defendant did not follow as a matter of course. Without an entry of judgment, the action stood on the docket unfinished, and plaintiff had a right to be heard on its motion to amend the declaration. Westbrook Trust Co. v. Swett, 138 Me. 36, 21 A. (2d) 589.

Judgment given against party whose pleadings were first defective in substance.—On argument on demurrer, the court will, notwithstanding the defects of the pleadings demurred to, give judgment against the party whose pleadings were first defective in substance. Thus on demurrer to a plea, the defendant may take advantage of a substantial defect in the declaration. Calais v. Bradford, 51 Me. 414.

Amount of final judgment on demurrer.—Where the aggregate amount of the breaches of the bond declared on is set out in the replication, and the replication is adjudged good on demurrer, judgment must go for the amount thus claimed, unless the demurrer is, with the consent of the other party, and by leave of the court, withdrawn under this section. State v. Peck, 58 Me. 123. See State v. Peck, 60 Me. 498.

Applied in Dexter Savings Bank v. Copeland, 72 Me. 220; Clark v. Boyd, 119 Me. 530, 112 A. 345.

Cited in Bolster v. China, 67 Me. 551; Milner v. Hare, 126 Me. 14, 135 A. 522.

II. EXCEPTIONS TO RULING ON DEMURRER.

Ruling of presiding justice final where no exceptions taken.—The defendant's first special demurrer having been overruled and no exceptions having been taken to the ruling of the presiding justice, that ruling became final under the provisions of this section. Cratty v. Samuel Aceto Co., 148 Me. 453, 95 A. (2d) 689. See Tibbetts v. Dr. D. P. Ordway Plaster Co., 117 Me. 423, 104 A. 809.

Case stands continued pending decision of appellate court on exceptions.—When a demurrer is filed, joined and ruled upon and exceptions taken, the case under this section must be marked "Law" and go to the law court upon the questions raised by the demurrer, without further proceedings at nisi prius, until decision is received back from the law court. Tripp v. Park Street Motor Corp., 122 Me. 59, 118 A. 793, overruling dicta to the contrary in Wakefield v. Littlefield, 52 Me. 21.

When there is a ruling at nisi prius either sustaining or overruling a demurrer and exceptions are taken and allowed, the case should stand continued with no further action at nisi prius until a decision is handed down by the law court, when, subject to the provisions of this section, the plaintiff may amend if the demurrer is sustained and the declaration is amendable, or the defendant may plead

anew if it is overruled. Page v. Bourgon, 138 Me. 113, 22 A. (2d) 577. See Gilbert v. Dodge, 130 Me. 417, 156 A. 891.

See also, Copeland v. Hewett, 93 Me. 554, 45 A. 824, wherein it was said that while demurrers to declarations and pleadings to the merits stay the cause, and exceptions may be entered in the law court at once, exceptions to the sustaining of a demurrer to a plea in abatement cannot be brought to the law court until a disposal of the action upon the merits. Copeland v. Hewett, 93 Me. 554, 45 A. 824.

Amending, pleading over and proceeding to trial as waiver of exceptions.—For the plaintiff to amend or the defendant to plead over before having the validity of his exceptions determined would be a waiver of his exceptions. Tripp v. Park Street Motor Corp., 122 Me. 59, 118 A. 793.

The defendant, by pleading and proceeding to trial upon the merits of the case, before having the validity of his exceptions to the overruling of his demurrers to the amendments determined, waives such exceptions. Gilbert v. Dodge, 130 Me. 417, 156 A. 891. See Gilbert v. Cushman, 113 Me. 525, 95 A. 201.

The defendant by pleading and going to trial waives his exception to the overruling of the demurrer, but not his exception to the allowance of the amendment. Page v. Bourgon, 138 Me. 113, 22 A. (2d) 577.

Judgment not entered until term after decision certified.—Where the decision of the law court is based on a demurrer, the judgment cannot be entered until the term next after the decision is certified. Furbish v. Robertson, 67 Me. 35.

Exceptions held not frivolous.—See Roberts v. Niles, 95 Me. 244, 49 A. 1043.

Demurrer deemed frivolous, and plaintiff entitled to treble costs.—See Mitchell v. Sutherland, 74 Me. 100.

Finding that demurrer filed at second term was frivolous.—The adjudication of the presiding judge at nisi pruis that a demurrer, filed at the second term and presented and passed upon the day it was filed, is frivolous and intended for delay, has no effect upon the rights or liabilities of the defendant and he is not legally aggrieved thereby. Blanding v. Mansfield, 72 Me. 427.

III. RIGHT TO AMEND OR PLEAD ANEW.

A. After Demurrer Sustained.

Section recognizes power of full court over amendments.—The provision in this section that the single justice "before exceptions are filed and allowed" has the same power as the full court to allow the plaintiff to amend, etc., is a distinct recognition of the power of the full court over amendments, and in no respect in derogation of its authority. Fleming v. Courtenay, 95 Me. 128, 49 A. 611.

Ample power is left in this section to the law court and the judge at nisi prius to permit the party found in fault to replead or amend upon payment of costs, when there is reason to believe that the former pleadings did not properly present the party's case. Augusta v. Moulton, 75 Me. 551; Fleming v. Courtenay, 95 Me. 128, 49 A. 611.

The plaintiff may amend his declaration if it is amendable upon compliance with the provisions of this section. Hutchins v. Libby, 148 Me. 433, 95 A. (2d) 560.

And defendant may plead anew after demurrer to plea sustained.—Where the plea is bad, by this section the defendant may plead anew on payment of costs from the time when it was filed. Endicott v. Morgan, 66 Me. 456.

After a demurrer to the defendant's plea in bar is sustained, the court at nisi prius has power to allow the defendant to plead anew. The power is to be exercised in the discretion of the presiding justice, and only in the furtherance of justice. Mayberry v. Brackett, 72 Me. 102.

Where a plea puis darrein continuance is adjudged bad on demurrer, the court may, in the exercise of its discretionary power, award a repleader in furtherance of justice. Augusta v. Moulton, 75 Me. 551. See McKeen v. Parker, 51 Me. 389.

The presiding judge has no power to grant leave to amend before joinder in demurrer; but after ruling and before allowing exceptions he has "the same power as the full court to allow the plaintiff to amend or the defendant to plead anew." Maine Central Institute v. Haskell, 71 Me. 487.

To allow an amendment before there was any joinder of the demurrer, or ruling upon it, would deprive the defendant of his right, which he clearly has by this section, of requiring the court to rule upon a plea which the opposite party has made in the case. Wakefield v. Littlefield, 52 Me. 21.

A party is not compelled to file a motion asking for an amendment before filing exceptions when the necessity for it has not been authoritatively declared. Fleming v. Courtenay, 95 Me. 128, 49 A. 611.

And motion may be made after decision

of law court on exceptions.—Express provision is made in this section for the filing of amendments after a decision by the law court upon the demurrer, and no statute exists and no rule or decision of the court can be found requiring a party to file his motion to amend before taking exceptions to the overruling of a demurrer to a plea in abatement, or depriving the court of the power to allow amendments in such a case upon a motion made after exceptions "are filed and allowed," and after the decision of the law court has been certified to the trial court. Fleming v. Courtenay, 95 Me. 128, 49 A. 611.

Judge at nisi prius determines whether declaration is amendable. — If the case is before the law court upon exceptions to the ruling of the presiding judge against the demurrer and the exceptions are sustained and the declaration adjudged defective, it is then for the judge at nisi prius, after the case is remanded, upon proper motion, to rule in the first instance whether the declaration was amendable or not, that question not being before the law court upon a mere exception to the overruling, or to the sustaining, of the demurrer. Maine Central Institute v. Haskell, 71 Me. 487.

Unless parties have stipulated that law court shall determine such question. — Where the parties have stipulated that the law court shall "determine whether the amendment asked by the plaintiff can be allowed if the declaration is held insufficient, and if so, upon what terms," the law court will make that determination. Maine Central Institute v. Haskell, 71 Me. 487.

B. After Demurrer Overruled.

This section relaxes the severity of the common law, whereby, when exceptions to the overruling of a demurrer to the declaration were overruled, judgment on the demurrer, or that plaintiff recover, followed and was final. Rollins v. Central Maine Power Co., 112 Me. 175, 91 A. 837.

A new right is given, not to the plaintiff, whose rights at common law are abridged, but to the defendant whose rights are enlarged upon his compliance with the conditions named. Rollins v. Central Maine Power Co., 112 Me. 175, 91 A. 837.

Defendant has right to plead anew if demurrer filed at first term. — If a demurrer to the declaration in a civil suit is filed at the first term and overruled, the defendant has the right to plead anew on payment of costs, unless the demurrer is "frivolous and intended for delay." Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433.

Otherwise leave to plead anew cannot be claimed as legal right.—A demurrer not having been filed at the first term, leave to plead anew cannot be claimed as a legal right. Winthrop Savings Bank v. Blake, 66 Me. 285; Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433. See Maine Central Institute v. Haskell, 71 Me. 487.

But is in discretion of presiding justice. —The demurrer not having been filed at the first term, leave to plead anew could not be claimed as a legal right. The motion was addressed to the discretion of the presiding justice; and to the exercise of a discretionary power, exceptions do not lie. Winthrop Savings Bank v. Blake, 66 Me. 285.

And where no such leave is granted, judgment is final.—Where a demurrer is not filed until the second term, and no leave to plead anew is granted, the defendant has no right to plead anew after the demurrer has been overruled. In such cases judgment is to be entered for the plaintiff. Palmer v. Blaine, 116 Me. 524, 102 A. 291. See Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433.

When the demurrer is not filed at the first term, and leave of the court and of the opposite party to withdraw it is not obtained, no right to plead anew exists. The judgment in such a case is final. Fryeburg v. Brownfield, 68 Me. 145; Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433.

Right to plead anew must have been previously reserved.—If a demurrer is not filed until a later term, there must be a stipulation and court order permitting the defendant to plead over if overruled. If the right to plead anew has not been previously reserved and consent given by the court and expressly or impliedly by the opposite party at or before the time when the demurrer is filed at the later term, the defendant may not plead anew when the demurrer is overruled, and judgment should be entered. Hutchins v. Libby, 149 Me. 371, 148 A. (2d) 433.

C. Time and Manner of Filing Amendment or New Pleadings.

Right to amend or plead anew must be asserted in time and manner specified. — This section gives the parties rights to amend or plead anew after the decision on a demurrer, which did not previously exist, and for the purpose of enabling them to secure those rights, the action is to stand upon the docket until the term following the certificate of decision. But

these rights must be asserted within the time and in the manner specified, otherwise they are waived, and the case ended. State v. Peck, 60 Me. 498.

Section is imperative as to terms upon which plaintiff may amend.—In respect to demurrers to declarations, this section is imperative as to the terms upon which the plaintiff may amend, if his declaration is adjudged defective upon demurrer. In such case if the declaration is amendable, "the plaintiff may amend upon payment of costs, from the time when the demurrer was filed." Colton v. Stanwood, 67 Me. 25.

Pleadings must be filed and costs paid on second day of term. — Where the new pleadings are not filed on the second day of the term, and the costs are not paid, in accordance with this section, final judgment must be entered. State v. Peck, 60 Me. 498.

When a special demurrer to a replication, setting out all the facts necessary to maintain the plaintiff's case, is overruled and the replication adjudged good, final judgment follows, if the costs are not paid and new pleadings filed on the second day of the term succeeding the decision. State v. Peck, 60 Me. 498.

Filing pleadings without payment of costs is insufficient. — The defendant filed his new pleadings on first day of the "next term" but made neither payment nor tender of the costs upon either the first or second day. Notwithstanding the defendant's objection that "there had been no taxation of costs, nor request for payment thereof, nor any mention whatever previously made in regard to costs," the court properly ruled as matter of law that the filing of the plea without payment of costs did not make a good plea and granted the plaintiff's motion for judgment on the demurrer. Rollins v. Central Maine Power Co., 112 Me. 175, 91 A. 837.

Time of filing amendment where no exceptions taken. — When the decision is made by the presiding justice and no exceptions are taken, this section is silent as to the time of filing the amendment, but this omission is supplied by rule of court. Tibbetts v. Dr. D. P. Ordway Plaster Co., 117 Me. 423, 104 A. 809.

Filing of amendment not regarded as motion for extension of time.—The mere filing of the amendment itself, after the prescribed time therefor had elapsed, cannot be regarded as a motion for extension of time, nor can the allowance of the amendment by the court be regarded as the granting of such a motion. Tibbetts v. Dr. D. P. Ordway Plaster Co., 117 Me. 423, 104 A. 809.

Sec. 39. Hearings and judgments in vacation.—Any justice of the superior court, on application of either party and on notice, may in vacation hear and determine a demurrer or any interlocutory motion in any cause pending, may make an order making any matter, interlocutory motion or petition in order for hearing during vacation or during a regular session of court and may make any order therein which the court could make if in session; and by agreement of parties he may, at any time or place, try and determine issues of fact and of law submitted to him and render any judgment therein which the court could render if in session. Any such justice may in vacation render judgment in any case heard by him in term time. Parties shall have the right of exception to such orders and judgments and to other rulings on questions of law as if judgment had been rendered in term time. Bills of exceptions in such cases shall be filed within 30 days from the rendition of judgment unless the time is further extended by any justice of such court. When a judgment for the plaintiff is rendered in vacation, all pending attachments of property shall continue in force for 30 days after the next term in that county. (R. S. c. 100, § 39. 1945, c. 136.)

History of section.—See Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248; Gregoire v. Lesieur, 146 Me. 203, 78 A. (2d) 494.

"Vacation" defined.—In this section the legislature made use of the term "vacation" as meaning the period of time between the end of one term and the beginning of another. Robinson, Appellant, 116 Me. 125, 100 A. 373.

This section, authorizing decisions in vacation on matters heard during term time confers no authority beyond that period which intervenes between the adjournment of one term and the opening of another. Bolduc v. Granite State Fire Ins. Co., 147 Me. 129, 83 A. (2d) 567.

This section refers to matters heard in term next preceding vacation.—By this section it is provided that any justice may in vacation render judgment heard by him in term time. Undoubtedly the enactment means that he may in vacation render judgment in a matter or cause heard by him in term time next preceding such

vacation. Robinson, Appellant, 116 Me. 125, 100 A. 373.

And does not give authority to render or enter judgment at the term following the vacation. Robinson, Appellant, 116 Me. 125, 100 A. 373.

This section applies to probate appeals heard in term time and decided in vacation. Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

It does not include allowance of exceptions to rulings made in term time. Poland v. McDowell, 114 Me. 511, 96 A. 834.

This section does not deny the right of trial by jury; nor does it inhibit the waiving of such right. It means exactly what ordinary signification imports, and that is that, by mutual consent of opposite litigants, a justice, at other than term time, and without the intervention of a jury, may try and determine questions both of fact and of law, and directly enter judgment. Hutchins v. Penobscot, 120 Me. 281, 113 A. 618.

The right to review by bills of exceptions is preserved by the express provisions of this section. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

This section expressly confers power on "any justice" to extend the time for filing exceptions. Carey v. Bourque-Lanigan Post No. 5, 149 Me. 390, 102 A. (2d) 860.

But "any justice" is not authorized to allow bills of exceptions.—This section provides that bills of exceptions to vacation judgments should be filed within thirty days after the rendition of judgment "unless the time is further extended by any justice." The authority so conferred on "any justice" is limited to time extensions. It carries no power for allowing bills of exceptions. Gregoire v. Lesieur, 146 Me. 203, 78 A. (2d) 494.

To "further extend" is to prolong or lengthen an existing time for filing. Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

When judgment final. — A judgment in vacation, upon resting without attack by exceptions for the thirty-day period or such period "further extended," becomes final. Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

Where an appeal from the probate court was submitted to supreme court of probate at the June, 1949 term and dismissed in vacation on August 12, 1949 without bill of exceptions being filed within a thirty-day period as provided by the statute and without further extension of time, the court is without jurisdiction to re-open or further extend the time for filing exceptions, notwithstanding the fact that the clerk's office did not notify petitioner's counsel of the August 12th judgment until September 13th and the further fact that the clerk's office, within the week prior to September 13, had informed petitioner that judgment had not been rendered. Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

Applied in Mitchell v. Canadian Realty Co., 121 Me. 512, 118 A. 373; Glidden v. Rines, 124 Me. 286, 128 A. 4; F. R. Conant Co. v. Lavin, 124 Me. 437, 126 A. 647; Cumberland County Power & Light Co. v. Hiram, 125 Me. 138, 131 A. 594; Fickett, Appellant, 125 Me. 430, 134 A. 544; Van Woudenburg v. Valentine, 136 Me. 209, 7 A. (2d) 623; Jones v. Jones, 126 Me. 238, 8 A. (2d) 141.

Sec. 40. Actions on insurance policies.—In all actions at law on insurance policies, a declaration in indebitatus assumpsit on an account annexed, with an allegation that the plaintiff has complied with all conditions of the policy of insurance mentioned in the account annexed, shall be deemed sufficient. The account annexed shall state the number of the policy and the amount claimed as due, both as principal sum and interest, if any. The fact that the amount claimed in the account annexed varies from the amount found to be due the plaintiff shall not defeat the action unless there be a fraudulent claim of an excessive amount. If the defendant relies upon the breach of any condition of the policy by the plaintiff as a defense, it shall set the same up by brief statement or special plea at its election; and all conditions, the breach of which is known to the defendant and not so specially pleaded, shall be deemed to have been complied with by the plaintiff. The plaintiff by counter brief statement or replication may set up any matter waiving or legally excusing his noncompliance with conditions as alleged by the defendant. Nothing herein shall be construed as changing in any way the common law burden of proof as to such matters as are so put in issue under the pleadings. (R. S. c. 100, § 40.)

In cases arising under this section the burden of proof is still upon the plaintiff, but only as to such matters as are put in issue under the pleadings. Connellan v.

Federal Life & Casualty Co., 134 Me. 104, 182 A. 13.

The plaintiff is not required to set forth anything more in his account annexed than the amount claimed as due both as principal sum and as interest if any. The plaintiff is not required to prove the full sum claimed as due in his account annexed in order to recover. This section expressly excuses him from this burden. Oakes v. Franklin Fire Ins. Co., 122 Me. 361, 120 A. 53.

Whether by brief statement or special plea, the legislature limits and restricts the defendant to what it has traversed in its plea, to what it has specifically pleaded. It enacted this section for this specific form of action and no other; and the brief statement cannot therefore be extended by construction, but must be confined to what is so specifically pleaded. Austin v. Prudential Health & Accident Ins. Co., 124 Me. 232, 127 A. 276; Russell v. Granite State Fire Ins. Co., 121 Me. 248, 116 A. 554.

Breach of condition not specifically pleaded deemed complied with. — This section provides that any defense to a breach of the policy shall be made by a brief statement or special plea, and every breach not so specifically pleaded shall be deemed to be complied with by the plaintiff. This rule of pleading is too plain for interpretation and too positive to admit of the exercise of discretion. It was undoubtedly meant to be both restrictive and technical. Russell v. Granite State Fire Ins. Co., 121 Me. 248, 116 A. 554; Austin v. Prudential Health & Accident Ins. Co., 124 Me. 232, 127 A. 276.

Nonpayment of premium due as breach of condition.—Where the provisions of an insurance contract made it clear that the intention of the parties was to enter into a continuing contract subject to the condition that the assured pay the monthly premiums, nonpayment of premium when due was a breach of condition which must be set up by brief statement or special plea under this section, and a brief statement setting up that there was no existing insurance contract in force, was not a compliance with the statute requirement. It added nothing to the general issue to inform the plaintiff as to the ground of defense. Connellan v. Federal Life & Casualty Co., 134 Me. 104, 182 A. 13.

Applied in Bradbury v. Insurance Co. of Pa., 118 Me. 191, 106 A. 862; Union Trust Co. of Ellsworth v. Philadelphia Fire & Marine Ins. Co., 127 Me. 528, 145 A. 243; Cox v. Metropolitan Life Ins. Co., 139 Me. 167, 28 A. (2d) 143; Bernstein v. Metropolitan Life Ins. Co., 139 Me. 388, 34 A. (2d) 682; Albert v. Maine Bonding & Casualty Co., 144 Me. 20, 64 A. (2d) 27; Pearson v. Aroostook County Patrons Mut. Fire Ins. Co., 149 Me. 313, 101 A. (2d) 183.

Sec. 41. Trespass on land; tender.—In actions of trespass on lands, the defendant may file a brief statement disclaiming all title to the land described, and alleging that the trespass was involuntary, or by negligence or mistake, or in the prosecution of a legal right, and that before action brought he tendered sufficient amends therefor or that he brings money into court to satisfy the damages with costs to that time; and if on trial he establishes the truth of his allegations, he recovers costs. (R. S. c. 100, § 41.)

This section is not inconsistent with § 42 of this chapter. This section authorizes an involuntary trespasser to tender amends before action brought, or to bring money into court after the action is entered. Those privileges are not accorded to the voluntary or willful trespasser. But any trespasser may offer to be defaulted, under the provisions of § 42. The two modes of remedy provided by the two sections are independent of each other. The one is in addition to the other, and not opposed to it. Boyd v. Cronan, 71 Me. 286.

Money must be brought into court on first day of return term. — One who has made a tender of amends as provided by this section will lose the benefit of it if he does not bring the money into court on the first day of the return term of the writ. Fernald v. Young, 76 Me. 356.

Sec. 42. Offer defaulted.—In any personal action the defendant may in writing, entered of record with its date, offer to be defaulted for a specified sum. If accepted, interest may be added from that date to date of judgment. If not accepted within such time as the court orders, it shall not be offered in evidence or have any effect upon the rights of the parties or the judgment to be rendered except as to the costs; but no costs shall be allowed the defendant if the offer is accepted within the time fixed by the court or if accepted when no time has

been so fixed. If the offer is not so accepted and the plaintiff fails to recover a sum as due at the time of the offer greater than the sum offered, he recovers such costs only as accrued before the offer and the defendant recovers costs accrued after that time, and his judgment for costs may be set off against the plaintiff's judgment for debt and costs. (R. S. c. 100, § 42.)

History of section.—See Wentworth v. Lord, 39 Me. 71; Mercer v. Bingham, 42 Me. 289; Hartshorn v. Phinney, 48 Me. 300.

Purpose of section.—This provision was intended to furnish an opportunity to a defendant, in order to put a stop to litigation and consequent costs, to admit his liability for a certain amount, when the other party claimed in his suit a greater sum in damages, and thereby present an inducement to the latter to accept the offer, and release himself from the exposure to further litigation and the recovery of costs by the defendant, in consequence of a verdict for a sum no greater than that offered. Gowdy v. Farrow, 39 Me. 474.

Section 41 and this section are not inconsistent.—See note to § 41.

This section was intended to be broad enough to embrace all actions where an offer could be made, and it was necessary therefore, to carry out the designs of its authors, that all further defense to an action, and also all questions of damages should be determined by the offer, if it should be accepted. Gowdy v. Farrow, 39 Me. 474.

It applies to any and all personal actions.—The law allows full costs in all real actions, and also in all personal actions in which the realty is involved. This section no more excludes from its operation one kind of personal action than another. It includes any and all personal actions. The language is comprehensive. Boyd v. Cronan, 71 Me. 286.

Including action of trespass quare clausum fregit.—Under this section, an offer of default may be made in an action of trespass quare clausum fregit, with the usual effect of such an offer upon the taxation of costs. Such an action is a personal action within the meaning of this section. Boyd v. Cronan, 71 Me. 286.

But not to writs of entry.—See Carson v. Walton, 51 Me. 382.

It is applicable when the case is referred after the offer, as well as when the amount due is found by a verdict. It is the penalty imposed for nonacceptance when all that is due is offered. Higgins v. Rines, 72 Me. 440.

And when plaintiff's claim is reduced by setoff.—A pending action, in which there was an account filed in setoff and an offer to be defaulted, was referred by rule of court, and the referee found the plaintiff's claim was reduced by setoff below twenty dollars. The amount found due being less than the offer to be defaulted, the plaintiff was entitled to full costs to the day of the offer, and the defendant to full costs since that day. Higgins v. Rines, 72 Me. 440.

This section no longer requires a trial of the case as one of the conditions requisite to entitle the defendant to costs. The only condition is, that the plaintiff shall fail "to recover a sum as due at the time of the offer greater than the sum offered," in which case the defendant recovers costs from that time. Hartshorn v. Phinney, 48 Me. 300.

An offer to be defaulted is not an admission of a cause of action in the plaintiff. Avery v. Straw, 30 Me. 458.

This section does not appear to have been designed to afford the plaintiff any advantages, beyond what he might derive from the offer itself. The reasons upon which the rule was established that a tender of a part admits the contract stated in the declaration, do not apply to an offer to allow the plaintiff to take judgment for a certain sum. Such offer may be made to avoid the risk of costs, where there may be a chance for the recovery of nominal damages or a small amount, where the defendant thinks that there is nothing due. Jackson v. Hampden, 20 Me. 37.

Or a waiver of the objection that the writ is not sealed. Tibbetts v. Shaw, 19 Me. 204.

Nor may such offer be used as evidence.—It is provided by this section that in actions pending, an offer to be defaulted for a sum certain, unaccepted, is no admission of the cause of action or of any indebtment of the defendant; nor shall such offer be used as evidence before the jury in the trial. Wentworth v. Lord, 39 Me. 71.

An offer to be defaulted, if unaccepted, cannot be used as evidence for any purpose in the trial of the action. Gowdy v. Farrow, 39 Me. 474.

And judgment must depend on verdict rendered.—If, when an offer to be defaulted has been made, the plaintiff proceeds to trial, the judgment in the case must depend on the verdict rendered. The

offer will affect the costs only. Wentworth v. Lord, 39 Me. 71.

And plaintiff is not entitled to judgment for amount of unaccepted offer.—After an offer is made upon the record, and the action tried and verdict rendered for the defendant, the plaintiff is not entitled to judgment for the offer upon the record. Wentworth v. Lord, 39 Me. 71, overruling Boynton v. Frye, 33 Me. 216.

Defendant may have time for acceptance fixed by court.—By this section it is the right of the defendant to have the time fixed by the court, within which the plaintiff may accept his offer to be defaulted for a specified sum. Gilman v. Pearson, 47 Me. 352.

After the time fixed by the court expires, the defendant, though not bound by any acceptance, still has the advantage of the offer, so far as it may affect the costs. Gilman v. Pearson, 47 Me. 352.

But offer is not void if he fails to do so.—If a defendant makes an offer, and does not have the time for its acceptance fixed by the court, it is not void for that reason. The only disadvantage he thereby incurs is that of having his offer accepted at any time before trial. If not accepted, the offer has the same effect in one case as in the other. If the plaintiff does not recover a sum greater than that offered, he is entitled to no costs accruing after the offer is made, but must pay costs to the defendant. Gilman v. Pearson, 47 Me. 352. See Hartshorn v. Phinney, 48 Me. 300.

And plaintiff may accept at any time before offer revoked.—If a defendant causes to be entered upon the docket an offer to be defaulted for a specified sum, but has no time fixed for its acceptance, the plaintiff may accept it at any time before it is revoked. Hartshorn v. Phinney, 48 Me. 300.

Form of offer.—An offer in writing in an action pending in court, made by the defendant's attorney in these words, "and now on this third day of the term the defendant, by his attorney, comes and offers to be defaulted for the sum of seventy dollars damages in said action," is a compliance with this section. Gowdy v. Farrow, 39 Me. 474.

Verbal offer entered on docket must be disregarded.—Where no offer to be defaulted has been made in writing, if it appears that an entry of such offer was made on the docket by the clerk upon the authority only of a verbal direction of the attorney of the defendant, the court must disregard it. Hunt v. Elliott, 20 Me. 312.

Applied in Fogg v. Hill, 21 Me. 529; Stone v. Waitt, 31 Me. 409; Pingree v. Snell, 42 Me. 53; Pingree v. Snell, 46 Me. 544; Woodcock v. McCormick, 55 Me. 532.

Cited in Wilson v. Aetna Casualty & Surety Co., 145 Me. 370, 76 A. (2d) 111.

Sec. 43. Offer of judgment against plaintiff.—In any personal action the plaintiff may, in like manner, offer to have judgment rendered against him for a specified sum and the proceedings thereon and the effect of such offer upon his rights and liabilities shall be the same as is provided in respect to the defendant in the preceding section. (R. S. c. 100, § 43.)

Sec. 44. Tender before entry; town may tender or offer to be defaulted. — A tender, with the costs then accrued, may be made after action brought and before its entry to the plaintiff or his attorney with the same effect as if made before action brought. In actions against towns for injury to the person or damage to property from defect in ways, a town may make a tender before commencement or entry of the action or offer to be defaulted for a specified sum with the same effect as in actions on contract. (R. S. c. 100, § 44.)

Applied in Call v. Lothrop, 39 Me. 434.

Sec. 45. Partial failure of consideration of note.—In any proceeding at law or in equity in which the amount due on a promissory note given for the price of land conveyed is in question and a total failure of consideration would be a defense, a partial failure of consideration may be shown in reduction of damages. (R. S. c. 100, § 45.)

History of section.—See Crummett v. Littlefield, 98 Me. 317, 56 A. 1053.

This section abrogates the rule which for a long time prevailed in this state to the effect that a partial failure of title constituted no defense to a suit on a note given for real estate. Hathorn v. Wheelwright, 99 Me. 351, 59 A. 517.

Note given for consideration other than real estate.—The rule to the effect that a partial failure of title constituted no defense to a suit on a note given for real estate

was never applicable, in this state, to a note given for other considerations. Upon the contrary, it is well settled that a partial failure of consideration may be shown in reduction of damages. Hathorn v. Wheelwright, 99 Me. 351, 59 A. 517.

Sec. 46. Property of deceased debtor on joint contract liable.—The goods and estate of a deceased debtor in a joint contract, express or implied, or in a judgment on contract are liable in the same manner and the creditor has the same remedy as in case of a joint and several contract. (R. S. c. 100, § 46.)

History of section.—See Duly v. Hogan, 60 Me. 351.

Under this section the death of the debtor makes the contract several as well as joint, and the creditor may pursue his remedy either against the survivors or the estate of the deceased, or against both, in separate suits. Duly v. Hogan, 60 Me. 351.

Sec. 47. Truth justifies in libel, save in case of malice.—In an action for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libelous. If its truth is established, it is a justification unless the publication is found to have originated in corrupt or malicious motives. (R. S. c. 100, § 47.)

Instructions.—Under this section instructions to the jury that the truth of the publication of a libel is now a defense, accompanied with other instructions by which the plaintiff may be denied the right to have the jury pass upon the question whether the libel originated from corrupt or malicious motives, would be erroneous. Pierce v. Rodliff, 95 Me. 346, 50 A. 32.

Applied in Pease v. Bamford, 96 Me. 23, 51 A. 234; Stanley v. Prince, 118 Me. 360, 108 A. 328.

Sec. 48. Mitigation of damages in action for libel.—The defendant in an action for libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through error or by inadvertence and that he has in writing, within a reasonable time after the publication of the charge, retracted the charge and denied its truth as publicly and as fully as he made the charge; and he may also prove in mitigation of damages that the plaintiff has already recovered or has brought action for damages for, or has received or has agreed to receive compensation for, substantially the same libel as that for which said action was brought. (R. S. c. 100, § 48.)

Sec. 49. Unproved allegations.—In actions for libel or slander, an unproved allegation in the pleadings that the matter charged is true shall not be deemed proof of malice unless the jury on the whole case find that such allegation or the defense thereunder is made with malicious intent. (R. S. c. 100, § 49.)

A jury is warranted in increasing an award because of the failure of a defendant to establish by evidence a plea of truth. Hall v. Edwards, 138 Me. 231, 23 A. (2d) 889.

Sec. 50. Burden of proof on defendant in certain cases of negligence; contributory negligence pleaded.—In actions to recover damages for negligently causing the death of a person or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant. (R. S. c. 100, § 50.)

This legislation is in consonance with public policy. In an action between living parties, the plaintiff would be required to prove that he was in the exercise of due care and that no want of care on his part contributed as a proximate cause of the accident. When, however, his lips are sealed in death, his version of the accident is not available. Neither can he deny or explain evidence offered by the defendant. Ramsdell v. Burke, 140 Me. 244, 36 A. (2d) 573.

The language of this section is unambiguous and plain. The decedent, in the case provided for in this section, is presumed to have been in the exercise of due

care at the time of the accident and injury, and this presumption cannot be rebutted by an offer of evidence tending to prove contributory negligence, unless it "shall be pleaded" by the defendant. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

Where contributory negligence is not pleaded it is not in issue.—Where the defense of contributory negligence was not pleaded, the defendant was precluded from offering any evidence tending to prove contributory negligence. Contributory negligence, if it existed on the part of the decedent, was not in issue under the pleadings. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

And where it is pleaded it must also be proved.—Upon the issue of contributory negligence, the deceased by this section is presumed to be in the exercise of due care. Contributory negligence was properly pleaded, but this section also requires that it be proved. Sturtevant v. Ouellette, 126 Me. 558, 140 A. 368.

To sustain a finding that the decedent was guilty of contributory negligence and to rebut the presumption of due care on the part of the decedent it must be shown that there was evidence of probative value that the defendant had sustained the burden of proof of such alleged contributory negligence. Ramsdell v. Burke, 140 Me. 244, 36 A. (2d) 573.

And burden of proof is on defendant.—Due care on the part of decedent is presumed. The presumption is a disputable one. Upon the issue of contributory negligence, the burden of proof is on defendant. Metrinko v. Witherell, 134 Me. 483, 188 A. 213.

In case of immediate death, under the original statute giving a right of action, it was not only incumbent upon the plaintiff to prove the negligence of the defendant, but also that the decedent, at the time of the accident, was in the exercise of due care. Under this section, the burden of proof upon the question of due care was shifted and the rule of pleading contributory negligence changed. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

Due care is a matter of affirmative proof on plaintiff's part unless the case falls within the scope of this section. The burden of proof, on this issue, is on plaintiff. Cole v. Wilson, 127 Me. 316, 143 A. 178.

This section creates a presumption as to the due care of the deceased person "at the time of all acts in any way related to his death or injury," which obviates the necessity of proof in his behalf and makes a prima facie case for the plaintiff with respect to the decedent's own due care. Ramsdell v. Burke, 140 Me. 244, 36 A. (2d) 573.

But it does not compel submission of question of contributory negligence to jury.—While under this section the person for whose death or injury the action is brought is presumed to have been in the exercise of due care, it does not follow that the question of contributory negligence must necessarily be submitted to the jury. Where there is no substantial conflict in the evidence nor doubt as to the fair and reasonable inferences deducible from it, a question of law is presented for the court. Levesque v. Dumont, 117 Me. 262, 103 A. 737. See Ward v. Cumberland County Power & Light Co., 134 Me. 430, 187 A. 527.

This section enacts a presumption of care; next, it casts upon the defendant the burden of overcoming such presumption, and proving want of care on the part of the deceased person. This shifting of the burden of proof works no change in the underlying principles of law. If a plaintiff's intestate's own want of ordinary care is proved to have been contributory to his death, plaintiff may not prevail. Field v. Webber, 132 Me. 236, 169 A. 732; Bechard v. Lake, 136 Me. 385, 11 A. (2d) 267.

This section did not change the substantive law of negligence in any respect. The tribunal hearing the case must still be satisfied on all the evidence that the plaintiff was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury, and that the defendant was negligent. All these elements must appear by the greater amount of credible evidence. Cullinan v. Tetrault, 123 Me. 302, 122 A. 770.

This statute does not change the substantive law of negligence. Under it, the tribunal hearing the case must still be satisfied on all the evidence that the deceased was in the exercise of due care and did not by his own acts of omission or commission help to produce his injury. Ward v. Cumberland County Power & Light Co., 134 Me. 430, 187 A. 527.

This statute did not undertake to change the substantive law of negligence. Cases must still be decided upon all the evidence. Field v. Webber, 132 Me. 236, 169 A. 732.

Plaintiff still has burden of proving negligence of defendant.—While the plaintiff is relieved under this section of the burden of proving that no lack of care on the

part of the deceased contributed to his injury, he still has the burden of showing by some competent evidence that it was due to the negligence of the defendant. Mahan v. Hines, 120 Me. 371, 115 A. 132.

It is incumbent upon the plaintiff to prove negligence on the part of the defendant. If such negligence is proved, it is incumbent upon the defendant, if he would avoid liability, to prove contributory negligence on the part of the plaintiff's intestate as a proximate cause of the injury. Bechard v. Lake, 136 Me. 385, 11 A. (2d) 267.

Instruction properly refused. — Under this section it was proper to refuse to instruct the jury, in substance, that, where death followed but was not caused by the injury, the administrator prosecuting had the burden of the proposition that there was no contributory negligence on the part of his decedent. Dougherty v. Maine Central R. R., 125 Me. 160, 132 A. 209.

Applied in Allen v. Aroostook Valley R. R., 115 Me. 361, 98 A. 1027; Welch v. Lewiston, Augusta & Waterville Street Ry., 116 Me. 191, 100 A. 934; Kidney v. Aroostook Valley R. R., 119 Me. 597, 111 A. 334; Danforth v. Emmons, 124 Me. 156, 126 A. 821; Day v. Isaacson, 124 Me. 407, 130 A. 212; McDonald v. Pratt, 129 Me. 434, 152 A. 532; Stone v. Roger, 130 Me. 512, 154 A. 73; Smith v. Joe's Sanitary Market, 132 Me. 234, 169 A. 900; Shaw v. Piel, 139 Me. 57, 27 A. (2d) 137; Blanchette v. Miles, 139 Me. 70, 27 A. (2d) 396; Haskell v. Herbert, 142 Me. 133, 48 A. (2d) 637.

Cited in Coolidge v. Worumbo Mfg. Co., 116 Me. 445, 102 A. 238.

Sec. 51. No reversal for wrong joinder. — When in a civil action the declaration contains a good count and bad ones or a wrong joinder of counts, and no written objection is made until after the cause is committed to the jury and a general verdict has been recorded, the judgment cannot for such cause be reversed on writ of error. (R. S. c. 100, § 51.)

Cited in Fernald v. Garvin, 55 Me. 414.

Sec. 52. No motion in arrest.—No motion in arrest of judgment in a civil action can be entertained. (R. S. c. 100, § 52.)

Purpose of section.—The legislature, unwilling that judgments should be arrested or reversed, after a fair trial, has enacted this section. It would be a reproach to the law, if a party were permitted to lie by, and, after the expense and delay of a trial, to deprive his opponent of a judgment to which it would seem he was justly entitled. Conway Fire Ins. Co. v. Sewall, 54 Me. 352.

A motion to dismiss for want of jurisdiction, after verdict, may be treated as a motion in arrest of judgment, and no such motion, in any civil action, can be sustained in this state, by reason of this statute. Stetson v. Corinna, 44 Me. 29.

Applied in Thornton v. Townsend, 39 Me. 181; Fox v. Conway Fire Ins. Co., 53 Me. 107; Fernald v. Garvin, 55 Me. 414; Richmond v. Toothaker, 69 Me. 451; Lunt v. Stimpson, 70 Me. 250.

Sec. 53. On certain bonds and recognizances, jury to assess damages.—In actions on bond or contract in a penal sum for the performance of covenants or agreements or on a recognizance to prosecute an appeal, when the jury finds the condition broken, they shall estimate the plaintiff's damages and judgment shall be entered for the penal sum, and execution shall issue for such damages and costs. (R. S. c. 100, § 53.)

Cross reference.—See note to § 160, re costs in action on bond.

History of section.—See Lewis v. Warren, 49 Me. 322; Philbrook v. Burgess, 52 Me. 271; Corson v. Dunlap, 83 Me. 32, 21 A. 173.

This section was intended to have a wide and beneficent and not a narrow operation. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

It is not restricted to cases where there is a written agreement separate from and independent of the bond itself; the agreement may be implied from the nature of the covenant in the bond, or may be inferential only. Corson v. Dunlap, 83 Me. 32, 21 A. 173, overruling the rule of practice indicated in Philbrook v. Burgess, 52 Me. 271, so far as inconsistent.

