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Chapter 112.

Commencement of Civil Actions.

Forms and Requisites of Writs.

Sec. 1. Forms of writs remain until changed by court.—The forms of writs in civil actions remain as established; but the supreme judicial court, by general rules, may make such alterations therein for all courts as changes in the law or other causes require. (R. S. c. 99, § 1.)

Execution is a writ and may be altered.—An execution is a writ within the meaning of this section. Authority to change a writ implies authority to change an execution issued upon a judgment rendered in a suit commenced by such writ. Stringer v. Coombs, 62 Me. 160.

Sec. 2. Actions commenced by original writs; framed to be capias and attachment or original summons; writs sold only to attorneys.—All civil actions, except scire facias and other special writs, shall be commenced by original writs; which, in the superior court, may be issued by the clerk in term time or vacation and framed to attach the goods and estate of the defendant and for want thereof to take the body, or as an original summons, with or without an order to attach goods and estate; and in actions against corporations and in other cases where goods or estate are attached and the defendant is not liable to arrest, the writ and summons may be combined in one. A writ issued by the clerk of any county may be made returnable in any other county in which the action might be legally brought.

Clerks of judicial courts, judges and registers of the probate courts, recorders of the municipal courts and trial justices of the state shall not sell or deliver any blank writs or precepts bearing the seal of said courts and the signature of said judges, recorders, registers and trial justices to any person except one who has been admitted as an attorney and counselor at law and solicitor and counselor in chancery in accordance with the laws of this state, and said judges and registers of said probate courts shall not receive any paper, petition or other instrument pertaining to the practice of law before said probate courts unless it bears the indorsement of an attorney or counselor at law duly authorized to prac-

tice before said courts, except that the above provisions shall not apply to a party in interest in the subject matter in said courts. (R. S. c. 99, § 2.)

Cross references.—See note to § 24, re constitutionality of attachment; c. 103, § 7, re jurisdiction of supreme judicial court; c. 107, § 1, re concurrent jurisdiction of supreme judicial court and superior court in certain cases; note to c. 120, § 1, re prohibited arrests.

History of section. — See McInnes v. McKay, 127 Me. 110, 141 A. 699; Belfast v. Bath, 137 Me. 91, 15 A. (2d) 249.

Actions are confined to courts of law by the meaning of the first clause of this section. Webster v. County Com'rs, 63 Me. 27.

The service of a writ is to be made according to its form, irrespective of the use which is made of it. Blanchard v. Day, 31 Me. 494.

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

But writ omitting seal not amendable.— The seal of a court has been held to be a matter of substance, and an original writ not amendable, where the seal was omitted from it. Bailey v. Smith, 12 Me. 196.

Defects of form in writs, as prescribed under §§ 1-5, are to be taken advantage of by plea in abatement. Mahan v. Sutherland, 73 Me. 158.

Authority of clerk of courts confined to his county.—The clerk of courts is essentially a county officer. While the legislature might conceivably clothe him with authority in connection with a court of statewide jurisdiction, outside of his own county, yet such intent is inconsistent with the provisions of this section. Belfast v. Bath, 137 Me. 91, 15 A. (2d) 249.

And he cannot sign writ issuing from another county.—It was not the intent of the legislature to enlarge and extend the authority of a clerk so that he may sign writs which purportedly issue from a county other than his own. Belfast v. Bath, 137 Me. 91, 15 A. (2d) 249.

Writ must show issuance by clerk where entered, or by another clerk and made returnable where entered. — A writ entered in court must show on its face one of two things: that it was issued by the clerk of courts for the county where it is entered; or that it was issued by the clerk of courts for another county and made returnable where entered. Belfast v. Bath, 137 Me. 91, 15 A. (2d) 249.

And it may be abated if returnable after intervening term.—A writ in the supreme judicial court returnable at a term after an intervening term, at which it might have been returnable, is voidable and may be abated on motion seasonably filed. McAlpine v. Smith, 68 Me. 423.

Joint promisors brought in by original writ if estate of deceased sole defendant not prosecuted. — Where, in an action founded on contract against a sole defendant who dies, and the action is not prosecuted against his personal representative, the plaintiff cannot bring in new joint promisors except by means of an original writ. Duly v. Hogan, 60 Me. 351.

Election of form of writ limited by provisions against certain arrests.—The right of election as to the form of the writ allowed under this section is limited by c. 120, § 1, which prohibits the arrest of any person on mesne process in suits on contracts and on judgments founded on them, with certain exceptions. Cleaves v. Jordan, 34 Me. 9.

And writ does not authorize attachment and arrest at same time. — It does not appear to have been the intention to permit a creditor to take the property of a debtor from his possession, or to create a lien upon it, and at the same time to arrest his body. Hence the frame of the writ is such, that an attachment and an arrest are not commanded or authorized at the same time. Trafton v. Gardiner, 39 Me. 501.

For arrest authorized only upon want of property. — The authority of an officer to arrest the body of the defendant, in an action of trespass, rests upon the want of property to be attached. Trafton v. Gardiner, 39 Me. 501.

Attachment rests solely on statute.—The foundation of the practice and procedure of attaching the property of a defendant and holding it to satisfy a judgment which the plaintiff may recover rests solely on statute. McInnes v. McKay, 127 Me. 110, 141 A. 699.

Writ of attachment against certain property may isssue against town.—Real estate belonging to a town may be attached on a writ against the town, under some conditions, as when it is not exempted by statute, and when it is not used by the town in the performance of its public functions. It follows that a writ of attachment may be issued against a town. And a writ so issued is not abatable on that ground. Ripley v. Harmony, 111 Me. 91, 88 A. 161.

Writ should not order attachment after insolvency. — Where an action is brought

against an administrator, upon a claim disallowed by the commissioners, after the estate is rendered insolvent, the writ should contain no order to attach the goods of the intestate. An attachment made by such a writ would be illegal. Thayer v. Comstock, 39 Me. 140.

But such defect waived if not seasonably excepted to.—A writ commanding attachment of property of a debtor represented insolvent is abatable, either on motion or by plea, if made or filed within the time allowed by the rules of court; but if omitted, the objection to the form of the writ is waived. Thayer v. Comstock, 39 Me. 140.

Officer to take and safely keep, receive bail or commit.—The specific duty of the officer, when he arrests on original writs, is left to the mandate of the writ to take and safely keep, under which he must receive bail or commit. Jones v. Emerson, 71 Me. 405.

Quoted in Pressey v. Snow, 81 Me. 288, 17 A. 71.

Cited in Hodge v. Swasey, 30 Me. 162; Richardson v. Rich, 66 Me. 249; Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Sec. 3. Justice writs.—Writs issued by a trial justice or judge of a municipal court shall be signed by him or by the clerk or recorder of such court and sealed, except as provided by section 6 of chapter 108. (R. S. c. 99, § 3. 1949, c. 69, § 2.)

Sec. 4. Attachment and arrest on scire facias.—All writs of scire facias may contain a direction to the officer serving them to attach the property of the defendants and to arrest their bodies, when liable to arrest, as in writs of attachment. (R. S. c. 99, § 4.)

Officer to take and safely keep, receive bail or commit.—When an officer arrests on scire facias, his specific duty is left to the mandate of the writ to take and safely keep, under which he must receive bail or commit. Jones v. Emerson, 71 Me. 405.

Sec. 5. Unknown defendant sued by assumed name.—When the name of a defendant is not known to the plaintiff, the writ may issue against him by an assumed name; and if duly served, it shall not be abated for that cause but may be amended on such terms as the court orders. (R. S. c. 99, § 5.)

Indorsement of Writs.

Sec. 6. Indorsement of writ, petition or bill.—Every writ original, of scire facias, of error, of audita querela, petition for writ of certiorari, for review or for partition, and bill in equity shall, when the plaintiff, petitioner or complainant is not an inhabitant of the state, upon motion filed in court at the first term, as of course, be indorsed by such sufficient inhabitant of the state, or security for costs furnished by deposit in court in such amount as the court shall direct; and if, pending such suit, the plaintiff, petitioner or complainant removes from the state, such an indorser shall be procured or security for costs furnished on motion of the defendant or other party to the suit; but if one of such plaintiffs, petitioners or complainants is an inhabitant of the state, no indorser or security shall be required except by special order of court. (R. S. c. 99, § 6.)

The object of this section is to afford a security to the defendant for his costs in case the suit should fail. Sawtelle v. Wardwell, 56 Me. 146; Ferguson v. Gardner, 92 Me. 245, 42 A. 393.

Writs of summons and attachment are original writs and embraced within the meaning of the expression "every writ original" as used in this section. Pressey v. Snow, 81 Me. 288, 17 A. 71.

Provision for scire facias and other special writs is not limitation on indorsement of original writs. — Scire facias and other special writs enumerated in this section are additional to the original provisions requiring original writs to be indorsed, and are not qualifications or limitations thereof. Pressey v. Snow, 81 Me. 288, 17 A. 71.

The indorsement is simply a contract by which the indorser becomes liable for costs, and is to be construed by the same rules as are applicable to other contracts. Sawtelle v. Wardwell, 56 Me. 146.

And may be furnished before request therefor.—A voluntary indorsement of the writ, by a sufficient person, before entry, is a substantial and effective compliance with the statute; it cannot be material, nor

operate to the injury of defendant, if the indorsement is voluntarily furnished by plaintiff at any time before the defendant asks for it. Ferguson v. Gardner, 92 Me. 245, 42 A. 393.

If a writ is not indorsed before service, it may be a good objection by way of plea in abatement or on motion; but it will not avail the defendant after pleading to the merits. Clapp v. Balch, 3 Me. 216.

At return term.—An objection to the sufficiency of the indorsement of a writ should be made at the return term. Stevens v. Getchell, 11 Me. 443.

Within allowed time. — A motion to quash a writ for want of an indorser as required by this section, must be filed within the time allowed for pleas in abatement. Smith v. Davis, 38 Me. 459.

And objection is waived by failure seasonably to except.—The provisions of this section were made for the benefit of the defendant, which, if he pleases, he might waive; and if at the return term he does not except to the want of an indorser either by plea or motion, he must be considered as having waived the security provided for his benefit. Littlefield v. Pinkham, 72 Me. 369.

An attorney, who puts his name on a writ as indorser, makes himself liable as indorser. Davis v. McArthur, 3 Me. 27.

And satisfies requirement of section. — The requirement of an indorsement, under this section, is satisfied by the indorsement thereon of the name of the attorney, he being a sufficient person. Stone v. McLanatham, 39 Me. 131.

For such is deemed his intended purpose.—The rule that the signature of the plaintiff's attorney upon the back of a writ, in the absence of any words connected therewith to show a different purpose, must be regarded as having been placed there to meet the requirement of this section is a sound rule, and well calculated to promote the administration of justice. Richards v. McKenney, 43 Me. 177.

And the surname of an attorney written on the back of a writ is an indorsement of it, under this section. Sawtelle v. Wardwell, 56 Me. 146.

As is any designation substituted for indorser's name.—As there are no statutory provisions regulating the form of signature of the indorser under this section, it is left to the general principles of the common law. By these rules, a person may become bound by any mark or designation he thinks proper to adopt, provided it is used as a substitute for his name, and he intends to bind himself. Sawtelle v. Wardwell, 56 Me. 146.

As well as an impliedly authorized indorsement.—Where the name of the plaintiff was indorsed on his writ by the attorney who commenced the action, without adding his own name as attorney, it was held, nevertheless, to be a sufficient indorsement, it being done in the presence of the plaintiff, he making no objection thereto, and afterwards prosecuting the suit. Stevens v. Getchell, 11 Me. 443.

"From office of," appearing before indorsement, is not limitation thereof.—The words "from the office of" appearing before the indorsement of an attorney's name on a writ is no satisfactory evidence, that they were adopted by the attorney to limit the effect of his indorsement; for when an attorney does an act required by law, he must be regarded as having done it in obedience to the law. Stone v. McLanathan, 39 Me. 131.

And is good indorsement. — An indorsement, on the back of the writ, under the printed words "from the office of" is a good indorsement. Ferguson v. Gardner, 92 Me. 245, 42 A. 393.

An indorsement of a writ as follows, "No. 262. From the office of J. Smith" is a sufficient compliance with this section. Bennett v. Holmes, 79 Me. 51, 7 A. 902.

But an indorsement, "Mr. officer, attach," followed by the signature of plaintiff's attorney, is not an indorsement within the meaning of this section. Gilmore v. Crosby, 76 Me. 599.

Other proof may not be shown to prove intended limitation of indorsement. — The name of the plaintiff's attorney indorsed by him upon the back of the writ, although preceded by the words "office of," or "from the office of," is a sufficient indorsement under this section; and it is not competent to defeat such apparent effect, by other proof, to show an intended limitation. Richards v. McKenney, 43 Me. 177.

For it would operate a fraud upon defendant.—The entry of a writ indorsed by an attorney is virtually an affirmation by the attorney that such indorsement is the one required by law; and it would operate as a fraud upon the defendant to deprive him of the statutory security which prima facie it affords, by allowing the party making it to avoid its legal effect by the introduction of parol proof. Richards v. McKenney, 43 Me. 177.

And contradict the record.—An indorsement on the back of a writ, in all cases where the suit is prosecuted to judgment, becomes a part of the record, and its ap-

parent legal intendment should not be open to contradiction. Richards v. McKenney, 43 Me. 177.

But indorser may require proof by inspection that signature is genuine or authorized.—The party sought to be charged as an indorser is allowed to require proof by inspection of the writ itself, that his name is upon the writ, and if it purports to be there, that it is his genuine signature, or authorized by him. Wilson v. Hobbs, 32 Me. 85.

Though attorney may be estopped from denying validity of indorsement.—Where plaintiff's attorney's name was indorsed on a writ by a third person, who erroneously supposed he was authorized to do so, and the attorney afterwards prosecuted the action to trial, without informing the other party of the error, he was held to have ratified the indorsement, estopped from denying its validity, and held liable for the costs recovered against the plaintiff in that suit. Booker v. Stinchfield, 47 Me. 340.

Former provision of section.—For cases relating to a former provision of this section requiring indorsement "before entry in court," see Treat v. Bent, 51 Me. 478; Pressey v. Snow, 81 Me. 288, 17 A. 71.

Stated in Crossman v. Moody, 26 Me. 40.

Cited in Abbot v. Crawford, 6 Me. 214.

Sec. 7. Liability of indorser.—In case of avoidance or inability of the plaintiff or petitioner, the indorser is liable, in an action on the case brought within 1 year after the original judgment in the court in which it was rendered, to pay all costs recovered against the plaintiff. A return upon the execution by an officer of the county where the indorser lives, that he has demanded of the indorser payment thereof, and that he has neglected to pay or to show the officer personal property of the plaintiff sufficient to satisfy the execution, or that he cannot find the indorser within his precinct, is conclusive evidence of his liability in the suit. (R. S. c. 99, § 7.)

The liability of the indorser of a writ is incurred when the writ is indorsed. Thomas v. Washburn, 24 Me. 225; Oliver v. Blake, 24 Me. 353.

The "avoidance or inability of the plaintiff" refers to the plaintiff of record, though he may be a nominal one merely. Skillings v. Boyd, 10 Me. 43.

Indorser is liable upon plaintiff's avoidance or inability.—This section throws upon the indorser of the writ, the responsibility of answering for the costs recovered against the plaintiff upon his avoidance or inability. Wheeler v. Lothrop, 16 Me. 18.

And it is not necessary that avoidance and inability of the original plaintiff should both concur. If redress be sought properly for either incident, and duly proved, the plaintiff will be entitled to judgment. Wilson v. Chase, 20 Me. 385.

Nor is the liability under this section made to depend upon the inability of the debtor at any precise time; the provision is intended to give to the defendant in the original action security against the loss of costs, which he may recover in a suit against him, which shall prove to be groundless. Thomas v. Washburn, 24 Me. 225.

Defendant must show diligence against plaintiff before recourse to indorser.—The defendant, who recovers costs against the plaintiff, whose writ was indorsed, ought to use reasonable diligence to recover the costs of the principal, the original plaintiff, before he shall have recourse to the surety, the indorser of the writ. Wilson v. Chase, 20 Me. 385; Merrill v. Walker, 24 Me. 237.

Where at the time of the indorsement of the writ, one of the plaintiffs resided within the state, and the other without its limits; and before judgment the latter had removed within the state, and ever afterwards resided therein, and the defendant in that action was seasonably notified thereof; reasonable diligence must be used to collect the costs of him, before the indorser can be made liable. Merrill v. Walker, 24 Me. 237.

He must show return on execution within year.—In preparatory proceedings to charge an indorser of a writ, it is essential that there should be the record evidence of diligence in order to establish avoidance. It should appear by an officer's return on some execution issued within a year after the judgment, in order to show reasonable diligence on the part of the creditor, to recover the costs against the original plaintiff. Wilson v. Chase, 20 Me. 385; Thomas v. Washburn, 24 Me. 225.

And parol evidence inadmissible to supply omission thereof.—In an action against an indorser parol evidence is inadmissible to supply the omission of a return on execution. Wilson v. Chase, 20 Me. 385.

But return is conclusive only of facts stated therein.—In an action against the

indorser of a writ the return of an officer on the execution showing that no property of the judgment debtor was to be found within his precinct is conclusive only of the facts so returned. Thomas v. Washburn, 24 Me. 225.

And not sufficient evidence of inability. —In an action against the indorser of a writ, the return of an officer on the execution, which had issued for the costs, is not sufficient evidence of the inability contemplated by the statute. Harkness v. Farley, 11 Me. 491.

A return showing that no property of the debtor was to be found is not conclusive evidence of the inability of the judgment debtor. Thomas v. Washburn, 24 Me. 225.

Though commitment of plaintiff and discharge by poor debtor's oath is sufficient.—The return of the arrest of the plaintiff and commitment on the execution, and his subsequent discharge by taking the poor debtor's oath exhibit satisfactory evidence of his inability to satisfy the costs, unless this evidence is impeached. Wheeler v. Lothrop, 16 Me. 18.

Parol evidence admissible to show ability or inability, not contradicting return.—Parol proof may be introduced by either party touching the question of the ability or inability of the original plaintiff to pay costs, not contradicting the officer's return. Harkness v. Farley, 11 Me. 491; Oliver v. Blake, 24 Me. 353.

Evidence of the inability of a debtor may be sought for elsewhere than from what appears of record in the original action, or on any execution issued on the judgment recovered in it. Oliver v. Blake, 24 Me. 353.

Indorser may defend by showing original plaintiff possessed of property in the state.—The liability of indorsers of writs depends upon the inability or avoidance of the debtor, and if it be shown that he was possessed of property, which it is reasonable to suppose could have been seized upon execution by the creditor, he exercising ordinary care and vigilance, in any other county in the state than the one to which the officer's return refers, it would be a defense to an action against an indorser for want of ability in the debtor. Thomas v. Washburn, 24 Me. 225.

Indorsement by one not a party has no effect independent of statute. — The indorsement of a name upon the back of a writ, by one not a party thereto, can have no effect independent of statutory provisions; of itself it manifests no intention of the indorser, which can be understood. Crossman v. Moody, 26 Me. 40.

And he may not be liable on his signature. — Sections 6 and 8 would be wholly unavailing, were it not for the provisions of this section, which defines what the liability of indorsers shall be. Since this section prescribes under what state of facts liability shall attach to the indorsers, it must refer to such indorsers only as §§ 6 and 8 require. It follows, that if a stranger to a suit voluntarily puts his name upon the back of the writ, when the statute does not require it and vests the court with no power to order it, he can be no more liable to pay the costs, which may be recovered against the plaintiff in case of avoidance or inability of the latter than he would be, if he placed his name upon the back of the execution recovered, or bond, which might be taken upon the arrest of the debtor therein. Crossman v. Moody, 26 Me. 40.

If an indorsement be made upon a writ, where no liability under the statutory provisions is incurred thereby, by order of the presiding judge, or as a condition prescribed by him, upon the performance of which a motion for the benefit of the indorser should be allowed by the judge; then no liability is incurred under such indorsement. Crossman v. Moody, 26 Me. 40.

Former remedy by scire facias. — Prior to the enactment of the provision of this section providing for an action on the case, it was held that the proper remedy was by scire facias. How v. Codman, 4 Me. 79.

Applied in Richards v. McKenney, 43 Me. 177; Chesley v. Perry, 78 Me. 164, 3 A. 180.

Sec. 8. Court may require new indorser or additional deposit.—If, pending such suit, petition or process, any such indorser or deposit becomes insufficient or such indorser removes from the state, the court may require a new and sufficient indorser or additional deposit, and by consent of the defendant the name of the original indorser may be struck out; and such new indorser shall be liable or such deposit holden for all costs from the beginning of the suit; and, if such new indorser is not provided or security furnished within the time fixed

by the court, the action shall be dismissed and the defendant shall recover his costs. (R. S. c. 99, § 8.)

Stated in Crossman v. Moody, 26 Me. 40.
Cited in Wilson v. Hobbs, 32 Me. 85.

Venue.

Sec. 9. Personal and transitory actions; transfer from one county to another.—Personal and transitory actions, except process of foreign attachment and except as provided in the 7 following sections, shall be brought, when the parties live in the state, in the county where any plaintiff or defendant lives; and when no plaintiff lives in the state, in the county where any defendant lives; and when not so brought, they shall on motion or inspection by the court be abated and the defendant allowed double costs. When the plaintiff and defendant live in different counties at the commencement of any such action, except process of foreign attachment, and during its pendency one party moves into the same county with the other, it may, on motion of either, be transferred to the county where both then live if the court thinks that justice will thereby be promoted; and be tried as if originally commenced and entered therein; provided, however, that suits by the assignee of a nonnegotiable chose in action, when brought in the superior court or in a municipal court, shall be commenced in the county in which the original creditor might have maintained his action; and when brought before a trial justice, the writ shall be made returnable before a magistrate who would have had jurisdiction had the chose in action not been assigned. (R. S. c. 99, § 9.)

Cross reference.—See c. 108, § 4, re jurisdiction of municipal courts.

This section applies only to actions which are both personal and transitory. Gordon v. Merry, 65 Me. 168.

And is not applicable to trespass for injury to realty.—The action of trespass, though a personal action, is, when brought for the recovery of damages for an injury to the realty, not transitory, but local. It does not belong to the class of cases which are required by this section to be brought in a county where either a plaintiff or defendant lives. Gordon v. Merry, 65 Me. 168.

Court retains jurisdiction over transitory actions in any county where brought.—Transitory actions are broadly distinguished from those which are local in their nature; and this section, prescribing the counties in which the former may be brought and tried, does not in the least change their legal character; but over such the court has jurisdiction in any county in which they are commenced. But it is otherwise in those, which are in their nature local. Webb v. Goddard, 46 Me. 505.

As for trover for personal property.—Trover for personal property after it was severed from the land, and the injury to the realty was not the gist of the action, was held to be both personal and transitory, and cognizable by any court that had jurisdiction of the parties. Gordon v. Merry, 65 Me. 168.

Party waives irregularities of venue in transitory action by failure seasonably to except.—Where the courts have jurisdiction of the cause and subject, as in transitory actions, where the jurisdiction is not limited by statute; and where they hold also jurisdiction of the persons, either by being rightly served with process returned in the right county, as designated by statute, or where they have taken jurisdiction of the persons by their submission to the jurisdiction, no exception can be taken to the rendering of a valid judgment; and a defendant waives all exceptions to irregularity, including the fact that the process is made returnable in the wrong county, by a general appearance and plea or answer to the merits. An omission to make a motion to dismiss the action at an early stage, in such case, is regarded as a waiver of the objection. Webb v. Goddard, 46 Me. 505.

And by filing setoff.—Though an action is not brought in the right county, under this section, when a defendant appears and files an account in setoff, in an action pending in an inferior court which has jurisdiction of the subject matter, that court acquires jurisdiction of the person and the cause. Thornton v. Leavitt, 63 Me. 384.

Applied in Greenwood v. Fales, 6 Me. 405.

Cited in Boynton v. Fly, 12 Me. 17; Badger v. Towle, 48 Me. 20; Mansur v. Coffin, 54 Me. 314.

Sec. 10. Sheriff's bond.—Actions on bonds given by sheriffs to the treasurer of state shall be brought in the county for which such sheriff is commissioned. (R. S. c. 99, § 10.)

Sec. 11. Actions of debt on judgment. — Actions of debt founded on judgment rendered by any court of record in the state may be brought in the county where it was rendered or in the county in which either party thereto or his executor or administrator resides at the time of bringing the action. (R. S. c. 99, § 11.)

Cited in Edwards v. Moody, 60 Me. 255.

Sec. 12. Jurisdiction obtained by attachment. — In all actions commenced in any court proper to try them, jurisdiction shall be sustained if goods, estate, effects or credits of any defendant are found within the state and attached on the original writ; and service shall be made as provided in section 21. (R. S. c. 99, § 12.)

Proceeding by attachment is substantially in rem.—In a proceeding against the property of a defendant, within the jurisdiction of the court, where the defendant is not personally bound by the judgment beyond the property in question; it is substantially a proceeding in rem. Eastman v. Wadleigh, 65 Me. 251.

And attachment, to give jurisdiction, may be made upon trustee process, as well as in other cases where the defendant's property is attached. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Notwithstanding trustee is foreign corporation.—The court has jurisdiction over the property of a nonresident defendant, in the possession of his trustee transacting business in this state through duly authorized agents, notwithstanding such trustee is a foreign corporation. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Jurisdiction acquired over nonresidents by attachment or submission. — Jurisdiction, where persons reside out of the state, is obtained by attachment of their property within the state and only to the extent of such attachment. But the defendants may, by appearing and demurring, submit to the jurisdiction of the court. Mahan v. Sutherland, 73 Me. 158.

Property of nonresident and attachment are prerequisites to jurisdiction. — The jurisdiction of the court is to be sustained if goods, estate, effects or credits of a defendant, though a nonresident, are found within the state, and being found are attached. Property of the defendant and its attachment are prerequisites to jurisdiction where the defendant is a nonresident. Where there is no attachment, no valid judgment can be rendered. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

And return showing property attached is sufficient.—Although the return is not definite as to quantity and location of the goods, if it shows that goods of the defendant were attached on the writ in this state, it is sufficient for jurisdictional purposes. Perry v. Griefen, 99 Me. 420, 59 A. 601.

The court may have jurisdiction over the property of a nonresident defendant, though not over his person. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

But if no jurisdiction attached at time of entry, case dismissed upon motion.—Where the court had, at the time of the entry of the action, no jurisdiction either of the person or by the attachment of the property of the defendant, the case will, on motion seasonably filed, be dismissed, although personal service was made before a hearing upon the motion. Cassity v. Cota, 54 Me. 380.

Jurisdiction by attachment is coextensive with attachment.—The state authorizes the seizure of the real or personal estate of nonresidents found within its boundaries and its appropriation to the payment of their debts. The jurisdiction is only by attachment. It is coextensive with and limited by the attachment, and ends with the disposition according to law of the estate so attached. Where there is no attachment, no valid judgment can be rendered. Eastman v. Wadleigh, 65 Me. 251.

Under this section jurisdiction is acquired by attachment. It is not acquired over the person of the defendant, for he is a nonresident; nor over other property; but only over the property attached. Eastman v. Wadleigh, 65 Me. 251.

Where there has been an attachment of the property of a nonresident of the state, though no personal service upon the defendant, a judgment will bind the property but not the person. Badger v. Towle, 48 Me. 20.

And court cannot proceed unless property is attached.—The court, in an action

founded on an attachment of property and service under § 21, cannot proceed unless the officer finds some property of the defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction. Eastman v. Wadleigh, 65 Me. 251.

Judgment pursuant to record finding of proper notice cannot be collaterally attacked.—Where a record contains a finding that notice was given to the defendants, the judgment rendered in pursuance thereof cannot be treated as a nullity or collaterally attacked; it must be regarded as to all intents and purposes valid until reversed. Blaisdell v. Pray, 68 Me. 269

But judgment against nonresident by attachment not valid in other states.—A judgment obtained by attachment of defendant's property and service as prescribed in § 21, while effective to bind the property of a nonresident, and to justify its appropriation to the payment of his debts, has no force and validity as against person or property outside the territory of the state in which it is rendered. So a judgment similar in its character and with like incidents rendered in another state would have no force nor validity here. Eastman v. Wadleigh, 65 Me. 251.

And no suit can be maintained on a judgment founded on attachment of property and service under § 21 in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor can the costs in that proceeding be collected of the defendant, out of any other property than that attached in the suit. Eastman v. Wadleigh, 65 Me. 251.

Applied in Steward v. Walker, 58 Me. 299.

Cited in Mansur v. Coffin, 54 Me. 314; Plurede v. Levasseur, 89 Me. 172, 36 A. 110.

Sec. 13. Local and transitory actions in which counties, towns and other corporations are parties.—Local and transitory actions shall be commenced and tried as follows: when both parties are counties, in any county adjoining either; when a county is plaintiff, if the defendant lives therein, in an adjoining county; if he does not live therein, in the county in which he does live; when a county is defendant, if the plaintiff lives therein, in that county or in an adjoining county; if he does not live therein, in that county or in that in which he does live; when a corporation is one party and a county the other, in any adjoining county; when both parties are towns, parishes or school districts, in the county in which either is situated; when one party is a town, parish or school district and the other some corporation or natural person, in the county in which either of the parties is situated or lives; but all actions against towns for damages by reason of defects in highways shall be brought and tried in the county in which the town is situated. All other corporations may sue and be sued in the county in which they have an established place of business or in which the plaintiff or defendant, if a natural person, lives. (R. S. c. 99, 13.)

