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Chapter 157.

Insolvent Estates.

This chapter was designed to regulate proceedings of commissioners of insolvency, and of the probate court, in all cases where such commissioners should be appointed. Hall v. Merrill, 67 Me. 112.

Distribution.

Sec. 1. Priority of claims and payment. — An insolvent estate, after payment of the expenses of the funeral and of administration, shall be appropriated:

I. To the allowance made to the widow or widower and children.

II. To the expenses of the last sickness.

III. To debts entitled to a preference under the laws of the United States.

IV. To public rates and taxes, and money due the state.

V. To all other debts.

A creditor of one class is not to be paid until creditors of preceding classes, of which the administrator had notice, are fully paid. (R. S. c. 144, § 1.)

Cross references.—See c. 92, § 87, re assignees, receivers, executors, etc., to pay taxes from money in their hands; c. 170, § 21, re disposal of life insurance.

Claim for physician's services rendered during last sickness is preferred debt.— A claim for services rendered by a physician in the last sickness of the testator or intestate, is a preferred debt, and not subject to payment pro rata, under a commission of insolvency. Flitner v. Hanly, 18 Me. 270.

As are public rates and taxes. — By this section, "public rates and taxes and money due the state" have priority over the general creditors of an insolvent estate. State v. Hichborn, 67 Me. 504.

In the settlement of insolvent estates of deceased persons, taxes are preferred. Bisbee v. Mt. Battie Manufacturing Co., 107 Me. 185, 77 A. 778.

Applied in Bulfinch v. Benner, 64 Me. 404.

Quoted in Burgess v. Young, 97 Me. 386, 54 A. 910.

Cited in Brown v. Whitmore, 71 Me. 65; Bird v. Bird, 77 Me. 499, 1 A. 455; Woodbridge v. Tilton, 84 Me. 92, 24 A. 582; Robbins, Petitioner, 126 Me. 555, 140 A. 366.

Sec. 2. When representation of insolvency not made.—When an estate is not sufficient to pay more than such expenses and claims of the first 4 classes, the administrator is exonerated from payment of any claims of the 5th class without making a representation of insolvency. (R. S. c. 144, § 2.)

If the inventory of the estate shows no assets, representation of insolvency is unnecessary. McCluskey, Appellant, 116 Me. 212, 100 A. 977.

No inventory or representation of insolvency is necessary if no assets are found. Thurlough v. Kendall, 62 Me. 166.

Nor is such representation necessary if assets not sufficient to pay claims of first four classes.—It is only by an inventory and an account and by regular proceedings in the probate court, that an administrator can defend a suit on the ground of insolvency of the estate. If, however, the assets are sufficient only to pay the preferred debts, the statute does not re-

quire the useless ceremony of formally representing the estate insolvent. Woodbridge v. Tilton, 84 Me. 92, 24 A. 582.

Which fact may be shown in defense to suit on administrator's bond. — By this section, when by proper proceedings in probate court, it is demonstrated that the estate is not sufficient to pay more than the expenses of the funeral and administration, and the first four classes of debts named in § 1, that fact, whenever ascertained, may be pleaded and shown in defense to a suit on the administrator's bond. Burgess v. Young, 97 Me. 386, 54 A. 910.

When an estate is not sufficient to pay more than the funeral expenses and expenses of administration and the first four classes of debts named in § 1, the administrator is exonerated from payment of any claim of the fifth class, without representation of insolvency. The nonliability of the sureties on his bond is judicially ascertained when the administrator's account is subsequently settled, showing that the estate was exhausted by the expenses and the first four classes named in § 1. Burgess v. Young, 97 Me. 386, 54 A. 910.

This section is entirely silent as to the time when the administrator shall ascertain the condition of the estate of his intestate, or when he shall settle his final account, in order to exonerate himself from paying the debts of the 5th class. The language is "when an estate is not sufficient, etc." That is, at whatever time, in the settlement of the estate, it is discovered that the estate "is not sufficient," then the administrator is exonerated. In the absence of any statute to the contrary, the discovery of the insufficiency of the estate would be seasonable, if the settlement of the final account, showing the facts necessary to exonerate, was entered upon the records of the probate court, in time to enable such records to be pleaded in defense to the action on the bond. Burgess v. Young, 97 Me. 386, 54 A. 910.

Applied in Ludwig v. Blackinton, 24 Me. 25; Webb v. Gross, 79 Me. 224, 9 A. 612; Hemenway v. Cunningham, 113 Me. 559, 92 A. 897.

Commissioners.

Sections 3-9 provide for the appointment of commissioners on insolvent estates and the mode of their proceeding. Donnell, Appellant, 114 Me. 324, 96 A. 230.

Commissioners constitute special tribunal. — The commissioners of insolvency are substituted for the court, as referees or arbitrators are in the cases submitted to them. They constitute a special tribunal to receive and examine claims against the estate and to adjudicate upon them, with power to administer oaths and examine witnesses, as courts of record do. An appeal is allowed from their decision. An adjudication by the commissioners is final and binding on both parties, unless appealed from and unless the appeal is prosecuted according to the requirements of the statute. Bates v. Ward, 49 Me. 87.

Sec. 3. When representation made; commissioners sworn; report. —When it appears to the administrator that an estate may be insufficient to pay the debts of the 5th class, on his application to the judge of probate the judge shall appoint two or more commissioners to receive and decide upon all unpreferred claims against the estate, except those of the administrator. They shall first be sworn, and shall make report to the court of all claims presented, and of their disposal, with the sum allowed on each claim. The judge may, for sufficient cause, revoke such appointment and issue a new commission or proceed otherwise as the case may require. (R. S. c. 144, § 3.)