It applies to bonds where there may be several breaches at different times, scire facias being the proper remedy to obtain execution for damages accruing from subsequent breaches. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

Such as bond given by respondent in bastardy proceedings.—This section applies

to an action on the bond given by a respondent in bastardy proceedings, in which the order of court requires that payments be made by the principal in the bond to the complainant in installments, and there may be breaches after the first suit. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

And not to bonds conditioned to pay a single sum on a day certain.—The portion of this section which requires a judgment for the penalty does not apply to a bond conditioned to pay a single sum on a day certain, because in such case there can be but one breach and one assessment, and no necessity exists for retaining the penalty as a security for future breaches. But in such case a judgment for the penalty would not be injurious to any party, and such merely inaccurate judgments are occasionally seen. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

It does not extend to certain statutory bonds, bail bonds, recognizances, bonds for good behavior, bonds to do or not to do some collateral act, and the like. These bonds and some others are not money or business bonds, and are not conditioned for the security of covenants and agreements in the sense of this section, and can be chancered by the court with much more propriety than by a jury. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

It is not applicable in actions on poor debtors' bonds.—See Hathaway v. Crosby, 17 Me. 448; Barnard v. Bryant, 21 Me. 206; Burbank v. Berry, 22 Me. 483; Clifford v. Kimball, 39 Me. 413. See also c. 120, § 79.

Or on replevin bonds where damages are full and final.—The damages recovered in a suit on a replevin bond being full and final there is no occasion to have judgment entered for the penal sum of the bond. Kimball v. Thompson, 123 Me. 116, 122 A. 46.

The judgment should be for the penalty, and damages should be assessed so far as they have accrued at the time of the assessment, future damages to be recovered by after-process of scire facias, and judgment should not be given, once for all, for all the damages that will ever be sustained, both past and prospective. Corson v. Dunlap, 83 Me. 32, 21 A. 173.

Stated in Machiasport v. Small, 77 Me. 109.

Cited in Ware v. Jackson, 24 Me. 166; Brett v. Murphy, 80 Me. 358, 14 A. 934.

Sec. 54. Sureties on official bond may defend.—Sureties upon official bonds may appear and defend in suits against their principal whenever such sureties may ultimately be liable upon such bonds. (R. S. c. 100, § 54.)

Sec. 55. Interest.—Interest shall be allowed on the amount found due for damages and costs in actions on judgments of a court of record. (R. S. c. 100, § 55.)

History of section.—See Edwards v. Moody, 60 Me. 255.

Interest allowed on judgments recovered before justice of peace.—Interest is allowed on amount found due for damages and costs in actions on judgments recovered before any justice of the peace, without proof that payment had ever been demanded of the judgment debtor. Edwards v. Moody, 60 Me. 255.

Sec. 56. Judge may sit by consent although his town or county is party.—A justice or judge may sit in the trial or disposal of an action in which the county or town where he resides is a party or interested, if the party adverse to such county or town enters on the docket a waiver of all objections. (R. S. c. 100, § 56.)

This section forbids a justice of the supreme judicial court to sit in the trial or disposal of an action in which his county or town is a party or interested, except upon waiver of the adverse party. Peirce v. Bangor, 105 Me. 413, 74 A. 1039.

Validity of statutes removing disqualification for municipal interest.—See Auburn v. Paul, 110 Me. 192, 85 A. 571.

Sec. 57. Death of party, executor or administrator may appear or be summoned; heirs also, in equity.—When a party to a suit dies and his death is suggested on the record and the cause of action survives, his executor or administrator may become a party or at the request of the other party be summoned to appear and become a party. Service of the summons shall be made on him 14 days before the term to which it is returnable. If he neglects to appear, judgment may be entered by nonsuit or default according to chapter 165.

If the suit is in equity, his executor, administrator or heirs at law may in like manner appear or be summoned without a bill of revivor. (R. S. c. 100, § 57.)

Cross references.—See c. 103, § 18, re proceedings on death of party while action pending before law court; c. 112, § 58, re actions by officers for goods attached and taken by them do not abate by death of either party; c. 165, § 7, re proceedings when the only party to an action who survives, dies.

At common law, by the death of the parties, the suit would have abated. But by this section, the death of a party being suggested, his executor or administrator may become a party, or be summoned in to become a party, at the instance of the opposing party, when the cause of action survives. Fulton v. Nason, 66 Me. 446.

This section applies to both plaintiff and defendant. Fulton v. Nason, 66 Me. 446.

And is applicable where both have died. —Where in a pending action both parties have died, the administrator of the plaintiff has a right to appear, and to summon in the administrator of the defendant. Fulton v. Nason, 66 Me. 446.

It refers only to executors and administrators appointed within the state. Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415.

A citation to an executor should be served by a competent officer. An acknowledgment of service by an attorney is not sufficient if not followed by an actual appearance in court. Segars v. Segars, 76 Me. 96.

At least fourteen days before return term.—A citation to an executor must be served at least fourteen days before the term to which it is returnable. A citation made returnable at a certain day in the term, after the first, and served fourteen days before that day, is not sufficient. Segars v. Segars, 76 Me. 96.

Applied in Hubbard v. Johnson, 77 Me. 139.

Quoted in Treat v. Dwinel, 59 Me. 341.

Sec. 58. Guardian ad litem appointed for insane party. — When a party becomes insane, the suit may be prosecuted or defended by his guardian who, on application of his friend or of the other party, may be appointed for that purpose by a justice of the court in term time or in vacation. He is entitled to a reasonable compensation and is not liable for costs. (R. S. c. 100, § 58.)

Guardian of insolvent insane party not liable for costs.—Where, after the commencement of a suit, the defendant is adjudged insane and a guardian appointed, by whom his estate is represented insolvent, and the suit defended, the guardian is not liable for costs. Sanford v. Phillips, 68 Me. 431.

Stated in King v. Robinson, 33 Me. 114.

Sec. 59. Motions to set aside verdicts on report to full court.—When a motion is made in the superior court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice or authenticated by the certificate of the official court reporter. When the motion is founded on any alleged cause not shown by the evidence presented at the trial, the testimony in support of the allegations of the motion and in rebuttal or impeachment may be taken out and a report of the same, together with that presented at the trial, shall be signed by the justice or authenticated by the certificate of the official court reporter, and the case shall be marked "Law." When the law court is of the opinion that any such motion is frivolous or intended for delay it may award double or treble costs. (R. S. c. 100, § 59. 1953, c. 420, § 1.)

Cross references.—See note to § 60; § 191, re procedure for obtaining new trial where certified copy of evidence cannot be obtained due to death or disability of official court reporter; c. 107, § 51, re proceedings upon death or disability of presiding justice.

History of section.—See State v. Hill, 48 Me. 241; State v. Dodge, 124 Me. 243, 127 A. 899.

Procedure under section.—This section provides that a litigant, believing himself aggrieved at a verdict, may file in the superior court a motion for a new trial, to be heard and decided by the supreme judicial court upon the evidence, a transcript of which and copy of the record must be furnished by the moving party and filed within such time as the presiding justice may order. This motion, so entered upon the docket of the superior court, is, upon filing of the transcript of the evidence and

copy of the record by the movant, certified by the clerk of that court to the clerk of the court for entry upon the docket of the supreme judicial court. The supreme judicial court, upon entry upon its docket of such a motion, accompanied by the transcript of evidence and copy of record, has the same authority as to the granting or denial of a new trial as the justice of the superior court. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1.

This section applies to civil actions only. State v. Hill, 48 Me. 241.

This section does not apply to criminal cases. State v. Dodge, 124 Me. 243, 127 A. 899.

It does not apply to divorce cases.—There is neither express nor implied statutory authorization for a motion for a new trial being received and accepted by the supreme judicial court sitting as a law court in divorce cases. Carroll v. Carroll, 144 Me. 171, 66 A. (2d) 809.

The provisions of this section refer to actions at law in which a verdict has been rendered in the ordinary form, and not to libels for divorce. While proceedings in divorce are civil in their nature as distinguished from criminal, yet they are ecclesiastical in their origin, are regulated entirely by statute, and cannot be classed as civil actions or cases. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

Motion should conform with this section, § 60, and rules of court.—Motions for new trials in actions allowed to proceed regularly to trial in the courts must follow and conform with the rules of court and the provisions of this section and § 60. Except as limited by the rules or statute, however, common-law rules of practice and procedure remain in force. Bourisk v. Mohican Co., 133 Me. 207, 175 A. 345.

The verdict and the nature and grounds of the action and of the defense should appear in a motion to have a verdict set aside as being against law or evidence. Bartlett v. Lewis, 58 Me. 350.

And without motion before the law court, it cannot act.—Where evidence apparently taken out, under this section, and in support of a motion for new trial upon the ground of newly discovered evidence, is presented, but no motion for such new trial is before the law court, there is no record upon which the law court can act. Hills v. Paul, 116 Me. 12, 99 A. 719.

For law court can determine only such matters as are brought up by statutory procedure.—The law court is not a court of common-law jurisdiction, and therefore has no inherent power to grant new trials. It is purely a creature of statute and as such can hear and determine only those matters authorized by statute and brought to it through the statutory course of procedure. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

If motion granted, new trial had; otherwise judgment automatic.—A general motion for a new trial in civil actions is made and entered after the verdict of the jury, and before the judgment of the court is rendered. Judgment is deferred until a verdict is found and stands unreversed. If the motion is granted in a given case a new trial is had. If the motion is denied the verdict stands and judgment follows automatically. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

Judgment on findings submitted to jury subject to exceptions, not motion for new trial.—When a presiding justice, in an ordinary civil action at law, submits certain findings to the jury, and on the strength of those findings orders judgment for plaintiff or defendant, a question of law is raised and the losing party must seek his remedy not by motion for new trial but through exceptions to the ruling of the court ordering judgment. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

And correctness of award of triple damages raised by exception, not motion.—The question of the correctness of the ruling of the presiding justice in awarding triple damages, after a verdict for actual damages had been returned by the jury, should be raised by exception, not by general motion. Colby v. Tarr, 140 Me. 237, 36 A. (2d) 357.

The second clause of this section includes a motion for a new trial after verdict on the ground of incompetence of a juror when made in a civil action. State v. Gilman, 70 Me. 329.

A motion based on newly discovered evidence falls within the second sentence of this section. Mitchell v. Emmons, 104 Me. 76, 71 A. 321.

And this section contains the only authority for a motion based on newly discovered evidence. White v. Andrews, 119 Me. 414, 111 A. 581.

In Mitchell v. Emmons, 104 Me. 76, 71 A. 321, the court simply decided that a motion for a new trial upon the ground of newly discovered evidence was governed by § 59 instead of § 1; that under § 59 notice of such motion could only be ordered by the court in session. It was not decided that § 1 did not authorize a justice in vacation to order notice upon an original petition of which the court had

jurisdiction. Sproul v. Randell, 107 Me. 274, 78 A. 450.

Motion to set aside verdict cannot be considered without report of whole evidence.—A motion to set aside a verdict, as against evidence, must be sustained with a report of the whole evidence which was submitted to the jury. Without such certified report, the court has no authority to consider the motion. Rogers v. Kennebec & Portland R. R., 38 Me. 227; Nutt v. Merrill, 40 Me. 237; Lakeman v. Pollard, 43 Me. 463; Taylor v. Pierce, 43 Me. 530; Hart v. Elmore, 127 Me. 321, 143 A. 176.

And report must be duly authenticated.—Where the evidence reported is not duly authenticated by the presiding judge, as required by law, the motion for a new trial will therefore not be considered. Simpson v. Norton, 45 Me. 281.

It must be signed by presiding justice.—By this section, when a motion is made to have a verdict set aside as being against law or evidence, a report of the whole evidence shall be signed by the presiding judge. A report, certified by the counsel to be a correct report of all the material evidence in the case, is not sufficient. Bartlett v. Lewis, 58 Me. 350.

Court may not report merely such evidence as may be considered material.—It was not the intention of this section to authorize the presiding justice to report such portion of the evidence as he might consider to be the whole evidence relating to a particular point, or as material to a decision of it; it was the intention to have the whole evidence submitted to the jury reported. Rogers v. Kennebec & Portland R. R., 38 Me. 227.

And law court cannot waive report.—The statutory right of a hearing upon a motion for a new trial is conditional upon furnishing the law court with a report of the evidence. This condition cannot be waived or dispensed with by the law court. Morin v. Claflin, 100 Me. 271, 61 A. 782.

Though report may be amended.—A mere report of the evidence, made upon a motion to set aside the verdict as being against evidence, may be amended at any time before a final hearing before the full court. Treat v. Union Ins. Co., 56 Me. 231.

The "justice" in the second sentence of this section means the justice presiding at the term when the motion is filed. Mitchell v. Emmons, 104 Me. 76, 71 A. 321.

Provision for certification by reporter does not avoid necessity for certificate of justice.—The provision of this section for certification of the testimony by the reporter does not do away with the necessity for a certificate of the presiding justice reporting the case to the law court. It simply relieves him from certifying to the correctness of the transcript of the evidence. Hills v. Paul, 116 Me. 12, 99 A. 719.

Duty of producing report is upon moving party.—The duty of having prepared a report of the evidence in support of a motion for a new trial, of presenting it to the presiding justice for his signature, and of producing it at the law court, is of course imposed upon the party who seeks to have the verdict of the jury set aside. Morin v. Claflin, 100 Me. 271, 61 A. 782.

If death of stenographer prevents filing of report, motion overruled.—When, by reason of the death of an official court stenographer, a party who has filed a motion for a new trial at law is unable to procure a report of the evidence, the law court has no authority to remand the case for a new trial; it must overrule the motion. Morin v. Claflin, 100 Me. 271, 61 A. 782. See § 191, re procedure for obtaining new trial where certified copy of evidence cannot be obtained due to death or disability of official court reporter.

Applied in Smith v. Richards, 16 Me. 200; Bank of Cumberland v. Bugbee, 19 Me. 27; Marshall v. Baker, 19 Me. 402; Kent v. Bonzey, 38 Me. 435; Folsom v. Skofield, 53 Me. 171; Hewey v. Nourse, 54 Me. 256; Darby v. Hayford, 56 Me. 246; Driscoll v. Gatcomb, 112 Me. 289, 92 A. 39; Proven Pictures v. Strand Theatre Operating Co., 136 Me. 515, 5 A. (2d) 235.

Cited in Wallace v. Columbia, 48 Me. 436; Clark v. Stetson, 113 Me. 276, 93 A. 741.

Sec. 60. Verdict set aside by presiding justice.—Any justice of the superior court may set aside a verdict and grant a new trial in a civil case tried before him, when in his opinion the evidence demands it; but such verdict shall not be set aside by a single justice when 2 verdicts have been rendered against the applicant.

A motion to so set aside a verdict must be filed at the same term at which such verdict is rendered and shall be heard by the presiding justice either in term

time or in vacation at his discretion; if such motion is heard in term time the presiding justice may render his decision in vacation or at a later term.

If such decision is unfavorable to the moving party, no judgment shall be entered in the action until the expiration of 10 days thereafter, during which period such moving party may file another motion to have the verdict set aside as against law or evidence as provided in section 59, without prejudice by reason of the denial of the previous motion by the presiding justice, and all proceedings thereon shall be in accordance with the provisions of said section 59. (R. S. c. 100, § 60.)

History of section. — See Hasten v. Baltimore & Ohio R. R., 115 Me. 205, 98 A. 634.

Section derogates from common law power of justice to grant new trial.—The power to grant a new trial is a power usually belonging to courts exercising common law jurisdiction, and the new trial was in early times granted only by the trial judge or judges. It remained so until statutory provisions supervened, altering the practice. The statutes rather take from, than add to the powers of a single judge in this respect. Brown v. Moore, 79 Me. 216, 9 A. 355.

Such power is now governed by this section and § 59.—Except where there is a statute applicable to a special case, the authority of a justice of the superior court on motion to set aside a verdict and grant a new trial in a civil action is now governed by the provisions of this section and § 59. The legislature has restricted the inherent power of the trial judge in this respect. Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

Motion must be filed within 10 days after decision.—This section is so worded that the litigant must file his motion to the appellate court within ten days after the filing of the decision by the presiding justice, and this is so, even though by reason of a provision as to remittitur that order would not become effective as a grant or denial of the motion. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1.

Justice may grant new trial, or new trial unless remittitur filed.—It is the established law that it is within the authority of the justice to enter an order unconditionally granting a motion to set aside a verdict; or, if he deems the verdict faulty only by reason of excessive damages, to make an order granting a new trial unless the plaintiff shall, within a specified time, file a remittitur of all damages in excess of an amount named in said order. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1; DeBlois v. Dunkling, 145 Me. 197, 74 A. (2d) 221.

But he can act only when motion based on cause shown by evidence at trial.—It is clear from the provisions of this section and § 59 that a justice of the superior court can act only when the motion is based on an alleged cause shown by the evidence presented at the trial. In all other cases the motion comes to the law court for determination at first hand. Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

The denial of motion for a new trial by the presiding justice, when the motion is intended for him, is not exceptionable. Bubar v. Sinclair, 146 Me. 155, 79 A. (2d) 165. See Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131; Bodwell-Leighton Co. v. Coffin & Wimple, 144 Me. 367, 69 A. (2d) 567.

To obtain a new trial the movant has the burden of proving the jury verdict is manifestly wrong. Perry v. Butler, 142 Me. 154, 48 A. (2d) 631.

Meaning of "vacation."—The word "vacation" as used in this section should be construed to mean such time as the court is not actually in session. A justice may in vacation render judgment in a matter or cause heard by him in term time next preceding vacation. The statute gives no authority to the presiding justice or the court to render or enter judgment at the term following the vacation. Moreland v. Vomilas, 127 Me. 493, 144 A. 652.

Last paragraph of section abrogates former requirement of electing one tribunal to exclusion of other.—Previous to the enactment of Chap. 66 of the Public Laws of 1939, amendatory of this section, a litigant aggrieved could seek his remedy in either court. He was, however, obliged to make choice between the two tribunals, and a motion to the presiding justice precluded a resort to the appellate court either by motion or exceptions. A motion to either tribunal operated as a waiver of right to apply to the other. This rule, however, was abrogated by Chap. 66 of the Public Laws of 1939, which added the last paragraph of this section. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1.

Moving party may now resort to both tribunals.—It was the clear intent of the 1939 amending statute to give to the aggrieved litigant, in place of a choice of one of the two tribunals, access to both,

the motion to the appellate court to be exercised upon "denial" of his previous motion to the presiding justice. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1.

Filing of second motion within 10 days of decision not waiver of first motion.—The filing of a second motion under § 59 within the ten-day period provided in this section, and before the exercise of the option by the plaintiff as to remittitur contained in an order of the presiding justice conditionally granting new trial under this section, is not a waiver of the first motion under this section. The filing of the second motion before the expiration of the ten-day period is a compliance with the terms of this section, and indicates only an intent to preserve the right to invoke the jurisdiction of the appellate court if the order of the presiding justice, by filing of the remittitur by the plaintiff, becomes effective as a denial of a new trial. Waye v. Decoster, 140 Me. 192, 36 A. (2d) 1.

For a case, prior to the enactment of the last paragraph of this section, holding that a moving party must elect between the two tribunals, see Averill v. Rooney, 59 Me. 580.

For a case concerning setting aside a verdict in a probate case, see McKenney v. Alvord, 73 Me. 221.

Cited in Burr v. Bucksport & Bangor R. R., 64 Me. 130.

Sec. 61. In trespass, jury to find if willful.—In actions of trespass on property, the court and jury or magistrate shall determine whether the trespass was committed willfully; if so found, a record thereof shall be made and a memorandum thereof minuted on the margin of the execution. (R. S. c. 100, § 61.)

See c. 120, § 81, re willful trespass.

Sec. 62. Damages on protests of bills.—Damages on protests of bills of exchange of $100 or more, payable by the acceptor, drawer or indorser of a bill in this state are, if payable at a place 75 miles distant, 1%; if payable in the state of New York or in any state northerly of it and not in this state, 3%; if payable in any Atlantic state or territory southerly of New York and northerly of Florida, 6%; and in any other state or territory, 9%. (R. S. c. 100, § 62.)

Promissory notes, though negotiated, are not within the provisions of this section. Loud v. Merrill, 47 Me. 351.

Applied in Loud v. Merrill, 45 Me. 516.

Sec. 63. Action by public officer not abated by ceasing to act.—No action commenced in his official capacity by a public officer is abated by his ceasing to hold the office; but it may be prosecuted by his successors to the same uses; and the necessary amendments may be made and notices given. (R. S. c. 100, § 64.)

Sec. 64. No action on demands discharged by partial payment.—No action shall be maintained on a demand settled by a creditor or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small. (R. S. c. 100, § 65.)

Section modifies common law as to agreed discharge of debt by part payment.—At common law payment of part of the debt, as and for the whole, did not extinguish it, on the ground that the amount paid was no consideration for the release of the amount unpaid. By this section this rule of law is changed, so that now in this state no action can be maintained for the balance of a debt where an amount, however small, has been paid in full discharge of the whole debt. Mayo v. Stevens, 61 Me. 562.

This section applies to demands undisputed as well as to demands disputed. Knowlton v. Black, 102 Me. 503, 67 A. 563; Bell v. Doyle, 119 Me. 383, 111 A. 513.

This section applies to demands either liquidated or unliquidated. Bell v. Doyle, 119 Me. 383, 111 A. 513.

"Demand" as used in this section is synonymous with debt, amount due. Frankfort v. Waldo Lumber Co., 128 Me. 1, 145 A. 241.

And a tax is not a "demand," as the word is used in this section. Frankfort v. Waldo Lumber Co., 128 Me. 1, 145 A. 241.

Section recognizes settlements made in other states.—The language of this statute is very broad and comprehensive. It makes no distinction between compromises made in another state, which are sought to be enforced or repudiated here, and compromises made in this state; it sustains

both alike when made in good faith, and inhibits all attempts to set them aside. Percival v. Hichborn, 56 Me. 575.

Settlement upon part payment vitiated by fraud.—The settlement or discharge of a demand or claim by the payment of any sum less than the amount due thereon, under this statute, is binding and effectual, unless vitiated by fraud on the part of the debtor. Bisbee v. Ham, 47 Me. 543.

But such settlement must be rescinded before suit on original cause.—After a settlement, before the creditor can maintain a suit on the original cause of action on the ground of fraud on the part of the debtor, he must rescind the contract of settlement, and tender to the debtor whatever sum he had paid in effecting it. Bisbee v. Ham, 47 Me. 543; Percival v. Hichborn, 56 Me. 575.

Discharge of one joint debtor upon payment of his share not inference of intention to settle whole debt.—No intention to settle the whole debt, upon the payment of a part, is apparent, or can properly be inferred from an agreement to discharge in full only one of two joint debtors, upon his payment of one-half of the debt. Drinkwater v. Jordan, 46 Me. 432.

And discharge of one surety upon part payment does not release all.—When sureties bind themselves severally for the payment of the same debt they are liable to contribution so that all shall fare alike. The release of one by deed would release all; but the discharge of one on part payment of the liability would not, although the discharge of the debt might do so, under the provisions of this section. Deering v. Moore, 86 Me. 181, 29 A. 988.

To bring partial payment within section, demand must be settled.—By this section the settlement of a demand upon the receipt of money or other valuable consideration, however small, will bar an action upon it. But the demand must be settled in order to effectuate that result. The discharge of a debtor from liability upon a demand that is to remain outstanding will not so operate. This distinction applies where one of two joint debtors is discharged upon the consideration of part payment, leaving the demand outstanding against the other. Such discharge will not bar an action against both; nor can it be pleaded by the other in an action against him, if the liability is several. Deering v. Moore, 86 Me. 181, 29 A. 988.

This section only applies where payment of part is tendered and accepted in full discharge at the time. Where the payment is not tendered and accepted in full, but only on account, it constitutes no consideration for any agreement for an abridgment of the creditor's prior rights. First Nat. Bank of Guilford v. Ware, 95 Me. 388, 50 A. 24.

But settlement need not be express.—No invariable rule can be laid down as to what constitutes a settlement agreement, and each case must be determined largely on its own peculiar facts. The agreement need not be express, but may be implied from the circumstances and the conduct of the parties. Fuller v. Smith, 107 Me. 161, 77 A. 706; Bell v. Doyle, 119 Me. 383, 111 A. 513.

Accord and satisfaction under this statute is based upon an agreement between the parties, as at common law. Bell v. Doyle, 119 Me. 383, 111 A. 513.

Meaning of accord and satisfaction.—Under this section an accord and satisfaction is an executed agreement, whereby one party gives and the other receives in satisfaction of a demand, liquidated or unliquidated, money or other valuable consideration, however small. Fuller v. Smith, 107 Me. 161, 77 A. 706.

If creditor receives payment on condition of full settlement, claim is settled.—If the debtor adds to his intention a condition that if the creditor accepts he does so in full settlement of the claim, and, fully understanding both the intention and the condition, the creditor does accept, then accord and satisfaction are established as a bar to subsequent suit upon the claim. Horigan v. Chalmers Motor Co., 111 Me. 111, 88 A. 357; Bell v. Doyle, 119 Me. 383, 111 A. 513.

But he must understand condition of payment.—To constitute an accord and satisfaction it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it, he takes it subject to such condition. Fuller v. Smith, 107 Me. 161, 77 A. 706.

In order to render payment of part an extinguishment of the whole debt under this section, both parties must concur in the understanding that the amount paid is paid and received as and for the whole debt. Mayo v. Stevens, 61 Me. 562; Bell v. Doyle, 119 Me. 383, 111 A. 513.

Proof whereof must be clear and convincing.—When the debtor makes tender with condition that if the creditor accepts it, he does so in full settlement of the

claim, then such tender and acceptance constitute accord and satisfaction, but the proof must be clear and convincing that the creditor understood the condition on which the tender was made, or the circumstances under which it was made were such that he was bound to understand it. Bell v. Doyle, 119 Me. 383, 111 A. 513.

But acceptance of condition may be shown by implication from circumstances. —If an offer of money is made to one upon certain terms and conditions, and the party to whom it is offered takes the money, though without words of assent, the acceptance is an assent de facto and he is bound by it. The acceptance of the money involves the acceptance of the condition. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest even can affect this result. The amount having been offered in full settlement, and having been accepted as such, impliedly at least, the creditor cannot treat this sum as a payment pro tanto and recover the balance as due on the original claim. And under this section, payment so made and accepted is in full satisfaction, whether the claim is liquidated or unliquidated. Anderson v. Standard Granite Co., 92 Me. 429, 43 A. 21; Viles v. American Realty Co., 124 Me. 149, 126 A. 818.

As where creditor accepts check as full settlement, otherwise requested to be returned.—Where a check sent by defendant to plaintiff was expressly stated to be in full settlement and final payment of a contract, and its return was requested if not correct, it was held that the acceptance and use of that check by the plaintiff, without question or objection, bound him to the terms upon which it was offered, and made complete an accord and satisfaction of the demand. Viles v. American Realty Co., 124 Me. 149, 126 A. 818.

It must be shown that the debtor tendered the amount in satisfaction of the particular demand, and that it was accepted by the creditor as such. Fuller v. Smith, 107 Me. 161, 77 A. 706; Bell v. Doyle, 119 Me. 383, 111 A. 513; Viles v. American Realty Co., 124 Me. 149, 126 A. 818; Fogg v. Hall, 133 Me. 322, 178 A. 56.

Accord and satisfaction is a question of fact for the jury, unless only one inference can be drawn from the testimony. Bell v. Doyle, 119 Me. 383, 111 A. 513.

Whether payment accepted as discharge of particular claim held jury question.—In an action by an employee for breach of a contract of employment, it was held, under the evidence, that it was a jury question whether the employer tendered a check on condition that its acceptance should satisfy any claim for damages for discharge, as well as payment of a balance due the employee, and whether the employee knew or should have known that the check was so tendered. Fuller v. Smith, 107 Me. 161, 77 A. 706.

Payment of undisputed claim may be consideration for discharge of different claim.—The tender and acceptance of payment of the whole of an undisputed claim may constitute consideration for the settlement of another and distinct claim, if the debtor is unwilling to pay it except on the condition that the creditor will accept it in full satisfaction of his independent claim, and tenders it on that condition, and the creditor accepts it on that condition. Fuller v. Smith, 107 Me. 161, 77 A. 706.

But such condition must be made explicitly and unmistakably.—When a person tenders his creditor the exact amount of his undisputed debt, but intends that if it is accepted it shall also be in satisfaction of another demand, fairness and justice require that he should make his intention known to the creditor in some unmistakable manner. If the debtor undertakes to state the condition on which he makes the tender his statement should be explicit, and all uncertainty and doubt should be resolved against him. Fuller v. Smith, 107 Me. 161, 77 A. 706.

And any doubt resolved against debtor.—If the debtor undertakes to state the condition on which he makes the tender, his statement should be explicit, and all uncertainty and doubt should be resolved against him. Fuller v. Smith, 107 Me. 161, 77 A. 706.

Note given with indorsement of third party in settlement will avoid action for balance.—If a debtor gives, and the creditor receives, in full satisfaction of the debt, a note indorsed by a third person for a less sum than the amount of the debt, it is a good accord and satisfaction to bar a subsequent suit by the creditor to recover the balance of the debt, even if the case should not come within the provisions of this section. Varney v. Conery, 77 Me. 527, 1 A. 683.

But a payment not by way of compromise or settlement of a claim is not a bar to a recovery of any balance actually due the creditor. Fogg v. Hall, 133 Me. 322, 178 A. 56.

And mere receipt of check purportedly for balance of account, not accord and sat-

isfaction.—The receipt of a check purporting to be for the balance of an account, and the use of it, in the absence of an agreement to accept it as payment in full, is not an accord and satisfaction. Bell v. Doyle, 119 Me. 383, 111 A. 513.

Nor is check given, without concurring intention of settlement.—Check on which was written, to the acceptance of the payee: "In full to June 8 inc," held not to show settlement, to the concurrence of both parties, of the whole demand by a receipt of any sum less than the amount due thereon. Fogg v. Hall, 133 Me. 322, 178 A. 56.

Part payment in installments under settlement agreement not within section.—When a debtor has proposed to his creditors that they accept in full discharge of their admitted claims a percentage in two installments, the mere acceptance by a creditor of the first installment with notice that it is paid under that proposition does not bind the creditor to discharge his claim upon payment of the last installment. This section applies only to cases where the final payment is received in full present discharge. First Nat. Bank of Guilford v. Ware, 95 Me. 388, 50 A. 24.

Nor is composition agreement without consideration.—In the trial of an action of assumpsit on an account annexed, wherein the defendant offered in evidence an unsealed, written agreement, signed by the plaintiffs and five other creditors of the defendant, therein stipulating to "take fifty per cent of the amount due us in full, for account against" him; and oral evidence that the defendant, prior to the commencement of this suit, presented to the plaintiffs the draft of a third person, of an amount equal to fifty per cent of the account in suit, and claimed a receipt in full; but that the plaintiffs refused to accept the draft and give the receipt; it was held that the evidence disclosed no consideration for or mutuality in the written agreement, and that the defense was not within this section. Webb v. Stuart, 59 Me. 356.

Nor partial payment with promise to pay balance in debtor's "own time".—Part payment of a debt made with an agreement that the debtor shall have his "own time to pay the balance," does not come within the operation of this section, and an action is maintainable to recover the amount remaining due. Mayo v. Stevens, 61 Me. 562.

When a debt is discharged, by consent of the creditor, for less than its amount, a subsequent promise to pay it will not be binding. Phelps v. Dennett, 57 Me. 491.

Nor will action lie on note given in settlement of account after discharge of judgment upon such account.—Where a negotiable note has been given in settlement of an account, and a judgment has been afterwards obtained upon the account and discharged by one duly authorized for any valuable consideration, no action can be maintained by the original creditor either upon the note or the judgment. Fogg v. Sanborn, 48 Me. 432.

Discharge of assigned debt by attorney is operative unless authority revoked prior to discharge.—By reason of this section, no action can be maintained upon a demand which has been entrusted to an attorney for collection and by him discharged for any consideration, however small. The assignment of such demand does not affect the discharge, unless the attorney's authority is revoked by the assignee before the discharge. Fogg v. Sanborn, 48 Me. 432.

But attorney's ordinary authority not sufficient to compromise claims.—An attorney who is clothed with no other authority than that arising from his employment in that capacity, has no power to compromise and settle or release and discharge his client's claim. Pomeroy v. Prescott, 106 Me. 401, 76 A. 898.

Waiving by attorney of items of client's writ held not within section.—In an action where it was alleged in defense that the plaintiff's attorney had waived and released certain items in the plaintiff's writ, this section was not available in defense, because there was no settlement of the demand "in full discharge thereof," and because it did not appear that there was any valuable consideration whatever for "waiving and releasing" the items. Pomeroy v. Prescott, 106 Me. 401, 76 A. 898.

Evidence held sufficient to show that the settlement of a demand was made by the plaintiff's "attorney entrusted to collect it." Cloran v. Houlehan, 88 Me. 221, 33 A. 986.

Evidence insufficient to show release.—See Furber v. Fogler, 97 Me. 585, 55 A. 514.

Applied in Weymouth v. Babcock, 42 Me. 42; Staples v. Wellington, 62 Me. 9; Potter v. Monmouth Mut. Fire Ins. Co., 63 Me. 440; Valley v. Boston & Maine R. R., 103 Me. 106, 68 A. 635.

Defense of Suits by Subsequent Attaching Creditors.

Sections 65-70 applied in Johnson v. Whidden, 32 Me. 230.

Sec. 65. Petition to defend prior suits by subsequent attaching creditor.—When property has been attached, a plaintiff who has caused it to be attached in a subsequent suit may, by himself or attorney, petition the court for leave to defend the prior suit and set forth therein the facts as he believes them to be, under oath; and the court may grant or refuse such leave. (R. S. c. 100, § 66.)

History of section.—See Smart v. Smart, 64 Me. 317.

Both suits must be pending, when the plaintiff in the subsequent suit claims to intervene. Smart v. Smart, 64 Me. 317.

By the terms of this section it is discretionary with the court to grant or refuse leave to the subsequent attaching creditor to defend the prior suit. And it is only upon petition setting forth the facts as the petitioner believes them to be, that such leave can be granted. Sawyer v. Sawyer, 74 Me. 579.

This section places no limitation or restriction upon the defending creditor. It does not say in terms or by implication that he may defend upon some grounds, but not upon others. The language used is general, that he may, upon leave obtained, "defend the prior suit." Sawyer v. Sawyer, 74 Me. 579.

And he may interpose statute of limitations in defense of prior suit.—Where a subsequent attaching creditor has obtained leave of court to defend a suit of a prior attaching creditor he may set up the statute of limitations as a ground of defense. Sawyer v. Sawyer, 74 Me. 579.

This section does not apply to a subsequently attaching creditor, who has obtained a judgment, which has been satisfied. Smart v. Smart, 64 Me. 317.

Cited in Gamage v. Harris, 79 Me. 531, 11 A. 422.

Sec. 66. If leave granted, bond given.—If leave is granted, the petitioner shall give bond or enter into recognizance with sufficient surety in such sum as the court orders, to pay the plaintiff in the prior suit all damages and costs occasioned by such defense; and an entry of record shall be made that he is admitted to defend such suit. (R. S. c. 100, § 67.)

Sec. 67. Judgment, how entered when defense fails.—When the petitioner enters into recognizance and fails in his defense, execution on his recognizance shall be issued against him for the damages found by the court, and costs; and judgment shall be rendered between the original parties as if no such defense had been made. (R. S. c. 100, § 68.)

Sec. 68. How entered when defense prevails. — When the petitioner prevails, judgment shall be rendered against the plaintiff and in favor of the petitioner, and execution issued thereon for his costs; and costs may or may not be awarded to the original defendant. (R. S. c. 100, § 69.)

Subsequent creditor not precluded from defending prior suit by defendant's tender of subsequent claim.—Where a subsequent attaching creditor had been permitted to defend the suit of a prior attaching creditor, under the provisions of §§ 65-68, it was held that he could not be precluded from pursuing the defense by the defendant bringing into court, and depositing with the clerk for his acceptance, the amount of his, the said subsequent attaching creditor's, claim. Holbrook v. Weatherbee, 12 Me. 502.

Sec. 69. When judgment in prior suit rendered at first term, creditor may have review.—When judgment in such prior suit is rendered at the first term of the court, the plaintiff in such subsequent suit, within 1 year thereafter, first giving bond to each party as provided in section 66, may petition as provided in section 65 for leave to sue out a writ of review of such action; and such leave may or may not be granted. If it is granted and on final judgment the sum originally recovered is reduced, judgment shall be entered and execution issued for the difference, not exceeding the amount due from the original defendant to the petitioner, with costs for his sole use, which operates as a payment of his debt to the amount of damages recovered. (R. S. c. 100, § 70.)

Sec. 70. Prior attachment to delay or defraud creditors void. — When it appears by the verdict or otherwise that such prior attachment was made with intent to delay or defraud creditors or that there was collusion between the plaintiff and defendant for that purpose, such attachment is void. (R. S. c. 100, § 71.)

Applied in Smart v. Smart, 64 Me. 317.

Suits by and against Bankrupts and Insolvents.

Sec. 71. Actions by bankrupts or insolvents.—A person who has been declared a bankrupt or an insolvent may maintain an action respecting his former property in his own name, unless objection is made by plea in abatement, if before final judgment the assent of his trustee or assignee is filed in the office of the clerk of the court in which the action is pending. (R. S. c. 100, § 72.)

Sec. 72. Attachments made 4 months before bankruptcy or insolvency.—Actions in which an actual attachment of property was made 4 months prior to the filing of a petition in bankruptcy or insolvency by any defendant therein shall be disposed of under the ordinary rules of proceedings in court. (R. S. c. 100, § 73.)

Applied in Leighton v. Kelsey, 57 Me. 55.

Cited in West v. Furbish, 67 Me. 17.

Sec. 73. Other actions against bankrupts or insolvents. — All other actions for recovery of a debt provable in bankruptcy or insolvency, when it appears that any defendant therein has filed his petition in bankruptcy or insolvency or has been adjudged a bankrupt or an insolvent, on petition of his creditors before or after the commencement of the suit, shall be continued until the bankrupt or insolvent proceedings are closed unless the plaintiff strikes such defendant's name from the suit, which he may do without costs; but when such defendant does not use diligence in the prosecution of his bankrupt or insolvent proceedings, after 1 term's notice to him in writing from the plaintiff, the court may refuse further delay. (R. S. c. 100, § 74.)

Purpose of section.—This is a strong and clear statutory declaration, designed to prevent the annoyance of suits in one tribunal while a manifest defense to them is being obtained in another tribunal, and to establish uniformity of practice in such matters in court. Simmons v. Lander, 85 Me. 197, 27 A. 100.

The object of this section would seem to be two-fold. One clause is intended to protect the bankrupt, that the action shall, on suggestion of bankruptcy by the bankrupt, be continued a reasonable time, to the end that the question of his discharge may be determined, and if obtained, that he may plead it; and the other to aid the plaintiff in obtaining a speedy judgment against his solvent debtors, when without this statute his remedy might be clogged by reason of the bankruptcy of one of them. West v. Furbish, 67 Me. 17.

The plaintiff need not wait for the termination of bankrupt proceedings, to the end that if the bankrupt obtain his certificate of discharge he may plead it; but upon suggestion of the commencement of such proceedings, the plaintiff may, if he will, thereupon strike such bankrupt defendant's name from the suit "without costs," and proceed at once against the remaining defendants. West v. Furbish, 67 Me. 17.

This section permits a creditor holding a claim against a bankrupt and some other or others, who has an action pending against all of them, to discontinue against the bankrupt in order to obtain a speedy judgment against his solvent debtors. First Nat. Bank of Pittsfield v. Morong, 146 Me. 430, 82 A. (2d) 98.

Section applies where there is but one defendant.—This section, providing that the plaintiff may, under certain circumstances, strike a bankrupt defendant's name from the suit without costs, applies to cases in which there is but one defendant, as well as to those where there are more than one. Severy v. Bartlett, 57 Me. 416.

And makes no distinction between joint and several promisors.—The objection that this section permits the striking out of a bankrupt defendant's name only

when he is a several promissor is not tenable. The section makes no distinction between joint and several promisors, but applies in terms to "any defendant." West v. Furbish, 67 Me. 17.

But it must be invoked by someone in court.—This section does not execute itself. There must be someone in court to invoke its application. "When it appears that the defendant has filed his petition" are the significant words of the section. Simmons v. Lander, 85 Me. 197, 27 A. 100.

The suggestion of bankruptcy is one to be made by the bankrupt. The continuance is to be granted upon the application of the bankrupt. The plea of a discharge in bankruptcy is a personal one, which the defendant may make or not at his own election. If the defendant declines relying upon the privileges granted by this section, the cause proceeds to trial. If judgment is rendered against him it is a valid judgment, and is unaffected by his discharge. Palmer v. Merrill, 57 Me. 26.

Plaintiff cannot suggest bankruptcy of defendant.—The plaintiff has no more right to suggest the bankruptcy of the defendant than he has to plead his certificate of discharge if he obtains one. Palmer v. Merrill, 57 Me. 26.

After proceeding to trial and becoming nonsuited, the plaintiff cannot, of his own motion, suggest the bankruptcy of the defendant, and avoid the payment of costs, by striking the bankrupt defendant's name from the suit. Palmer v. Merrill, 57 Me. 26.

