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Chapter 165.

Actions by or against Executors and Administrators.

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Sec. 1. Process against estate in their hands.—Writs and executions against executors and administrators, for costs for which they are not personally liable and for debts due from the deceased, run against his goods and estate in their hands. (R. S. c. 152, § 1.)

Execution runs against deceased's goods only when executor not personally liable. —By this section it is only in those cases where executors and administrators are not personally liable for costs, that execution therefore is to run against the goods and estate of the deceased in their hands. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Judgment mistakenly entered against administrator may be corrected.—Where the clerk of the courts, in an action against an administrator, erroneously enters up judgment against the administrator instead of against the goods and estate of the intestate, or makes a mistake in the name of the administrator, the judgment should not be reversed, but corrected. Piper v. Goodwin, 23 Me. 251.

Applied in Nowell v. Bragdon, 14 Me. 320; Ludwig v. Blackinton, 24 Me. 25.

Quoted in Hathaway v. Sherman, 61 Me. 466.

Cited in Thayer v. Comstock, 39 Me. 140.

Sec. 2. Executions for costs against own goods and estate.—Executions for costs run against the goods and estate and for want thereof against the bodies of executors and administrators, in actions commenced by or against them and in actions commenced by or against the deceased, in which they have appeared, for costs that accrued after they assumed the prosecution or defense, to be allowed to them in their administration account, unless the judge of probate decides that the suit was prosecuted or defended without reasonable cause. (R. S. c. 152, § 2.)

History of section. — See Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Section enacted for protection of deceased's estate.—This statute was enacted for the protection of estates of deceased persons, and to prevent them from being frittered away in frivolous and groundless suits by indiscreet or litigious executors and administrators. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

And remedy for costs is exclusive.—This section is not intended to give a creditor a cumulative remedy, of which he may avail himself or not at his election, without depriving him of the right to have an execution for costs against the goods and estate of the deceased. The remedy for costs there given is exclusive. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Executors and administrators, and they alone, are liable for the costs. If, in the judgment of the judge of probate, the suits were prosecuted or defended with reasonable cause, the costs paid are to be allowed to them in their administration accounts; if without reasonable cause, the costs are not to be allowed, and the consequences of their contentious spirit or lack of discretion fall, and rightly fall, upon them and not upon the estate which they represent. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

If an administrator becomes liable for costs and expenses incurred through his fault, these are no charge upon the estate. Boynton v. Ingalls, 70 Me. 461.

Separate execution should be issued for costs. — In an action against an executor or administrator, wherein judgment is rendered for debt and damages, and for costs also, two executions should be awarded, one for the debt or damages against the goods or estate of the deceased in the hands of the executor or administrator, and the other for the costs, against the

goods, estate and body of the executor or administrator. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Where the plaintiff is entitled to judgment against an administrator of the estate of an intestate, no commissioners of insolvency having been appointed, he will, by the provisions of this section, be entitled to one execution against the goods and estate of the intestate for the amount of the debt, and to another against the administrator personally for the amount of the costs. Ludwig v. Blackinton, 24 Me. 25.

And levy on one execution issued for both debt and costs is void. — Where, in an action against an executor, one execution issues for both debt and costs against the goods and estate of the deceased in his hands, and is satisfied by levying the same upon the lands of the testator, such levy is void. Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793.

Sec. 3. Execution against estate of deceased, if returned unsatisfied.—When a proper officer makes his return on an execution issued under the provisions of section 1 that he cannot find personal property of the deceased, or other means to satisfy it, a writ of scire facias, suggesting waste, may be issued against the executor or administrator; and if he does not show cause to the contrary, execution shall issue against him for the amount of the judgment and interest, not exceeding the amount of waste, if proved. (R. S. c. 152, § 3.)

Executor or administrator liable to judgment creditor only on ground of waste.—The policy has always been to make an executor or administrator liable de bonis propriis to a judgment creditor only on the ground of waste. It may be that the burden is put upon the executor of proving that there has been no waste; but, if he can show this, it is the clear implication of the statute that he shall not be liable on scire facias. Burgess v. Young, 97 Me. 386, 54 A. 910.

And adjudication of insolvency of the estate since the judgment is a defense.— It has been held that, in scire facias on a judgment recovered against an administrator, it is a defense to show that, after the judgment, a representation and adjudication of the insolvency of the estate was made. Burgess v. Young, 97 Me. 386, 54 A. 910.

As is settlement of account showing all assets exhausted in paying preferred claims. — If the administrator or executor can show that, since the judgment was rendered, there has been an adjudication of insolvency, or the settlement of the account showing that all the assets have been exhausted in paying preferred charges and claims, he shows that there has been no waste, and, therefore, that he is not liable for the judgment. Burgess v. Young, 97 Me. 386, 54 A. 910.

But administrator assuming defense of action against intestate must suggest insolvency.—If an administrator of an estate represented insolvent assumes the defense of an action pending against his intestate, and neglects to suggest the insolvency on record and prays a stay of execution, so that execution is issued, and returned nulla bona, a writ of scire facias suggesting waste will lie against him, and he is liable to a judgment and execution de bonis propriis. Sturgis v. Reed, 2 Me. 109.

Sec. 4. Administrator d. b. n. may prosecute and defend and sue judgments.—When an executor or administrator ceases to be such, an action pending in his favor or against him may be prosecuted by or against an administrator de bonis non; and if he does not appear after due notice, judgment may be rendered, as if the suit had been commenced by or against him for debt and for costs, as herein provided. An administrator de bonis non may maintain an action on uncollected judgments recovered by the deceased, or by his executors or administrators, before their death or removal from office. (R. S. c. 152, § 4.)

Sections 4-6 cannot be extended beyond fair construction of their terms.—Sections 4-6 are in derogation of the common law, and cannot be extended beyond the meaning derived from a fair construction of their terms. Taylor v. Sewall, 69 Me. 148.

And the remedy given to an administrator de bonis non, in §§ 4-6, does not include that of review. Taylor v. Sewall, 69 Me. 148.

Administrator d. b. n. cannot maintain real action.—The title to the testator's real estate does not vest in administrators de bonis non. They can maintain no real actions. Brown v. Strickland, 32 Me. 174.

Remedy under earlier statute.—As to

remedy for an administrator de bonis non upon an unsatisfied judgment, under an earlier statute, see Paine v. McIntire, 32 Me. 131.

Cited in Cooley v. Patterson, 49 Me. 570; Waterman v. Dockray, 78 Me. 139, 3 A. 49; Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Sec. 5. Scire facias against administrator d. b. n.—When an executor or administrator ceases to be such after judgment against him, a writ of scire facias may be issued against the administrator de bonis non, and after due notice an execution may issue as provided in the preceding section; but the costs for which the executor or first administrator was personally liable may be enforced against his executor or administrator. (R. S. c. 152, § 5.)

Cross reference. — See note to § 4.

Cited in Cooley v. Patterson, 49 Me. 570; Waterman v. Dockray, 78 Me. 139, 3 A. 49.

Sec. 6. Writ of error.—A writ of error may be maintained by or against an administrator de bonis non, when it could be by or against an executor or first administrator. (R. S. c. 152, § 6.)

Cross reference. — See note to § 4.

Cited in Cooley v. Patterson, 49 Me. 570; Waterman v. Dockray, 78 Me. 139, 3 A. 49; Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Sec. 7. When only party to action dies. — When the only plaintiff or defendant dies while an action that survives is pending, or after its commencement and before its entry, his executor or administrator may prosecute or defend, as follows: the action or an appeal, if made, may be entered, the death of the party suggested on the record and the executor or administrator may appear voluntarily; if he does not appear at the second term after such death or after his appointment, he may be cited to appear, and after due notice thereof, judgment may be entered against him by nonsuit or default. (R. S. c. 152, § 7.)

Cross reference. — See note to § 13, re cases where one of several parties dies.

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

But foreign executor who qualifies in the state may prosecute action. — If a foreign executor complies with the statutory requirements to acquire capacity to act as executor in Maine, he may come in as plaintiff in an action commenced by his decedent in this state, and prosecute the action to its conclusion. Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415. See c. 154, §§ 15, 17, 89.

Right to prosecute or defend appeals limited to those already made.—This section, providing for the prosecution and defense by executors or administrators of certain actions pending or commenced during the life of the testator or intestate, is, in the case of appeal, strictly limited to those which have been made. A petition for leave to enter an appeal, even if granted, cannot be held to be an appeal made or taken. Sprowl v. Randell, 108 Me. 350, 81 A. 80, holding that this section does not give a right of appeal to an executor or an administrator of one aggrieved in his lifetime by an order of a judge of probate. See c. 153, § 38, and note.

Representative cannot be cited until after second term. — This section gives the privilege to the representative to come in voluntarily until the second term after such death or his appointment, and only authorizes a citation in case of a neglect to come in at such term, and after due notice, judgment to be entered. Segars v. Segars, 76 Me. 96.

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

Stated in Dwinal v. Holmes, 37 Me. 97.

Sec. 8. Actions which survive. — In addition to those surviving by the common law, the following actions survive; replevin, trover, assault and battery, trespass, trespass on the case and petitions for and actions of review; and these actions may be commenced by or against an executor or administrator or, when the deceased was a party to them, may be prosecuted or defended by them. (R. S. c. 152, § 8.)

Cross reference. — See c. 112, § 58, re actions by officers for goods attached and then taken from them do not abate by party's death.

History of section.—See Hooper v. Gorham, 45 Me. 209.

Section changes common law as to survival of actions for personal injury.—At common law, a right of action to recover damages for personal injuries did not survive. But, by this section, those actions that could be maintained at common law for personal injuries were made to survive and can be prosecuted by the personal representatives, whether an action had been brought in the lifetime of the injured party or simply the cause of action had accrued and the injured party has died before suit was actually brought. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

But survival of such action depends on continuance of life after accident.—A right of action for personal injury can only survive if it once existed and it could exist if the sufferer survived the injury for any appreciable time. The test is the continuance of life after the accident and not the length of time nor want of consciousness during that time. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476. See § 9 and note, re action for wrongful death.

And not consciousness of injured person.—Where the injured party survives in an unconscious state, a cause of action accrues to him in his lifetime and survives to his personal representative, but if there is no evidence to warrant the jury in finding that the deceased endured any conscious pain or suffering, only nominal damages can be recovered. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

Actions against town for injury from defective way survive.—An action brought upon a statute, to recover against a town for a personal injury, caused by a defect in its highway, will not abate by the death of the plaintiff, but may be prosecuted by the executor or administrator of the deceased. Hooper v. Gorham, 45 Me. 209.