Local action brought in wrong county subject to exception by demurrer, or under general issue, etc.—When an action local in its nature, as where an injured plaintiff sues a town for damages by reason of a defect in its highways, is commenced in a wrong county, the defendant is not obliged to plead the fact in abatement. If the objection appears on the record, he may avail himself of the objection on demurrer; or, if it does not appear in the record, the defendant may avail himself of it on trial under the general issue. The plaintiff, after the general issue has been pleaded, may be nonsuited. So, too, judgment may be arrested. Haskell v. Woolwich, 58 Me. 535.

Section not modified by special act providing how actions brought against corporation.—A special act, incorporating an insurance company and providing that actions may be brought against the company in a particular county, was held neither to repeal in express terms nor by necessary implication, so much of this section as authorizes the plaintiff to maintain his action in the county where he resides. Martin v. Penobscot Mut. Fire Ins. Co., 53 Me. 419.

Applied in Androscoggin & Kennebec R. R. v. Stevens, 28 Me. 434.

Cited in Badger v. Towle, 48 Me. 20.

Sec. 14. Actions for forfeitures.—When a forfeiture is recoverable in a civil action, such action shall be brought in the county in which the offense was committed unless a different provision is made by statute; and if on trial it does

not appear that such offense was committed in the county where the action was brought, the verdict shall be in favor of the defendant. (R. S. c. 99, § 14.)

Sec. 15. Certain actions in behalf of state.—An action in behalf of the state to enforce the collection of state taxes upon any corporation or to recover of any person or corporation moneys due the state, public funds or property belonging to the state, or the value thereof, may be brought in any county; provided that on motion of the defendant, any justice of the superior court holding the term at which such action is returnable may, for sufficient reasons shown, remove the same to the docket of said court in any other county for trial and may, upon such removal, award costs to the defendant for 1 term, to be paid by the treasurer of state on presentation of the certificate of the amount thereof from the clerk of courts of the county from which said action is transferred. (R. S. c. 99, § 15.)

See c. 16, § 153, re proceedings in case of failure to make returns and pay tax; c. 36, § 61, re trespass upon public lands.

Sec. 16. Justice actions, service.—An action against 2 or more defendants residing in different counties, to be tried before a trial justice or municipal court, may be brought in the county where either resides; and the writ and execution shall be directed to and executed by the proper officers in each of such counties; but if there is only 1 defendant, such action shall be commenced in the county where he resides. (R. S. c. 99, § 16.)

Cross reference.—See c. 108, § 4, re jurisdiction of municipal courts.

One summoned as trustee in a process of foreign attachment is a defendant within the meaning of this section. Boynton v. Fly, 12 Me. 17.

Service on Residents.

Sec. 17. Service by separate summons.—When goods or estate are attached, a separate summons, in form by law prescribed, shall be delivered to the defendant or left at his dwelling house or last and usual place of abode, at least 14 days before the sitting of the court to which it is returnable, which shall be sufficient service. (R. S. c. 99, § 17.)

Cross reference.—See c. 114, § 3, re service of writs in trustee process.

Service of summons requisite to legal service.—Though an attachment may have been made upon a writ, yet if a summons is not served, the defendant is not bound to appear at court, even though he should have procured from the officer an attested copy of the writ. Such an attachment with such a copy so obtained would not constitute a legal service. Hodge v. Swasey, 30 Me. 162.

Service made less than 14 days before return term is not legal service.—This section requires the service to be made fourteen days before the return term. Anything less than that is not a legal service, in other words, is not a service. And a defendant may rely in such case on a want of notice as an excuse for his nonappearance in the action. He may expect that an improper judgment will not be accorded against him. Dow v. March, 80 Me. 408, 15 A. 26.

And judgment may be refused.—It is correct to refuse judgment, when from an inspection of the officer's return it appears that the service, by summons, was only thirteen days before the court. Dow v. March, 80 Me. 408, 15 A. 26.

But appearance cures defective service unless seasonable plea thereto is made.—An appearance, though special, cures a defective service, unless seasonable plea or motion is made after appearance to take advantage of the defect. A defendant in such case waives an insufficient service, if he appears to object to it, but fails to make his objection as required by the rules of court, and his appearance stands for all purposes. The presumption is that he assents to the service and appears generally, having taken no steps to indicate to the contrary. Dow v. March, 80 Me. 408, 15 A. 26.

Summons inconsistent with writ insufficient.—Where a defendant was described in the writ as of a named county, and the

officer declared in his return that he left a summons for him at his last and usual place of abode in another named county, the service was held insufficient. Sanborne v. Stickney, 69 Me. 343.

A writ of capias or attachment upon which an attachment has been made is properly served by summons. Stowell v. Hooper, 121 Me. 152, 116 A. 256.

Separate summons required pursuant to writ ordering attachment and summons.—In serving a writ, which directs the officer to attach the property of the defendant, and to summon him, there should be a separate summons, even though no actual attachment be made. In such a case, the service ought not to be made by a copy or by reading the original. Blanchard v. Day, 31 Me. 494.

And writ directing attachment may be served by separate summons after attachment.—A writ against the master of a vessel to recover a penalty for the unlawful use of a seine, directing an attachment of the vessel and seine, may, after the attachment of such vessel and seine, be served upon the defendant by a separate summons. Turner v. Friend, 59 Me. 290.

A "summons" is properly ordered to issue to a resident, and a "notice" ordered to be given to a nonresident. Abbott v. Abbott, 101 Me. 343, 64 A. 615.

"Abode" is defined as place of abiding, dwelling, residence, home. The essential idea is a place of dwelling, as distinguished from a place of business. Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

The office or place of business of a defendant is not equivalent to his "last and usual place of abode," in the language of this section. Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

And leaving summons at office insufficient.—A return which recites that defendant was summoned by leaving a summons "at the last and usual place of abode in Camden, County of Knox and State of Maine (his office) of John Doe his agent in this state...." is sufficient on its face, under this section, by reason of including the words "his office." Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Process left at defendant's abode supposedly effects actual notice.—The law proceeds upon the supposition that, until a new domicile is established, a man will have at the domicile he has left some person enjoying his confidence, careful of his interests and charged with his concerns, who will give him actual notice of any civil process that may be left for him at such place. Sanborn v. Stickney, 69 Me. 343; Thomas v. Thomas, 96 Me. 223, 52 A. 642; Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

Constructive service made only on residents.—The obvious construction of this section and § 21 is that constructive service can only be made upon parties defendant resident within the limits of the state and, therefore, within the jurisdiction of the court. Thomas v. Thomas, 96 Me. 223, 52 A. 642.

Not on mere commorant.—One who is merely commorant in this state, cannot be regarded as a resident of the state so that substituted service can be made as provided by this section. Thomas v. Thomas, 96 Me. 223, 52 A. 642.

Such service gives jurisdiction over the person and meets due process requirement.—The service of a writ on a resident defendant in the mode prescribed by this section by leaving a summons at his last and usual place of abode gives the court jurisdiction to enter a personal judgment against him. And such procedure is in no sense a denial of due process of law. Jordan v. McKay, 132 Me. 55, 165 A. 902.

Though in case of substituted service the statute must be strictly complied with. Camden Auto Co. v. Mansfield, 120 Me. 187, 113 A. 175.

An officer's return upon a writ, that he "gave the defendant the summons for his appearance at court," is sufficient evidence that he delivered to the defendant a separate summons, in form by law prescribed. Blanchard v. Day, 31 Me. 494.

Judgment upon insufficient service valid till reversed.—A judgment founded on a writ not served in conformity with the requirements of this section is nevertheless to be deemed valid and binding upon all the parties and privies to it until it is reversed. Cole v. Butler, 43 Me. 401.

But action on judgment by default without sufficient service not sustainable.—If an action is entered and defaulted without appearance upon the part of the defendant and without sufficient service as required by this section, an action upon the judgment cannot be sustained. Sanborn v. Stickney, 69 Me. 343.

Property liable to levy on execution may be attached.—A fair construction of the language of this section does not require that the property attached should belong to the defendant. It is sufficient if the property is such as the law makes liable to be levied upon to satisfy any judgment that may be recovered. Turner v. Friend, 59 Me. 290.

And attachment of chip satisfies section.—The attachment of a chip as certified to in the officer's return is a legal fiction, but such nominal attachment is a sufficient compliance with the provisions of this section. Jordan v. McKay, 132 Me. 55, 165 A. 902.

Cited in Hinckley v. Bluehill Granite Co., 16 Me. 370; Tweed v. Libbey, 37 Me. 49.

Sec. 18. Original summons served by reading or copy, except writs of replevin.—Where the process is by original summons, wherein the law does not require a separate summons to be left with the defendant, service by reading the writ or original summons to the defendant, or by giving him in hand or leaving at his dwelling house or last and usual place of abode a certified copy thereof at least 14 days before it is returnable, is sufficient, except a writ of replevin which shall be served by giving the defendant in hand or leaving at his dwelling house or last and usual place of abode a certified copy thereof at least 14 days before it is returnable. (R. S. c. 99, § 18.)

Section not changed by § 19 as to mode of service.—The provision in this section is general, and the mode of service, pointed out in section 19, relates to those on whom the service may be made, and was evidently not designed to change the mode provided in this section. Harris v. Somerset & Kennebec R. R., 47 Me. 298.

Meaning of "to be left with the defendant."—The words "to be left with the defendant" mean the same thing as the words of § 17, to wit, "delivered to the defendant or left at his dwelling house or last and usual place of abode." Harris v. Somerset & Kennebec R. R., 47 Me. 298.

Sec. 19. Service on municipal and other corporations; service upon any foreign or alien corporation; time of service.—In suits against a county, the summons shall be served by leaving an attested copy thereof with one of the county commissioners or their clerk; against a town, parish, religious society or school district, with the clerk or one of the selectmen or assessors, if there is any such officer; if not, with a member of such corporation; and against any other corporation, however created, with its president, clerk, cashier, treasurer, general agent or director; if there is no such officer or agent found within the county where such corporation is established or where its records or papers are by law required to be kept, with any member thereof; and in all suits and proceedings at law or in equity against any foreign or alien company or corporation established by the laws of any other state or country, and having a place of business within this state or doing business herein, service of the writ, bill, petition or other process is sufficient if made by leaving an attested copy thereof with the president, clerk, cashier, treasurer, agent, director or attorney of such company or corporation, or by leaving such copy at the office or place of business of such company or corporation within this state; and in each case, it shall be so served 14 days at least before the return day thereof. (R. S. c. 99, § 19.)

Cross references.—See c. 45, § 40, re service of process and notice on steam railroads; c. 102, § 12, re collection of debts of deorganized towns.

When writ served on corporate trustee returnable.—The general rule, that a writ against an individual which may be fully served fourteen days before one term of the court is not properly returnable at a subsequent term, does not apply where the date of the writ and the service on a corporation named as trustee therein, are less than thirty days prior to the return day of the earlier term. Such writ may properly be made returnable to and entered at the next term. Walker v. Tewksbury, 67 Me. 496.

Plea in abatement to service of writ must be certain to all intents.—A plea in abatement that the service of the writ is defective and insufficient under this section, should have the greatest accuracy and precision; it should be certain to every intent and must not be argumentative; it should be a direct and positive averment of what the service of the writ in fact was, and that no other service was in fact made. An averment that "it appears" that the only service was, etc., is not sufficient. Perry v. New Brunswick Ry., 71 Me. 359.

Applied in Hinckley v. Bluehill Granite Co., 16 Me. 370; Harris v. Somerset & Kennebec R. R., 47 Me. 298.

Quoted in Hammond Beef & Provision

Co. v. Best, 91 Me. 431, 40 A. 338; Estabrook v. Ford Motor Co., 136 Me. 367, 10 A. (2d) 715.

Cited in Ouellette v. City of New York Ins. Co., 133 Me. 149, 174 A. 462.

Sec. 20. Service on domestic corporation, when no officer found.—When no officer, general agent or member of a domestic corporation can be found in the county in which the same is located or in the county in which its last certificate of election of clerk was filed, the officer having any process for service on such corporation may file a copy thereof in the registry of deeds of the county in which such corporation was located or in which its last certificate of election of clerk was filed, and make return of his doings, which shall be sufficient service. (R. S. c. 99, § 20.)

See c. 89, § 216, re fees of registers of deeds; c. 89, § 230, re recording of miscellaneous records.

Service on Nonresidents.

Sec. 21. Service on nonresident defendants; notice.—If any defendant is not an inhabitant of the state, the writ may be served on him by leaving a summons or copy, as the case may be, with his tenant, agent or attorney in the state, at least 14 days before the sitting of the court; and if his goods or estate are attached and he has no such tenant, agent or attorney, after entry, the court in the county where the process is returnable, or before entry, the court in any county may order notice to the defendant or a justice thereof in vacation may make such order signed by him on the back of the process; and if it is complied with and proved, he shall answer to the suit. A trial justice or judge of a municipal court may in like cases order like notice on any process returnable or pending before him. (R. S. c. 99, § 21.)

History of section.—See Martin v. Bryant, 108 Me. 253, 80 A. 702.

Provisions of section not dispensed with by comity.—The provisions of this section are the positive law of this state, and courts have no power to dispense with them by the rules of comity. South Boston Iron Co. v. Boston Locomotive Works, 51 Me. 585.

Court acquires jurisdiction by attachment within state.—Under this section the court acquires jurisdiction over the property of a nonresident when it is found within the state and attached. Both must concur. Martin v. Bryant, 108 Me. 253, 80 A. 702.

But only to extent of attachment.—The jurisdiction over property is acquired by the attachment of the property, and only to the extent of the attachment. Martin v. Bryant, 108 Me. 253, 80 A. 702.

Service on agent of nonresident not authorized if no property attached.—This section does not authorize the service of a writ against a nonresident to be made upon his tenant, agent or attorney in the state, when no property is attached thereon, for by such service the court acquires no jurisdiction over the person of the defendant. Martin v. Bryant, 108 Me. 253, 80 A. 702.

The obvious construction of this section and § 17 is that constructive service cannot be made on nonresident parties defendant. Thomas v. Thomas, 96 Me. 223, 52 A. 642.

Personal jurisdiction of nonresident acquired by service or submission.—Jurisdiction of the person of a nonresident is acquired only by service of process upon him within the jurisdiction of the court, or by his submission to its jurisdiction. Martin v. Bryant, 108 Me. 253, 80 A. 702.

Though equity may enjoin nonresident upon attachment and service on attorney.—When a bill in equity is inserted in a writ of attachment, and the defendant's property situated within this state has been attached thereon, and service of the bill made upon the defendant's attorney, the court will have jurisdiction to enjoin the defendant from further prosecuting an action at law, notwithstanding the defendant may not have resided, or personally been within this state since the commencement of the bill. Marco v. Low, 55 Me. 549.

Judgment on notice under section not binding elsewhere.—The notice to be given by this section, though given as required, will not give jurisdiction so that the judgment shall be binding elsewhere. Eastman v. Wadleigh, 65 Me. 251.

Applied in Nelson v. Omaley, 6 Me. 218;

Stephenson v. Davis, 56 Me. 73; Blaisdell v. Pray, 68 Me. 269; Perry v. Griefen, 99 Me. 420, 59 A. 601.

Quoted in Steward v. Walker, 58 Me. 299.

Cited in Holmes v. Fox, 19 Me. 107; Tweed v. Libbey, 37 Me. 49; Badger v. Towle, 48 Me. 20; Cassity v. Cota, 54 Me. 380; Cousens v. Lovejoy, 81 Me. 467, 17 A. 495; Plurede v. Levasseur, 89 Me. 172, 36 A. 110; Abbott v. Abbott, 101 Me. 343, 64 A. 615.

Sec. 22. Service on foreign insurance and express companies.—In actions by inhabitants of this state against insurance companies established by any other state or country on policies of insurance, signed or countersigned by agents in this state, on property or lives or against accidents in this state, and in such actions against express companies so established, service is sufficient if made on the person who signed or countersigned such policies, or on any agent or attorney of either such company, or if left at the last and usual place of abode of such person, agent or attorney at least 30 days before the return day of the suit; but the court may, in any case, order further notice. (R. S. c. 99, § 22.)

Cross references.—See c. 22, §§ 70-73, re service of process on nonresident motor vehicle owners; c. 53, § 134, on foreign corporations acting as trustee under mortgages made by domestic corporations; c. 60, §§ 62, 63, on foreign insurance companies; c. 60, § 180, on foreign fraternal beneficiary associations; c. 60, § 209, on foreign surety, credit insurance or title insurance companies; c. 102, § 12, on towns whose charters have been repealed.

This section relates only to an action on the policy of insurance. Ouellette v. City of New York Ins. Co., 133 Me. 149, 174 A 462.

Want or Defect of Service Cured.

Sec. 23. New service by special order.—When the property of a defendant is attached on a writ and no service is made on him before entry, or if service in any case is defective for any cause without fault of the plaintiff or his attorney, the court may order a new service which, when made, is as effectual as if proper service had been made in the first instance; but no first order for service shall be made at any other than the return term; and no subsequent order, if any person interested objects thereto unless for good cause shown. (R. S. c. 99, § 23.)

Section applies to mistake of officer or plaintiff in leaving process.—This section refers to a case where a summons or copy has been left, and where, by reason of some mistake of the officer or the plaintiff as to the place where, the time when, or the person with whom the same has been left, the service is defective or insufficient, and in such case the court is given power, at its discretion, to order a new summons to be issued and served, and such service is as effectual as if made on the original writ. Briggs v. Davis, 34 Me. 158.

And where all parties have not been served.—The legislature designed to provide by this section for the entry in court of actions in which, at the time of entry, there had been no service upon all the parties upon whom the process must be legally served before judgment could be finally entered up. Steward v. Walker, 58 Me. 299.

But mistake as to sitting of court not available.—Where a suit is commenced before the running of the statute, and by mistake of the attorney as to the sitting of the court, the action is not entered, this mistake will not avail the party, under this section, to maintain a new suit after the statute has run. Packard v. Swallow, 29 Me. 458.

And order for service not granted if no property attached and no service attempted.—When no property is attached, and no service of any kind attempted, the action cannot properly be entered and an order of notice obtained. And if such an order is improvidently made and complied with, the action will nevertheless be dismissed on the defendant's motion, if the motion is seasonably made. Searles v. Hardy, 75 Me. 461.

New summons requires answer to the writ.—The new summons provided for by this section is a new summons to a defendant. It would not be a service of the writ, but merely a summons to come in and answer to the writ. Mansur v. Coffin, 54 Me. 314.

Section does not authorize exceptions to

overruling of objections.—This section does not provide that any person making objection may have exceptions to the overruling of his objection, nor is the right of exception a necessary incident of the right to object. Abbott v. Abbott, 106 Me. 113, 75 A. 323.

For a case relating to an action in which no service had been made, prior to the enactment of the provision pertaining to cases in which no service has been made before entry, see Briggs v. Davis, 34 Me. 158.

For a case relating to the time in which new service may be made, before the enactment of the last two clauses of this section, see Hobart v. Bennett, 77 Me. 401.

Applied in Abbott v. Abbott, 101 Me. 343, 64 A. 615; Augusta Trust Co. v. Glidden, 133 Me. 241, 175 A. 912.

Stated in Davis v. Cass, 127 Me. 167, 142 A. 377.

Attachment of Personal Property.

Sec. 24. Personal property subject to attachment.—All goods and chattels may be attached and held as security to satisfy the judgment for damages and costs which the plaintiff may recover, except such as, from their nature and situation, have been considered as exempt from attachment according to the principles of the common law as adopted and practiced in the state, and such as are hereinafter mentioned. Such personal property may be attached on writs issued by a trial justice or judge of a municipal court in any county, when directed to the proper officer. (R. S. c. 99, § 24.)

I. Nature of Attachment.

II. Custody of Attached Property.

III. Liability of Officer.

Cross References.

See § 67, re property exempt from attachment; note to c. 178, § 52, re attachment of logs pursuant to statutory lien under that chapter.

I. NATURE OF ATTACHMENT.

Attachments are to secure final judgments and costs.—Attachments on mesne process are for the security of the final judgments which may be recovered, and legal costs incident to their enforcement and collection. Searle v. Preston, 33 Me. 214.

The purpose of an attachment is to secure to the creditor the property which the debtor has at the time it is made so that it may be seized and levied upon in satisfaction of the debt after judgment and execution are obtained. McInnes v. McKay, 127 Me. 110, 141 A. 699.

An attachment is a part of the remedy provided for the collection of the debt. McInnes v. McKay, 127 Me. 110, 141 A. 699.

An attachment is regarded as a quasi proceeding in rem and is a provisional remedy, the purpose of which is to acquire a lien upon the property of the debtor, temporary in its nature, to await the final judgment of the court in the action. McInnes v. McKay, 127 Me. 110, 141 A. 699.

And under control of legislature till execution.—Until the lien is perfected by levying execution, the remedy by attachment is in the control of the legislature which might lawfully modify or abrogate it. McInnes v. McKay, 127 Me. 110, 141 A. 699.

It does not prevent sale by debtor before execution.—A lien by attachment is not an absolute right. It does not destroy title or the right to sell. Until a sale on execution, the debtor has full power to sell or dispose of the property attached without disturbing the possession, in case of personalty, or rights acquired by the attachment. McInnes v. McKay, 127 Me. 110, 141 A. 699.

And attachment is not deprivation without due process.—Although an attachment may, within the broad meaning of the term property, deprive one of property, yet conditional and temporary as it is, and part of the legal remedy and procedure by which the property of a debtor may be taken in satisfaction of the debt, if judgment be recovered, it is not the deprivation of property contemplated by the constitution. And if it is, yet it is not a deprivation without "due process of law," for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal. The requirements of "due process of law" and "law of the land" are satisfied. McInnes v. McKay, 127 Me. 110, 141 A. 699.

Taking and retaining possession or control essential to attachment.—An attachment of personal property is made by taking possession and control of the same to be held to be forthcoming on execution. Independent of any statute, to preserve and continue the attachment the officer must retain possession. He must either have the actual physical custody of it, or such control as to have the power of taking immediate possession. But to obviate the inconvenience of doing this in the case of bulky articles, § 27 provides for recordation. Bass v. Dumas, 114 Me. 50, 95 A. 286.

And to make an effective attachment of any personal property, an officer must make an actual seizure. He cannot attach a vessel absent and afloat upon the sea while he is upon the land. Bradstreet v. Ingalls, 84 Me. 276, 24 A. 858.

Though officer need not actually handle goods attached.—To constitute an attachment, it is not necessary that the officer should handle the goods attached, but he must be in view of them with the power of controlling them and of taking them into his possession. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

And the return of the officer on the writ is at least prima facie evidence of the attachment of the property therein enumerated. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

But attachment of part of large mass of material, without designating such part, not valid.—An attachment of a portion of a large mass of material, leaving the mass exactly as found and without in any way designating the attached from the unattached and setting the one apart from the other, is not valid. Bisbee v. Grant, 127 Me. 243, 142 A. 775.

Other factors bearing on attachment.—In determining what shall constitute an attachment, regard must be had to the nature of the property, its situation, the expenses of removal, and the kind of possession, if any, which the owner retains of it. Bicknell v. Trickey, 34 Me. 273.

Officer may contest claims to attached property.—By virtue of the law which empowers the officer to attach the goods and chattels of the defendant in the writ placed in his hand for service, he acquires a special property in the goods attached and the right to contest all claims thereto asserted by any third parties. Lashus v. Matthews, 75 Me. 446.

For so long as he remains liable therefor.—The sheriff's relation to the property by virtue of the attachment, and the reduction of it into his possession and control are such that he is vested with a special property in it which enables him to protect the rights he has acquired, and this special property continues so long as he remains liable for it, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner, upon the attachment being dissolved. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

It is the officer's duty to attach personal instead of real property, if so directed. Moulton v. Chadborne, 31 Me. 152.

He may attach indivisible property beyond required value.—An officer may attach an indivisible article of property, though far beyond the value he was directed by his precept to attach. Moulton v. Chadborne, 31 Me. 152.

And he is not bound by debtor's request to attach particular property, nor by offers of security.—A request by the debtor that the officer attach other property, instead of that which he has already attached, imposes no duty upon the officer; neither does the offer of a third person to deposit money, for the officer's security to induce him to discharge the property attached, impose any duty. Moulton v. Chadborne, 31 Me. 152.

Excessive attachment by error of judgment does not invalidate attachment.—Where an officer attached a lot of logs containing three million feet, and in his return estimated the logs at six hundred thousand feet, the error was one of judgment which did not invalidate the attachment. Parker v. Williams, 77 Me. 418, 1 A. 138.

But the lien cannot exceed sum specified in precept.—The lien created by the attachment upon the debtor's property cannot exceed the sum which the officer is commanded in his precept to attach; the officer's return cannot go beyond it, and would be void for the excess if it should profess to do so. Morse v. Sleeper, 58 Me. 329.

And property can be attached only to secure the demands sued; if other demands are afterward introduced, the attachment will not be good against subsequent attaching creditors. Fairbanks v. Stanley, 18 Me. 296.

Officer must redeliver to debtor if he prevails or if creditor is paid, etc.—Where goods are attached on mesne process, the duty of the officer to the defendant is to redeliver them to him, if the plaintiff does not prevail in his action, or if the attachment is dissolved by payment made to the

creditor, or otherwise. Bailey v. Hall, 16 Me. 408.

Sale of property to plaintiff dissolves attachment.—Where a plaintiff, having attached certain property, takes a bill of sale for such property, the attachment will then be dissolved. Stanley v. Drinkwater, 43 Me. 468.

From an attachment of a vessel on the stocks and of "the spars belonging to the same," it will not be considered that the spars were a part of the vessel. Snow v. Cunningham, 36 Me. 161.

II. CUSTODY OF ATTACHED PROPERTY.

Officer must hold property to satisfy judgment.—The sheriff is the mere minister of the law to preserve for the creditor satisfaction of the debt, and it is therefore indispensably necessary that he should sustain such a relation to personal property, which he has seized, as will enable him to hold it to answer the purpose for which it was attached. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

Though he may make custodial arrangements.—During the pendency of the suit, the officer may make such arrangements upon his own responsibility, in regard to the custody of the property as he may see fit. To these arrangements the attaching creditor is not a party, unless he should choose to make himself so by direct participation or express consent. The removal of the attached property beyond the officer's reach would have no effect on the rights and liabilities of the parties in relation to each other. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

Right of plaintiff and duty of officer that property be forthcoming.—Upon the attachment of personal property on mesne process, the attaching officer shall keep the attached property safely, so that it may be forthcoming in order to be taken upon such execution as shall be issued after the final termination of the suit in a judgment in favor of the plaintiff. The extent of the plaintiff's right and of the officer's duty, as to such property, is that it shall be forthcoming. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

Receipt to officer for attached property is only for his security.—A receipt given to an officer, upon the attachment of personal property, is an instrument designed for the security of the officer, and for that alone. Hence if the attachment is dissolved, and the property has gone back to the debtor, the officer can recover only nominal damages upon the receipt. Fowles v. Pindar, 19 Me. 420.

And officer is not bound to take receipt for property attached, but may retain it in his own possession. Moulton v. Chadborne, 31 Me. 152.

But if he does, without creditor's consent, he is liable for property.—The officer is not bound to take any receipt for property. If he should do it, without consent of the creditor, he would be liable to him, at all events, for the property. And though it is frequently best for all concerned that it should be done, yet there is no obligation on the officer to do it. Moulton v. Chadborne, 31 Me. 152.

To hold receiptor, demand requisite within 30 days of judgment.—In order to hold the receiptors for attached property liable for the value of the property, to respond the judgment of the attaching creditor, a demand therefor is to be made within thirty days from the rendition of judgment by an officer having the execution, which issued thereon. Fowles v. Pindar, 19 Me. 420.

Receiptor is officer's servant, and property again attachable.—When the officer takes a receipt for the property, the receiptor is regarded as his servant; and the goods remaining in the possession of the receiptor may be again attached by the same officer on a subsequent process. Norris v. Bridgham, 14 Me. 429; but see Stanley v. Drinkwater, 43 Me. 468.

And attachment remains in force till 30 days after judgment.—If goods are attached and receipted for to the officer, and the execution is delivered to him and he demands the goods of the receiptor within thirty days of the time when the judgment was rendered, the attachment is not dissolved, nor the goods released therefrom; and the receiptor may, after the expiration of the thirty days, take the goods and deliver them to the officer to be sold on the execution. Merrill v. Curtis, 18 Me. 272.

But officer loses possession if debtor retains custody.—Where the goods are permitted to remain in the possession of the debtor, the officer by himself or his servant is not regarded as in possession, so that he can again attach the same goods without seizing them anew. Norris v. Bridgham, 14 Me. 429.

There is no constructive possession in the officer after he has left attached property in the possession of the debtor. Pillsbury v. Small, 19 Me. 435.

And attachment is dissolved except where statute to contrary.—An officer can-

not, consistently with the preservation of the lien, constitute the debtor his agent to keep the chattels attached. Except so far as authorized by statutory provision, he cannot leave such property with the debtor, without dissolving the attachment. Gower v. Stevens, 19 Me. 92.

Though debtor and surety may be liable on receipt unless bankruptcy intervenes.—Where goods were attached, and the debtor, with a surety, gave a receipt therefor to the officer, and such proceedings were had that both had become liable upon the receipt; and then the principal debtor went into bankruptcy and obtained his certificate of discharge as a bankrupt; it was held that under the laws of the United States, such certificate will discharge the bankrupt only, and not the other receiptor. Farnham v. Gilman, 24 Me. 250.