If a bankrupt defendant fails to use due diligence in the prosecution of his bankrupt proceedings after one term's notice in writing from the plaintiff, then, in the absence of any stay of proceedings from the bankrupt court, the plaintiff may by leave of court proceed without further delay against all the defendants, including the bankrupt. West v. Furbish, 67 Me. 17.

Where bankrupt permits action to be defaulted.—Where a defendant, while in insolvency, might have had an action against him continued until his insolvency proceedings were closed, but permitted the action to be defaulted without appearance on his part, and at a later term, the action having been continued for judgment, moved to have the default removed in order to enable him to plead his discharge then obtained, it is within the discretion of the presiding judge to grant the motion or not, and exceptions do not lie to his decision of the question. Simmons v. Lander, 85 Me. 197, 27 A. 100.

Applied in Damon v. United Photo Materials Co., 109 Me. 563, 84 A. 464; Bates Sweet Cigar & Confectionery Co. v. Howard Cigar Co., 137 Me. 51, 15 A. (2d) 190.

Sec. 74. Discharge in bankruptcy, how pleaded.—A discharge in bankruptcy may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt and a certificate of such discharge under seal of the court granting the same shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge. (R. S. c. 100, § 75.)

Setoff.

Sec. 75. Setoff filed during first term; entered on docket.—Demands between plaintiffs and defendants may be set off against each other as follows:

The defendant, during the term to which the writ is returnable, must file a brief statement of his demand, in substance as certain as in a declaration, which by leave of court may be amended. The clerk shall enter on it the date of filing and on the docket under the action the date and notice of the filing. (R. S. c. 100, § 76.)

Cross references.—See c. 112, § 85, and note, re cross actions and setoffs against nonresidents; c. 114, § 64, and note, re setoff on trustee process.

Right of setoff at law is wholly regulated by statute.—The right in this state to set off one demand against another is wholly regulated and determined by statute, and the rights of parties must depend upon the provisions of law by which it is regulated. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227. See Call v. Chapman, 25 Me. 128; Houghton v. Houghton, 37 Me. 72; Robinson v. Safford, 57 Me. 163.

But courts of common law have an equitable jurisdiction in cases of setoff independent of statute, practically coextensive with that of courts of equity. By the exercise of this equitable jurisdiction the courts are enabled to do justice between the parties in cases not strictly

within the provision of the statute. Collins v. Campbell, 97 Me. 23, 53 A. 837. See also Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726, treated in note to § 76.

Payments and setoffs distinguished.—See Dodge v. Swazey, 35 Me. 535.

Pleading in setoff must be in the manner prescribed by statute, "in substance as certain as in a declaration." Ruggles Lightning Rod Co. v. Ayer, 124 Me. 17, 125 A. 144.

Or defendant cannot avail himself of his demand.—It is well settled that a defendant cannot avail himself of any demand he may have against the plaintiff, unless it has been filed in setoff pursuant to the provisions of the statute. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

And where there is not a strict compliance with the provisions of the statute, the court is not authorized by it to allow a setoff to be made. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

Claim not mentioned in statement of demand not allowed in setoff.—In a suit by the indorsee of a note against the maker, a note given by the indorser to the defendant cannot be allowed in setoff, if not mentioned in the defendant's statement of his setoff demands. Hopkins v. Megquire, 35 Me. 78.

Note held sufficiently explicit as demand for monies paid.—A promissory note, given to a third person by the defendant as surety for the plaintiff, and taken up by the defendant, with the creditor's receipt of payment from the defendant thereon, being duly filed in the clerk's office by way of setoff, is of itself sufficiently explicit as a demand for monies paid, within the meaning of this section. Fox v. Cutts, 6 Me. 240.

Note proved under account for money had and received.—A note for money given by the plaintiff to the defendant may be proved under an account filed in setoff for money had and received. For that purpose no amendment of the setoff claim is necessary, though it is allowable, if moved for. Gragg v. Frye, 32 Me. 283.

Setoff is included in submission of action to referee.—An account filed in setoff by a defendant, pursuant to the provisions of this section, becomes a part of the action and would be included in a submission of such action to a referee. Eaton v. Cole, 10 Me. 137.

But rule of reference must provide for adjustment of claims in setoff.—If a cause be referred before any plea in setoff has been filed, and the rule of reference does not provide for the adjustment of claims in setoff, the referee has no authority to consider any such claim. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

And defendant must file statement of demand as required by this section.—The fact that a case is by agreement of parties referred to referees, instead of being tried before a jury or heard by the court, does not relieve the defendant, if he wishes to claim setoff, from the necessity of filing, during the term to which the writ was returnable, a brief statement of his demand in setoff as required by this section. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

During term to which writ is returnable.—A hearing before referees is not a continuation of a term of court at which the reference is made. Failure to file a brief statement of his demands in setoff during the term to which the writ is returnable, as required by this section, precludes a defendant, where the rule of reference does not provide for adjustment of claims in setoff, from presenting such demands at the hearing before the referees, and the referees have no authority to receive such brief statement or to consider setoffs claimed under it. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

Commencement and end of term.—The time of commencement of a term of court is fixed by statute, and the end of a term is fixed by the final adjournment of the court for that term. Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

An account in setoff cannot be allowed unless the clerk has noted thereon the day upon which it was received and filed. Pond v. Niles, 31 Me. 131.

The defendant has a right at law to withdraw an account which he has filed in setoff. Upon this right he may insist, although the putting of the setoff before the jury might prove the existence of mutual and open accounts between the parties, and although the withdrawal of it would expose the plaintiff's claim to the statute of limitations. Theobald v. Colby, 35 Me. 179.

A defendant living out of the state, upon whom service is made, after the entry of the action in court may seasonably file his claim in setoff on the first day of the term next succeeding the service. Otis v. Adams, 41 Me. 258.

Setoff applied ratably to each of several indebtments.—Where, in a suit upon several distinct indebtments, a setoff claim

is allowed by the jury, the law presumes the amount to have been allowed ratably upon each of the indebtments. A surety upon one of such indebtments has no right to claim that such setoff be applied by priority upon that particular indebtment. Franklin Bank v. Cooper, 36 Me. 221.

Applied in Wilson v. Russ, 20 Me. 421; Bartlett v. Pearson, 29 Me. 9; Boyd v. Bartlett, 54 Me. 496; Fletcher v. Harmon, 78 Me. 465, 7 A. 271.

Sec. 76. What demands set off.—A demand originally payable to the defendant in his own right, founded on a judgment or contract express or implied, for the price of real or personal estate sold, for money paid or had and received, for services done, for a liquidated sum or for one ascertainable by calculation may be set off. A city or town in an action by a delinquent taxpayer may set off any unpaid taxes against any properly authorized payment to which the taxpayer is entitled, provided that prior to trial the amount shall have been paid to the tax collector and a receipt in writing shall have been given to the person taxed, as prescribed in section 86 of chapter 92. (R. S. c. 100, § 77.)

I. In General.

A. Nature of Demand.

B. Demand Must Be Due and Payable.

C. Requirements as to Mutuality.

II. Setoff of Judgments.

III. Setoff of Bank Deposits.

I. IN GENERAL.

A. Nature of Demand.

The demands to be set off must be upon judgments or contracts, and by this section the character of the demands which may be set off is clearly defined and determined. Hall v. Glidden, 39 Me. 445.

Claim must be for liquidated sum or one ascertainable by calculation.—When founded on a contract, for the price of personal estate sold, the claim filed in setoff must be "for a liquidated sum, or for one ascertainable by calculation." Ruggles Lightning Rod Co. v. Ayer, 124 Me. 17, 125 A. 144.

The true construction of the words "liquidated sum or one ascertainable by calculation," contained in this section, is to limit them to such judgments or contracts that the amount of the defendant's demand can only be ascertained by the judgment or contract itself, or by mathematical calculations on the same. Hall v. Glidden, 39 Me. 445.

Unliquidated claim for use and occupation of real estate cannot be allowed.—An unliquidated claim for use and occupation of real estate cannot, upon any construction, be considered as embraced in the "price of real or personal estate sold, or for money paid, money had and received, or for services done." Neither can it be regarded as a demand "for a sum liquidated, or one that may be ascertained by calculation." Hall v. Glidden, 39 Me. 445.

Thus in setoff a charge for rent of real estate, where there is no contract as to the price, cannot be sustained. Hall v. Glidden, 39 Me. 445.

But charge for rent based upon contract may be set off.—There is no reason why a charge for rent, based upon a contract, for a sum liquidated or one that may be ascertained by calculation, should not be presented in setoff. Such a claim is within the statutory limits. Lamson v. Dirigo Fish Co., 128 Me. 364, 147 A. 655.

Account for goods tortiously taken and retained is not allowable.—For goods belonging to the defendant, but tortiously taken and detained by the plaintiff, an account filed by the defendant in setoff to the plaintiff's demand cannot be sustained. Hopkins v. Megquire, 35 Me. 78.

The value of securities in pledge, tortiously dealt with by the pledgee, unless reduced to money or its equivalent, cannot be recovered by setoff. Fletcher v. Harmon, 78 Me. 465, 7 A. 271.

Balance of proceeds of securities legally sold by pledgee may be set off.—When securities pledged to secure the payment of a debt are legally sold by the pledgee, he sells for his own account so far as necessary to pay his debt, and the proceeds when received to that extent become his own, and operate as payment; but the balance is money "had and received" by him for the pledgor's use, and may be

recovered as such, by action, or by setoff in an action by the pledgee against the pledgor. Fletcher v. Harmon, 78 Me. 465, 7 A. 271.

Setoff of proceeds of securities illegally sold.—When securities are illegally sold by the pledgee, and he has actually received money therefor, the pledgor may waive the tort, and require the money so received to be applied in payment of the debt secured, and may recover any balance of the same by action for money had and received, or by setoff; but he can only avail himself of these remedies when money, or its equivalent, has been actually received from the tortious sale, and he must be content with the money received as his measure of damages. Fletcher v. Harmon, 78 Me. 465, 7 A. 271.

An account in setoff must be of such a character that the record will protect the party against an action relating to the same matter. Stevens v. Blen, 39 Me. 420.

Thus, where the defendant took back a horse he had sold to plaintiff, on his saying that he would do what was right about it or would leave it to a third person, and plaintiff had in fact used and damaged the horse while thus owning it, in an action between them such claim for use and damage is not a matter in setoff. Stevens v. Blen, 39 Me. 420.

Claim barred by laches.—If, on account of his own laches in not rescinding a sale, the vendee cannot maintain a count for money paid or had and received for the article delivered, he cannot set off the claim against the vendor's suit growing out of a distinct transaction. Cutler v. Gilbreth, 53 Me. 176.

Account barred by statute of limitations.—In a suit upon a witnessed note, where an account barred by the statute of limitations was filed in setoff, it was held that as a setoff the law would not sustain it, nor appropriate the account to the payment of the note. Nason v. McCulloch, 31 Me. 158.

Setoff not allowed in action for pauper supplies.—In an action by one town against another for supplies furnished to a pauper, the defendant town cannot file in setoff a demand against the plaintiff town for the support of paupers belonging to the latter. Augusta v. Chelsea, 47 Me. 367.

Applied in Medomak Bank v. Curtis, 24 Me. 36.

B. Demand Must Be Due and Payable.

A claim in setoff, to be available, must be due and payable at the time of the commencement of the plaintiff's action. Houghton v. Houghton, 37 Me. 72; Robinson v. Safford, 57 Me. 163.

Mere liability as surety not allowed.—A mere liability as surety, existing at the time, but not discharged till after the plaintiff's suit is brought, cannot be allowed in setoff. Houghton v. Houghton, 37 Me. 72; Robinson v. Safford, 57 Me. 163.

Unless it ripened into absolute claim before commencement of suit.—Where the defendant's liability, though originally contingent, had ripened into an absolute claim against the plaintiff before the commencement of the suit, by reason of the defendant's paying drafts drawn by him for the accommodation of the plaintiff, the statute of setoff allows such claims to be filed. Robinson v. Safford, 57 Me. 163.

A sum paid by the defendant as indorser of the plaintiff's note several months after the action was commenced is not allowable in setoff. The liability was a contingent one, and no actual indebtedness has accrued to the defendant prior to the commencement of the suit. Robinson v. Safford, 57 Me. 163.

Claim for value of lost security cannot be set off in action on debt secured.—The plaintiffs lent the defendant money and took his note therefor with a United States bond as collateral security. After the note was payable and before it was paid, the bond was stolen from the bank. The defendant could not legally file his claim for the value of the bond in an action against him upon the note, since there could be no liability on the part of the bank to return the bond until the note had been paid. Winthrop Savings Bank v. Jackson, 67 Me. 570.

C. Requirements as to Mutuality.

A cardinal rule in the interpretation of statutes of setoff requires that there be mutuality of demand both as to the quality of the right and identity of the parties. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Mutuality is implied in the word setoff, not the nominal mutuality indicated by the record, but the real mutuality shown by the evidence. Barton v. McKay, 135 Me. 197, 193 A. 733.

Parties must be identical.—The provisions of the law in respect to accounts in offset cannot be carried out, unless the

parties having cross demands are identical. Banks v. Pike, 15 Me. 268; Adams v. Ware, 33 Me. 228.

Demand must be against real plaintiff.—In order that a demand may be set off it must be a demand against the plaintiff, or if the plaintiff be merely nominal or representative, then it must be against the real plaintiff. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Demand against plaintiff individually cannot be set off if he sues as trustee.—A demand against the plaintiff individually, though "originally payable to the defendant in his own right," cannot be set off if the plaintiff sues as administrator or trustee. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

But defendant may interpose setoff against plaintiff in interest. — Setoff, whether a setoff of demands under the statute or a setoff of judgments at common law, is a right which the defendant may interpose against the plaintiff in interest. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Thus he may set off claims against cestuis que trustent.—The defendant in an action by a trustee in his capacity as such has the same rights as regards setoff that he would have against the cestuis que trustent. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Setoff of claim against town treasurer not allowed in suit by town.—In a suit by a town against an attorney who had collected monies for the treasurer of a town in that capacity, to recover the monies so collected, the attorney could not set off any demand of his own against the treasurer in his private capacity. Newcastle v. Bellard, 3 Me. 369.

An assignment will not defeat the right of setoff if both causes of action existed at the time the assignment was made. An assignee can have no rights which the assignor did not have, and if the right of setoff had attached at the time of the assignment, as it always does when both causes of action have then matured, the assignee must take the demand cum onere, with the right of setoff still clinging to it. Peirce v. Bent, 69 Me. 381. See also §§ 78, 79 and notes, re effect of assignment.

The fact that there has been an assignment by the plaintiff for the benefit of creditors does not modify or change the rights of the parties under the statute authorizing a setoff of mutual claims. The plaintiff gains no advantage, in this respect, nor does the defendant lose any of his rights on this account. Robinson v. Safford, 57 Me. 163.

Setoff in action on promissory note indorsed when overdue.—In an action on a promissory note, brought by the indorsee, who had taken it when overdue, against the maker, the defendant is entitled to the benefit of all setoffs which existed against the payee at the time of the indorsement. Barney v. Norton, 11 Me. 350; Robinson v. Perry, 73 Me. 168.

As to setoff in a suit against the maker by the holder of a dishonored note indorsed overdue, of the maker's counterclaims against the indorser, see Wood v. Warren, 19 Me. 23.

Where the indorsee who sues upon a promissory note has only a lien upon a part of the amount, as collateral security for money due from the promisee, a debt due from the promisee to the maker of the note may be set off against the residue. Moody v. Towle, 5 Me. 415.

The doctrine of the necessity of a mutuality of demands in setoff is not binding in equity.—Although as a usual rule equity will not allow a setoff of debts accruing in dissimilar capacities, it is well settled that a court of equity will take cognizance of cross claims between litigants, though wanting in mutuality and set off one against the other whenever it becomes necessary to effect a clear equity or prevent irremediable injustice. Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726. See also Collins v. Campbell, 97 Me. 23, 53 A. 837, treated in note to § 77.

The insolvency of the party against whom the setoff is claimed is well recognized as a sufficient ground for equitable interference. Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726.

II. SETOFF OF JUDGMENTS.

Judgments in cross actions may be set off, the one against the other, when the parties in interest are the same, on motion addressed to the court in which one or both of the actions are pending. If the amounts are equal, both will be satisfied. If the amounts are unequal, the smaller will be satisfied in full, and the larger to the extent of the smaller, and an execution will issue for the balance. Such a setoff will not be allowed to defeat an attorney's lien for his costs; but his lien extends only to the taxable costs. Peirce v. Bent, 69 Me. 381.

Nor will it make any difference that one of the judgments is against a principal and his sureties. A judgment in favor of the principal alone may be applied in satisfaction of one against him and his sureties. Peirce v. Bent, 69 Me. 381.

The right to setoff in this class of cases is not dependent upon statutory law. It

exists at common law. Peirce v. Bent, 69 Me. 381.

Judgments recovered in different names may be set off when the beneficial interest in them is mutual. Burnham v. Tucker, 18 Me. 179.

Judgment against the maker of a promissory note indorsed when overdue may be set off against a judgment in favor of an indorsee. Burnham v. Tucker, 18 Me. 179.

A judgment for damages for breach of a covenant of warranty in the conveyance of property will be allowed in reduction of the mortgage debt for such conveyance. Where such judgment is not recovered till after judgment in a suit for foreclosure, but before foreclosure is complete, it will still be allowed in an equity process for that purpose. Harrington v. Bean, 94 Me. 208, 47 A. 147.

III. SETOFF OF BANK DEPOSITS.

A depositor who is indebted to the bank as a general rule is entitled to set off the amount to his credit against his indebtedness even though the bank is insolvent. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

But savings bank depositors who are debtors to the bank have no right of setoff. The reason is that savings bank depositors are not creditors of the bank, except in a limited sense. They occupy a position sui generis, but resembling that of stockholders. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

In case of segregation of a depositor's notes to secure a savings account, the deposit cannot be set off against such segregated notes. The bank holds such segregated notes in trust to secure the savings account. Its liability to depositors is not as such trustee. Hence the right of setoff does not apply. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Notwithstanding depositor's intention to apply deposit to payment of notes.—A depositor's intention to apply a certain savings bank deposit marked "Special" to the payment of his segregated note does not entitle such depositor to the right of setoff, even though such intention is made known to the treasurer, provided the deposit remains under the exclusive control of the depositor and subject to withdrawal by him. Lawrence v. Lincoln County Trust Co., 123 Me. 273, 122 A. 765.

Bank stockholder's statutory liability may be set off against distributive share in assets.—When a person entitled to share in the distribution of a trust fund is also indebted to the fund, and is insolvent, his indebtedness in equity may be set off against his distributive share. Under this rule, a stockholder's statutory liability may be set off against his distributive share in the assets of a bank. Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726.

But the right of setoff extends to the distributable share of the assets of the bank to which a stockholder is entitled as a depositor, and not to his entire deposit. Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726.

Although mutuality is lacking.—The relation of a depositor to a trust or banking company is ordinarily that of a creditor. A bank stockholder is indebted, not to the bank, but to its creditors. Viewed from a legal aspect, the mutuality of demand as to the quality of the right and the identity of the parties, essential to a right of setoff at law, is lacking. Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726.

Sec. 77. Demand due from all plaintiffs to all defendants.—The demand must be due from all the plaintiffs to all the defendants jointly. When there is a dormant partner, claims due from the ostensible one may be set off as if there were no dormant partner. (R. S. c. 100, § 78.)

A debt due to the defendant from the plaintiff jointly with others, cannot be set off in a suit at law. Adams v. Ware, 33 Me. 228. See Fox v. Cutts, 6 Me. 240.

And in an action against two defendants, they cannot set off a demand against plaintiff in favor of one of them. Banks v. Pike, 15 Me. 268.

But this section does not apply in action against maker and indorser of note.—The rule embodied in this section, that at law in actions against several defendants neither is entitled to set off his separate debt against the plaintiff, has no application in an action against the maker and indorser of a promissory note, since the obligation is not joint but several, and the indorser is not a comaker or joint promisor under the Uniform Negotiable Instruments Act. Barton v. McKay, 135 Me. 197, 193 A. 733.

Although cases against them are tried together.—The severalty of the rights and liabilities of the defendants as maker and indorser of a promissory note in suit is not affected by the trial of the cases together. The maker of the note is entitled to a setoff of the debt or demand due him severally. Barton v. McKay, 135 Me. 197, 193 A. 733.

Setoff of demands against partnership or

individual partner.—In an action by a firm for a partnership claim, a demand against one of the partners individually is not a legal or proper offset, and conversely in an action by one of a firm for his individual claim a demand against the firm cannot be set off. Jones v. Vinal Haven Steamboat Co., 90 Me. 120, 37 A. 879.

Right of administrator to withhold distributive shares of distributees jointly indebted to estate.—See Webb v. Fuller, 85 Me. 443, 27 A. 346.

Setoff allowed in exercise of court's equitable jurisdiction. — Statutes regulating the right of setoff usually limit its application to mutual demands, and if there are several plaintiffs the demands must be from all jointly, if several defendants to all jointly. But courts of common law have an equitable jurisdiction in cases of setoff independent of statute, practically coextensive with that of courts of equity, and opposite demands arising upon judgments may be, upon motion, set off against each other whenever such setoff is equitable. Collins v. Campbell, 97 Me. 23, 53 A. 837. See also Cooper v. Fidelity Trust Co., 132 Me. 260, 170 A. 726, treated in note to § 76.

The court in its discretion may offset judgments where the creditor in the one is one of several joint debtors in the other. Fox v. Cutts, 6 Me. 240.

Sec. 78. Demands assigned set off by agreement.—When a plaintiff had received notice that a demand against him had been assigned to the defendant and had, before his suit was commenced, agreed to pay it to him or to receive it as payment towards his demand, it may be set off. (R. S. c. 100, § 79.)

Note indorsed to defendant.—A defendant cannot claim to set off against the plaintiff's demand a note indorsed to the defendant, unless the plaintiff had agreed with the defendant to pay him such note or to receive it upon his demand. Smith v. Ellis, 29 Me. 422. See Call v. Chapman, 25 Me. 128.

A trustee who owes the principal defendant cannot deduct from the funds in his hands an account which another person has assigned to him against the principal defendant, unless after such assignment the principal defendant has agreed to pay the account to him. Soule v. Kennebec Maine Ice Co., 85 Me. 166, 27 A. 92.

Applied in American Bank v. Wall, 56 Me. 167.

Sec. 79. Demands acquired after notice.—When a defendant had notice of the assignment of a demand, he cannot have any demand set off that accrued or was acquired after such notice. (R. S. c. 100, § 80.)

Knowledge of assignment sufficient to prevent defendant's introducing claims in setoff.—See Lewis v. Hodgdon, 17 Me. 267.

Waiver of right to set off demand acquired prior to assignment.—See Merrill v. Merrill, 3 Me. 463.

Cited in Bartlett v. Pearson, 29 Me. 9.

Sec. 80. Suits by one for another.—When an action is brought by one person for the use of another, a demand against the latter may be set off. (R. S. c. 100, § 81.)

Sec. 81. Equitable dues set off.—When the demand to be set off is a bond or contract with a penalty, only the sum equitably due can be set off. (R. S. c. 100, § 82.)

Sec. 82. Demands due from deceased person, how set off.—Demands against a person belonging to a defendant at the time of the death of such person may be set off against claims prosecuted by his executor or administrator; and if a balance is found due to the defendant, judgment shall be in like form and of like effect as if he had commenced a suit therefor; but if the estate is insolvent, it must be presented to the commissioners or added to the list of claims like other judgments. (R. S. c. 100, § 83.)

Rights to setoff are same as if all parties were alive.—Rights to a setoff in a suit wherein an executor or administrator is a party are the same that would have existed, if all the parties interested had continued in life. Adams v. Ware, 33 Me. 228.

And death of joint debtor does not work separation of demands.—It was clearly the design of the statute in relation to setoff that there should not be a separation of demands which were joint against the original debtors by the death of one of them, although a severance might be the consequence of the death, and the same rule was intended to apply to a suit by or against an executor or administrator and the one whom he represents, excepting so far as that rule is modified by other provisions. Adams v. Ware, 33 Me. 228.

But any lawful claims against insolvent

estate may be filed.—To an action by an administrator of an insolvent estate, upon a judgment which had been assigned by the intestate for security to a creditor, any lawful claims against the intestate which defendant had at the time of his death may be filed and allowed in setoff, after the debt for which the judgment was assigned has been first paid and the costs of the suit, and if the amount in setoff exceeds the balance due in the suit, the defendant is entitled to a judgment for the excess, and to have the same certified to the probate court as his claim against the estate. Ellis v. Smith, 38 Me. 114.

Whether or not they could have been set off had both parties lived.—Where a person has deceased, and his estate has been rendered insolvent and commissioners have been appointed, all claims and demands between such estate and a creditor are subject to be set off, and the balance only should be allowed, or recovered, although there could have been no setoff if both parties had lived. Medomak Bank v. Curtis, 24 Me. 36. See Morrison v. Jewell, 34 Me. 146.

And whether or not they were presented before commissioners. — In an action brought by the administrator of an insolvent estate, the defendant is permitted to plead his counterclaims, whether they were presented before the commissioners or not, and whether they could have been filed in setoff or not in a suit by the deceased intestate. Ellis v. Smith, 38 Me. 114.

An equitable claim against an insolvent estate, though never presented to the commissioners, may still be shown by way of setoff to an action of assumpsit brought by the administrator. Lyman v. Estes, 1 Me. 182.

Claim of surety on joint promissory note of deceased.—Where one of two principal debtors in a joint promissory note is dead, and the money has been paid by a surety, he may file it in offset against a demand in favor of the estate of the deceased against him, and this though the estate has been represented insolvent. Fox v. Cutts, 6 Me. 240.

Note against intestate held by defendant as indorsee.—In a suit prosecuted by the administrator of an insolvent estate, a note against the intestate, held by the defendant as indorsee, may be filed and allowed in setoff. The provision in regard to setoffs in this chapter does not apply in such cases. Ellis v. Smith, 38 Me. 114.

Debt of testator cannot be set off against debt created since death.—It is an established rule that if executors sue for a debt created to them since the testator's death, defendant cannot set off a debt due him from the testator. Rich v. Hayes, 101 Me. 324, 64 A. 656.

Applied in Barton v. McKay, 135 Me. 197, 193 A. 733.

Sec. 83. Setoff in actions against persons in a representative capacity.—In actions against executors, administrators, trustees or others in a representative capacity, they may set off such demands as those whom they represent might have set off in actions against them; but no demands due to or from them in their own right can be set off in such actions. (R. S. c. 100, § 84.)

Cross references.—See, generally, note to § 82. See c. 157, § 16, re administrator shall file abstract of demands of deceased.

Demands due administrator in his individual capacity cannot be set off.—Judgments awarded to an administrator in his individual capacity by the express terms of this section could not be set off against the plaintiff's note in suit before judgment. Rich v. Hayes, 101 Me. 324, 64 A. 656.

Where the plaintiff by a trustee process attached the principal defendant's distributive share of personal estate to which he was entitled in the hands of an administrator, the administrator in his trustee disclosure was not entitled to prove that the plaintiff was indebted to him in his individual capacity and set off this sum against such sum as was due to the plaintiff from the intestate's estate. Howe v. Howe, 97 Me. 422, 54 A. 908.

Nor can debts created since death of decedent.—It is an established rule that if executors sue for a debt created to them since the testator's death, defendant cannot set off a debt due to him from the testator. If the defendant could not set off in such a case neither could the executor, if he was the defendant, for the rule must be mutual. Rich v. Hayes, 101 Me. 324, 64 A. 656.

Nor claims purchased with funds of estate after death.—An administrator cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim with which the decedent had no connection in his lifetime, purchased by the administrator with the funds of the estate for that purpose, after the death of his intestate. Rich v. Hayes, 101 Me. 324, 64 A. 656.

Applied in Harrington v. Bean, 94 Me. 208, 47 A. 147.

Cited in Crummett v. Littlefield, 98 Me. 317, 56 A. 1053.

Sec. 84. Setoff in actions brought by executors or administrators of insolvent estates.—In joint or several actions by the executor or administrator of an estate represented insolvent against two or more persons having joint or several demands against such estate, the demands may be filed in setoff by either of the defendants at the first term of the court or at the first term after such representation of insolvency if made after the commencement of such actions; and if, on trial, a balance is found due to the defendants jointly or to either of them, judgment shall be entered for such balance as the jury finds or the court orders, and it shall be treated and disposed of as other judgments against insolvent estates. (R. S. c. 100, § 85.)

See note to § 82, re demands which may be set off against insolvent estates; c. 157, § 19, re actions pending on claims not preferred.

Sec. 85. Pleadings and issue in setoff.—The trial may proceed in cases of setoff on issue joined without a plea of setoff; and if an issue is not otherwise formed, the defendant may, except in actions of assumpsit, plead that he does not owe the sum demanded; and the plaintiff is entitled to every defense against such setoff that he might have, by any form of pleading, to an action against him on the same demand. (R. S. c. 100, § 86.)

The Revised Statutes do not require a setoff to be pleaded, as in the English practice. Houghton v. Houghton, 37 Me. 72.

Plaintiff may file setoff against setoff.—The same right of setoff which the defendant has against the plaintiff's claim, the plaintiff may have against the setoff. Boyd v. Bartlett, 54 Me. 496.

There is no prescribed limitation as to the time for the plaintiff to file an account in setoff, but it should be received under such conditions as will effectually protect the defendant against surprise. Boyd v. Bartlett, 54 Me. 496.

Applied in Winthrop Savings Bank v. Jackson, 67 Me. 570.

Cited in Miller v. Moses, 56 Me. 128.

Sec. 86. Discontinuance with consent; limitation.—When a demand is filed in setoff, the action cannot be discontinued without consent of the defendant. The statute of limitations applies to demands filed in setoff as if actions had been commenced on them at the date of the plaintiff's action. (R. S. c. 100, § 87.)

Cross reference.—See c. 112, § 110, re application of statutes of limitations to setoffs.

The setoff when filed is to have relation back to the date of the plaintiff's writ, and its effect is to be the same as if then filed. Though the setoff may be outlawed when filed, yet if that was not the case when the plaintiff commenced his action, the bar of time will not apply. Houghton v. Houghton, 37 Me. 72.

Applied in Dyer v. Morris, 68 Me. 472.

Sec. 87. Costs in setoff.—When no balance is found due to either party, no costs are recoverable. If a balance is found due to the plaintiff, he shall have judgment therefor with costs, and if a balance is found due from the plaintiff, judgment shall be rendered therefor in favor of the defendant, with costs; but no such judgment shall be rendered against the plaintiff when the demand sued had been assigned before the commencement of the action; nor for any balance due from any other person than the plaintiff. (R. S. c. 100, § 88.)

Cross reference.—See § 155 et seq., re costs.

In an action by the indorsee of a promissory note indorsed and transferred after it is due, the defendant, the promisor, may file an account which he had against the promisee at the time of the transfer of the note in setoff, as a defense thereto. This section recognizes the right of setoff as a defense in cases like this, of claims not between the parties to the suit, and provides that, in such case, no judgment shall be recovered against the plaintiff for any balance due the defendant. Robinson v. Perry, 73 Me. 168.

Where the plaintiff becomes nonsuit, no judgment can be rendered against him upon an account in setoff. Sewall v. Tarbox, 30 Me. 27.

Verdict on setoff and counter setoff.—In an action on account annexed, where a setoff was filed by defendant and a counter setoff by plaintiff, if the jury, upon the whole account, find as much due the defendant as there is due the plaintiff, the verdict should be, "nothing due either party." Morgan v. Hefler, 68 Me. 131.

Cited in Foster v. Ordway, 26 Me. 322.

Sec. 88. Similar proceedings before inferior tribunals. — Similar proceedings in setoff may take place before municipal courts and trial justices, the demand in setoff being filed on the return day of the writ; but judgment cannot be rendered for a defendant for an amount in excess of the civil jurisdiction of such court, exclusive of costs. (R. S. c. 100, § 89.)

Auditors.

Sec. 89. Auditors; fees.—When an investigation of accounts or an examination of vouchers is required, the court may appoint one or more auditors to hear the parties and their testimony, state the accounts and make a report to the court upon such matters therein as may be ordered by the court, and the report is prima facie evidence upon such matters only as are expressly embraced in the order. They shall notify the parties of the time and place of hearing and have power to adjourn; witnesses may be summoned and compelled to attend and may be sworn by the auditor. The fees and necessary expenses of auditors so appointed shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county and the amount thereof shall be fixed by the court upon the coming in of the report. (R. S. c. 100, § 90.)

Cross references.—See § 2, re appointment in vacation; § 122, re rules of evidence.

History of §§ 89-92.—See Howard v. Kimball, 65 Me. 308.

Auditors appointed under this section are the proper tribunal in all actions of account. Closson v. Means, 40 Me. 337.

Auditors and referees appointed by the court are not required to be sworn. Sanborn v. Kimball, 64 Me. 140.

The authority and duty of auditors, are substantially the same as those conferred upon them by the common law in the action of account. Closson v. Means, 40 Me. 337.

Auditors may be appointed in any case involving accounts.—Formerly in this state auditors were appointable only by the consent of parties. R. S. 1841, c. 115, § 49. Now the court can appoint them in any case involving accounts. Hacker v. Johnson, 66 Me. 21.

And it is immaterial whether the case was sent to the auditors by consent of the parties. The court could send it there with or without consent. Smith v. California Ins. Co., 87 Me. 190, 32 A. 872.

This section gives either party a trial by jury, if dissatisfied with the auditors' report, and makes that report evidence to the jury upon trial of the cause. Gorham v. Hall, 57 Me. 58.

Object of auditors' report to simplify issue tried.—The object of the statute by which the courts are authorized to refer cases to auditors and to require their reports to be read as prima facie evidence, although neither party may desire it, is to simplify and elucidate the issue to be tried. King v. Thompson, 116 Me. 316, 101 A. 724.

Auditors empowered to settle facts as to correctness of accounts.—As incident to his duty, an auditor has power to pass upon the facts in controversy, and settle them so far as may be necessary to ascertain the correctness of any debit or credit claimed by either party. Smith v. Minnick, 88 Me. 484, 34 A. 274.

And may determine any agreements affecting right of action or defense.—An auditor is authorized to consider and determine such questions of fact as are necessarily involved in stating the accounts and which are essential to a correct determination of the matters submitted by the court. In doing this he may, if it becomes necessary, determine whether or not there was a special agreement between the parties in reference to the subject matter, even though such agreement, if found, would defeat a right of action or defense. Smith v. Minnick, 88 Me. 484, 34 A. 274.

Without such power their authority to compel witnesses and hear parties would be nugatory.—The power to compel the attendance of witnesses and to hear the parties and their testimony would be nugatory unless accompanied with a power to pass upon the facts in controversy. There is implied here a power to settle such controverted facts as may be necessary to ascertain whether the debit or credit claimed ought to be allowed. Howard v. Kimball, 65 Me. 308.

Auditors are part of court and governed by legal principles.—An auditor is not an independent tribunal like a referee chosen as such by the parties. He is a part of the court itself which entrusts him with its

commission. Like any other tribunal of law, he must be governed by legal principles. Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.

And auditors cannot receive in a hearing before them any but legal evidence. Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.

Objections may be made to their report.—The auditors' report may be objected to, either on account of any mistake of the law, or any improper admission or rejection of evidence, or because they have taken into consideration matters not submitted to them. Paine v. Maine Mut. Marine Ins. Co., 69 Me. 568.

Objection to evidence upon which auditors' conclusion based is by motion to recommit.—An objection to a portion of the evidence upon which the auditor has based his conclusion cannot be taken as a matter of right, except by motion to recommit the report to the auditor before the trial. To allow such an objection to be taken for the first time, at the trial, as a ground for rejecting the whole report and proceeding to trial without it would defeat the purpose of the statute. King v. Thompson, 116 Me. 316, 101 A. 724.

And not by exception to admission of report in evidence.—No exception lies to the admission in evidence of an auditor's report, objected to for the first time upon the grounds that his conclusions were based on incompetent evidence. King v. Thompson, 116 Me. 316, 101 A. 724.

For report, or portions thereof, are not thus subject to exclusion.—The objection that certain evidence contained in an auditor's report was inadmissible is not ground for excluding the report or for striking out the portions of it based on such evidence on a motion made at the trial. King v. Thompson, 116 Me. 316, 101 A. 724.

And exceptions do not lie to auditors' refusal to report facts found.—In an action of account, although the auditors refuse or neglect to report the facts by them found, when requested by one of the parties, no exceptions lie. The law requires of them no such action. Closson v. Means, 40 Me. 337.

But court may strike out portions of report found to be erroneous in law.—If one of the findings of the auditor appears to the court, upon the facts reported by him, to be erroneous in matter of law, or in excess of the authority conferred by the rule of reference, the jury may be instructed accordingly, and so much of his report stricken out, leaving the rest to have its proper weight and effect. King v. Thompson, 116 Me. 316, 101 A. 724.

And parties may further defend matters submitted or withheld.—Parties are not estopped by the auditor's report, even in matters submitted to the auditors, from further defense in such matters, the effect of the auditors' report being no more than merely to change the burden of proof. And, a fortiori, an auditor's report can create no estoppel in matters not submitted to him. Smith v. California Ins. Co., 87 Me. 190, 32 A. 872.

Though where no issues are made up before the auditors, none can afterwards be made on the presentation of their report for acceptance by the court. Closson v. Means, 40 Me. 337.

Auditors' report may be conclusive.—In an action of account, where no issues of fact are made before the auditors, and no charge of misconduct or partiality, their report is conclusive. Closson v. Means, 40 Me. 337.

Duties of auditor in assessing damages on collectors' bond, different from those under this section.—After a default in an action on a collectors' bond, and after an auditor has been appointed to assess damages, and has made his report, the defendants have no right to a jury to assess damages for them. Though styled an auditor, the duties of the person appointed to assess the damages are essentially different from those contemplated by this section for the appointment of an auditor "to state the accounts." Gorham v. Hall, 57 Me. 58.

Expressions of opinion in auditor's report.—See Howard v. Patterson, 72 Me. 57.

Applied in Perry v. Chesley, 77 Me. 393.

Cited in Norridgewock v. Hale, 80 Me. 362, 14 A. 943.

Sec. 90. All hearing, majority report.—When there is more than 1 auditor, all must hear, but a majority may report, stating whether all did hear. Their report may be recommitted. They may be discharged and others appointed. They shall be allowed a reasonable compensation to be fixed by the court and paid as provided in the preceding section. (R. S. c. 100, § 91.)

This section confers general authority with respect to the recommitment of the report, without limitation as to the term or the previous history of the case. Phillips v. Gerry, 75 Me. 277.

And it is within discretion of judge to

order recommitment.—Notwithstanding a report has once been accepted and used at one trial, when the verdict was set aside and a new trial granted, it is within the discretion of the presiding judge to order a recommitment of the report to the auditor for a more extended statement of his findings upon matters of fact. Phillips v. Gerry, 75 Me. 277; King v. Thompson, 116 Me. 316, 101 A. 724.

Where the auditors' second report reaffirms the first, it is competent for the court to allow both to be read in evidence at the new trial. Phillips v. Gerry, 75 Me. 277.

Cited in Gorham v. Hall, 57 Me. 58.

Sec. 91. Report as evidence.—The auditor's report may be used as evidence by either party and may be disproved by other evidence. (R. S. c. 100, § 92.)

Auditors' report prima facie evidence subject to impeachment and disproval.—The results reached by the auditor are not conclusive upon the parties, and his report when offered in evidence is subject to be impeached, rebutted, controlled or disproved by competent evidence to be laid before the jury. But it amounts to prima facie evidence sufficient to warrant a verdict unless thus impeached or disproved. Howard v. Kimball, 65 Me. 308.

And evidence before auditors or evidence withheld admissible to impeach or support report.—The defendant is at liberty to put in the same evidence which was before the auditor, or such other evidence pertinent to the case before the jury, as he desired. Either party has that right and will commonly find it necessary to avail himself of it, as to disputed items, whether the object is to impeach or to support the auditor's report. Howard v. Kimball, 65 Me. 308; King v. Thompson, 116 Me. 316, 101 A. 724.

As well as items in addition to report and items not allowed by auditors.—The party reading an auditor's report may, as well as his adversary, produce evidence in addition to it, and may prove items not allowed by the auditor, or offer proof to contradict any part of it, without destroying the prima facie effect of its findings unless they are thus successfully impeached or disproved. King v. Thompson, 116 Me. 316, 101 A. 724.