As do actions for injury done by dog.—An action of trespass for double damages, under c. 100, § 17, for injury done by a dog, survives the plaintiff's death during its pendency. Prescott v. Knowles, 62 Me. 277.

And all actions of trespass. — This section makes no distinction in respect to survivorship, between actions of trespass upon the person and upon property; or between actions of trespass at common law and actions of trespass created by statute; all these several kinds of actions of trespass are included in the term "actions of trespass." Prescott v. Knowles, 62 Me. 277.

And trespass on the case. — All actions of "trespass on the case" without modification or qualification are made to survive. The term "trespass on the case," considering the connection in which it stands, and the purpose of the legislature as indicated by past legislation upon this subject, may be fairly construed to mean all actions of tort which are properly designated by the term, whether of injury to the property or person. Withee v. Brooks, 65 Me. 14.

Thus, action on the case for slander survives. — By this section, an action on the case for slander survives, and, after the death of the plaintiff, may be prosecuted by his executor, or the administrator of his estate. Nutting v. Goodridge, 46 Me. 82.

As does action for deceit in leading woman into void marriage. — Where a woman is led into a void marriage with a married man, under his false pretense that he is a single man, he being at the time a married man and having a lawful wife alive, an action for deceit therefor is an action of trespass on the case within the meaning of this section, and in case of his death, the right of action survives against his personal representative. Withee v. Brooks, 65 Me. 14.

But an action for deceit resulting in mere pecuniary loss does not survive either at common law or by the provisions of this section. Ahern v. McGlinchy, 112 Me. 58, 90 A. 709.

Nor does action for breach of promise. — An action for an alleged breach of promise of marriage does not come within the provisions of this section. Hovey v. Page, 55 Me. 142.

And appeal from estimate of damages for land taken on eminent domain is not an "action."—An appeal from the estimate of damages by the municipal officers for land taken for the site of a public library building is not an "action" within this statute, providing for the survival of actions after the death of a party. Hayford v. Bangor, 103 Me. 434, 69 A. 688.

Conflict of laws. — See Dalton v. McLean, 137 Me. 4, 14 A. (2d) 13.

Applied in Norcross v. Stuart, 50 Me. 87; Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415.

Quoted in Smith v. Estes, 46 Me. 158; Treat v. Dwinel, 59 Me. 341.

Cited in Dwinal v. Holmes, 37 Me. 97; State v. Maine Central R. R., 60 Me. 490.

Sec. 9. Actions for injuries causing immediate death.—Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony. (R. S. c. 152, § 9.)

Cross references.—See c. 113, § 50, and note, re burden of proving contributory negligence in action for wrongful death; note to c. 114, § 1, re action for wrongful death may be brought by trustee process.

History of §§ 9 and 10.—See Anderson v. Wetter, 103 Me. 257, 69 A. 105; Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

Section creates right of action where none existed at common law.—Prior to the passage of this section, if death was instantaneous, there was no remedy whatever and if the injury was immediately followed by a comatose condition for a longer or shorter period, and that was followed by death, there was no real remedy, for, although the personal representative had a right of action under the survival statute, the damages were nominal. To obviate this injustice, and to grant compensation to the family of the injured party, this section and § 10 were passed. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

Sections 9 and 10 were enacted to provide for a right of action for death, because no money recovery was permitted for a death at the common law. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

The object of this section was not to give a new right of action where ample means of redress already existed, but to supplement the existing law, and give a new right of action in a class of cases where no means of redress before existed. Sawyer v. Perry, 88 Me. 42, 33 A. 660; Anderson v. Wetter, 103 Me. 257, 69 A. 105; Ames v. Adams, 128 Me. 174, 146 A. 257.

The effect of this legislation was not to create a new remedy for an existing cause of action but to create the cause of action itself where none existed before. It was therefore necessarily a new cause of action, a new right of action. Anderson v. Wetter, 103 Me. 257, 69 A. 105; Ames v. Adams, 128 Me. 174, 146 A. 257.

This statute is to be construed as a new statute, creating a new right, and not as affirming or reviving an ancient right. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29; Anderson v. Wetter, 103 Me. 257, 69 A. 105.

And supersedes remedy by indictment.—This statute superseded and abrogated the remedy by indictment for negligently causing the death of a person in all cases for which it provides a remedy by a civil action. State v. Maine Central R. R., 90 Me. 267, 38 A. 158.

Right of action is creature of statute.—At common law no remedy by action existed for loss of life. The right of action is a pure creature of statute and upon the fair construction of that statute the action stands or falls. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

And no remedy given except as therein specified.—Sections 9 and 10 are not independent acts of the legislature but allied sections of one and the same act, passed originally as chap. 124, of the Public Laws of 1891. One is not to be construed strictly and the other liberally, but both are to be construed together and, as they create a liability unknown to the common law, their effect is to be limited to cases clearly within the terms of the act. No right of action is to be inferred and no remedy is to be given except as specified in the statute. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

Section does not give action against town acting in governmental capacity.—The words "person" and "corporation" in this section do not include a town, when the town charged with a wrongful act, neglect or default is engaged in its governmental rather than corporate capacity. Chase v. Litchfield, 134 Me. 122, 182 A. 921, wherein it was said that the case did not make it necessary for the court to indicate what its opinion would be in a case where such wrongful act, neglect or default had to do with the performance of a corporate or private act.

Declaration under common law not amendable to introduce cause under this section.—Where the original declaration was framed under the common law, an amendment introducing a cause of action

under this section is not allowable. Anderson v. Wetter, 103 Me. 257, 69 A. 105.

Wrongdoer not subject to two actions for single injury.—It was the intention of the legislature to provide means of redress for a class of cases in which redress for injuries resulting in immediate death could not be had, and not to duplicate the wrongdoer's liability, and subject him to two actions for a single injury. Sawyer v. Perry, 88 Me. 42, 33 A. 660.

The legislature did not intend by this act to give two actions for a single injury —one for the benefit of the decedent's estate, and another for the benefit of his widow and children or next of kin. The legislative intention was to extend means of redress to a class of cases where none before existed. Sawyer v. Perry, 88 Me. 42, 33 A. 660.

Right vests immediately in statutory beneficiary. — This statute affords a remedy where none existed at common law; yet it does not provide for the survival to the personal representatives of a right of action for the benefit of the estate. A new right of action is conferred, with a different measure of damages; the right of action is not for the benefit of the estate, the creditors or distributees; it is for the benefit of certain designated persons, and the right of action vests immediately and finally at the time of the death in the statutory beneficiary. Danforth v. Emmons, 124 Me. 156, 126 A. 281. See note to § 10.

Test of right to maintain action is whether injured party would have had right.—This section affords and measures a remedy for certain designated persons, where none existed at common law. The test of the right to maintain the action is the right of the injured person to have maintained an action had death not ensued. Field v. Webber, 132 Me. 236, 169 A. 732; Metrinko v. Witherell, 134 Me. 483, 188 A. 213.

The right of action conferred by this section is measured solely by the statute. While the measure of damages is different, the sole test of the right to maintain the action, is the right of the injured person to have maintained an action, had death not ensued. Danforth v. Emmons, 124 Me. 156, 126 A. 821.

The purpose of this section was to make possible recovery for death in certain cases; not all. A "person" or "corporation" whose "wrongful act, neglect or default" has resulted in death (immediate and without conscious suffering) is by the statute made liable to the personal representative of the deceased, if the act, neglect or default were such as would, if death had not ensued, have entitled the party injured to maintain an action. Chase v. Litchfield, 134 Me. 122, 182 A. 921.

And contributory negligence of beneficiary is not bar to action. — As the right of action given by this statute depends solely upon the right of the injured party to recover, if living, the contributory negligence of one of the beneficiaries, not imputable to the decedent, is not a bar to the action. Danforth v. Emmons, 124 Me. 156, 126 A. 821.

Nor does such negligence reduce damages. — Contributory negligence of one beneficiary cannot avail in partial reduction of the damage to the extent of the share of such negligent beneficiary. Danforth v. Emmons, 124 Me. 156, 126 A. 821.

Presumption of deceased's due care.— There is a presumption that the deceased was in the exercise of due care, and the defendant must plead contributory negligence specially. This presumption of due care on the part of the deceased is a presumption of fact, but what the true fact is may clearly and positively appear either in the plaintiff's case or in the defendant's. It is a presumption of fact that may be overcome by credible evidence to the contrary. Greene v. Willey, 147 Me. 227, 86 A. (2d) 82.

This section applies only to cases in which the person injured dies immediately. Sawyer v. Perry, 88 Me. 42, 33 A. 660.

The statutory cause of action under this section and the common-law cause of action for personal injuries are inherently distinct, both in their nature and in their results. The statutory cause of action begins where the common law leaves off. The common law gave to the personal representative a right of action to recover for conscious suffering up to the time of death, but nothing for the death itself. The statute does not apply in case of conscious suffering, and therefore gives no damage for that; but for the death itself which must follow immediately. The former is brought for the benefit of the estate, the latter for the benefit of the next of kin, and ignores the estate. Anderson v. Wetter, 103 Me. 257, 69 A. 105; Ames v. Adams, 28 Me. 174, 146 A. 257.

Or dies without conscious suffering.— The statute affords a right of action for injuries causing death where one is instantly killed or dies without conscious suffering. Conley v. Portland Gas Light Co., 96 Me. 281, 52 A. 656.

This section gave relief where no sub-

stantial relief existed before, and includes both injuries producing immediate death, where no action could before be brought, and those producing at once a condition of insensibility, continuing without cessation until death, where an action could be brought, but only nominal damages could be recovered. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

But death need not be instantaneous.—An instantaneous death is an immediate death, but an immediate death is not necessarily and in all cases an instantaneous death. Sawyer v. Perry, 88 Me. 42, 33 A. 660.

When it is said that the death must be immediate, it is not meant that it must follow the injury within a period of time too brief to be perceptible. If an injury severs some of the principal bloodvessels, and causes the person injured to bleed to death, his death may be regarded as immediate, though not instantaneous. If a blow upon the head produces unconsciousness, and renders the person injured incapable of intelligent thought or speech or action, and he so remains for several minutes, and then dies, his death may very properly be considered as immediate, though not instantaneous. Sawyer v. Perry, 88 Me. 42, 33 A. 660; Conley v. Portland Gas Light Co., 96 Me. 281, 52 A. 656.