Attachment once dissolved is not revived upon officer regaining possession.—Where the lien acquired by an attachment is dissolved by a delivery of the property attached to the debtor, such lien does not revive upon his regaining possession of it by delivery from such debtor—though it is delivered to him with the intent that it may be appropriated towards the payment of the debt on which it had been attached. Gower v. Stevens, 19 Me. 92.

And delivery of property by officer for receipt promising to redeliver or pay value dissolves lien.—It has been held that where an officer has attached goods on mesne process, and has delivered them up, on the written promise of two persons to redeliver them on demand, or pay their value, the receiptors have the election, whether they will pay the value or deliver the property, and the officer must be considered as having abandoned the possession, and permitted the goods to go to whomsoever they may belong. Waterhouse v. Bird, 37 Me. 326.

III. LIABILITY OF OFFICER.

Officer is held to ordinary skill and diligence in finding attachable property.—An officer is not bound at all events to find attachable property, if the defendant has such. Nulla bona may be returned, if goods are not found by the exercise of ordinary skill and diligence by the officer. Strout v. Pennell, 74 Me. 260.

And burden is on plaintiff to show neglect of officer and damages.—The burden of proof is upon the plaintiff, in an action against an officer for neglecting to attach an article of personal property upon a writ, to show that he has suffered damage by such neglect. The court cannot infer it without proof. Wolfe v. Dorr, 24 Me. 104.

Sheriff is liable for neglects of deputies.—The duties and liabilities of deputies are in all respects similar to those of a sheriff; and the latter is answerable for neglects of the former, if the neglects were of duties devolving upon them when they held deputations under him. Lambard v. Fowler, 25 Me. 308.

Which may be charged directly against either officer.—If a deputy sheriff has been guilty of negligence or misconduct by which a debtor or creditor has been injured, an action for such injury may be brought directly against the deputy or the sheriff; and in the latter case the wrong may be charged generally as committed by the sheriff, and on trial be proved to have been done by the deputy, for whose acts he is answerable. Lambard v. Fowler, 25 Me. 308.

An officer by attaching chattels and taking them into his custody becomes personally chargeable with their value. Phillips v. Fields, 83 Me. 348, 22 A. 243.

An officer must at his peril see to it that he does not attach the wrong property. Though even here an unusual risk may be avoided. Stout v. Pennell, 74 Me. 260.

And when an officer has made a valid attachment upon a writ he must maintain it at his peril. Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

He is not discharged by sending receipt for goods to plaintiff's attorney.—If the attaching officer delivers the attached property to a third person, taking his receipt to redeliver the same, and afterwards, before the expiration of thirty days after judgment, sends the receipt to the attorney of the creditor, without any request or agreement that it should be received as a substitute for the claim of the creditor upon the officer for a delivery of the property, and the attorney takes measures to obtain it from the receiptor; this does not discharge the officer from his liability. Humphreys v. Cobb, 22 Me. 380.

Unless such attorney authorizes or approves the receipt.—If an attorney, to whom a demand is entrusted for the purpose of receiving or securing the amount due, authorizes an officer, who may receive a writ thereon, to take the receipt of a certain individual for the goods which he directed to be attached, or approves the same after it is so taken, the officer is discharged from his liability for not retaining the possession. Farnham v. Gilman, 24 Me. 250.

His return of attachment imposes duty to keep goods for 30 days after judgment for creditor.—The return of goods as at-

tached upon mesne process by a sheriff imposes upon him the duty to keep them till the expiration of thirty days after final judgment in the action in favor of the creditor, notwithstanding he may cease to be the sheriff after the attachment. Lambard v. Fowler, 25 Me. 308.

And placing execution in officer's hands is notice to apply goods to execution.—If the creditor causes his execution to be placed in the hands of the officer who has made the attachment, he being still in office, within thirty days after judgment, that will be sufficient notice to him that the creditor claims to have the goods, which were attached, applied to satisfy the execution; and that he is not at liberty to restore them to the debtor. Humphreys v. Cobb, 22 Me. 380.

Whereupon no other demand necessary.—If the deputy, who has returned goods attached upon mesne process, receives the execution issued upon the judgment in the same action in favor of the creditor, in season to save the attachment, though he may be a deputy at the time under another sheriff, no other demand of the property is necessary; for he, being presumed to have in possession the property attached, is obliged by his duty as an officer to make the seizure. Lambard v. Fowler, 25 Me. 308.

But demand must be made on officer who attached goods if execution given to other officer.—When the execution is not placed in the hands of the officer who made the attachment, but in the hands of another deputy, or in those of a constable or coroner, a demand should be made upon the officer who attached the goods, within thirty days after judgment in order to hold him responsible; or he, being without notice that the creditor has not obtained payment in some other mode, may be obliged to restore the goods to the debtor. Humphreys v. Cobb, 22 Me. 380.

Unless superseding facts shown, demand is indispensible.—A demand upon an officer, for personal property attached on a writ within thirty days from the rendition of judgment, is indispensable to fix his liability, unless other facts are shown that supersede the necessity of a demand. Wetherell v. Hughes, 45 Me. 61.

And seasonable demand renders officer liable.—A demand by the creditor, within thirty days after his judgment, of the goods attached by the sheriff, that they may be taken in execution and disposed of by sale, and a failure to deliver them renders him liable. Lambard v. Fowler, 25 Me. 308.

He must exercise ordinary care for preservation of property attached.—The officer, by his attachments as returned on the several precepts committed to him, assumes important liabilities to the owners as well as to the several attaching creditors. The property thereby comes under his control, and he is liable to all parties interested for the use of at least ordinary care for its protection and preservation. Bicknell v. Trickey, 34 Me. 273.

And such care will discharge him of responsibility for loss.—The sheriff must safely keep property seized upon execution. Ordinary care, however, it is generally held, will discharge an officer from responsibility in case of the loss of goods attached upon mesne process. But whatever the liability of an attaching officer may be to the creditor for the loss of property attached on writ or seized upon execution, his liability to the debtor or owner is only that of ordinary care: such care and diligence as a prudent business man would bestow upon his own property. Strout v. Pennell, 74 Me. 260.

His return is evidence of possession on which to found liability.—In an action against an officer for not maintaining possession of personal property, which he has returned as attached upon a writ, his return is evidence of possession that will render him liable, if the case discloses nothing to show that such return was made under misapprehension, and the creditor in the suit omits no duty required on his part to fix the liability of the officer. Wetherell v. Hughes, 45 Me. 61.

Officer liable for value of property shown in return and in receipt.—In an action against the officer for not keeping property attached, the value of the property attached, as stated in the officer's return, and in a receipt taken for it, in the absence of all contradictory proof, may be taken as the true value of the property for which the officer is liable. Willard v. Whitney, 49 Me. 235.

Or, after sale, for deterioration in value.—If the attachment is preserved, and made effectual by a seasonable sale on the execution, and if the goods have, by the misconduct of the officer, deteriorated in value, and have for that reason sold for a less sum to the prejudice of the debtor, then he may have an action for the injury. Bailey v. Hall, 16 Me. 408.

And he cannot impeach judgment against debtor to lessen his liability.—In an action against an officer for not keeping property attached on the writ, the officer cannot impeach the judgment against the

debtor for fraud to lessen his own liability, or for the benefit of the debtor. Willard v. Whitney, 49 Me. 235.

Whether officer is trespasser not dependent upon result of suit on attachment.—The question whether or not an officer serving in good faith and in a proper manner a writ from a court of competent jurisdiction is a trespasser in making an attachment, does not depend upon the result of the suit in which the attachment is made. The officer represents not the attaching creditor alone, but the law, which authorizes him to act. Lashus v. Matthews, 75 Me. 446.

He is liable only on facts existing when action commenced and tried.—The validity of the claim sued is not in issue in a suit against the officer for making the attachment. The plaintiff must recover for an improper attachment, if at all, upon the facts alleged and proved to have existed at the time when the action was commenced and tried. Lashus v. Matthews, 75 Me. 446.

The conduct and motives of the officer, at the day and hour of making the attachment, are to be looked at to determine whether he acted unlawfully in attaching property. Moulton v. Chadborne, 31 Me. 152.

And remedy of debtor postponed until attachment dissolved.—While the officer lawfully holds the goods for the creditor, to whom he is responsible for their safe keeping, the remedy of the debtor in relation to them is postponed, until the attachment is dissolved. Bailey v. Hall, 16 Me. 408.

For creditor's claim is paramount during life of attachment.—While the lien created by the attachment continues, the officer is not liable to the suit of the debtor, although he does not keep the property safely. He is liable to the creditor, whose claim is paramount to that of the debtor, until the attachment is dissolved. Bailey v. Hall, 16 Me. 408.

But debtor may claim full indemnity when entitled to return of goods.—A right of action does not accrue in favor of the debtor against the officer until he is entitled to a return of the goods. He has then a claim to a full indemnity free from any lien in favor of the creditor. Bailey v. Hall, 16 Me. 408.

Generally an officer is not liable for attaching too much or too little property, if he exercises a sound discretion and acts in good faith. Strout v. Pennell, 74 Me. 260; Jensen v. Cannell, 106 Me. 445, 76 A. 914; Saliem v. Glovsky, 132 Me. 402, 172 A. 4.

If an officer is ordered in the writ to attach to a specified amount, and he attaches personal property by him valued at a greater sum, it does not necessarily follow that he acted oppressively or illegally. Merrill v. Curtis, 18 Me. 272.

And his return is not conclusive against him as to value.—An officer's return in some cases, is not conclusive against him, where he states a thing which must necessarily be a matter of opinion or judgment merely. This applies to a statement of time, or to a statement of value. Strout v. Pennell, 74 Me. 260.

Though excessive attachment is improper use of process.—Where an officer is commanded to attach property to the value of $70.00, and property in value from $1000.00 to $1200.00 is attached; such attachment is grossly excessive, and is an improper use of process. Saliem v. Glovsky, 132 Me. 402, 172 A. 4.

Sec. 25. Kept on premises where found; owner's bond. — Personal property attached may be kept upon the premises where the same is found and the attaching officer may appoint a keeper thereof; but if the owner of said property or the occupant of said premises requests the officer in writing to remove said keeper, the officer shall remove the property attached or the keeper without unreasonable delay. If the defendant in writing requests the officer making the attachment to allow said property attached to remain upon the premises where found until he may give a bond dissolving said attachment, the officer shall not remove said property until the defendant has had a reasonable opportunity to give said bond. (R. S. c. 99, § 25.)

Sec. 26. Attachment of hay and animals.—When hay in a barn, horses or neat cattle are attached and are suffered to remain by permission of the officer in the defendant's possession on security given for their safekeeping and delivery to the officer, they are not subject to a 2nd attachment to the prejudice of the first. (R. S. c. 99, § 26.)

Object of section to avoid expense of keeping or removing property.—The object of the legislature in enacting this section was to prevent the expense of keep-

ing the animals therein mentioned, and removal of the hay, between the time of the attachment and the sale of them on execution, by the officer or the person to whom they had been delivered by him. Woodman v. Trafton, 7 Me. 178.

And it contemplates use of property by debtor. — This section which authorized the officer to permit property to go back into the hands of the debtor, upon taking a receipt, without dissolving the attachment, contemplates, or at least does not prohibit, a reasonable use of the property by the debtor. Tyler v. Winslow, 46 Me. 348.

Who is liable therefor in absence of ordinary care.—If either cattle or horses, attached and allowed to remain in the debtor's possession, are lost or diminished in value through the negligence or fault of the debtor, he will be liable therefor upon his contract. He is bound to use ordinary care. Tyler v. Winslow, 46 Me. 348.

But he is not liable for loss without fault.—It has been held in this state that a receiptor for a horse attached is not liable for its value, where it dies in his hands, without his fault, before a demand. Tyler v. Winslow, 46 Me. 348.

This section was designed to preserve and continue the lien on the property attached, in the same manner as though it had remained in the exclusive possession of the officer. Woodman v. Trafton, 7 Me. 178.

Which was formerly lost by leaving property in possession of debtor.—Before this section was enacted, if any personal property was attached on mesne process and permitted to remain in the possession of the debtor, or was returned to his possession, the lien created by the attachment was thereby lost and at an end. Woodman v. Trafton, 7 Me. 178.

To preserve attachment, need not prove receiptor acted at request of debtor.—To preserve an attachment, under this section, of the property herein mentioned, if left in the possession of the debtor, it is not necessary to prove affirmatively that the receiptor acted at the request of the debtor. Merrill v. Curtis, 18 Me. 272.

And sale by debtor confers no rights over attaching creditor.—The lien created by attachment of the articles enumerated in this section is not dissolved by taking the security there mentioned; and therefore a subsequent sale of such articles by the debtor, even without notice, gives the vendee no rights against the attaching creditor. Woodman v. Trafton, 7 Me. 178.

Sec. 27. Attachment of bulky personal property recorded in town clerk's office.—When any personal property is attached which by reason of its bulk or other special cause cannot be immediately removed, the officer may within 5 days thereafter file in the office of the clerk of the town in which the attachment is made, an attested copy of so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ and the court to which it is returnable, and such attachment is as effectual and valid as if the property had remained in his possession and custody. The clerk shall receive the copy, noting thereon the time, enter it in a suitable book and keep it on file for the inspection of those interested therein. When the attachment is made in an unincorporated place, such copy shall be filed and recorded in the registry of deeds for the registry district in which said unincorporated place is located. (R. S. c. 99, § 27.)

Section affects method of preserving attachment.—By this section no attempt is made to change the mode of making the attachment, but a new and easier method of preserving it is provided. Wentworth v. Sawyer, 76 Me. 434; Kelley v. Tarbox, 102 Me. 119, 66 A. 9.

And substitutes notice for possession.—In ordinary cases a change of possession follows an attachment. One object of this section would seem to be to provide a substitute for this change of possession and the notice therefrom resulting. Bicknell v. Trickey, 34 Me. 273.

Which keeps attachment as effectually as if possession retained by officer.—This section has so far modified the common law in relation to attachments of bulky property that when the officer has complied with its provisions, such attachment shall be as effectual and valid, as if the property had remained in his possession and custody. It is the statutory mode of preserving the lien which otherwise could only have been retained by actual custody and possession of the property by the officer. Wentworth v. Sawyer, 76 Me. 434.

Officer not prevented from regaining actual possession.—By filing with the town clerk the copy and certificate required by

this section, the officer does not deprive himself of the right to regain actual possession of the property attached, and to remove it whenever necessary for its preservation. Wentworth v. Sawyer, 76 Me. 434.

For he retains right to possession to protect property. — Under this section the right of the officer to possession continues, and he may interfere "to protect the property, when by a change of circumstances, its removal and reduction into his possession become proper or necessary. Wentworth v. Sawyer, 76 Me. 434.

But officer must still initially take actual possession.—The officer must take actual possession of personal property, and the statutory provision for his filing a copy of his return in the town clerk's office is for his relief as to keeping possession once taken, substituting public notice of the attachment in certain cases for visible retention of possession. His special property in the goods attached still continues, with the right to resume actual possession at any time. Perry v. Griefen, 99 Me. 420, 59 A. 601.

And no attachment is created if officer fails so to do.—Where an officer filed, as required by this section, an attested copy of his return on a writ that he had attached, so far as he had power so to do, a vessel then at sea, and sought to make the attachment effective as of the date of the return by actual seizure of the vessel afterwards on her arrival in port, it was held that no attachment had been created by the return. Bradstreet v. Ingalls, 84 Me. 276, 24 A. 858.

The validity of an attachment under this section does not depend upon the doings of the clerk who records it, but upon the doings of the officer. If the officer has in all particulars performed his duty, nothing which the town clerk can do or omit to do will invalidate the attachment. Lewiston Steam Mill Co. v. Foss, 81 Me. 593, 18 A. 288.

This section does not mean that the property must be so bulky or so heavy that it cannot be moved at all. Tolman v. Carleton, 110 Me. 57, 85 A. 390.

And specification that property immovable not necessary.—This section does not require the copy filed with the town clerk to contain a statement that the property attached could not be removed by reason of bulk. Brogan v. McEachern, 103 Me. 198, 68 A. 822.

Officer may use judgment as to what constitutes bulky property.—This section furnishes no standard as to what constitutes bulky property. The nature of the property, its situation and expense of removal are to be considered. The officer is left to use his judgment, though his judgment is not conclusive. Still, his decision fairly exercised is entitled to some weight. Tolman v. Carleton, 110 Me. 57, 85 A. 390.

Railroad track held bulky property.—An attachment of railroad track, without removal, would be valid and effectual, if a return to the town clerk's office is made instead of keeping possession and custody. Fifield v. Maine Central R. R., 62 Me. 77.

And building on leased land.—A building standing on leased land must be deemed personal property for the purpose of attachment under this section. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

As well as hay, cordwood, iron, etc.—Attachments have been upheld, under this section, where copies of returns were filed in case of hay in mow, of a wooden building, of bark, of a temporary track and sleepers, of charcoal and cordwood, of pig iron and of heavy machines. Tolman v. Carleton, 110 Me. 57, 85 A. 390.

But easily removable property not within section.—Property attached that is easily removable, such as a wagon, is not within the meaning of this section; and a lien acquired by the attachment will be lost by the neglect of the officer to retain possession of the property. Thompson v. Baker, 74 Me. 48.

The filing of a copy of the return is not a part of the process of attaching personal property, as it is in attaching real estate. Personal property can be attached and the attachment preserved without any such filing, and the attachment will be preserved though the copy filed is defective. Perry v. Griefen, 99 Me. 420, 59 A. 601.

It preserves lien and officer's right to possession.—To relieve the officer from the necessity of retaining actual possession he must follow this section. He must file an attested copy of his return, and that means that he must first make a return. Filing the attested copy does not continue the possession. It is a substitute for possession. By it the lien of the attachment is preserved. So is the officer's special property, and right to take possession. Bass v. Dumas, 114 Me. 50, 95 A. 286.

Officer must sign the return.—A return not signed by the officer is not a return, although it may be signed by someone else in his name and by his direction. The very office of a return requires a signature. And it is the signature which authenticates it and gives it its official character. When the signature of a public officer is required,

he must make it himself. He cannot delegate the doing of it. Bass v. Dumas, 114 Me. 50, 95 A. 286.

As well as the copy thereof.—The attestation of the copy required to be filed is an official act. It must be done by the officer, by his own signature. Bass v. Dumas, 114 Me. 50, 95 A. 286.

If copy of return not filed and possession not retained, attachment is lost.—Upon attachment of property under this section, if the requisite certificate is not filed with the town clerk, and no return is made by the officer that it has been done, the attachment is lost after the lapse of five days from the time it was made, where possession was not retained by the officer. The property is then free to be taken on any other writ or execution. Wetherell v. Hughes, 45 Me. 61; Bass v. Dumas, 114 Me. 50, 95 A. 286.

But officer not liable therefor if creditor neglects seasonably to demand property.—An officer who had attached on a writ property that could not be removed, and neglected to file in the town clerk's office a certificate as the statute requires, or to keep actual possession of it, is released from liability to the creditor in the suit, if the creditor neglects seasonably on execution to demand the property of the officer, although it had been sold pending his suit on an execution against the same debtor in favor of another creditor. Wetherell v. Hughes, 45 Me. 61.

The word "town," as used in this section, includes cities and plantations, and the same reasons exist for having attachments made in plantations there recorded, when the plantation is organized and has a clerk's office in which they can be recorded, as exist for having them recorded in the towns in which they are made. Parker v. Williams, 77 Me. 418, 1 A. 138.

And officer may assume apparent legality of town.—The provisions of this section for recordation neither require nor allow the officer to enter upon an investigation to ascertain whether or not some technical irregularity may be found in the proceedings, taken for organizing the town of recordation, affecting its corporate existence. The apparent existence of the town should be regarded by the officer as the real existence. Cookson v. Parker, 93 Me. 488, 45 A. 505.

Former provision of section.—For a case relating to a former provision providing for recordation in the oldest adjoining town, see Grant v. Albee, 89 Me. 299, 36 A. 397.

Applied in Stevens v. Thatcher, 91 Me. 70, 39 A. 282; Chalmers v. Littlefield, 103 Me. 271, 69 A. 100.

Quoted in part in Monaghan v. Longfellow, 81 Me. 298, 17 A. 74.

Stated in part in Thurston v. Haskell, 81 Me. 303, 17 A. 73.

Cited in Shaw v. Wilshire, 65 Me. 485; Phillips v. Brown, 74 Me. 549.

Sec. 28. Attachment of shares in a corporation.—When the share or interest of any person in an incorporated company is attached on mesne process, an attested copy of the writ with a notice thereon of the attachment, signed by the officer, shall be left with the clerk, cashier or treasurer of the company; and such attachment is a lien on such share or interest and on all accruing dividends; and if the officer having the writ exhibits it to the official of the company having custody of the account of shares or interest of the stockholders, and requests a certificate of the number held by the defendant, and such official unreasonably refuses to give it or willfully gives him a false certificate thereof, he shall pay double the damages occasioned by such refusal or neglect; to be recovered against him in an action on the case by the creditor. (R. S. c. 99, § 28.)

Cross reference.—See c. 118, § 14, re certification of debtor's shares of corporation.

What constitutes "notice."—The "notice" of an attachment required by this section is fully complied with by serving an attested copy of the officer's return of the attachment, indorsed upon an attested copy of the writ. Hagar v. Union Nat. Bank, 63 Me. 509.

Stated in Benson v. Smith, 42 Me. 414.

Sec. 29. Attachment of franchise and other property of corporation.—The franchise and all right to demand and take toll and all other property of a corporation may be attached on mesne process, and the attaching officer shall leave an attested copy of the writ with a notice of the attachment thereon, signed by him, with the clerk, treasurer or some officer or member of the corporation, as provided in section 19. (R. S. c. 99, § 29.)

Stated in Benson v. Smith, 42 Me. 414.

Sec. 30. Successive attachment on same writ or property.—Successive attachments in one or more counties may be made upon the same writ by the same or different officers before service of the summons upon the person whose property is attached; but none after such service. Personal property attached on process may be subsequently attached by a different officer, who shall furnish the last preceding attaching officer with a copy of the precept within a reasonable time. (R. S. c. 99, § 30.)

Personal Property Attached Sold on Writ.

Cross reference. — See c. 178, § 16, re sale of attached vessel on the stocks.

Sections 31-41 not applicable to property not the debtor's and requiring judgment on validity of lien. — Sections 31-41 were not intended to authorize a sale upon the writ of property confessedly not the debtor's and which could not be levied on until after notice to the claimant and a judgment of the court that it was subject to the lien claimed; and, therefore, a sale under these sections and in accordance with them affords no defense to the officer in an action brought against him by the owner to recover the value of the property sold. This reasoning clearly applies against the right to sell upon the writ vessels attached, to secure statutory liens upon them, on process not against the owners directly. Buck v. Kimball, 75 Me. 440.

As for lien on logs where owner not defendant.—It has been held that §§ 31-41, which authorize the sale of certain kinds of personal property on mesne process, do not apply to logs attached upon a writ in which the owner of the logs is not a defendant, to secure a statutory lien for services rendered to a contractor in cutting and hauling them. Buck v. Kimball, 75 Me. 440.

Prior to execution, attached property can be sold only under §§ 31-38.—Prior to sale on execution, personal property attached can be sold only "by consent of the debtor and creditor" under § 31, or in accordance with §§ 32-38. Saliem v. Glovsky, 132 Me. 402, 172 A. 4.

And officer who sells contrary thereto is trespasser ab initio.—An officer, who attaches property on mesne process, and sells it thereon, without the consent of the creditor and owner, or otherwise than in accordance with the mode prescribed by §§ 31-41, thereby becomes a trespasser ab initio. The proceedings of the officer being unauthorized, he must be regarded as a trespasser. Ross v. Philbrick, 39 Me. 29; Everett v. Herrin, 48 Me. 537; Saliem v. Glovsky, 132 Me. 402, 172 A. 4.

Purchaser may become trespasser also.—If an officer makes an unauthorized sale on a writ, of property legally attached, he becomes a trespasser ab initio. And the purchaser at such a sale becomes a trespasser, if he takes the property away after notice from the owners that the validity of the sale was denied and would be contested. Buck v. Kimball, 75 Me. 440.

And suit by owner not delayed by pendency of action on attachment.—The pendency of the action, on which property was attached by an officer who acted as a trespasser ab initio, interposes no obstacle to an immediate suit by the owner. Ross v. Philbrick, 39 Me. 29.

But if officer has jurisdiction, sale will be valid though manner of offering irregular.—The true rule, as adopted in this state, is that an officer's sale of goods by public auction on judicial process, he being authorized by law, as by §§ 31-41, and having an official jurisdiction over the proceedings, will pass the debtor's title, to a bona fide purchaser, notwithstanding the directions of the law as to the manner of offering property for sale may not have been complied with. May v. Thomas, 48 Me. 397.

Sec. 31. Sale on writ of personal property attached.—When personal property is attached, the officer, by consent of the debtor and creditor, may sell it on the writ before or after entry, observing the directions for selling on execution; and if it is attached by different officers, it may be so sold by the first attaching officer; or in case of his death, if he was a deputy sheriff, by the sheriff or another deputy by written consent of the debtor and all attaching creditors; and the proceeds, after deducting necessary expenses, shall be held by the officer making the sale, subject to the successive attachments as if sold on execution. (R. S. c. 99, § 31.)

Section protects debtor and subsequent attaching creditors.—The object of this section is to protect subsequent attaching creditors and to guard the interests of the

debtor. It determines the order of the appropriation of the proceeds and the rights between creditors, but it does not bear upon the relation between the creditor and his attorney or between them and the officer. Ducett v. Cunningham, 39 Me. 386.

The burden of paying the "necessary expenses" is upon the debtor and not upon the creditor. Baldwin v. Hatch, 54 Me. 167.

Officer may deduct expenses before satisfying execution. — An officer, holding funds arising from the sale of goods attached, may deduct a reasonable compensation for the expense of keeping and selling the goods, before applying the balance to the satisfaction of the execution. Baldwin v. Hatch, 54 Me. 167.

And he will not be liable for paying proceeds to creditor's attorney.—Where property is sold upon mesne process under this section, the payment of the proceeds by the officer to the attaching creditor's attorney, before judgment is rendered, will protect him against any suit by the creditor for a failure to apply the same to the execution issued on such judgment; for the payment to the attorney is payment to his principal. Ducett v. Cunningham, 39 Me. 386.

Applied in Knight v. Herrin, 48 Me. 533; Hinckley v. Gilmore, 49 Me. 59.

Sec. 32. Perishable goods sold without consent. — When personal property liable to perish, be wasted, greatly reduced in value by keeping or be kept at great expense is attached, and the parties do not consent to a sale thereof, the same may be examined and appraised before or after entry of the action, as provided in sections 33 to 41, inclusive. (R. S. c. 99, § 32.)

Section presupposes refusal under § 31 before creditor may invoke this section.—This section did not intend to give the right to the creditor to subject the debtor and his goods to the expense of an appraisement and notices, etc., until he had refused an application to have the property sold by consent of all parties under § 31. It would be manifestly unjust to incur these expenses until such refusal on the part of the debtor. Hinckley v. Gilmore, 49 Me. 59.

But section not applicable to action to secure lien on logs where owner not defendant.—The provisions of this section and § 31 authorizing, in certain cases, an officer to sell on mesne process personal property attached, do not apply where logs are seized on a writ brought to secure the statutory lien thereon, in favor of one who has rendered services in cutting and hauling them, if the owner of the logs is not a party defendant in the writ; and such proceedings and sale affords no justification to the officer in a suit against him for their value by the owner of the logs. Hinckley v. Gilmore, 49 Me. 59.

For logs themselves cannot act as defendants.—Logs attached, on which the plaintiff has a lien for labor, cannot act as defendants in a suit by attachment to subject the logs to the plaintiff's claim, for the logs cannot assent to, or refuse, a proposition to sell by consent under § 31. A question may be asked to test whether the provisions of these sections apply to such a case, viz.: Can the debtors sued consent to a sale under § 31, and by that consent justify the officer in selling another man's logs? Hinckley v. Gilmore, 49 Me. 59.

Applied in Gannett v. Cunningham, 34 Me. 56; Knight v. Herrin, 48 Me. 533.

Quoted in Saliem v. Glovsky, 132 Me. 402, 172 A. 4.

Cited in Moulton v. Chadborne, 31 Me. 152; Ross v. Philbrick, 39 Me. 29.

Sec. 33. Appraisal in certain cases.—At the request of either party interested, the officer shall give notice of the time and place of appraisal, with the names of the parties to the action and of the supposed owner of the property, by posting notices thereof in 2 or more public places in the town where the property was attached, or by giving personal notice thereof to all parties to the suit 4 days at least before the appraisal. He shall prepare a schedule of the property and cause 3 disinterested appraisers acquainted with the nature and value of such goods to be appointed, one by the creditor, one by the debtor and one by himself; and if either party neglects to make an appointment, he shall appoint one in behalf of such party. (R. S. c. 99, § 33.)

Officer not bound by mere offer of debtor to have appraisal.—The mere offer by the debtor to have an appraisal of attached property, without any further steps taken by him, is insufficient to impose any duty upon the officer. Moulton v. Chadborne, 31 Me. 152.

Sale without owners' consent contestable though owners chose appraiser.—Where an officer without the consent of

the owners sold a vessel attached on a writ, brought to enforce a lien claim, the owners are not estopped from contesting the validity of the sale because of the fact that they chose one of the appraisers at the time of such sale. Buck v. Kimball, 75 Me. 440.

Applied in Gannett v. Cunningham, 34 Me. 56; Snow v. Cunningham, 36 Me. 161; Knight v. Herrin, 48 Me. 533; Pike v. Dilling, 48 Me. 539; Hinckley v. Gilmore, 49 Me. 59; Sawyer v. Wilson, 61 Me. 529; Cross v. Elliot, 69 Me. 387.