Judge may reject portions of report not proper to go to jury.—It is competent for the judge presiding at the trial, when an auditor's report is offered in evidence, to reject such portions of it as are not proper to go to the jury, and receive the remainder, ruling upon the introduction of those parts which are objected to as he would in the case of a deposition. Howard v. Kimball, 65 Me. 308.

Instruction as to effect of auditor's report as evidence.—See Howard v. Kimball, 65 Me. 308.

Applied in Phipsburg v. Dickinson, 78 Me. 457, 7 A. 9.

Cited in Gorham v. Hall, 57 Me. 58.

Sec. 92. Defendant in action of account neglects to account.—When in an action of account, judgment has been entered that the defendant account, and he unreasonably neglects to appear, or appearing, neglects to render an account before auditors appointed to take it, they shall certify the fact and the court may enter a default and judgment thereon or cause the damages to be assessed by a jury. (R. S. c. 100, § 93.)

Stated in Jarvis v. Noyes, 45 Me. 106.

Referees.

Sec. 93. Referees.—In all cases in the supreme judicial or in the superior court in which the parties agree that the same may be tried by one or more persons as referees, the court may appoint the same, not exceeding 3, whose fees and necessary expenses shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county, and the amount thereof shall be fixed by the court upon the coming in of the report.

No fee or compensation other than his necessary expenses shall be paid any justice of the supreme judicial or of the superior court for his services as referee, but this provision shall not apply to an active retired justice. (R. S. c. 100, § 94.)

Cross references.—See § 2, re appointment in vacation; § 122, re rules of evidence; c. 121 and notes, re reference by parties; c. 123, § 1, paragraph IV, re review when judgment rendered on report of referees.

The power of the court regarding references is restricted by statute to cases pending in the supreme judicial or superior court. Chaplin, Appellant, 131 Me. 187, 160 A. 27.

It is not given to supreme court of probate.—The right of reference of probate appeals is certainly not expressly given to the supreme court of probate, and that court cannot supply what the legislature has totally omitted. Chaplin, Appellant, 131 Me. 187, 160 A. 27.

And reference of equity case not authorized.—The jurisdiction of the equity judge cannot be delegated to others, and the provisions of our statute do not authorize a reference of an equity case. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Section applies only to civil cases.—The words of this section authorizing trial by referees of all cases in the superior court, where the parties consent, apply only to civil cases. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Reference of disputes is governed by the provisions of our statutes, and consent alone cannot confer jurisdiction. Faxon v. Barney, 132 Me. 42, 165 A. 165.

Auditors and referees appointed by the court are not required to be sworn. Sanborn v. Kimball, 64 Me. 140.

Referees are special tribunal whose report is subject to acceptance by court.—Referees appointed under rule of court by agreement of the parties undoubtedly act judicially, but they are not the court. They constitute a special tribunal of the parties' own choosing, whose report must be accepted by the court before any judgment can be rendered thereon. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

And seasonable exceptions lie to erroneous award of referees.—Where a referee awards costs against a defeated party, and in his report states specifically what items of costs he awarded, whether the award is erroneous is a question of law, and exceptions will lie as a matter of right to the acceptance of the report. But when such a report is accepted, and the defeated party, without fraud, accident or mistake, fails to preserve his rights by taking exceptions to the acceptance of the report, error will not afterwards lie to reverse the judgment against him. Thompson v. Mason, 92 Me. 98, 42 A. 314.

Exceptions and objections to findings of referee.—See Lincoln v. Hall, 131 Me. 310, 162 A. 267.

Finality of findings of referees.—See Staples v. Littlefield, 132 Me. 91, 167 A. 171.

Applied in Dobson v. Chapman, 131 Me. 336, 162 A. 793; Smith v. Paine, 133 Me. 88, 174 A. 42.

Sec. 94. Amendment of pleadings allowed, filed.—At any time before completion by the referee or referees of the hearing of testimony in any action referred under rule of court, any amendment of the pleadings which would be allowable by the court in the absence of such reference may, on written motion notwithstanding such reference, be allowed in term time or vacation by any justice of the superior court on such terms as he may impose or with the consent of all parties by the referee or referees. Such motion and any amendment allowed thereon shall be filed with the clerk of the court in which the action is pending. (R. S. c. 100, § 95.)

Cited in Bartlett v. Chisholm, 146 Me. 206, 79 A. (2d) 167.

Juries.

Sec. 95. Impaneling of jury; challenges; alternate jurors. — When venires for jurors are returned to court the clerk shall, at the commencement of each term, prepare an alphabetical list of the names of the several persons returned as traverse jurors; and before they are impaneled, the court shall cause it to be ascertained whether all so returned are present, and any juror desiring to be excused shall make application therefor when his name is called and thereupon be heard on said application. The clerk shall then place separately upon tickets in a box, the names of all jurors legally summoned and in attendance and not excused, and the names shall be drawn from the box by the clerk, after having been thoroughly mixed, one at a time, and the first 12 persons whose names are drawn from the box shall compose the first jury and shall be impaneled by the first 2 being sworn, and then the other 10 in succession as they were drawn and in such divisions as the court directs or all at the same time; and the next 12 so drawn

shall be impaneled and sworn in like manner and shall compose the second jury; but before proceeding to the trial of any civil or criminal case, other than for an offense punishable by imprisonment for life, the clerk may, under direction of court, at the request of either party, place the names of all jurors legally summoned and in attendance, and not engaged in the trial of any other cause, separately upon tickets in a box and the names shall be drawn from the box by the clerk after having been thoroughly mixed, one at a time, for the purpose of constituting a jury; and each party may peremptorily challenge 4 jurors; but in such case all peremptory or other challenges and objections to a juror drawn, if then known, shall be made and determined and the juror sworn or set aside before another name is drawn, and so on until the panel is completed; provided that the right to challenge peremptorily any person called or returned to serve as a juror may be exercised after it has been determined that the person so called or returned stands indifferent. A new jury shall be thus drawn for the trial of each cause; and after the panel is thus completed, the presiding justice shall appoint a foreman for the trial of the case.

Whenever by reason of the prospective length of a trial or other cause the court in its discretion shall deem it advisable, it may direct that not more than 2 jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Such alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Such alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges and be subject to the same obligations and penalties as jurors on the regular panel. An alternate juror who does not replace a juror on the regular panel shall be discharged when the jury retires to consider its verdict. If one or more alternate jurors are called, each party shall be entitled to one peremptory challenge in addition to those otherwise allowed by law. (R. S. c. 100, § 96.)

The provisions of this section are in terms applicable only to civil and criminal cases pending in a judicial court. Davis v. Bangor & Piscataquis R. R., 60 Me. 303.

This section does not apply to the impaneling of a sheriff's jury, summoned to assess damages for land taken for the location of a railroad; and the parties are not entitled to have the names of all the jurors summoned placed separately in a box, and the jury drawn in accordance with the provisions of this section. Nor have they the right peremptorily to challenge two jurors. Davis v. Bangor & Piscataquis R. R., 60 Me. 303.

The object of this section plainly is to give a party to a civil or criminal case pending in a judicial court a right to have a jury of twelve selected by lot from at least two full panels, or from all the jurors in attendance not otherwise engaged. Davis v. Bangor & Piscataquis R. R., 60 Me. 303.

The right to challenge peremptorily two jurors is only given in connection with proceedings under this chapter. Davis v. Bangor & Piscataquis R. R., 60 Me. 303.

Defendants in criminal case, except those punishable by imprisonment for life, have peremptory challenges jointly only.— In the trial of criminal causes, other than those punishable by imprisonment for life, where there are several defendants, they are jointly, and not severally, entitled to the peremptory challenges allowed by statue. The challenges are allowed to them as a party and not as persons. State v. Cady, 80 Me. 413, 14 A. 940.

Exceptions do not lie to the exclusion from the panel of a juror whom one defendant objects to and another defendant desires to retain. State v. Cady, 80 Me. 413, 14 A. 940.

Applied in State v. Garing, 74 Me. 152; State v. Dyer, 136 Me. 282, 8 A. (2d) 301.

Cited in State v. Chadbourne, 74 Me. 506.

Sec. 96. Supernumeraries, transfers and excuses.—Supernumerary jurors may be excused from time to time until wanted, and they may be placed on either jury as occasion requires; jurors may be transferred from one jury to the other when convenience requires it; and for good reason, any juror may be excused. (R. S. c. 100, § 97.)

Sec. 97. Jurors' oath.—The following shall be the form of oath, administered to traverse jurors in civil causes:

"You, and each of you swear, that in all causes betwixt party and party, committed to you, you will give a true verdict therein according to the law and the evidence given you. So help you God."

When a juror is conscientiously scrupulous of taking an oath, the word "affirm" shall be used instead of "swear" and the words "this you do under the pains and penalties of perjury" instead of the words "so help you God." (R. S. c. 100, § 98.)

Applied in Bowler v. Washington, 62 Me. 302.

Sec. 98. Foreman.—Each jury, after being thus impaneled and sworn, shall retire and choose their foreman by ballot or make the choice upon retiring with the first cause with which they are charged; and when a foreman is absent or excused from service, a new foreman shall be chosen as aforesaid, subject in each case to appointment by the court, as provided in section 95. (R. S. c. 100, § 99.)

Sec. 99. Talesman, returned. — When, by reason of challenge or other cause, a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of a cause, the court shall cause jurors to be returned from the bystanders or from the county at large to complete the panel if there are on the jury not less than 7 jurors drawn and returned as before provided. Such jurors shall be returned by the sheriff or his deputy or such other disinterested person as the court appoints. (R. S. c. 100, § 100.)

If no supernumerary juror present, talesman may be returned to fill vacancy. —If at any time during a term of the court there is no supernumerary juror present, and a vacancy occurs on either panel, it may be filled by causing a talesman to be returned, instead of transferring one from the other jury. Wallace v. Columbia, 48 Me. 436.

A juror can be returned from the bystanders only for some particular case then to be tried, for which alone he could be sworn. If the occasion for a talesman recurs, one should be returned and sworn again, as before. If jurors are wanted for the term, new venires should be issued therefor. Wallace v. Columbia, 48 Me. 436.

If the sheriff returns a talesman, in a cause in which his deputy is a party, it is a good ground of challenge to the juror, but will not support a motion to set aside the verdict. Walker v. Green, 3 Me. 215.

Cited in State v. Hume, 148 Me. 226, 91 A. (2d) 672.

Sec. 100. New jurors or new juries summoned during term. — The court may, in term time, issue venires for as many jurors as are wanted, to be drawn, notified and returned forthwith or on a day appointed; and when in any county the business requires a protracted session, the court may, during the term, excuse all or any of the jurors originally returned and issue venires for new jurors to supply their places, who shall be drawn and notified to attend at such time as the court directs. (R. S. c. 100, § 101.)

Cited in Wallace v. Columbia, 48 Me. 436.

Sec. 101. Challenge of jurors.—The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion or is sensible of any bias, prejudice or particular interest in the cause; and if it appears from his answers or from any competent evidence that he does not stand indifferent in the cause, another juror shall be called and placed in his stead. (R. S. c. 100, § 102.)

History of section.—See State v. Knight, 43 Me. 11.

Section declaratory of common law entitling parties to unprejudiced jury.—At the very basis of our trial system stands a disinterested, unprejudiced jury as triers of the fact, a body every member of which should be free from bias and prejudice.

To this both parties are entitled as a matter of law as well as of justice. In order to secure this result, this statute, which is but declaratory of the common law, has been enacted. International Agricultural Corp. v. Willette, 120 Me. 423, 115 A. 170.

This provision appears to have been designed to secure to a party by his own motion a trial by impartial jurors, and not to deprive the court of a right to set aside a juror, when it had from any document or other competent testimony ascertained that he was not, or could not be expected to be, impartial. State v. Williams, 30 Me. 484.

But parties must inquire of impartiality of jurors before trial commences, to preserve right to new trial.—The parties have by virtue of this section a right to examine any juror on oath to ascertain whether he is related to either party, has given or formed any opinion or is sensible of any bias, prejudice or particular interest in the cause. The parties should make the necessary inquiries to ascertain whether the jurors can impartially try the cause before the trial commences, and avoid the delay of their investigation till after the rendition of the verdict. A party remiss in this way is not entitled to a new trial as a matter of right, though it may be ordered as a matter of discretion. Minot v. Bowdoin, 75 Me. 205.

Challenges of jurors are allowed in criminal as in civil causes, and for similar reasons, and the court is the only tribunal which the statute has provided for their trial, whether they are principal challenges or challenges to the favor. State v. Knight, 43 Me. 11.

Meaning of "indifferent." — What is meant by a person standing indifferent? Manifestly that the mind is in a state of neutrality as respects the person and the matter to be tried; that there exists no bias either for or against, in the mind of the juror, calculated to operate upon him; that he comes to the trial with a mind uncommitted and prepared to weigh the evidence in impartial scales. International Agricultural Corp. v. Willette, 120 Me. 423, 115 A. 170.

Party waives nothing by accepting juror who falsely denies interest.—A party is entitled to full, fair and frank answers from a juror on voir dire, so that he may challenge the juror if it appears that he is not indifferent. And a party has the right to rely upon the juror's statements, and waives nothing by accepting him after his denial of interest, the statement being untrue and the party being thereby misled. International Agricultural Corp. v. Willette, 120 Me. 423, 115 A. 170.

And the court will grant relief against a false denial of proven interest or bias by a juror being examined by counsel on the voir dire. International Agricultural Corp. v. Willette, 120 Me. 423, 115 A. 170.

Quoted in Ware v. Ware, 8 Me. 42; Hardy v. Sprowle, 32 Me. 310; Jewell v. Jewell, 84 Me. 304, 24 A. 858.

Sec. 102. Challenge from panel; right regulated.—In addition to challenges otherwise provided, either party may, before the trial commences, peremptorily challenge 1 juror from the panel unless the right of challenge provided in section 95 has been exercised; and the court may, by rules, prescribe the manner in which such right shall be exercised. (R. S. c. 100, § 103.)

Peremptory challenge not available as to sheriff's jury.—The right of peremptory challenge does not exist when the question of damages for taking of land under power of eminent domain is to be determined by a sheriff's jury. Barrett v. Bangor, 70 Me. 335.

Failure to exercise peremptory challenge as waiver of objection to incompetent juror.—See State v. Albano, 119 Me. 472, 111 A. 753.

Applied in State v. Garing, 74 Me. 152.

Sec. 103. View ordered. — In any jury trial the presiding justice may order a view by the jury. (R. S. c. 100, § 104.)

Sec. 104. Judge to charge jury on matters of law but not to express opinion on issues of fact.—During a jury trial the presiding justice shall rule and charge the jury, orally or in writing, upon all matters of law arising in the case but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial if either party aggrieved thereby and interested desires it; and the same shall be ordered accordingly by the law court upon exceptions. (R. S. c. 100, § 105.)

I. General Consideration.
II. Substance of Charge to Judge.
III. Opinions upon Issues of Fact.

I. GENERAL CONSIDERATION.

Section strictly construed.—A statute like this, if it is to be held as not trenching upon the prerogative of the court, must be strictly construed. State v. Day, 79 Me. 120, 8 A. 544; State v. Stuart, 132 Me. 107, 167 A. 550; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

It prohibits expression of opinion on issue of fact.—This section simply requires a judge, if he makes a charge to the jury, to refrain from expressing an opinion upon any issue of fact arising in the case. McLellan v. Wheeler, 70 Me. 285.

Meaning of "charge."—The charge is a general statement of the claims or theories of both parties, as indicated by the evidence, without expressing an opinion as to the correctness of any claim or theory. Desmond v. Wilson, 143 Me. 262, 60 A. (2d) 782.

Duty of justice to present issues and law to jury.—In the trial of an action it is the duty of the presiding justice, at the close of the evidence, to present the case, in his charge to the jury, by pointing out clearly and concisely the precise issues in controversy and the rules of law applicable thereto. Desmond v. Wilson, 143 Me. 262, 60 A. (2d) 782.

For omission to charge jury, advantage must be taken before jury retires.—While under this section it is the duty of the presiding justice to charge the jury orally or in writing upon all matters of law arising in the same, yet ordinarily advantage of such an omission so to do may not be taken, unless, before the jury retires, the court's attention is called to such omission. State v. Smith, 140 Me. 255, 37 A. (2d) 246.

How bill of exceptions may show issue upon which opinion expressed.—To bring a case within the provisions of this statute, the bill of exceptions must show in some mode what the issue was upon which the alleged opinion was expressed. This may be done by reporting the pleadings, and so much of the evidence as is material, or the excepting party may allege in terms what the particular issue was; and then so much of the charge as is the subject of complaint would present the question. Merrill v. Merrill, 67 Me. 70.

Applied in State v. Townsend, 145 Me. 384, 71 A. (2d) 517.

Cited in Howard v. Kimball, 65 Me. 308; State v. Carter, 121 Me. 116, 115 A. 820.

II. SUBSTANCE OF CHARGE TO JURY.

Scope of charge to jury.—A judge should make the jury understand the pleadings, positions and contentions of the litigants. He may state, analyze, compare and explain evidence. He may aid the jury by suggesting presumptions and explanations, by pointing out possible reconciliations of seeming contradictions, and possible solutions of seeming difficulties. He should do all such things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment. He is to see that no injustice is done. York v. Maine Central R. R., 84 Me. 117, 24 A. 790; State v. Mathews, 115 Me. 84, 97 A. 824; Benner v. Benner, 120 Me. 468, 115 A. 202; Allard v. La Plain, 125 Me. 44, 130 A. 737; State v. Jones, 137 Me. 137, 16 A. (2d) 103; State v. Hudon, 142 Me. 337, 52 A. (2d) 520; Desmond v. Wilson, 143 Me. 262, 60 A. (2d) 782.

That the presiding judge may state the grounds respectively taken by counsel—that he may rule the law as applicable to the hypotheses assumed by the one and the other is assumed in the idea of a charge. State v. Benner, 64 Me. 267.

Section not contravened by judicial observations, etc., in aid of jury.—A charge to the jury does not contravene this statute, prohibiting the presiding justice from expressing "an opinion upon issues of fact arising in the case," because of general observations made before commenting on the testimony; or because it contains affirmations of familiar principles for the application of evidence; or considerations of an elementary and axiomatic character; or statements, which, considered in their appropriate connection, do not manifest an expression of opinion. State v. Richards, 85 Me. 252, 27 A. 122.

And it does not prohibit statement to jury of questions to be determined.—This section does not go so far as to prohibit the presiding judge from stating to the jury the questions which they are called upon to determine. Such statement when clearly and directly presented may often be of service by enabling the jury to apply intelligently the legal rules given them, a bald and abstract enunciation of which however accurate, might tend rather to

confuse and lead them to disagree. McLellan v. Wheeler, 70 Me. 285; Ruggles v. Coffin, 70 Me. 468; State v. Day, 79 Me. 120, 8 A. 544; State v. Lambert, 104 Me. 394, 71 A. 1092.

It restricts charge only as to opinions upon issues of fact.—This statute contemplates that the judge shall charge the jury subject only to the prohibition that he shall not "express an opinion upon issues of fact arising in the case." With the exception of this limitation, there is no restriction whatever upon the rights, duties, or powers of the court in the trial of a cause. State v. Benner, 64 Me. 267.

The authoritative expression of opinion "as to the issues of fact arising in the case" is the extent and limit of the prohibition. State v. Benner, 64 Me. 267.

And justice cannot state issues of fact in manner implying obedience. — When the legislature, in defining the respective functions of the court and of the jury in the trial of a case, laid down the inhibition that the judge must not express opinion on arising issues of fact, it went no further in its meaning than that he should refrain from speaking of the facts in manner implying his utterance entitled to obedience. He must separate the questions of law from the questions of fact, and thus disunited send the questions of fact to the jury, free from authoritative verbal invasion by himself. Benner v. Benner, 120 Me. 468, 115 A. 202; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

But section does not restrict statements to jury upon uncontroverted facts. — The prohibition relates to the expression of an opinion upon an issue of fact arising in the case. Facts about which there is no dispute, and concerning which there is no issue, may properly be called to the attention of the jury in the discretion of the presiding justice. They may be stated to the jury as proved or admitted, or about which there is no contention, without any infringement of the statute prohibition. State v. Day, 79 Me. 120, 8 A. 544.

Notwithstanding potent inferences may be drawn therefrom. — Matters of fact which are not in dispute between the parties but which appear in the case may be stated to the jury as proved or admitted. Inferences from such matters may be potent in disposing of the controverted questions; yet the statement by the judge of the matters proved and not controverted, or expressly admitted is not an expression of opinion upon an issue of fact, however strong the inference therefrom may be. Neither is the utterance of a mere truism, or of a matter of common experience which nobody would think of disputing, however it might bear upon the issue, an infringement of the statute prohibition. McLellan v. Wheeler, 70 Me. 285.

Justice should collate evidence and resolve it into its simplest elements for jury. —The presiding justice, in addition to his duty of instructing the jury upon the law, should aid them by recalling and collating the details of testimony and resolving complicated evidence into its simplest elements. State v. Means, 95 Me. 364, 50 A. 30.

But he must do so impartially.—The law is well settled that, if a trial judge sees fit to summarize the evidence for a jury's benefit, he must do so with strict impartiality and must not magnify the importance of the proofs on one side and belittle those on the other side. State v. Brown, 142 Me. 16, 45 A. (2d) 442; State v. Hudon, 142 Me. 337, 52 A. (2d) 520.

He may call attention to controverted facts. — It is proper for the presiding judge, in giving a requested instruction, to call the attention of the jury to the controverted question of fact upon their decision of which its applicability depends. Perkins v. Oxford, 66 Me. 545.

As well as to inferences. — It is in accordance with our procedure that the jury shall have the benefit of an orderly and clear presentation from the presiding justice of the factual issues, and that attention shall be called to reasonable inferences deducible from existent circumstances. It is the fault or the misfortune of a defendant himself that the facts, when arrayed in logical order and relation, should be convincing of guilt. State v. Jones, 137 Me. 137, 16 A. (2d) 103.

And to positions of parties. — It is a part of the duty of a presiding justice to call the attention of the jury to the several positions respectively assumed by the counsel on the one side and the other, so that thereby the jury may the more distinctly perceive the precise question submitted to them for their determination. State v. Benner, 64 Me. 267; Hamlin v. Treat, 87 Me. 310, 32 A. 909.

He should eliminate uncontroverted facts and indicate issues. — It is the duty of the presiding justice to present the case to the jury as plainly as possible. He should eliminate uncontroverted matters and distinctly point out the precise issues. State v. Fenlason, 78 Me. 495, 7 A. 385.

And he has large discretion as to drawing jury's attention to evidence.—If the

legislature has the constitutional power to restrict the judiciary, a co-ordinate department under the same constitution with itself, it has not undertaken to forbid the presiding justice to explain the issue to the jury, or to call their attention to such of the testimony as he thinks will aid them. In many cases after a long trial with several issues, the judge must necessarily review more or less of the testimony, if there is to be any hope of an intelligent decision. In the performance of this important and delicate duty, he must have a large discretion which it would be impracticable for the law court to control. Murchie v. Gates, 78 Me. 300, 4 A. 698.

Charge held good under section. — Where paragraphs of the judge's charge called the attention of the jury to testimony coming partly from the defendant himself, which had an important bearing upon the questions upon which the jury were to pass, and consisted mainly of interrogatories addressed to the jury, which it behooved them to consider and answer in coming to a conclusion upon the main question, it was held that such a charge did not constitute expressions of opinion prohibited by this section. State v. Smith, 65 Me. 257.

Justice may instruct jury to apply consistency and probability tests.—The judge could properly instruct the jury to apply to the testimony of witnesses the tests of consistency and probability and aid them in arriving at the truth, the fact in issue, by stating both affirmatively and interrogatively the various propositions and incidental questions to be considered and determined by them. State v. Means, 95 Me. 364, 50 A. 30; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

This section does not require that the judge shall instruct the jury upon questions of law not arising in the case, especially when based upon hypothetical facts founded upon testimony not in the case. Pillsbury v. Sweet, 80 Me. 392, 14 A. 742.

III. OPINIONS UPON ISSUES OF FACT.

Prohibition of opinions refers to issues to be determined by jury. — The prohibition is that the presiding justice shall not express an opinion upon "issues of fact arising in the case." Obviously, the statute has reference to issues to be determined by the jury. It can have no application to questions addressed only to the court, even if they involve issues of fact. State v. Stuart, 132 Me. 107, 167 A. 550.

And not to suggestion of inferences to aid jury. — It is the authoritative expression of an opinion by the presiding justice as to an issue of fact arising in the case which is prohibited by this section, and not the suggestion of an obvious inference from admitted facts and circumstances, made to assist the jury in coming to a clear understanding of the law and the evidence. State v. Mathews, 115 Me. 84, 97 A. 824; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

Judge may not express prohibited opinions indirectly. — This section forbids a judge during a trial, including the charge, to express an opinion on issues of fact. What he is forbidden to do directly he may not do indirectly. State v. Brown, 142 Me. 16, 45 A. (2d) 442.

But comments as to general experience and rules of conduct, not exceptionable.— Comments of the presiding justice which are deductions only of truth based upon general experience are not subject to exceptions; nor will a statement of a rule of conduct, so uniform among men as to be proverbial, be regarded as an expression of the individual opinion of the presiding justice. State v. Means, 95 Me. 364, 50 A. 30.

Issues disappearing with hearing of evidence, not "issues of fact."—Issues of fact are sometimes presented by the pleadings which vanish when all the evidence has been heard. These are not "issues of fact arising in the case" within the purview of this statute. Harvey v. Dodge, 73 Me. 316.

Distinction between opinion and statement of sufficiency of evidence.—To give an opinion upon the force and effect of testimony, which is in the case, is one thing, and to state that there is none tending, or sufficient to prove a given fact, is another and a very different thing. The former is prohibited by the statute, the latter is not. Pillsbury v. Sweet, 80 Me. 392, 14 A. 742.

Prohibited opinion not inferred from allusion to indisputable facts. — It does not follow that the judge has expressed an opinion upon the issue because his opinion may be inferred from some allusion which he may make to some obvious and indisputable fact; nor because an inference favorable or unfavorable to the position taken by one of the parties may be drawn from such obvious truth or fact. McLellan v. Wheeler, 70 Me. 285; Harvey v. Dodge, 73 Me. 316; State v. Lambert, 104 Me. 394, 71 A. 1092; State v. Jones, 137 Me. 137, 16 A. (2d) 103; State v. Hudon, 142 Me. 337, 52 A. (2d) 520.

Though inferences therefrom may be strong. — Inferences from matters proved

and not controverted or expressly admitted may be potent in disposing of the controverted questions; yet the statement by the judge of such matters is not an expression of opinion upon an issue of fact, however strong the inference therefrom may be. State v. Day, 79 Me. 120, 8 A. 544.

Nor is such opinion expressed by drawing jury's attention to important questions.—Nor does it follow that there is an expression of opinion upon any issue of fact merely because the presiding justice may see fit to call the jury's attention to certain questions of fact by way of interrogatories addressed to them upon matters important for their consideration in arriving at a correct conclusion upon the main question. State v. Day, 79 Me. 120, 8 A. 544; State v. Jones, 137 Me. 137, 16 A. (2d) 103.

It was not error for the judge, in the course of his charge to the jury, to interrogatively read a letter that had been introduced in evidence, to show either its relation to the subject of the controversy or the want thereof. Benner v. Benner, 120 Me. 468, 115 A. 202.

Procedural remarks to counsel not opinions. — It is not every remark of the presiding justice, especially when made to counsel in relation to the manner of conducting a cause, that is to be regarded as the expression of an opinion upon "issues of fact." Elwell v. Sullivan, 80 Me. 207, 13 A. 901.

Nor is charge that there is no evidence impeaching character of witness. — It is not in violation of this statute for the justice to state in his charge to the jury that there is no evidence impeaching the character of a certain witness as to virtue or integrity. State v. Means, 95 Me. 364, 50 A. 30.

Nor hypothetical statement presupposing issue determined. — A hypothetical statement, which presupposes as its basis that the issue has already been determined, is not an expression of an opinion "upon issues of fact arising in the case," within this section. State v. Benner, 64 Me. 267.

Nor refusal of instruction on ground of no basis in testimony.—To refuse to give a requested instruction, on the ground that it has no basis in the testimony in the case, is not expressing "an opinion upon issues of fact arising in the case," contrary to the provisions of this section. Pillsbury v. Sweet, 80 Me. 392, 14 A. 742.

Nor ruling that jury might determine competency of expert. — The presiding justice did not express an opinion upon an issue of fact before the jury in violation of this section, when, upon objection that a medical expert, whose opinion had been solicited, was not competent or qualified to give an opinion on a particular question, the justice ruled that it was a matter of argument for the jury as to the competency of the expert. State v. Stuart, 132 Me. 107, 167 A. 550.

And direction of attention to dubious incidents in testimony is unexceptionable. —Nor will exceptions lie to remarks of the justice made in the charge, which consist of an analysis of the testimony of a respondent to an indictment, and directing attention to the dubious incidents of his narrative. State v. Means, 95 Me. 364, 50 A. 30.

Judge may disclaim determination of facts. — When instructions bearing upon the issues at the trial are accompanied with the statement to the jury, "That is for you to judge," "these are considerations for you, I express no opinion"; this is a disclaimer, by the presiding justice, of any purpose of assuming to determine the facts in issue. State v. Means, 95 Me. 364, 50 A. 30.

And suggestions to jury not necessarily opinions.—Suggestions for the consideration of the jury are not necessarily to be construed as directions to be followed, or expressions of opinion as to inferences or conclusions to be drawn from the evidence. Allard v. La Plain, 125 Me. 44, 130 A. 737.

An inadvertent misstatement by the presiding justice is not the "expression of an opinion upon an issue of fact arising in the case," within the meaning of this section. Grows v. Maine Central R. R., 69 Me. 412; Jameson v. Weld, 93 Me. 345, 45 A. 299.

Duty of counsel to call attention to misstatements. — It is the duty of counsel to call the attention of the court to the fact that, if in any instance from misapprehension, the testimony of a witness has been erroneously stated. State v. Benner, 64 Me. 267; Murchie v. Gates, 78 Me. 300, 4 A. 698.

To supposed expressions of opinion. — When counsel regards the charge as an expression of opinion by the presiding justice he should request the court to rectify the mistake or take his exception as the statute and rule of the court provide, before the jury retires. State v. Hudon, 142 Me. 337, 52 A. (2d) 520.

And to matters assumed uncontroverted which counsel proposes to controvert.— If the presiding judge inadvertently as-

sumes as uncontroverted any matter of fact in evidence upon which neither party proposes to raise an issue to the jury, it is the obvious duty of counsel to call the attention of the judge to the position taken in behalf of his client, so that the mistake may be rectified before the case goes to the jury. Harvey v. Dodge, 73 Me. 316.

Before jury retires. — If the justice makes a misstatement of the evidence, his attention must be called to the error before the jury retires. And attention must be called to the error specifically in order that it may be corrected. Jameson v. Weld, 93 Me. 345, 45 A. 299.

Otherwise counsel waives exceptions. — If a presiding justice inadvertently misstates a fact in evidence, the counsel should, at the time, call his attention to it, in order that it may be then corrected; if he does not, he will waive exception thereto. Grows v. Maine Central R. R., 69 Me. 412; Elwell v. Sullivan, 80 Me. 207, 13 A. 901; State v. Richards, 85 Me. 252, 27 A. 122.

Counsel waives objection arising from expressions of opinion by the presiding justice if he fails to call attention thereto. State v. Hudon, 142 Me. 337, 52 A. (2d) 520.

If counsel neglects to call attention to matter assumed to be uncontroverted by the justice, which counsel proposes to controvert, such neglect may properly be considered as a waiver of exception thereto. Harvey v. Dodge, 73 Me. 316; State v. Fenlason, 78 Me. 495, 7 A. 385.

Expressions held not error. — It is not error to say to the jury that their verdict is not final and irreversible, and that the evidence is to be reported to the governor and council for their consideration and examination, and that after revising the evidence they may order the execution of the sentence, or commute it, or pardon the offender. State v. Benner, 64 Me. 267.

The use of the word "pungent," by the presiding justice, in alluding, during his charge to the jury, to iodine or ointment used upon the plaintiff's arm, though it may be inaccurate, is not deemed to be prejudicial. Jameson v. Weld, 93 Me. 345, 45 A. 299.

The collateral statement of the judge, in association with granting leave to introduce further testimony, that injustice would not be done in his court if he could help it, does not attain to the rank of exceptional error. Benner v. Benner, 120 Me. 468, 115 A. 202.

Prejudice to party not cured by statements of platitudes to jury.—Prejudice to the respondent is not cured by telling the jury that they are the judges of the facts, by platitudes against prejudice, racial or otherwise, nor merely because the matter is put to the jury in the form of questions. State v. Brown, 142 Me. 16, 45 A. (2d) 442.

Charge held not to contain indirect "expressions of opinion" as to the credibility of the witnesses. State v. Mann, 143 Me. 305, 61 A. (2d) 786.

Summary of the testimony and the weight to be given to it held to be heavily balanced in favor of the state. State v. Brown, 142 Me. 16, 45 A. (2d) 442.

Sec. 105. Separate verdicts as to defendants.—In actions of contract against more than 1 defendant, the jury may return a separate verdict as to each defendant or as to 2 or more defendants jointly, and judgments shall be entered accordingly. In case of separate judgment against defendants in the same action, the court shall apportion the costs to be taxed against each defendant. (R. S. c. 100, § 106.)

Individual liability may be proved though action is on joint liability. — In an action on a contract express or implied, individual liability of defendants may be established though the action is brought as on a joint liability. Discrepancy between the contract declared on, and that proved, under this section constitutes no variance. Day v. Scribner, 127 Me. 187, 142 A. 727.

And judgment may be given against one of two defendants though joint liability not proved.—Where one of the defendants is a principal in the contract declared on, and the other a guarantor only, this section does not authorize the joinder in one action of parties to contracts so different in their nature and terms, but judgment may be entered under it for the plaintiff as to one of the defendants, although the joint liability is not proved. Smith v. Loomis, 72 Me. 51.

Where a declaration is sufficient to admit proof of a several liability of some one of the defendants, upon such proof, judgment can be entered against that defendant, although a joint liability was not established. Palmer v. Blaine, 115 Me. 287, 98 A. 753.

Nonliability of one of three defendants on several contract, not grounds for nonsuit.—In an action upon a several contract against three, the fact that the evi-

dence against one of the three does not show him to be liable is not cause for a nonsuit. The plaintiff might still be entitled to a verdict against the others under this section. Rumford Nat. Bank v. Arsenault, 108 Me. 241, 79 A. 986.

Applied in Gleason v. Sanitary Milk Supply Co., 93 Me. 544, 45 A. 825.

Cited in Moore v. Knowles, 65 Me. 493; Robinson v. Buswell, 130 Me. 209, 154 A. 571; Arnst v. Estes, 136 Me. 272, 8 A. (2d) 201.

Sec. 106. Juries may find special verdicts for cases of law.—The traverse jury may, in all cases, find a special or general verdict, subject to the opinion of the court on a case agreed on by the parties and reserved or on the facts as reported by the justice presiding at the trial. (R. S. c. 100, § 107.)

A jury has a right to decline the finding of any other than a general verdict. Fuller v. Kennebec Mut. Ins. Co., 31 Me. 325.

Sec. 107. When jurors do not agree.—When a jury not having agreed return into court stating the fact, the justice may, in his discretion, explain any questions of law if proposed to him or restate any particular testimony and send them out again for further consideration; but they shall not be sent out a 3rd time in consequence of their disagreement unless on account of difficulties not stated when they first came into court. (R. S. c. 100, § 108.)

Court may impress jury with importance of coming to agreement. — It is proper for the judge, when the jury comes into court after having had the case under consideration for some hours, to impress upon the jury the importance of their coming to an agreement if possible. Emery v. Estes, 31 Me. 155; Virgie v. Stetson, 73 Me. 452.

It is not error for the presiding justice to recall the jury into court, after they have considered a case submitted to them for some time, and endeavor to impress upon them the importance of agreeing upon a verdict. State v. Rollins, 77 Me. 380.

It is not error for the presiding justice to impress upon the jury the propriety of coming to an agreement, of harmonizing their views. It is a discretion to be exercised wisely by the presiding justice. Cowan v. Umbagog Pulp Co., 91 Me. 26, 39 A. 340.

And if counsel objects to statements to jury, he must object when stated.—Where a statement was made to the jury by the judge at the request of both counsel concerning the desire of the parties that a verdict might be reached, and the losing party was thereafter dissatisfied with the statement; if he would complain of it, he should have remained in court and expressed his dissent, upon which the presiding judge would doubtless have modified the statement so as not to include him. Virgie v. Stetson, 73 Me. 452.

Justice may inquire of jury's difficulties, in exercise of discretion in sending them out.—A discretion is confided to the judge to restate any particular testimony and to send the jury out, before they have agreed, more than once; and to enable him to exercise it properly he must make suitable inquiries respecting their difficulties, and thus become informed of any such difficulties respecting the law as well as the facts. Edmunds v. Wiggin, 24 Me. 505; Virgie v. Stetson, 73 Me. 452.

The words "if proposed to him," contained in this section, were not designed to limit the power of the judge to the explanation of such questions of law only, as should be voluntarily proposed by the jury. Edmunds v. Wiggin, 24 Me. 505; Virgie v. Stetson, 73 Me. 452.

Returning jury to their room after unauthorized departure, not a sending of them out. — When a jury returns into court without permission, the judge's direction that they withdraw to their room, does not constitute sending them out, within the meaning of this statute, which prohibits the jury to be sent out a third time. Emery v. Estes, 31 Me. 155.

To sustain exceptions for sending jury out 3 times, the sending out must be contrary to section.—Exceptions will not be sustained on the ground that the jury were sent out three times in violation of this section when it does not appear that the jury were sent out a third time "in consequence of their disagreement;" nor when it does not appear that they were sent out at all after the first time "on account of difficulties not stated when they first came into court." Cowan v. Umbagog Pulp Co., 91 Me. 26, 39 A. 340.

Sec. 108. When juror not disqualified by residence.—In prosecutions

for recovery of money or other forfeiture, it is not a cause of challenge to a juror that he is liable to pay taxes in a county, town or plantation which may be benefited by the recovery. (R. S. c. 100, § 109.)

Validity of statutes removing disqualification for municipal interest. — See Auburn v. Paul, 110 Me. 192, 85 A. 571.

Cited in Hardy v. Sprowle, 32 Me. 310; State v. Bangor, 98 Me. 114, 56 A. 589.

Sec. 109. Objections not stated before trial waived.—If a party knows any objection to a juror in season to propose it before trial and omits to do so, he shall not afterwards make it, unless by leave of court for special reasons. (R. S. c. 100, § 110.)

A "party" includes the attorney of the party. Brown v. Reed, 81 Me. 158, 16 A. 504.

"Before trial" must mean, in this section, before the termination of the trial. Brown v. Reed, 81 Me. 158, 16 A. 504.

Notice of probable disqualification of juror amounts to knowledge thereof. — A party or his attorney will be considered as knowing of the disqualification of a juror if such party or attorney has information from trustworthy sources of the probable existence of the disqualification, and neglects to make inquiry to ascertain whether the information is well founded. Brown v. Reed, 81 Me 158, 16 A. 504.

After verdict party presumed to have had knowledge of objection. — Notwithstanding an objection would have been sustained if the juror had been challenged, yet after verdict the party will be presumed to have had knowledge of the objection, and to have waived it. Mt. Desert v. Cranberry Isles, 46 Me. 411.

Where the venires were open to the inspection of the parties before the jury was impanelled and they were constructively notified of the objection to the juror in question, they must be presumed to have waived it. Mt. Desert v. Cranberry Isles, 46 Me. 411.

And objection after trial may be too late.—It is too late after the trial to object that a juror was irregularly returned and sworn, if the facts were known to the party before the trial, and it does not appear that he was thereby injured. Wallace v. Columbia, 48 Me. 436.

Notice, before trial, of communications between party and jurors precludes objection thereafter. — Where, during the progress of the trial, defendant's counsel had notice of some communication between the plaintiff and some of the jurors, this was sufficient at least to have put him upon an inquiry, and, by consenting to go on with the trial without objection, he consented to abide with the result. Fessenden v. Sager, 53 Me. 531.

As does knowledge of interest of juror. —Having knowledge of the interest of a juryman, and then voluntarily proceeding to trial, is a waiver of any objection on that account. Jameson v. Androscoggin R. R., 52 Me. 412.

To secure new trial for prejudice of juror, client and counsel must negative prior knowledge.—Before the party can claim a new trial by reason of the prejudice of a juror, it must affirmatively appear that he and his counsel were ignorant of its existence at or before the trial. State v. Bowden, 71 Me. 89.