Cross reference. — See note to c. 171, § 46, re no levy on estate after appointment of commissioners.

Commissioners do not pass on preferred claims. — The commissioners of insolvency are required to pass only upon the claims of such creditors as are entitled to a pro rata distribution of what may remain after the payment of the preferred claims; and their report should not embrace the preferred claims. Flitner v. Hanley, 19 Me. 261.

Or those of administrator.—None of the provisions of §§ 3-9 show that the commissioners have anything whatever to do in passing upon the allowance of the private claim of an administrator against the estate. It doesn't go into their hands even

for annexation to the list of claims allowed. Donnell, Appellant, 114 Me. 324, 96 A. 230. See note to § 8.

If section followed, estate is settled as insolvent even if it afterwards proves solvent.—A perusal of the statutes governing the settlement of estates of decedents will disclose that one method is provided for settling estates assumed to be solvent, and another and different method for settling estates assumed to be insolvent. Which method shall be pursued in the settlement of any particular estate must necessarily be determined early in the proceedings. This determination cannot be delayed until it is finally ascertained whether the estate is in fact insolvent, because that fact cannot be certainly known until the estate is finally settled. Hence, it is provided that when it appears to the administrator, that the estate may be eventually insolvent, he may so represent to the court and have commissioners appointed to adjudicate upon claims. The appointment of commissioners upon such representation necessarily determines that the estate shall thereafter be settled as an insolvent estate. The estate is thereby "decreed insolvent," not as to the fact of its actual insolvency, but as to the method of its settlement. The estate must thereafter be settled as an insolvent estate, even though it be in fact abundantly solvent. Walker v. Newton, 85 Me. 458, 27 A. 347.

Cited in Donnell, Appellant, 114 Me. 324, 96 A. 230.

Sec. 4. Meetings and notice; time allowed to prove claims; in case of death of commissioner. — The commissioners shall appoint convenient times and places for their meetings and give notice thereof as the judge directs. Six months after their appointment shall be allowed in the first instance for the presentation of claims. An additional time, not exceeding in the whole 18 months, may be allowed therefor or for any particular claim or claims specified in the judge's order. If one or more of the commissioners die, after the expiration of the 18 months and before the commission is returned, the judge may appoint new commissioners and allow an additional time not exceeding 3 months for the presentation of claims. (R. S. c. 144, § 4.)

Creditors given 18 months to present claims. — The statute manifestly intends that 18 months in the whole should be given to the creditors in which to present their claims. Griffin v. Parcher, 48 Me. 406.

The "additional time, not exceeding in the whole 18 months," means time in which the creditors may prove, and the commissioners may act upon the claims to be proved. Griffin v. Parcher, 48 Me. 406.

Special statute of limitations applies to claims against insolvent estate.—The presenting of a claim to commissioners is to be esteemed equivalent to originating a suit, and the special statute of limitations (c. 165, § 17) of actions against executors and administrators applies to claims against estates after representation of insolvency as well as before. It is an absolute bar unless suit is brought before the representation, or the claim is presented to the commissioners afterwards, within the period limited. The insolvency statute changes the mode, but does not extend the time, of commencing process for enforcing claims against estates. Jellison v. Swan, 105 Me. 356, 76 A. 920; Harmon v. Fagan, 130 Me. 171, 154 A. 267.

While this section allows full six months for the presentation of claims, only such claims can be allowed as are not barred, when presented, by the special statute of limitations (c. 165, § 17), or by the general statute of limitations, or by some other principle of law. Jellison v. Swan, 105 Me. 356, 76 A. 920.

Cited in Donnell, Appellant, 114 Me. 324, 96 A. 230.

Sec. 5. Presentation and proof of claims.—Claims must be presented in writing supported by affidavit of the claimant or of some person cognizant thereof, stating what security the claimant has, if any, and the amount of credit to be given according to his best knowledge and belief. The commissioners may require a claimant to be sworn and may examine him on all matters relating to his claim; and administer oaths to claimants and witnesses. Any claim filed in the registry of probate supported by affidavit as provided in section 15 of chapter 165 shall be considered as if presented to said commissioners, provided the same is so filed before the expiration of the 6 months' period named in the

preceding section. Before making their report said commissioners shall adjudicate upon all claims so filed. (R. S. c. 144, § 5.)

Cross reference. — See c. 113, § 82, re setoffs of demands due from a deceased person.

Section designed as protection against spurious claims.—The design of this section was to afford persons administering on estates additional means for the protection of the estate against spurious claims. Marshall v. Perkins, 72 Me. 343.

Claims against an insolvent estate must be supported by affidavit. White v. Brown, 67 Me. 196.

The statute is imperative. Claims "must" be supported by the affidavit of the claimant or of a person "cognizant thereof." Morgan v. McCausland, 96 Me. 449, 52 A. 931.

But claimant sworn only at requirement of commissioners. — The commissioners, before whom the claim is presented for the allowance, "may require a claimant to be sworn, and may examine him on all matters relating to his claim." He is only sworn at the requirement of the commissioners, never at his own instance. White v. Brown, 67 Me. 196.

Applied in Kenison v. Dresser, 121 Me. 77, 115 A. 554.

Cited in Donnell, Appellant, 114 Me. 324, 96 A. 230.