And duration of period of unconsciousness is immaterial.—This statute was designed to cover cases of immediate death, which include cases both of instantaneous death and of total unconsciousness, following immediately upon the accident and continuing until death, and the duration of that period of unconsciousness is immaterial. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

Whether the unconscious condition continues for minutes or hours or days, the reason of the rule still prevails and the statute applies. Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476.

Declaration must aver immediate death.—It is well settled that this statute gives only a right of action to the personal representative of a deceased person, whose immediate death was caused by the negligence or fault complained of, and it necessarily follows that the declaration must contain a sufficient averment of such immediate death. Carrigan v. Stillwell, 97 Me. 247, 54 A. 389.

It not being averred in the plaintiff's declaration that her husband died immediately, but, on the contrary, it being therein averred that he survived about an hour, the declaration describes only a common-law right of action, in which the damages, if any are recovered, must be for the benefit of the decedent's estate generally, and not for the exclusive benefit of his widow, and, in its amended form, (declaring that the action was brought for the exclusive benefit of the widow of the deceased), it was demurrable, and the demurrer was rightfully sustained. Sawyer v. Perry, 88 Me. 42, 33 A. 660.

And lack of conscious suffering.—In order to bring an action under §§ 9 and 10 it must be alleged in the declaration, or appear by inference, that there was no conscious suffering. It is a statutory action to recover for the death only. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

A count in a declaration in an action brought for the benefit of a decedent's mother, and alleging that the plaintiff's decedent, a week before her death, received "serious and painful injuries," and that she "languished and died," without an averment, direct or by inference, that the death was immediate, or that there was no conscious suffering, describes an action at common law, and seeks compensation for a beneficiary who is only entitled to receive under another and statutory form of action, and is demurrable. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

Where there is no averment in either count that the injured person died immediately, but in the first and second counts it is alleged that he "died within twenty minutes," and in the third count that he "received injuries from which he thereafterwards died," and in the first count it also affirmatively appears by express averment that he "suffered much in body and mind;" and in the second count it fails to appear, either by inference or direct averment, whether he became unconscious from his injuries or endured conscious suffering while he survivied, the declaration does not state a cause of action under this section. Conley v. Portland Gas Light Co., 96 Me. 281, 52 A. 656.

But particular words indicating time of death need not be used.—In a declaration under this section, it is not necessary that any particular words, indicating the time of death, should be used, if it necessarily appears from the averment that the death of the deceased was immediate. Carrigan v. Stillwell, 97 Me. 247, 54 A. 389, holding that an allegation that the deceased "was then and there burned to death and consumed by said fire, and then and thereby lost her life," was a sufficient allegation that the immediate death of the deceased,

within the meaning of the statute, was caused in the manner described.

Conflict of laws.—See Frost v. C. W. Cone Taxi & Livery Co., 126 Me. 409, 139 A. 227.

Applied in Haggerty v. Hallowell Granite Co., 89 Me. 118, 35 A. 1029; Boardman v. Creighton, 93 Me. 17, 44 A. 121; Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418; Conley v. Maine Central R. R., 95 Me. 149, 49 A. 668; Boardman v. Creighton, 95 Me. 154, 49 A. 663; Ward v. Maine Central R. R., 96 Me. 136, 51 A. 947; Thornton v. Maine State Agricultural Society, 97 Me. 108, 53 A. 979; Day v. Boston & Maine R. R., 97 Me. 528, 55 A. 420; McDonough v. Grand Trunk Ry., 98 Me. 304, 56 A. 913; McCarthy v. Claflin, 99 Me. 290, 59 A. 293; Carrigan v. Stillwell, 99 Me. 434, 59 A. 683; Edgeley v. Appleyard, 110 Me. 337, 86 A. 244; Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973; Monk v. Bangor Power Co., 112 Me. 492, 92 A. 617; Graffam v. Saco Grange, Patrons of Husbandry No. 53, 112 Me. 508, 92 A. 649; Crosby v. Maine Central R. R., 113 Me. 270, 93 A. 744; Nelson v. Burnham & Morrill Co., 114 Me. 213, 95 A. 1029; Royal v. Bar Harbor and Union River Power Co., 114 Me. 220, 95 A. 945; Kapernaros v. Boston & Maine R. R., 115 Me. 467, 99 A. 441; Levesque v. Dumont, 116 Me. 25, 99 A. 719; Welch v. Lewiston, Augusta & Waterville Street Ry., 116 Me. 191, 100 A. 934; Williams v. Hoyt, 117 Me. 61, 102 A. 703; Levesque v. Dumont, 117 Me. 262, 103 A. 737; Chickering v. Lincoln County Power Co., 118 Me. 414, 108 A. 460; Day v. Isaacson, 124 Me. 407, 130 A. 212; Richards v. Neault, 126 Me. 17, 135 A. 524; Sturtevant v. Ouellette, 126 Me. 558, 140 A. 368; Stone v. Roger, 130 Me. 512, 154 A. 73; Bowley v. Smith, 131 Me. 402, 163 A. 539; Pelletier v. Morris, 132 Me. 488, 167 A. 863; Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219; Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393; Blanchette v. Miles, 139 Me. 70, 27 A. (2d) 396; Ramsdell v. Burke, 140 Me. 244, 36 A. (2d) 573; Haskell v. Herbert, 142 Me. 133, 48 A. (2d) 637; Laferriere v. Augusta Ice Co., 143 Me. 248, 60 A. (2d) 517.

Cited in Bligh v. Biddeford & Saco R. R., 94 Me. 499, 48 A. 112; Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Sec. 10. How such action brought; amount recovered, disposed of.—Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action, except as hereinafter provided, shall be for the exclusive benefit of the widow or widower, if no children, and of the children, if no widow or widower, and if both, then for the exclusive benefit of the widow or widower and the children equally, and, if neither, of his or her heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding $10,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, and in addition thereto, shall give such damages as will compensate the estate of such deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses, provided that such action shall be commenced within 2 years after the death of such person. (R. S. c. 152, § 10.)

Cross reference.—See note to § 9.

Cause of action accrues at death.—The cause of action accrues at death by the very terms of this statute, which makes the two years' limitation, within which suit can be brought, begin at that time. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

To beneficiaries as they then exist.—Under this section, the party for whose benefit the action is brought depends upon the nature of the family that is left, and four different conditions are provided for, widow without children, children without widow, widow and children, heirs at law. But in any event, the immediate, absolute and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

And cause cannot be transferred by beneficiary's death or failure to sue.—The cause of action vests immediately and finally at the time of the death in the statutory beneficiary, and not when suit is brought, or recovery is had, and hence, on the death of decedent, without children, the cause of action vests in his widow, and cannot be transferred to any other benefi-

ciary by her death or failure to sue. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

Nor is life interest created in widow with remainder to heirs.—This statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at law. One action is granted, not several. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

Some beneficiary must exist at time of death.—The language of this statute is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the deceased, otherwise no right of action arises. The suit is not for the benefit of the estate and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party and acts as trustee. The legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the legislatures of some states have done. But if none of the beneficiaries exist at the time of death, no right of action is created. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

And the writ must show for whose benefit the action is brought. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

The writ must show for whose benefit the action is brought, because the judgment must follow the writ, and the amount recovered passes to the beneficiary named, the administrator acting merely as a trustee or conduit. Hammond v. Lewiston, Augusta & Waterville Street Ry., 106 Me. 209, 76 A. 672.

Death of beneficiary does not abate action but it does limit recovery.—The right of having an action maintained therefor is not abated by the beneficiary's death, but the damages recoverable in his behalf are limited to the pecuniary loss he suffered up to the time of his death. Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393, overruling Williams v. Hoyt, 117 Me. 61, 102 A. 703.

In ordinary cases, the compensatory damages which may be awarded under the statute are and must be based solely on probabilities. But, when a beneficiary dies pendente lite, his death has a controlling influence on the quantum of the recovery for his benefit. His right to compensation for his pecuniary loss vests as of the time of the death of the person killed, not at the time of bringing suit or of recovery. Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

Section provides remedy for children suffering injury from death of mother.—The remedy given by this statute includes an action for the benefit of children who have sustained pecuniary injuries resulting from the death of their mother. Danforth v. Emmons, 124 Me. 156, 126 A. 821.

Section assumes death causes some damages.—This statute must be construed to assume that the immediate death of a person, old or young, may carry with it some damages. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

Some damage is presumed, though the dead child was young. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219.

Amount of compensation measured by standard prescribed. — The right to any compensation is wholly created by the statute, and the amount of the compensation is to be measured solely by the standard prescribed by the statute. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

It is the duty of the court, regardless of sentiment, to observe the clear mandate of this statute and finally fix the measure of damages in accordance therewith. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

The right to recover damages at all in this class of cases is purely statutory. There was no common-law action. The court is, therefore, confined to the express language of the statute. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

Which is pecuniary effect of death upon beneficiaries.—The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29; Graffam v. Saco Grange, Patrons of Husbandry No. 53, 112 Me. 508, 92 A. 649; Williams v. Hoyt, 117 Me. 61, 102 A. 703, overruled on another point in Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393; Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219; Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

And sum given is present value of future pecuniary benefits.—The sum given must be the present worth of the future pecuniary benefits of which the beneficiary has been deprived by the wrongful act, neglect, or default of the defendant. Oakes v. Maine Central R. R., 95 Me. 103, 49 A.

418; Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219; Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393. See Conley v. Maine Central R. R., 95 Me. 149, 49 A. 668.

The measure of damages in this class of cases is based entirely upon the prospective pecuniary benefit, which the decedent at a given age can be anticipated to furnish his beneficiary. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

A pecuniary loss or damage is a material one, susceptible of valuation in dollars and cents. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219.

Punitive damages or damages for suffering, etc., are not allowed.—No punitive damages can be recovered, nor any damages by way of penalty. No damages can be recovered for any suffering by, nor injury to, the deceased himself or his estate. His creditors cannot be heard to complain that his estate has been diminished to their injury, nor that they have lost the chance that he would have earned something with which to pay them. No damages can be recovered for any grief, distress of mind, loss of mere companionship or society, or injury to the affections, suffered by the beneficiaries. Nor can damages be recovered for the value of the life to the deceased, to the state or community. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29. See Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, 92 A. 649.

Damages may not be given, in a case of this kind, by way of punishment, or through sympathy, or from prejudice, but as a pure question of pecuniary computation, and nothing more; no matter who or what the survivors may be. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219; Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

The damages under this statute cannot be punitive; neither can they be given for the physical pain and suffering of the deceased or the grief and sorrow of the child and husband who survive. Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418.