Parties are not to lie by and speculate upon the chances of a verdict, and if unsuccessful, claim a new trial because a partial and prejudiced juror, and known so to be, was on the panel, when, if they had subjected him to examination or had disclosed their knowledge of existing facts, he would not have been permitted to sit on the cause. By proceeding to trial, the party must abide the result. State v. Bowden, 71 Me. 89.

Similarly as to interest of juror.—Where a new trial is sought because of a juror's interest, the ignorance of such fact, both on the part of client and counsel, should be fully established. Jameson v. Androscoggin R. R., 52 Me. 412.

A simple denial of knowledge of interest of a juror, made in the motion, omitting to negative such knowledge on the part of his counsel, unaccompanied by an affidavit or other proof establishing the truth of such denial, is not sufficient to warrant the court in setting aside the verdict. Jameson v. Androcoggin R. R., 52 Me. 412.

And verdict not set aside where only counsel had knowledge of interest.—The interest of a juryman, if known to counsel at the time of trial, though not known to the client until after verdict, is no ground for setting it aside. Jameson v. Androcoggin R. R., 52 Me. 412.

An objection to a juror, because he is related to a party interested in the cause,

must be made by way of challenge. After verdict it comes too late. McLellan v. Crofton, 6 Me. 307.

Burden is on party asserting relationship of juror to negative knowledge of client and counsel.—The burden is on a party, who complains of the disqualifying relationship of a juror to the adverse party, to show that neither he, nor any one of the attorneys engaged for him in the trial, knew the fact before the verdict was rendered. Brown v. Reed, 81 Me. 158, 16 A. 504.

If a party would set aside a verdict because of the relationship between one of the jurors and one of the parties, he must negative the fact of knowledge of such relationship on his part. Tilton v. Kimball, 52 Me. 500.

And right to object lost by neglect so to do.—The right to object, so far as relates to jurors who are related to either party within the prohibited degree, may be lost by the neglect or omission of the parties. By this section a waiver in writing is not required. Tilton v. Kimball, 52 Me. 500.

Applied in Lane v. Goodwin, 47 Me. 593.

Quoted in Jewell v. Jewell, 84 Me. 304, 24 A. 858.

Sec. 110. Verdict not affected by irregularities.—No irregularity in the venires or drawing, summoning, returning or impaneling jurors is sufficient to set aside a verdict, unless the party objecting was injured by the irregularity or unless the objection was made before the return of the verdict. (R. S. c. 100, § 111.)

Objection after trial for irregularly returned juror too late if facts known and party not injured.—It is too late, after the trial, to object that a juror was irregularly returned and sworn, if the facts were known to the party before the trial, and it does not appear that he was thereby injured. Wallace v. Columbia, 48 Me. 436.

If the sheriff return a talesman in a cause in which his deputy is a party, it is a good ground of challenge to the juror, but will not support a motion to set aside the verdict. Walker v. Green, 3 Me. 215.

Applied in State v. Neagle, 65 Me. 468.

Sec. 111. Verdict set aside for improper practices with jurors.—If either party, in a cause in which a verdict is returned, during the same term of the court, before or after the trial, gives to any of the jurors who try the cause any treat or gratuity or purposely introduces among the papers delivered to the jury when they retire with the cause, any papers which have any connection with it but were not offered in evidence, the court on motion of the adverse party may set aside the verdict and order a new trial. (R. S. c. 100, § 112.)

This statute is mainly in affirmance of the common law powers of the court, and is permissive only. It is expressive of the strong purpose of the lawmaking body that litigants shall have jurors free from all improper influences. Shepard v. Lewiston, Brunswick & Bath Street Ry., 101 Me. 591, 65 A. 20.

This section refers to the misconduct of parties during the term of court, and not to acts innocent in themselves, which occurred months before the term. Shepard v. Lewiston, Brunswick & Bath Street Ry., 101 Me. 591, 65 A. 20.

Section liberally construed to effectuate remedial purpose thereof.—This statute is remedial. The mischief to be remedied is public as well as private. The statute seeks to safeguard the verdict during the term, after, as well as before, the trial. It is the duty of the court to give such liberal construction to the statute as will most effectually meet the beneficial end in view, prevent a failure of the remedy and advance right and justice. To effectuate the legislative intent cases within the reason of the law must be included. Ellis v. Emerson, 128 Me. 379, 147 A. 761; Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

And strictly enforced to such purpose.—This statute, expressing the strong purpose of the lawmaking body that party litigants are entitled to jurors free from all improper influences, affirms the seal of condemnation at all times placed by courts upon improper interference with the impartiality of jury verdicts. Included in Chapter 84 of the Public Laws of 1821 and in all subsequent revisions, the power of reversal there given has been exercised consistently where violations of the statute were made to appear. The law is founded upon public policy. Its strict enforcement is imperative. Ellis v. Emerson, 128 Me. 379, 147 A. 761.

It condemns influencing of jurors by parties or friends, successfully or other-

wise.—"More than once, and in no uncertain language, the court has placed the seal of condemnation, not alone upon the attempts of parties by word or deed to influence or prejudice jurors outside the courtroom, but also upon the indiscretion of their friends along the same line. And the court has not stopped to inquire whether the attempt was successful, nor whether the mind of a juror was actually influenced, but only whether or not the mind of a juror might have been influenced by the attempt, or whether the attempt might have any tendency to influence the mind of a juror." York v. Wyman, 115 Me. 353, 98 A. 1024; Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892; Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

Though impeachment of verdict would seem to require at least influence by consent of party.—In order that a verdict should be impeached by improper approaches to a juryman to influence him, it would seem that such an act should be the act of one of the parties, or his agent, or by his consent and arrangement. Bishop v. Williamson, 11 Me. 495.

Where party attempts or permits influence, verdict for such party presumed product of influence.—Whenever it appears that a party has attempted to bias jurors by bringing improper influence to bear upon them, the court will not stop to inquire whether the attempt was successful, but will presume that a verdict in his favor was the product of vicious influence, and set it aside. So, in many cases, the same result has followed when parties have, without corrupt motive or wrongful intent permitted influences to bear upon jurors which might bias their judgments, at least when it has not been shown affirmatively that no harm resulted. Shepard v. Lewiston, Brunswick & Bath Street Ry., 101 Me. 591, 65 A. 20.

Even appearances of influence to be avoided.—It is better that there should be the disturbance of a verdict, the case in which it is returned to stand for trial anew—better, even, that a guilty person should escape punishment—than that there should be countenance of a verdict not free from improper influence, or the suspicion thereof. The appearance of evil should as much be avoided as evil itself. Too much care and precaution cannot be used to keep jury trials pure. State v. Brown, 129 Me. 169, 151 A. 9; Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

Discretion of justice under section exercised according to settled doctrines.—While the presiding justice may, under the statute, be clothed with discretionary powers, yet such authority must be exercised in accordance with settled doctrines, vital and essential requisites to the proper trial of cases and the administration of justice. Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

And verdict not set aside where no evidence of abuse of discretion.—The discretion exercised by the presiding justice under this section in his action on the motion to set aside the verdict should not be disturbed where there is no evidence, and no circumstances from which it can be inferred that he abused that discretion. Balavich v. Yarnish, 149 Me. 1, 97 A. (2d) 540.

A motion to set aside a verdict for misconduct of a juror is a proceeding that may be instituted independent of any statute. Walker v. Bradford, 117 Me. 147, 103 A. 15.

Discussion of case between party and juror held cause to set aside verdict.—Where during the term, and before the trial of a case, the foreman of the jury, by invitation spent the Sabbath at the defendant's house, when and where the defendant conversed with him about the suit, and while the cause was on trial, the foreman gave to his associates the information he received from the defendant; it was held that the verdict should be set aside. McIntire v. Hussey, 57 Me. 493.

And evidence from former trial given to jury similarly held.—After the evidence was closed, but before argument and during a temporary adjournment of the court, one of the jurors called upon the defendant, asked for, received and read in part, a printed copy of the evidence adduced at a former trial of the cause, and formed a conclusion therefrom that the testimony of some of the witnesses at the former trial varied somewhat from that given by them at the latter. The verdict was for the plaintiff for nominal damages, and, on motion of the plaintiff, it was held that the verdict should be set aside and a new trial granted, whatever the defendant's motives may have been. Heffron v. Gallupe, 55 Me. 563.

But verdict not set aside where prior verdict given jury unless fraudulently done.—A verdict will not be set aside because the verdict of a former jury was delivered them, with the papers in the case, unless fraudulently or designedly

done with intent to influence them. Harriman v. Wilkins, 20 Me. 93.

This section relates to a gratuity given by a party, or his attorney, before or after trial during the term. Balavich v. Yarnish, 149 Me. 1, 97 A. (2d) 540.

This section makes no distinction as to the time of giving such treat or gratuity so long as it occurred at the same term of court when the case was tried. Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

Motion for new trial on ground of gratuity given should go to law court.—In cases where new trials are sought on grounds that a juror or jurors have been given a gratuity, the better practice is to present the motion directly to the law court. The motion, however, may be presented to the presiding justice. Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

Verdict to be set aside if gratuity might have had unfavorable effect.—The statutory intention is that, where treat or gratuity has had, or might have had, an effect unfavorable to the opposing party, the verdict, whether right or not, should be set aside. State v. Brown, 129 Me. 169, 151 A. 9; Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170; Balavich v. Yarnish, 149 Me. 1, 97 A. (2d) 540.

Receipt of fees as witness while juror, held not gratuity.—It is incorrect for a person, drawn as a juror, and who was also summoned as a witness for the party prevailing, to receive his fees as a witness, for any part of the time he was sitting as a juror to try the cause. But this does not constitute a gratuity, within this section, and if it does not appear that either the party prevailing or the juror knew it to be incorrect, and if there is no evidence of corrupt intention, it is not sufficient cause for setting aside the verdict. Handly v. Call, 30 Me. 9.

Verdict set aside where party entertained juror.—Where the prevailing party in a cause tried by jury, previous to the trial, but during the same term, conveyed one of the jurors several miles in his own sleigh, to the house of a friend, where he was hospitably entertained for the night; the verdict was for this reason set aside. Cottle v. Cottle, 6 Me. 140.

Plaintiff entertained at house of juror.—See Walker v. Bradford, 117 Me. 147, 103 A. 15.

Conveying of juror held to warrant setting verdict aside.—Where, after the testimony and arguments of counsel had been heard, and before the delivery of the charge, counsel for the plaintiff tendered to one of the jurors and the latter accepted gratuitous conveyance in the automobile of such counsel over a distance which would by public conveyance have entailed upon the juror the expenditure of money, the court, on motion of the adverse party, should set aside the verdict and order a new trial as provided by this section. Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892.

In a criminal case, the giving of a ride by a deputy sheriff to a juror, whether with ulterior motive, in mere courtesy or civility, or in thoughtless indiscretion, was improper conduct requiring the granting of a new trial. State v. Brown, 129 Me. 169, 151 A. 9.

After rendition of verdict, counsel for the plaintiff, the plaintiff and two of his witnesses, were about to return from Augusta to Waterville in his automobile when a juror living at Waterville requested a ride thereto at the suggestion of a deputy sheriff. It was further stipulated and agreed that there was no improper motive in granting the gratuity to the juror. A new trial should have been granted under this section. Derosby v. Mathieu, 136 Me. 91, 2 A. (2d) 170.

Conveying juror, with other facts, held not to warrant new trial.—Where the prevailing party conveyed a juror, living on the road passed by the party, home in his wagon, and no conversation relative to the cause took place; it was held, that although the conduct was indiscreet and incorrect, and if persisted in after a knowledge of its impropriety, it would afford sufficient cause for a new trial, yet that the verdict in this case might be regarded as having been found by a jury free from improper influences, and that judgment might be rendered thereon. Hilton v. Southwick, 17 Me. 303.

Nor does gift of trivial value to society of which juror trustee.—The gift of a "blue book" of free tickets on an electric railroad, of trivial value, as a favor, not particularly to the recipient, but rather to the society of which he was a trustee, months before the donee was or could have been expected to be drawn as a juror in an action against the railroad should not of itself be regarded as evidence of bias or prejudice on the part of the juror, or as raising a presumption that his verdict was affected by improper influences, or that it might have been otherwise tainted. In the absence of proof aliunde that the plaintiff was preju-

diced, the verdict must stand. Shepard v. Lewiston, Brunswick & Bath Street Ry., 101 Me. 591, 65 A. 20.

But invitation to dinner, though withdrawn, held gratuity.—To the jury which brought in the plaintiff's verdict, there was voluntarily given by plaintiff's attorney an invitation to dinner, which was withdrawn when the attorney's attention was called to this section. It was given freely and without recompense. It may have been extended only in the spirit of genial courtesy and hospitality but it permits of the construction that, within the definition of "gratuity" by the lexicographers, it was something voluntarily given in return for a favor or service. It must be recognized as a gratuity prohibited by this statute and the seal of condemnation put upon it. Ellis v. Emerson, 128 Me. 379, 147 A. 761.

The act of a deputy sheriff, in getting evidence in a criminal cause, must be regarded as that of a party adverse to the defendant. State v. Brown, 129 Me. 169, 151 A. 9.

Applied in Studley v. Hall, 22 Me. 198.

Cited in Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

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

Sec. 112. Subpoenas for witnesses.—The clerks of the several courts, trial justices and justices of the peace may issue subpoenas for witnesses to attend before any court or before persons authorized to examine witnesses, to give evidence concerning any pending matter. (R. S. c. 100, § 113.)

Witness must be in actual attendance at courthouse.—To justify one in certifying his travel and attendance as a witness, he must have been in actual attendance at the courthouse. And though not bound to be constantly within the house, he must, at his peril, be within call when needed. Kennedy v. Wright, 34 Me. 351.

Sec. 113. Religious belief affects credibility only; atheists may testify.—No person is an incompetent witness on account of his religious belief but he is subject to the test of credibility; and a person who does not believe in the existence of a Supreme Being may testify under solemn affirmation and is subject to the pains and penalties of perjury. (R. S. c. 100, § 114.)

For case decided under an earlier form of this section, which made a belief in a Supreme Being a prerequisite to the admission of a witness to testify, but provided that after he had been admitted, no inquiry should be allowed as to his religious opinions, see Smith v. Coffin, 18 Me. 157.

Sec. 114. Parties, husbands, wives and others interested as witnesses.—No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity by reason of his interest in the event thereof as party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility, and the husband or wife of either party may be a witness. (R. S. c. 100, § 115.)

Cross references.—See § 116, re attestation of wills; c. 148, § 22, re testimony of husband or wife of accused in criminal cases.

History of section.—See Nash v. Reed, 46 Me. 168; Walker v. Sanborn, 46 Me. 470; Haswell v. Walker, 117 Me. 427, 104 A. 810.

The purpose of §§ 114-119 was to enlarge the admission of evidence. Palmer v. Bangor, 46 Me. 325.

But they cannot be extended by construction.—Sections 114-119, being in derogation of the common law, cannot properly be extended by construction so as to embrace cases not fairly within the scope of the language used. Dwelly v. Dwelly, 46 Me. 377.

A statute authorizing a man to be a witness in his own case is in derogation of the common law, and must be construed strictly. Kelton v. Hill, 59 Me. 259.

It was the purpose of this section to enlarge and not to restrict the sources of evidence in all those cases to which it was intended to apply, by removing the legal restrictions then existing upon the rights of parties to give testimony in their own suits. There was no necessity for such a statute in cases where such right existed before. Murray v. Joyce, 44 Me. 342.

It was not intended to exclude a person from being a witness who was before admissible either by statute or the common law. Dyer v. Huff, 43 Me. 255.

Or to affect then existing statutes.—This section was not intended to affect any of the statutes existing at the time of its passage, but was designed to change the rule of the common law, which excluded parties of record, and those having any interest in the event of the suit, from testifying. It was only an enlargement of certain acts admitting certain persons to give evidence in cases where by the common law they were held incompetent. Dyer v. Huff, 43 Me. 255.

The language of this section is most general. More comprehensive phraseology cannot readily be imagined. Palmer v. Bangor, 46 Me. 325; Bliss v. Shuman, 47 Me. 248.

It applies to suits in which but one party can be a witness.—This section applies to suits in which but one party, from the very nature of the case, can be a witness, as where one party is a corporation and the other not. It applies also to cases in which, by the statutes then in force, or by the common law, one party had the right to give testimony, and the other not. This section was not intended in any way to affect such existing rights, but only to confer the right where it did not previously exist. Murray v. Joyce, 44 Me. 342.

But it is modified by § 116.—Section 116 modifies the scope of this section. Clark, Appellant, 114 Me. 105, 95 A. 517.

And it does not apply where one party is executor or administrator.—See § 119 and note.

The term witness, in specific terms, is made applicable to a party by this section, and he is to testify in all cases "except as is hereinafter provided." Bliss v. Shuman, 47 Me. 248.

And parties must testify subject to the same general rules as other witnesses, unless restricted by the power by which they have been permitted to testify. Wheelden v. Wilson, 44 Me. 11.

Thus c. 117, relating to depositions, applies.—The party being, by the express provisions of this section, a witness, the provisions of c. 117, relating to depositions, are as applicable to him as to any other witness. The term witness is equally as predicable of him as of any other witness. Bliss v. Shuman, 47 Me. 248.

This section allows the respondent to a process under the Bastardy Act to be a witness. Murray v. Joyce, 44 Me. 342.

Effect of section in bastardy proceedings.—See Woodbury v. Yeaton, 135 Me. 147, 191 A. 278.

The design of the provision of this section relating to husband and wife was only to remove the objection, which was based on grounds of policy, to the admissibility as witnesses of husband and wife, and not to render them competent where by law their testimony was excluded on different grounds. Drew v. Roberts, 48 Me. 35.

By this section, the husband or wife "may," not must, be a witness. State v. Black, 63 Me. 210.

In cases coming within the provisions of § 119, neither husband nor wife can testify for the other. Tuck v. Bean, 130 Me. 277, 155 A. 277. See Drew v. Roberts, 48 Me. 35; Jones v. Simpson, 59 Me. 180. See also note to § 119.

The wife of the payee of a promissory note may be a witness to the signature of the maker. Shepard v. Parker, 97 Me. 86, 53 A. 879.

Admissibility of testimony of husband and wife under early form of section.—See Dwelly v. Dwelly, 46 Me. 377; Walker v. Sanborn, 46 Me. 470.

Applied in McKeen v. Frost, 46 Me. 239; Beach v. Pennell, 50 Me. 587; Bucknam v. Perkins, 55 Me. 490; Woodbury v. Gardner, 77 Me. 68; Douglass v. Snow, 77 Me. 91; Travelers Ins. Co. v. Foss, 124 Me. 399, 130 A. 210; Everett v. Allen, 125 Me. 55, 130 A. 858.

Cited in Leavitt v. Bangor, 41 Me. 458; Jones v. Larrabee, 47 Me. 474; Warren v. Baxter, 48 Me. 193; Hunter v. Lowell, 64 Me. 572; Fairfield Savings Bank v. Small, 90 Me. 546, 38 A. 551; Mansfield v. Gushee, 120 Me. 333, 114 A. 296; Milner v. Hare, 126 Me. 14, 135 A. 522.

Sec. 115. Exemption when action implies an offense.—No defendant shall be compelled to testify in any suit when the cause of action implies an offense against the criminal law on his part. If he offers himself as a witness, he waives his privilege of not criminating himself, but his testimony shall not be used in evidence against him in any criminal prosecution involving the same subject matter. (R. S. c. 100, § 116.)

Cross reference.—See note to § 114.

This section was inserted for the benefit of the defendant, in order to protect his constitutional rights. Nash v. Reed, 46 Me. 168.

It rests on the old maxim nemo temtui

suprum accusare, which has been incorporated in the constitution in the clause providing that the accused "shall not be compelled to furnish or give evidence against himself." The legislature, while admitting the parties, simply means to preserve this clause of the constitution in full and unimpaired vigor. Palmer v. Bangor, 46 Me. 325.

It refers to "offenses against the criminal law" which are personal offenses on the part of the defendant, who shall offer himself as a witness, who is entitled to the privilege "of not testifying when his testimony might render him liable to prosecution for a criminal offense," and who, having this privilege, might waive it. Palmer v. Bangor, 46 Me. 325.

And does not apply to a corporation, which cannot offer itself as a witness nor testify, and which, having no privileges "of not testifying," can waive none. Palmer v. Bangor, 46 Me. 325.

It would be a forced and unnatural construction to regard a corporate neglect of duty, for which the witness could not be personally liable, and for which the corporation is indictable, as "an offense against the criminal law on the part of the defendant," on account of which he is to be excused from testifying, because "his testimony might render him liable to prosecution for a criminal offense." Palmer v. Bangor, 46 Me. 325.

Or to town sued for injury caused by defect in highway.—In a suit against a town for an injury to the plaintiff, caused by a defect in the highway in the town, the plaintiff is admissible as a witness although no inhabitant of the town has been offered as a witness for the defendants, and the town is liable to indictment for having its roads out of repair. Palmer v. Bangor, 46 Me. 325.

Whether the cause of action implies an offense against the criminal law, is to be determined by the allegations in the writ. Carlisle v. McNamara, 48 Me. 424.

Testimony in bastardy proceedings.—See Dyer v. Huff, 43 Me. 255; Murray v. Joyce, 44 Me. 342.

Cited in Bucknam v. Perkins, 55 Me. 490.

Sec. 116. Attestation of wills and instruments not affected.—Nothing in section 114 affects the law relating to the attestation of the execution of last wills and testaments or of any other instrument which the law requires to be attested. (R. S. c. 100, § 117.)

Cross reference.—See note to § 114.

A wife is not a competent attesting witness to a will which contains a devise to her husband. Clark, Appellant, 114 Me. 105, 95 A. 517.

Applied in Jones v. Larrabee, 47 Me. 474; Warren v. Baxter, 48 Me. 193.

Stated in McKeen v. Frost, 46 Me. 239.

Cited in Milner v. Hare, 126 Me. 14, 135 A. 522.

Sec. 117. Testimony of party out of state.—When a party to a suit resides without the state or is absent therefrom during the pendency of the suit and the opposite party desires his testimony, a commission under the rules of court may issue to take his deposition; and such nonresident or absent party, upon such notice to him or his attorney of record in the suit of the time and place appointed for taking his deposition, as the court orders, shall appear and give his deposition. If he refuses or unreasonably delays to do so, he may be nonsuited or defaulted by order of court unless his attorney admits the affidavit of the party desiring his testimony as to what the absent party would say, if present, to be used as testimony in the case. (R. S. c. 100, § 118.)

Cross reference.—See note to § 114.

Cited in Tuxbury, Appellant, 67 Me. 267.

Sec. 118. Testimony of party contradicted by coplaintiffs or codefendants.—When a party either nominal or real or the husband or wife of a party is used as a witness by an adverse party, testimony may be introduced by such adverse party to contradict or discredit him. (R. S. c. 100, § 119.)

Cross reference.—See note to § 114.

Sec. 119. Not applicable to executors, administrators or heirs, save in special cases.—The 5 preceding sections do not apply to cases where, at the time of taking testimony or at the time of trial, the party prosecuting or

the party defending, or any one of them, is an executor or an administrator or is made a party as heir of a deceased party; except in the following cases:

I. The deposition of a party or his testimony given at a former trial may be used at any trial after his death if the opposite party is then alive, and in that case the latter may also testify.

I. General Consideration.

II. Cases to Which Section Applies.

A. In General.

B. Suits by or against Executors or Administrators.

C. Where Person Is Made Party as Heir of Deceased Party.

III. Witnesses and Evidence Excluded.

I. GENERAL CONSIDERATION.

History of section.—See Nash v. Reed, 46 Me. 168; Haswell v. Walker, 117 Me. 427, 104 A. 810.

Strict construction.—The statutes regulating the admission of the testimony of parties are to be examined carefully and construed strictly. Berry v. Stevens, 69 Me. 290.

The purpose of this section was to place parties on an equality in case of the death of one of them, that the other should not have the benefit of his own testimony, when his opponent could not be heard. Walker v. Sanborn, 46 Me. 470.

The reason for this section is plain. Where death has closed the mouth of one party, the law seeks to make an equality by closing the mouth of the other. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

This section was inserted for the benefit of the representatives of a deceased party, because of the decease of their ancestor, whose testimony alone, if living, might control that of his adversary. Nash v. Reed, 46 Me. 168.

It makes no distinction between actions of contract and actions of tort. Nor is there any distinction in reason. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. Hallowach v. Priest, 113 Me. 510, 95 A. 146.

Disqualification removed by § 114 is restored by this section.—When an administrator is party, unless a case be within an exception to this section, the disqualification which was removed by § 114 is restored, and the competency of the witness is to be determined by the rules of the common law. Travelers' Ins. Co. v. Foss, 124 Me. 399, 130 A. 210.

And living party may not testify as to facts happening before death of deceased.—Under this section, when the party prosecuting an action or the party defendant is an executor or administrator, the other party is not permitted to testify as to facts happening before the death of the deceased person, except in certain case specified. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

When an executor, administrator or other legal representative of a deceased person is a party, his adversary is not a competent witness as to his transactions with the decedent except as authorized by one of the several subparagraphs of this section. Sachelie v. Connellan, 141 Me. 267, 43 A. (2d) 300.

The living party must endeavor to prove his case by some witness who is not a party, when the personal representative has not permitted the "closed door" to open. The law is jealous of the rights of each, and although it may sometimes work an injustice by closing the mouth of the living, it approaches exact justice in the great majority of cases. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

Claim to testify under exception to section should appear at trial.—If a party who is excluded from testifying under the general rule expressed in this section would avail himself of a right to testify under an exception thereto, he should make his claim to testify under the exception appear at the trial. White v. Brown, 67 Me. 196.

Applied in Burleigh v. White, 64 Me. 23; Woodbury v. Gardner, 77 Me. 68; Talbot v. Hathaway, 113 Me. 324, 93 A. 834; Ladd v. Bean, 117 Me. 445, 104 A. 814; Emery v. Wheeler, 129 Me. 428, 152 A. 624; Norton v. Smith, 130 Me. 58, 153 A. 886; Pelletier v. Morris, 132 Me. 488, 167 A. 863.

Cited in Millay v. Wiley, 46 Me. 230.

II. CASES TO WHICH SECTION APPLIES.

A. In General.

The word "party" is used here in reference to a person who can legally be a

plaintiff or defendant, in the general sense of those terms, to a suit, in the character of executor, administrator, or as having been made such as heir of a deceased party. And this section applies only to those suits when one or the other party is in fact such as is mentioned in the provision. McKeen v. Frost, 46 Me. 239.

The provisions of this section were intended to apply to contests that operate upon and bind the estate, to which the testator, if living, would be a party. Millay v. Wiley, 46 Me. 230.

Section inapplicable where issue is whether property in controversy is part of estate.—When the very question in issue is, whether the property in controversy is a part of an estate of which one of the parties is an administrator, the parties are admissible as witnesses. For while that fact is in dispute, it does not yet appear that either party is an administrator respecting such property. It is the duty of the court to rule whether either party is such administrator, and when that is the fact on trial before the jury, the court cannot find that either party is then within the exception so as to be excluded. Beach v. Pennell, 50 Me. 587.

Master in chancery may examine both parties.—A master in chancery is not bound to report the evidence, but only the facts proved. He may examine the parties as to the receipt of rents and profits, or the possession of the estate, although one of them may be an administrator. Bailey v. Myrick, 52 Me. 132.

Case heard before auditor.—In a suit for labor and services brought or prosecuted against the estate of a deceased person, and heard before an auditor, the plaintiff, unless the defendant is a witness in relation to facts occurring before the death of such deceased person, cannot testify as to such facts. Silver v. Worcester, 72 Me. 322.

B. Suits by or against Executors or Administrators.

The mere fact that defendant is an administrator is not sufficient to render plaintiff incompetent as a witness. He must be a party in his official character and appear as such. Douglass v. Snow, 77 Me. 91.

It must appear that he acts in his capacity of administrator. — The parties should not be excluded in any case, unless it appears, as a fact not in controversy, that one of them is acting as an administrator or executor, in regard to the property or other matter in dispute. Beach v. Pennell, 50 Me. 587.

And description of parties in writ is not conclusive.—Parties are admissible as witnesses unless it appears, at the time of the trial, that one of the parties is prosecuting or defending as an administrator or executor. The description of the parties in the writ is not conclusive. Beach v. Pennell, 50 Me. 587.

Subject matter of controversy must be part of estate.—It is not material that either party is, in fact, an administrator of some estate, unless the subject matter of the controversy is a part of the same estate. And, until that fact appears, the rule must be applied, which admits the parties, and not the exception, which excludes them. Beach v. Pennell, 50 Me. 587.

If an administrator employs the funds of the estate to purchase a judgment, he should be deemed to have done so in his individual capacity, and he must sue on the judgment in his own name and not in his representative capacity. Hayes v. Rich, 101 Me. 314, 64 A. 659.

A person named as executor in a will is not really and legally such until the will is proved and he has given bond, and, in a contest as to its execution, he is not within this section. McKeen v. Frost, 46 Me. 239.

Executor is not "party prosecuting or defending" will contest.—Where the validity of a will is contested, a person named therein as executor, is not "a party prosecuting or defending," within the true intent and meaning of this section. Millay v. Wiley, 46 Me. 230.

Executor of mortgagor is not proper party to writ of entry by mortgagee.—In a writ of entry by a mortgagee to recover possession, for the purpose of foreclosure for condition broken, of premises mortgaged by a deceased mortgagor to secure an obligation given by him conditioned for the mortgagee's support during life, the administrator of the deceased mortgagor cannot be made a party defendant. Golder v. Golder, 95 Me. 259, 49 A. 1050.

The provisions of this section include executors on the estate of one in prison under sentence of death. Knight v. Brown, 47 Me. 468.

Where bank interpleads executor and husband of depositor.—Where a savings bank brought a bill in equity asking that the husband, on the one side, and the executor of the will of his deceased wife, on the other side, be required to interplead respecting the ownership of a deposit standing on the books of the bank in the name of the wife, and both contending

parties filed their respective answers, each claiming the deposit as his own, the real contestants for the funds were the husband, on the one side, and the executor, on the other, and thereafter the original plaintiff, the savings bank, occupied the position of a mere stakeholder, neither having nor claiming any interest in the subject matter, and the husband was not a competent witness under this section. Fairfield Savings Bank v. Small, 90 Me. 546, 38 A. 551.

C. Where Person Is Made Party as Heir of Deceased Party.

This section applies only in cases where the heir is made a party because he is an heir, and where the ancestor would have been the party were he alive. It was intended to reach cases where real estate is represented in court, by heirs, as personal estate is by executors or administrators; as where, in a real action, heirs come in to prosecute or defend a suit, instead of their ancestor who dies pendente lite, or where heirs commence proceedings to redeem a mortgage running to the ancestor, or where the proceeding is against heirs to recover land, which, in the lifetime of the ancestor, was held in trust for another person. Wentworth v. Wentworth, 71 Me. 72.

It has reference to c. 172, § 16.—The provision of this section relating to persons made parties as heirs of a deceased party, has reference to c. 172, § 16, which provides that no real action shall be abated by the death of either party, after its entry in court, but shall be tried after notice has been duly served upon those interested in his estate. In such case an opportunity is presented for the heirs of a deceased party to become a party, which brings it within this section. Nash v. Reed, 46 Me. 168.

The heirs of a testator, who contest the probate of his will, are not excluded as witnesses, "as heirs of a deceased party," and as being within this section. Nash v. Reed, 46 Me. 168.

In no sense can one be treated as having been made a party as heir of a deceased party where she contests the probate of a will, simply as the guardian of some of the heirs at law of the deceased, in the appellate court of probate. McKeen v. Frost, 46 Me. 239.

Party to real action claiming title by descent is not within section.—Where plaintiff in a real action claims to have inherited a share of the property as heir to a decedent, he demands in his own right that which he inherited from the decedent, and is not made a party as "heir of a deceased party." Johnson v. Merithew, 80 Me. 111, 13 A. 132.

Two children of a deceased mother who bring suit against their father and sister, praying for a partition of the homestead, to which they claim title by descent from their mother, are not "made parties as heirs of a deceased party" within the meaning of this section. They do not bring the suit because they are heirs, but because they claim to hold the homestead in their own individual right. Pierce v. Rollins, 83 Me. 172, 22 A. 110.

The demandant in a writ of dower is a competent witness in her own behalf, although the tenant holds the estate by inheritance from his father, the demandant's late husband. The son is not "made a party as an heir of a deceased party," but is a party because he is the tenant of the estate. Wentworth v. Wentworth, 71 Me. 72.

Widow takes not as heir but as widow.—In a writ of entry by a mortgagee to recover possession, for the purpose of foreclosure for condition broken, of premises mortgaged by a deceased mortgagor to secure an obligation given by him conditioned for the mortgagee's support during life, where the action is against the widow of the deceased mortgagor, in possession and claiming title, the widow is not made a party as the heir of her deceased husband. Since a widow takes not as heir but as widow, the action is against her personally, and the mortgagee is a competent witness in his own behalf. Golder v. Golder, 95 Me. 259, 49 A. 1050.

Illustrative cases.—See Hinckley v. Hinckley, 79 Me. 320, 9 A. 897.

The orator seeks a decree that the respondent shall convey certain real estate to him, upon two grounds: I. That he may secure the benefit of a resulting trust that arose in his favor in the hands of his wife in her lifetime, and at her death descended to the respondent, her daughter; and II. That he may have specific performance of the respondent's agreement with him to make the conveyance. As to the first ground the respondent is "made a party as heir of a deceased party," and the orator's testimony is inadmissible to prove the trust. But to prove the alleged agreement to convey, the orator is a competent witness, because touching that agreement the respondent is summoned to answer in her own right, and on her own account. Higgins v. Butler, 78 Me. 520, 7 A. 276.

III. WITNESSES AND EVIDENCE EXCLUDED.

Competency of witnesses is governed by rule of common law.—Section 114, allowing parties to be witnesses, by the express terms of this section is made not to apply to cases where one of the parties is an administrator or executor, except in certain cases here specified. The competency of witnesses not bringing themselves within these exceptions is governed by the rule of the common law. Tuck v. Bean, 130 Me. 277, 155 A. 277.

And party to record is incompetent although without interest.—In an action brought by an administrator on a joint and several promissory note, against a principal and surety, the defaulted principal is not a competent witness, at common law and under this section, for the surety. His position as party to the record precludes his testifying, although he may be without interest. Wing v. Andrews, 59 Me. 505.

But this section restricts only parties to the action. An interested witness can testify. It is only a party who cannot, in cases where the other party is deceased. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

The restriction in this section was manifestly intended to restrict parties in testifying, and not witnesses otherwise interested. Walker v. Sanborn, 46 Me. 470; Rawson v. Knight, 73 Me. 340; Haskell v. Harvey, 74 Me. 192.

And husband or wife of living party.—The husband or wife of the surviving party is not a competent witness in cases where, under this section, such surviving party is not. Berry v. Stevens, 69 Me. 290. See Drew v. Roberts, 48 Me. 35; Jones v. Simpson, 59 Me. 180; Hunter v. Lowell, 64 Me. 572; Hallowach v. Priest, 113 Me. 510, 95 A. 146; Tuck v. Bean, 130 Me. 277, 155 A. 277.

In a suit brought by the administrator of an estate, one interested therein as an heir is competent as a witness, by the provisions of § 114, admitting parties and persons interested to testify. Gunnison v. Lane, 45 Me. 165.

Testimony of officers and incorporators of corporate party is admissible.—This section includes only parties to the action, and even though a corporation can only speak through its officers, such officers are not parties to the action within the meaning of the section. Central Maine General Hospital v. Carter, 125 Me. 191, 132 A. 417.

Testimony of incorporators and officers of the plaintiff corporation was offered by the plaintiff and properly admitted against the objection of the defendants' counsel upon the ground that such officers and incorporators were in effect parties to the suit and so were disqualified as witnesses under this section. Central Maine General Hospital v. Carter, 125 Me. 191, 132 A. 417.

Defendant as to whom plaintiff has discontinued is competent.—In an action brought by a personal representative there is no doubt the plaintiff may at any time discontinue as to a defendant, who, being thus discharged, is a competent witness. But the presiding judge errs in ordering, during the trial and over plaintiff's objections, a verdict in favor of one of the defendants that he may be a witness for his codefendants. Berry v. Stevens, 71 Me. 503.

Creditor of estate is competent in settlement of executor's accounts.—When in settling his accounts in the probate court an executor claims credit for a sum as paid upon a debt due from the estate, the alleged creditor is a competent witness for the executor to prove that the money so paid him was legally due him from the estate, and he may testify like any other witness to matters happening before the death of the testator. Escott, Appellant, 95 Me. 522, 50 A. 708.

Declarations by the deceased in his lifetime against his interest are always admissible. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

And witnesses not parties may testify to such declarations and to conversations between parties.—This section does not prevent the plaintiff, where the defendant has died, from calling witnesses, who are not parties, to testify to previous talks they may have had with the deceased party, or conversations they heard between the parties, when both were living, provided of course that the testimony is relevant and otherwise admissible under rules of evidence. It does not prevent a witness from stating the words of the living party made in the presence of the then living and now deceased party, and his replies if any, or that he made no reply. The whole of a conversation should be given if asked for. Tobey v. Quick, 149 Me. 306, 101 A. (2d) 187.

But living party may not testify in explanation of such declarations.—The living party may not testify in explanation, unless and until the personal representative opposing bids him do so, when the asserted admission was by his adversary's

decedent. Evidence other than testimony by the living party must be relied upon to establish identity of the admission, and to explain or control its legal and natural import. Weed v. Clark, 118 Me. 466, 109 A. 8.

The affidavit provided for in § 132 is not admissible in evidence, under this section, in a case where the defendant is administrator or executor. Haswell v. Walker, 117 Me. 427, 104 A. 810.

Application of "shop book rule."—In a suit for labor and services brought or prosecuted against the estate of a deceased person, the plaintiff cannot testify as to facts occurring before the death of the deceased except as allowed under the common law of the state to present in suitable cases his books of account and verify them by his suppletory oath. Silver v. Worcester, 72 Me. 322.

In actions between a living party and the representative of a deceased party, for goods sold, or performance or services rendered, as charged in shopkeeper's books which are supported by the suppletory oath of the party presenting the books or of someone in his behalf, except in the case of bulky articles and services of such a nature as to require assistance in delivery or performance, the person making the entries, whether he be the living party or a clerk, servant or agent, if he has knowledge of the fact, may make oath to the delivery or the performance of the services. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

But if the entries were made by the living party and the goods were of such a bulky nature or the services rendered were of such a character as to make it impossible that delivery was made without aid or the services performed without assistance, then the person rendering such aid or such assistance, if living, sane, within the jurisdiction of the court and able to attend and give testimony, should be called under the best evidence rule. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

For statutory modification of "shop book rule," see § 133.

Failure to object to testimony admitted in violation of section as waiver.—See Haslam v. Perry, 115 Me. 295, 98 A. 812.

Stipulation that no objection shall be made to admission of testimony.—A review may be granted to a party who has become insane and been placed under guardianship, upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of the case in review. And when the review is granted upon such stipulation made, it is binding upon the legal representative of the petitioner, after his decease. Austin v. Dunham, 65 Me. 533.

Introduction of deposition for purpose of rendering testimony of living party admissible.—It may well be doubted whether the adverse party could, within this paragraph, offer the deposition of his deceased opponent for the purpose of rendering his own testimony admissible when otherwise it would not be. Folsom v. Chapman, 59 Me. 194.

II. In all cases in which an executor, administrator or other legal representative of a deceased person is a party, such party may testify to any facts, admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts and any such representative party or heir of a deceased party may testify to any fact, admissible upon general rules of evidence, happening after the decease of the testator, intestate or ancestor; and in reference to such matters the adverse party may testify.

The language of this paragraph is most general.—It applies in all cases when an executor, administrator or other legal representative of a deceased person is a party. Haskell v. Hervey, 74 Me. 192.

As a litigant, the personal representative has all the rights his decedent would have had if living. And besides, he alone holds the key which will open the door and allow his adversary to enter and testify regarding facts that happened before the dead man died. Weed v. Clark, 118 Me. 466, 109 A. 8.

Where both parties are representatives, both may testify.—Where both parties to a suit are executors or administrators of deceased parties, either may by virtue of this paragraph testify to any facts legally admissible upon the general rules of evidence happening before the death of such person. Haskell v. Hervey, 74 Me. 192.

And either may take initiative in offering testimony.—This paragraph allows either the representative party plaintiff or the representative party defendant to take the initiative in offering testimony. This provision does not limit the right of either representative party. It is broad enough to allow either to take the initiative in testifying to facts happening before the

death. Burrill v. Giles, 119 Me. 111, 109 A. 390.