Sec. 6. Refusal or perjury by claimant.—If the claimant refuses to submit to such examination his claim shall be rejected. If he or a witness knowingly answers or testifies falsely in relation to any claim, he is guilty of perjury. (R. S. c. 144, § 6.)

Stated in Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Cited in White v. Brown, 67 Me. 196; Donnell, Appellant, 114 Me. 324, 96 A. 230.

Sec. 7. Value of claimant's security deducted; appraisal. — When a claimant holds security for his claim of less value than its amount, he shall be allowed only the difference between it and such value, estimated by the commissioners, who shall give him a certificate thereof. If either party is dissatisfied with that valuation, the judge, on application and after notice to the other party, may appoint 3 disinterested men to appraise on oath such security and make return thereof, by them signed, to the court; and their appraisal shall be substituted for the first, and the amount allowed varied accordingly. If the claimant declines to take the property at such appraisal and relinquishes his claim thereon, its appraised value shall be added by the judge to the sum allowed on which he is to receive his dividend and the property appraised shall be disposed of by the administrator. (R. S. c. 144, § 7.)

Claim on whole debt constitutes waiver of security.—Three methods of procedure are open to a mortgagee when the estate of the mortgagor is adjudged insolvent. He might foreclose his mortgage and look to his security; he might prove the balance of his debt before the commissioners, after deducting the value of his security to be ascertained by the methods provided by this section; or he might surrender or waive his security and prove his whole debt before the commissioners. If the last method is chosen and he presents his whole claim to the commissioners on oath, declaring that it is justly due him, and that he has no security therefor, and the commissioners allow and report his whole claim to the probate court, and their report is there accepted, by this procedure all security is waived and surrendered, for the creditor cannot receive a dividend on his whole claim and hold his security as well. So long as he retains the security he cannot prove his whole debt. If he voluntarily proves his whole debt, he thereby necessarily waives his security. Nickerson v. Chase, 90 Me. 296, 38 A. 175.

Cited in Donnell, Appellant, 114 Me. 324, 96 A. 230.

Sec. 8. Interest on claims; report recommitted; claim of administrator.—Interest shall be computed on claims allowed, from the death of the debtor to the time of the commissioners' first report, unless the contract otherwise provides. At the expiration of the time limited, the commissioners shall make their report to the judge who, before ordering distribution, may recommit it for the correction of any error appearing to him to exist. Their fees shall be

paid by the administrator. Any claim which he has against the estate shall be examined and allowed by the judge and by him annexed to the list of claims, and a proportional dividend decreed to him. (R. S. c. 144, § 8.)

Claims of executor or administrator not presented to commissioners. — The last sentence of this section applies solely to the private claim of an administrator against an insolvent estate and shows that such a claim is not required to be presented to the commissioners in any form. The language of the statute is clear and says that such a claim shall be examined and allowed by the judge, and by him, not the commissioners, annexed to the list of claims, and proportional part decreed by the judge to him, the administrator, holding the private claim. In other words, a private claim is a distinct and exclusive matter from beginning to end for the adjudication of the judge of probate. Donnell, Appellant, 114 Me. 324, 96 A. 230. See § 3 and note.

But such claims of executor or administrator must be specially passed upon.— Claims of an executor or administrator must be specially passed upon by the probate judge, or the payment of them cannot be allowed. Wadleigh v. Jordan, 74 Me. 483.

As a matter of law. — The judge does not pass upon a claim of the administrator as a matter of discretion, but as a matter of law. Donnell, Appellant, 114 Me. 324, 96 A. 230.

Section contemplates hearing before judge of probate. — There is no statute provision for an appeal from the commissioners, as a court. The appeal is from their decision after it is made to the court of probate. (§ 12). This section contemplates that a party aggrieved may have a hearing before the judge of probate, before an appeal, and he may obtain a recommitment of the report to correct the errors he complains of in the disallowance of his claim. Robbins Cordage Co. v. Brewer, 48 Me. 481.

Sec. 9. Commissioners forfeit compensation for neglect of duty.— Commissioners of insolvency who neglect to render their report to the judge for 3 months after the expiration of the time allowed them for receiving claims forfeit all compensation for their services and may be cited by the judge to show cause for their negligence. (R. S. c. 144, § 9.)

Cited in Donnell, Appellant, 114 Me. 324, 96 A. 230.

Contingent Claims.

Sec. 10. Proof of contingent claims.—Contingent claims may be proved and the amount allowed reported, stating their nature and distinguishing them from other claims. The judge ordering distribution shall leave in the hands of the administrator a sum sufficient to pay on them the percentage paid to others. (R. S. c. 144, § 10.)

This section requires funds to be retained for contingent claims. That class of claims embraces those only, concerning which it is uncertain or contingent, whether they will ever become debts. Of that kind are the liabilities of a surety. Such a claimant may present his contingent claim, and funds are to be reserved for it. Greene v. Dyer, 32 Me. 460.

Applied in Nealley v. Segar, 57 Me. 563.

Sec. 11. Proceedings on such claims after 4 years. — If, within 4 years after administration was granted, such claims become absolute, there shall be paid upon them a percentage equal to that paid on other claims, if it can be done without disturbing prior dividends. If they do not become absolute within that time or if payment of an equal percentage does not exhaust the sum reserved, the residue shall be distributed to all creditors whose claims have been proved or allowed by the judge. (R. S. c. 144, § 11.)

A reservation for contingent claims is not to be continued more than four years. Greene v. Dyer, 32 Me. 460.

Applied in Nealley v. Segar, 57 Me. 563.

Appeals.