Sentimenal hurts, losses from the deprivation of society or companionship, wounds of the affections, any distress of mind, any grief, suffered by the beneficial plaintiffs, are not elements which may properly find relection in damages. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219.

Neither loss of the decedent's society and companionship, nor any grief suffered by the beneficiaries has proper place in the award. Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

Death of one from whose continued life pecuniary benefit is probable constitutes pecuniary injury.—Generally, where there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, whether arising from legal, or family relations, the untimely extinction of that life is a pecuniary injury. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

And beneficiary need have no legal claim against deceased. — It is not essential to the right of the beneficiaries to recover damages for such death, that they should have had any legal claim against or upon the deceased. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29; Williams v. Hoyt, 117 Me. 61, 102 A. 703, overruled on another point in Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

In determining the amount of the pecuniary benefit a sixteen-year-old boy would be to his father after arriving at his majority, probabilities of marriage, sickness, personal responsibilities and the vicissitudes of life all must be considered. At best it is entirely a matter of conjecture. Williams v. Hoyt, 117 Me. 61, 102 A. 703, overruled on another point in Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393.

And death need not cause actual subtraction from his estate. — The death need not cause an actual subtraction from the estate or income of the beneficiaries or from their earning power. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

As the section does not restrict recovery to the immediate loss of money or property. The words of the statute, allowing damages for "pecuniary injuries," look to the prospective advantages of a money nature, which have, in consequence of the premature death, been cut off. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219.

Loss of education through death of parent is a pecuniary injury.—The education and training which children may reasonably expect to receive from a parent are of actual and commercial value to them as better fitting them to obtain an income or estate. The loss of that education and training through the death of the parent from the fault of the defendant would be, in the statute sense, a pecuniary injury. So the attentions and kindness of children to parents, though adding nothing to their estate, may add much to the physical

comfort or ease of their life, independent of the affections or of the joy of companionship. The loss of these might, under some circumstances, be a pecuniary injury. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

This section makes the jury the judges of the amount of damages. Blanchette v. Miles, 139 Me. 70, 27 A. (2d) 396.

But court can reduce jury's estimate.—This statute makes the jury the judge of what amount will be a "fair and just compensation." The court can cut the jury's estimate down to such sum only as it thinks reasonable, unbiased men would concede to be sufficient — to a sum more than which would be manifestly excessive. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

And it may express limit beyond which verdict would be wrong.—While it is not the province of the court to assess damages, or to fix what is "reasonable and just compensation" for the pecuniary injury, in such cases, it may express the extreme limit beyond which a verdict should be deemed clearly wrong. Conley v. Maine Central R. R., 95 Me. 149, 49 A. 668.

Conclusion as to damages must be based on probabilities.—It is evident that the pecuniary damages to be recovered under this statute can never be ascertained with exactness nor with any satisfactory degree of approximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusion arrived at must be based on probabilities instead of facts. The only facts that can be ascertained are those which occurred before or at the time of the death. From that data, what would probably have occurred, had not the wrongful act or neglect of the defendant intervened, must be conjectured as carefully as possible. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29.

The damages in this class of cases can never be the subject of precise mathematical demonstration or calculation. They are based upon the probabilities of the future which can only be shown by the facts of the past. Evidence is received in regard to many matters which in other actions for personal injuries are irrelevant or immaterial. Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418.

In the case of the death of a child of tender age, whose very existence for years to come depends upon the protection of its parents; who, under the school laws, must attend school until the age of fifteen; whose capacity and character are in no way established; whose life is uncertain; whose future pecuniary usefulness to its parents is a problem depending upon so many contingencies that it cannot be solved; a question is presented so speculative and devoid of data that any reasonable or satisfactory conclusion is practically impossible. In the last analysis, all that can be done toward calculating the future value of a young child to its parents is to make an estimate based upon such presumption of that value as may be derived from common knowledge and experience, as no evidence is possible that can foretell the future history of any given child. Curran v. Lewiston, Augusta & Waterville Street Ry., 112 Me. 96, 90 A. 973.

And much is left to discretion of jury.—It is obvious that damage for wrongful death is not susceptible of exact computation and that much must be left to the discretionary judgment of the jury. But there must be some definite evidence upon which to base the judgment. Bowley v. Smith, 131 Me. 402, 163 A. 539.

Much is left to the sound judgment of the assessor of damages. They relate to the future, and as to them there can be no exact knowledge except as to "medical, surgical and hospital care and treatment." Blanchette v. Miles, 139 Me. 70, 27 A. (2d) 396.

Which should consider deceased's earning capacity.—In death cases an important factor in determining the amount which may properly be awarded is the earning capacity of the deceased. Bowley v. Smith, 131 Me. 402, 163 A. 539.

The earning capacity of the deceased is an important consideration, and this necessarily includes not only her physical ability to labor, but the probabilities of her being able to obtain profitable employment. Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418.

And his age, health, means, etc. — The circumstances of the deceased and the beneficiaries are to be ascertained. The legal, family or other ties are to be considered. The age, capacity, health, means, occupation, temperament, habits and disposition of the deceased and of the beneficiaries are material to be known. They would be subject, however, to acceleration, retardation, interruption and even extinction by other circumstances which may possibly, or probably, or even surely occur after the death. These inevitable, probable, and even possible subsequent

circumstances are therefore to be looked for and considered. Whatever result is arrived at must be reached from a careful balancing of the various probabilities. McKay v. New England Dredging Co., 92 Me. 454, 43 A. 29; Blanchette v. Miles, 139 Me. 70, 27 A. (2d) 396.

The age, health, occupation, means, habits, capacity, education, temperament, character and other similar facts relating to the deceased, are admissible as tending to show his probable pecuniary usefulness to the beneficiary. Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418; Bowley v. Smith, 131 Me. 402, 163 A. 539.

The life expectancy of the deceased and the beneficiary, her infant son, the probability of her surviving her husband and being the sole support of her child, the length of time that might reasonably be expected to elapse before the boy would be able to help his mother and care for himself, the possibility that in time she in her turn might become dependent upon him for her support, the loss of a mother's training and good influence which would tend to make him a better man and capable of acquiring more money — all these are proper considerations in determining the amount of the pecuniary injury resulting to the beneficiary. Oakes v. Maine Central R. R., 95 Me. 103, 49 A. 418.

But the jury must not be governed merely by possibilities. Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219.

And injury suffered must be estimated, not guessed at.—Although in this class of cases the pecuniary injury sustained is necessarily indefinite, it is not therefore illimitable. It should be estimated, not guessed at. All reasonable probabilities must be taken into account, as well those which tend to make the pecuniary injury less, as those which tend to increase it. Conley v. Maine Central R. R., 95 Me. 149, 49 A. 668.

Verdict held excessive. — See Carrier v. Bornstein, 136 Me. 1, 1 A. (2d) 219; Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A. (2d) 393; Laferriere v. Augusta Ice Co., 143 Me. 248, 60 A. (2d) 517.

Applied in Ward v. Maine Central R. R., 96 Me. 136, 51 A. 947; Conley v. Portland Gas Light Co., 96 Me. 281, 52 A. 656; McCarthy v. Claflin, 99 Me. 290, 59 A. 293; Carrigan v. Stillwell, 99 Me. 434, 59 A. 683; Anderson v. Wetter, 103 Me. 257, 69 A. 105; Perkins v. Oxford Paper Co., 104 Me. 109, 71 A. 476; Edgeley v. Appleyard, 110 Me. 337, 86 A. 244; Monk v. Bangor Power Co., 112 Me. 492, 92 A. 617; Crosby v. Maine Central R. R., 113 Me. 270, 93 A. 744; Kapernaros v. Boston & Maine R. R., 115 Me. 467, 99 A. 441; Levesque v. Dumont, 116 Me. 25, 99 A. 719; Levesque v. Dumont, 117 Me. 262, 103 A. 737; Chickering v. Lincoln County Power Co., 118 Me. 414, 108 A. 460; Richards v. Neault, 126 Me. 17, 135 A. 524; Ames v. Adams, 128 Me. 174, 146 A. 257; Field v. Webber, 132 Me. 236, 169 A. 732; Pelletier v. Morris, 132 Me. 488, 167 A. 863; Chase v. Litchfield, 134 Me. 122, 182 A. 921; Metrinko v. Witherell, 134 Me. 483, 188 A. 213; Ramsdell v. Burke, 140 Me. 244, 36 A. (2d) 573; Haskell v. Herbert, 142 Me. 133, 48 A. (2d) 637; Greene v. Willey, 147 Me. 227, 86 A. (2d) 82.

Cited in Frost v. C. W. Cone Taxi & Livery Co., 126 Me. 409, 139 A. 227.

Sec. 11. Conscious suffering preceding death.—Whenever death ensues following a period of conscious suffering, as a result of personal injuries due to the wrongful act, neglect or default of any person, the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages in a separate count in the same action for such death, brought, commenced and determined and subject to the same limitation as to the amount recoverable for such death and exclusively for the beneficiaries in the manner set forth in the preceding section, separately found, but in such cases there shall be only one recovery for the same injury. (R. S. c. 152, § 11.)

History of section. — See Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

Recovery for suffering must be on a separate count.—Only one action is necessary, under this section, in order to recover for conscious suffering and for the death following, but there must be at least two counts. That there must be "a separate count in the same action for such death" is the express command of the legislature as contained in this section. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

A count in plaintiff's declaration alleging the death of the decedent, and that she "suffered excruciating pain," and that plaintiff seeks compensation under the provisions of this section is demurrable in the absence of a separate count for such death, since, by statute, damages for

wrongful or negligent death, following conscious suffering, may only be recovered "in a separate count in the same action." Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

The reason for the demand of this statute that a separate count be inserted is to enable the jury to find the amount due for the conscious suffering and to separately find the amount due for the death. Damages for conscious suffering are recoverable by decedent's estate; and damages for the death, following the conscious suffering, belong to the statutory beneficiaries classified in § 10. Hogue v. Roberge, 142 Me. 89, 47 A. (2d) 727.

Sec. 12. Damages in actions of trespass; goods returned in replevin not assets.—When an action of trespass, or trespass on the case, is commenced or prosecuted against an executor or administrator, the plaintiff can recover only the value of the goods taken or damage actually sustained; and when judgment is rendered against an executor or administrator in an action of replevin for a return of goods, those returned shall not be considered assets and such return discharges him. (R. S. c. 152, § 12.)