Representative who is widow and residuary legatee may testify.—The fact that the representative party defendant was the widow and residuary legatee of her decedent did not debar her from testifying as to matters which were not confidential communications between herself and her husband. Burrill v. Giles, 119 Me. 111, 109 A. 390.

But representative presenting his private claim against estate is excluded.—An executor or administrator, in prosecuting his private claim against the estate which he represents, cannot testify in his own behalf as against his estate which he nominally represents, but which in such an instance, is the real defendant against which he is proceeding as plaintiff. He is barred from refuting statements attributed to him as made before the death of his intestate. His wife's testimony as to both these matters is equally incompetent. Tuck v. Bean, 130 Me. 277, 155 A. 277.

Surviving partner is not representative entitled to testify.—A surviving partner, who gives bond under c. 161, § 2, and is afterwards sued upon a note of the firm, is not, therefore, a representative of his deceased partner, and as such entitled to testify to facts happening before his decease, within the provisions of this section. Holmes v. Brooks, 68 Me. 416. See Roux v. Lawand, 131 Me. 215, 160 A. 756.

Representative may introduce affidavit provided by § 132.—Where the representative party seeks to testify by use of the affidavit provided by § 132, the rule relating to testimony which may be given in suits by or against executors and administrators is not a bar to his right to speak. The offer and admission of such affidavit would entitle the defendant to testify under the limitations of this section. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

"Adverse party" means living party.—"The adverse party," who is precluded from testifying under this paragraph, unquestionably means the living party, whether plaintiff or defendant. Burrill v. Giles, 119 Me. 111, 109 A. 390.

Where representative party has testified adverse party may testify.—If matters before the death of his decedent be made pertinent to issue, by the testimony of the administrator, the adverse party is competent to testify respecting what was thus made of concern. Travelers' Ins. Co. v. Foss, 124 Me. 399, 130 A. 210.

But he is confined to facts testified to by representative party.—The legislature meant in this paragraph to confine the testimony of the adverse party to such facts as the representative party had testified to. It was not intended to permit the adverse party to go over all matters in his testimony, giving his own version without fear of contradiction, upon all the issues of the case, where the representative party has perhaps only testified to a conversation with such adverse party. Hall v. Otis, 77 Me. 122.

However he may always testify as to matters happening after death of decedent.—The fact that one of the parties to a suit is the representative of a person deceased, does not preclude the other party from the privilege of being a witness in his own behalf respecting matters that have happened after the death of such deceased person, whether the representative party testifies or not. Formerly the rule was otherwise, this paragraph having been amended since the decision in Kelton v. Hill, 59 Me. 259. Swasey v. Ames, 79 Me. 483, 10 A. 461.

Introduction of affidavit of living party does not enable him to testify.—Where, in an action against the representative of a deceased person, the defendant offered a written statement, signed and sworn to by the plaintiff, which statement was not admissible as evidence in behalf of the plaintiff of the facts therein stated, but was admissible in behalf of the defendant as an admission by the plaintiff against interest, the defendant did not, by offering the statement, thereby remove the common law disability and enable the plaintiff to testify as to facts relating to the transactions covered by the statement. Guild v. Eastern Trust & Banking Co., 125 Me. 292, 133 A. 164.

Nor does testimony as to statements made by him before decedent's death. — Where defendant, who was sued in his representative capacity, introduced a witness who testified to a conversation with plaintiff before the death of defendant's intestate, but not in his presence, plaintiff was not competent to testify in regard to that conversation. Sherman v. Hall, 89 Me. 411, 36 A. 626.

Unless the door is opened by the personal representative, the other party may not testify as to what happened before decedent's death, not even to interpret that which is hidden from or doubtful to or-

dinary and easy perception and intelligence, or is only implied, in a statement which he himself made while the other lived. Weed v. Clark, 118 Me. 466, 109 A. 8.

Applied in McLean v. Weeks, 65 Me. 411.

Cited in Burleigh v. White, 64 Me. 23; White v. Brown, 67 Me. 196.

III. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying.

The object of this paragraph was to reach those cases where parties, who might have brought the action in their own names, have transferred the claim, without the actual interest, and thus prevented the defendant from being a witness. Drew v. Roberts, 48 Me. 35.

This paragraph does not declare administrators or executors, as such, to be nominal parties. Farnum v. Virgin, 52 Me. 576.

It may be said that generally, in his representative capacity, an administrator is a party to an action which he brings far more than "nominal only." It is the duty of an administrator to collect money due the estate, by suit if it is not otherwise collectible, and to distribute the same according to law. Macgowan v. Schlosberg, 134 Me. 456, 187 A. 727.

It must appear that decedent or representative has no interest in claim.—An executor, who sues as such, on a debt claimed to be due to the estate, cannot be a nominal party unless it appears that his testator or he, as executor, had or has no interest in the claim, but the interest is in another, or others, in whose name the action might have been brought or might be defended. Drew v. Roberts, 48 Me. 35; Macgowan v. Schlosberg, 134 Me. 456, 187 A. 727.

As where demand in suit has been assigned.—The party suing in a representative capacity is a nominal party when the funds derivable from the suit do not belong to the estate, but do belong to some individual to whom the demand in suit has been assigned, and who is compelled, by the rules of law, to prosecute in the name of the administrator. Wing v. Andrews, 59 Me. 505.

If the intestate was owner of the note in suit, the administrator is not a nominal party. Farnum v. Virgin, 52 Me. 576.

When a promissory note belongs to and is sued for the benefit of an intestate in the name of the administrator, the plaintiff cannot be deemed a nominal party within this paragraph, whether the proceeds finally go to pay the debts of the estate or to the plaintiff as heir at law of the intestate. Wing v. Andrews, 59 Me. 505.

Representative suing for death by wrongful act is not nominal party.—In an action on the case for the alleged negligence of the defendant in the operation of an automobile whereby the plaintiff's intestate was so injured that he subsequently died, the representative party is not nominal only. The suit, like ordinary suits by executors or administrators, is brought for the benefit of the estate of the deceased. Hallowach v. Priest, 113 Me. 510, 95 A. 146.

An executor can be shown to be a nominal party by the probate records only, in an action of trover by him to recover the value of certain personal property belonging to the estate. Buck v. Rich, 78 Me. 431, 6 A. 871.

Evidence of bad faith must be clear, to the effect that such money as was paid, and further sums promised pursuant to the agreement sued on, were the property of and due to another than to the decedent, in order to place a plaintiff executor or administrator in a position of a nominal party. Macgowan v. Schlosberg, 134 Me. 456, 187 A. 727.

Action by workmen's compensation insurance carrier subrogated to rights of injured employee.—In an action against an administrator by the insurance carrier of an employer of an employee to whom workmen's compensation has been paid, based upon the right of subrogation, for damages for alleged tort by the intestate which occasioned the paying of compensation, the administrator not having testified, the plaintiff may nevertheless introduce the employee as a witness; though the employee is not within the letter of this paragraph, he is within its purpose, its spirit, its equity. Travelers' Ins. Co. v. Foss, 124 Me. 399, 130 A. 210.

IV. In an action by or against an executor, administrator or other legal representative of a deceased person in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto.

History of paragraph.—See Berry v. Stevens, 69 Me. 290.

The phrase "other memoranda" means memoranda made by the deceased only; it does not include receipts given by the adverse party to the deceased in his lifetime. Cary v. Herrin, 59 Me. 361.

The mere handling of a paper to refresh the memory of a witness is not using it as evidence on either side so as to authorize the other party to testify in relation thereto. The books or memoranda must be used as specific pieces of evidence, and must be submitted to the court or jury as and for evidence. Folsom v. Chapman, 59 Me. 194.

It is "the other party" who may testify in relation to the account books or other memoranda of a deceased person, when offered in evidence by his representative, either as plaintiff or defendant. Berry v. Stevens, 69 Me. 290.

But "the other party" cannot be permitted to make himself a witness by offering a memorandum of the deceased. If he offers it, he must be content with its legal import and effect, unless he can explain it by the testimony of disinterested witnesses. Berry v. Stevens, 69 Me. 290.

This paragraph cannot be so construed as to permit the surviving party to put in a memorandum signed by the deceased, and then engraft upon it his own testimony to an independent substantive contract with the deceased, which not only does not appear in the memorandum, but is inconsistent with it. Berry v. Stevens, 69 Me. 290.

Statement held not memorandum justifying admission of other party's testimony.—A statement in a letter, "You have my husband's receipt it will be honored never fear," is not a memorandum of any promise to pay, and not such a memorandum as would justify the acceptance of a plaintiff claimant as a witness under the provisions of this paragraph. Bowler v. Merrill, 129 Me. 142, 150 A. 491.

Applied in Burleigh v. White, 64 Me. 23.

V. In actions where an executor, administrator or other legal representative is a party and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator or other legal representative.

The defendant, not being an heir of the deceased, was not made a competent witness by the fact that two heirs at law of the testatrix testified at the instance of the plaintiff, and his testimony was properly excluded. Hahn v. Dean, 108 Me. 555, 82 A. 204.

VI. In all actions brought by the executor, administrator or other legal representative of a deceased person, such representative party shall not be excused from testifying to any facts admissible upon general rules of evidence, happening before the death of such person, if so requested by the opposite party; but nothing herein shall be so construed as to enable the adverse party to testify against the objection of the plaintiff when the plaintiff does not voluntarily testify. (R. S. c. 100, § 120.)

The purpose of this paragraph is to enable "the opposite party," whether representative or adverse, to call the plaintiff as a witness, and at the same time inhibit the "adverse party" from claiming the right to testify as he might, had the plaintiff voluntarily taken the stand. Burrill v. Giles, 119 Me. 111, 109 A. 390.

"Adverse party" means living party.—"The adverse party," who is precluded from testifying by the last clause of this paragraph, unquestionably means the living party, whether plaintiff or defendant. Burrill v. Giles, 119 Me. 111, 109 A. 390.

"Opposite party" may be living or representative party.—The phrase "the opposite party" is broader than the phrase "the adverse party." "The opposite party" may be a living party, or a representative party, defendant; but "the adverse party" means only the living party. The last clause of this paragraph therefore applies only when the defendant is "the adverse party." Burrill v. Giles, 119 Me. 111, 109 A. 390.

The last clause of this paragraph applies only when defendant is "the adverse party." Burrill v. Giles, 119 Me. 111, 109 A. 390.

Representative who is "opposite party"

may testify.—This paragraph does not inhibit the representative party, when the opposite party, from claiming the right to testify. Burrill v. Giles, 119 Me. 111, 109 A. 390.

Sec. 120. Taking of testimony.—If in the trial of a civil case there is a conflict of oral testimony or the contents of a written statement are denied or controverted by the person involved therein, it is competent to show in testimony the interest or bias of the person testifying orally or the person preparing the written statement. (R. S. c. 100, § 121.)

Sec. 121. Insane party.—The rules of evidence which apply to actions by or against executors or administrators apply in actions where a person shown to the court to be insane is solely interested as a party. (R. S. c. 100, § 122.)

Sec. 122. Rules in special proceedings of civil nature.—The rules of evidence in special proceedings of a civil nature, such as before referees, auditors, county commissioners and courts of probate, are the same as herein provided for civil actions. (R. S. c. 100, § 123.)

Applied in Nash v. Reed, 46 Me. 168; Austin v. Dunham, 65 Me. 533; Preble v. Preble, 73 Me. 362.

Sec. 123. Witnesses summoned, neglecting to attend, in contempt; liable for damages.—When a person, summoned and obliged to attend before any judicial tribunal, fails to do so without reasonable excuse, he is liable to the party aggrieved for all damages sustained thereby. The judge or justice of such tribunal may issue a capias to apprehend and bring such delinquent before him, and he shall be punished by a fine of not more than $100 and costs of attachment, and committed until the same and costs are paid. (R. S. c. 100, § 124.)

Insufficient sum left as witness fee. — Where through some inadvertence or mistake, an insufficient sum of money was left as a witness fee for a prospective witness, she was not obliged to obey the subpoena, and she would not be liable for the damages sustained by reason of her failure to attend under this section because she had not been legally summoned. Pease v. Bamford, 96 Me. 23, 51 A. 234.

Sec. 124. Refusal to answer.—When a witness in court refuses to answer such questions as the court allows to be put, he shall be punished by a fine of not more than $100 or by imprisonment for not more than 3 months. (R. S. c. 100, § 125.)

Quoted in Call v. Pike, 68 Me. 217.

Stated in State v. Bragg, 141 Me. 157, 40 A. (2d) 1.

Sec. 125. Oaths. — A person to whom an oath is administered shall hold up his hand unless he believes that an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing any other than the Christian religion may be sworn according to the ceremonies of his religion. (R. S. c. 100, § 126.)

Sec. 126. Affirmation.—Persons conscientiously scrupulous of taking an oath may afirm as follows: "I affirm under the pains and penalties of perjury," which affirmation is of the same force and effect as an oath. (R. S. c. 100, § 127.)

Applied in State v. Adams, 78 Me. 486, 7 A. 267; State v. Welch, 79 Me. 99, 8 A. 348.

Sec. 127. Certain convictions affect credibility.—No person is incompetent to testify in any court or legal proceeding in consequence of having been convicted of an offense; but conviction of a felony, any larceny or any

other crime involving moral turpitude may be shown to affect his credibility. (R. S. c. 100, § 128. 1947, c. 265, § 1.)

Cross reference.—See note to c. 135, § 1, re testimony as to previous conviction of witness is material within meaning of perjury statute.

Origin of section.—This section had its origin in the outgrowth of the modern idea that the sources of evidence ought to be enlarged. State v. Watson, 63 Me. 128.

Section relates only to qualification and impeachment of witnesses.—This section relates only to the qualification as witnesses of persons who have been convicted of crime, and to the admission of evidence of their prior conviction of certain crimes for the purpose of affecting their credibility as witnesses. State v. McClay, 146 Me. 104, 78 A. (2d) 347.

It does not limit introduction of prior conviction for other purposes than impeachment.—The 1947 amendment to this section, which inserted the words "of a felony, any larceny, or any other crime involving moral turpitude," limited the number and class of crimes, the conviction of which could be used for the purpose of impeachment. As such it established a rule of evidence restricting the use of prior convictions for a single purpose, that of impeaching a witness. It neither purported to forbid, nor did it in any way limit the introduction of evidence of a prior conviction for other purposes when such evidence would be admissible on other issues properly involved in the case. Nor did it, even by implication, modify the rules of criminal pleading. State v. McClay, 146 Me. 104, 78 A. (2d) 347.

It removes disqualification of infamy.—This section removes all objection to the witness on the ground of infamy, by reason of a conviction for a criminal offense. State v. Jones, 51 Me. 125.

Deposition of convicted murderer is legal testimony.—The deposition of a person, taken while he is under sentence of death, having been convicted of murder, is made legal testimony by this section. Woodman v. Churchill, 51 Me. 112.

Where defendant has offered himself as a witness, the state may impeach him in that character by presenting the record of his conviction of a felony, although he has offered no testimony to his good character. Such evidence may not be offered or used for any other purpose except to affect defendant's credibility as a witness, but for that purpose it is competent, made so by this section. State v. Watson, 65 Me. 74.

Only conviction for felony, larceny or crime involving moral turpitude may be shown.—By the 1947 amendment to this section the legislature plainly intended that only convictions for a felony, for any larceny, or for a crime involving "moral turpitude," can be shown to affect credibility. Convictions for offenses which are not larcenies or felonies or do not involve "moral turpitude" cannot be shown. State v. Jenness, 143 Me. 380, 62 A. (2d) 867. See State v. Hume, 145 Me. 5, 70 A. (2d) 543.

It is well recognized that moral turpitude cannot be exactly defined by a rule to fit all cases. It may or may not be said to exist, depending on the facts, conditions and circumstances. The record of a conviction does not show moral turpitude when the offense is such that a majority of good citizens would not so consider it, even though other good citizens, with minority ideas of reform, might positively affirm its existence. State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

"Moral turpitude" implies something immoral in itself, regardless of its being punishable by the law. It is an act of baseness, vileness, or depravity in the private or social duties which man owes to his fellowmen or to society in general, contrary to the customary rule of right and duty between man and man. It is something done contrary to justice, honesty, modesty and good morals. The word "moral" in the phrase "moral turpitude" seems to be nothing more than emphasis on the word "turpitude." State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

And has been defined as "inherent baseness or vileness of principle"; "the quality of a crime involving grave infringement of the moral sentiment as distinguished from mala prohibita." State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

Generally speaking, crimes malum in se involve moral turpitude, while most offenses that are unlawful only because made so by statute do not. State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

Driving an automobile while intoxicated involves moral turpitude, but not the driving when merely under the influence of liquor. State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

Illegal sale or possession of liquor does not.—Illegal sales, and possession for illegal sales of intoxicating liquors, do not involve moral turpitude. State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

Question relating to conspiracy admissible.—A question asked by the prosecuting attorney relating to conspiracy was

admissible, because a felony. State v. Jenness, 143 Me. 380, 62 A. (2d) 867.

Question as to previous convictions held improper.—Where a witness was asked whether she had been "convicted of a criminal offense," and the answer "Yes" was given after express admonition by the trial court that it must be answered categorically, the ruling of the trial court overruling an objection to the question was erroneous. State v. Hume, 145 Me. 5, 70 A. (2d) 543.

It matters not whether the guilt of the accused has been established by plea or by verdict of guilty. When no issue either of law or of fact remains to be determined, and there is nothing to be done except to pass sentence, the respondent has been convicted, and the record of that conviction, or the docket entries where no extended record has been made, are admissible against him to prove such conviction. State v. Knowles, 98 Me. 429, 57 A. 588; State v. Herlihy, 102 Me. 310, 66 A. 643.

The plea of nolo contendere is an implied confession of the offense charged, and the judgment of conviction follows that plea as well as the plea of guilty. Hence records showing an indictment against respondent, his plea of nolo contendere, and his sentence by the court were admissible for the purposes of affecting the credibility of the respondent who had become a witness in his own behalf. State v. Herlihy, 102 Me. 310, 66 A. 643.

Sec. 128. Fees of witnesses.—Witnesses in the supreme judicial court or the superior court or in the probate courts and before a trial justice or a municipal court shall receive $2, and before referees, auditors or commissioners specially appointed to take testimony or special commissioners on disputed claims appointed by probate courts, $1.50, or before the county commissioners $1 for each day's attendance and 6¢ a mile for each mile's travel going and returning home; but the court in its discretion may allow at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court, a sum not exceeding $25 per day for the attendance of any expert witness or witnesses at said trial, in taxing the costs of the prevailing party, except that the expense of all expert witnesses for the state in murder cases shall be in such amounts as the presiding justice shall allow and shall be paid by the state and charged against the appropriation for the department of the attorney general; but such party or his attorney of record shall first file an affidavit during the term at which such trial is held and before the cause is settled, stating the name, residence, number of days in attendance and the actual amount paid or to be paid each expert witness in attendance at such trial. No more than $2 per day shall be allowed or taxed by the clerk of courts in the costs of any suit for the per diem attendance of a witness, unless the affidavit herein provided is filed, and the per diem is determined and allowed by the presiding justice. (R. S. c. 100, § 129. 1947, c. 20.)

In the absence of statute, expert witness fees cannot be allowed to the prevailing party and included in his taxable costs. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

And under this statute, if expert witness fees are taxable, they can be taxed only in the "costs of the prevailing party." Goodridge, Appellant, 137 Me. 13, 14 A. (2d) 501.

They are allowed only in trials before superior court and supreme judicial court.—The only authority for the allowance of expert witness fees is when an expert testifies "at the trial of any cause, civil or criminal, in said supreme judicial court or the superior court." Goodridge, Appellant, 137 Me. 13, 14 A. (2d) 501; Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Clerk cannot include such fees in taxable costs until allowed by justice.—In no case can expert witness fees be included by the clerk in the taxable costs of the prevailing party until after they have been determined and allowed by the presiding justice. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

This statute does not permit a construction giving authority for the allowance of expert witness fees in the probate court, either original or appellate. Goodridge, Appellant, 137 Me. 13, 14 A. (2d) 501.

A hearing before referees, under a rule of reference issued out of the superior court, is not a trial in the superior court, within the meaning of this statute, so far as the provision relative to expert witness fees is concerned. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Former provision of section.—For a case relating to fees of expert witnesses prior to the enactment of that part of this section which provides for fees of such witnesses, see Gordon v. Conley, 107 Me. 286, 78 A. 365.

Sec. 129. Fees of police officer or constable.—No police officer or constable paid a salary or paid upon a per diem basis by a city, town or plantation shall receive any fee as a complainant or witness, or for making an arrest or for attendance at court but shall be reimbursed by such city, town or plantation for his actual costs of arrest and actual expenses of travel and attendance. Whenever any fines or penalties are imposed by any court in any proceeding in which such a police officer or constable is a complainant or a witness, said court may tax costs for such complainant or witness in the usual manner to be paid by the county treasurer upon approval of the county commissioners to the municipality employing such police officer or constable. (1947, c. 290, § 1. 1949, c. 349, § 129. 1951, c. 232.)

Sec. 130. Not obliged to attend court unless fees paid or tendered.—No person is obliged to attend any court as a witness in a civil suit or at any place to have his deposition taken unless his legal fees for travel to and from the place and for 1 day's attendance are first paid or tendered; and his fees for each subsequent day's attendance must be paid at the close of the preceding day if he requests it. (R. S. c. 100, § 130.)

Sec. 131. Signature proved.—The signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested. (R. S. c. 100, § 131.)

Sec. 132. Affidavit of plaintiff prima facie evidence.—In all actions brought on an itemized account annexed to the writ, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the suit with all proper credits given and that the prices or items charged therein are just and reasonable shall be prima facie evidence of the truth of the statement made in such affidavit and shall entitle the plaintiff to the judgment unless rebutted by competent and sufficient evidence. When the plaintiff is a corporation, the affidavit may be made by its president, secretary or treasurer. If the said affidavit be made without the state before a notary public using a seal, a certificate of a clerk of a court of record or by a deputy or assistant clerk of the same with the seal of said court attached thereto stating that said notary public is duly authorized to act as such and to administer oaths shall be prima facie evidence of the authority of said notary public to act and to administer an oath and that the signature of said notary affixed thereto is genuine. (R. S. c. 100, § 132.)

This section violates no constitutional provision. Fishing Gazette Publishing Co. v. Beale & Gannett Co., 124 Me. 278, 127 A. 904.

This statute is in derogation of the common law and should be strictly construed. There should be no attempt to extend its terms or plain intent by judicial legislation. Hamilton Brown Shoe Co. v. McCurdy, 124 Me. 111, 126 A. 377; Sawyer v. Hillgrove, 128 Me. 230, 146 A. 705; Penley v. Edwards, 129 Me. 156, 150 A. 535.

The affidavit, if properly admissible, constitutes part of the evidence and should follow the pleadings. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

Whether the affidavit is admissible is a question for the court. If admissible, probative force would be for the jury. Dyar Sales & Machinery Co. v. Mininni, 132 Me. 79, 166 A. 620.

It must be "made before a notary public using a seal."—This method of proof is wholly statutory. The use of affidavits as evidence on which to base a final judgment is not permitted in this state in actions at law unless by virtue of some statute. Only the affidavits, therefore, described by this section, and made before the magistrate therein named, i. e., "a notary public using a seal," can be received and have the probative force given to it by the statute. Fishing Gazette Publishing Co. v. Beale & Gannett Co., 124 Me. 278, 127 A. 904.

Affidavits made without the state must be properly authenticated.—Affidavits made outside Maine, for use in Maine, are not receivable in evidence unless there be authentication of the signature of the attesting officers. The statute provides the exclusive method. Dyar Sales & Machinery

Co. v. Mininni, 132 Me. 79, 166 A. 620, decided under an earlier form of this section requiring a court clerk to certify the genuineness of the signature of an out-of-state notary.

Authorization of signature of out-of-state notary under earlier form of section.—See Dyar Sales & Machinery Co. v. Mininni, 132 Me. 79, 166 A. 620.

Nature of the affidavit.—What the affiant swears is that the account correctly states the debits, and that, all credits deducted, the balance there shown is due and unpaid. The oath supports the account as it appears, in completeness, in the writ. That oath never was intended to support an amended account, asserting a different debt situation. Dyar Sales & Machinery Co. v. Mininni, 132 Me. 79, 166 A. 620.

The affidavit differs from deposition and requires strict compliance with section.—An ex parte affidavit differs from a deposition in that the adverse party does not have notice or opportunity to cross examine. To raise such an affidavit to the plane of evidence, strict compliance with legislative prescription is indispensable. Dyar Sales & Machinery Co. v. Mininni, 132 Me. 79, 166 A. 620.

This statute prescribes a rule of evidence; it puts itemized accounts into an evidential class of their own, without creating a change in the substantive law. Mugerdichian v. Goudalion, 134 Me. 290, 186 A. 611.

This section enables a plaintiff to make out a prima facie case without submitting himself to cross examination. Sawyer v. Hillgrove, 128 Me. 230, 146 A. 705.

The affidavit is prima facie evidence; it is sufficient to raise a presumption of fact, or establish the fact in question unless rebutted. Mugerdichian v. Goudalion, 134 Me. 290, 186 A. 611; Winters v. Smith, 148 Me. 273, 91 A. (2d) 920.

A plaintiff, on the trial of his action of assumpsit on account annexed to recover money loaned, by the introduction, in conformity with this section, of his own verifying affidavit, absent objection, with no proof independent, makes out a case, which could properly be found to entitle him to a recovery. Mugerdichian v. Goudalion, 134 Me. 290, 186 A. 611.

But affidavit does not compel jury to accept all charges as correct.—The fact that there was an affidavit filed in the case does not compel a jury to accept as truth that any or all the charges for labor or materials are correct. The jury has the right to determine, under all the circumstances, whether the prices charged were "just and reasonable" and whether the affidavit was correct when it stated that the account is "a true statement of the indebtedness." Winters v. Smith, 148 Me. 273, 91 A. (2d) 920.

Meaning of "itemized account." — An "itemized account" is a detailed statement of items of debt and credit arising on the score of a contract. "Itemized" requires specific statement. Mugerdichian v. Goudalion, 134 Me. 290, 186 A. 611.

The word "itemized" in this section exacts specific narration. A general charge, such as "repairs as ordered" is too indefinite. Dyar Sales & Machinery Co. v. Mininni, 132 Me. 79, 166 A. 620.

The primary idea of the word "account" is some matter of debt and credit, or demand in the nature of debt and credit, between parties. The term implies that one is responsible to another for moneys or other things. Mugerdichian v. Goudalion, 134 Me. 290, 186 A. 611.

Section facilitates procedure in collection of accounts.—This section applies only to actions brought on an itemized account. It relates to a statement of the indebtedness existing between the parties to the suit. It may be appropriately called a statute to facilitate procedure in collection of accounts in actions of assumpsit. Hamilton Brown Shoe Co. v. McCurdy, 124 Me. 111, 126 A. 377; Sawyer v. Hillgrove, 128 Me. 230, 146 A. 705; Penley v. Edwards, 129 Me. 156, 150 A. 535.

It does not comprehend action against guarantor on account against nonparty. — This section does not apply to an action brought to determine and enforce liability of a guarantor, where the account which appears in the case is against one who is not a party to the suit, as the terms of the statute provide. Hamilton Brown Shoe Co. v. McCurdy, 124 Me. 111, 126 A. 377.

Affidavit limited to cases where plaintiff competent witness under §§ 114 and 119.—When the legislature enacted the provisions for plaintiff's affidavit in 1913, the plain intention of the lawmaking body was to limit the use of such affidavit to cases in which the plaintiff would be a competent witness under the provisions of §§ 114 and 119. Haswell v. Walker, 117 Me. 427, 104 A. 810.

And the affidavit is not admissible in evidence under § 119, in a case where the defendant is administrator or executor. Haswell v. Walker, 117 Me. 427, 104 A. 810.

Representative party not barred from testifying by use of affidavit.—Where the representative party seeks to testify by use of the affidavit provided by statute, the rule relating to testimony which may be given in suits by or against executors and administrators is not a bar to his right to

speak. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

The probative effect of the affidavit referred to in this section must always be considered, even though it is declared by statute to be prima facie evidence. Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

While the language of this statute is mandatory as to the effect and sufficiency of such affidavits as evidence, its probative force must still be for the jury, or the tribunal determining the facts. Fishing Gazette Publishing Co. v. Beale & Gannett Co., 124 Me. 278, 127 A. 904.

Probative effect of affidavit of administrator having no personal knowledge of transaction.—See Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

Account sued on held to be mutual, open and current, and so within this section. Pride v. King, 133 Me. 378, 178 A. 716.

Account for labor and materials held properly itemized and meeting the requirements of this statute, under which plaintiff justified his account. See Jones v. Berry, 140 Me. 311, 37 A. (2d) 745.

Section held inapplicable to action of assumpsit by beneficiary against trustee to obtain payment of balance of trust fund provided in will. See Penley v. Edwards, 129 Me. 156, 150 A. 535.

Exceptions and objections to referees' findings.—See Staples v. Littlefield, 132 Me. 91, 167 A. 171.

Applied in Benner v. Benner, 120 Me. 468, 115 A. 202; Diplock v. Blasi, 128 Me. 528, 149 A. 149; Burnham v. Hecker, 139 Me. 327, 30 A. (2d) 801.

Sec. 133. Accounts not inadmissible because hearsay or self-serving.—An entry in an account kept in a book or by a card system or by any other system of keeping accounts shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid. The court in its discretion, before admitting such entry in evidence, may, to such extent as it deems practicable or desirable but to no greater extent than the law required before June 30, 1933, require the party offering the same to produce and offer in evidence the original entry, writing, document or account from which the entry offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the entry offered or the original or any other entry, writing, document or account from which the entry offered or the facts therein stated were transcribed or taken or who has personal knowledge of the facts stated in the entry offered. (R. S. c. 100, § 133.)

By this section the legislature intended to render a rule of proof, the "shop book rule," less difficult. Hunter v. Totman, 146 Me. 259, 80 A. (2d) 401.

Entries not fairly considered an "account," not admissible—with exceptions.—This section does not apply to entries in a book, or entries in a card or other system, which are simply memoranda made for the convenience or purposes of the one who made them. Entries that cannot fairly be considered as an "account" are not admissible in evidence, except as have been previously permitted under certain circumstances to refresh recollection, or as statements against interest, without supporting proof from those who had personal knowledge of the facts. Hunter v. Totman, 146 Me. 259, 80 A. (2d) 401.

A notebook or inventory of the number of barrels of potatoes in a field, or the number delivered to a potato house, kept by a person who had no personal knowledge, from slips or "tickets," not being an account and not showing a charge or a credit, is not admissible in evidence under this section, without proof by the person or persons who had the actual knowledge. Hunter v. Totman, 146 Me. 259, 80 A. (2d) 401.

When entries made on information from third parties admissible.—The law, "before June 30, 1933," as referred to in this section, is that in order to render account books admissible, where the entries were made on information given to the bookkeeper by third parties, it must be shown that (1) the informant is dead or insane, or (2) the informant is beyond the jurisdiction, or (3) the informant is unable to attend court. Mansfield v. Gushee, 120 Me. 333, 114 A. 296; Hunter v. Totman, 146 Me. 259, 80 A. (2d) 401.

Cited in Richardson v. Lalumiere, 134 Me. 224, 184 A. 392.

Sec. 134. Records of other courts evidence.—The records and proceedings of any court of the United States or of any state, authenticated by the

attestation of the clerk or officer having charge thereof and by the seal of such court, are evidence. (R. S. c. 100, § 134.)

Stated in Reed v. Stevens, 120 Me. 290, 113 A. 712.

Sec. 135. Judicial notice.—Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States. (R. S. c. 100, § 135.)

This state has adopted the Uniform Judicial Notice of Foreign Law Act, §§ 135-140 of this chapter. This is supplemented by § 141 of this chapter. Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

Purpose thereof.—The purpose of the Judicial Notice Act was undoubtedly to simplify the method of properly bringing to the consideration of the court applicable principles of foreign law, and to leave its determination to the court instead of the jury. Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

Presumption that common law of other states same as that of Maine continues.—At common law, in the absence of proof to the contrary, there is a presumption that the common law of another state is the same as that of Maine, the forum. Even though the statute provides that the court shall take judicial notice of the law of other states, this presumption with respect to the common law continues, and will prevail unless overcome by evidence or by pertinent decisions or statutes called to or coming to the attention of the court. Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

And the court is not required to take judicial notice of the law of another state, except as it is brought to the court's attention by the record or the briefs. Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

§§ 135-141 applied in Morneault v. Boston & Maine R. R., 144 Me. 300, 68 A. (2d) 260.

Sec. 136. Information of court.—The court may inform itself of such laws in such manner as it may deem proper and the court may call upon counsel to aid it in obtaining such information. (R. S. c. 100, § 136.)

Cross reference.—See note to § 135.

Court not bound to inform itself of foreign law, though it has authority so to do.—Unless pertinent decisions or statutes of foreign jurisdictions are called to the court's attention either in the record or in the briefs, and if no evidence as to the foreign law is offered, as permitted both by the common law or by §§ 138 and 141, it is not the duty of the court to inform itself thereof, suo moto. This does not mean that the court has no authority to do so. This section confers such authority upon the court. The foregoing construction of the statute is fortified by the further provision of this section authorizing the court to "call upon counsel to aid it in obtaining such information." Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

Sec. 137. Ruling reviewable.—The determination of such laws shall be made by the court and not by the jury and shall be reviewable. (R. S. c. 100, § 137.)

See note to § 135.

Sec. 138. Evidence as to laws of other jurisdictions.—Any party may also present to the trial court any admissible evidence of such laws, but to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties, if any, either in the pleadings or otherwise. (R. S. c. 100, § 138.)

See note to §§ 135, 136.

Sec. 139. Foreign country.—The law of a jurisdiction other than those referred to in section 135 shall be an issue for the court but shall not be subject to the provisions of sections 135 to 138, inclusive, concerning judicial notice. (R. S. c. 100, § 139.)

See note to § 135.

Sec. 140. Interpretation of §§ 135-140; title.—The provisions of sections 135 to 140, inclusive, shall be so interpreted and construed as to effectuate

their general purpose to make uniform the law of those states which enact them and may be cited as the "Uniform Judicial Notice of Foreign Law Act." (R. S. c. 100, § 140.)

See note to § 135.

Sec. 141. Foreign laws and unwritten laws of the states, how proved.—Foreign laws may be proved by parol evidence, but when such law appears to be existing in a written statute or code, it may be rejected unless accompanied by a copy thereof. The unwritten law of any other state or territory of the United States may be proved by parol evidence and by books of reports of cases adjudged in their courts.

Reference to the citation of such cases shall be deemed to incorporate them in the record. The determination of such law shall be for the court on all the evidence. (R. S. c. 100, § 141.)

Cross references.—See notes to §§ 135, 136.

Stated in Reed v. Stevens, 120 Me. 290, 113 A. 712.

Sec. 142. Attested copies of deeds admissible.—In all actions touching the realty or in which the title to real estate is material to the issue, and where original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence without proof of their execution when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs. (R. S. c. 100, § 142.)

This statute limits the admissibility of office copies of deeds to cases where original deeds would be admissible. Hudson v. Webber, 104 Me. 429, 72 A. 184.

Office copy of unacknowledged deed not admissible.—Since an original deed, unacknowledged, or without proper acknowledgment, is invalid and inadmissible except as against the grantor and his heirs, an office copy of the same is not admissible. Hudson v. Webber, 104 Me. 429, 72 A. 184.

Copy of deed prima facie evidence in favor of one other than grantee.—Independently of rules of court, the certified copy of a deed duly recorded is prima facie evidence, when the party producing it is not the grantee. And the original deed is admissible without proof of execution in the same manner as the copy would be. Hatch v. Bates, 54 Me. 136.

Presumption arises that grantor had seizin enabling him to convey.—An office copy being prima facie evidence, there is no necessity of calling the attesting witness. It raises a presumption that the grantor had sufficient seizin to enable him to convey, and operates to vest the legal seizin in the grantee. Webster v. Calden, 55 Me. 165.

And presumption of execution and delivery arises.—The production of an office copy of a deed, in the absence of any circumstances tending to remove the presumption arising therefrom, is prima facie evidence not only of the execution, but also of the delivery of the deed. Egan v. Horrigan, 96 Me. 46, 51 A. 246; Holman v. Lewis, 107 Me. 28, 76 A. 956.

Which is rebuttable.—The certified copy is prima facie evidence of the original and its execution, subject to be controlled by rebutting evidence. Webster v. Calden, 55 Me. 165.

And if rebutted, further proof of execution required.—When an office copy of a deed from the registry is read in evidence in a real action, a presumption of its execution and delivery arises; but when this presumption is rebutted by evidence, then further proof of execution must be made, or it fails to serve as proof of a conveyance. Flynn v. Sullivan, 91 Me. 355, 40 A. 136.

Copy must appear to be properly acknowledged.—Whether the deed was properly acknowledged, not only in form, but before a magistrate having jurisdiction, must appear upon the copy itself, when an office copy is offered. Hudson v. Webber, 104 Me. 429, 72 A. 184.

And record must show deed sealed. — The record, to be effectual as evidence of the conveyance of the legal title to the property mentioned in it, must in some manner represent that the instrument was sealed. Hudson v. Webber, 104 Me. 429, 72 A. 184.

An office copy of a deed recorded in another registry than that in which the land is situated is not admissible. Jewett v. Persons Unknown, 61 Me. 408.

Office copies of deeds given by the land agents of Maine and Massachusetts admitted under the provisions and limitations of this section. See Jewett v. Persons Unknown, 61 Me. 408.

But this section only applies to anterior

deeds, and expressly excludes from its operation the deed to the party himself. Webber v. Stratton, 89 Me. 379, 36 A. 614.

This statute, authorizing the use of records and copies of records of deeds as evidence of the existence, execution and delivery of originals, only applies to deeds prior to that in which the party is the grantee or heir of a grantee. McCleery v. Lewis, 104 Me. 33, 70 A. 540.

Office copies and originals to party not admissible without proof of execution.— The legislature seems to have carefully guarded against any inference that without this statute the originals of deeds to a party, though acknowledged and recorded, would be admissible without proof of execution. Office copies and originals of anterior deeds duly acknowledged and recorded are by the statute made admissible "without proof of execution." The inference would seem to be that acknowledged and recorded deeds to the party, being without the statute, are not to be admitted without proof of execution. Webber v. Stratton, 89 Me. 379, 36 A. 614.

By the settled law of this state neither the copy of the record nor the record itself is admissible evidence to prove the existence of an original, the plaintiff being a grantee in the supposed deed. McCleery v. Lewis, 104 Me. 33, 70 A. 540.

And heirs of grantees cannot introduce copies without proving execution. — The legislature has signified its sense of the importance of the production of original deeds where the title to real estate is in controversy, by making the admission of office copies the subject of special statute provision, by which the heirs of grantees are in effect precluded from the use of copies without proof of the execution of the original deed. Elwell v. Cunningham, 74 Me. 127; Egan v. Harrigan, 96 Me. 46, 51 A. 246.

And exhaustion of means to produce original.—To lay the foundation for the introduction of an office copy, instead of the original deed under which he claims, by the heir of the grantee in a suit for the land, it is incumbent on such heir to prove the execution and genuineness of the deed which he claims is lost, and also to show that he has exhausted his apparent means to produce the original. Elwell v. Cunningham, 74 Me. 127; Egan v. Harrigan, 96 Me. 46, 51 A. 246.

But grantees of such heirs may introduce copies without proving execution.—While this section does not permit the grantee of a deed, or one claiming as heir of the grantee, or justifying as servant of the grantee or his heirs, to introduce in evidence an attested copy from the registry of deeds instead of the original deed, yet it does allow a grantee from such heir to introduce such office copy in his own behalf, though in a previous suit the heir to recover the same land was not permitted to introduce the office copy, and conveyed his interest to the grantee, his attorney in that suit, and then became voluntarily nonsuit, it not appearing that the conveyance was not made in good faith and with intent actually to pass the title. Holman v. Lewis, 107 Me. 28, 76 A. 956.

Sufficiency of acknowledgment. — See Hudson v. Webber, 104 Me. 429, 72 A. 184.

Sec. 143. Certain copied records of deeds admissible.—Copies made from any portion of either of the volumes of the early records in the York county registry of deeds published by the authority of the legislature and placed in each registry, when attested by any register of deeds having lawful custody of such printed volume, also records duplicated from originals or from copies of originals in any registry of deeds and filed in such registry of deeds or in any other registry of deeds by authority of law and copies made from such records when attested by the register of deeds of the county or district where such records are filed, may be used in evidence like attested copies of the original records. (R. S. c. 100, § 143.)