Appeals governed by principles of ordinary actions at law.—On appeals from the decision of commissioners of insolvent estates, the statutes provide what shall be the form of the action to be commenced (§ 14) and that, on the trial of such ac-

tion, the creditor may be examined on oath (§ 17). In all other respects, the course of proceedings and the principles upon which testimony is to be received or rejected, are the same as those applicable to ordinary actions at law. The statute gives no cause of action where none exists without it. Gould v. Carlton, 55 Me. 511.

Sec. 12. Appeals; bond; notice.—The claimant, the administrator, an heir at law or any creditor may appeal from the decision of the commissioners by giving written notice thereof at the probate office within 20 days after their report is made. If the appellant is an heir at law or creditor other than the claimant, he shall file in the probate office with his notice of appeal a bond to the claimant with sureties to the satisfaction of the judge for the payment of all costs awarded against him. When the appeal is made by any party other than the claimant, he shall give notice to the creditor within 30 days by service of a copy, attested by the register, on him, his agent or attorney, personally or by leaving it at his last and usual place of abode if he has any within the state; otherwise, such notice shall be given as the judge directs. (R. S. c. 144, § 12.)

Appeal may await final action of judge. —A party is not compelled to enter an appeal until the report has been made to the judge. An appeal, bfeore the report is would be anomalous to compel a party to appeal from anything but the final action of the court or tribunal, on the subject matter. Robbins Cordage Co. v. Brewer, 48 Me. 481.

A party may safely wait until the final action of the probate court taken on the report under § 8 before making his appeal. Robbins Cordage Co. v. Brewer, 48 Me. 481.

And appeal before report filed would be inoperative. — The 20 day limitation for making an appeal does not begin to run until the report is signed and made to the judge. An appeal, before the report is filed in the probate office, would be too soon, and therefore inoperative. Robbins Cordage Co. v. Brewer, 48 Me. 481.

Appeal is to common-law tribunal.— This section allows an appeal "from the decision of the commissioners." Upon the report of the commissioners no decree is required to be made by the judge of probate from which an appeal can be taken. The appeal from the decision of the commissioners is to a common-law tribunal, and not to the supreme court of probate, as on appeal from the decree of the judge of probate. Morgan v. McCausland, 96 Me. 449, 52 A. 931.

Donees and legatees have right to appeal.—A special right to appeal from the findings of commissioners of insolvency is given by this section to heirs at law and all creditors, the spirit of which plainly includes donees, whose claims are subject to reduction by reason of existing insolvency, and legatees under a will. McLean v. Weeks, 65 Me. 411.

Sufficiency of notice not governed by technicalities. — The statute requires no special form for the notice. The technical subtleties of the common law are not required in probate proceedings, and if the notice is in writing, is seasonably delivered to the register of probate at his office, and clearly states all the facts of which it is necessary the administrator should be informed, it substantially answers all the requirements of the statute. Pattee v. Lowe, 35 Me. 121.

But notice must be subsequent to commissioners' return.—Notice before the return of the commissioners is not in compliance with the requirements of the statute, but premature and inoperative. Subsequent notice is made a prerequisite to the maintenance of the action. Pattee v. Lowe, 36 Me. 138.

And given at probate office.—The notice of appeal is to be given at the probate office, and not to the commissioners. Robbins Cordage Co. v. Brewer, 48 Me. 481.

If the claimant is the appealing party, all that is required of him is to give notice at the probate office. Palmer v. Palmer, 61 Me. 236.

But if he is not he should be notified of appeal. — If the claim was disallowed in whole or in part and, being dissatisfied, the claimant appeals, there is no need of notice to him, and notice at the probate office where the estate is being settled must necessarily come to the knowledge of the representative party. But if the claimant is the prevailing party before the commissioners and the representative party, being dissatisfied, appeals, then the claimant should be notified in order that he may bring his action in the common-law court. Palmer v. Palmer, 61 Me. 236.

A "party other than the claimant" being the appellant, "he is to give notice to the

creditor within thirty days," before his appeal can be considered as perfected. In such case, the statute requires the two notices, one at the probate office for the guidance of the court and all concerned there, and the other to the creditor. Palmer v. Palmer, 61 Me. 236.

Within 30 days after report accepted.— The "30 days" mentioned in the last clause of this section, limiting the time of giving notice to the creditor, commence when the "20 days" in the first clause begin. Hence, "within 30 days" there used, means "within 30 days" "after their report is made." The phrase "after their report is made" is not to be taken literally, but means "after their report has been made to the judge and by him has been accepted." The phrase "after their report is made," means the same as after their report "has been returned and finally accepted." Palmer v. Palmer, 61 Me. 236.

In order to perfect appeal.—The object of the notice required by this section is to notify the creditor that an appeal is claimed. To give it is a step that must be taken in order to perfect the appeal. Waterman v. Pulsifer, 73 Me. 34.

Commissioner's decision final absent appeal. — An adjudication by the commissioners is final and binding on both parties, unless appealed from and unless the appeal is prosecuted according to the requirements of the statute. Palmer v. Palmer, 61 Me. 236.

Liability of heir for costs.—An heir appealing from an allowance by commissioners of insolvency is liable under this section, to have costs awarded against him if the creditor recovers, though the amount may be less than that awarded by the commissioners. Henry v. Miller, 61 Me. 105.

Applied in Merrill v. Crossman, 68 Me. 412; Wilkins v. Cook, 123 Me. 474, 123 A. 902.

Stated in Bates v. Ward, 49 Me. 87.