Sec. 34. Proceedings by appraisers.—The appraisers shall be sworn by the officer without fee, or by a justice of the peace or trial justice, and shall examine such property; and if in their opinion any part of it is liable to perish, be wasted, be greatly reduced in value by keeping or be kept at great expense, they shall appraise it at its value in money. (R. S. c. 99, § 34.)

Applied in Gannett v. Cunningham, 34 Me. 56; Snow v. Cunningham, 36 Me. 161; Knight v. Herrin, 48 Me. 533.

Sec. 35. Property delivered to debtor on depositing money or giving bond; bond returned with officer's doings.—After the appraisers have proceeded according to the provisions of the preceding section, at the request of the debtor the property shall be delivered to him, on his depositing with the officer the appraised value thereof in money or giving bond to him with 2 sufficient sureties, conditioned to pay him said value or satisfy all judgments recovered in the suits in which the property is attached, if demanded before the attachments expire or within 30 days after the time when the creditors might demand payment out of the proceeds of the property if sold as hereinafter provided; and he shall return such bond with the writ on which the first attachment is made, with a return of his doings in relation thereto. (R. S. c. 99, § 35.)

Attached perishables must be separately appraised and bonded for any subsequent attachment.—When perishable articles are attached on a writ, and are subsequently attached, together with additional articles by the same officer, upon a writ in favor of another creditor, such additional articles, before they can be restored to the debtor, must be appraised and bonded separately from those attached on the first writ. If the officer restores such additional articles to the debtor on bond, without having caused them to be thus separately appraised and bonded, it is an official misfeasance, making him liable to account to the last attaching creditor for their value, if needed for the payment of his execution. Snow v. Cunningham, 36 Me. 161.

Creditor's remedy is upon bond.—A creditor's remedy, under his attachment of property returned to the debtor upon his bond, is by suit upon the bond taken by the officer from the debtor, and not by action against the officer. Snow v. Cunningham, 36 Me. 161.

And statutory proceedings when correct are conclusive and absolve officer.—The statutory proceedings under this section, when correct, are conclusive, and they constitute a justification to the officer, and exempt him from liability for the property attached and disposed of under an appraisal. Snow v. Cunningham, 36 Me. 161.

Applied in Knight v. Herrin, 48 Me. 533.

Sec. 36. Bond sued by any creditor.—If the bond is forfeited, any one or more of the creditors may bring an action of debt thereon in the name of the officer, and shall indorse their names on the writ. If judgment is for the defendants, execution for costs shall be issued against them jointly, or one against each for his proportion, as the court thinks just. If judgment is for the plaintiffs, the money recovered shall be applied to pay their necessary expenses in prosecuting the suit, not reimbursed by costs recovered of the defendants; and the residue belongs to the attaching creditors according to their priorities; but no execution shall be awarded for the use of any creditor without reserving what may be due on any prior attachment, whether the creditor therein is a party to the suit on the bond or not. (R. S. c. 99, § 36.)

Sec. 37. Attaching creditor, not a party to the suit on bond.—An attaching creditor not a party to such suit, on his motion before final judgment

therein, may become a party on such terms as the court orders, as if he had been a party originally; and his name shall then be indorsed on the writ; or he may bring scire facias on the judgment and recover the sum due him on the bond. No creditor whose cause of action on the bond accrued more than a year prior to the suit thereon shall have judgment or execution therein; nor bring such scire facias unless within a year after the cause of action accrued. (R. S. c. 99, § 37.)

Sec. 38. Sale after appraisal.—If such property, after its appraisal, is not delivered to the debtor as aforesaid, the officer shall sell it, make return of all his doings relating thereto and hold and dispose of the proceeds as in a sale by consent. (R. S. c. 99, § 38.)

After appraisal property liable to sale as on execution.—Before appraisal, the officer holds the property by attachment on a writ; after appraisal it is liable to seizure as on execution, and is to be sold in the same manner as if so seized. Knight v. Herrin, 48 Me. 533.

Sale within 4 days of appraisal renders officer trespasser ab initio.—If personal property has been attached on a writ and appraised under § 32, a sale thereof by the officer before four days from the appraisal is unauthorized, and he thereby becomes a trespasser ab initio. Knight v. Herrin, 48 Me. 533.

Applied in Sawyer v. Wilson, 61 Me. 529.

Sec. 39. Proceeds attached in hands of the officer.—The proceeds of such property sold by consent or after an appraisal may be further attached by the officer as property of the defendant while remaining in his hands; and held and disposed of as if the property itself had been attached; but after retaining enough to satisfy all attachments existing thereon at any time, nothing herein shall prevent his paying the surplus to the debtor. (R. S. c. 99, § 39.)

Attachable proceeds are only those of legal statutory sale.—This section presupposes a sale in compliance with the statute. The proceeds that can be attached under this section are the proceeds of a statutory sale, not of one illegal and unauthorized by law. Everett v. Herrin, 48 Me. 537.

Sec. 40. Right by priority in case of sale preserved.—When goods which are sold or appraised and delivered to the debtor in the manner before provided have been attached by several creditors, any one of them may demand and receive satisfaction of his judgment, notwithstanding any prior attachments, if he is otherwise entitled to demand the money and a sufficient sum is left of the proceeds of the goods or of their appraised value to satisfy all prior attachments. (R. S. c. 99, § 40.)

Sec. 41. Replevin of property attached and claimed by one not a party to suit; sale.—When personal property, attached on mesne process, is claimed by a person not a party to the suit, he may replevy it within 10 days after notice given him therefor by the attaching creditor, and not afterwards; and after that, the attaching officer, without impairing the rights of such person, at the request and on the responsibility of the plaintiff and with consent of other attaching creditors, if any, may sell it at auction as on execution, unless the debtor claims it as his and forbids the sale. (R. S. c. 99, § 41.)

If sale transfers possession, officer not liable in replevin.—After the possession is changed by the sale, there is no longer occasion for replevin against the officer. But the vendee has no rights which the officer could not legally sell. Therefore, the property in the hands of the purchaser is unlawfully detained, and as such, is liable to replevin. Coombs v. Gorden, 59 Me. 111.

Sale of property of third person conveys no title.—The sale by an officer of the property of a third person, against whom the execution does not run, does not convey a good title. Coombs v. Gorden, 59 Me. 111.

Applied in Buck v. Kimball, 75 Me. 440.

How Property of Part Owners, When Attached, May Be Disposed of.

Sec. 42. Property of part owner attached, appraised and delivered to another owner on giving bond; bond returned with writ.—When personal property is attached in a suit against one or more part owners thereof, at the request of another part owner, it shall be appraised as hereinbefore provided, one appraiser to be chosen by the creditor, one by the officer and the other by the requesting part owner; and thereupon it shall be delivered to such part owner on his giving bond to the officer with 2 sufficient sureties, conditioned to restore it in like good order, pay the appraised value of the defendant's share therein or satisfy all judgments recovered in the attaching suits, if demanded within the time during which it would be held by the attachments. Such bond shall be returned with the writ with the doings of the officer thereon and, if forfeited, like proceedings may be had as are provided in section 36. (R. S. c. 99, § 42.)

Officer entitled to possession of entire property when attached against one tenant in common.—This section recognizes the principle that when personal property, owned by tenants in common, is attached in a suit against one of them, the officer is entitled to the possession and control of the whole, during the pendency of the attachment, although on the levy of the execution, he sells only the share or interest of the judgment debtor, and the purchaser acquires only the right of a part owner. Rich v. Roberts, 50 Me. 395.

Bond not operative until actual delivery.—Though the appraisal has been had, and the bond given by another part owner as required by this section, yet such bond does not become operative until actual delivery to the part owner. Hardy v. Sprowle, 32 Me. 322.

Sec. 43. Part owner so paying, has lien on property; attachment dissolved.—If any part of such appraised value is so paid, the defendant's share of the property is thereby pledged to the party paying; and if not redeemed, he may sell it and account to the defendant for the balance, if any; but if the attachment is dissolved, he shall restore such share to the defendant or to the attaching officer for him. (R. S. c. 99, § 43.)

Attachment of Property Mortgaged or Pledged.

Sec. 44. Attachment of personal property mortgaged, pledged or under lien.—Personal property not exempt from attachment, mortgaged, pledged or subject to any lien created by law and of which the debtor has the right of redemption, may be attached, held and sold as if unencumbered, subject to the provisions of the following 6 sections. (R. S. c. 99, § 44.)

Mortgage or pledge condition must be distinct and specific.—In order to have a mortgage or pledge good as against attaching creditors there must be at least a distinct and specific condition that can be clearly stated and understood, and which, being performed, the property would be released. It must be such a demand or claim as can be stated, under the requirements of this section and §§ 45 and 46, so definitely that the sum to be paid by the attaching officer is fixed and certain. Fairfield Bridge Co. v. Nye, 60 Me. 372.

Attachment cannot be made until compliance with §§ 45 and 46.—Where there were two subsisting mortgages on a vessel, it has been held that the vessel could not be legally attached upon mesne process without first paying or tendering the amount of the mortgage debts in accordance with the provisions of §§ 45 and 46. Foster v. Perkins, 42 Me. 168.

Formerly no notice required by lienor before action against officer.—Where an officer attached personal property on which a lien existed, no notice whatever at any time was required by the common law preliminary to a suit by the lienor against the attaching officer. Holmes v. Balcom, 84 Me. 226, 24 A. 821.

Mortgagee in just possession of after-acquired stock in trade is paramount to attaching creditor.—A mortgagee in a chattel mortgage duly recorded, who has taken and retained possession of after-acquired stock in trade as a part of the property described in the mortgage, by virtue of an explicit agreement in the mortgage authorizing him so to do, is entitled to hold such after-acquired property, not purchased

with the proceeds of any of the stock sold, as against a creditor who attaches it after possession taken by the mortgagee. Burrill v. Whitcomb, 100 Me. 286, 61 A. 678.

But not if he had no possession at time of attachment—with exceptions.—A mortgagee of after-acquired chattels obtains no title or right to them as against a creditor of the mortgagor, who attaches them in the hands of a mortgagor before the mortgagee has taken possession. There are exceptions to this rule respecting chattels of which the mortgagor had potential ownership at the time the mortgage was given, and chattels purchased with the proceeds of those sold and substituted for them in accordance with the terms of the mortgage. Burrill v. Whitcomb, 100 Me. 286, 61 A. 678.

Officer liable to consignee-lienor for attaching goods on ship without tendering amount of lien.—When a consignee has a lien for advances upon goods on board ship, which are taken from the ship by an attaching officer on a writ against the consignor without tendering to the carrier or the consignee the amount of the lien, the carrier may maintain an action therefor against the officer. Holmes v. Balcom, 84 Me. 226, 24 A. 821.

But so long as the officer has a right to retain the property, he cannot be liable to the mortgagor in an action for its value. Rich v. Roberts, 50 Me. 395.

Applied in Colson v. Wilson, 58 Me. 416; Phillips v. Emery, 85 Me. 240, 27 A. 125.

Stated in part in Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 A. 1001.

Cited in Deering v. Lord, 45 Me. 293; Barrows v. Turner, 50 Me. 127.

Sec. 45. When officer attaching mortgaged property is exempt from suit.—When personal property, attached on a writ or seized on execution, is claimed by virtue of such mortgage, pledge or lien, the claimant shall not bring an action against the attaching officer therefor:

I. Until he has given him at least 48 hours' written notice of his claim and the true amount thereof; or (1949, c. 349, § 128)

II. If the officer or creditor within that time discharges the claim by paying same or tendering the amount due thereon; or (1949, c. 349, § 128)

III. If the officer within that time restores the property; or (1949, c. 349, § 128)

IV. Where the property was attached on a writ or seized on execution while in the hands or possession of the mortgagor, the attaching creditor within that time summons the claimant to answer in the same action such questions as may be put to him relative to the consideration, validity and amount due secured by such mortgage. (1949, c. 349, § 128)

Such summons may be in substantially the following form:

STATE OF MAINE

....., ss. To. .....
..... Greeting:

We COMMAND YOU, that you appear at our ..... Court, to be held at ....., within and for the County of ..... aforesaid, on the ....., day of ....., A. D. 19.., then and there to answer unto ..... in a plea of the case ..... as in our writ of attachment, dated the ..... day of ....., A. D. 19.., and made returnable to said court on the ..... day of ....., A.D. 19.., is fully set forth, in which ..... of ..... is named defendant and on which writ the following described property, claimed by you as mortgagee, was attached as the property of said defendant; viz., ...
.....

then and there to answer in such action, such questions as may be put to you relative to the consideration, validity, and amount justly due secured by such mortgage, and abide the judgment of court thereon.

FAIL NOT OF APPEARANCE AT YOUR PERIL.

Witness, the HONORABLE ..... Justice of the Superior Court (Judge of said Court) at ....., the ..... day of ..... in the year of our Lord one thousand nine hundred and .....

.....
Clerk.

From the office of

.....

.....

Such summons, when property is attached on the writ, shall be returnable to the court to which the writ is returnable or to any justice thereof in vacation not less than 10 days nor more than 60 days after service thereof, and when property is seized on execution such summons shall be made returnable to any justice or judge of the court issuing such execution on any day fixed by such justice or judge not less than 10 days nor more than 60 days thereafter. Service in either case shall be by copy of such summons attested by the officer serving the same. If in either case the mortgagee or claimant fails to appear and answer, or after hearing fails to establish his claim under such mortgage, pledge or lien, he thereby waives the right to hold the property thereon. (R. S. c. 99, § 45. 1949, c. 349, § 128.)

This section and § 46 are to be fairly and liberally construed in furtherance of their object. Nichols v. Perry, 58 Me. 29.

Purpose of this section and § 46 to enable creditor to discharge claims and retain attachment.—This section was intended to accomplish the same general purpose as § 46, to enable the attaching creditor or officer to discharge a claim, by payment of the amount due, and retain the benefit of the attachment. Hill v. Wiles, 113 Me. 60, 92 A. 996.

And to avoid litigation upon unknown or fraudulent claims, and to facilitate release of attachment.—This section and § 46 were designed to prevent the assertion, by a suit involving cost and expense, of an outstanding title, the existence of which was unknown to the officer making the attachment, and the setting up of claims merely colorable and fraudulent, having no just foundation; and to give the officer or attaching creditor an opportunity to pay the mortgage debt if he chose, or to release the attachment without being subjected to cost for an inadvertent and harmless interference with the rights of the mortgagee. Nichols v. Perry, 58 Me. 29.

But not for defense of officer who hazards litigation knowing of claims.—This section and § 46 were not designed to furnish a defense to an officer who prefers to hazard a contest, and so knowingly and intentionally denies the right of the mortgagee altogether in the outset, and puts him to the proof, where such officer has knowledge of the existence of the mortgage, and of the mortgagee's intention to assert his claim, and such information from the mortgagee as to the amount of the mortgage debt as will enable him or the attaching creditor to discharge it if he thinks it worthwhile, and to avail himself of any false statement of the mortgagee in relation to it. Nichols v. Perry, 58 Me. 29.

And officer may waive notice.—If the defendant officer waives the necessity of the notice required by subsection I, the plaintiff will not be required to prove it has been given. Monaghan v. Longfellow, 82 Me. 419, 19 A. 857.

Section applies to irregular mortgage essentially a conditional sale.—This section requiring notice of the amount of a mortgage claim, before maintaining a suit against an officer who has attached the property, applies to an irregular mortgage written in the form of a lease, which by its more essential terms discloses itself to be a conditional sale of personal property. Gross v. Jordan, 83 Me. 380, 22 A. 250.

A promissory note, containing a stipulation that the personal property for which it is given shall remain the property of the payee until the note is paid, is of the nature of a chattel mortgage, and falls within the scope of subsection I. Monaghan v. Longfellow, 82 Me. 419, 19 A. 857.

Mortgagee must comply with both sections before bringing action.—A substantial performance of the requirements of this section and § 46 by the mortgagee is a condition precedent to the maintenance of his action. Nichols v. Perry, 58 Me. 29.

The object of subsection I of this section is manifest, and the legislature has seen fit to make it a condition precedent to the bringing of an action. Fairfield Bridge Co. v. Nye, 60 Me. 372.

The officer, who has sureties for the

faithful discharge of duty, is entitled to personally receive the notices specified in both this section and § 46. Phillips v. Fields, 83 Me. 348, 22 A. 243.

He must give officer actual notice of claim and definite amount thereof.—The officer must have not only knowledge of the fact that there is a mortgage or other claim in existence, but information from the claimant himself that he has such a claim upon the property attached, and coupled with this a statement of the amount actually and justly due, made with such definiteness as shall enable the officer or attaching creditor to tender the proper sum in discharge, and to hold the claimant for the penalty given by § 46, if his statement is discovered to be false or exaggerated. Nichols v. Perry, 58 Me. 29.

Notwithstanding officer has other knowledge of claim.—That the officer knows there is a mortgage on record, and fortifies himself in advance with a bond of indemnity from the creditor, will not excuse the neglect of the mortgagee to give the notice required by this subsection. Nichols v. Perry, 58 Me. 29.

But notice of aggregate sum due is sufficient.—The notice required by this subsection need not contain particulars, explanations, or items of the debt, but may give merely the aggregate sum due; for if the creditor pays the full claim and can prove that it was false or excessive, he can recover under the provisions of § 46 double the amount wrongfully claimed. Therefore, all his rights are preserved, and he cannot justly complain that the notice is indefinite as to particular items. Nichols v. Perry, 58 Me. 29.

And mortgagee cannot interfere with property until 48 hours after such notice.—Mortgaged property may be attached on a writ against the mortgagor and possession thereof taken from the mortgagee by the officer, and the mortgagee cannot interfere with it, until he has given the officer forty-eight hours' written notice of the true amount due on the mortgage, nor then, nor ever after, if the amount due is tendered him within that time, as provided in this section. Ramsdell v. Tewksbury, 73 Me. 197.

Where mortgaged property is attached by an officer as the property of the mortgagor and placed in the hands of a servant of the officer for safekeeping, before the mortgagee can maintain replevin therefor against such servant, he must give the notice required by this section. Potter v. McKenney, 78 Me. 80, 2 A. 844.

But notice not prerequisite to replevin based on absolute bill of sale.—Where the plaintiff does not claim the property by virtue of any mortgage, pledge or lien, but by absolute bill of sale, and the goods are not replevied from the attaching officer, but from his keeper, the notice of the plaintiff's claim mentioned in this section is not necessary before bringing replevin. Douglass v. Gardner, 63 Me. 462.

48 hours' notice intended to permit discharge of claim.—The provision proscribing an action against an attaching officer for the property, unless he has given at least forty-eight hours' notice of his claim and the true amount thereof is to give the officer or creditor, within the time limited, an opportunity to discharge the claim by payment. Franklin Motor Car Co. v. Hamilton, 113 Me. 63, 92 A. 1001.

The notice provided by this section is merely preliminary to the action. The only time named for the notice is that it shall precede the action by forty-eight hours. Within that limit of time, the officer can restore the property, if he then has it, or if he has it not, he can pay the claim, and in one way or the other avoid further liability. Holmes v. Balcom, 84 Me. 226, 24 A. 821.

Claimant may give notice any time before statute of limitations has run.—This section does not require that the notice be given before the property is sold by the attaching officer, nor does it limit the time for bringing the suit. The action may be brought as before, at any time within the statute of limitations, without reference to the situation of the property, or its disposition by the officer. Holmes v. Balcom, 84 Me. 226, 24 A. 821; Hill v. Wiles, 113 Me. 60, 92 A. 996.

Notice of claim "exceeding $900" is sufficient, and payment thereof prevents further claim.—A statement from a claimant that there is due him "exceeding $900" is a sufficient statement of a claim of $900, and a tender of $900, if the attaching creditor has seen fit to make it, would relieve the officer from any further claim on the part of the claimant, who, not having specified any amount beyond that, would, after tender by the creditor, be estopped from claiming any more. To that amount the claim is distinct and certain, and sufficient to enable the officer or creditor to make a payment or tender which would discharge the mortgage. Nichols v. Perry, 58 Me. 29.

Applied in Colson v. Wilson, 58 Me. 416; Fairfield Bridge Co. v. Nye, 60 Me.

372; Hamlin v. Jerrard, 72 Me. 62; Burrill v. Whitcomb, 100 Me. 286, 61 A. 678.

Stated in Rich v. Roberts, 48 Me. 548.

Cited in Coombs v. Gorden, 59 Me. 111.

Sec. 46. Mortgagee must account within 10 days after notice; false account.—The officer may give the claimant written notice of his attachment; and if he does not within 10 days thereafter deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon; and if his account is false, he forfeits to the creditor double the amount of the excess, to be recovered in an action on the case. (R. S. c. 99, § 46.)

Section liberally construed to prevent litigation on unknown claims, and to facilitate payment thereof.—This section is to be fairly and liberally construed in furtherance of its object. It was designed to prevent the assertion, by a suit involving cost and expense, of an outstanding title, the existence of which was unknown to the officer making the attachment, and to give the officer or attaching creditor an opportunity to pay the mortgage, if he chooses, or to release the attachment without being subjected to cost for an inadvertent and harmless interference with the rights of the mortgagee. Hill v. Wiles, 113 Me. 60, 92 A. 996.

Required statement of true amount due guards attaching creditors against fraudulent mortgages. — Attaching creditors must be considered, as well as mortgages; and to guard against dishonest and fraudulent mortgages, the mortgagees are required to state the amount due, or excuse the statement by such full, particular, detailed account as it is in their power to give, that the officer may have all the information upon which to act, that is practicable for the mortgagee to have. Phillips v. Fields, 83 Me. 348, 22 A. 243.

Officer personally entitled to notice.—If chattels attached appear to be mortgaged, upon notice to the mortgagee of his attachment, the officer is entitled to receive from the mortgagee a "true account" of the amount due on his claim, in order that he may save himself by releasing the attachment, or paying the mortgage, or demanding indemnity from the attaching creditor if he insists upon disputing the mortgage. The liability is a personal one, and the officer is entitled to receive the notice. Phillips v. Fields, 83 Me. 348, 22 A. 243.

And notice from a mortgagee to the attaching creditor, instead of the attaching officer, is not a compliance with this section. Phillips v. Fields, 83 Me. 348, 22 A. 243.

For attaching creditors may be irresponsible.—A notice from a mortgagee to the attaching creditors, who may be pecuniarily irresponsible, might serve the officer no good purpose. They might suppress the notice and allow the ten days specified in this section to elapse, and leave the officer to take care of himself. Phillips v. Fields, 83 Me. 348, 22 A. 243.

Delivery to the creditor's attorney is not delivery to the officer. Hill v. Wiles, 113 Me. 60, 92 A. 996.

An attaching officer is entitled to a definite statement of the amount due on a mortgage of the chattels attached, that is, the statement of a definite sum that is claimed to be due. Phillips v. Fields, 83 Me. 348, 22 A. 243.

Notice claiming "exceeding $900," held sufficient.—A notice stating, "There is actually due me ... exceeding nine hundred dollars, as at the time said mortgage was given," was held sufficient as a statement of nine hundred dollars due, for which the property could be redeemed. Phillips v. Fields, 83 Me. 348, 22 A. 243.

But claim for "somewhere about" a specified figure not sufficient.—A notice from the mortgagee stating that it is impossible for him to know the amount of his mortgage claim, but that he thinks it is "somewhere about" a specified figure, is not sufficient. Phillips v. Fields, 83 Me. 348, 22 A. 243.

Officer may force claimant to disclose claim. — This section and § 45 go along, pari passu. Under § 45 the officer will have, necessarily, the right to pay at some time, since suit cannot be brought against him until he has forty-eight hours' notice, and an opportunity to pay. But under this section, he is not compelled to wait the delays of the claimant, but by giving notice he can force him to disclose his claim within ten days. Hill v. Wiles, 113 Me. 60, 92 A. 996.

And he may pay a claim after sale. — If the officer may have the right to pay and discharge after sale, under § 45, there is no incongruity in affording him that privilege under this section. And such was the legislative intention. Hill v. Wiles, 113 Me. 60, 92 A. 996.

First mortgagee failing to disclose claim may be postponed to subsequent claimants. —The failure of a first mortgagee to comply with this section in giving the attaching officer the amount due under the first

mortgage was held to have postponed that mortgage, so far as the rights of attaching creditors were concerned, to a subsisting second mortgage, and the second mortgage became the first on the property. Phillips v. Emery, 85 Me. 240, 27 A. 125.

Applied in Colson v. Wilson, 58 Me. 416.
Stated in Nichols v. Perry, 58 Me. 29.
Cited in Coombs v. Gorden, 59 Me. 111; Fairfield Bridge Co. v. Nye, 60 Me. 372; Holmes v. Balcom, 84 Me. 226, 24 A. 821.

Sec. 47. Validity of mortgage established.—If, upon examination held under the provisions of section 45 or upon the verdict of a jury as hereinafter provided, it appears that the mortgage is valid, the court or such justice or judge thereof, having first ascertained the amount justly due upon it, may direct the attaching creditor to pay the same to the mortgagee or his assigns within such time as it orders; and, if he does not pay or tender the amount within the time prescribed, the attachment shall be vacated and the property shall be restored. If the attaching creditor pays or tenders the amount directed to be paid within such time and the mortgagee or his assigns fail to immediately assign such mortgage to the attaching creditor, the mortgagee or his assigns shall be estopped from claiming any interest in such attached goods by virtue of his mortgage. (R. S. c. 99, § 47.)

Cited in Holmes v. Balcom, 84 Me. 226, 24 A. 821.

Sec. 48. Validity of mortgage tried before jury; costs.—If the attaching creditor denies the validity of the mortgage and moves that the validity may be tried by jury, the court shall order such trial upon an issue which shall be framed under its direction and if, upon such examination or verdict, the mortgage is adjudged valid, the mortgagee or his assigns shall recover his costs. (R. S. c. 99, § 48.)

Sec. 49. Creditor redeems and officer sells. — When the attaching creditor has paid to the mortgagee or his assigns the amount ordered by the court, the sheriff after making the sale shall pay to the creditor, and the creditor may retain out of the proceeds of the property attached, when sold, the amount so paid with interest, and the balance shall be applied to the payment of his debt. (R. S. c. 99, § 49.)

Sec. 50. When attaching creditor does not recover judgment.—If the attaching creditor, after having paid the amount ordered by the court, does not recover judgment, he may nevertheless hold the property until the debtor has repaid with interest the amount so paid. (R. S. c. 99, § 50.)

Attaching Officer Dies or Is Removed, or Property Replevied.

Sec. 51. Goods attached by officer not assets of his estate.—Personal property attached by an officer and in his possession and his claim for damages when it is taken from him remain subject to such attachment in case of his death, as if he were alive, and are not assets belonging to his estate. (R. S. c. 99, § 51.)

Sec. 52. If replevied, liable to further attachments. — The property described in section 51 replevied from the officer is liable to further attachments as if in his possession; and if there is judgment for a return in the replevin suit, the plaintiff and his suerties are liable for the whole property or its value, although some attachments were made after the replevin. (R. S. c. 99, § 52.)

Sec. 53. If officer dies or is removed, further attachments. — If an attaching officer dies or is removed from office while the attachment is in force, whether the property was in his possession or not, it and its proceeds may be further attached by any other officer the same as it might have been by the first officer. Such further attachments shall be made by a return setting forth an at-

tachment in common form and by whom the property was previously attached; and if the goods have not been replevied, by leaving a certified copy of the writ, omitting the declaration and of the return of that attachment, with the former officer if living, or if dead, with his executor or administrator, or if none has been appointed, with the person having possession of the goods; or if the goods have been replevied and the officer who made the original attachment is dead, such copy shall be left with his executors or administrators or with the plaintiff in replevin; and the attachment shall be considered as made when such copy is delivered in either of the modes before described. (R. S. c. 99, § 53.)

Sec. 54. Limitation of right to attach goods replevied.—Goods, taken by replevin from an attaching officer, shall not be further attached as property of the original defendant in any other manner than that provided in the 2 preceding sections so long as they are held by the person who replevied them or by any one holding under him, unless the original defendant has acquired a new title to the goods. (R. S. c. 99, § 54.)

Effect of Death of Party.

Sec. 55. Attachments, dissolved by death of insolvent.—The attachment of personal property continues in force after the death of the debtor as if living, unless before a sale thereof on execution his estate is decreed insolvent; but it is dissolved by such decree, and the officer, on demand thereafter, shall restore such property to the executor or administrator on payment of his legal fees and charges of keeping. (R. S. c. 99, § 55.)

Cross reference. — See § 72, et seq., re dissolution of attachments.

This section applies alike to all property, whether attached in the ordinary mode or by foreign attachment. It applies as well to money due to the debtor as to his visible goods. Tyler v. Winslow, 46 Me. 348.

Attachments dissolved by death and decree of insolvency.—Upon the death of the debtor and the issuing of a decree of insolvency upon his estate, the intent of the law, under this section, plainly is that whatever is liable to distribution shall be freed from attachment. Martin v. Abbot, 1 Me. 333.

But if attached property taken on execution before death, officer may dispose of same.—Under this section where the property attached has been taken on execution before the death of the debtor, the officer may proceed to dispose of the same according to law, in the same manner as if the debtor were living. Tyler v. Winslow, 46 Me. 348.

And attachment by trustee process may not be dissolved.—An attachment by trustee process is not dissolved by the death of the principal debtor and the issue of a commission of insolvency on his estate, if, before the death of the debtor, the plaintiff issues his execution, and duly demands of the trustee to pay over an amount sufficient to satisfy the same, although, subsequent to such demand and the death of the principal defendant, scire facias issued and further disclosure was made thereon. Tyler v. Winslow, 46 Me. 348.