Sec. 144. Copies of public records made by photographic process; admissibility.—Copies made by photographic process from public records shall be received as evidence in the courts of this state under existing laws if duly attested by the officials required by law to keep said records. (R. S. c. 100, § 144.)

Sec. 145. Photostatic, photographic copy of records, etc., authorized.—Whenever any officer or employee of the state or of any county, city or town is required or authorized by law, or otherwise, to record or copy any document, plat, paper or instrument in writing, he may do such recording or copying by any photostatic, photographic or other mechanical process which

produces a clear, accurate and permanent copy or reproduction of the original document, plat, paper or instrument in writing. (R. S. c. 100, § 145.)

Sec. 146. Photostatic, photographic copies and records admissible.—Copies and records produced by any photostatic, photographic, microfilm or other mechanical process which produces a clear, accurate and permanent copy or reproduction thereof shall have the same effect as the originals from which they are copies, and copies thereof and therefrom shall be admissible in evidence in any court or at any hearing provided for by law in this state, in like manner, under like conditions and with like effect as if they were copies from the originals. (R. S. c. 100, § 146.)

Sec. 147. Copies of consular and customhouse documents and records are evidence.—Copies of papers and documents belonging to, or filed or remaining in the office of any consul, vice-consul or commercial agent of the United States and of official entries in the books or records of such office, when certified under the hand and official seal of the proper consul, vice-consul or commercial agent are evidence. Copies of registers or enrollments of vessels, or of any other customhouse records or documents deposited in the office of the collector of customs, attested by him or his deputy, under seal of office, may be used in evidence and shall have the same effect as the production of the records in court, verified by the recording officer in person. (R. S. c. 100, § 147.)

Sec. 148. Adjutant general's certificate as evidence.—The certificate of the adjutant general relating to the enlistment of any person from this state in the United States' service and of all facts pertaining to the situation of such person, to the time of and including his discharge, as found upon the records of his office, are prima facie evidence of the facts so certified in any suit or proceeding. (R. S. c. 100, § 148.)

This section does not supersede the use of officially printed copies of the records in the adjutant general's office as evidence. This section does not specify any mode of making or proving copies of such papers. It does not require that all copies used in evidence shall be certified by the adjutant general. It only provides that certain particular facts may be certified by the adjutant general as found upon the records, without the whole record being copied. There is no prohibition against using a full copy if a party desires it. Milford v. Greenbush, 77 Me. 330.

Applied in Hemmingway v. Grafton, 70 Me. 392.

Cited in Atwood v. Winterport, 60 Me. 250.

Sec. 149. Authentication of copy.—An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. (R. S. c. 100, § 149.)

Sec. 150. Proof of lack of record.—A written statement signed by an officer having the custody of an official record, or by his deputy, that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as provided in the preceding section,

is admissible as evidence that the records of his office contain no such record or entry. (R. S. c. 100, § 150.)

Sec. 151. Other proof.—The provisions of the 2 preceding sections shall not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute, or by the rules of evidence at common law. (R. S. c. 100, § 151.)

Sec. 152. Testimony of a deceased subscribing witness or magistrate given in subsequent suit.—When the testimony of a subscribing witness to a deed or of the magistrate who took the acknowledgment thereof has been taken in the trial of any civil cause in relation to the execution, delivery or registry of such deed, and such witness has since died, proof of such former testimony is admissible in the trial of any other civil cause involving the same question if the parties are the same or if one of the parties is the same and the adverse party acted as agent or attorney for the adverse party in the former suit; but such testimony may be impeached like the testimony of a living witness. (R. S. c. 100, § 152.)

Sec. 153. Writings dated on Sunday.—No deed, contract, receipt or other instrument in writing is void because dated on the Lord's Day without other proof than the date of its having been made and delivered on that day. (R. S. c. 100, § 153.)

Cited in First Nat. Bank of Bar Harbor v. Kingsley, 84 Me. 111, 24 A. 794.

Sec. 154. Defendant must restore consideration; actions for injury received on Lord's Day.—No person who receives a valuable consideration for a contract, express or implied, made on the Lord's Day shall defend any action upon such contract on the ground that it was so made until he restores such consideration; nor shall the provisions of chapter 134 relating to the observance of the Lord's Day affect in any way the rights or remedy of either party in any action for a tort or injury suffered on that day. (R. S. c. 100, § 154.)

History of section.—See Bridges v. Bridges, 93 Me. 557, 45 A. 827.

This law was enacted for the public protection, treating parties fairly, alike. Wentworth v. Woodside 79 Me. 156, 8 A. 763.

This section is broad and remedial and should be liberally construed, to prevent fraud or injustice. Wentworth v. Woodside, 79 Me. 156, 8 A. 763.

The object of this section is to compel a defendant to a Sunday contract to do equity. The section is imperative, plain, and comprehensive. First Nat. Bank of Bar Harbor v. Kingsley, 84 Me. 111, 24 A. 794.

Section unconditionally requires restoration of consideration in order to defend.—This statute is exacting—unconditional. It matters not that the defendant cannot restore the consideration, or profitably or safely restore it. If he does not in fact restore he cannot defend. There may be many cases where a defendant cannot restore the consideration received. It may have passed into other hands, or gone into other form, or been consumed or lost. And cases may often arise where a defendant is unwilling to take the risk to restore. But for all such cases was the statutory requirement intended. Wentworth v. Woodside, 79 Me. 156, 8 A. 763.

And defendant cannot avoid section by showing note sued on held through intervening indorser.—A defendant cannot shield himself against the provisions of this section requiring restoration of the consideration received by him before interposing a defense, by the fact that his indorsement and delivery of the notes sued on were not to the plaintiff, but to an intermediate party who also indorsed and delivered them to the plaintiff. The law among other things presumes an indorsement of negotiable paper to be for value. If that value has not been restored, a defense cannot be allowed. First Nat. Bank of Bar Harbor v. Kingsley, 84 Me. 111, 24 A. 794.

Nor by demurrer failing to show consideration restored.—The defendant cannot, under this section, defend an action based on the promise of his intestate, alleged to have been made on the Lord's

Day, by a demurrer which, admitting the facts set forth in the declaration, fails to show that the consideration received by the intestate has been restored. Baxter v. Macgowan, 132 Me. 83, 167 A. 77.

Tender of consideration held to rescind contract and for defense.—Where the defendant sold a horse on Sunday with warranty to the plaintiff who tendered a return of it, which was refused, it was held that the tender rescinded the contract and the purchase money became the plaintiff's, and the defendant cannot resist its return because of the Sunday law. The same result would follow in an action upon the contract for breach of warranty. Bridges v. Bridges, 93 Me. 557, 45 A. 827.

Action for labor performed on Sunday not within section.—An action to recover for labor performed on Sunday, in violation of the Lord's Day statute, does not come within the exception of this section, which applies to contracts express or implied made upon the Lord's Day. In such an action the objection is not to the time of making the contract, but concerns the actual performance of labor which was forbidden by statute. Carson v. Calhoun, 101 Me. 456, 64 A. 838.

Nor is action in assumpsit or case for breach of warranty. — It matters not whether the plaintiff's action is assumpsit for breach of an implied warranty to furnish suitable goods, or case for negligence in not so doing. In either case, the action would be for an "injury suffered" on Sunday, and this the section expressly excepts from the operation of the Sunday statute. Bridges v. Bridges, 93 Me. 557, 45 A. 827.

Section retroactive.—See Berry v. Clary, 77 Me. 482, 1 A. 360.

Cited in Dyer v. Belfast, 88 Me. 140, 33 A. 790; McCarthy v. Leeds, 116 Me. 275, 101 A. 448.

Costs.

The word "costs" in this chapter relates to costs as established by the statutes of this state, and as taxed under its provisions. It has no relation to costs existing under other jurisdictions, and which are to be taxed and allowed by the judicial tribunals of other governments. Folan v. Lary, 60 Me. 545.

Sec. 155. Costs for party prevailing.—In all actions, the party prevailing recovers costs unless otherwise specially provided. If, after a verdict, the party in whose favor the jury found carries the case into the law court and the decision there is against him, he recovers no costs after the verdict but the party prevailing in the law court recovers costs accruing after verdict. (R. S. c. 100, § 155.)

I. General Consideration.

II. Who Is "Party Prevailing."

Cross References.

See § 87, re costs in setoff; c. 123, § 15, and note, re costs in actions of review; c. 129, § 4, and note, re costs when judgment reversed on writ of error.

I. GENERAL CONSIDERATION.

Costs defined. — "Costs" to which parties are entitled in civil actions, is a legal term implying an amount derived from items to be regularly taxed and allowed to be due to the party by the judgment of the court. Norris v. Hall, 18 Me. 332.

Costs are regulated wholly by statute, none being allowed by the common law, eo nomine. Mudgett v. Emery, 38 Me. 255.

Laws in force, when judgment is rendered, control.—The costs in an action are controlled by the laws in force when the judgment is rendered, and not by those in force when the action was commenced. Ellis v. Whittier, 37 Me. 548.

The general rule is that the party prevailing shall recover costs. This rule obtains except where, by some special enactment, a different one is established. Estes v. White, 61 Me. 22.

Although he does not prevail to the full extent of his claim.—In actions at law, costs and the recovery thereof are regulated by express statutory provisions, the prevailing party being entitled thereto, when not otherwise specially provided, although he does not prevail to the full extent of his claim. Stilson v. Leeman, 75 Me. 412.

This general provision is to control in all cases, except when limited or restricted by some other statute. Ellis v. Whittier, 37 Me. 548.

But the parties may waive this statute. Robinson v. Chase, 115 Me. 165, 98 A. 483.

And do so by agreeing to reference.— The settled practice gives to a referee the authority to determine the question of

costs. By agreeing to the reference the party submits to that authority, and waives his statutory right. Robinson v. Chase, 115 Me. 165, 98 A. 483.

A petition for a review is not an action within the meaning of this section. Hopkins v. Benson, 21 Me. 399. See § 163, re costs on petition for review.

Nor is a petition for partition.—A petition for partition is not an action within the meaning of this section. Costs are allowable only as provided in the statute regulating the proceedings in partition. Counce v. Persons Unknown, 76 Me. 548.

In equity costs are in discretion of court.—In suits in equity the whole subject of costs rests in the sound discretion of the court. Stilson v. Leeman, 75 Me. 412.

This section does not apply to a controversy between the plaintiff in a trustee action and a claimant of the fund trusteed. Costs in such a matter may be awarded as in equity; it is substantially an equitable proceeding. White v. Kilgore, 78 Me. 323, 5 A. 70.

Costs are awarded against party who does not prevail. — The necessary implication is that costs must be awarded against the party who does not prevail, and this, by the uniform practice of our courts, is the adverse party upon the record. Freeman v. Cram, 13 Me. 255.

A prochein ami is not a party to the suit in such a sense as to make him responsible for costs. Leavitt v. Bangor, 41 Me. 458.

Persons resisting commissioners' return in partition proceedings. — In a petition for partition, where commissioners are appointed upon a default, and make a return, which is resisted by a written motion, this proceeding does not make those who file the motion parties or subject them to costs. Moore v. Mann, 29 Me. 559.

The equitable assignee of a chose in action, who took the assignment during the pendency of a suit thereon, and who afterwards, without any knowledge that the suit was groundless, prosecuted it for his own benefit, but failed to recover, is not liable to the defendant for taxable costs or other expenses incurred in the defense. Freeman v. Cram, 13 Me. 255.

Costs are to be ascertained by the order or judgment of the court before which the action is pending. Freeman v. Cram, 13 Me. 255.

Record should show judgment for costs.—While the decision in a case at law is the act of the court, the judgment following the decision is the act of the law; and the clerk of the court should record the full consequent judgment of the law as well as the decision of the court. When a party is entitled by law to costs as a consequence of a decision of the court, the record should show a judgment for costs. Thomas v. Thomas, 98 Me. 184, 56 A. 651.

Omission of clerk to record judgment for costs.—If the clerk of the court omits to record a judgment for costs, the court has power at any time, certainly upon notice and hearing and in some cases without either, to cause the omission to be supplied and a full proper record made showing a judgment for costs. Thomas v. Thomas, 98 Me. 184, 56 A. 651.

Enforcement of payment. — Payment of costs is not enforced in our practice by attachment, but by execution. An action of debt may be brought under the judgment, but neither assumpsit nor case can be maintained for the recovery of legal costs. Freeman v. Cram, 13 Me. 255.

Applied in Gibson v. Waterhouse, 5 Me. 19; Hathorne v. Cate, 5 Me. 74; State v. Harlow, 26 Me. 74; Whitney v. Brown, 30 Me. 557; Burnham v. Ross, 47 Me. 456; Leighton v. Colby, 56 Me. 79.

Quoted in Fuller v. Miller, 58 Me. 40.

Cited in Morgan v. Hefler, 68 Me. 131.

II. WHO IS "PARTY PREVAILING."

Where several issues are made up and tried in the same cause, some of which are found against the "party prevailing," he is still entitled to his full costs upon all the issues, by the provisions of this section. O'Brien v. Dunlap, 5 Me. 281.

Defendant is prevailing party where action dismissed. — Where an action is dismissed, whether from defect or inaptitude of process, or a want of jurisdiction over the parties, arising from commencing the suit in the wrong court, or over the subject matter of the suit, the defendant must be considered as the prevailing party. Harris v. Hutchins, 28 Me. 102. See Saco v. Gurney, 34 Me. 14.

Although trial is nullity for want of jurisdiction.—Although the trial of an action before a magistrate is a nullity for want of jurisdiction, and on appeal the action is dismissed, the defendant, as the prevailing party, is still entitled to his costs. Call v. Mitchell, 39 Me. 465.

And plaintiff moved to dismiss his own writ.—Where the plaintiff moved to dismiss his own writ for want of jurisdiction, and the defendant claimed costs, they were allowed. Reynolds v. Plummer, 19 Me. 22.

Or defendant appeared specially to move to dismiss for want of service.—A defendant who appears and files a motion

to dismiss the action for want of sufficient service of the writ, even though he appears for that purpose only and for no other, becomes thereby a party to the action, and if his motion be sustained and the action dismissed, he is the "prevailing party" and is entitled to costs by force of this section. Thomas v. Thomas, 98 Me. 184, 56 A. 651. See Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

But neither party prevails where act on which suit is founded is repealed.—When the act on which a suit pending is founded is summarily repealed, and a complete bar to all further proceedings in the suit thereby interposed, by the legislature, then all voluntary control or agency of the parties in the disposition of the cause is ended vi majori, and neither can be regarded as the prevailing party. Saco v. Gurney, 34 Me. 14. See Dudley v. Greene, 35 Me. 14.

Where the process was void for want of a seal, no costs were allowed. Tibbetts v. Shaw, 19 Me. 204.

Appeal wrongfully entered and dismissed.—When a party wrongfully enters upon the docket of the supreme judicial court what purports to be an action appealed from a lower court, and the adverse party appears and moves its dismissal, assigning as a reason for its dismissal that no appeal has been duly taken, and the motion is sustained and the action dismissed, the party making the motion and obtaining the dismissal must be regarded as a "prevailing party" and entitled to costs. Pomroy v. Cates, 81 Me. 377, 17 A. 311. See Harris v. Hutchins, 28 Me. 102.

Appeal dismissed for illegality of recognizance.—When an appealed action is dismissed from the supreme judicial court on account of the illegality of the recognizance, the appellee is entitled to recover costs incurred for the travel and attendance of his witnesses. Brown v. Allen, 54 Me. 436.

Judgment reduced on appeal.—Where the plaintiff recovered judgment for nearly $200, the defendant appealed, and in the appellate court the plaintiff recovered $37 only, the plaintiff was entitled to his costs after the appeal, under the general provisions of this section, he being "the prevailing party." Polleys v. Smith, 10 Me. 69. See § 158.

Damages found by commissioners reduced by jury.—In a case of complaint under the statute for flowage, commissioners were appointed by the court, who, upon a view of the premises, reported the yearly damages at $12. The defendants claimed a trial by jury, who returned a verdict for $6.87 only, as the yearly damage. The complainant was nevertheless the prevailing party and entitled to costs. Burrill v. Martin, 12 Me. 345.

Judgment against maker of note satisfied while action against indorser pending.—Where suits were simultaneously commenced against the maker and indorser of a promissory note, and judgment was obtained against the maker, which was satisfied, in the absence of any agreement to the contrary, the indorser is entitled to costs in the suit against him. Foster v. Buffum, 20 Me. 124. See Maine Bank v. Osborn, 13 Me. 49.

Judgment reversed before trial of action thereon.—Where an action was brought on a judgment in full force then, but which judgment was reversed before the trial of the action, and by reason thereof the plaintiff became nonsuit, the defendant was allowed full costs. Fuller v. Whipple, 15 Me. 53.

Debt in suit paid to plaintiff's creditor on trustee process.—Where the defendant in a suit, after service of the writ and before entry of the action, was summoned as the trustee of the plaintiff, in a foreign attachment, and paid over to the plaintiff's creditor all he owed to the plaintiff, and at a subsequent term pleaded these facts in bar of the original action, to which the plaintiff demurred, the plea was a good bar, and the defendant as the prevailing party was entitled to his costs subsequent to the joinder in demurrer. Killsa v. Lermond, 6 Me. 116.

Disclaimer in real action.—In a real action, where, by a brief statement, a portion of the demanded premises is disclaimed, and such part is accepted by the demandant in satisfaction of his claim, demandant is not the prevailing party, and a judgment in his favor for costs is erroneous. Mudgett v. Emery, 38 Me. 255.

A party who comes into a court of equity to redeem a mortgage, although entitled to redeem, must pay cost to a defendant who is not in fault. Bourne v. Littlefield, 29 Me. 302.

Sec. 156. Costs to parties and attorneys.—Costs allowed to parties and attorneys in civil actions shall be as follows: to parties recovering costs before a trial justice, 33¢ for each day's attendance and the same for every 10 miles'

travel: to parties recovering costs in the supreme judicial or superior courts, 33¢ for every 10 miles' travel and $3.50 for attendance at each term until the action is disposed of, unless the court otherwise directs.

Costs for travel shall be taxed for the prevailing party in civil suits according to the distance of said party or his attorney who resides nearest to the place of trial, unless said prevailing party or his attorney who resides farthest from said place of trial actually travels the greater distance for the special purpose of attending court in such cause, in which case costs shall be taxed for the last-named distance, and when the action is in the name of an indorsee and the plaintiff is the prevailing party, such costs for travel shall be taxed according to the distance of the attorney, payee or indorsee who is nearest to the place of trial, unless the attorney, payee or indorsee residing the greater distance from said place of trial actually travels such greater distance for the special purpose of attending court in said cause. No costs for travel shall be allowed for more than 10 miles' distance from any justice or municipal court nor more than 40 miles' distance from any other court, unless the plaintiff prevailing actually travels a greater distance or the adverse party, if he recovers costs, by himself, his agent or attorney in fact travels a greater distance for the special purpose of attending court in such cause.

For a power of attorney, 50¢; and for the plaintiff's declaration, 50¢ in the superior court, but no fee for a power of attorney shall be taxed before any municipal court or trial justice unless otherwise specially provided in the act establishing such court. For an issue in law or fact, there shall be allowed for an attorney's fee, $2.50 in the supreme judicial or superior courts. A fee of $5 shall be taxed in the plaintiff's costs for making up a conditional judgment under the provisions of section 10 of chapter 177.

In cases of forcible entry and detainer, parties shall be allowed the same costs as in ordinary civil actions.

A party summoned as trustee and required to attend court and make a disclosure shall be entitled to costs as follows: if the claim sued for does not exceed $20 such trustee shall be entitled to travel and attendance and 25¢ for the oath; and if the claim sued for exceeds $20 such trustee shall be entitled to $2.50 in addition to the above fee and when required to attend court for further examination such trustee shall be entitled to travel and attendance.

In all municipal courts the amount of costs allowed in civil actions shall depend upon the amount recovered and not upon the ad damnum in the writ; and the allowance for travel and attendance to parties recovering costs in municipal courts or before any trial justice shall be limited to 2 terms, except that the court may, for good and sufficient cause, order such allowance for additional terms.

No costs shall accrue, be taxed or allowed for any precept required in legal proceedings, whether in law or equity, unless the same shall issue from and bear the indorsement of an attorney at law.

The allowance for travel and attendance to parties recovering costs in the superior court shall be limited to 2 terms and every other term at which a trial is had except in addition thereto in case a demurrer, plea in abatment or motion to dismiss is filed by the defendant, the prevailing party in such 3 last-named proceedings shall be allowed travel and attendance in such action for not exceeding 2 additional terms. The court may for good and sufficient cause order such allowance for additional terms in all actions before it. No referee shall allow costs in any proceedings in excess of the above provisions. (R. S. c. 100, § 156. 1949, c. 349, § 130.)

Right to costs is wholly statutory.— The right of a prevailing party in an action to recover costs is wholly statutory. He is entitled only to such allowances as costs as the statute has made provision for, and subject to the limitations which it has imposed. Porteous, Mitchell & Braun Co. v. Miller, 107 Me. 155, 77 A. 710.

This section is the general statute au-

thorizing the taxation of costs, exclusive of expert witness fees, for the prevailing party in an action in court. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Party not entitled to travel and attendance for each and every term.—Under this section the prevailing party is not entitled as a matter of law to have travel and attendance taxed for each and every term the case had been in court, for the court has authority to direct otherwise. Porteous, Mitchell & Braun Co. v. Miller, 107 Me. 155, 77 A. 710.

And court may direct otherwise at time costs are taxed.—Under this section the court has authority to direct as to the number of terms for which travel and attendance are to be taxed, and such authority may be exercised by the court when application is made to it, under the provisions of § 179, to have the costs taxed and passed upon by the court. Porteous, Mitchell & Braun Co. v. Miller, 107 Me. 155, 77 A. 710.

No travel allowed beyond line of state.—Neither a party nor a witness can be allowed travel beyond the line of the state. Kingfield v. Pullen, 54 Me. 398.

By this section, the prevailing party is entitled to costs for travel only from his place of residence in this state to the place of trial. Thus the prevailing party, who resided in Maine, was not entitled to costs for travel from a place without the state, where he had been temporarily in Connecticut at work, and from which he actually traveled for the special purpose of attending court. Torrens v. Green, 115 Me. 122, 98 A. 118.

The forty-mile limitation in the second paragraph has reference to the distance from the place of residence to the place of trial. Torrens v. Green, 115 Me. 122, 98 A. 118.

If the party and his attorney reside at different distances, costs are allowed only for the distance of the nearer one of the two from his residence to the place of trial, except where the one who resides the greater distance actually travels that distance to court, in which case costs are allowed for the greater distance; but only from his place of residence. Torrens v. Green, 115 Me. 122, 98 A. 118.

Referees have no powers to allow expert witness fees and include them in the costs of reference, by virtue of the provisions of this section. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Cited in Rowe v. Shaw, 56 Me. 306.

Sec. 157. Costs upon appeal in condemnation proceedings. — In all proceedings for the estimation of damages for the taking of lands or other property under any general or special law, if the owner of the land, after an award made by the county commissioners, enters an appeal therefrom and fails to obtain a final judgment for an amount greater than the amount of the said award with interest thereon to the date of said judgment, he shall be subject to costs accruing after the date of said first award and the amount thereof may be applied in reduction of the sum required to be paid by said judgment. (R. S. c. 100, § 157.)

Sec. 158. If plaintiff appeals from judgment in his favor.—When a plaintiff appeals from a judgment of a municipal court or a trial justice in his favor and does not recover in the appellate court a greater sum as damages, he recovers only a quarter of the sum last recovered for costs. (R. S. c. 100, § 158.)

Cross reference.—See note to § 155, re costs where damages are reduced on appeal by defendant.

History of section. — See Polleys v. Smith, 10 Me. 69.

Apparent increase in damages occasioned by accumulation of interest.—Where the verdict on appeal is for a greater sum than was given in the court below, the court, on a hearing as to costs, will not go out of the record to ascertain whether the damages, though apparently increased, are in truth diminished as to the principal sum in dispute, and the apparent increase occasioned only by the accumulation of interest. Baker v. Appleton, 4 Me. 66.

For case decided under early form of this section, whereunder defendant was entitled to his costs since the appeal, he having obtained a reduction of the damages by his appeal, see Brown v. Attwood, 7 Me. 356.

Sec. 159. Costs in actions of replevin. — In actions of replevin commenced in the superior court, when the jury finds that each party owned a part

of the property, they shall find and state in their verdict the value of the part owned by the plaintiff when replevied without regard to the value as estimated in the replevin bond; and if such value does not exceed $20, the plaintiff recovers for costs only ¼ part of such value. (R. S. c. 100, § 159.)

Cross reference.— See note to § 160, re costs in action on replevin bond.

Defendant entitled to full costs. — If in replevin a verdict is found for the defendant as to a small part of the goods, of less value than twenty dollars, yet he is entitled to full costs. Harding v. Harris, 2 Me. 162.

Applied in Ridlon v. Emery, 6 Me. 261.

Stated in Brewer v. Curtis, 12 Me. 51.

Sec. 160. If improperly sued in superior court, ¼ costs; on report of referees, full costs allowed.—In actions commenced in the superior court, except those by or against towns for the support of paupers, if it appears on the rendition of judgment that the action should have been commenced before a municipal court or a trial justice, including actions of replevin where the value of the property does not exceed $20, the plaintiff recovers for costs only ¼ part of his debt or damages. On reports of referees, full costs may be allowed unless the report otherwise provides. (R. S. c. 100, § 160.)

I. General Consideration.

II. What Actions Should Have Been Commenced before Inferior Tribunal.

A. As Determined by Amount of Judgment or Verdict.

B. Where Title to Real Estate Is in Issue.

III. Actions for Support of Paupers.

IV. Costs on Reports of Referees.

Cross References.

See c. 92, § 93, re costs in lien for taxes; c. 120, § 80, re costs in actions on bonds.

I. GENERAL CONSIDERATION.

History of section.—See Brown v. Keith, 14 Me. 396; Burnham v. Ross, 47 Me. 456; Hervey v. Bangs, 53 Me. 514; Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

Purpose of section.—The particular object of the provision which restricts the plaintiff's costs in certain actions to a sum equal to one quarter of his debt or damage recovered is to discourage a plaintiff from commencing them in the higher courts when a less expensive and convenient tribunal is open to him. Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

This provision was designed to apply to those cases where the action might have been commenced before a municipal court or trial justice, and the loss of a large part of his costs was intended as a sort of punishment upon the plaintiff for unnecessarily and improperly commencing his action in the superior court, when a less expensive tribunal was open to him. Chesley v. Brown, 11 Me. 143.

As to purpose of this section, see also Brown v. Keith, 14 Me. 396.

Reasonable construction.—Courts must give a reasonable construction to this section. Chesley v. Brown, 11 Me. 143.

No provision in this section negatives the jurisdiction of the superior court of actions commenced therein notwithstanding they properly "should have been commenced before" one of the inferior tribunals specified. On the contrary the rendition of judgment in such actions is permitted when the ad damnum is more than twenty dollars. Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

Court is to look into case.—The phraseology, "if it shall appear on the rendition of judgment," was used doubtless with an intention that the court should look into the case, and see that the plaintiff, when he commenced his action, could not have commenced it properly elsewhere than in the superior court. Forbes v. Bethel, 28 Me. 204.

Questions to be determined.—The question under this section is whether upon the whole facts it appears that the action should have been brought before the lower tribunal. The first question to be determined is whether, when the amount of debt or damage is less than twenty dollars, the case is within the exceptions. If not, then the next question is whether the amount of debt or damage is beyond the jurisdiction of a trial justice. Hervey v. Bangs, 53 Me. 514.

Cited in Folan v. Lary, 60 Me. 545.

II. WHAT ACTIONS SHOULD HAVE BEEN COMMENCED BEFORE INFERIOR TRIBUNAL.

A. As Determined by Amount of Judgment or Verdict.

Amount of judgment is ordinarily controlling.—Whether an action ought to have been brought before a trial justice is ordinarily to be determined by the amount of the judgment. Lawrence v. Ford, 44 Me. 427; Lewis v. Warren, 49 Me. 322.

And if it is less than $20, quarter costs only are allowed.—If the amount of the judgment does not exceed twenty dollars, the plaintiff's costs can be only one quarter part as much as his debt or damage, unless a different rule of taxation is authorized by some other statute. Lawrence v. Ford, 44 Me. 427.

Verdict below $20 shows that action was within jurisdiction of justice.—The verdict settles the amount of damages or debt for which the suit was instituted. If below twenty dollars, in cases not excepted, the verdict shows that the cause of action was one within the jurisdiction of a justice. Hervey v. Bangs, 53 Me. 514.

If the verdict does not exceed twenty dollars, it shows the cause of action was within the jurisdiction of a trial justice and should have been commenced before him. Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

In actions of tort, where unliquidated damages are sought to be recovered, the court cannot well have any other criterion whereby to determine whether they ought to have been brought before trial justices, or a municipal court, than the amount for which verdicts may be rendered in them. Forbes v. Bethel, 28 Me. 204.

Interest on verdict does not affect question of costs.—As interest on a verdict is no part of the cause of action, it in nowise affects the question of costs even when it swells the debt or damage to an amount of judgment exceeding twenty dollars. Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

Where, the action having been continued one term, interest may be allowable on the plaintiff's verdict, so that he will finally recover more than twenty dollars for his damages, he is nevertheless restricted as to his costs. It is "on the rendition of judgment" apparent, from the finding of the jury, that the action should have been brought before a trial justice. Forbes v. Bethel, 28 Me. 204.

Where, in an action of slander, the plaintiff, after having obtained a verdict for nineteen dollars damages, alleged exceptions which were overruled by the law court, and at the time of rendition of judgment the verdict, together with the accruing interest thereon, amounted to more than twenty dollars, the plaintiff is entitled to only quarter costs. The defendant in such a case is not entitled to any cost. Hervey v. Bangs, 53 Me. 514.

It may be otherwise where interest accrues pursuant to contract.—In case of a contract, drawing interest as part of the contract, it is not necessary that the plaintiff should have a good cause of action for twenty dollars when he institutes his suit, if, before judgment, obtained and taken without unnecessary delay, the debt, including the interest as a part, amounts to more than twenty dollars. But in an action of tort, interest makes no part of the cause of action. It is not allowed as such in the damages. Hervey v. Bangs, 53 Me. 514.

Amount of verdict increased on appeal.—If the plaintiff, on appeal to the supreme judicial court, recovers more than twenty dollars as damage, he is entitled to full cost in the lower court, although the verdict there in his favor was for less than twenty dollars. Moore v. Thompson, 34 Me. 207.

Full costs allowed where judgment for penalty of bond exceeds $20.—Where judgment is rendered for the amount of the penalty of a bond, being sufficiently large to carry full costs, and execution issues for a mere nominal sum as damages, the plaintiff is entitled to full costs. Howard v. Brown, 21 Me. 385.

In an action on a replevin bond in which the penalty is more then twenty dollars, if the damages assessed are less than that sum, the plaintiff will have full costs although the action was not commenced before a trial justice, since under § 53 judgment is entered for the penal sum, although execution issues only for damages assessed and costs. Lewis v. Warren, 49 Me. 322.

Actions to recover statutory penalties.—If in a trial of an action of debt, commenced in a superior court, to recover under a penal statute not less than twenty nor more than fifty dollars forfeited to the prosecutor, the jury return a verdict for twenty dollars only, the plaintiff is entitled to quarter costs only. Spaulding v. Yeaton, 82 Me. 92, 19 A. 156.

Where in an action commenced in the superior court to recover a statutory penalty, which is "not to exceed one hundred dollars," the jury assesses damages for the plaintiff at one cent, the plaintiff is entitled to one fourth of that sum only as costs. Houlton v. Martin, 50 Me. 336.

For a case in which full costs were allowed in an action to recover a statutory penalty, although the recovery did not exceed twenty dollars, see Chesley v. Brown, 11 Me. 143.

B. Where Title to Real Estate Is in Issue.

Cross reference.—See c. 110, § 3, re exception of actions in which title to real estate is in question from jurisdiction of trial justices.

Plaintiff entitled to full costs where title to real estate is in issue.—In actions of trespass quare clausum fregit, and all actions where the title to real estate is at issue, according to the pleadings or brief statement filed by either party, the plaintiff is entitled to full costs, although he recovers less than twenty dollars damages. Burnham v. Ross, 47 Me. 456.

It is not necessary that action should be trespass quare clausum.—It is not necessary under this section and c. 110, § 3, that the action should be trespass quare clausum, to entitle the plaintiff to recover full costs. It is enough that it is an action which does and may concern real estate. Wendall v. Greaton, 63 Me. 267.

In an action for breach of warranty in the conveyance of land, the defendant by his pleadings may bring the title into question. In such a suit brought originally in the superior court, the plaintiff, if he prevails, is entitled to full costs, although the damage which he recovers does not exceed twenty dollars, the court not being authorized to decide that the action, within the meaning of this section, "should" have been brought before a trial justice. Morrison v. Kittridge, 32 Me. 100.

In an action for obstructing a right of way, the defendant by his pleadings may bring the plaintiff's title into question. The action may, therefore, be brought originally into the superior court, with a recovery of full costs, though the damage recovered should not exceed twenty dollars. Sutherland v. Jackson, 32 Me. 80.

In an action of the case for obstructing a watercourse, full costs are taxable, upon a sound construction of this section, though less than twenty dollars is recovered. Simpson v. Seavey, 8 Me. 138.

In an action of the case for digging a trench and diverting water from the plaintiff's mill, full costs are to be taxed for the plaintiff prevailing, though the damages awarded to him are less than twenty dollars, since the plaintiffs must necessarily have shown a title to the real estate as the foundation of their right to recover. Williams v. Veazie, 8 Me. 106.

In an action on the case for nuisance to real estate, brought in the superior court, full costs are to be taxed although the damages recovered are less than twenty dollars. Wendall v. Greaton, 63 Me. 267.

In an action for carelessly setting a fire by which trees on the plaintiff's land were burned, if the plaintiff recover less than twenty dollars, full costs will be allowed him. Mellows v. Hall, 49 Me. 335.

III. ACTIONS FOR SUPPORT OF PAUPERS.

Only cases in which settlement of pauper is involved are excepted.—It was not the intention of the legislature to allow full costs in action which might properly have been brought before a trial justice, or in a municipal court, except in those cases where the settlement of a pauper was involved, and the rights of the parties depended on a liability to provide for such pauper by virtue of some statute. In such cases, the question of settlement is usually more important then the amount of damages, inasmuch as the judgment may be conclusive upon the parties in relation to future claims. This was undoubtedly the reason why the legislature thought it proper to take this class of cases out of the rule established by this section. Rawson v. New Sharon, 43 Me. 318.

And section applies to action on express contract for support of pauper. — The amendment which excepted from this section actions by or against towns for the support of paupers was not intended to apply to cases of express contract made for the support of paupers, whether written or verbal. Rawson v. New Sharon, 43 Me. 318.

Action by master of house of correction to recover for support of pauper therein.—An action by the master of a house of correction to recover the expenses incurred in support of a pauper therein is "an action against a town for the support of paupers" within the meaning of this section, and full costs are recoverable, although the damages recovered are less than twenty dollars. Gilman v. Portland, 51 Me. 457.

IV. COSTS ON REPORTS OF REFEREES.

Reference cases are excepted from quarter-costs rule.—The only purpose of the closing sentence in this section is to except reference cases from the quarter-costs rule. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Referee may determine question of costs. —The last sentence of this section plainly

implies that a referee may determine the question of costs. Robinson v. Chase, 115 Me. 165, 98 A. 483.

It is in the power of referees to award in regard to the costs of court. Nutter v. Taylor, 78 Me. 424, 6 A. 835.

And full costs are taxed unless referee otherwise directs.—Full costs are taxed upon the reports of referees, where the plaintiff is the prevailing party, however small the amount recovered may be, unless the referees otherwise direct. Brown v. Keith, 14 Me. 396.

Report submitting question of costs to court.—Where the referee instead of leaving the question of costs as left by the statute, or making a special decision in relation thereto, states certain facts, abstains from deciding as to the cost, and submits the question to the court, the report "otherwise provides," and the plaintiff is not entitled to full costs. Higgins v. Rines, 72 Me. 440.

Report providing for "legal costs to be taxed by court."—Where a case was referred, under rule of court, and the report awarded the plaintiff less than twenty dollars and "legal costs of court to be taxed by the court," since the report did not otherwise provide, the plaintiff was entitled to full costs. Stevens v. Spear, 82 Me. 184, 19 A. 157.

Report allowing charges of surveyor.—Regularly it is for the court and not the referees to fix the compensation of a surveyor, appointed by the court in the case. But where the referees allow the charges of the surveyor, that part of their report will not be rejected, when there is no suggestion that the charges thus allowed were unreasonably large in amount. Nutter v. Taylor, 78 Me. 424, 6 A. 835.

Sec. 161. When damages reduced by setoff, full costs.—When an account is filed in setoff and the plaintiff recovers not exceeding $20, he is entitled to full costs if the jury certify in their verdict that the damages were reduced to that sum by reason of the amount allowed in setoff. (R. S. c. 100, § 161.)

Cross references.—See note to § 42, re plaintiff's claim reduced by setoff to amount less than offer to be defaulted; § 87, re costs in setoffs.

This section requires that the verdict of the jury should make the fact of the reduction certain, and it is to appear from that and that alone. The court is under no obligation, nor has it any authority, to reason upon the circumstances of the case and draw inferences as to what a jury might or might not do. The statute is peremptory. It is plain and easily followed, and there is no reason for departing from its provisions. Hilton v. Walker, 56 Me. 70.

Jury must certify that damages were reduced by setoff.—Where in assumpsit a setoff is filed, and the plaintiff obtains a verdict for less than twenty dollars, he is entitled to quarter costs only, unless the jury certifies in its verdict that the damages were so reduced by means of the setoff claim allowed to the defendant. Thompson v. Thompson, 31 Me. 130. See Hilton v. Walker, 56 Me. 70.

Acceptance of offer to be defaulted for sum less than $20.—Where the defendant filed an account in setoff, and thereafter offered to be defaulted for a sum less than twenty dollars, the plaintiff, in order to recover full costs, should have it appear upon the docket that his acceptance of the offer was by reason of a reduction of his judgment, in consequence of the account filed in setoff. Lawrence v. Ford, 44 Me. 427.

Stated in Stevens v. Spear, 82 Me. 184, 19 A. 157.

Sec. 162. Costs of evidence not doubled. — When a party recovers double or treble costs, the fees of witnesses, depositions, copies and other evidence are not doubled or trebled. (R. S. c. 100, § 162.)

Sec. 163. On petitions for review, etc.—On application of a private person for a writ of review, certiorari, mandamus or quo warranto, or like process, the court may or may not allow costs to a person appearing on notice as respondent. (R. S. c. 100, § 163.)

A petition for a review is not an action within the meaning of § 155, but the court has power to award costs for the respondents, in such case, under the provisions of this section. Hopkins v. Benson, 21 Me. 399.

Applied in Hurley v. Robinson, 85 Me. 400, 27 A. 270.

Sec. 164. Plaintiff nonsuited pays costs; second suit stayed until costs of first paid.—When a plaintiff becomes nonsuited or discontinues his suit, the defendant recovers costs against him, and in all actions, as well those of qui tam as others, the party prevailing is entitled to his legal costs. When costs have been allowed against a plaintiff on nonsuit or discontinuance and a second suit is brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid and the suit may be dismissed unless they are paid at such time as the court appoints. (R. S. c. 100, § 164.)

Purpose of section.—The object of this section is to prevent a party from being harrassed by successive suits, by an irresponsible plaintiff, or by one who will not, if he is able, pay the costs awarded against him. Morse v. Mayberry, 48 Me. 161.

The obvious purpose of this section was to prevent a multiplicity of suits for the same cause of action in the courts of this state. Folan v. Lary, 60 Me. 545.

This section should be interpreted liberally in behalf of defendants. Smith v. Allen, 79 Me. 536, 12 A. 542.

The phrase "former suit" applies only to a suit in this state and not to one in another jurisdiction. Folan v. Lary, 60 Me. 545.

Thus, where, in the state of New Hampshire, the defendant had on nonsuit recovered judgment for costs against the plaintiff in an action by the latter against the former, and then the plaintiff brought suit in this state for the same cause of action, proceedings would not be stayed until the costs in the former suit were paid. Folan v. Lary, 60 Me. 545.

Second suit may be stayed though brought by assignee.—After the nonsuit of an action, a second suit upon the same demand may be stayed by the court until the defendant's costs in the former action be paid, notwithstanding the second suit is brought by an assignee, who, when purchasing the demand, had no knowledge that it had previously been put in suit. Warren v. Homestead, 32 Me. 36.