Sec. 13. Petition for leave to bring suit, after failing to prosecute appeal.—A person, whose claim has been disallowed in whole or in part and who by accident or mistake has omitted to give notice at the probate court in season, or after giving such notice has by accident or mistake omitted further to prosecute his appeal may, within 2 years after the report is made, petition the superior court and, after notice to the administrator and hearing, leave may be given to commence a suit at the next term of the court in the county where administration was granted for the recovery of his claim, but not after 4 years from granting administration. No decree of distribution can be disturbed by a judgment so recovered. (R. S. c. 144, § 13.)

Cross reference.—See c. 113, § 8, re entry of appeals at another term of court.

Section contemplates notice to executor and hearing. — The power given by this section, to the probate court, to grant leave to a creditor of an insolvent estate to institute a suit for recovery of his claim in a common-law court under certain circumstances, contemplates a notice to the executor or administrator, and a hearing before the probate judge. Bulfinch v. Waldoboro', 54 Me. 150.

Applied in Merrill v. Crossman, 68 Me. 412; Brackett v. Chamberlain, 115 Me. 335, 98 A. 933.

Sec. 14. Proceedings on appeal.—When an appeal is so taken or leave is so granted, the claim shall be determined in an action for money had and received, commenced within 3 months after the report was made or at the next term after leave was granted. Such claim shall be deemed contingent and provision shall be made for it as in sections 10 and 11. (R. S. c. 144, § 14.)

The action provided for by this section is to be commenced by the claimant. Palmer v. Palmer, 61 Me. 236.

Within 3 months. — If the proceedings under the commission of insolvency were conformable to law and valid, an action not commenced within 3 months after the report of commissioners was returned, is not seasonably brought, and cannot be sustained. Pattee v. Lowe, 36 Me. 138.

Section applies where writ left with commissioners but claim not proved. — Where the commissioners of insolvency gave notice of their meetings for the presentation of claims, and the plaintiff left his writ with them, but never proved his claim set out in the writ, the claim was thereby presented; and if it was not allowed, the claimant's remedy thereafter was by appeal and an action for money had and received under this section. Nealley v. Segar, 57 Me. 563.

Action cannot be regarded as probate appeal.—The action for money had and received, commenced by one claiming to be a creditor of an insolvent estate under administration, cannot be regarded as a probate appeal cognizable by the supreme court of probate without regard to the amount involved; this construction being inconsistent with the provision in § 16 for the commencement of such actions before trial justices, who have no appellate jurisdiction from the probate court. Merrill v. Crossman, 68 Me. 412.

The statute action given to one who claims to be a creditor of an insolvent estate, where the commissioners of insolvency decide against him, or where the administrator, an heir at law, or another creditor, gives notice at the probate office of an appeal from a decision of such commissioners in his favor, is not to be regarded as a probate appeal. In cases of dissatisfaction with the decision of the commissioners of insolvency appointed by the probate court, under certain statute provisions and restrictions, the question between the claimant and the estate is transferred from the probate court to a common-law court having jurisdiction of the parties and case for decision. Merrill v. Crossman, 68 Me. 412.

Applied in Gould v. Carlton, 55 Me. 511; Merrill v. Crossman, 68 Me. 412; First Nat. Bank of Salem v. Grant, 71 Me. 374; Alden v. Goddard, 73 Me. 345; Haskell v. Hervey, 74 Me. 192; Morgan v. McCausland, 96 Me. 449, 52 A. 931; Jellison v. Swan, 105 Me. 356, 76 A. 920; Wilkins v. Cook, 123 Me. 474, 123 A. 902.

Stated in Bates v. Ward, 49 Me. 87.

Sec. 15. If claim allowed and appeal taken by administrator, heir or creditor, claimant may apply to superior court.—A person whose claim against an insolvent estate has been allowed by commissioners and their decision has been appealed from by the administrator, heir at law or any other creditor, and who by accident or mistake has omitted to commence an action for money had and received within the time prescribed by section 14, may petition the superior court, and after notice to the administrator and a hearing, the court may grant leave to commence an action for the recovery of his claim at the next term of the court in the county where administration was granted, within 4 years from granting administration, but no decree of distribution can be disturbed by a judgment so recovered. (R. S. c. 144, § 15.)

Applied in Brackett v. Chamberlain, 115 Me. 335, 98 A. 933.

Sec. 16. Proceedings in suit and judgment. — The creditor, before service, must annex to his writ a schedule of his claims, stating the nature of them or file it with the clerk of the court where the writ is returnable, 14 days before its return day; or 7 days before the return day, when the action is brought before a trial justice. At such time as the court directs, the administrator shall file an abstract of all demands of the deceased against the claimant and judgment shall be rendered for either party for the balance ascertained at the trial. (R. S. c. 144, § 16.)

Claim proved must be same as that annexed. — If the claim made by the evidence on trial is in no sense the same or similar to the specification annexed, nothing in the annexed schedule gives notice to the defendant of the claim actually relied on, and the proceedings are irregular and not in compliance with law. Morgan v. McCausland, 96 Me. 449, 52 A. 931.

Applied in Merrill v. Crossman, 68 Me. 412.

Stated in Bates v. Ward, 49 Me. 87.

Sec. 17. Reference; examination of creditor.—When notice of appeal is given or leave granted, the parties may agree upon referees authorized to act by a rule of the probate court, whose award is final. On trial before the court or referees, the creditor may be examined on oath, as before commissioners, and with like effect, if he refuses to be examined. (R. S. c. 144, § 17.)