Penal or double damages not recoverable against decedent's estate. — The obvious construction of this section is that, in those actions in which punitive, penal or double damages may be recovered of a living defendant, only actual damages are recoverable against the estate of a deceased party in the hands of his representative. Prescott v. Knowles, 62 Me. 277.

Sec. 13. When one of several parties dies; survivors may testify. —When either of several plaintiffs or defendants in an action that survives dies, the death may be suggested on the record, and the executor or administrator of the deceased may appear or be cited to appear as provided in section 7; and the action may be further prosecuted or defended by the survivors and such executor or administrator jointly, or by either of them; and judgment may be entered against the survivors and also against the goods and estate of the deceased in the hands of such executor or administrator, and a joint execution issued; and the survivors, if any, on both sides of the action may testify as witnesses. (R. S. c. 152, § 13.)

History of section.—See Treat v. Dwinel, 59 Me. 341; Duly v. Hogan, 60 Me. 351.

The object of this section is to prevent the abatement of actions. It intends that all actions, when the cause survives, may be continued in court and prosecuted, either by the survivors or the administrator. It seeks to avoid the necessity of commencing new actions, in such cases, after the death of a party. Norcross v. Stuart, 50 Me. 87.

Survivor must be one who can prosecute suit in his own name.—The survivor named in this section must be one who can do what the section authorizes a survivor to do, that is, prosecute the suit further in his own name. Norcross v. Stuart, 50 Me. 87.

Thus, in an action in the name of husband and wife for injuries sustained by her, the husband cannot be considered a party after the death of the wife, but if made her administrator, he may prosesute in that capacity. Norcross v. Stuart, 50 Me. 87.

Surviving joint promisors cannot be summoned where joint execution could not issue.—This section does not authorize the summoning in of survivors with the personal representatives of a deceased joint promisor except in cases where, if the plaintiff prevails, a joint execution can issue without violating other statute provisions. Thus, 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 this section could not issue without contravening c. 157, §§ 18 and 19. Duly v. Hogan, 60 Me. 351.

Time when administrator may be summoned in. — Section 7 contains no provision regulating the manner in which the representative party shall be summoned in, but does refer to and fix the time when it may be done. Therefore, the words, "as provided in section 7" in this section must refer to the provision regulating the time, which thus becomes a part of this section and applicable to cases where there are more than one plaintiff or defendant. The result is that the administrator has until "the second term after such death, or after his appointment," in which to make his

election whether he will appear or not. If at such second term he neglects or refuses to enter an appearance, he may then be summoned in. Snow v. Bartlett, 64 Me. 384.

Quoted in Strang v. Hirst, 61 Me. 9.

Sec. 14. Heirs, devisees or legatees may petition to defend suit; bond.—When suit has been brought against an executor or administrator, any of the heirs, devisees or legatees of the deceased may personally or by attorney petition the court for leave to defend the suit, setting forth the facts as he believes them to be and his reasons for so desiring to defend, and the court may grant or refuse such leave. If leave is granted, the petitioner shall give to the administrator or executor bond in such sum as the court orders, to hold the executor or administrator harmless for any damages or costs occasioned by the suit or by said defense; and an entry of record shall be made that he is admitted to defend such suit. (R. S. c. 152, § 14.)

Sec. 15. Claims against estates filed in writing with affidavit; no action for 30 days; claims not filed barred.—All claims against estates of deceased persons, including claims for amounts paid under the provisions of sections 276 to 297, inclusive, of chapter 25, and except for funeral expenses, expenses of administration, legacies, distributive shares and for labor and materials for which suit may be commenced under the provisions of section 39 of chapter 178, shall be presented to the executor or administrator in writing or filed in the registry of probate, supported by an affidavit of the claimant or of some other person cognizant thereof, either before or within 12 months after his qualification as such executor or administrator; and no action shall be commenced against such executor or administrator on any such claim until 30 days after the presentation or filing of such claim as above provided. Any claim not so presented or filed shall be forever barred against the estate, except as provided in sections 18, 20 and 22. (R. S. c. 152, § 15. 1949, c. 233, § 1.)

History of section.—See Littlefield v. Cook, 112 Me. 551, 92 A. 787.

Purpose of section.—The evident design of this section was to prevent actions involving needless cost and expense to the estate in collecting honest claims against it, by compelling a claimant to hand to the administrator the nature and extent of his claim and allow the reasonable prescribed period for investigating it. Marshall v. Perkins, 72 Me. 343; Hurley v. Farnsworth, 107 Me. 306, 78 A. 291.

The purpose of the notice of a claim against an estate required to be given to the executor or administrator is to give him, without the formality required in a pleading, such information of the nature and extent of the claim against the estate that he may investigate and determine whether the claimant should properly be paid or the demand rejected. Grant v. Choate, 133 Me. 256, 176 A. 289.

The primary object of this legislation is to apprise the administrator of the nature, as well as the extent, of the claim, that, after opportunity for investigation, he may arrange to pay or to contest it. Eddy v. Starbird, 135 Me. 183, 192 A. 702.

Compliance is condition precedent to maintenance of action.—By this section the presentment or filing of a claim is made a condition precedent to the right to maintain an action. Holbrook v. Libby, 113 Me. 389, 94 A. 482; Fessenden v. Coolidge, 114 Me. 147, 95 A. 777.

One making claim against an estate is required by the provisions of this section, as a condition precedent to the maintenance of his action, to present his claim in writing to the administrator or executor or file it in the registry of probate supported by his affidavit, or that of some other person cognizant thereof, either before or within twelve months after the qualification of the administrator or executor. Kelley v. Forbes, 128 Me. 272, 147 A. 159. See Berube v. Girard, 149 Me. 338, 101 A. (2d) 866.

No recovery in our courts of law can be had in suit on a claim against the executor of one deceased testate (with certain exceptions) unless the claim shall have been presented to the executor in writing, either before or within twelve months after his qualification as such executor. Stetson v. Caverly, 133 Me. 217, 175 A. 473.

And claim not presented or filed is forever barred.—If the claim is not presented or filed as required in this section, suit thereon is forever barred, except in certain

cases. This is the only penalty following such failure. McCluskey, Appellant, 116 Me. 212, 100 A. 977.

Failure to present or file claims within the period allowed by law is, when insisted, a matter of fatal consequence. The penalty is, with regard to the estate, perpetual bar. Eddy v. Starbird, 135 Me. 183, 192 A. 702.

Presentment or filing must be alleged and proved. Holbrook v. Libby, 113 Me. 389, 94 A. 482.

And noncompliance may be shown under general issue.—Want of filing or presentment may be taken advantage of under the general issue. Holbrook v. Libby, 113 Me. 389, 94 A. 482.

While, before the claim is barred by the statute of limitations, presentment or filing may be waived by the personal representative, under a plea of the general issue in an action of assumpsit against a decedent's estate, want of filing or presentment is in issue and failure to prove performance or waiver thereof bars an action by the claimant. Kelley v. Forbes, 128 Me 272, 147 A. 159.

The statutory requirement as to presentment of claims may be waived. Houlton Trust Co. v. Lumbert, 136 Me. 184, 5 A. (2d) 921. See Rawson v. Knight, 71 Me. 99; Marshall v. Perkins, 72 Me. 343.

While claim is not yet barred.—An administrator or executor may waive the presentment or filing of claims, under oath, while the claim is not yet barred. Littlefield v. Cook, 112 Me. 551, 92 A. 787.

But waiver must be made within period for filing claims.—A waiver of statutory requirements for presentment of claims against estates of deceased persons can only be made within period for filing of claims. Houlton Trust Co. v. Lumbert, 136 Me. 184, 5 A. (2d) 921.

When a claim has become barred by the limitation provided in this section, the executor cannot waive the section. Littlefield v. Cook, 112 Me. 551, 92 A. 787.

A waiver may be shown by a course of conduct signifying a purpose not to stand on the right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. Houlton Trust Co. v. Lumbert, 136 Me. 184, 5 A. (2d) 921.

Thus, appointment of commissioners and hearing before them operate as waiver.—The appointment of commissioners upon the administrators' application to "determine whether any and what amount shall be allowed," and the hearing had before them, operate as a waiver of any defect or insufficiency in the claim as presented. Canal Nat. Bank v. Cox, 120 Me. 488, 115 A. 255.

As does written agreement that claims have been duly presented.—An agreement in writing signed by the administrators and the heirs, who are also the claimants, "that the claims have been duly presented to said administrators and payment demanded," is a waiver by the administrators of the presentment or filing of the claims, even though in fact the statement was not true. Littlefield v. Cook, 112 Me. 551, 92 A. 787.

But failure to call attention to defect in claim is not waiver.—When an executor or administrator has received a written claim that does not exhibit the nature of the claim, he is not bound to call attention to the defect, and his omission to do so is not sufficient evidence of a waiver of his statutory right to be informed of the nature of the claim. Hurley v. Farnsworth, 107 Me. 306, 78 A. 291.

Nor is administrator's statement that he "will not pay a wrong bill."—An administrator's statement that he "will not pay a wrong bill" is not sufficient evidence of waiver of defects in a written claim. Hurley v. Farnsworth, 107 Me. 306, 78 A. 291.

This section fixes a time limit within which, and before suit, there shall be either presentation in writing of the claim to the executor or administrator, or, supported by affidavit, filing in the registry of probate. Eddy v. Starbird, 135 Me. 183, 192 A. 702.

A claim may be filed before the appointment of the administrator. Bernstein v. Kehoe, 122 Me. 144, 119 A. 198.

A claim properly made and filed any time after the decease of the intestate and entered within twelve months after the appointment of his administrator is a valid claim so far as the time of filing is concerned. Bernstein v. Kehoe, 122 Me. 144, 119 A. 198.

Section provides alternative methods of presenting claim.—This section was intended to give an alternative in the choice and manner of presenting a claim against an estate. The first and usual way is to present the bill against the estate to the administrator or executor. The second and less usual way is to file the claim in the registry of probate supported by affidavit. This latter course was undoubtedly intended to be as much of a protection to the claimant as to the estate, since in this manner positive record evidence of filing

his claim would be preserved. Howe v. Gray, 119 Me. 465, 111 A. 756.

Affidavit is not necessary where claim is presented to administrator.—The phrase "supported by an affidavit by the claimant" does not apply to the claim presented to the administrator or executor, but only to the claim filed in the registry of probate. The first method of presenting a claim was intended to be sufficient without affidavit. Howe v. Gray, 119 Me. 465, 111 A. 756.