Applied in Willard v. Whitney, 49 Me. 235; Cunningham v. Gushee, 73 Me. 417.

Sec. 56. Liability if property sold before demand; setoff not allowed.—If, after such decree and before such demand, the officer has sold the property on execution, he is liable to the executor or administrator in an action, not of trespass but for money had and received, for the proceeds, if in his hands; but if paid over to the judgment creditor, such creditor is so liable, and he shall not set off any demand which he has against the executor or the administrator or against the estate of the deceased. (R. S. c. 99, § 56.)

Sec. 57. Appraisal of property under attachment.—After the death of a defendant and before a decree of insolvency on his estate, the executor or administrator may demand of the attaching officer a certified copy of his return on the writ, with a description of the property attached, so that it may be described in the inventory of the estate subject to the attachment, and the appraisers may demand a view thereof so as to appraise it; and if the officer fails to com-

ply with either demand, he forfeits to the executor or administrator not less than $10 nor more than $30. (R. S. c. 99, § 57.)

Sec. 58. Actions by officers for goods attached, do not abate by party's death.—An action, brought by an officer for taking from him personal property attached by him, does not abate by the death of either party; but may be prosecuted by or against his executor or administrator. If the officer is dead and his representative recovers the property or money, it shall be held and applied as if he were alive; but, if he fails to recover, he shall return the property or pay the damages awarded in full, although the estate of the deceased is insolvent. (R. S. c. 99, § 58.)

Sec. 59. If officer dies pending suit and no administrator appointed, party in interest may carry on suit.—If an officer authorized to serve precepts dies pending a suit for or against him for official neglect or misconduct and no administration is granted on his estate within 3 months thereafter, the party for whose benefit the suit is so prosecuted or defended may carry it on in his own name by entering his appearance and giving security for costs, as the court directs. (R. S. c. 99, § 59.)

Attachment of Real Estate.

Cross Reference.—See c. 171, re title by levy of execution.

Sec. 60. Real estate and interests subject to attachment; officer need not view.—All real estate liable to be taken on execution as provided in chapter 171; the right to cut and carry away grass and timber from land sold by this state or Massachusetts, the soil of which is not sold and all other rights and interests in real estate may be attached on mesne process and held to satisfy the judgment recovered by the plaintiff, but the officers need not enter on or view the estate to make such attachment. (R. S. c. 99, § 60.)

Cross reference. — See note to § 24, re constitutionality of attachment.

History of section. — See Houston v. Jordan, 35 Me. 520; Poor v. Chapin, 97 Me. 295, 54 A. 753.

The right to attach real estate upon a writ is purely a statutory right. Poor v. Chapin, 97 Me. 295, 54 A. 753.

And the lien is not limited to amount specified in writ.—The lien, created by an attachment of real estate, is not limited to the amount, which the officer in the writ was commanded to attach. Searle v. Preston, 33 Me. 214.

Attachment is security for judgment and costs.—Attachments on mesne process are for the security of the final judgments which may be recovered, and legal costs incident to their enforcement and collection. Searle v. Preston, 33 Me. 214.

Attached property held to satisfy judgment by execution thereon.—The provision that the property described "may be attached upon mesne process, and held to satisfy the judgment recovered by the plaintiff" necessarily means that the property attached may be held to satisfy the judgment by enforcing the execution issued thereon; for attachment on mesne process and levy upon execution are so inseparably connected that the former is a useless ceremony unless it can be made effective by the latter. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

For purpose of attachment is to obtain lien enforceable on execution. — The only object of an attachment is to obtain a lien upon the property attached which will continue until final judgment is obtained, and which may then be enforced by a seizure upon the execution. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

But such lien may be released, discharged, lost.—An attachment of real estate, upon mesne process, creates a lien upon the estate, which may be made available to the creditor after judgment by a levy of the execution thereon. It is only a lien, and may be released, discharged, lost, or abandoned by the party originally instituting it. It is created at the instance, and for the benefit of the plaintiff in an action, and may be by him discharged. Bachelder v. Perley, 53 Me. 414.

When a debtor holds the legal record title to real estate and has in it a valuable personal interest, it can be attached. Lambert v. Allard, 126 Me. 49, 136 A. 121.

But property not attachable if not amenable to execution.—This section does not authorize attachment on mesne process of any property which cannot be seized upon the execution subsequently obtained. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

In order to enforce a lien acquired by attachment, a seizure upon the execution must be made within the period provided in § 72. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

The interest which an obligee or his assignee has in a conditional bond for the conveyance of real estate is attachable by his creditors. Houston v. Jordan, 35 Me. 520.

The right to a conveyance of real property, when legally acquired in any mode, though resting in contract, is attachable on mesne process, and may be seized and sold on execution. Neil v. Tenney, 42 Me. 322.

At any time after its inception, and before conveyance of title.—The right to attach a debtor's interest in real estate, by virtue of a contract to convey, is not limited by this section to a time, before conditions have been performed, where the contract is subject to conditions. The section authorizes the attachment of the debtor's contractual interest during the existence of the contract, and at any time after its inception, and before its consummation by a conveyance of the title. Whitmore v. Woodward, 28 Me. 392.

But interests forfeited therein for nonperformance are not attachable. — The obligee of a bond for the conveyance of real estate, who has forfeited his right thereto by a nonperformance of a condition precedent, has no claim or interest in the estate which can be attached on mesne process; and if, after such attachment is made, the obligee should, without fraud, procure a renewal of the bond, and sell and assign the renewed bond, his assignee's rights would not be affected by the attachment. Brett v. Thompson, 46 Me. 480.

Land fraudulently conveyed is attachable. — Under this section land fraudulently conveyed by a debtor may be attached on mesne process. By such attachment the creditor acquires a lien upon the property, which is preserved and perfected by the levy, so as to be good against any intervening conveyance. Such a lien by attachment, may be secured as well in actions on the case for torts, as in suits upon contracts. Hall v. Sands, 52 Me. 355.

Though tenants cannot be ousted until proper proceedings therefor.—Though a debtor fraudently conveys property, the creditor, under this section, can attach such property and acquire a lien which may be perfected by enforcement of the execution issued on his subsequent judgment; but before the tenants can be ousted, the question must be determined in proper proceedings. Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 A. 1039.

After a first attachment and sale, a second attaching creditor takes nothing by purchase on execution.—After a first, valid attachment of real estate has been made, followed by subsequent proceedings to judgment and sale according to law, a second attaching creditor takes nothing by purchase on his execution at a sheriff's sale, unless perhaps the right of redeeming from the sale on execution under the first attachment. Poor v. Chapin, 97 Me. 295, 54 A. 753.

A mortgagee has no attachable interest in the premises so long as the mortgage remains open. Thornton v. Wood, 42 Me. 282.

And the purchaser of an equity of redemption sold on execution, has no attachable interest in the premises during one year within which it may be redeemed. Thornton v. Wood, 42 Me. 282; Rogers v. Wingate, 46 Me. 436.

Both cases rest on the same principle.—The same reasons, on which the principle rests that the right of the mortgagee cannot be taken on mesne process and execution, apply with equal force to the right of redeeming from a sale of the equity or redemption made by an officer upon execution. Thornton v. Wood, 42 Me. 282.

But the interest of a vendor in a bond for a deed to land is subject to attachment and levy. The interest of such vendor differs from the non-attachable interest of the mortgagee or levying creditor. Lambert v. Allard, 126 Me. 49, 136 A. 121.

Attachment is made merely by writing a return upon the writ.—In making an attachment of real estate, there need be no overt act on the part of the officer. He does not go upon the land or make any seizure. He simply writes a return upon the writ itself. No notice need be given to anyone at the time of the attachment. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

And a seizure thereafter relates back to date of attachment. — When a lien is acquired by virtue of a valid attachment, the subsequent seizure of the property upon execution within the time allowed by

statute will relate back to the date of the attachment and take precedence over intervening attachments or conveyances, and this is all that is accomplished by an attachment. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

Officers' returns are effectual if intent is clearly disclosed. — Courts will give effect to the returns made by officers, although informally made, when the intention is sufficiently disclosed by the language used to be clearly discernible. But when the obscurity is so great that the purpose cannot be ascertained, the courts will not attempt to make the return effectual by a construction merely conjectural. Hathaway v. Larrabee, 27 Me. 449.

An attachment of all the debtor's "right, title and interest to any real estate in the County of P" is effectual to create an attachment of the estate, when the debtor has made a conveyance of his title to another person, but the deed has not been recorded. Roberts v. Bourne, 23 Me. 165; Veazie v. Parker, 23 Me. 170.

And a description of property by an officer, as the debtor's right of redeeming the property conveyed by a certain mortgage, is sufficient to sustain an attachment thereof. Wolfe v. Dorr, 24 Me. 104.

But vague, uncertain language is insufficient. — Where an officer made a return of an attachment upon a writ, against three defendants, in the following words: "... I have attached all the right, title and interest the defendant has, in and to any real estate ...," it was held that the use of the word defendant in the singular rendered language too vague and uncertain to create a lien by attachment on the estate of either one of the defendants. Hathaway v. Larrabee, 27 Me. 449.

Applied in Holmes v. Fernald, 7 Me. 232; Moore v. Richardson, 37 Me. 438; Nash v. Whitney, 39 Me. 341; Carleton v. Ryerson, 59 Me. 438; Ricker v. Moore, 77 Me. 292; Chipman v. Peabody, 88 Me. 282, 34 A. 77.

Cited in Shaw v. Wise, 10 Me. 113; Phillips v. Pearson, 55 Me. 570; Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

Sec. 61. Real estate attached on writs from certain municipal courts.—If a municipal court has a regular seal and a recorder and has jurisdiction in any action where the amount of damage claimed exceeds $20, real estate and interests in real estate attachable on writs from the superior court may be attached on writs or taken on executions from such court where the amount of the debt or damage, exclusive of costs, exceeds $20. (R. S. c. 99, § 61.)

Sec. 62. When attachment of right of redemption, holds premises free.—When a right of redeeming real estate mortgaged or taken on execution is attached and such estate is redeemed or the encumbrance removed before the levy of the execution, the attachment holds the premises discharged of the mortgage or levy, as if they had not existed. (R. S. c. 99, § 62.)

Section construed in light of principle that payment of mortgage operates a cancellation or assignment. — This section should be construed in the light of the principle that when money due upon a mortgage is paid, it may operate to cancel the mortgage, or may operate in the nature of an assignment of it, placing the person who pays the money in the shoes of the mortgagee, as may best subserve the purposes of justice and the just and true interests of the parties. Williams v. Libby, 118 Me. 80, 105 A. 855.

But the element of an absolute discharge of the mortgage is not essential to constitute a redemption in contemplation of law, nor are circumstances under which the mortgagee can be compelled to discharge the mortgage. If a mortgagor is able to arrange for or cause the mortgage debt to be paid and by agreement the premises are released to a third party for the mortgagor's benefit, it constitutes a redemption as to the mortgagee, and by the mortgagor, though the property is not directly conveyed to the mortgagor, or the mortgage discharged. Bernstein v. Blumenthal, 127 Me. 393, 143 A. 698.

And this section applies to a discharge in fact, and not to a discharge by mutual mistake, the validity of which may be set aside. Williams v. Libby, 118 Me. 80, 105 A. 855.

Attaching creditor is prior to mortgagee who takes absolute deed from debtor.—If, after an attachment of an equity of redemption, the mortgagor conveys the premises to the mortgagee by an absolute deed, for the consideration of the notes secured by the mortgage and other land, such grantee cannot hold the estate which may be duly levied on by virtue of the at-

tachment, against such attaching creditor of the mortgagor. Whitcomb v. Simpson, 39 Me. 21.

Attachment will sustain levy upon estate in fee if incumbrance relieved. — An attachment on mesne process of a right and equity of redemption is sufficient to sustain a levy upon the estate in fee, if at the time of the levy the incumbrance created by the mortgage is relieved. Jewett v. Whitney, 43 Me. 242.

Sec. 63. Attachment not valid unless recorded and claim specified in writ; seizure on execution; lien.—No attachment of real estate on mesne process creates any lien thereon, unless the nature and amount of plaintiff's demand is set forth in proper counts, or a specification thereof is annexed to the writ, nor unless the officer making it within 5 days thereafter files in the office of register of deeds in the county or district in which some part of said estate is situated, an attested copy of so much of his return on the writ as relates to the attachment, with the value of the defendant's property which he is thereby commanded to attach, the names of the parties, the date of the writ and the court to which it is returnable. If the copy is not so filed within 5 days, the attachment takes effect from the time it is filed, if before the entry of the action, although it is after service on the defendant. No seizure of real estate on execution where there is no subsisting attachment thereof made in the suit in which such execution issues, creates any lien thereon, unless the officer making it within 5 days thereafter files in the office of the register of deeds in the county or district in which some part of said estate is situated, an attested copy of so much of his return on said execution as relates to the seizure, with the names of the parties, the date of the execution, the amount of the debt and costs named therein and the court by which it was issued. If the copy is not so filed, the seizure takes effect from the time it is filed. Such proceedings shall be had in such office by the register of deeds, as are prescribed in sections 212 to 242, inclusive, of chapter 89. All recorded deeds take precedence over unrecorded attachments (R. S. c. 99, § 63.)

I. General Consideration.

II. Plaintiff's Demand.

III. Attested Copy of Return.

I. GENERAL CONSIDERATION.

Section enacted to protect innocent parties without notice of undisclosed attachments. — This section embodies a legislative intent to protect, as practical experience has demonstrated to be advisable, the interest of innocent parties without notice of undisclosed attachments. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

Prior to the enactment of this section secret attachments were very common, and often not known or disclosed until a levy on execution was made. In order to protect, particularly, subsequent bona fide purchasers, the legislature provided for the recordation of attachments in the registry of deeds. Jordan v. Keen, 54 Me. 417.

This section is for the benefit and protection of all persons who have any interest in examining the record title to property to which they may thereafter become owner, either in whole or in part, absolutely or otherwise. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

And should be construed to that end.— Registry laws, such as this section, are designed for the protection of innocent parties, and should be so construed as to effect that object, and not operate an injustice. Swift v. Guild, 94 Me. 436, 47 A. 912.

Wherefore actual notice is equivalent to registry. — It has been generally held and approved in this state that actual notice of a prior conveyance or other infirmity of title is equivalent to registry. Swift v. Guild, 94 Me. 436, 47 A. 912.

And unrecorded attachment is valid against debtor.—As against the judgment debtor a seizure is good, though not recorded, but it does not create a lien which may displace subsequent bona fide purchasers without notice. That such is the true construction of the section is apparent from the provision that if the copy of the officer's return is "not so filed, the seizure takes effect from the time it is filed." The record is important to protect

innocent parties; it is of no importance to the debtor. Swift v. Guild, 94 Me. 436, 47 A. 912.

But attaching creditor who records is prior to unrecorded deed. — A creditor complying with the requirements of this section and attaching the real estate without notice of the rights of a holder of an unrecorded deed will have priority over such holder. United States Plywood Co. v. Verrill, 131 Me. 469, 164 A. 200.

Section affords public information as to attached real estate. — The object of this section obviously is to afford information to the public of the condition of the title of such real estate as had been attached on mesne process, and to obviate the evils which had resulted from a system of private attachments. Nash v. Whitney, 39 Me. 341.

And makes public records satisfactory evidence of existence of incumbrances. — The object of this section is, that the records at the registry of deeds shall of themselves afford satisfactory evidence whether any incumbrance exists upon an estate or not. Dutton v. Simmons, 65 Me. 583.

The last sentence of this section applies equally to mortgages on real estate as to unconditional deeds. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

And was enacted to protect against undisclosed attachments.—Before the enactment of the last sentence of this section, no search of the record title, however painstaking and accurate, could guarantee to a purchaser or mortgagee security against an undisclosed attachment already made but not recorded. It was to avoid this result that that sentence was enacted. First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

An attachment of real estate, invalid when made, cannot be rendered valid by any amendment of the writ. Drew v. Alfred Bank, 55 Me. 450; Bisbee v. Mt. Battie Mfg. Co., 107 Me. 185, 77 A. 778.

To recover against officer, untrue return and damage must be shown.—To maintain an action against an officer for a false return it is necessary to show, not only that the return complained of is untrue in fact, but also, that the party seeking redress has been damaged thereby. Nash v. Whitney, 39 Me. 341.

As well as full compliance with the law by plaintiff. — Before a plaintiff can claim damages against an officer for an alleged false return, allegedly resulting in the loss of the property upon which he claims a lien, he must show that he has performed all those acts which the law requires to create and preserve such lien. Nash v. Whitney, 39 Me. 341.

Applied in French v. Lord, 69 Me. 537; Chipman v. Peabody, 88 Me. 282, 34 A. 77.

Stated in part in Fairbanks v. Stanley, 18 Me. 296.

Cited in Stanley v. Drinkwater, 43 Me. 468; Bean v. Camden Lumber & Fuel Co., 124 Me. 102, 126 A. 285.

II. PLAINTIFF'S DEMAND.

Section requires sufficiently specific statement of demand to prevent substitution of other demands. — The intention of this section must have been to require an attaching creditor to furnish such information by his writ to subsequent attaching creditors and purchasers as would enable them to know what his demand was, and to require that it should be so specific as to prevent any other demand from being substituted in the place of that sued. Saco v. Hopkinton, 29 Me. 268; Osgood v. Holyoke, 48 Me. 410; Hanson v. Dow, 51 Me. 165; Jordan v. Keen, 54 Me. 417.

And writ must disclose ground of recovery.—If a count sets forth the nature and amount of the plaintiff's demand, so that one may know the ground upon which he claims to recover, that is sufficient under this section. Shaw v. Nickerson, 60 Me. 249.

By proper counts or by specification. — Where the demand is not exhibited by the counts in the writ, it must be made to appear by a specification of it annexed to the writ. Saco v. Hopkinton, 29 Me. 268; Osgood v. Holyoke, 48 Me. 410.

Specification required where count for money had and received used.—In a count for money had and received no one can tell upon what ground a recovery is sought. Hence in those cases a specification is required setting forth the nature and amount of the plaintiff's claim, if a valid attachment is to be made on the writ. Otherwise, the plaintiff might introduce, under the money counts, subsequently acquired demands. Shaw v. Nickerson, 60 Me. 249.

For general counts not sufficient. — Information more certain and definite is required to be given of the plaintiff's demand than can be obtained from the general counts. Osgood v. Holyoke, 48 Me. 410.

And writ containing only general count is void. — A writ, upon which an attachment is made, containing at the time of service a general money count only, without any specification of the nature and amount of the claim to be proved under

it, is void, and creates no lien thereon. Everett v. Carleton, 85 Me. 397, 27 A. 265.

Where there was an attachment of real estate on a writ in which there was a count for money had and received, but no specification of the claim to be proved under it was annexed to the writ, it was held that, there being no sufficient specification of "the nature and amount of plaintiff's demand," such attachment was void. Osgood v. Holyoke, 48 Me. 410; Neally v. Judkins, 48 Me. 566.

Notwithstanding it contains count on a note.—An attachment is void against subsequent purchasers, where the writ contains a count on a note and a general money count without any specification of the nature of the plaintiff's demand under that count. Phillips v. Pearson, 55 Me. 570.

And attachment thereon is not saved by striking out the general count.—An attachment of real estate, made upon a writ containing a count upon a note, and a count for money had and received, without any specification of the claim to be proved under it, is void; and such an attempted attachment is not rendered valid by striking out the general count and taking judgment upon the count on the note alone. Drew v. Alfred Bank, 55 Me. 450.

But a count for money had and received with allegations as to claim may be sufficient.—A count in the usual form against an executor for money had and received by his testate in his lifetime to the plaintiffs' use, containing allegations as to filing the claim with the executor within the time required by statute, is sufficient under this section. Dexter Savings Bank v. Copeland, 72 Me. 220.

An attachment of real estate, made on a writ specifying that claims of $3000, intended to be proved under money counts, are for money obtained of plaintiff by defendant on notes amounting to $2400 specifically described, may be valid as against a subsequent purchaser, although neither of the notes mentioned was due at the time the writ issued. Jordan v. Keen, 54 Me. 417.

Or it may be sufficient if drawn with such precision as to constitute specification. — A count for money "had and received" may be drawn with sufficient precision so as to be a specification in itself; but when drawn without any particularity of circumstance, and not accompanied by a specification of claim, it is not sufficient to support an attachment of real estate under the provisions of this section. Briggs v. Hodgdon, 78 Me. 514, 7 A. 387.

Sufficient specification may be made upon account annexed. — It is a sufficient specification of the nature and amount of the plaintiff's claim, and a compliance with this section creating a lien on real estate in an action on account annexed, to charge the defendant "to one year's damage for flowage of intervale on my home lot, etc. from etc. to etc., agreed price." Coffin v. Freeman, 84 Me. 535, 24 A. 986.

Demand for a certain "amount" or "balance" due is not sufficient.—When an action is brought upon an account annexed to the writ, something more is required under the provisions of this section than a statement that there is a certain "amount" or "balance" due to the plaintiff. Bartlett v. Ware, 74 Me. 292.

No valid attachment of real estate can be made upon a writ containing no other description of the plaintiff's demand than the words, "To balance due on account and interest, $1500," nor upon a writ which specifies, "To amount due on account, $797.92. Interest, $75.00," with an additional allegation that under the money count the plaintiff would claim to recover the "balance" due on account. These specifications are insufficient. Belfast Savings Bank v. Kennebec Land & Lumber Co., 73 Me. 404.

Where the only count in the writ was upon an account annexed, which contained the following items: "Balance as per settlement, 2123.54 ... Mdse as per bill, 7.75 ... Mdse as per bill, 39.75"; it was held that the nature and amount of the plaintiff's demands were not sufficiently set forth to justify and sustain an attachment of real estate. Bartlett v. Ware, 74 Me. 292.

Where, in an action upon an account annexed, the only item in the account annexed was, "to groceries as per bill of particulars rendered, $28.52," the declaration was held bad on demurrer. Bartlett v. Ware, 74 Me. 292.

On a real estate attachment made on a writ in which the account annexed recites: "To groceries and provisions for the month of June, 1920, $34.74," no lien under the provisions of this section is created. Crockett v. Borgerson, 129 Me. 395, 152 A. 407.

And attachment on such demand is invalid as against prior conveyance.—Under this section an attachment of real estate, in a suit wherein the declaration contained only a common money count and a count upon an account annexed, which account merely charged balance due on an account and interest, is invalid as against a prior

conveyance, although the party claiming under the levy offered to prove that the said conveyance was fraudulent and void. Saco v. Hopkinton, 29 Me. 268.

Nor is statement of ad damnum, instead of sum sued for, sufficient. — If an officer attaching real estate files in the office of the register of deeds a statement of the ad damnum, instead of the sum sued for, it is not a sufficient compliance with this section, and no lien is thereby created. Nash v. Whitney, 39 Me. 341.

But specifications will be held sufficient where judgment legally rendered thereon. —The specifications will not be held insufficient as against a subsequent purchaser where a judgment has been regularly obtained, unless it appears certain that no judgment could be legally given on the money counts for the causes or claims stated in the specifications. Jordan v. Keen, 54 Me. 417.

Specifications required under section entirely distinct from similar provision of c. 178, § 36.—The provisions of this section making certain specifications necessary to create a lien by attachment are entirely distinct from the requirements of c. 178, § 36 respecting the statement of account necessary to preserve a lien already acquired. The operation of the one is radically different from that of the other. The underlying principle of the mechanic's lien is that of consent or contract. The process of acquiring a lien by attachment is wholly in invitum. They are separate and independent methods of procedure. Wescott v. Bunker, 83 Me. 499, 22 A. 388.

III. ATTESTED COPY OF RETURN.

Filing of attested copy of return is condition precedent.—This section is mandatory. The return filed in the registry is to be the foundation on which the attachment rests. It is in terms made a condition precedent to the validity of the attachment. Dutton v. Simmons, 65 Me. 583.

And unless filed, property is not held.— The language of this section does not require that the officer should personally carry the copy of his return on the writ to the register's office; but it must be lodged there, or the property returned upon the writ, if real estate, is not held by the attachment. Kendall v. Irving, 42 Me. 339.

Officer's return and attested copy should show compliance with section. — The officer should not merely comply with the statute relating to attachments, but his return, and the attested copy thereof, should show that he has so complied. The writ commands the officer to return his doings thereon. Carleton v. Ryerson, 59 Me. 438.

Otherwise no attachment created. — Under this section the officer must return such an attachment as will create a lien. But a return, which does not show a compliance with the essential requirements of the statute relating to attachments, creates none. Carleton v. Ryerson, 59 Me. 438.

And validity of return determined by facts at time made.—The return of the officer is not a part of the writ; it is outside of it and must be valid or invalid according to the facts existing at the time it is made. Drew v. Alfred Bank, 55 Me. 450.

Unattested copy of return filed is not compliance. — A simple copy of so much of the officer's return on the writ as relates to the attachment, without being attested, is not a compliance with this section, so as to create a valid attachment against subsequent purchasers. Farrin v. Rowse, 52 Me. 409.

The return should set forth that the "attested copy" was left as this section prescribes. The attachment is not fully completed until that is done. Carleton v. Ryerson, 59 Me. 438; Dutton v. Simmons, 65 Me. 583.

As well as the time thereof. — The return should show when the attested copy required by this section was left, but if it fails to show that specifically, the court will allow an amendment. Carleton v. Ryerson, 59 Me. 438.

The return and copy filed are, respectively, evidence and public notice of attachment. — The officer's return upon the writ is the only evidence of a valid attachment of real estate; and the return required to be made to the registry of deeds and its recordation are notice of the attachment to the public. Bessey v. Vose, 73 Me. 217.

Return cannot generally be amended to affect intervening purchasers. — The officer's return of an attachment of real estate, or of a levy upon it, cannot be amended to affect the title of an intervening purchaser for full value, unless there is sufficient appearing by the return to give third parties notice that all the requirements of law have probably been complied with. Bessey v. Vose, 73 Me. 217.

The officer's certificate to the registry of deeds is admissible in evidence to contradict his return upon the writ. Dutton v. Simmons, 65 Me. 583.

And to show no lien created, but not to prove attachment.—The officer's return to the registry may be admitted to impeach his return upon the writ, by showing that

the return to the registry is not a copy of the return of attachment upon the writ, and that therefore no lien was created, but it cannot be admitted as evidence of a valid attachment. That can only be shown by the return upon the writ. Bessey v. Vose, 73 Me. 217.

For the return upon the writ is not always conclusive of facts therein stated. —The officer's return upon the writ, that he has duly made to the register of deeds the certificate as required by law, is not always conclusive evidence of the facts therein stated, and his return may be contradicted and controlled by the production of the certificate itself. Dutton v. Simmons, 65 Me. 583.

But the return cannot control the copy filed. — Though as a general rule the return of a sheriff on a process, except in relation to himself when sued, is absolutely conclusive, his return on the writ cannot control the certificate made and filed by him in the registry of deeds. Dutton v. Simmons, 65 Me. 583.

Statement of sum sued for, instead of "value of defendant's property," not sufficient. — A statement filed by the officer of the sum sued for, instead of "the value of the defendant's property," which the officer is commanded to attach, is not a compliance with this section. Farrin v. Rowse, 52 Me. 409.

Section requires merely "names of the parties."—This section does not require any statement of the capacity in which the parties named in the certificate of the attaching officer sue or are sued. It merely requires the "names of the parties." C. A. Weston Co. v. Colby, 107 Me. 104, 77 A. 637.

But misdescription of parties may avoid attachment.—The certificate by an officer to the register of deeds of an attachment of the real estate of Henry "M." Smith, when the name of the defendant in the writ is Henry "F." Smith, is such a misdescription of the person sued as will render the attachment void. Dutton v. Simmons, 65 Me. 583.

The certificate by an officer to the register of deeds of an attachment of the real estate of Augusta Moulton, is not a sufficient compliance with this section to create a valid lien upon the real estate of Augustus Moulton, when the register is thereby misled, and the only attachment appearing of record is of the real estate of Augusta Moulton. Shaw v. O'Brion, 69 Me. 501.

A certificate that describes the parties as "R. G. Smith v. John B. Jones et als.," sufficiently states the names of the parties to give notice of the attachment of the property of Jones, but it is not sufficient in regard to the property of other defendants. Lincoln v. Strickland, 51 Me. 321.

Naming of court required as notice to third persons. — The object of the provision of this section requiring to be named the court to which the writ is returnable is not to give the parties notice of the suit, but to give third persons notice of the attachment, and furnish them the means of ascertaining its continuance or termination. Lincoln v. Strickland, 51 Me. 321.

And substantial compliance with requirement is sufficient. — A certificate stating: "Court and term to which the writ is returnable. S. J. C., August term, Kennebec court, 1856," is a substantial compliance with the provision of this section which requires the certificate to contain the name of "the court to which (the writ) is returnable." Lincoln v. Strickland, 51 Me. 321.

Sec. 64. Action not effectual against person not party thereto, until attachment made and recorded.—No action commenced, either by original writ or bill in equity inserted in a writ of attachment, in which the title to real estate is involved, is effectual against any person not a party thereto or having actual notice thereof until an attachment of such real estate is duly made and recorded in the registry of deeds in and for the county or district in which such real estate is situated, in the same manner as attachments of real estate in other cases are now recorded. (R. S. c. 99, § 64.)

Cited in Snow v. Russell, 94 Me. 322, 47 A. 536.