Creditor not privileged to testify as of right. — The statute provides that "the creditor may be examined on oath," etc. This does not give him the privilege of testifying in his own behalf as matter of right, but leaves it discretionary with the court to require him to do so, on motion of the defendant, when the discovery of the truth seems to make it necessary. Gould v. Carlton, 55 Me. 511.

Claim rejected if creditor refuses to testify. — "On trial before the court or referees, the creditor may be examined on oath, as before commissioners, and with the like effect if he refuses to be examined;" that is, that his claim will be rejected as provided by § 6, in case of such refusal. White v. Brown, 67 Me. 196.

Cited in Thompson v. Dyer, 55 Me. 99.

Sec. 18. Judgment against administrator added to claims allowed. —If final judgment or award is made against an administrator, no execution can be issued except for costs allowed to the prevailing party. The sum found due to the claimant shall be entered by the judge of probate on the list of debts entitled to dividends. The administrator may charge costs awarded against him to the estate, but not when he appealed without reasonable cause shown for it. (R. S. c. 144, § 18.)

No execution to issue against insolvent estate except for costs. — After a representation of insolvency, and appointment of commissioners, no execution, except for costs, shall issue in any case against the executor or administrator, but the claim allowed by commissioners, or by a verdict or judgment of court, shall be certified among the list of claims allowed, for a dividend. Wyman v. Fox, 55 Me. 523.

The issuing of any execution against an insolvent estate is forbidden. Duly v. Hogan, 60 Me. 351.

And administrator must prevent execution by suggesting the insolvency.—It is the duty of the administrator to prevent an execution by a suggestion on the record of the insolvency. If he does not, and no such suggestion is made to the court, there is no legal reason why execution should not issue. Wyman v. Fox, 55 Me. 523.

It is the plain duty of the personal representative, after he has appeared in the action, to see that all the rights of the estate and of other creditors are protected, by interposing the fact of insolvency. Wyman v. Fox, 55 Me. 523.

Applied in Ridlon v. Cressey, 65 Me. 128; Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Cited in Nealley v. Segar, 57 Me 563; Sanford v. Phillips, 68 Me. 431; Walker v. Newton, 85 Me. 458, 27 A. 347.

Suits Pending and Commenced.

Sec. 19. Actions pending. — Actions pending on claims not preferred, when a decree of insolvency is made, may be discontinued without costs; or continued, tried and judgment rendered with the effect and satisfied in the manner provided in cases of appeal. No action can be commenced, except on a preferred claim, after such decree. (R. S. c. 144, § 19.)

No action brought on unpreferred claim after representation of insolvency.—No action shall be brought against an administrator, after the estate is represented insolvent, unless for a demand which is entitled to a preference, and not affected by insolvency of the estate; or unless the assets should prove more than sufficient to pay all claims allowed by the commissioners. Pattee v. Lowe, 36 Me. 138.

And such representation can be pleaded in bar.—When an estate has been represented insolvent, and so declared by competent authority, this can be pleaded in bar of a suit against an administrator. Dillingham v. Weston, 21 Me. 263.

But pending suit may be continued.—If the case has been contested or has been pending a long time in court and the costs are large, it might be unreasonable to require the plaintiff to discontinue without cost. The law, therefore, permits him to stand in court on his original action, as he would stand in case of an appeal entered. If he prefers to have the adjudication of another tribunal, he may discontinue his suit in court and resort to the new tribunal, and, if not satisfied with the determination, may appeal and bring a new suit for money had and received, and, in that new suit, have all demands between the parties adjusted. Bates v. Ward, 49 Me. 87.

With same affect as appeal.—Where a creditor has a suit pending at the time of the death of the intestate, he can have his claim ascertained and determined in either of the two ways, as he may prefer. He may at once discontinue his suit without cost, and present his claim, without reference to the suit, before the commissioners, where he will have a right to appeal. Or he may retain his suit in court and have the amount there determined by

the jury, in which case no execution can issue. But the amount is to be certified to the judge of probate, to be entered on the list of contingent claims entitled to a dividend. In other words, "it is to be tried and judgment rendered with like effect and satisfied in the manner provided in case of appeal." Bates v. Ward, 49 Me. 87.

Two courses were open to the plaintiff under this section: (1) to discontinue without costs or (2) to continue, try, and have judgment rendered with the effect, and satisfied in the manner provided in cases of appeal, which contemplates a return made to the probate office, as of a contingent claim (§ 14), and a sum to be left in the hands of the administrator, sufficient to pay the percentage paid to others, which is to be paid, provided the claim becomes absolute within four years from the grant of administration, if it can be done without disturbing prior dividends, and not otherwise. (§§ 10 and 11.) Nealley v. Segar, 57 Me. 563.

And without action by commissioners.—In all cases where insolvency is pleaded or suggested, the claim named in the pending action must be brought within the knowledge and action of the probate court, and must be entered by the judge on the list of contingent claims. But this may be done where the action is continued and tried in court, under this section, by a proper certificate from the court, without any action of the commissioners. Bates v. Ward, 49 Me. 87.

Provided claim not presented to commissioners.—By this section it is provided that "actions pending on claims not preferred when a decree of insolvency is made, may be discontinued without costs; or continued, tried and judgment rendered with the effect, and satisfied in the manner, provided in cases of appeal. No action can be commenced, except on a preferred claim, after such decree." That is, no action, except the action for money had and received by way of appeal, can be commenced upon any unpreferred claim after the decree of the probate court adjudging the estate insolvent and appointing commissioners, but an action commenced before such decree may be further maintained, provided plaintiff does not present the claim declared upon to the commissioners. Shurtleff v. Redlon, 109 Me. 62, 82 A. 645; Kenison v. Dresser, 121 Me. 77, 115 A. 554.