Section does not require issuing of execution.—The costs of a preceding suit, in which the plaintiff has been nonsuited, "when a second suit is brought for the same case, must be paid at such time as the court appoints," else "further proceedings shall be stayed." It is enough that costs have accrued. This section does not require the issuing of an execution. Folan v. Lary, 60 Me. 545.

It is immaterial that plaintiff has more and better evidence in second suit.—Where the question is, whether the defendant has been twice sued for the same cause, it matters not that the plaintiff may have in the second suit more or better evidence of his claim than he had in the first, or that he could not maintain his first suit, but can maintain the second. The statutory requirement is not founded on the theory that the plaintiff has as good grounds for sustaining one suit as the other. The presumption is that he discontinues his suit for the reason that he may improve his chances of success by a later proceeding. But the defendant should not be perplexed by the plaintiff's experiments without some amends for the annoyance which is thereby inflicted on him. Smith v. Allen, 79 Me. 536, 12 A. 542.

Section applies though additional cause of action is embraced in second writ.—It is enough that the plaintiff has so brought her suit that the cause of action first relied on may be relied on again, that the declaration just as much embraces it in the second as in the first suit. The statutory requirement applies, although a new and additional cause of action is embraced in the second writ. Smith v. Allen, 79 Me. 536, 12 A. 542.

When the second suit contains the "same cause of action" as the first, it cannot be prosecuted until the costs of the first suit are paid, although the second may contain additional claims. Morse v. Mayberry, 48 Me. 161.

It does not apply where first action was in tort and second in assumpsit.—This section did not apply where the declaration in the former action was in tort and disposed of on demurrer, and the latter action is in assumpsit. Long v. Woodman, 65 Me. 56.

Or where first was for covenant broken and second on account annexed for rent.—Where a plaintiff has become nonsuit in an action for covenant broken, the declaration being upon an indenture, or lease, under seal, and afterwards commences another action in assumpsit upon an account annexed for rent, the cause of action is not the same within the meaning of this section. Brunswick Gas Light

Co. v. United Gas, Fuel & Light Co., 88 Me. 552, 34 A. 416.

Applied in Marble v. Snow, 14 Me. 195; Howard v. Kimball, 65 Me. 308; Hayden v. Maine Central R. R., 118 Me. 442, 108 A. 681; Fontaine v. Peddle, 144 Me. 214, 67 A. (2d) 539.

Cited in Thomas v. Thomas, 98 Me. 184, 56 A. 651.

Sec. 165. Suitor in name of state liable for costs.—When a suit is brought in the name of the state for the benefit of a private person, his name and place of residence shall be indorsed on the writ; and if the defendant prevails, judgment for his costs shall be rendered against such person and execution issued as if he were plaintiff. (R. S. c. 100, § 165.)

Stated in Perry v. Kennebunkport, 55 Me. 453.

Sec. 166. State liable for costs in civil suit.—When a defendant prevails against the state in a civil suit, judgment for his costs shall be rendered against it and the treasurer of the county shall pay the amount on a certified copy of the judgment; and the amount shall be allowed to him in his account with the state. (R. S. c. 100, § 166.)

Defendant in scire facias upon recognizance entitled to costs.—Scire facias in favor of the state upon a recognizance entered into by the defendant to prosecute an appeal in a criminal process is an action, and the defendant, if he is the prevailing party, is entitled to his costs against the state under the provisions of this section. State v. Harlow, 26 Me. 74.

Sec. 167. No fees for travel taxable for state.—When the state recovers costs in a civil suit no fees shall be taxed for the travel of an attorney. (R. S. c. 100, § 167.)

Sec. 168. In suit in name of assignor, writ indorsed; costs.—The name and place of residence of an assignee, if known, shall, at any time during the pendency of the suit, be indorsed by request of the defendant on a writ or process commenced in the name of his assignor or further proceedings thereon shall be stayed; and if the defendant prevails, judgment for his costs shall be rendered against the plaintiff and such assignee as if both had been originally joined in the action; but if not so indorsed and proceedings are stayed, the defendant may maintain an action on the case against the assignee for his costs. (R. S. c. 100, § 168.)

History and purpose of section.—Perry v. Kennebunkport, 55 Me. 453.

This section leaves no discretion in the court, but is peremptory that, when an action is commenced in the name of an assignor, the name and place of residence of the assignee, if known, shall be indorsed, by the request of the defendant, on the back of the writ. McGee v. McCann, 69 Me. 79.

If the fact of the assignment is established, the defendant is of right entitled to have his motion granted that the name and place of residence of the assignee be endorsed upon the writ or further proceedings stayed. It is not discretionary with the presiding justice. Liberty v. Haines, 101 Me. 402, 64 A. 665.

The terms assignee and assignor necessarily imply an assignment, and there can be no assignment within the meaning of this section, whatever may be the form of words used, unless the subject matter is such as can be legally assigned. McGee v. McCann, 69 Me. 79.

But section applies though jury finds assignment ineffectual as against release of claim.—It was contended that an assignee was not liable for costs under this section because the jury found the assignment to him ineffectual as against a release of the claim given by the assignor. But the finding of the jury did not establish that he was not in fact an assignee, and in that character he carried on the controversy upon the questions of the validity of the release, and whether there was a want of notice of the assignment, in either of which had he prevailed, the final result would have been favorable to him. Staples v. Wellington, 62 Me. 9.

And it is not confined to cases of assignments made before action brought.—The liability of an assignee under this section for the costs of an action prosecuted for his benefit is not confined to cases in

which the assignment is made before action brought. Staples v. Wellington, 62 Me. 9.

This section recognizes the force of unwritten assignments by requiring the assignee in such actions to indorse his name and place of residence upon the back of the writ, and in making him liable for costs. Simpson v. Bibber, 59 Me. 196.

It does not apply to bills in equity.—The provision of the section requiring an assignee of a claim in suit to indorse the writ or process does not apply to a bill in equity, even if the bill is inserted in a writ. Stevens v. Shaw, 77 Me. 566, 1 A. 743.

Evidence insufficient to establish fact of assignment.—See Liberty v. Haines, 101 Me. 402, 64 A. 665.

Applied in Smith v. Loomis, 72 Me. 51.

Sec. 169. If assignee not known, defendant may recover costs and offset judgment.—If the name of such assignee is not known to the defendant until after he has recovered judgment against the plaintiff for costs, he may maintain an action on the case against such assignee for his costs within 6 years from the time of judgment; and such judgment for costs may be set off between such assignee and the defendant as if the assignee had been plaintiff in the suit. (R. S. c. 100, § 169.)

Cited in Stevens v. Shaw, 77 Me. 566, 1 A. 743.

Sec. 170. Assignee of choses not negotiable, may sue in own name.—Assignees of choses in action, not negotiable, assigned in writing may bring and maintain actions in their own names, but the assignee shall hold the assignor harmless of costs and shall file with his writ the assignment or a copy thereof; and all rights of setoff are preserved to the defendant. (R. S. c. 100, § 170.)

Cross references.—See c. 60, § 301, re suit by assignee of insurance policy; c. 112, § 9, re personal and transitory actions; c. 171, § 21, re right of assignee of judgment to bring action of debt in own name.

Purpose of section.—This section was intended to give the real owner of a chose in action the right to meet his adversary face to face upon the record, to enable the real party in fact to be such in the action, and in such case to relieve the assignor from any danger of liability for costs. Coombs v. Harford, 99 Me. 426, 59 A. 529.

Choses in action defined.—Choses in action have been defined as "personal rights not reduced to possession, but recoverable by a suit at law." Wood v. Decoster, 66 Me. 542.

Generally all causes of suit for any debt, duty or wrong are to be accounted choses in action. Ware v. Bucksport & Bangor R. R., 69 Me. 97.

Included under the general head of things in action are "money due on bond, note, or other contract." A debt of record constitutes a contract of the highest nature, being established by the sentence of a court of judicature. Wood v. Decoster, 66 Me. 542.

Section changes common law.—At common law of course, the assignee of a chose in action, not negotiable, could not maintain an action in his own name. He must sue in the name of the assignor. But by statute in this state such assignees may sue in their own names. Coombs v. Harford, 99 Me. 426, 59 A. 529.

And should not be extended by implication.—This section is an innovation on the common law of questionable expediency, and should not be extended by implication. Soule v. Kennebec Maine Ice Co., 85 Me. 166, 27 A. 92.

This section was not intended to give the real owner a right to sue in the name of someone else. In the sense in which we use the term here, the real owner need not be the sole beneficial owner. He may be the owner of part interest only and trustee for the balance, or he may be trustee for the whole. These considerations affect only the parties to the assignment. They arise in multitudinous forms in business transactions. They do not concern the debtor. But we use the term real owner as contra distinguished from a colorable assignee, one who is made assignee solely for the purpose of bringing suit in his own name. Coombs v. Harford, 99 Me. 426, 59 A. 529.

And it does not extend to fictitious or colorable assignments.—This section furnished a remedy for a real difficulty, and its provisions should not be extended to assignments which are fictitious or merely colorable. Coombs v. Harford, 99 Me. 426, 59 A. 529.

Such as assignment without consideration made merely for purpose of bringing suit.—An assignment of a chose in action, made without consideration, and merely

for the purpose of bringing suit for the benefit of the assignor, is colorable only, and vests no title in the assignee. Such assignee cannot maintain suit thereon in his own name. Coombs v. Harford, 99 Me. 426, 59 A. 529.

An assignment of an account made without consideration, and for the sole purpose of collecting it by suit in the name of the assignee for the benefit of the assignor, is deemed colorable only and inoperative to transfer the property in the account to the assignee, or the right to maintain an action upon it in his own name. Waterman v. Merrow, 94 Me. 237, 47 A. 157.

This section does not authorize division of a chose in action.—This section does not authorize, and never was intended to authorize, the division of a chose in action among different assignees, or the assignment of a part and the reservation of a part by the assignor, so as to subject the debtor without his consent to more than one suit. Getchell v. Maney, 69 Me. 442.

This section does not authorize the assignment of a specific sum per month for a specified number of months, "out of the moneys that may be due to" the assignor "for services as laborer," when such sum is a part only of the money due. Getchell v. Maney, 69 Me. 442.

Nor does it change rule as to filing assigned claims in offset.—This section has not changed the rule that a defendant assignee cannot file in offset a claim which he has purchased against the plaintiff, unless the plaintiff has before the date of the suit received notice of the assignment, and has agreed to pay it to the assignee. Soule v. Kennebec Maine Ice Co., 85 Me. 166, 27 A. 92.

Assignee of judgment may maintain action of debt in his own name.—The assignee of a judgment for debt and cost may maintain an action of debt thereon in his own name, under and by virtue of this section. Nor is the right confined to the immediate assignee of the judgment creditor; the remedy is available to any subsequent assignee who can show a good title. Wood v. Decoster, 66 Me. 542. See Hayes v. Rich, 101 Me. 314, 64 A. 659. See also c. 171, § 21.

And scire facias against a trustee may be maintained in the name of an assignee of the original judgment, under the provisions of this section. Ware v. Bucksport & Bangor R. R., 69 Me. 97.

But appeal from award in eminent domain is not "action."—An appeal from an award of damages for taking of land under power of eminent domain is not an "action" within the meaning of this section and an assignee may not bring such appeal in his own name. Rines v. Portland, 93 Me. 227, 44 A. 925.

Notwithstanding this section an assignee if he chooses may still sue in his assignor's name, and suing in such a manner, need not supply the assignment. But to maintain an action in his own name, save as he may be excused by a defendant, an assignee must come within and follow this section. Weed v. Boston & Maine R. R., 124 Me. 336, 128 A. 696.

Notwithstanding this section, an assignee if he chooses may still sue in the assignor's name, and if he does so, he is not required to file a copy of the assignment. Hall v. Hall, 112 Me. 234, 91 A. 949.

This section authorizes, but does not require, assignees of choses in action assigned in writing to bring actions upon them in their own names. There is nothing in it to limit or exclude remedies previously existing. McDonald v. Laughlin, 74 Me. 480; Rogers v. Brown, 103 Me. 478, 70 A. 206.

Equitable assignee may sue in assignor's name but not in his own.—An equitable assignment carries with it the undoubted right of the assignee to bring suit in the name of the assignor but not in his own, as this section limits the right of an assignee to bring suit in his own name to the method therein prescribed. Seruta v. Surace, 111 Me. 508, 90 A. 328.

And subsequent written assignment enables equitable assignee to sue in own name.—An oral agreement constituted an equitable assignment of bills due a partnership to one of the partners, and would authorize him to bring suit in the name of the assignor, but not in his own name. A subsequent written assignment was confirmatory of his title and enabled him to bring suit in his own name, under this section. Lord v. Downs, 112 Me. 396, 92 A. 327.

Right of assignee to sue in own name depends entirely on this section.—At common law, subject to an exception having no relation to the present case, no action could be assigned so as to give the assignee a right to sue in his own name. The right of an assignee to bring suit in his own name depends entirely upon this section. Harvey v. Roberts, 123 Me. 174, 122 A. 409.

And this section imperatively requires an assignment in writing. Harvey v. Roberts, 123 Me. 174, 122 A. 409.

Otherwise action is maintainable only in name of assignor.—Where the assignment is not in writing the action is maintainable only in the name of the assignor. Weed v. Boston & Maine R. R., 124 Me. 336, 128 A. 696.

Assignment or copy thereof must be filed with writ.—In the common law the assignee of a chose in action is required to sue in the name of his assignor. In the statute book is the law which permits an assignee to name himself as plaintiff, but with his writ must be the assignment, or a copy thereof. The permission vouchsafed is coupled with positive command. Weed v. Boston & Maine R. R., 124 Me. 336, 128 A. 696.

Or it is not admissible in evidence against objection.—Assignments not filed with the writ are not admissible in evidence against objection. Damren v. American Light & Power Co., 91 Me. 334, 40 A. 63.

In order to maintain an action in his own name by the assignee of a nonnegotiable chose in action, this section requires the assignee to file the assignment, or a copy thereof, with his writ. The assignment not so filed is not admissible in evidence at the trial. The declaration should aver the assignment in such case. National Shoe & Leather Bank of Auburn v. Gooding, 87 Me. 337, 32 A. 967.

But failure to file assignment must be seasonably objected to.—Where the assignment, or copy, is not filed with the writ when an action is brought by the assignee in his own name as provided by this section, the objection to such omission must be seasonably taken by motion or plea in abatement, and where a motion to dismiss for such cause was not filed until the second term, the defendant had waived the objections. Littlefield v. Pinkham, 72 Me. 369.

If one sues as assignee and does not file the assignment or copy, the failure must be availed timely, else it will be regarded as waived. Weed v. Boston & Maine R. R., 124 Me. 336, 128 A. 696.

The omission to file the assignment or a copy thereof with the writ in accordance with the requirement of this section must be challenged by a defendant who desires to take advantage of it by a plea in abatement. United Feldspar & Minerals Corp. v. Bumpus, 141 Me. 7, 38 A. (2d) 164.

Or it is cured by introduction of assignment in evidence.—A plaintiff's omission to file an assignment of a nonnegotiable chose in action, or a copy thereof, pursuant to this section, if not challenged by a plea in abatement, is cured by the introduction of the assignment in evidence. United Feldspar & Minerals Corp. v. Bumpus, 141 Me. 7, 38 A. (2d) 164.

Assignment made on bill of items annexed to writ sufficient.—Where the assignment of an account is made on the bill of items annexed to the writ, it is a sufficient filing with the writ. It is not necessary to have such assignment made on a separate paper. Sleeper v. Gagne, 99 Me. 306, 59 A. 472.

Demurrer to declaration alleging assignment.—Upon demurrer to a declaration alleging the sale, transfer, and assignment, the presumption is that the assignment is valid under this section, and if the defendant would contest its validity or sufficiency, he must do it by plea or brief statement. Neither that question nor any alleged failure to file the assignment with the writ in conformity with the requirements of this section is open to him on demurrer. Wood v. Decoster, 66 Me. 542.

Judgment based on failure to file assignment does not bar another action.—Where the judgment in a former suit between the parties was based on plaintiff's failure to file a copy of his assignment as required in this section, the former judgment did not involve an adjudication upon the merits of the claim, and hence was not a bar to the maintenance of another action. Damren v. American Light & Power Co., 95 Me. 278, 49 A. 1092.

Action maintained without filing of assignment.—One who takes charge of an animal for sale on commission has such a special property therein that he may sue a railroad for the killing of the animal, where, before suit, he has paid the owner its value, and need not file a copy of a written assignment as provided in this section. Smith v. Maine Central R. R., 114 Me. 474, 96 A. 778.

Applied in Arey v. Hall, 81 Me. 17, 16 A. 302; Metropolitan Ins. Co. v. Day, 119 Me. 380, 111 A. 429.

Cited in Murphy v. Adams, 71 Me. 113; Shurtleff v. Redlon, 109 Me. 62, 82 A. 645; Osher v. Frangedakis, 133 Me. 512, 174 A. 264.

Sec. 171. Assignment of accounts.—Every written assignment made in good faith, whether in the nature of a sale, pledge or other transfer, of an account receivable or of an amount due or to become due on an open account or on a

contract, all hereinafter called "account," with or without the giving of notice of such assignment to the debtor shall be valid, legal and complete at the time of the making of such assignment and shall be deemed to have been fully perfected at that time. Thereafter no bona fide purchaser from the assignor, no creditor of any kind of the assignor and no other assignee or transferee of the assignor in any event shall have or be deemed to have acquired any right in the account so transferred or in the proceeds therof or in any obligation substituted therefor which in any way shall affect the rights therein of the original assignee. In any case where, acting without knowledge of such assignment, the debtor in good faith pays or otherwise satisfies all or part of such account to the assignor, or to such creditor, subsequent purchaser or other assignee or transferee, such payment or satisfaction shall be acquittance to the debtor to the extent thereof, and such assignor, creditor, subsequent purchaser or other assignee or transferee shall be a trustee of any sums so paid and shall be accountable and liable to the original assignee therefor. (1945, c. 100.)

Sec. 172. Returned property; adjustments.—If, in the case of any assigned account, merchandise sold or any part thereof is returned to or recovered by the assignor from the account debtor and is thereafter dealt with by the assignor as his own property, said assignor shall hold such returned goods or any such goods as may be recovered by him, and every part thereof, in trust for the benefit of said assignee, or if the assignor grants credits, allowances or adjustments to the account debtor, the right to or lien of the assignee upon any balance remaining owing on such account and his right to or lien upon any other account assigned to him by the assignor shall not be invalidated, irrespective of whether the assignee shall have consented to, or acquiesced in, such acts of the assignor. (1945, c. 100.)

Sec. 173. Limitation.—Notwithstanding the provisions of any general or special law, the provisions of sections 171, 172 and 173 shall control, except as to transactions occurring before July 21, 1945, and except that the provisions of sections 171, 172 and 173 shall not be construed to alter or affect existing law with respect to the transfer of negotiable instruments, or to affect the liens of factors acquired through the provisions of sections 4 to 11, inclusive, of chapter 181. (1945, c. 100. 1951, c. 266, § 114.)

Sec. 174. In divers actions against same party at same term, or in case of division of an account, only 1 bill of costs allowed plaintiff.—When a plaintiff at the same term of a court brings divers suits which might have been joined in one against the same party, or divides an account which might all have been sued for in 1 action and commences successive suits upon parts of the same or brings more than 1 suit on a joint and several contract, he recovers costs in only one of them; and on only one of the judgments shall execution run against the body of the same defendant, unless the court, after notice to the defendant and hearing, certifies that there was good cause for commencing them. (R. S. c. 100, § 171.)

Purpose of section.—The object of this section is to prevent the unnecessary multiplication of suits, by prohibiting the recovery costs on more than one suit, "unless the Court shall certify that there was good cause for commencing them." Bicknell v. Trickey, 34 Me. 273.

The word "plaintiff" as used in this section means the plaintiff of the record. Perry v. Kennebunkport, 55 Me. 453.

Section applies where plaintiff has several causes of action of same nature.—When a plaintiff has several distinct causes of action, of the same nature, he is allowed to pursue them cumulatively in the same writ, and if he does not, he can recover but one bill of cost, if he sues on them severally. De Proux v. Sargent, 70 Me. 266.

It does not apply where he must bring separate suits to enforce separate liens.—When the party has lien debts, and to enforce them is compelled to bring several suits against each piece of property upon which a separate lien attaches, this pro-

vision does not apply. In such case, as matter of right, he would be entitled to the certificate of the court to enable him to recover his costs in each suit he might be compelled to bring to enforce his rights. Bicknell v. Trickey, 34 Me. 273.

Or where demand is partly upon lien claim and partly not.—When a creditor's demand is partly upon a lien claim, and partly upon a non-lien claim, he may maintain separate actions, with a recovery of cost in each, notwithstanding the general rule of allowing cost in one suit only, if the matters sued might have all been united in one action. Bicknell v. Trickey, 34 Me. 273.

Or where successive suits are brought for successive trespasses.—When successive suits are brought for successive trespasses on real estate, each suit commenced before the next succeeding trespass, the plaintiff is entitled to recover costs in each suit upon default or verdict. This section has no reference to such a state of facts. Eames v. Black, 72 Me. 263.

Or where indorsee of promissory notes sues in names of different payees.—Where the indorsee of two negotiable promissory notes made payable to different payees, causes each of the notes to be sued, at the same term, in the name of its respective payee, the plaintiff of record will be entitled to costs in each suit. Perry v. Kennebunkport, 55 Me. 453.

Sec. 175. If execution could issue, no costs in action on judgment.—A plaintiff shall not be allowed costs in an action on a judgment of any tribunal on which an execution could issue when such suit was commenced, except in trustee process. (R. S. c. 100, § 172.)

Cross reference.—See c. 114, § 85, re abatement of trustee suit on judgment.

Section prospective only.—See Withee v. Preston, 33 Me. 211.

Costs allowed in trustee process.—Under this section a plaintiff shall recover costs in an action of debt by trustee process, commenced in good faith, on a judgment on which an execution might have issued when such action was commenced, although the alleged trustee be discharged on motion by reason of defective service on him. Leighton v. Colby, 56 Me. 79.

Sec. 176. Travel in actions by a corporation.—In actions of a corporation, its travel is computed from the place where it is situated, if local, otherwise from the place where its business is usually transacted, not exceeding 40 miles, unless its agent actually travels a greater distance to attend court. (R. S. c. 100, § 173.)

Sec. 177. Power of court over costs.—The power of the court to require payment of costs or to refuse them as the condition of amendment or continuance is not affected by this chapter. (R. S. c. 100, § 174.)

Sec. 178. When bankrupt recovers no costs.—When a defendant pleads a discharge in bankruptcy or insolvency obtained after the commencement of the suit, he recovers no costs before the time when the certificate was produced in court. (R. S. c. 100, § 175.)

Sec. 179. Hearing on costs; appeal. — When a nonsuit or default is entered, or verdict rendered, or a report of referees is accepted in an action, either party on application to the court may have the costs recoverable taxed by the clerk and passed upon by the court during the term; and any party aggrieved by the decision may file exceptions thereto; but if no such application is made, the clerk, after adjournment, shall determine the costs and either party dissatisfied with his taxation may appeal to the court or to a judge in vacation from whose decision no appeal shall be taken, and all attachments shall continue in force for 30 days after such appeal is decided; provided, however, that the costs shall be taxed and the appeal taken within 30 days from the rendition of final judgment or within 30 days from the term following the receipt of a rescript from the law court. (R. S. c. 100, § 176.)

This section applies only to those costs which the clerk himself might tax in the first instance. It does not apply to expert witness fees, for in no case can they be included by the clerk in the taxable costs of the prevailing party until after they

have been determined and allowed by the presiding justice. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

And only where report of referees is accepted.—This section only applies where the report of referees is accepted. Newell v. Stanley, 137 Me. 33, 15 A. (2d) 30.

Court may direct as to number of terms for which travel and attendance taxed.—The court may exercise its authority to direct as to the number of terms for which travel and attendance are to be taxed when application is made to it, under the provisions of this section to have the costs taxed and passed upon. Porteous, Mitchell & Braun Co. v. Miller, 107 Me. 155, 77 A. 710.

Applied in Reed v. Reed, 118 Me. 321, 108 A. 103.

Cited in Folan v. Lary, 60 Me. 545.

Action for Damages Arising from Perjury.

Sec. 180. Action for damages when judgment obtained by perjury.—When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may bring an action on the case within 3 years after such judgment or after final judgment in any proceedings for a review thereof against such adverse party, or any perjured witness or confederate in the perjury, to recover the damages sustained by him by reason of such perjury; and the judgment in the former action is no bar thereto. (R. S. c. 100, § 177.)

Section gives new and additional remedy.—Before this section was passed, the only remedy of the injured party was by review, under the second specification of c. 123, § 1. This section gave a new and additional remedy. The injured party may now bring his action directly against the witness, or he may apply for a review on discovering the perjury. Landers v. Smith, 78 Me. 212, 3 A. 463.

It applies only to perjury in civil suits.—At common law, the perjury of a witness affords no ground of action. In certain cases, this action for perjury is authorized by this section, but it applies only to perjury in civil suits. Severance v. Judkins, 73 Me. 376; Garing v. Fraser, 76 Me. 37.

The essential elements of civil liability for perjury under this section are (1) a judgment obtained against a party (2) by the perjury of a witness (3) introduced at the trial by the adverse party. A declaration that contains no allegation satisfying the third requirement is demurrable. Milner v. Hare, 126 Me. 14, 135 A. 522.

To maintain an action under this section it must appear (1) that a judgment has been obtained against the plaintiff (2) by the perjury of a witness introduced at the trial by the adverse party (3) to result in damage to the plaintiff. Cole v. Chellis, 122 Me. 262, 119 A. 623.

Judgment must be one based on judicial finding of fact.—The judgment contemplated in this section is a judgment based on a judicial finding of fact. A refusal to grant a nonsuit or a reversal of an order of nonsuit is a judgment, but it is not so founded. Cole v. Chellis, 122 Me. 262, 119 A. 623.

Judgment entered upon refusal of motion for nonsuit will not support action.—In case of "judgment obtained by perjury" an action is under this section maintainable to recover damages, but a defendant who authorizes the court to assume that the plaintiff's testimony is true for the purpose of passing on a motion for a nonsuit and agrees that if the nonsuit is refused final judgment may be entered for the plaintiff for the amount of his claim does not present a case within the intendment of this section. Cole v. Chellis, 122 Me. 262, 119 A. 623.

Section does not apply where defendant was called to stand by plaintiff.—Where the defendant may have been called to the stand by the plaintiff, perjury is none the less criminal, but this section creating the civil remedy does not apply. Milner v. Hare, 126 Me. 14, 135 A. 522.

Action for perjury or proceedings for review must be begun within three years.—This section requires that either the action for perjury or the proceedings for review, should be begun within three years from judgment in the action in which the perjury was committed. The party who waits more than three years before doing anything cannot then revive his right of action against a witness by instituting proceedings for a review. Landers v. Smith, 78 Me. 212, 3 A. 463.

Executions.

Sec. 181. Issue and return.—Executions may be issued on a judgment of the supreme judicial court or superior court after 24 hours from its rendition, returnable within 3 months. (R. S. c. 100, § 178.)

Cross reference.—See c. 115, § 5, re executions in actions in which bail is taken.

The general object of this section was undoubtedly to give the debtor an opportunity to examine into the correctness of the judgment. Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Section does not apply to disclosure commissioners. — This section, requiring the issue of execution to be deferred twenty-four hours after the rendition of judgment, does not apply to disclosure commissioners. Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Execution issued within 24 hours after judgment is irregular.—If an execution is issued within twenty-four hours after judgment, though it be on the following day, it is irregular under this section and may for that cause be set aside. Allen v. Portland Stage Co., 8 Me. 207.

But such irregularity can only be shown by parties or privies, and it cannot affect the title of an innocent purchaser without notice. Allen v. Portland Stage Co., 8 Me. 207.

Parol evidence may be received to show the hour of the day at which an execution was issued, for the purpose of showing that it was within twenty-four hours after judgment, and therefore irregular. Allen v. Portland Stage Co., 8 Me. 207.

When execution may be served.—If an execution is dated the third day of June, and is made returnable at the end of three months, it may be served on the third day of September. Chase v. Gilman, 15 Me. 64.

Requirement of return is for benefit of plaintiff. — Statutory provisions which require sheriffs and constables to return writs of execution are designed for the benefit of the plaintiffs therein and are not available for defendants aggrieved by any omission. Trafton v. Hoxie, 134 Me. 1, 180 A. 800.

And return is not necessary to permit officer to justify under process. — A return of final process, wherein an execution running against the body in the nature of a capias ad satisfaciendum, is not required in order to permit the officer to justify under the process. It was so held at common law. The provisions of this section, making executions returnable within three months, have not changed the rule. Trafton v. Hoxie, 134 Me. 1, 180 A. 800.

Stated in Withee v. Preston, 33 Me. 211.

Cited in State v. Hall, 49 Me. 412.

Sec. 182. Not after 1 year; exception. — No first execution shall be issued after 1 year from the time of judgment, except in cases provided for by section 5 in which the first execution may be issued within not less than 1 year nor more than 2 years from the time of judgment. (R. S. c. 100, § 179.)

History of section. — See Jackson v. Gould, 72 Me. 335.

Plaintiff may take out execution though he has commenced action on judgment. — The plaintiff, having obtained a judgment, was authorized to take out an execution thereon at any time within one year from its rendition, notwithstanding he had, before he took out his execution, caused an action to be commenced upon the same judgment. The commitment of the defendant on the execution did not discharge or annul the judgment on which it issued, nor discharge the action pending thereon. Moor v. Towle, 38 Me. 133.

Judgment taken to have been rendered on last day of term. — Where the term at which judgment was rendered was held on the fourth Tuesday of May, 1835, and was continued for several weeks, unless a special judgment was entered, the judgment must be taken to have been rendered the last day of the term. Thus an execution issued June 3, 1836, was issued within the year. Chase v. Gilman, 15 Me. 64.

Applied in Farley v. Bryant, 41 Me. 400.

Cited in Withee v. Preston, 33 Me. 211.

Sec. 183. Renewed in 10 years.—An alias or pluries execution may be issued within 10 years after the day of the return of the preceding execution and not afterwards. (R. S. c. 100, § 180.)

Alias executions issue at any time after former ones have been returned, as a matter of course. Skolfield v. Skolfield, 90 Me. 571, 38 A. 530.

Alias execution may issue in real action to foreclose mortgage.—This section is general enough to authorize the issuance of alias execution under c. 172, § 40, in a real action to foreclose a mortgage. Belcher v. Knowlton, 89 Me. 93, 35 A. 1019.

Quoted in Withee v. Preston, 33 Me. 211.

Sec. 184. When execution not so issued, scire facias on judgment.—When execution is not issued within the times prescribed by the 2 preceding sections, a writ of scire facias against the debtor may be issued to show cause why execution on the judgment should not be issued, and if no sufficient cause is shown, execution may be issued thereon. (R. S. c. 100, § 181.)

The provisions of this section apply to all judgments alike. Littlefield v. Greenfield, 69 Me. 86.

Remedy is optional.—The remedy by scire facias provided in this section is permissive by its terms, and leaves it optional with the creditor to pursue the remedy here provided or bring an action of debt. Littlefield v. Greenfield, 69 Me. 86.

Sec. 185. Interest on judgments.—On executions issued on judgments interest shall be collected from the time of judgment. (R. S. c. 100, § 182.)

History of section.—See Edwards v. Moody, 60 Me. 255.

Judgments of justices.—This section sustains, by implication, the right to recover interest in actions upon judgments of justices. Edwards v. Moody, 60 Me. 255.

Applied in Clark v. Metcalf, 38 Me. 122; Hamant v. Creamer, 101 Me. 222, 63 A. 736.

Sec. 186. New execution may be issued on proof of loss.—A justice of the court in which the judgment was rendered, upon proof by affidavit or otherwise of the loss or destruction of an execution unsatisfied in whole or in part, may order a new execution to be issued for what remains unsatisfied. (R. S. c. 100, § 183.)

Sec. 187. Execution upon award to creditor by commissioners on solvent estate.—When the report of commissioners appointed by the probate court to decide upon exorbitant, unjust or illegal claims against a solvent estate has been returned and finally accepted in favor of a creditor, and the amount allowed him is not paid within 30 days thereafter, he may file a certified copy of such report in the office of the clerk of courts and apply in writing to a justice of the superior court for an execution; and such justice shall order a hearing thereon, with or without notice to the adverse party. The application shall be entered on the docket of the court if in session, otherwise on the docket of the preceding term. If no sufficient cause is shown to the contrary, the justice shall direct an execution to be issued for the amount allowed the creditor by such report with interest from its return to the probate court, and costs allowed by the probate court, if any, $3 for clerk's fees, and travel and attendance and expense of copies and service of notices, as in suits at law. (R. S. c. 100, § 184.)

Sufficient compliance with requirement of certified copy of report. — It is sufficient compliance with the provisions of this section, requiring a certified copy of the commissioner's report to be filed before making an application for execution, if the order of acceptance by the probate court, referring to and making the report a part of the order, be certified. Palmer v. Palmer, 61 Me. 236.

The creditor can resort to the process provided in this section when an executor has entered an appeal from the report of the commissioners, but has failed to complete it by giving the requisite notice. Palmer v. Palmer, 61 Me. 236.

Sufficiency of commissioners' report.—See Palmer v. Palmer, 61 Me. 236.

Cited in Hall v. Merrill, 67 Me. 112.

Official Court Reporters.

Sec. 188. Official court reporters, their appointment, duties, salary and expenses.—The chief justice of the supreme judicial court may appoint not

more than 11 official court reporters to serve for a term of 7 years, who shall report the proceedings in the supreme judicial court and in the superior court and who shall be officials of the court to which they may from time to time be assigned by the chief justice, and be sworn to the faithful discharge of their duties, and each of whom shall receive from the state a salary of $5,000 per year. They shall take full notes of all oral testimony and other proceedings in the trial of causes, either at law or in equity, including the charge of the justice in all trials before a jury and all comments and rulings of said justice in the presence of the jury during the progress of the trial, as well as all statements and arguments of counsel addressed to the court, and during the trial furnish for the use of the court or either of the parties a transcript of so much of their notes as the presiding justice may direct. They shall also furnish a transcript of so much of the evidence and other proceedings taken by them as either party to the trial requires, on payment therefor by such party at the rate of 20¢ for every 100 words. One of said official court reporters designated for the purpose shall perform such clerical services as may be required of him by the chief justice who may allow him reasonable compensation for such clerical services for which he shall be reimbursed.

Official court reporters appointed by the chief justice of the supreme judicial court shall also receive, from the county in which the court or an equity proceeding is held, their expenses when in attendance upon such court or equity proceeding away from their place of residence but not otherwise; a detailed statement of such expenses actually and reasonably incurred shall be approved by the presiding or sitting justice.

The chief justice may appoint temporary court reporters to serve at his pleasure, to fulfill the duties of official court reporters whenever it may seem necessary to him in carrying out the functions and duties of the court. While in the performance of their temporary duties, these court reporters shall receive the same compensation as provided by law for, and shall have all the powers and duties of, official court reporters.

At the request of the president of the senate and the speaker of the house of representatives, the chief justice of the supreme judicial court may grant a leave of absence without pay for not more than 5 months to no more than 2 such official court reporters for legislative reporting. Such compensation as may be provided for official court reporters assigned for legislative reporting shall not be less than the salary provided for services as official court reporters. (R. S. c. 100, § 185. 1945, c. 308. 1949, c. 64. 1951, c. 401. 1953, c. 414; c. 420, § 2.)

Quoted in Stenographer Cases, 100 Me. 271, 61 A. 782.

Sec. 189. Appointment for hearings in vacation. — At any hearing in vacation of a cause in law or equity pending in the supreme judicial court or in the superior court, the presiding justice may, when necessary, appoint a court reporter other than his regularly appointed official court reporter to report the proceedings thereof, who shall receive for his services from the treasury of the county in which the cause is pending a sum not exceeding $10 a day for attendance in addition to actual traveling expenses; but when at such hearings the presiding justice employs his regularly appointed official court reporter, such official court reporter shall receive from said treasury only the amount of his actual expenses incurred in attending the same. (R. S. c. 100, § 186. 1953, c. 420, § 3.)

Sec. 190. Authentication of evidence. — In all cases coming before the law court from the supreme judicial court or from the superior court in which a copy of the evidence is required by statute, rule of court or order of the presiding justice, a certificate signed by the official court reporter, stating that the report furnished by him is a correct transcript of his stenographic notes of the testimony and proceedings at the trial of the cause, shall be a sufficient authentication there-

of without the signature of the presiding justice. (R. S. c. 100, § 187. 1953, c. 420, § 4.)

Cross reference. — See note to c. 148, § 30, re section applies to appeal to law court from denial of motion for new trial in felony case.

Certificate held insufficient. — The certificate of the official court reporter reading "A correct transcript of the foregoing testimony" falls far short of that provided for in this section, which requires that the certificate shall state "that the report furnished by him is a correct transcript of his stenographic notes of the testimony and proceedings at the trial of the cause." Hills v. Paul, 116 Me. 12, 99 A. 719.

Applied in State v. Dodge, 124 Me. 243, 127 A. 899.

Sec. 191. Death or disability.—When a verdict has been rendered or a decree made in any cause, in law or equity, in the supreme judicial court or in the superior court, and a certified copy of the evidence taken by the official court reporter cannot be obtained by reason of the death or disability of such reporter, the justice who presided at the trial of such cause may, if a motion for a new trial has been filed during the term at which the verdict was rendered, on petition therefor, after notice and hearing thereon, set aside such verdict and grant a new trial at any time within 1 year after it was returned when in his opinion the evidence demands it; and exceptions allowed by such justice, when the evidence or any portion thereof is made a part of the exceptions or an appeal taken from any decree in equity made by him, may be heard and determined by the law court either upon a statement of facts agreed upon by counsel and certified by such justice or upon a report signed and certified by him as a true report of all the material facts in the case. (R. S. c. 100, § 188. 1953, c. 420, § 5.)

Sec. 192. Testimony proved by certified copy of notes of former testimony.—Whenever it becomes necessary in any court in the state to prove the testimony of a witness at the trial of any former case in any court in the state, the certified copy of the notes of such testimony, taken by the official court reporter at the court where said witness testified, is evidence to prove the same. (R. S. c. 100, § 189. 1953, c. 420, § 6.)

Section is constitutional.—This section has placed a certified copy of the record kept by the reporter in the sworn performance of his official duty upon the footing of other documentary evidence, and this is not prohibited by the constitutional provisions in Art. I, § 6, or any other article, of the constitution. State v. Frederic, 69 Me. 400.

It makes testimony a quasi record.— This section makes the minutes of the testimony of a witness, taken by the reporter who is a sworn officer of the court, a quasi record, a certified copy of which is declared to be legal evidence to prove the testimony of such witness whenever proof of the same is relevant in the case on trial. State v. Frederic, 69 Me. 400.

The phrase, "in the trial of any former case," fairly includes any former trial of the same case. State v. Frederic, 69 Me. 400.

Former testimony admissible to impeach witness at second trial of same case. — A court reporter's certified copy of the testimony given by a witness, called by the defendant at a former trial of an indictment for an assault and battery in which the jury disagreed, is admissible to impeach the testimony of such witness at the second trial. State v. Frederic, 69 Me. 400.

Applied in State v. Budge, 127 Me. 234, 142 A. 857.

Cited in Edegely v. Appleyard, 110 Me. 337, 86 A. 244.

Sec. 193. Stenographic reports taxed in bill of costs.—Any amount legally chargeable by official court reporters for writing out their reports for use in law cases and actually paid by either party whose duty it is to furnish them may be taxed in the bill of costs and allowed against the losing party, as is now allowed for copies, if furnished by the clerk. (R. S. c. 100, § 190. 1953, c. 420, § 7.)

Crier.

Sec. 194. Sheriff, deputy or clerk may act as crier. — The duties of the crier in the courts shall be performed by the sheriff or any deputy or by the clerk. (R. S. c. 100, § 191.)

Judicial Council.

Sec. 195. Judicial council established.—A judicial council, as heretofore established, shall make a continuous study of the organization, rules and methods of procedure and practice of the judicial system of the state, the work accomplished and the results produced by that system and its various parts. Said council shall be composed of the attorney general; 2 justices of the superior court; 2 judges of the municipal courts of the state; 1 judge of a probate court of this state; 1 clerk of the judicial courts of this state; 2 members of the bar; and 3 laymen, all to be appointed by the governor with the advice and consent of the executive council. The appointments by the governor shall be for such periods, not exceeding 4 years, as he shall determine. (R. S. c. 100, § 192.)

Sec. 196. Reports.—The judicial council shall report annually on or before the 1st day of December to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable. (R. S. c. 100, § 193.)

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