Sec. 65. When right of redemption or to a deed by contract attached, the creditor may redeem or pay.—When a right to redeem real estate under mortgage, levy, sale on execution or for taxes or a right to a conveyance by contract is attached, the plaintiff in the suit, before or after sale on execution, may pay or tender to the person entitled thereto the amount required to discharge such encumbrance or fulfill such contract; and thereby the title and

interest of such person vest in the plaintiff subject to the defendant's right to redeem; but such redemption by the defendant or any person claiming under him by a title subsequent to the attachment shall not affect such attachment, but it shall continue in force and the prior encumbrance as against it shall be deemed discharged. (R. S. c. 99, § 65.)

Attaching creditor, holding release from mortgagee, may maintain writ of entry against owner.—One who has paid to the mortgagee the amount due upon a mortgage of real estate, claiming to have attached the right to redeem, and received the release of the mortgagee's interest therein, as provided by this section and § 66, may maintain a writ of entry for possession against the owner of the equity or redemption. Hammond v. Reynolds, 72 Me. 513.

Applied in New England Wiring & Construction Co. v. Farmington Elec. Light & Power Co., 84 Me. 284, 24 A. 848.

Sec. 66. Mortgagee or contractor to state, on demand, sum due; on payment, to release his interest in premises. — Such person, on written demand, shall give the plaintiff a true written statement of the amount due him; and on payment or tender thereof shall release all his interest in the premises; and if he refuses, he may be compelled to do so by a bill in equity. Such release shall recite that under authority of this and the preceding section, the plaintiff had attached the premises and paid or tendered the amount due the grantor; the plaintiff shall thereupon hold such title in trust for the defendant, and subject to his right of redemption, without power of alienation until after 1 year from the termination of said suit, or from the sale of the equity on any execution recovered therein. (R. S. c. 99, § 66.)

Applied in Hammond v. Reynolds, 72 Me. 513; New England Wiring & Construction Co. v. Farmington Elec. Light & Power Co., 84 Me. 284, 24 A. 848.

Property Exempt from Attachment and Execution.

Cross Reference.—See c. 22, § 81, re financial responsibility law.

Sec. 67. Personal property.—The following personal property is exempt from attachment and execution:

I. The debtor's apparel; household furniture necessary for himself, wife and children, not exceeding $200 in value, and 1 bed, bedstead and necessary bedding for every 2 such persons.

Meaning of apparel. — Apparel means dress, clothing, vestments, garments; but a garment wholly or partially in pieces for repair or alteration would be included in the term, as would also cloth in the process of manufacture when such cloth has assumed a form and shape to fit the body of a particular person. Ordway v. Wilbur, 16 Me. 263.

II. All family portraits, Bibles and schoolbooks in actual use in the family; 1 copy of the statutes of the state, a library not exceeding $150 in value, a watch not exceeding $10 in value and a wedding ring or engagement ring not exceeding $10 in value.

III. All his interest in 1 pew in a meetinghouse where he and his family statedly worship.

IV. One cooking stove; all iron stoves used exclusively for warming buildings; charcoal, and not exceeding 12 cords of wood conveyed to his house for the use of himself and family; all anthracite coal, not exceeding 5 tons; all bituminous coal, not exceeding 50 bushels; and $50 worth of lumber, wood or bark.

V. All produce of farms until harvested; 1 barrel of flour; 50 bushels of oats; 50 barrels of potatoes; corn and grain necessary for himself and family, not exceeding 30 bushels; all other provisions raised or bought and necessary

for himself and family; and all flax raised on a half acre of land and all articles manufactured therefrom for the use of himself and family.

Purpose and scope of subsection.—The obvious purpose of the exemption contained in this subsection is to prevent the taking from the debtor of those articles which he has provided, and which are suitable as food for himself and family; and not to extend the exemption to those species of grain which may by sales or exchanges indirectly contribute to the same end, when by their nature and the general custom of the community in which the debtor lives, they are unsuitable to be used in the making of bread, and are not so designed by the owner. Hence, to entitle the debtor to the exemption, the corn and the grain in themselves must be necessary for the object expressed. Blake v. Baker, 41 Me. 78.

Exemption not applicable to one not requiring grain as food.—If the debtor is unmarried, or has no family depending upon him for support, but is a boarder, or in such a situation that he can have no design to use corn or grain as food for himself or his family, these articles do not become necessary for the sustenance of himself and his family, and are not exempt. Blake v. Baker, 41 Me. 78.

VI. The tools necessary for his trade or occupation, materials and stock designed and procured by him and necessary for carrying on his trade or business and intended to be used or wrought therein, not exceeding $100 in value, and 1 sewing machine and 1 washing machine not exceeding $100 each in value for actual use by himself or family; the musical instruments used by him in his profession as a professional musician, not exceeding $200 in value.

"Tool" restricted to its popular meaning.—No property will be considered as exempt or intended to be, as a tool, under this subsection, which in popular language is not and cannot be designated or described by the use of that word. Knox v. Chadbourne, 28 Me. 160.

This section does not exempt machines. Articles correctly designated by the use of that term in popular language are not intended to be included in the exemption of "tools" of a debtor. Knox v. Chadbourne, 28 Me. 160.

Nor farm implements used by debtor to cultivate soil beyond necessity.—While this subsection might cover a hoe, a rake, a scythe and other articles of husbandry, essential to the operation of the farm, to the extent of enabling the husbandman to procure a living for himself and family, it was never intended that its meaning should be so expanded as to include the implements or machinery by means of which the farmer might be able to cultivate the soil beyond the necessities of himself and family. Martin v. Buswell, 108 Me. 263, 80 A. 828. See sub-§ IX, re farm implements exempt.

A mill saw was held not to be a tool, exempted from attachment under this subsection, for it is not an instrument worked by hand, or by muscular power. Batchelder v. Shapleigh, 10 Me. 135.

VII. One pair of working cattle, or instead thereof 1 pair of mules or 1 or 2 horses not exceeding in value $400, and a sufficient quantity of hay to keep them through the season. If he has more than 1 pair of working cattle or mules, or if the 2 horses exceed in value $400, he may elect which pair of cattle or mules or which horse shall be exempt. If he has a pair of mules or 1 or 2 horses so exempt, he may also have exempt for each of said horses or mules, 1 harness not exceeding $40 in value; and 1 horse sled not exceeding the same value; but if he has at the same time an ox sled, he may elect which sled shall be exempt.

Subsection intended to enable debtor to retain means of livelihood.—The legislature did not so much design this subsection to encourage the growth of horses, as it did to enable the poor debtor to obtain and retain the means of an honest livelihood; and, at his option, to substitute horse power for that of oxen, to be confined to the farm, rather than to the race course. Hughes v. Farrar, 45 Me. 72.

He may claim exemption of a colt.—The exemption is for the benefit of the debtor. If not able to own a pair of oxen or a horse or horses of the statutory value, a debtor may claim exemption of a colt under this subsection. Kennedy v. Bradbury, 55 Me. 107.

And he may elect to hold either cattle or horses.—The debtor cannot hold the cattle and the horse or horses mentioned in this subsection, but he may hold either of them exempt from attachment if he owns both.

The one may be more valuable or desirable to the debtor than the other, and it would be contrary to the policy of the law to allow the creditor to deprive him of the right to choice. The exemption is for the benefit of the debtor, and the right of election is in him. Colson v. Wilson, 58 Me. 416.

But the choice must be signified at time of attachment.—If the debtor would avail himself of his right of choice to retain either working cattle or horses, he must signify his wishes to the officer, when the attachment is made, if he has the opportunity to do so; otherwise he will be deemed to have waived his right to hold the property exempt from attachment and execution. Colson v. Wilson, 58 Me. 416.

Exemption applies to one horse not exceeding $400, or 2 horses not exceeding $400.—The clause of this section pertaining to the value of horses exempted means, in effect, one horse not exceeding in value $400, or two horses not exceeding in value the same sum. Hughes v. Farrar, 45 Me. 72; Everett v. Herrin, 46 Me. 357.

And horse of greater value not exempted.—A horse of the value of $450, the property of a debtor, who owns at the same time no working cattle or other horse, is not exempted from attachment and execution under this subsection. Hughes v. Farrer, 45 Me. 72.

An insolvent debtor cannot claim as exempt a yoke of oxen sold the day before the commencement of insolvency proceedings. Nason v. Hobbs, 75 Me. 396.

Trespass cannot be maintained by merely proving attachment. — A debtor cannot maintain trespass against an officer for attaching his horse by simply proving the attachment, and omitting to show any facts tending to prove it was exempt under this subsection. Daniels v. Marr, 75 Me. 397.

VIII. Domestic fowl not exceeding $100 in value, 2 swine, 1 cow and 1 heifer under 3 years old and the calves raised from them until they are 1 year old, or if he has no oxen, horse or mule, 2 cows, and he may elect the cows or cow and heifer, if he has more than are exempt, 10 sheep and the wool from them and the lambs raised from them until they are 1 year old, and a sufficient quantity of hay to keep said cattle, sheep and lambs through the winter season.

Hay is not exempted for the use of sheep, unless at the time of the attachment the debtor has the sheep. Foss v. Stewart, 14 Me. 312.

When a cow is by law exempt from attachment, it has been held that a heifer, if the owner has no cow, is exempt from attachment. Kennedy v. Bradbury, 55 Me. 107.

Former provision of subsection.—For a case relating to a former provision of this subsection providing for exemption of "thirty hundred of hay for the use of said cow," and "two tons for the use of said sheep," see Kennedy v. Philbrick, 38 Me. 135.

IX. One plough, 1 cart or truck wagon or 1 express wagon, 1 harrow, 1 yoke with bows, ring and staple, 2 chains, 1 ox sled and 1 mowing machine, 1 corn planter, 1 potato planter, 1 cultivator, 1 horse hoe, 1 horse rake, 1 sprayer or duster, 1 grain harvester and 1 potato digger.

History of subsection.—See Smith v. Chase, 71 Me. 164.

Meaning of "express wagon."—An express wagon is a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles; and one that may conveniently be used for such purpose is within the exemption. Whether a particular vehicle falls within this description is a question of fact for the jury. Walker v. Carkin, 88 Me. 302, 34 A. 29.

Peddler's wagon not exempted.—A peddler's wagon designed to be used in trade from place to place is not a vehicle which is exempted from attachment and execution under this subsection. Smith v. Chase, 71 Me. 164.

X. One boat not exceeding 2 tons burden, usually employed in fishing business, belonging wholly to an inhabitant of the state.

XI. The personal property of any copartnership shall be exempt from attachment of mesne process or seizure on execution for any individual debt or liability of such copartner, but such copartner's interest in the partnership

property may be reached and applied in payment of any judgment against him in the manner provided for in section 7 of chapter 107. (R. S. c. 99, § 67.)

Cross references. — See additional exemptions: c. 14, § 44, re outfit furnished members of active militia and officers; c. 31, § 24, re claims under "Workmen's Compensation Act;" c. 58, § 20, re shares of stock in cemetery corporations; c. 59, § 161, re 2 shares of stock in loan and building associations; c. 60, §§ 159, 232, re life and accident policies and money due thereon; c. 60, § 187, re money due from policies in fraternal beneficiary associations; c. 64, § 18, re state employees' and teachers' retirement; c. 100, § 42, re personal baggage while held under innkeeper's lien.

Section contemplates debtor as individual.—Joint debtors are not within the letter of this section. The property, therefore, which is exempt, must be owned in severalty and not jointly. The language of this section, specifying the property exempted is predicated upon the idea that the beneficiary is an individual. Exemption therein provided is recognized as the privilege of an individual and not of a firm or other joint association or corporation. Thurlow v. Warren, 82 Me. 164, 19 A. 158.

The statute of exemption is to be construed with reference to the situation and vocation of the owners of property. A merchant cannot claim farm implements to be exempt, any more than he could a boat which he had no occasion to use as a fisherman, or corn or grain for himself and family when he was unmarried and had no family and was a boarder; or hay for cows and sheep when he had neither. Files v. Stevens, 84 Me. 84, 24 A. 584.

Section intended to prevent depriving debtors of simple means of livelihood in their vocations.—The evident object of this section is not that anyone may own and claim to be exempted all the various kinds of chattels therein enumerated, but that persons should not be deprived of the simple means by which they gained a livelihood in their respective vocations. Files v. Stevens, 84 Me. 84, 24 A. 584; Walker v. Carkin, 88 Me. 302, 34 A. 29.

But not for conducting extensive operations.—This section aims to place beyond the reach of creditors sufficient of nearly everything to enable the debtor to obtain a livelihood for himself and family, but beyond this the statute did not intend to go. It did not contemplate as "necessary articles" those which enable the cultivation of 25 acres of one crop. It is not intended that the debtor shall be protected in carrying on extensive farming operations or an extensive trade, with a large capital in tools, while his creditors may be suffering for the money justly due them. Martin v. Buswell, 108 Me. 263, 80 A. 828.

Exemptions available to noncitizen debtor.—A debtor, though not a citizen of this state, is entitled to avail himself of the provisions of our law exempting property from attachment. This section does not limit the exemption to the property of a citizen, except in the single case of a fishing boat. Everett v. Herrin, 46 Me. 357.

Debtor may waive exemptions. — A debtor may always waive his privilege under this section and consent that his exempted property may be applied to the payment of his debts; and it is not necessary that such waiver should be expressed in words. It may be made by acts or by neglect to act. Jensen v. Cannell, 106 Me. 445, 76 A. 914.

Objection that property is exempt not available by demurrer.—An objection that the attachment of property, by which to that extent jurisdiction is gained, the defendants residing out of the state, is of property exempt under this section, cannot be taken advantage of by demurrer. Such demurrer must be deemed frivolous. Mitchell v. Sutherland, 74 Me. 100.

If an officer attaches property not liable to attachment under this section, he is a trespasser. Foss v. Stewart, 14 Me. 312.

But to hold him liable, plaintiff must show property exempt at time of original attachment.—In an action against an officer for attaching property exempted under this section, the burden of proof is upon the plaintiff, not only to show that the property was by law exempt from attachment, but that it was so exempt when the original attachment was made. Greaton v. Pike, 34 Me. 233.

Applied in Wentworth v. Sawyer, 76 Me. 434.

Quoted in Martin v. Buswell, 108 Me. 263, 80 A. 828.

Homesteads.

Sec. 68. Homestead.—A lot of land and dwelling house and outbuildings thereon, the property of a householder in actual possession thereof and not

the owner of an exempted lot purchased from the state, is exempt from attachment and levy on execution as provided in the following sections. (R. S. c. 99, § 68.)

Cross reference.—See § 71, re lien of mechanics, etc.

Exempted property not subject to fraudulent alienation.—Such property of a debtor as by positive statutory provision is exempted from attachment or seizure for the owner's debts, is not susceptible of fraudulent alienation; for no creditor can, in legal contemplation, be defrauded by his debtor's conveyance of property, which is not amenable to any civil process in behalf of such creditor. Pulsifer v. Waterman, 73 Me. 233.

Sec. 69. Exemption; claim recorded. — The person described in section 68 may file in the registry of deeds in the county or district where the land lies a certificate signed by him, declaring his wish for such exemption and describing the land and buildings; and the register shall record it in a suitable book; and so much of such property as does not exceed $1,000 in value is exempt from attachment or levy on execution issued on a judgment recovered for any debt, contracted jointly or severally by such person after the date of the recording thereof; and the record in the register's office is prima facie evidence that the certificate purporting to be there recorded was made, signed and filed as there appears. (R. S. c. 99, § 69.)

The record required by this section is for the protection of the public, and the certificate should express clearly the exemption claimed. Lawton v. Bruce, 39 Me. 484.

Filing of certificate essential to exemption.—By this section it is apparent that all wishing to avail themselves of the provisions of § 68 must file their certificates, and that unless this is done, they cannot claim the exemptions thereby allowed. Lawton v. Bruce, 39 Me. 484.

Exempted property remains liable for debts incurred before recording. — The property exempted under § 68 remains liable to seizure or levy on executions issued on judgments recovered on debts contracted before the date of the recording. Creditors prior to the recording are thus protected. Mills v. Spaulding, 50 Me. 57.

And for interest and costs on a judgment after recordation.—If the debtor so long neglects to pay a judgment recovered on a debt incurred before the exemption provided under § 68 is recorded that no execution can be issued, and a suit is brought on that judgment, the execution that afterwards issues may be levied on the premises, notwithstanding it includes interest and costs that have accrued after the recording of the certificate of exemption. Mills v. Spaulding, 50 Me. 57.

Sec. 70. When creditor claims homestead worth more than $1,000. —When such property is claimed by a creditor to be of greater value than $1,000, it may be seized on execution and the appraisers shall first set off such part thereof as the debtor may select, and if he neglects to do so, the officer may select for him, to such value, by metes and bounds; and they shall then appraise and set off to the creditor so much of the remainder as may be necessary to satisfy the execution; the appraisers shall be sworn accordingly and the officer shall make return of his doings thereon. (R. S. c. 99, § 70.)

Sec. 71. Widow and children may occupy during widowhood and minority; not exempt from mechanics' lien.—After his death, the exempted premises shall not be sold for payment of his debts during the widowhood of his widow or the minority of any of his children; but may be occupied by his widow during her widowhood and by his children during minority, free from claim by any creditor of his estate. This and the 3 preceding sections do not exempt such property from the lien of mechanics or material men. (R. S. c. 99, § 71.)

Dissolution of Attachments.

Sec. 72. Attachment continues for 30 days after judgment; ex-

piration of real estate attachment. — An attachment of real or personal estate continues for 30 days and no longer after final judgment in the original suit, and not in review or error; except attachments of real estate taken on execution; or equities of redemption sold on execution; or an obligee's conditional right to a conveyance of real estate sold on execution; or property attached and replevied; or property attached belonging to a person dying thereafter, or specially provided for in any other case; but an attachment of real estate shall expire at the end of 5 years from the date of filing the same in the office of the register of deeds in the county or district where the said real estate or some part of it is situated, unless the said register shall, within said period, at the request of the plaintiff or his attorney bring forward the same upon the book of attachments, and at the expiration of 5 years from the time of such first or any subsequent bringing forward, such attachment shall expire unless within said period it is again brought forward in like manner. The register shall be entitled to the same fee for bringing forward such attachment upon the said book of attachments as for the original entry thereof. (R. S. c. 99, § 72.)

Cross references.—See § 55, et seq., re effect of death of party; c. 113, § 5, re continuance of attachment on original writ; c. 113, § 179, re hearing on costs; c. 114, § 73, re liability to second attachment; c. 125, § 16, re continuance of attachment if goods are replevied; c. 171, § 40, re redemption of real estate, etc.

Officer absolved of liability if no demand for goods made within 30 days after judgment.—Where goods were attached by an officer on mesne process and no demand was made upon him for the property attached within thirty days after judgment, the officer was held thereby to be discharged from any liability to the judgment creditor by reason of such attachment. Norris v. Bridgham, 14 Me. 429.

Applied in Wheeler v. Fish, 12 Me. 241; Brown v. Allen, 92 Me. 378, 42 A. 793.

Quoted in part in Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

Stated in Holmes v. Fernald, 7 Me. 232; Norris v. Bridgham, 14 Me. 429; McInnes v. McKay, 127 Me. 110, 141 A. 699.

Cited in Humphreys v. Cobb, 22 Me. 380.

Sec. 73. Attachments dissolved. — All attachments of real or personal estate are dissolved by final judgment for the defendant; by a decree of insolvency on his estate before a levy or sale on execution; by insolvency proceedings commenced within 4 months as provided in the insolvency law; by a reference of the suit and all demands between the parties thereto by a rule of court and judgment on the report of the referees; and by an amendment of the declaration, by consent of parties, so as to embrace a larger demand than it originally did, and judgment for the plaintiff thereon, unless the record shows that no claims were allowed the plaintiff not originally stated in the writ. (R. S. c. 99, § 73.)

Cross references.—See § 55, et seq., re effect of death of party; c. 171, § 39, re certain mortgages not to be transferred.

Section restricted to general attachments creating liens.—The provision in this section relating to dissolution of attachments is restricted to general attachments by which liens are created. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

It is not construed to destroy equities of mechanic's lien.—With respect to the dissolution of attachments under this section, it is to be observed that the assignees in insolvency take the property subject to the strong equities attaching to a mechanic's lien, the security of which is in no way obnoxious to the policy of the insolvent law; and the insolvent statute should not be construed to destroy those equities by dissolving the lien. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

And attachment to enforce such lien not dissolved by insolvency proceedings.—The enforcement of a mechanic's lien is not obnoxious to the policy of the insolvent law although the attachment may be within four months of the filing of the petition in insolvency; and an attachment made to enforce the lien is not dissolved by proceedings in insolvency. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

For equities of mechanic's lien are stronger than those of ordinary attachment on mesne process.—There is an obvious distinction between the lien which a mechanic acquires under statutory provisions by furnishing labor and materials in the erection of a building and a general

lien created by the ordinary attachment on mesne process. In the latter case, an attaching creditor has no claim for preference over other creditors except by his attachment; whereas, when a mechanic obtains a statutory lien, and relying thereon, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement. Laughlin v. Reed, 89 Me. 226, 36 A. 131.

The issuing of a decree of insolvency may be shown to dissolve an attachment. Willard v. Whitney, 49 Me. 235.

Notwithstanding the property was sold by assignee in bankruptcy subject to attachment.—Where an attachment of real estate was made, and more than four months after the attachment the defendant filed his petition in bankruptcy, subsequently receiving his discharge, and thereafter died; it was held that notwithstanding the fact that the real estate attached upon the writ had passed to the defendant's assignee in bankruptcy, and had been sold by him, subject to the attachment, the attachment had been dissolved, according to the express provisions of this section, by a decree of insolvency on the estate of the defendant before a levy or sale on execution. Belfast Savings Bank v. Lancey, 93 Me. 422, 45 A. 523.

And an attachment made after a representation of insolvency would be illegal; a writ which commands such an unlawful act is bad in form. Thayer v. Comstock, 39 Me. 140.

But attachment not dissolved by filing of petition later than 4 months thereafter. —An attachment of real estate under this section is not dissolved by the filing of a petition in bankruptcy later than 4 months after such attachment. Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 A. 1039.

And execution may be levied on intestate's estate where administrator failed to suggest insolvency.—If the administrator of an estate, decreed insolvent, assumes the defense of an action pending against his intestate, and neglects to suggest the insolvency upon the record, the execution, regularly issued upon the judgment recovered against the administrator, may be levied on the real estate of the intestate, though it has been fraudulently conveyed by him. Wyman v. Fox, 59 Me. 100.

Levy pursuant to judgment for damages exceeding the ad damnum dates from levy, and not from attachment. — A levy upon real estate, made by virtue of an execution issued upon a judgment, wherein the debt or damage recovered exceeds the amount of the ad damnum, dates from the time of the levy, and does not relate back to the time of the attachment. Such a levy is effectual to pass the debtor's title to the creditor and his assigns. Morse v. Sleeper, 58 Me. 329.

Applied in Mooney v. Kavanagh, 4 Me. 277; Clark v. Foxcroft, 7 Me. 348; Ridlon v. Cressey, 65 Me. 128; Pulsifer v. Waterman, 73 Me. 233.

Cited in Bachelder v. Perley, 53 Me. 414; Wyman v. Fox, 55 Me. 523; Leighton v. Kelsey, 57 Me. 85.

Sec. 74. Certificate of dissolution of attachment. — When an attachment is dissolved by judgment for the defendant, or if the writ upon which the attachment is made is not entered in the court to which it was returnable within the first 5 days of the return term, the clerk of the court shall give any person applying therefor a certificate of that fact, which the register of deeds shall note on the margin of the record of the attachment. The said clerk of courts may charge a fee of 50¢ for such certificate. Before or after the entry of said writ in said court, or before or after judgment thereon, or if said writ is not entered in court, the plaintiff or his attorney in such suit may discharge the attachment in writing on the margin of the record thereof, or said plaintiff or said attorney may give a certificate, signed, sealed and acknowledged by him that said attachment is in whole or in part discharged, which the register of deeds shall record with a reference thereto on the margin of the records of attachments. The register of deeds shall note the record of said discharge on the margin of the records of attachments within an hour of the delivery to him of either of the aforesaid certificates. Such attachments may be discharged on the record thereof in the registry of deeds by an attorney at law authorized in writing by the plaintiff in said suit; provided, however, that said writing is first recorded or filed in said registry of deeds with a reference thereto made by said

register of deeds on the margin of the record of the attachment. (R. S. c. 99, § 74.)

Section provides for record of dissolution of attachment.—The object of this section is, when an attachment is dissolved, to provide in certain cases for a record of such fact. Benson v. Carr, 73 Me. 76.

The purpose of this section is not to restrict or annul the general authority of the attorney to release an attachment of real or personal estate before judgment. Benson v. Carr, 73 Me. 76.

Applied in Sprague v. A. & W. Sprague Mfg. Co., 76 Me. 417.

Sec. 75. Real estate attachment discharged of record when dissolved. — When an attachment of real estate is made in any action and the writ is not entered in court, or when any attachment of real estate is dissolved by lapse of time or failure to levy upon the judgment debt within the time prescribed by law to preserve said attachment and the said attachment then remains undischarged upon the records of the registry of deeds, the plaintiff upon the demand of the defendant shall either cause the said attachment to be discharged upon the records of the registry of deeds or give a certificate, signed, sealed and acknowledged by him that said attachment is discharged, when said certificate is prepared and presented to the plaintiff by the defendant, which said certificate the register of deeds shall record with reference thereto on the margin of the record of said attachment. (R. S. c. 99, § 75.)

Sec. 76. Plaintiff fails or refuses to discharge attachment.—If the plaintiff shall upon demand unreasonably delay or refuse to discharge the said attachment as prescribed in section 75, then a bill in equity against the said plaintiff may be filed by the defendant in the county in which the attachment of said real estate has been made; upon said bill, such notice shall be given as may be ordered in term time or in vacation, and upon proof thereof such proceedings may be had according to the usual course of suits in equity, and said attachment shall be discharged by a decree of court duly filed in the registry of deeds, which the register of deeds shall record with reference thereto on the margin of the record of said attachment. (R. S. c. 99, § 76.)

Sec. 77. Debtor may petition for a valuation and release. — Any defendant, whose interest in real estate is attached on mesne process, may petition a justice of the superior court in term time or vacation, setting forth the names of the parties to the suit, the court and county in which it is returnable or pending, the fact of the attachment, the particular real estate and his interest therein, its value and his desire to have it released from the attachment. Such justice shall issue a written notice which shall be served on all parties to the suit living in the state, including trustees mentioned in section 82, and on the plaintiff's attorney, 10 days at least before the time fixed therein for a hearing. (R. S. c. 99, § 77.)

Sec. 78. Valuation and release on bond of debtor.—If, at the hearing, such justice finds that such interest is worth as much as the amount ordered in the writ to be attached, he shall order such defendant to give bond to the plaintiff, with sufficient sureties, conditioned to pay the judgment recovered by the plaintiff, with his costs on the petition, within 30 days after judgment, such bond, except as hereinafter provided, to be in an amount equal to the amount ordered in the writ to be attached; but, if he finds that such interest is worth less than the amount ordered in the writ to be attached, such bond, except as hereinafter provided, shall be in an amount equal to the value of such interest; provided, however, that if, in either event the justice shall find that the value of the interest attached is in excess of the amount of any judgment which the plaintiff may reasonably be expected to recover, with his costs on the petition, he may fix the amount of such bond at such sum, not exceeding the

amount ordered to be attached and not exceeding the value of the interest attached, as he may deem adequate to protect the plaintiff in the collection of any judgment recovered by him, with his costs on the petition. (R. S. c. 99, § 78.)

Sec. 79. Proceedings and bond filed in clerk's office. — The petition and proceedings thereon shall be filed in the clerk's office in the county where the action is pending or returnable and recorded as a part of the case; and the bond, when approved by such justice, shall also be filed therein for the use of the plaintiff. (R. S. c. 99, § 79.)

Sec. 80. Certificate of proceedings from clerk recorded.—The clerk shall give the petitioner an attested copy of the petition and proceedings with a certificate under seal of the court attached thereto, that such bond has been duly filed in his office; and the recording of such copy and certificate in the registry of deeds in the county where such real estate or interest therein lies vacates the attachment. (R. S. c. 99, § 80.)

Sec. 81. Same proceedings vacate attachment of personal property.—When personal property is attached, the same proceedings may be had as provided in the 4 preceding sections and the officer shall also be notified of the hearing; and the delivery to him of the copy and certificate mentioned in the preceding section vacates the attachment and he shall return the property to the petitioner on demand. When the property attached is stock in a banking or other corporation or is such that the attachment must be recorded in the town clerk's office, such copy and certificate shall be filed with the officer of such corporation, who shall be entitled to 20¢ for filing the same and necessary certificate thereof, or with the town clerk with whom the attachment is filed; and thereby the attachment is vacated. (R. S. c. 99, § 81.)

Sec. 82. Foreign attachments vacated by same proceedings. — In cases of foreign attachment, the same proceedings originated by any principal defendant may be had, except that the bond to the plaintiff shall be conditioned to pay the amount, if any, which he may finally recover against the trustees, with costs on the petition, within 30 days after judgment, not exceeding the amount of the judgment against the principal defendant. The justice shall also require the petitioner to give bond to each trustee named in the petition, with sureties, in a sum sufficient to protect him against any judgment recovered by the plaintiff and paid by him, and his legal costs in the suit, and the costs allowed him by such justice at the hearing on the petition, if he appears. Such bonds, when approved by such justice, shall be filed in the clerk's office for the use of the trustees. The delivery of the copy and certificate hereinbefore mentioned to the trustees vacates the attachment of any goods, effects or credits in their hands belonging to the petitioner. (R. S. c. 99, § 82.)