For such presentation discontinues such suit.—By the presentation of his claim to the commissioners, the plaintiff in a pending suit elects that tribunal, and this proceeding necessarily discontinues his suit. Bates v. Ward, 49 Me. 87.

And claimant must prosecute appeal by new suit.—If, pending an action in court, the defendant dies, and commissioners of insolvency on his estate are appointed by the judge of probate, and the claim in suit is, by the creditor, presented to them and their adjudication upon it had, from which he appeals, he cannot prosecute his appeal by amending his writ in the action pending, but must commence a new suit, declaring for money had and received, as the statute provides. Bates v. Ward, 49 Me. 87.

Administrator must appear and make representation of insolvency in pending suit.—The whole duty of the administrator, as to pending suits, is not performed when he has represented the estate insolvent and procured the appointment of commissioners in the probate court. He is bound to appear, when summoned into the common-law court, in order to make the representation of insolvency appear on the record there, either by plea or by motion for the stay of execution; and if he neglects this, and execution is regularly issued in due course, a levy under it, upon the property of the deceased, would be sustained, and the administrator held personally liable for waste. Frost v. Ilsley, 54 Me. 345. See § 18 and note.

And if such suit allowed to proceed to judgment in usual form levy against estate is binding.—Although an estate has been represented insolvent and actually proved to be so, yet, if the creditor is permitted, notwithstanding this, to proceed to judgment in a pending suit, in the usual form, a levy upon the execution will bind the estate, even though the attorney of the creditor knew of the representation of insolvency. Thompson v. Dyer, 55 Me. 99.

An action of debt to recover a preferred claim can be maintained against an administrator, without having laid the claim therefor before the commissioners of insolvency appointed upon said estate. Preferred claims are not required to be proved before such commissioners. Bulfinch v. Benner, 64 Me. 404.

Applied in Maxwell v. Pike, 2 Me. 8; Ridlon v. Cressey, 65 Me. 128.

Cited in Duly v. Hogan, 60 Me. 351; Sanford v. Phillips, 68 Me. 431; Pulsifer v. Waterman, 73 Me. 233; Walker v. Newton, 85 Me. 458, 27 A. 347.

Sec. 20. Claims not presented or not allowed, barred, except in case of further assets.—Claims not presented and claims disallowed without

appeal are forever barred from recovery by suit. Claims disallowed cannot be filed and proved in setoff, except to the amount of counter claims on behalf of the estate; but when, after distribution, further assets come into the hands of the administrator, claims not presented to the commissioners, on petition to the judge, and after due notice if proved or not disputed, may be allowed and paid like contingent claims. (R. S. c. 144, § 20.)

Disallowed claim may be proved in setoff against counter claim.—Prior to 1870, claims against insolvent estates disallowed, without appeal taken, were forever barred; and they could neither be recovered by suit, nor filed in setoff, except in case of further assets after distribution. But the legislature of that year changed the law so that while now, as before, a disallowed claim cannot be the subject of a suit, it may be filed and proved in setoff, to the amount only of the claim which the estate may establish against the claimant. Rogers v. Rogers, 67 Me. 456.

If the claimant would obtain his dividend from an insolvent estate, he must try out his claim disallowed by the commissioners and establish it before a jury on appeal. If, however, he does not care to make a substantive claim against the estate, but simply desires to use it as a protection against any one which the estate may set up against him, and the commissioners reject his, he need not be at the trouble and expense of an appeal, but may bide his time, until sued by the estate, and then file his claim in setoff and have its merits tried by the jury. Rogers v. Rogers, 67 Me. 456.

Stated in Lawrence v. Lincoln County Trust Co., 125 Me. 150, 131 A. 863.

Miscellaneous Provisions.

Sec. 21. Delay in settling account. — If an administrator neglects to settle his account within 6 months after the report on claims is made or within such further time as the judge allows, it is a breach of his bond. (R. S. c. 144, § 21.)

The terms of this section are absolute and it is a breach of his bond for an administrator to neglect to settle his account for more than six months after the report on claims is made. And this is so, even though he has not been cited by the court to account. Webb v. Gross, 79 Me. 224, 9 A. 612.

In case of failure to account creditor has action against administrator or on his bond.—Where the administrator of an insolvent estate neglects to exhibit and settle an account of his administration in the probate office for the term of six months after the report of the commissioners of insolvency has been returned and accepted, a creditor may maintain his action against the administrator in the same manner as if said estate had not been represented insolvent. But this provision is not exclusive of any other remedy—the creditor may, if he prefers it, maintain an action on the administration bond in the name of the judge of probate for the official negligence of the administrator, in which, judgment will be rendered for the penalty of the bond, and execution will issue for the amount of debt and costs. Dickinson v. Bean, 11 Me. 50.

The account required to be settled within the period of six months after the report is of the personal estate. Butler v. Ricker, 6 Me. 268.

The account required by this section extends to the goods and chattels, rights and credits of the deceased, which fall within the proper and ordinary power and duty of an executor or administrator. It is limited to the personal estate. Eaton v. Brown, 8 Me. 22.

Section satisfied if account exhibited, etc.—This section, which requires an administrator to settle his account of administration within six months after the commissioners on an insolvent estate have reported a list of claims, is satisfied if he exhibits his account within that time, and presents himself to verify and support it. Eaton v. Brown, 8 Me. 22.