Unless administrator requires it under c. 154, § 84.—Chapter 154, § 84, is a complement of this section with respect to the requirement of an affidavit and clearly implies that no affidavit is required in the first instance, where a claim is presented in writing to the administrator. Chapter 154, § 84, says, in effect, that if occasion arises in which the administrator may deem it advisable to obtain a more detailed and accurate statement of the debt and credit side of the claim, he can avail himself of that section, and demand an affidavit. Howe v. Gray, 119 Me. 465, 111 A. 756.

Sufficiency of affidavit made out of state. —See Holbrook v. Libby, 113 Me. 389, 94 A. 482.

Claim must give administrator all information which suit would disclose. — The intent of this section is to give the administrator thirty days before suit in which to investigate the claim proposed to be put in suit. If he cannot have all the information the suit itself would disclose, he does not have the opportunity for prior investigation contemplated in this section. Hurley v. Farnsworth, 107 Me. 306, 78 A. 291.

And must be stated with as much particularity as declaration.—The administrator is entitled to have disclosed in the writing the nature, as well as the extent, of the claim; to have disclosed what considerations are claimed to have been received by the deceased from the claimant, or what torts committed by him against the claimant. At the least, the administrator is entitled to as much particularity of statement in the prior presentation of the claim as he would be entitled to in the declaration in an action against him. Hurley v. Farnsworth, 107 Me. 306, 78 A. 291. See Canal Nat. Bank v. Cox, 120 Me. 488, 115 A. 255.

But formality of declaration is not required. — Notice filed with an executor must contain as much information as is required in a declaration. The same formality, however, is not necessary, provided the executor is apprised of the true substance of the demand. Grant v. Choate, 133 Me. 256, 176 A. 289.

The administrator is entitled to have the claim stated with as much particularity, but perhaps not with as much formality, as would be required in a declaration in a suit on the claim. Palmer, Appellant, 110 Me. 441, 86 A. 919; Canal Nat. Bank v. Cox, 120 Me. 488, 115 A. 255.

And substantial compliance with section is sufficient.—The notice filed pursuant to this section shall distinguish with reasonable certainty the claim from all other similar claims and give such information concerning the nature and amount of the demand as will enable the representative to act intelligently in approving or rejecting it, and a substantial compliance with the section is sufficient. Holmes v. Fraser, 140 Me. 81, 34 A. (2d) 76.

This section does not require the claimant to state the particulars of the claim, further than he would in a declaration in a writ. He need not state the consideration. The section does not contemplate that the claimant must, in the claim filed, advise the administrator as to these things. If it be an account, the claimant may file it. If it be a note, he may file it, or a copy of it, or without doing either, he may definitely describe it. Fessenden v. Coolidge, 114 Me. 147, 95 A. 777.

Erroneous statement of circumstances from which claim arose is not fatal.—Had the claimant misdescribed the note on which the claim was based, it might have been fatal. But an unnecessary, or even erroneous, statement of the circumstances out of which the claim arose should not be regarded as fatal. It certainly should not be so held unless it is shown that the administrator was misled thereby to his injury, and that an equitable estoppel was created. Fessenden v. Coolidge, 114 Me. 147, 95 A. 777. See Grant v. Choate, 133 Me. 256, 176 A. 289.

Claim held insufficiently stated. — A written claim for "balance due Jany. 1, 1904, $2265.50," does not exhibit the nature of the claim and is not a compliance with this section. Hurley v. Farnsworth, 107 Me. 306, 78 A. 291.

Claim held properly presented. — See Stetson v. Caverly, 133 Me. 217, 175 A. 473.

Claim and affidavit held properly filed.— Where the affidavit described the claim as the "annexed note and interest," and "the annexed note" was typewritten as to body and signature and was a copy of the original note declared upon in plaintiff's writ, the claim was properly filed, although the

affidavit described the claim as "annexed note," whereas it was not a note, but a copy thereof. Holmes v. Fraser, 140 Me. 81, 34 A. (2d) 76.

Note annexed to claim admissible without extraneous proof of consideration.— Where the holder of a promissory note, purporting to be for value received against the estate of the deceased maker, seasonably filed her claim, supported by affidavit, stating therein that her claim was for money loaned to the deceased "as evidenced by the note hereto annexed," the note was admissible in evidence without extraneous proof that the consideration was for money loaned. Fessenden v. Coolidge, 114 Me. 147, 95 A. 777.

Section inapplicable in suit based on agreement to dispose of property by will.— In enforcing an agreement to dispose of property by will to a particular person or for a particular purpose, the doctrine of impressed trust controls the rights of the parties. The claim is not against the estate of the deceased, but against and for certain property, real and personal, which, impressed with a trust in favor of the plaintiff, does not form any part of the estate. For that reason it is not necessary to file the notice required by this section where the claim is against the estate. Brickley v. Leonard, 129 Me. 94, 149 A. 833.

Assessment of statutory liability of bank stockholder. — See Wakem v. Duff, 134 Me. 137, 183 A. 128.

As to presentment of claim under earlier statute, see Eaton v. Buswell, 69 Me. 552; Rawson v. Knight, 71 Me. 99; Whittier v. Woodward, 71 Me. 161; Maine Central Institute v. Haskell, 71 Me. 487; Millett v. Millett, 72 Me. 117; Dexter Savings Bank v. Copeland, 72 Me. 220; Stevens v. Haskell, 72 Me. 244; Marshall v. Perkins, 72 Me. 343; Boothby v. Boothby, 76 Me. 17.

Applied in Kenison v. Dresser, 121 Me. 77, 115 A. 554; Emery v. Wheeler, 129 Me. 428, 152 A. 624; Baxter v. MacGowan, 132 Me. 83, 167 A. 77.

Cited in Carpenter v. Hadley, 118 Me. 437, 108 A. 679; Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

Sec. 16. State of Maine welfare claims barred unless administration taken out.—In an estate where the state has any claim under the provisions of section 276 to 297, inclusive, of chapter 25, the claim shall be forever barred unless administration is taken out on such estate within 2 years following the death of the welfare recipient or the surviving spouse, in the event said spouse occupies real estate of said welfare recipient. (1949, c. 233, § 2.)

Sec. 17. Continuance of actions, if brought within 1 year after qualification, without costs. — Actions against executors or administrators on such claims, if brought within 1 year after their qualification, shall be continued without cost to either party until said year expires and be barred by a tender of the debt within the year, except actions on claims not affected by the insolvency of the estate and actions on appeals from commissioners of insolvency or other commissioners appointed by the judge of probate. No action shall be maintained against an executor or administrator on a claim or demand against the estate, except for legacies and distributive shares, and except as provided in section 19, unless commenced and served within 20 months after his qualification as such executor or administrator. When an executor, administrator, guardian, conservator or testamentary trustee, residing out of the state, has no agent or attorney in the state, service may be made on one of his sureties in the same manner and with the same effect as if made on him. (R. S. c. 152, § 17.)

Cross references. — See c. 154, § 58, re limitation begins to run from time of granting letters in usual form; c. 154, § 62, re nonresident executors or administrators to appoint agent or attorney in state.

History of section. — See Sampson v. Sampson, 63 Me. 328; Gould v. Whitmore, 79 Me. 383, 10 A. 60; Jellison v. Swan, 105 Me. 356, 74 A. 920; Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Purpose of section. — This provision, except as to the time mentioned, is as old as the state government. Its object and policy are to compel an early settlement of the estates of deceased persons by requiring creditors thereof to prosecute their claims with reasonable diligence, to the end, inter alia, that widows and orphans, dependent thereon for subsistence, may realize at as early a day as practicable what belongs to them. Littlefield v. Eaton, 74 Me. 516.

Section is conclusive bar to claims not prosecuted within time limited.—In furtherance of its object, this section has

been considered to be a conclusive bar to, and practical extinguishment of claims not prosecuted within the time limited; an administrator cannot waive it, but is bound to plead it; no promise on his part can revive a claim thus barred, or prevent its barring an action not commenced within the appointed time. Littlefield v. Eaton, 74 Me. 516.

No remedy exists for claimant who has failed to bring action during statute period.—It would seem that, in the absence of any statutory provision excusing the delay, or new assets, no remedy exists for the claimant who has failed to avail himself of his rights during the statute period, whatever may have been the reasons therefor. Packard v. Swallow, 29 Me. 458; Littlefield v. Eaton, 74 Me. 516.

In carrying out the logical consequences of this peremptory statute bar, it has been held that an action of debt, commenced after the lapse of the statutory limit, to revive a judgment recovered within it, is barred; that a petition for a license to sell real estate on a claim barred will not be granted; that, if granted, it is void, since no lien of the creditor would remain on the real estate, of which the creditor could avail himself; that a levy under a judgment recovered on an action commenced after the limited period is void as to all persons except the administrator who suffered it; that a sum paid by the administrator to satisfy a judgment thus recovered would not be allowed in his official account; and that no disability of the claimant, as by infancy, during the period prescribed, will prevent his claim, if due and payable, from being barred. Littlefield v. Eaton, 74 Me. 516.

The disability of infancy has never been allowed as an avoidance of this section; on the contrary the lapse of time under the section has been regarded as an absolute bar to all claims, and it is right that it should be so. Baker v. Bean, 74 Me. 17. See Littlefield v. Eaton, 74 Me. 516; Fowler v. True, 76 Me. 43.

Nor does section make exception in favor of insane persons. — This section contains no exception in favor of insane persons or infants. Claims held by them against the estate of a deceased person are barred by the limitation as well as those held by others. Rowell v. Patterson, 76 Me. 196.

The limitations of this section for presenting claims against an estate to the administrator, and bringing an action thereon, apply to claims held by an insane person, though such person has no guardian during the two years next after the notice of the appointment of the administrator. Rowell v. Patterson, 76 Me. 196.

Distribution of fund after notice of claim does not extend time.—The fact that the defendant administrator distributed the fund among the heirs of the estate after notice of the plaintiff's claim is no reason for holding that the time for the commencement of the suit under this section is enlarged. Woodward v. Perry, 85 Me. 440, 27 A. 345.

Plaintiff cannot avoid section by omitting to describe defendant as administrator.—The plaintiff could not avoid the statute of limitation in favor of administrators by omitting to describe the defendant as an administrator in his writ. Such an omission could not enlarge the time for the commencement of the suit. Woodward v. Perry, 85 Me. 440, 27 A. 345.

Fraudulent concealment of cause of action.—As to evidence held insufficient to sustain an averment in a writ, commenced against an administrator more than two years after notice of his appointment, that the cause of action had been fraudulently concealed from the plaintiff by the defendant, see Given v. Whitmore, 73 Me. 374.