Sec. 83. Costs.—The party finally prevailing in the suit shall recover the costs of these proceedings, taxed as costs of court in other cases and certified by such justice, and execution shall issue therefor. (R. S. c. 99, § 83.)

Sec. 84. Attachment vacated on bond.—When real estate or personal property is attached on mesne process, and in all cases of attachment on trustee process, the attachment shall be vacated upon the defendant or someone in his behalf delivering to the officer who made such attachment, or to the plaintiff or his attorney, a bond to the plaintiff in a penal sum not exceeding the ad damnum of the writ, such bond to be approved as to penal sum and sureties by the plaintiff or his attorney, or by any justice or clerk of the superior court; conditioned that within 30 days after the rendition of the judgment, or after the adjournment of the court in which it is rendered or after the certificate of decision of the law court shall be received in the county where the cause is pending, he will pay to the plaintiff or his attorney of record the amount of said judg-

ment including costs; the bond shall be returned by the officer with the process, for the benefit of the plaintiff, and thereupon all liability of the officer to the plaintiff by reason of such attachment shall cease. Upon request, the plaintiff or his attorney shall give to the defendant a certificate acknowledging the discharge of such attachment, which may be recorded in the registry of deeds or town clerk's office, as the case may be, in which the return of the attachment is filed. If stock in any corporation is attached, such certificate shall be filed with the officer of the corporation with whom the return of such attachment is filed and he shall record the same. In trustee process the alleged trustee shall not be liable to the principal defendant for the goods, effects and credits in his hands or possession until such certificate shall be delivered to him, and upon receiving such certificate, he shall be discharged from further liability in said trustee action and need not disclose and shall not recover costs. (R. S. c. 99, § 84.)

Bond is new obligation and unaffected by bankruptcy of principal.—In an action of debt against the principal and sureties on a bond given under this section to release the attachment of personal property the bond is to be regarded as a new obligation and is unaffected by the bankruptcy of the principal. Marks v. Outlet Clothing Co., 122 Me. 406, 120 A. 427; Dunham Bros. Co. v. Colp, 125 Me. 211, 132 A. 388.

The rendition of judgment is a prerequisite to fixing liability of the sureties upon the bond, since the condition of the bond is that within thirty days after rendition of judgment the defendant will pay to the plaintiff the amount of judgment including costs. Dunham Bros. Co. v. Colp, 125 Me. 211, 132 A. 388.

To recover of officer, burden is on plaintiff to show negligence and damages.—In an action to recover damages of a sheriff for releasing personal property from attachment without first obtaining the bond prescribed by this section, the burden is on the plaintiff to show the negligent act and the damages suffered. Isenman v. Burnell, 125 Me. 57, 130 A. 868.

But proof of attachment, negligence, and amount of judgment makes prima facie case.—In an action to recover damages of a sheriff for releasing personal property from attachment without first obtaining the bond prescribed by this section, proof of property attached of sufficient value to satisfy the judgment when sold on execution, proof of the negligent act of the officer by which an attachment lien is lost, and proof of the amount of the judgment recovered on the writ make out a prima facie case and damages to the amount of the judgment. The burden is then on the officer to produce such evidence as may exist in mitigation of the damages. Isenman v. Burnell, 125 Me. 57, 130 A. 868.

And plaintiff need not demand goods of officer, knowing they have been released.—In an action against a sheriff for wrongful release of an attachment without his complying with this section, it would be a useless formality to require the plaintiff to demand the goods of the officer, knowing he had already released them. Isenman v. Burnell, 125 Me. 57, 130 A. 868.

Applied in Taylor v. Morgan & Co., 107 Me. 334, 78 A. 377; Bates St. Cigar & Confectionery Co. v. Howard Cigar Co., 137 Me. 51, 15 A. (2d) 190.

Cross Actions against Nonresidents.

Sec. 85. Cross actions and setoffs against nonresidents, service on attorneys.—When an action is brought by a person not an inhabitant of the state nor to be found therein to be served with process, he shall be held to answer to any action brought against him here by the defendant in the first action, if the demands in the 2 cases are of such a nature that the judgment or execution in one can be set off against the judgment or execution in the other; and if there are several defendants, each may bring such cross action, and set off his judgment against the judgment recovered against him and his codefendants, as if against him alone; and the service of the writs in such cross actions, made on the attorney of the plaintiff in the original suit, is as valid as if made on the party himself within the state. (R. S. c. 99, § 85.)

Courts of common law have an equitable jurisdiction in cases of setoff independent of statutory provision, practically coextensive with that of courts of equity, and op-

posite demands arising upon judgments may be, upon motion, set off against each other whenever such setoff is equitable. Collins v. Campbell, 97 Me. 23, 53 A. 837.

But mutuality is essential.—Mutuality is implied in the word "setoff," and is essential in every case dependent upon the discretion of the court, but it need not be a nominal mutuality indicated by the record, but real mutuality shown by the evidence. Collins v. Campbell, 97 Me. 23, 53 A. 837.

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

Section applies to cases where court or officer can effect setoffs.—It cannot be doubted that, whenever a setoff can be made by the court before which the actions are pending, or by the officer having executions, the creditor in one being the debtor in the other, "the demands are of such a nature" as to be within the provisions of this section. New Haven Copper Co. v. Brown, 46 Me. 418.

This section applies only where the parties are identical or where several defendants bring cross actions against a nonresident plaintiff, and does not authorize the setoff of a judgment to be recovered in an action of a firm against the judgment which a nonresident plaintiff may recover in his action against one of the partners. Collins v. Campbell, 97 Me. 23, 53 A. 837.

Where judgments were recovered at the same term, one in favor of A against B and sureties, and the other in favor of B against A; the court, on motion of B, setoff the one against the other. Prince v. Fuller, 34 Me. 122.

Court will sustain motion of setoff if others' rights do not intervene.—When two actions are in the same court at the same time, the plaintiffs in each being entitled to judgment, and the creditor in one is the debtor in the other, and a motion is made to the court to set off one judgment against the other; so far as one will extend towards the satisfaction of the other, the court will exercise the power to sustain such motion and make the setoff, if others' rights do not interfere. New Haven Copper Co. v. Brown, 46 Me. 418.

And ordinarily, setoffs may be allowed whenever the executions issued upon the judgments could be legally set off, one against the other, by the officer who may have them in his hands for service. New Haven Copper Co. v. Brown, 46 Me. 418.

Court may withhold judgment for a time in order to effect setoff.—To enable a party to have the benefit of the exercise of discretion in the court in setting off one judgment against another in cases then before the court, it has the power to withhold judgment until the defendant, if he will use due diligence, shall obtain his judgment for damages; after which, one judgment may be set off against the other, or one execution may balance the other. New Haven Copper Co. v. Brown, 46 Me. 418.

Officer shall set off executions held by him.—When an officer has in his hands executions, wherein the creditor in one is the debtor in the other in the same capacity and trust, he shall cause one execution to satisfy the other, so far as it will extend; if one of such executions is in the hands of the officer, and the creditor in the other tenders his execution to him, and requests him so to do, he shall so set off one against the other. New Haven Copper Co. v. Brown, 46 Me. 418.

Executions shall not be set off when one is assigned before the other becomes effective.—Executions shall not be set off against each other, when the sum due on one of them has been lawfully and in good faith assigned to another person before the creditor in the other execution became entitled to the sum due thereon. New Haven Copper Co. v. Brown, 46 Me. 418.

But burden is on assignee to show setoff inapplicable.—Before an assignee can successfully resist a setoff, it must appear that the assignment to him was before the debtor became entitled to the sum due to him in his action against the assignor. But to bring a case within the exception in favor of an assignee, the burden of proof is on him. New Haven Copper Co. v. Brown, 46 Me. 418.

Officer liable upon refusal to set off executions.—Where an officer held two executions, wherein the creditor in one was the debtor in the other, and refused to make a setoff as requested, he was held liable in trespass for taking the plaintiff's property to satisfy that part of the execution which would have been discharged by the application of the amount in his favor. New Haven Copper Co. v. Brown, 46 Me. 418.

Cited in Woodis v. Jordan, 62 Me. 490; Ingraham v. Berliawsky, 128 Me. 307, 147 A. 227.

Sec. 86. Actions continued for absent party to defend, or to set off judgment or execution.—The court in which either of such actions is pending may grant continuance to enable the absent party to defend or either party to set off his judgment or execution against the other; but they shall not be delayed by the neglect or default of either party. (R. S. c. 99, § 86.)

Court may withhold judgment for a time in order to effect setoff.—To enable a party to have the benefit of the exercise of discretion in the court in setting off one judgment against another in cases then before the court, it has the power to withhold judgment until the defendant, if he will use due diligence, shall obtain his judgment for damages; after which one judgment may be set off against the other, or one execution may balance the other. New Haven Copper Co. v. Brown, 46 Me. 418.

Cited in Woodis v. Jordan, 62 Me. 490.

Days on Which No Arrest Made or Process Served.

Sec. 87. Exemption from arrest on certain holidays. — No person shall be arrested in a civil action, on mesne process, or execution or on a warrant for taxes on the day of annual Thanksgiving; the 19th day of April; the 30th day of May; the 4th of July; the 1st Monday of September; Armistice Day, November 11th; or Christmas; and on the day of any military training, inspection, review or election, no officer or soldier required by law to attend the same shall be arrested on any such processes. (R. S. c. 99, § 87.)

See c. 107, § 55, re legal holidays.

Sec. 88. Exemption from arrest on election days.—No elector shall be arrested, except for treason, felony or breach of the peace, on the days of election of United States, state or town officers. (R. S. c. 99, § 88.)

Sec. 89. Civil process served on Lord's Day void; officer liable.—No person shall serve or execute any civil process on the Lord's Day; but such service is void, and the person executing it is liable in damages to the party aggrieved as if he had no process. (R. S. c. 99, § 89.)

Cross reference.—See note to c. 92, § 83, re property distrained for nonpayment of taxes not to be sold on Sunday.

It is only the service of civil process on the Lord's day that is prohibited by this section. State v. Conwell, 96 Me. 172, 51 A. 873.

Applied in Cressey v. Parks, 75 Me. 387.

Limitations of Personal Actions.

Cross reference. — See c. 165, § 21, re administrators.

Legislature has power to regulate limitations if vested rights not impaired and no personal liabilites created.—The legislature has full power and authority to regulate and change the form of remedies in actions if no vested rights are impaired or personal liabilities created. Statutes of limitation fall within this power. They are laws of process and where they do not extinguish the right itself, they are deemed to operate on the remedy only. Miller v. Fallon, 134 Me. 145, 183 A. 416.

The power of the legislature to shorten the period at the expiration of which the limitation bar shall take effect, provided it allows a reasonable time for parties to bring suit before their claims shall be deemed barred by the new enactment, and does not absolutely deprive the creditor of his remedy under color of regulating it, has been too often recognized by courts of the highest respectability for it to be questioned now. Sampson v. Sampson, 63 Me. 328.

Statutes of limitations are statutes of repose, to be interpreted and applied to effect that purpose. Any act or declaration interposed to defeat or postpone that effect is to be closely scrutinized. Johnston v. Hussey, 89 Me. 488, 36 A. 993.

And they are effective only when invoked.—The statute of limitations does not, of its own force, cut off claims, unless it be presented to the court as a defense. It furnishes only a rule of evidence. It defeats the remedy upon old promises, only when its benefits are invoked by the defendant. Ware v. Webb, 32 Me. 41.

Limitation existing where remedy sought governs.—The statute of limitations

operates merely upon the remedy; it is consequently local in its operation and the law of the place where the remedy is sought and not that of the situs of the contract, controls. Thompson v. Reed, 75 Me. 404.

As does the limitation existing when remedy sought.—The statute of limitations in force when the remedy is sought, and not that existing when the contract was made, must govern the remedy. Sampson v. Sampson, 63 Me. 328.

And when the statute of limitation has commenced to run, no subsequent disability will interrupt it, unless within some exception created by the statute. Trafton v. Hill, 80 Me. 503, 15 A. 64; McCutchen v. Currier, 94 Me. 362, 47 A. 923.

The time of actually making a writ with an intention of service is the time when an "action is commenced" within the meaning of the statute of limitations. Dodge v. Hunter, 85 Me. 121, 26 A. 1055.

The application of the statute of limitations is not confined to suits at law, and it equally affects those in chancery. Denny v. Gilman, 26 Me. 149. But see Heald v. Heald, 5 Me. 387.

Though equity court may prefer equitable rights to terms of statute.—A court of equity will give full effect to the statute of limitations and throw out stale demands and claims. But when it perceives that the party complaining has equitable rights, it will not refuse to give relief in a case proper for it, although the claim may have been outstanding for a long time. Chapman v. Butler, 22 Me. 191.

It may give appropriate relief where statute would deny it.—Where it appears in equity that lapse of time has not in fact changed the position of the parties in any important particular, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not refuse the appropriate relief, although a strict and unqualified application of limitation rules might seem to require it. Lawrence v. Rokes, 61 Me. 38.

And may even bar a claim before statute has run.—If the complainant in a suit in equity, by his laches and delay, has made it doubtful whether the other parties can be in a condition to produce the evidence necessary to a fair presentation of the case on their part; or it appears that they have been deprived of any just advantage which they might have had if the claim had been put forward before it became stale and antiquated; or if they are subjected to any hardship which might have been avoided by more prompt proceedings, although the full time may not have elapsed which would be required to bar any remedy at law; the court will deal with the remedy in equity as if barred. Lawrence v. Rokes, 61 Me. 38.

For equity acts in obedience to spirit of statute of limitations.—While a court of equity will ordinarily give full effect to the statutes of limitation affecting actions at law in analogous cases, in so doing it acts in obedience to the spirit of the statutes of limitation, and adopts the reason and principles on which, as positive rules, they are founded, rather than the rules themselves. Lawrence v. Rokes, 61 Me. 38.

Mortgage security not within statute.—A mortgage security has not been deemed to be within any branch of the statute of limitations. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred by the statute. Joy v. Adams, 26 Me. 330.

Forbearance to sue by reason of debtor's poverty does not affect running of statute. — In determining in any case whether the statute of limitations forms a bar, the forbearance of the creditor to sue by reason of the poverty of the person liable, is never to be taken into the account. Kennebunkport v. Smith, 22 Me. 445.

If contract silent as to time of performance, it may be required within reasonable time, and statute then attaches.—Where a contract is silent as to time of performance, either party may require a performance by the other within a reasonable time, and no cause of action would accrue till the lapse of such reasonable time for performance after demand. The limitation would not be perfected till six years from that time. Weymouth v. Gile, 83 Me. 437, 22 A. 375.

But conflicting facts bearing on running of statute present jury question.—When the statute of limitations is pleaded, and a part of the testimony of a witness, relied upon to fix the time when a particular fact transpired, indicates that it took place before, and that a part of it occurred after, the time when the statute of limitations commenced to run, it is the sole province of the jury to determine which part of the testimony is entitled to control. Harmon v. Harmon, 61 Me. 233.

Sec. 90. Actions to be commenced within 6 years. — The following actions shall be commenced within 6 years after the cause of action accrues and not afterwards:

I. Actions of debt founded upon a contract or liability not under seal, except such as are brought upon a judgment or decree of some court of record of the United States or of a state, or of some municipal court, trial justice or justice of the peace in this state.

"Court of record" defined.—A court of record is one which has jurisdiction to fine or imprison, or one having jurisdiction of civil cases above a statutory amount, and proceeding according to the course of the common law. Woodman v. Somerset, 37 Me. 29.

The court of county commissioners is not a court of record, within the meaning of this subsection. Mooers v. Kennebec & Portland R. R., 58 Me. 279.

And judgment of court of county commissioners is barred after 6 years.—In an action of debt upon a judgment of the court of county commissioners, it was held that since the judgment was not from a court of record, the action fell within the purview of this subsection, and was subject to the six-year limitation. Woodman v. Somerset, 37 Me. 29.

An action of debt to recover certain poll taxes and taxes on personal property is within the scope of this subsection. Topsham v. Blondell, 82 Me. 152, 19 A. 93.

But the statute of limitations does not apply to claims for flowage under a judgment. Knapp v. Clark, 30 Me. 244.

Applied in Livermore Falls Trust & Banking Co. v. Riley, 108 Me. 17, 78 A. 980; Carpenter v. Hadley, 118 Me. 437 108 A. 679.

Quoted in part in Edwards v. Moody, 60 Me. 255.

Cited in Beals v. Thurlow, 63 Me. 9.

II. Actions upon judgments of any court not a court of record, except municipal courts, trial justices and justices of the peace in this state.

III. Actions for arrears of rent.

IV. Actions of account, of assumpsit or upon the case founded on any contract or liability, express or implied.

Cause of action on contract accrues upon breach of duty.—The cause of action "on any contract or liability expressed or implied" does not accrue the moment the contract is made or the liability is incurred, but only when there is a breach of duty. Hale v. Cushman, 96 Me. 148, 51 A. 874.

Under a contract by which the defendant leases property and the plaintiff pays rent, such contract is a continuing one, and no cause of action exists until there is a breach of the contract. Duffy v. Patten, 74 Me. 396.

Where the plaintiff has made several payments under a parol contract for the purchase of land and the defendant subsequently repudiates the contract, the plaintiff's cause of action does not accrue to recover the payments until the seller is in fault, and therefore the statute of limitations begins to run only from that time. Richards v. Allen, 17 Me. 296.

Notwithstanding no injury results immediately.—If the action rests on a breach of contract, it accrues as soon as the contract is broken, although no injury results from the breach until afterwards. The statute of limitations commences to run from the time of the breach of agreement by the defendant, and at that moment the plaintiff can bring his action. Manning v. Perkins, 86 Me. 419, 29 A. 1114.

In actions on the case for torts, the cause of action accrues, generally, when the tort is committed; though in some cases of concealment of it by the wrongdoer, not until the wrong and injury have been discovered. Williams College v. Balch, 9 Me. 74.

A part of a continuing wrong may be barred.—The unreasonable delay of a common carrier in transporting goods for the plaintiff is not a case where the wrong is complete as soon as the delay becomes unreasonable. It is the case of a continuing wrong. Every day's continuance of the delay, like the continuance of a nuisance, or the continuance of a trespass, by occasioning new damage, creates a new cause of action. Whatever damage is occasioned by such delays as occurred more than six years before the commencement of the suit, is barred. But such damage as has been occasioned by inexcusable delays within six years may be recovered. Jones v. Grand Trunk Ry., 74 Me. 356.

Action for contribution is within subsection.—An action for contribution by one co-maker of a note against another co-maker is founded, not upon the note itself, but upon an implied contract of contribution. Such action must be commenced under this subsection within six years after the cause accrues. Paradis, Appellant, 134 Me. 333, 186 A. 672.

As is indorsement on witnessed note.—Although an indorsement may be on a witnessed note, the indorser's contract

does not come within the exception of § 95, and the general limitation of six years properly pleaded is a bar to recovery. Portland Savings Bank v. Shwartz, 135 Me. 321, 196 A. 405.

And action on instrument improperly sealed.—In this state an instrument bearing only a scroll in the form of the printed word "Seal" inclosed in brackets is not an instrument under seal. Action upon it must be brought in assumpsit, and it is within the scope of this subsection. Alropa Corp. v. Britton, 135 Me. 41, 188 A. 722.

An action does not accrue to an indorser of a note until he has paid the note or made a payment thereon. Luce v. McLoon, 58 Me. 321.

Whereupon the statute of limitations commences to run. — Since a right of action arises in favor of an indorser upon payment of a note by him, it follows that the statute of limitations, as between the indorser thus paying and the maker for whose use the payment is made, commences running at the time of the payment. It is apparent, therefore, that though the statute may be a bar if a suit were brought upon the note, it would not be a bar for money paid for the use of the maker, which it was his duty to have paid. If the payment is by legal compulsion, as upon a judgment in a suit commenced before the intervention of the statute, the same result would follow. Godfrey v. Rice, 59 Me. 308.

But action accrues against indorser without recourse, when indorsement made. — Since the payee of a negotiable promissory note, by his indorsement thereon without recourse, impliedly warrants that it was given for a valuable consideration, his liability accrues when the indorsement is made; and the statute of limitations then begins to run. Blethen v. Lovering, 58 Me. 437.

Statute begins to run on promise to refund money, when promise made.—Where a settlement was made wherein a claim was paid to one party, which the other alleged had already been settled by giving up a certain note; and the party to whom the payment was made promised that he would repay the amount if the other party ascertained that he ever held such note; it was held that the cause of action, if any, accrued immediately upon the making of the promise, and the six-year limitation commenced running from that time. Clark v. Howe, 23 Me. 560.

On a promise to reimburse the payment of a joint liability, when payment made.— If a mercantile partnership dissolves, and one of the members thereafter continues business, with an agreement that the inactive former member should repay to the other a certain proportion of all debts of the firm which the latter might pay, the cause of action under the agreement would arise whenever payment should be made upon one of the debts and not when the written agreement was executed; and the statute of limitations would begin to run between the parties at the same time. And if a creditor of the firm should keep his claim alive by reducing it to a judgment and the judgment should be renewed years after the original cause of action was barred, still the statute of limitations would not begin to run between the old partners, under their express agreement, until some payment is made by the payee. Mt. Desert v. Tremont, 75 Me. 252.

Where a portion of one town was set off and incorporated as a new town, and required to pay to the former a certain proportion of its liabilities, among which was a judgment recovered against it; it was held that the statute of limitations did not begin to run until payment of the judgment by the plaintiffs. Mt. Desert v. Tremont, 75 Me. 252.

On claim for money paid without consideration, when payment made. — Where money has been paid for more than six years for a consideration recently discovered to be false and of no value, and no fraud is imputable to the party receiving the money, the statute of limitations is a good bar to an action brought to recover it. Bishop v. Little, 3 Me. 405.

On claim against agent for money collected, when same received.—An attorney at law is liable in an action for money collected by him, in the same manner as any other agent, and without a special demand; and the statute of limitations begins to run from the time he receives the money. Coffin v. Coffin, 7 Me. 298.

And on claim against town for indemnity, when vote of indemnity made. — Where a collector of taxes was sued for misconduct, and judgment having been rendered against the collector, the execution was satisfied by extent upon his land; in an action by the collector against the town on its vote of indemnity, it was held that the damage was sustained by the extent, and that the statute began to run from the passage of the vote, and not from the expiration of the right of redemption. Page v. Frankfort, 9 Me. 115.

In action for detention of dower, held that action did not accrue until judgment recovered in action of dower. — In an action to recover damages for detention of

dower, after the commencement of the action of dower, it was held that the action did not accrue until the plaintiff had recovered judgment in her action of dower. The statute of limitations began to run at that time. Rackliff v. Look, 69 Me. 516.

The statute of limitations is not applicable to the costs of maintenance sustained by an executor in behalf of the widow of the testator. Pettingill v. Pettingill, 60 Me. 411.

Assumpsit founded on tort not affected by special statute of limitations in tort actions.—The special statute of limitations, c. 48, § 14, imposing a one-year limitation in actions of tort, does not include actions of assumpsit provided for under this subsection, although the claimed breach of the implied promise was founded originally on the commission of tort. Doughty v. Maine Central Transp. Co., 141 Me. 124, 39 A. (2d) 758.

For a case relating to this subsection before the inclusion therein of "actions of account," see Spaulding v. Farwell, 70 Me. 17.

Applied in McKown v. Whitmore, 31 Me. 448; Theobald v. Colby, 35 Me. 179; Drew v. Drew, 37 Me. 389; Theobald v. Stinson, 38 Me. 149; Ministerial & School Fund v. Rowell, 49 Me. 330; Mattocks v. Chadwick, 71 Me. 313; Berry v. Stevens, 71 Me. 503; Alden v. Goddard, 73 Me. 345; Wadleigh v. Jordan, 74 Me. 483; McKenney v. Bowie, 94 Me. 397, 47 A. 918; Sargent v. Perry, 101 Me. 527, 64 A. 888; Turcotte v. Dunning, 132 Me. 417, 171 A. 908; Partridge v. Lyon, 135 Me. 517, 200 A. 803; Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

Cited in Moore v. Fall, 42 Me. 450; Longfellow v. Longfellow, 54 Me. 240; Merrill v. Merrill, 63 Me. 78; Rand v. Webber, 64 Me. 191; Hathorn v. Kelley, 86 Me. 487, 29 A. 1108; Jameson v. Cunningham, 134 Me. 134, 183 A. 131.

V. Actions for waste, of trespass on land and of trespass, except those for assault and battery and false imprisonment.

VI. Actions of replevin, and other actions for taking, detaining or injuring goods or chattels.

In trover without unlawful appropriation, no cause of action accrues until demand and refusal.—In cases of trover, where the property came lawfully into the defendant's possession, and there has been no unlawful appropriation of it, no cause of action exists before demand and refusal; for until then no rights are violated or wrong done. Williams College v. Balch, 9 Me. 74.

It is well settled that title to personal property may be lost or gained by six years' adverse possession, under this subsection. Morey v. Haggerty, 122 Me. 212, 119 A. 527.

VII. All other actions on the case, except for slanderous words and for libel. (R. S. c. 99, § 90.)

Subsection VII applicable to action by administrator to recover property acquired from the deceased. — Subsection VII may be invoked in an action brought by an administrator to recover for property acquired by the defendant from the plaintiff's intestate, where the administrator had full knowledge of all the facts pertaining to the property involved. Peacock v. Ambrose, 121 Me. 297, 116 A. 832.

Editor's note.—The remainder of this note is applicable to the entire section and is not limited to subsection VII alone.

Cross references.—See c. 48, § 14, re actions for injuries caused by motor vehicles under control of public utilities commission shall commence within 2 years; note to c. 94, § 28, re limitation applicable to actions for recovery of expenses incurred in the care of paupers.

Statute of limitations founded on presumption of payment after running of statute. — The statute of limitations is founded on a presumption that a debt has been paid or otherwise discharged after the lapse of a certain time during which the creditor has made no attempt to enforce it or revive it, but that presumption does not arise if within the time limited the creditor resorted to legal proceedings to recover the debt. Densmore v. Hall, 109 Me. 438, 84 A. 983.

Cause of action accrues with the right to demand money, damages, or property. — The cause of action accrues when a person has a right to demand of another a sum of money as due to him, or damages for an injury done to him, or property belonging to him, subject only to the exception of concealment by the defendant. Williams College v. Balch, 9 Me. 74.

It accrues when contract made unless later time for performance is appointed.— In all cases of express contract, the cause of action accrues at the time the contract is made, unless by the terms of it, a

future day of payment or performance is appointed; in both which cases, the right to demand payment or performance and the cause of action, accrue at one and the same time, and such also is the case in relation to implied contracts. Williams College v. Balch, 9 Me. 74.

In actions of account, case in assumpsit, and debt, the time when the cause of action accrues depends on the nature and terms of the contract between the parties, as where by those terms an account is to be rendered, a sum of money is to be paid, or an act done at some future day. Williams College v. Balch, 9 Me. 74.

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

And amendment to action seasonably begun may be allowed after statute has run.—Where an action was begun before the statute had run, and an amendment was necessarily made in order to enable the plaintiff to recover, such amendment being for the same cause of action, though made after the statute of limitations had run; it was held that the statute did not bar recovery. Heath v. Whidden, 29 Me. 108.

What constitutes sufficient pleading of the statute.—A brief statement containing the paragraph, "that the first and successive installments on said note, as declared upon in plaintiff's writ and declaration, are barred by the statute of limitations, which defendants hereby invoke," sufficiently pleads the statute of limitations. Weeks v. Hickey, 129 Me. 339, 151 A. 890.

Statute begins to run immediately when money payable immediately, on demand, etc. — Whenever money is payable immediately, or on demand, or when requested, or when called for, the statute of limitations commences to run immediately, whether any demand of payment is made or not. Of course, the statute will not commence to run until a right of action accrues; but in such cases a right of action accrues immediately. Sanford v. Lancaster, 81 Me. 434, 17 A. 402.

When a note or bill is payable on demand, the statute of limitations runs from the date of the instrument, and not from the time of demand, because the right of action accrues immediately upon giving the note. Young v. Weston, 39 Me. 492.

A promissory note payable on demand is due instantly, and the statute of limitations begins to run from its date. It makes no difference, though the note be "on demand, with interest after six months," or to pay "when demanded," or "whenever called upon to do so." Ware v. Hewey, 57 Me. 391; Barron v. Boynton, 137 Me. 69, 15 A. (2d) 191.

On a note payable with interest on demand, the statute of limitations begins to run from the date of the note. Young v. Weston, 39 Me. 492.

A loan of money "to be paid when called for" is due on the day the money is lent, and the statute of limitations begins to run from that date. Ware v. Hewey, 57 Me. 391.

A promise to pay "in any time within six years from this date" is a promise to pay on demand, and a right of action accrues immediately. Young v. Weston, 39 Me. 492.

And when a note is made payable in several payments, the cause of action for the first payment accrues as soon as it becomes payable; the statute of limitations begins to run against it from that time, and not from the time when the latest sum should be paid. Burnham v. Brown, 23 Me. 400.

As installment payments required by terms of a note become due, a cause of action accrues and the statute of limitations runs against each from such maturity. Barron v. Boynton, 137 Me. 69, 15 A. (2d) 191.

But when a bill is entitled to grace, statute runs from last day thereof. — Where a bill of exchange is entitled to grace, the statute of limitations does not commence running from the day it would have fallen due by its terms, but from the last day of grace. Pickard v. Valentine, 13 Me. 412.