Account under section does not discharge administrator.—The settlement required by this section cannot be such as finally discharges the administrator from his trust and duty. It is merely to determine the amount of assets in his hands, subject to the claims of creditors. He has still duties to perform, for which he may be held to account. Butler v. Ricker, 6 Me. 268.

Former provision of section.—For consideration of an earlier form of this section providing for the recovery of the debt against the delinquent executor or administrator, see Ring v. Burton, 5 Me. 45.

Sec. 22. Waste or trespass on real estate of insolvent.—When an administrator commits waste or trespass, although an heir or devisee, or consents that another may do it, on real estate of his intestate insolvent, he shall account for treble the amount of the damage. He may, in an action of trespass, recover damages of a person committing the same, to be accounted for as assets, although such person is heir or devisee of the estate. (R. S. c. 144, § 22.)

Cross reference. — See c. 124, § 17, re liability of executor or administrator for waste.

Meaning of section cannot be extended.—This section being in derogation of the common law, its meaning cannot be extended beyond what a fair construction of its terms requires. McNichol v. Eaton, 77 Me. 246.

And "insolvent" is used in its literal sense.—The term "insolvent" is frequently, perhaps commonly, applied to estates in the process of settlement under a representation of insolvency either by an administrator, or in the hands of an assignee without regard to the final result as to its ability to pay all its debts, or otherwise. But under this section, the word is used in its more literal and perhaps more correct meaning, an absolute insufficiency to pay all its debts. McNichol v. Eaton, 77 Me. 246.

The burden of proof rests upon the plaintiff to bring his case within the provisions of this section. McNichol v. Eaton, 77 Me. 246.

And an action under this section must fail if there is no proof of insolvency. McNichol v. Eaton, 77 Me. 246.

At last domicile of intestate.—An estate cannot be known to be insolvent within the meaning of this section unless it so appears at the last domicile of the intestate. McNichol v. Eaton, 77 Me. 246.

And a mere representation is not sufficient.—An action may be maintained under this section if the estate is, in fact, insolvent. A mere representation is not enough. McNichol v. Eaton, 77 Me. 246.

Insolvency held to be admitted.—See Bates v. Avery, 59 Me. 354.

Administrator may recover from heir or devisee for waste or trespass.—In case of an insolvent estate, an administrator may recover damages even against "an heir or devisee" for waste or trespass committed upon the real estate. This is where such trespass subtracts from the permanent value of the estate. Kimball v. Sumner, 62 Me. 305.

But only if the estate is proved to be insolvent. McNichol v. Eaton, 77 Me. 246.

Cutting of timber held not waste.—The cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land as well as the present income, is not waste within the meaning of this section. McNichol v. Eaton, 77 Me. 246.

Sec. 23. Insolvency of estate in hands of executors and guardians.—This chapter applies to estates under charge of executors; and of guardians of insane persons and of spendthrifts, except so far as it is inapplicable; and an allowance for the support of their wards and their wards' families takes the place of an allowance to widows and children. (R. S. c. 144, § 23.)

Cross reference.—See c. 158, § 19, re adjustment by guardian of claims against ward's estate.

Applied in Pratt v. Seavey, 41 Me. 370; Fogg v. Tyler, 111 Me. 546, 90 A. 481.

Quoted in Sanford v. Phillips, 68 Me. 431.

Decree of Distribution.

Sec. 24. Decree of distribution.—After 30 days from the time when the report on claims is made, the judge shall make a decree of distribution of the balance in the hands of the administrator among the creditors, according to the provisions of this chapter. In case of further assets, he shall make another distribution on the same principles. (R. S. c. 144, § 24. 1949, c. 349, § 136.)

Applied in Pulsifer v. Waterman, 73 Me. 233.

Sec. 25. Account of payments allowed without notice.—After such decree of distribution, the judge may, without further notice, audit and allow

the account of the executor, administrator or guardian for payments made pursuant thereto. (R. S. c. 144, § 25.)

Section provides only case for settling account on decree of distribution.—In one case only is provision made for the settling of an account on a decree of distribution, and that is in the case of an insolvent estate under this section. And in such case the distribution is not made to distributees in the sense in which the word is used in the case of solvent estates when a balance after administration remains to be paid, but the distribution is made to creditors, and hence is a part of the administration of the estate. Mudgett, Appellant, 105 Me. 387, 74 A. 916.

Sec. 26. Report of commissioners on exorbitant claims final, even if estate insolvent.—When commissioners appointed under the provisions of section 74 of chapter 154 have reported on any claims submitted to them and their report has been accepted without appeal, it is final, notwithstanding the estate afterwards proves insolvent and commissioners of insolvency are appointed. The amount awarded by the first commissioners shall be entered by the judge on the list of debts entitled to dividends. (R. S. c. 144, § 26.)

Cross references.—See c. 124, § 16, re penalty for waste on lands of an insolvent deceased; c. 161, § 6, re appointment of commissioners on disputed claims.

Sum allowed by commissioners on exorbitant claims added to list although estate is able to pay all debts.—The probate judge may properly order the sum allowed by commissioners appointed under c. 154, § 74, to be added to the list of claims entitled to dividends upon such estate, though the commissioners of insolvency disallow all the other claims presented, and by reason of such disallowance, the estate is able to pay all the debts. Hall v. Merrill, 67 Me. 112.

Applied in Brackett v. Chamberlain, 115 Me. 335, 98 A. 933.