Limitation applies to action on judgment recovered within statutory period.—The statute limiting suits against an administrator may be effectually pleaded in bar to an action of debt commenced after the lapse of the statutory period on a judgment recovered against the administrator within the statutory period. McLellan v. Lunt, 11 Me. 150.

It applies after as well as before representation of insolvency.—The special statute of limitations of actions against executors and administrators contained in this section applies to claims against estates after representation of insolvency as well as before. It is an absolute bar, unless the suit is brought before the representation, or the claim is presented to the commissioners afterwards within the period limited for bringing a suit. 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, 74 A. 920; Harmon v. Fagan, 130 Me. 171, 154 A. 267. See c. 157, § 5, and note.

The presentment of a disputed claim to commissioners is to be deemed the commencement of an action for its enforcement, and the special statute of limitations contained in this section applies to such a proceeding as well as to an action at law.

Harmon v. Fagan, 130 Me. 171, 154 A. 267. See c. 154, § 74, and note.

And claim not so presented within twenty months is barred. — Unless a disputed claim, committed to commissioners, is presented to them in the manner and form required by law within twenty months after the executor or administrator is qualified, it is barred by this section. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Commissioners not appointed and claim not presented within twenty-month period.—Where the defendant filed his petition in the probate court for the appointment of commissioners, under c. 154, § 74, within period of limitation prescribed by this section after he had given notice of his appointment as administrator, but no action was taken thereon and no notice was given the plaintiff, and after the period of limitation had elapsed, the plaintiff accepted notice and agreed to the appointment of commissioners, who were appointed and acted on the claim, disallowing it, these proceedings did not deprive the defendant of the right to plead the statute of limitation. Whittier v. Woodward, 71 Me. 161.

Where a creditor's claim, being disputed by an executor, is committed to commissioners and the jurisdiction of the probate court attaches within the twenty-month period allowed for the commencement and service of an action, but the commissioners fail to qualify or act thereon and the creditor fails to present his claim to them within that period, the limitation of this section is not thereby extended. Harmon v. Fagan, 130 Me. 171, 154 A. 267.

Limitation is not applicable to federal government. — The limitation of this section, providing that actions not commenced within twenty months after the qualification of the administrator of an estate, does not have application against the federal government. United States of America, Appellant, 137 Me. 302, 19 A. (2d) 247.

Application to suits by surviving partner.—While a suit by a surviving partner against a debtor of the firm is not subject to the limitation provided in this section in suits against executors or administrators, such limitation is applicable to a suit by a surviving partner against the executor or administrator of a deceased partner. Bennett v. Bennett, 92 Me. 80, 42 A. 237.

Section applied to beneficiaries' demand against estate of trustee.—A trustee having given no bond as trustee and the identity of the trust fund or property being lost, the beneficiaries at his death stood in the position of general creditors of his estate, and on his death and the appointment of his executor, his estate became at once liable to a new trustee, who might have been appointed, for the amount of the trust fund, and the special statute of limitations applies to the beneficiaries' demands as to other claims against his estate. Fowler v. True, 76 Me. 43.

Assessment of statutory liability of bank stockholder. — See Wakem v. Duff, 134 Me. 137, 183 A. 128.

Service on resident surety.—The last clause of this section permits the same form of service upon a resident surety, in case there is no resident agent, as upon any other resident of the state. Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Applied in Parkman v. Osgood, 3 Me. 17; Huse v. Brown, 8 Me. 167; Lancey v. White, 68 Me. 28; Morrison v. Brown, 84 Me. 82, 24 A. 672; Dyer v. Walls, 84 Me. 143, 24 A. 801; Shurtleff v. Redlon, 109 Me. 62, 82 A. 645; Blunt v. McCoombs, 110 Me. 211, 85 A. 748; Houlton Trust Co. v. Lumbert, 136 Me. 184, 5 A. (2d) 921.

Cited in McCluskey, Appellant, 116 Me. 212, 100 A. 977.

Sec. 18. When action does not accrue within 12 months.—When an action on a covenant or contract does not accrue within said 12 months, the claimant may file his demand in the registry of probate within that time, verified as required in case of claims presented to the commissioners on insolvent estates; and the judge of probate shall direct that sufficient assets, if such there are, shall be retained by the executor or administrator, unless the heirs or devisees of the estate give bond to the executor or administrator, with one or more sureties, approved by the judge to pay whatever is found due on said claim. (R. S. c. 152, § 18.)

Creditor who has not filed demand has no remedy against executor.—Where a creditor has a claim against an estate which is not due until the period of limitation has expired, unless it has been filed in the probate office as required by this

section he can have no remedy against the executor. Pettengill v. Patterson, 39 Me. 498.

And executor cannot retain assets unless demand is filed.—If no demand is filed in accordance with this section, the executor has no right to retain the assets of the estate. That right exists only when the demand is filed, and the heirs or devisees do not give the required bond, and upon such refusal the judge of probate shall direct him to retain such assets as may be sufficient to satisfy the demand filed. The executor, if in no fault, should not be held, unless he has retained assets to meet the claim. That he cannot do without the direction of the judge of probate. Pettengill v. Patterson, 39 Me. 498.

But creditor is not compelled to file demand or lose remedy against heirs.—It is beyond the power of judicial construction to hold that §§ 18-20 compel a creditor whose action does not accrue within the period of limitation to file his claim in the probate office upon pain of losing his remedy against the heirs. Sampson v. Sampson, 63 Me. 328.

Section applies to claim of divorced wife under property settlement. — The claim of a former wife of deceased for payments not yet accrued under an agreement for property settlement adopted in the divorce decree is a claim for the ultimate payment of which sufficient assets should be ordered retained by the executors under the provisions of this section. Sard v. Sard, 147 Me. 46, 83 A. (2d) 286.

Claim against surety of guardian who has rendered final account.—Where, prior to the death of a surety on a guardian's bond, the ward had come of age and the guardian had rendered his final account, and a balance was declared in his hands, all that was required to fix the liability of the guardian or his sureties was to demand payment and if this was refused to bring a suit on the bond, and the obligation of the surety was not such a covenant or contract as is referred to in this section. Baker v. Bean, 74 Me. 17.

When action accrues. — See Blunt v. McCoombs, 110 Me. 211, 85 A. 748.

Stated in Johnson v. Libby, 111 Me. 204, 88 A. 647.

Cited in Boothby v. Boothby, 76 Me. 17; McCluskey, Appellant, 116 Me. 212, 100 A. 977.

Sec. 19. When bond given, and when not given.—When no bond is so given, an action may be brought by the claimant against the executor or administrator within 6 months after his demand becomes due. When a bond is given, assets shall not be reserved, but the estate is liable in the hands of the heirs or devisees, or those claiming under them, and an action may be brought on such bond. If anything is found due, the claimant shall have judgment therefor, and for his costs. (R. S. c. 152, § 19.)

When demand becomes due.—See Blunt v. McCoombs, 110 Me. 211, 85 A. 748.

Cited in Pettengill v. Patterson, 39 Me. 498; Sampson v. Sampson, 63 Me. 328; Johnson v. Libby, 111 Me. 204, 88 A. 647.

Sec. 20. Remedy on claim not filed within 12 months.—When such claim has not been filed in the probate office within said 12 months, the claimant may have remedy against the heirs or devisees of the estate within 1 year after it becomes due and not against the executor or administrator. (R. S. c. 152, § 20.)

Liability of heirs is contingent upon inability of creditor to have satisfaction from administrator. — The liability of the heirs on the covenants of their ancestor is by the operation of our statutes rendered contingent, depending on the inability of the creditor, from the nature of his claim, to have satisfaction during the existence of an administration. Webber v. Webber, 6 Me. 127.

The liability of the heir for the debts, covenants and contracts of the ancestor is only contingent and eventual, depending upon the absolute inability of the creditor or claimant, on account of the nature of his claim, to obtain satisfaction through legal process while the estate was under administration, or while the power to compel administration remained. Sampson v. Sampson, 63 Me. 328; Fowler v. True, 76 Me. 43.

And they are not liable where claim accrued within twelve months from qualification. — Where the right of action accrued within twelve months from the qualification of the administrator, no action will lie against the heir. Webber v. Webber, 6 Me. 127. See Sampson v. Sampson, 63 Me. 328.

When a claim that might have been en-

forced against the estate of a testator in the hands of his executors has become barred by the statute of limitations as against the executor, an action cannot be maintained for the same against the devisee under the provisions of this section. Fowler v. True, 76 Me. 43.

But existence of debt solvendum in futuro does not defeat claim against heir.—It is not the mere existence of a debt solvendum in futuro, but of a right of action within the statutory period for the recovery of such debt, which would defeat the claim against the heir, as the legislature has seen fit to frame the statutes. Taken together, §§ 18-20 must be held to authorize the maintenance of a suit against the heir or devisee in all cases where an action does not accrue against the estate in season to avoid the limitation bar, and the claim has not in fact been filed in the probate officer so that the creditor might either have a remedy against the heirs upon a bond to respond, or have his right of action against the executor or administrator extended until after the claim becomes due. Sampson v. Sampson, 63 Me. 328.

And creditor has option of filing claim under § 18 or bringing suit against heir.—Where an action does not accrue before the expiration of the period of limitation, the creditor has the option either to file his demand in the probate office, or resort to a suit against the heir, to be brought within a year from the time when his claim becomes due or payable. Sampson v. Sampson, 63 Me. 328.

What claimant must show.—To sustain an action against an heir or devisee under this section, the plaintiff must show that administration has been taken out on the estate of the ancestor, that the demand was not due and could not have been enforced within twelve months from the granting of administration and within one year after it became due. Baker v. Bean, 74 Me. 17.

The word "due" in this section is synonymous with "payable." Sampson v. Sampson, 63 Me. 328.

Action which would have accrued upon demand within twelve months is not maintainable against heir.—The contracts or covenants to which this section applies are those which by their terms and conditions were not enforceable within the statutory period. When an action would have accrued upon demand within the twelve months, it might have been brought against the administrator and in such case it is not maintainable against the heir or devisee. Baker v. Bean, 74 Me. 17.

A grantee's remedy on covenants of warranty having accrued upon his ouster, which occurred after the lapse of the statutory period from the qualification of the grantor's administrator, it should have been pursued against the heirs within one year after it accrued, by the provisions of this section. The grantee, not having done this, had, by his own neglect, lost his remedy on this covenant. Webber v. Webber, 6 Me. 127.

