

# MAINE STATE LEGISLATURE

The following document is provided by the  
**LAW AND LEGISLATIVE DIGITAL LIBRARY**  
at the Maine State Law and Legislative Reference Library  
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied  
(searchable text may contain some errors and/or omissions)

NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

---

FIRST ANNOTATED REVISION

---

IN FIVE VOLUMES

VOLUME 4



THE MICHIE COMPANY  
CHARLOTTESVILLE VIRGINIA

## Chapter 128.

### Writ for Replevying a Person.

**History of chapter.**—See *Nason v. Staples*, 48 Me. 123.

**This chapter was enacted for the exclusive benefit of the party held in custody.** The legislature did not intend that a third person might resort to this process. *Richardson v. Richardson*, 32 Me. 560; *Farnsworth v. Richardson*, 35 Me. 267.

**Specific performance is not within scope of chapter.**—An action commenced, not to relieve the plaintiff from an actually existing unlawful imprisonment or restraint, but to coerce performance of an alleged contract, is not within the language nor the spirit and intent of this chapter. *Richardson v. Richardson*, 32 Me. 560.

**Sec. 1. Persons entitled to writ, and from what court.**—If any person is imprisoned, restrained of his liberty or held in duress, unless by a lawful writ, warrant or other process, civil or criminal, he may have the writ for replevying the person, on application made by himself or anyone in his behalf to any justice of the superior court, in term time or vacation, at the discretion of such justice and not otherwise. (R. S. c. 115, § 1.)

**The writ de homine replegiando lies in favor of a person unlawfully imprisoned.** *Richardson v. Richardson*, 32 Me. 560; *Hutchings v. Van Bokkelen*, 34 Me. 126; *Garland v. Williams*, 49 Me. 16.

**This action cannot be maintained by one in jail by a voluntary self-surrender** for he is not unlawfully imprisoned. *Garland v. Williams*, 49 Me. 16.

**Meaning of "lawful".**—The term "lawful" as used in this section does not mean

legally sufficient, but is the same as legal process, or process of law. *Nason v. Staples*, 48 Me. 123.

**Writ will not issue if person is held under legal process.**—This section does not apply to cases of persons held under legal process, that is to say, a writ or warrant issuing from any court, under color of law, however defective. *Nason v. Staples*, 48 Me. 123, distinguishing *Gurney v. Tufts*, 37 Me. 130.

**Sec. 2. Issue and service.**—The writ described in this chapter shall issue from and be returnable to the superior court in the county where the plaintiff is confined, and be directed to a proper officer and served as soon as may be, 14 days at least before the return day. (R. S. c. 115, § 2.)

**Sec. 3. Form.**—The form of the writ shall be as follows:

"STATE OF MAINE.

[L. S.] . . . ., ss. To the sheriff of our county of . . . ., or his deputy, Greeting.

We command you, that without delay you cause to be replevied, C. D., who, as it is said, is taken and detained in a place called N., in our said county of . . . ., by the duress of G. H., that he may appear at our superior court, next to be held at . . . ., within and for the county of . . . ., on the . . . . day of . . . . next, then and there in our said court to demand right and justice against said G. H. for the duress and imprisonment aforesaid, and to prosecute his replevin, as the law directs; provided that the said C. D., (the plaintiff,) "before his deliverance, gives bond to the defendant, in such sum as you judge reasonable, with two sufficient sureties, with condition to appear at said court to prosecute his replevin against the defendant, and to have his body there to be redelivered, if thereto ordered by the court, and to pay all such damages and costs as are awarded against him; and if the plaintiff is delivered by you at a day before the sitting of said court, you shall summon the defendant to appear at said court.

Witness J. S., Esquire, our . . . ., at . . . ., the . . . . day of . . . ., in the year of our Lord nineteen hundred and . . . .

(R. S. c. 115, § 3.)

L. M., Clerk."

**Sec. 4. Bond given before writ issues.**—No person shall be delivered by such writ described in this chapter until a bond is given by the plaintiff or person

suing in his behalf, to be returned to the court with the writ, for the sufficiency of which the officer shall be answerable, as in case of bail in civil actions. (R. S. c. 115, § 4.)

See c. 115, § 1, re bail in civil actions.

**Sec. 5. Judgment.** — If the plaintiff maintains his action, he shall be discharged and recover his costs; but if not, the defendant shall recover his costs and such damages as the jury assess; or if the defendant is defaulted or the parties consent, the court may assess the damages. (R. S. c. 115, § 5.)

**Sec. 6. If defendant entitled to custody of plaintiff.**—If it appears that the defendant is bail for the plaintiff or that, as his child, ward, apprentice or otherwise, he is entitled to his custody, he shall have judgment for a redelivery of his body, to be held or disposed of according to law. (R. S. c. 115, § 6.)

This section is not intended for persons held under civil process. *Nason v. Staples*, 48 Me. 123.

The writ cannot be maintained against the father or guardian of a minor child, in behalf of such child. *Bridges v. Bridges*, 13 Me. 408.

If a father, after making an assignment of the services or society of his minor child, retakes the child into his own keeping, the remedy of the assignee is not by

replevin, but by action on the contract. *Farnsworth v. Richardson*, 35 Me. 267.

**Import of words "or otherwise."**—The words "or otherwise" imply cases of a similar nature to that of "child, apprentice, or one under bail" and to apply it to one in custody upon legal process would endanger important public and private rights and interests, without any possibility of redress. *Nason v. Staples*, 48 Me. 123.

**Sec. 7. If defendant has eloigned the plaintiff, he may be arrested and give bail.**—If it appears that the defendant has eloigned the plaintiff's body so that the officer cannot deliver him, the court, on motion, shall issue a writ of reprisal to take the defendant's body and him safely keep so that he may be at the next term of the court, to traverse the return of said writ for replevying the plaintiff; and he may be discharged by giving bail for his appearance at court, with two sufficient sureties, in such sum as the officer requires. (R. S. c. 115, § 7.)

**Sec. 8. Defendant, if guilty, imprisoned; writ of reprisal to issue; suggestion of plaintiff's death.**—The defendant may traverse the return on the writ for replevying the plaintiff and if it appears that he is not guilty of eloigning the plaintiff, he shall be discharged and recover costs; but if he does not traverse it, or if on such traverse it appears that the defendant did eloign the plaintiff, an alias writ of reprisal shall issue, substantially in the form heretofore established and used in the state, on which he shall be committed to jail to remain irrepleviable until he produces the body of the plaintiff or proves his death. He may suggest the plaintiff's death and the court shall impanel a jury to try the fact at the defendant's expense; and if the death is proved, he shall be discharged. (R. S. c. 115, § 8.)

**Sec. 9. If plaintiff produced.**—If the defendant, after the return of eloignment, produces the body of the plaintiff in court, the court shall deliver him from imprisonment, upon his giving the defendant such bond as hereinbefore in this chapter directed to be taken by the officer when the plaintiff is delivered by him; and for want thereof, he shall be committed to abide the judgment on the writ for replevying the plaintiff; and, in either case, the suit shall be tried as aforesaid. (R. S. c. 115, § 9.)