An action for breach of a covenant of seisin having accrued as soon as it was made, the right of action against the covenator's administrator was barred by the lapse of the statutory period since the grant of letters of administration, and could not thereafter be maintained against the heirs. Webber v. Webber, 6 Me. 127.

Remedy against heirs of deceased surety on bond.—Under this section, "the claimant may have a remedy against the heirs" of a deceased surety on a bond. This is an independent and additional remedy to that authorized upon the bond. While the plaintiff must pursue the legal course to fix the amount of his claim under the bond, when that is done, this section gives him this remedy which, without it, would not exist. This remedy is not in the control of the probate judge. He may give or withhold his consent to a prosecution on the bond, and having given it, no costs can be recovered by the defendants if they prevail. But this remedy is to be pursued at the option of the claimant, and at his risk. It must, therefore, be by such a process as will give the defendants a right to costs, if they prevail. No exception to the general rule in this respect, is made by the statute. Strickland v. Holmes, 77 Me. 197.

Heirs of a deceased surety cannot be liable jointly with the signer of the contract, as they do not become parties to it. Their liabilities are created solely by statute. Strickland v. Holmes, 77 Me. 197.

Liability of each heir is measured by assets individually received.—The extent of the liability of each heir or devisee is measured by the amount of assets individually received from the estate. Hence there should be an allegation in the declaration, not only that assets were received, but of the amount. Strickland v. Holmes, 77 Me. 197.

Widow is not liable as heir. — The widow of the decedent is not an heir. Nor can she be a devisee, where no will ap-

pears to have been made. As to her, the action must fail. Strickland v. Holmes, 77 Me. 197.

Applied in Johnson v. Libby, 111 Me. 204, 88 A. 647.

Cited in Boothby v. Boothby, 76 Me. 17.

Sec. 21. Limitations claimed for or against old administrator continued.—When an executor or administrator after qualification dies, resigns or is removed without having fully administered the estate, and a new administrator is appointed, such new administration shall be deemed to be a continuation of the preceding administration, and all limitations which could be claimed for or against the predecessor may be claimed for or against such successor; provided, however, that the time when there is no representative of the estate shall not be reckoned as part of the periods for the filing or proof of claims or limitations for bringing suits; and such periods, and generally the periods referred to where no provision to the contrary is made, shall be reckoned exclusive of such time. (R. S. c. 152, § 21.)

Sec. 22. Relief in equity when claim not presented within time limited. — If the supreme judicial court or the superior court, upon a bill in equity filed by a creditor whose claim has not been prosecuted within the time limited by the preceding sections, is of the opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, it may give him judgment for the amount of his claim against the estate of the deceased person; but such judgment shall not affect any payment or distribution made before the filing of such bill. (R. S. c. 152, § 22.)

Constructions of Massachusetts statute applicable. — This section first enacted in Maine in 1883, is almost a verbatim copy of the Massachusetts statute enacted in 1861, the language of which had several times received a judicial interpretation from the court of that state before it was adopted in this state in 1883. It is to be presumed that, in adopting the language thus interpreted, the legislature used it in the sense already judicially declared to be its true sense and meaning. Bennett v. Bennett, 93 Me. 241, 44 A. 894.

Section substitutes equitable for legal process. — Under this section an equitable process is substituted for the legal process, in form different processes, in substance and effect intended to be the same. Hurley v. Hewett, 87 Me. 200, 32 A. 875.

It does not create cause of action in equity where there was none at law. — The only object of this section is to relieve a creditor, under certain circumstances, from the limitation of the statute in regard to the prosecution of claims against the estates of deceased persons. It does not create a cause of action in equity, after the bar of the statute, when there was none at law before. Hodge v. Hodge, 90 Me. 505, 38 A. 535.

Nor does it create relation of debtor and creditor not already existing.—The design of this section was not to create the relation of creditor and debtor where not already existing, but to assist, in certain emergencies, those who are already creditors, but who have failed to seasonably present or prosecute their claims without culpable negligence on their part. White v. Thompson, 79 Me. 207, 9 A. 118.

A person who, in the lifetime of one deceased, indorsed his note for his accommodation, and after his death indorsed his administrator's note given in exchange for his note, and indorsed several renewals of the administrator's note, and finally paid the last note in the series himself, does not thereby become a creditor of the estate of the deceased and entitled to file a bill in equity under this section, although the administrator's note was in each instance worded as the note of the estate and not his own note. The administrator's notes bound him personally, but would not bind the estate. White v. Thompson, 79 Me. 207, 9 A. 118.

The relief to be granted in equity under this section is exceptional only. Bennett v. Bennett, 93 Me. 241, 44 A. 894.

Jurisdiction is special and limited. — If the estate has claims against the complainant not exactly such as may be in payment or satisfaction of his claim against the estate, they may be enforced by actions of law. Jurisdiction under a bill filed pursuant to this section is special and limited, extending only to the single question whether anything is due on the complainant's account. Hurley v. Hewett, 87 Me. 200, 32 A. 875.

And relief is granted only in cases unmistakably within section.—The statute

limitation within which claims may be enforced against the estate of deceased persons is important, serving the worthy purpose of preventing unreasonable delays in the administration and distribution of estates. Since the granting of relief under the provisions of this section contravenes this purpose of the special statute of limitations, such relief is grantable only in those cases that are unmistakably shown to be within the express provisions of this remedial statute strictly construed. Beale v. Swasey, 106 Me. 35, 75 A. 134. See Harmon v. Fagan, 130 Me. 171, 154 A. 267.

And both conditions of section must be complied with.—Both conditions of this section must be complied with. It is not enough for the plaintiff to show that he has a valid claim against the estate, a claim good in "justice and equity;" he must further show that he is not "chargeable with culpable neglect in not prosecuting his claim within the time so limited." Bennett v. Bennett, 93 Me. 241, 44 A. 894.

To sustain a bill under this section, it is incumbent on the plaintiffs to show two things; first that justice and equity require it, and secondly, that they are not chargeable with culpable neglect. Blunt v. McCoombs, 110 Me. 211, 85 A. 748.

The right of the plaintiff to relief under this section depends upon the following propositions: 1. The existence of a claim due him and enforceable by an action of law except for the special statute bar of limitations. 2. There are undistributed assets of the estate. 3. Justice and equity require it. 4. He is not chargeable with culpable neglect in not seasonably prosecuting his claim. Holway v. Ames, 100 Me. 208, 60 A. 897.

Plaintiff must show that justice and equity require application of section.—It is incumbent upon the plaintiff to prove that "justice and equity" require the application of this section. Burrill v. Giles, 119 Me. 111, 109 A. 390.

And that he is not chargeable with "culpable neglect." — The creditor must not only show that he has a valid claim against the estate good in "equity and justice," but he must also prove that he is not chargeable with "culpable neglect." Harmon v. Fagan, 130 Me. 171, 154 A. 267.

"Culpable neglect" defined. — "Culpable neglect" is defined to be "censurable" or "blameworthy" neglect, which exists when the loss can be fairly ascribed to the creditor's own carelessness, improvidence, or folly, or that of another for whose acts or ommissions he is chargeable. Harmon v. Fagan, 130 Me. 171, 154 A. 267. See Bennett v. Bennett, 93 Me. 241, 44 A. 894; Beale v. Swasey, 106 Me. 35, 75 A. 134.

"Culpable neglect" is less than gross carelessness, but more than the failure to use ordinary care, it is a culpable want of watchfulness and diligence, the unreasonable inattention and inactivity of creditors who slumber on their rights. It is the policy of the law to insure the speedy administration and distribution of estates of deceased persons. Holway v. Ames, 100 Me. 208, 60 A. 897.

If the plaintiffs have slumbered upon their rights, that is "culpable neglect." Blunt v. McCoombs, 110 Me. 211, 85 A. 748.

Delay in enforcing claim at request of estate may be "culpable neglect."—It has been held to be "culpable neglect" in the creditor of an estate to delay the enforcement of his claim even at the special request of the estate, and relying upon the distinct promises and assurances of the administrator or executor that the claim should certainly be paid. Beale v. Swasey, 106 Me. 35, 75 A. 134.

Plaintiff is chargeable with culpable neglect of his attorney.—To entitle the plaintiff to the relief provided for by this section, it is not enough for him to allege and show that he entrusted the enforcement of his claim to an attorney in good standing upon whom he relied, and that the attorney did not prosecute it as directed by the plaintiff, for the attorney's neglect to act in the premises must be considered as the neglect of the plaintiff. If such neglect is culpable, then the plaintiff must be chargeable with culpable neglect at least, in the absence of any special circumstances making it equitable for him to be relieved therefrom. Beale v. Swasey, 106 Me. 35, 75 A. 134.

Applied in First Auburn Trust Co., Appellant, 135 Me. 277, 195 A. 202.

Cited in Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

Sec. 23. Actions for legacies not affected; liability for unfaithful administration.—An action for the recovery of a legacy is not affected by the provisions of this chapter. When an executor or administrator is guilty of unfaithful administration, he is liable on his administration bond for all damages occasioned thereby. (R. S. c. 152, § 23.)

Executions after Creditor's Death.

Sec. 24. Executions after creditor's death.—When a judgment creditor dies before the first execution issues or before an execution issued in his lifetime is fully satisfied, such execution may be issued or renewed by order of any justice of the court rendering such judgment, in term time or vacation, or by like order of a municipal court or trial justice rendering such judgment, upon application in writing of the executor or general or special administrator of the deceased creditor; and any execution so issued or renewed may be subsequently renewed; but no execution shall issue or be renewed after the term within which it might have been done if the party had not died. (R. S. c. 152, § 24.)

Writ of execution not abated by death of judgment creditor.—At common law a writ of execution in the hands of an officer for service is not abated by the death of the judgment creditor, and it is the duty of the officer to serve it. The statutes of this state have not changed the common law rule in this respect. Wing v. Hussey, 71 Me. 185.

Sec. 25. Recitals of execution; to what uses property levied on, held.—In an execution issued under the provisions of the preceding section, originally or by renewal, besides the ordinary recitals, it shall be set forth in substance that since the rendition of judgment, the creditor (naming him) has died and that the person whose name is inserted in his place is the executor or administrator of his estate; and the command to the officer shall be the same as if the judgment had been recovered by the executor or administrator, who shall hold any real estate levied on to the same uses as if he had recovered judgment in his representative capacity. (R. S. c. 152, § 25.)