As to a principal, statute runs from date of payment of principal's debt by agent.— Where a general agent gave his negotiable note for labor performed for his principal, and on the principal refusing to take up the note, payment was enforced against the agent, it was held that the statute of limitations, as it regarded the principal, would commence running from the time of such payment, and not from the time of giving the note. Gilmore v. Bussey, 12 Me. 418.

And as between surety and cosurety, date of payment similarly obtains.—If a suit is brought by the payee against one of two sureties on a note before the statute of limitations could be successfully interposed as a defense by either party, and judgment is obtained and satisfied after

the time when the statute would have furnished a defense, the same statute would not prevent the maintenance of an action against the cosurety for contribution, brought within six years from the time of payment. Crosby v. Wyatt, 23 Me. 156.

The statute of limitation does not begin to run against a remainderman or a reversioner during the continuance of the particular estate. Poor v. Larrabee, 58 Me. 543.

And the bar of the statute of limitations must be pleaded, if at all, before an interlocutory judgment to account. Black v. Nichols, 68 Me. 227.

As between trustee and cestui que trust the limitation bar does not operate; no lapse of time is a bar to a direct trust. Craig v. Franklin, 58 Me. 479.

And presumptively it does not run against person deaf and dumb.—The statute of limitation does not run against a person deaf and dumb, unless he is shown to possess sufficient intelligence to know and comprehend his legal rights and liabilities. As the want of hearing and speech must necessarily prevent a full development of his intellectual powers, and place him at a great disadvantage in his dealings with others, the law throws around such a person for his protection the presumption of incapacity to manage his own affairs till the contrary is shown. This presumption, however, is not conclusive; it may be rebutted. Oliver v. Berry, 53 Me. 206.

Payment of outstanding debts to administrator does not revive barred claims. — The receipt of money for an outstanding debt by an administrator, after the lapse of four years from the grant of administration, does not revive any creditor's right of action which had been previously barred. Manson v. Gardiner, 5 Me. 108.

Actions for reimbursement for school conveyance accrue as in other actions for pauper supplies. Turner v. Lewiston, 135 Me. 430, 198 A. 734.

Applied in Steele v. Smalley, 141 Me. 355, 44 A. (2d) 213.

Cited in Pulsifer v. Pulsifer, 66 Me. 442.

Sec. 91. Suits for breach of promise to marry prohibited.—No action, suit or proceeding to recover damages for breach of promise to marry shall be maintained. (R. S. c. 99, § 91.)

Sec. 92. Suits against sheriff for escape; for misconduct. — Actions for escape of prisoners committed on execution shall be actions on the case and be commenced within 1 year after the cause of action accrues; but actions against a sheriff, for negligence or misconduct of himself or his deputies, shall be commenced within 4 years after the cause of action accrues. (R. S. c. 99, § 92.)

In applicable cases § 93 is exception to this section. — This section is general in its terms, while § 93 is specific, and the latter must, when applicable, be construed as an exception to this section; otherwise the two could not stand together. Trask v. Wadsworth, 78 Me. 336, 5 A. 182.

Statute runs from time consequences of officer's neglect arises. — In an action against a sheriff for misconduct, the statute commences to run from the time when the consequences of the act arise or happen, and not from the time when the act was done. Harriman v. Wilkins, 20 Me. 93.

But cause of action may accrue immediately upon neglect. — If the creditor cannot, either by demand or by delay to the return day of the execution, be restored to the right which he has lost, the cause of action accrues immediately upon the neglect. Lambard v. Fowler, 25 Me. 308.

And statute thereupon begins to run, whether sheriff or deputy charged.—An allegation in the writ in general terms that the sheriff is guilty of the acts, which are proved to have been done by the deputy, cannot extend the time within which the action may be brought therefor against the former; the principal can be held only four years for defaults of the deputy after the cause of action accrued, whether the writ contains the general charge against him, or the special declaration that the deputy was guilty. Lambard v. Fowler, 25 Me. 308.

For money collected by officer, statute runs from return day of execution. — Where a deputy sheriff has collected money on execution, which he has neglected to pay over, the limitation of four years under this section commences with the return day of the execution. Williams College v. Balch, 9 Me. 74.

Sec. 93. Assault, libel, etc., in 2 years. — Actions for assault and battery, and for false imprisonment, slander, libel and malpractice of physicians

and all others engaged in the healing art shall be commenced within 2 years after the cause of action accrues. (R. S. c. 99, § 93.)

Cross references. — See c. 126, § 31, re penalty no bar to action for damages for false imprisonment.

Acts occurring more than 2 years before suit brought may be shown to prove malice of slanderer.—In an action of slander it is competent for the court to allow the plaintiff to introduce evidence of facts that took place more than two years before the commencement of the suit, in proof of malice, when the statute of limitations is pleaded. Harmon v. Harmon, 61 Me. 233.

Action for false imprisonment brought under this section, not § 92. — An action against a sheriff for false imprisonment, whether by the act of the sheriff or his deputy, must be brought in accordance with the provision of this section and not § 92. Trask v. Wadsworth, 78 Me. 336, 5 A. 182.

Applied in McCutchen v. Currier, 94 Me. 362, 47 A. 923; Franklin v. Erickson, 128 Me. 181, 146 A. 437.

Quoted in Miller v. Fallon, 134 Me. 145, 183 A. 416.

Cited in Varney v. Grows, 37 Me. 306.

Sec. 94. Scire facias against bail, sureties in criminal recognizances and trustees, in 1 year.—No scire facias shall be served on bail unless within 1 year after judgment was rendered against the principal; nor on sureties in recognizances in criminal cases unless within 1 year after default of the principal; nor against any person adjudged trustee, unless within 1 year from the expiration of the first execution against the principal and his goods, effects and credits in the hands of the trustee. No action of debt in behalf of the state against sureties and recognizances in criminal cases shall be brought unless within 1 year after default of principal. (R. S. c. 99, § 94.)

History of section. — See State v. Cassidy, 125 Me. 217, 132 A. 518.

For a case relating to this section, before the enactment of the last sentence thereof, holding that debt would lie after the lapse of a year, see State v. Cassidy, 125 Me. 217, 132 A. 518.

Sec. 95. Not applicable to witnessed notes, bank bills, etc. — The foregoing limitations do not apply to actions on promissory notes signed in the presence of an attesting witness, or on the bills, notes or other evidences of debt issued by a bank; nor to any case or suit limited by statute to be commenced within a different time. (R. S. c. 99, § 95.)

History of section. — See Quimby v. Buzzell, 16 Me. 470.

An action for money had and received, sustained by an attested promissory note, is an action upon such note, within the meaning of this section, and may be maintained within the same period of limitation as if the note had been specifically declared upon. Merrill v. Merrill, 63 Me. 78.

Plaintiff need not allege note witnessed. —It is not necessary for the plaintiff, in an action on a note, to allege in the first instance that the note was witnessed; if the note is not witnessed, and therefore subject to the statute of limitations, that is the matter to be alleged in defense. Ware v. Webb, 32 Me. 41.

Note must be witnessed by one other than party thereto. — The phrase "signed in the presence of an attesting witness" in this section should be construed to mean that the attesting witness must be someone other than the parties to the note. Accordingly the payee of a note cannot be an attesting witness, within the meaning of this section. Shepherd v. Davis, 114 Me. 58, 95 A. 335.

Handwriting of witness provable by other witnesses. — If the attesting witness to a promissory note is called, and does not prove the handwriting of the name to be his, it is competent to prove it by the testimony of other witnesses. Quimby v. Buzzell, 16 Me. 470.

Whether a writing constitutes a note, within the meaning of this section, is a question of law. Pike v. Warren, 15 Me. 390.

What constitutes promissory note. — Where by the express terms of an instrument the defendant unconditionally promises to pay to the plaintiff or his order a fixed sum of money at a fixed time, it is all that is necessary to constitute a promissory note within the meaning of this section; and if it is witnessed, it is without the statute of limitations. Murray v. Quint, 102 Me. 145, 66 A. 313.

It is an essential attribute of a promissory note that it be payable in money. Bunker v. Athearn, 35 Me. 364.

One of the requisites of a promissory note is that it must be for a sum certain. An instrument not for a sum certain is not a promissory note and does not come within the provision of this section. Lime Rock Fire & Marine Ins. Co. v. Hewett, 60 Me. 407.

To constitute a promissory note, the instrument must necessarily be certain as to the fact of payment, and not be dependent on a contingency. Chapman v. Wight, 79 Me. 595, 12 A. 546.

A witnessed, written promise to pay the plaintiff at a time specified, "the sum of two hundred and twenty-five dollars, and such other sums as may arise as additional premium" on an insurance policy, is not a promissory note within the meaning of this section, since it is not for a sum certain. Lime Rock Fire & Marine Ins. Co. v. Hewett, 60 Me. 407.

A promissory note payable in specific articles is not within the meaning of this section. Gilman v. Wells, 7 Me. 25.

If instrument is not promissory note, attestation of witness will not avoid the bar.—If an instrument is not a promissory note, the fact of its having been signed in the presence of an attesting witness does not prevent its being barred by the statute of limitations. Chapman v. Wight, 79 Me. 595, 12 A. 546.

A renewal of a note, attested by a witness, gives the instrument the legal character of a witnessed note. Boody v. Lunt, 19 Me. 72.

Whether original note witnessed or not.—It is of no consequence whether an original note was witnessed or not after the proof of a new witnessed note for the sum due on the original. Lincoln Academy v. Newhall, 38 Me. 179.

A payment made upon a witnessed note, gives it new life for the next twenty years. Estes v. Blake, 30 Me. 164.

For whatever is effect of note when maturity attained is its effect when acknowledged.—A partial payment on an attested note is a valid agreement on the part of the maker that the note for that balance is to be treated as if the sum due became payable at that time and that an action therefore could be maintained if commenced within 20 years. Whatever was the effect of the note when it first reached maturity shall be its effect at the time of the acknowledgment; and this principle applies alike to attested and unattested notes. Lincoln Academy v. Newhall, 38 Me. 179.

Attestation not made when note signed or in presence of signer, not within section.—An attestation not made when the note was signed, or in the presence of the signer, is not a promissory note "signed in the presence of an attesting witness," and will not be excepted from the operation of the six-year statute under this section. Brown v. Cousens, 51 Me. 301.

And equivocal attestation may disqualify note as one attested.—Where there appeared at the foot of a promissory note at the left of the signatures of the promisors, a memorandum that interest had been paid to a certain day; and below this memorandum, was written, "Attest J. S. B.," all being in his handwriting, except the signatures of the promisors, it was held that the note did not fall within the exception of the statute of limitations as a witnessed note. Fryeburg Parsonage Fund v. Osgood, 21 Me. 176.

An action against the indorser of a promissory note is not within the exception of witnessed notes; and the general limitation of six years, duly pleaded, will defeat such action. An unattested indorsement is neither within the language nor the spirit of this section. Seavey v. Coffin, 64 Me. 224.

If a note is signed by one person, witnessed, and delivered over to the payee, and afterwards, when the subscribing witness is not present, a third person, in pursuance of an original agreement to that effect, signs his name upon the back thereof, so far as it respects the latter, the note is not within the provisions of this section as a witnessed note. Stone v. Nichols, 23 Me. 497; Ministerial & School Fund v. Rowell, 49 Me. 330.

For the indorsement is a new contract.—Even though an indorsement may be on a witnessed note, the indorser's contract is a new and different one and does not come within the exception of this section; and the general limitation of six years properly pleaded is a bar to recovery. Portland Savings Bank v. Shwartz, 135 Me. 321, 196 A. 405.

But the statute of limitations is no bar to an action brought in the name of an indorsee upon a witnessed note. Stanley v. Kempton, 30 Me. 118.

Attested indorsement acknowledging note, not within section.—An indorsement on a promissory note acknowledging it to be due, signed by the maker and attested by a witness, is not an attested promissory note within the meaning of this section. Young v. Weston, 39 Me. 492.

Nor is attested promise to pay note.—A signed and witnessed statement appearing

on the back of a promissory note promising to pay the within note was held not to be a promissory note signed in the presence of an attesting witness, but a guaranty, and subject to the six-year bar. Bunker v. Ireland, 81 Me. 519, 17 A. 706.

A memorandum promise in writing by the makers of a note to pay it in any time within six years from the date of the writing, though attested by a witness, is not an attested promissory note, but is subject to the limitation bar after six years. Young v. Weston, 39 Me. 492.

Applied in Howe v. Saunders, 38 Me. 350; Reed v. Wilson, 39 Me. 585; Pulsifer v. Pulsifer, 66 Me. 442; McGuire v. Murray, 107 Me. 108, 77 A. 692.

Cited in Paradis, Appellant, 134 Me. 333, 186 A. 672.

Sec. 96. Mutual and open accounts current.—In actions of debt or assumpsit to recover the balance due, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both, the cause of action shall be deemed to accrue at the time of the last item proved in such account. (R. S. c. 99, § 96.)

History of section.—See Lancey v. Maine Central R. R., 72 Me. 34; Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

Meaning of "account."—An account is a sum stated on paper; a registry of a debt or credit; an entry in a book of things bought or sold, of payments, services, etc.; a list or catalogue of items, whether of debts or credits. Theobald v. Stinson, 38 Me. 149.

Nature and not extent of dealings determines mutuality thereof.—Dealings may be essentially mutual between parties, whether there is one item or many items on each side. It is the nature, and not the extent, of the dealings that gives them the character of mutuality. Benjamin v. Webster, 65 Me. 170.

Accounts may be regarded as mutual where but a single item of credit is given. Nor does it make any difference that the credits given were not independent items of charge. It is enough that the credits were purely payments upon the plaintiff's account. Benjamin v. Webster, 65 Me. 170.

And cash credits only, do not rid the account of its mutuality under this section. Pride v. King, 133 Me. 378, 178 A. 716.

The mutual dealings between the parties constitute together the items of but one "account." Hagar v. Springer, 63 Me. 506.

And "mutual dealings" whether kept or proved by one party or both, constitute a mutual account. Lancey v. Maine Central R. R., 72 Me. 34.

"Mutual dealings," the items of which are unsettled, constitute an open account current, as distinguished from a stated account, or one that has been adjusted, liquidated and a balance struck after examination by the parties. Lancey v. Maine Central R. R., 72 Me. 34.

Stated accounts are balances agreed to be due.—Stated accounts, as opposed to open and current accounts, are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. McLellan v. Crofton, 6 Me. 307.

Determination of stated account and payment terminates mutual dealings. — When the items of the mutual dealings have been examined, the respective sums fixed and the balance agreed upon by the parties, and it has been paid, there is no longer an open account current or mutual dealings between them. Lancey v. Maine Central R. R., 72 Me. 34.

And items omitted from such stated account, not within section.—When parties make out what they believe to be a correct itemized statement of their mutual dealings and the balance is thereupon ascertained and paid, "the items" can no longer be considered "unsettled" within the meaning of this section, although one was omitted by mistake. And if, six years thereafter, on discovering the erroneous balance, an action counting on the entire account is brought to recover the real balance, the statute of limitations will bar the recovery. Lancey v. Maine Central R. R., 72 Me. 34.

But balance determined by plaintiff and interest claimed thereon not conclusive of stated account.—Where an account of more than six years' standing appeared on the books of the plaintiff's intestate, and the balance was carried to a new account, and interest claimed thereon, it was held that the jury was not therefore bound to regard this as conclusive evidence of an account then liquidated and stated, so as to enable the statute of limitations to attach to it. McLellan v. Crofton, 6 Me. 307.

Plaintiff need not strike balance and declare therefor.—It is not essential that the

plaintiff state both sides of the account, strike the balance and declare for that specific sum in order to render his action one "to recover the balance due." Hagar v. Springer, 63 Me. 506.

Either party or both may sue their individual side of the account, or both sides. If one party sues his side only, the defendant may or may not, at his option, file his side in setoff; and if he does not, he does not necessarily waive his right to recover it in another action. Hagar v. Springer, 63 Me. 506.

In mutual dealings if there are items on either side within six years, the statute does not attach on either side to those items of an earlier date. Davis v. Smith, 4 Me. 337.

This section preserves the right of action upon a mutual unsettled account for six years after the last item, no matter how far back the account commenced. Until there has been a period of at least six years during which there are no items, either debit or credit, the account is alive and suable. Rogers v. Davis, 103 Me. 405, 69 A. 618; Fairbanks v. Barker, 115 Me. 11, 97 A. 3; Mansfield v. Gushee, 120 Me. 333, 114 A. 296; Pride v. King, 133 Me. 378, 178 A. 716.

Where the treasurer of a corporation made annual charges in the corporation books for interest on a note given by him to the corporation, it was held that the credits of payments made, showed that there was between such treasurer and the corporation an open account current, and the cause of action accrued at the date of the last item proved in the account. Bluehill Academy v. Ellis, 32 Me. 260.

Whether such item is debit or credit, kept by one party or the other.—The statute begins to run with the last item of the account, and it makes no difference whether it is a debit or a credit item, or which party kept or proved it, or whether it appears in the plaintiff's credits or in the defendant's charges, if only it is an account of mutual dealings between the parties which has not been settled. Rogers v. Davis, 103 Me. 405, 69 A. 618; Mansfield v. Gushee, 120 Me. 333, 114 A. 296.

Where two items on the debit side of an account annexed to a writ as proved, were dated 1860 and 1867, respectively, while upon the credit side there was a single item of certain goods proved by the plaintiff to have been delivered by the defendant in 1862, it was held that under this section the cause of action accrued at the date of the last item proved. Baker v. Mitchell, 59 Me. 223.

And plaintiff may prove item of defendant's account in order to avoid the bar.—If none of the plaintiff's debit items are within six years next preceding the date of his writ, and the defendant does not file any account in setoff, or prove anything as payment, it will be incumbent upon the plaintiff in order to avoid the bar, to prove some item of credit, i. e., some item of the defendant's side of the account within six years. When he has done that, he will have taken out of the statute such items in his own side as are within six years of the credit item proved; for "the last item proved in such account" includes the last item on either side. Hagar v. Springer, 63 Me. 506.

But he cannot prove in bar items of which no account made.—Where the limitation bar has attached to all the items in the plaintiff's account, he cannot revive it by showing some acts of labor performed by defendant for him within six years from the commencement of his action, unless there was some account made of it. Theobald v. Stinson, 38 Me. 149.

Section does not rest upon partial payments principle.—The partial payments principle has reference solely to credits or payments, and regards such a payment as a recognition of the debt and a renewal of the promise to pay. This section rests upon other grounds. Rogers v. Davis, 103 Me. 405, 69 A. 618.

For question is not one of renewal of promise.—Under this section the question is not one of the recognition of the account and of the renewal of the promise to pay it by making a partial payment on account of it. Rogers v. Davis, 103 Me. 405, 69 A. 618.

Partial payment within 6 years on account generally, will avoid bar.—A partial payment within six years towards an account generally, whether of one or more items, would take the account out of the operation of the statute; and, a fortiori, the part payment of a particular item would take that item out of the statute. It makes no difference whether the credits are payments merely, or items of charge. Benjamin v. Webster, 65 Me. 170.

But payment on specific item in account will not avoid bar.—Where an item of credit is intended as a specific payment of only a particular charge in a plaintiff's account, in a case where there are several items, and not as a payment upon the account generally, such payment would not have the effect to take the whole account out of the operation of the statute. Benjamin v. Webster, 65 Me. 170.

And debtor cannot shorten the limita-

tion by payment of specific items.—When the parties by their mutual dealings, by some item of debit or credit, have extended the time of the operation of the statute upon the balance of the account, it does not lie in the power of the debtor then to shorten the time by making specific payment of debit items. Rogers v. Davis, 103 Me. 405, 69 A. 618.

Where the account is mutual, open and current, the statute of limitations begins to run with its last item, either of debit or credit, and the fact that the debtor, to whom credit has been given, for howsoever short a time, pays for the particular item or items for which credit was extended, does not bar recovery. Pride v. King, 133 Me. 378, 178 A. 716.

Credit item of cash relied upon to avoid bar must have been authorized by defendant.—If the only item in the account within six years of the date of the writ is a credit of cash, and this item is relied upon to take the account out of the operation of the statute of limitations, it must be made to appear that the credit was authorized by the defendant himself, or someone legally competent to act for him; otherwise, the account will be barred. Sawyer v. Lufkin, 58 Me. 429.

And plaintiff cannot prove in bar a setoff withdrawn by leave of court.—The plaintiff, to show charges made against him within six years from the commencement of his action upon an account, cannot give in evidence a setoff made up and filed by the attorney of the defendant, which was withdrawn by leave of court, before the trial of the action. Theobald v. Stinson, 38 Me. 149.

For a case relating to this section before the enactment of the provision including items "whether kept or proved by one party or both," see Dyer v. Walker, 51 Me. 104.

Former provision of section. — For a case relating to a former provision of this section concerning merchants' accounts, see McLellan v. Crofton, 6 Me. 307.

Applied in Perry v. Chesley, 77 Me. 393.

Cited in Lombard v. Pease, 14 Me. 349; Nason v. McCulloch, 31 Me. 158; Pond v. French, 97 Me. 403, 54 A. 920.

Sec. 97. Minors, etc., may sue after disability removed. — If a person entitled to bring any of the aforesaid actions is a minor or married woman, insane, imprisoned or without the limits of the United States when the cause of action accrues, the action may be brought within the times limited herein after the disability is removed. (R. S. c. 99, § 97.)

Cross reference.—See note to c. 166, § 39, re removal of legal disabilities of married women.

Exemption depends upon disability.—The exemption provided for in this section is made to depend upon the existence of a disability which means a want of legal qualifications, or incapacity. Brown v. Cousens, 51 Me. 301.

Statute runs from time of removal of all disabilities existing when action accrues.—If several disabilities exist together, at the time when the right of action accrues, the statute of limitations does not begin to run until the party has survived them all. Butler v. Howe, 13 Me. 397.

But party cannot claim subsequent disabilities.—Under this section a party cannot avail himself of a succession of disabilities, but only of such as existed, when the right of action first accrued. Butler v. Howe, 13 Me. 397.

Where a feme sole infant, entitled to the possession of personal property, made a demand thereof, and afterwards during the infancy became covert, and so continued until the suit was brought; it was held that the cause of action accrued at the time when the demand was made; and that the action, having been commenced more than six years after she became twenty-one years of age, was barred by the statute of limitations. Butler v. Howe, 13 Me. 397.

For they do not interrupt running of statute.—Relief is afforded by this section only when the disability existed when the cause of action accrued. When the statute of limitations has once begun to run, it is not interrupted by a subsequent disability. McCutchen v. Currier, 94 Me. 362, 47 A. 923.

The disability of a plaintiff by reason of being without the limits of the United States, ceases upon his return to any part thereof, however distant from the state of his domicile. Varney v. Grows, 37 Me. 306.

The phrase, "after the disability is removed," excludes all ambiguity from the construction of the section. The absence from the United States is the disability, and the return into the limits of the United States is the time from which the limitation commences. McMillan v. Wood, 29 Me. 217.

The enumeration of married women in

this section must be deemed a mere inadvertence, incidental to the radical change which took place in a legal system which had been in existence for time immemorial. Brown v. Cousens, 51 Me. 301.

For there is now no disability of married women, and consequently nothing to lay a foundation for the exemption contained in this section or to which the exemption can be attached. Brown v. Cousens, 51 Me. 301.

"Insane person" applies to persons idiotic, non compos mentis, deaf and dumb.—The words "insane person," as used in this section, are declared to be applicable to a person idiotic, or non compos mentis, which a person deaf and dumb is prima facie presumed to be. Oliver v. Berry, 53 Me. 206.

But presumptive incapacity of person deaf and dumb is rebuttable.—The statute of limitations does not run against a person deaf and dumb, unless he is shown to possess sufficient intelligence to know and comprehend his legal rights and liabilities. As the want of hearing and speech must necessarily prevent a full development of his intellectual powers, and place him at a great disadvantage in his dealings with others, the law throws around such a person for his protection the presumption of incapacity to manage his own affairs till the contrary is shown. This presumption, however, is not conclusive; it may be rebutted. Oliver v. Berry, 53 Me. 206.

For a case, prior to the removal of legal disabilities of married women, relating to the deferred attachment of the statute of limitations by reason of coverture, see Morrison v. Brown, 84 Me. 82, 24 A. 672.

Applied in Cutler v. Currier, 54 Me 81.

Sec. 98. General limitation of 20 years.—Personal actions on any contract, not otherwise limited, shall be brought within 20 years after the cause of action accrues. (R. S. c. 99, § 98.)

Section is peremptory, and not founded upon rebuttable presumption.—This section, unlike § 109, is not founded upon a presumption of payment liable to be rebutted by evidence; but its object, based on public policy, is to close the judicial tribunals against all contracts therein described commenced after the cause of action is twenty years old. The language is peremptory; and it is equivalent to a provision that no action shall be commenced after twenty years. Pulsifer v. Pulsifer, 66 Me. 442.

A mortgage given to secure witnessed notes barred under this section, nevertheless may not be considered as discharged. The reason is that the section does not in terms purport to be to the effect that actual payment shall be presumed to have been made; but it is founded upon motives of policy providing that no suit shall be commenced on the personal security after a certain period has elapsed after the sum secured shall have become due, unless the promise shall have been renewed within the period prescribed; and, moreover, it has always been considered that after such period has elapsed, no new consideration is necessary to render a new promise available. Joy v. Adams, 26 Me. 330.

Covenant or debt on sealed instrument within section.—Actions on sealed instruments in the form of covenant broken, or debt, are governed by the twenty years' limitation of this section. But if brought in assumpsit, that form of action is "otherwise limited" by the general statute of limitations. Alropa Corp. v. Britton, 135 Me. 41, 188 A. 722.

And witnessed notes, after the lapse of twenty years since they became payable, are barred by this section. Joy v. Adams, 26 Me. 330; Pulsifer v. Pulsifer, 66 Me. 442.

But prior to expiration of 20 years, action held barred by foreign judgment based on shorter limitation.—Where the indorsee of a witnessed promissory note, given in Maine, sued the maker in a foreign state; and the defendant, after pleading the statute of limitations, obtained a general verdict in his favor; and subsequently another plaintiff, as payee, brought another action against the defendant in Maine on the same note, the defendant having removed back to Maine; it was held that the action could not be maintained because of the constitutional requirement of "full faith and credit," and that evidence that the statute of limitations was the only issue tried in the former action was inadmissible, though twenty years had not elapsed. Sweet v. Brackley, 53 Me. 346.

And a payment made upon a witnessed note gives it new life for the next twenty years. Estes v. Blake, 30 Me. 164.

In the case of a witnessed note, when a partial payment has been made, whether indorsed or not, so far as the one who made the payment is concerned, the limitation recommences at the date of the

payment. Pulsifer v. Pulsifer, 66 Me. 442.

Form of action, not cause of action, determines statute of limitation applicable.—It is the form of action adopted by the pleader, rather than the cause of action upon which it is based, which determines the period within which it may be commenced. Alropa Corp. v. Britton, 135 Me. 41, 188 A. 722.

Applied in Howe v. Saunders, 38 Me. 350.

Cited in Brewer v. Thomes, 28 Me. 81; Hurd v. Coleman, 42 Me. 182; Paradis, Appellant, 134 Me. 333, 186 A. 672.

Sec. 99. When writ fails of service or defeated or judgment reversed, new suit in 6 months.—When a writ fails of sufficient service or return by unavoidable accident, or default, or negligence of the officer to whom it was delivered or directed, or is abated, or the action is otherwise defeated for any matter of form, or by the death of either party; or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action on the same demand within 6 months after the abatement or determination of the original suit or reversal of the judgment; and if he dies and the cause of action survives, his executor or administrator may commence such new action within said 6 months. (R. S. c. 99, § 99.)

Cross reference.—See c. 120, § 75, re provisions of § 99, applicable to suits on bonds, limitation.

History of section.—See Densmore v. Hall, 109 Me. 438, 84 A. 983.

Section prevents barring of timely and appropriate action for defects not affecting merits.—This section is intended to protect a diligent creditor from losing his cause of action on account of the abatement of his timely and appropriate action because of some matter not affecting its merits, but is not intended to afford the means for a designing creditor to extend his cause of action in violation of the statutory limitation. Densmore v. Hall, 109 Me. 438, 84 A. 983.

Defects in form are defects which are amendable. Densmore v. Hall, 109 Me. 438, 84 A. 983.

But action brought in wrong county not within section.—The limitation bar is not suspended for six months from attaching to a cause of action, where the writ was abated by reason of being brought in the wrong county; for such fault in bringing the action is not mere matter of form. Donnell v. Gatchell, 38 Me. 217.

The word "writ," as used in this section, means at least a writ made returnable according to law, and a writ not made returnable according to law, is ineffectual to save the cause of action from being barred by limitation. Densmore v. Hall, 109 Me. 438, 84 A. 983.

This section is not applicable to a case where the original writ is abated because returnable after an intervening term contrary to law. Densmore v. Hall, 109 Me. 438, 84 A. 983.

That cannot be deemed "unavoidable accident," which can be easily avoided. Marble v. Hinds, 67 Me. 203.

And absence of officer and miscarriage of mail are to be anticipated.—The risks of the probable absence of the sheriff from his office on the last day of service and of the possible miscarriage of the mail are contingencies to be anticipated. Marble v. Hinds, 67 Me. 203.

To avoid the bar upon miscarriage of mail, precaution must be shown.—If the plaintiff would avoid the bar of the statute of limitations by having seasonably sued out process which failed of service through inevitable accident in the transportation by mail; it has been held that he must show that he previously ascertained the course of the mail, and that a letter enclosing the precept, and properly directed, was put into the post office sufficiently early to have reached the officer by the ordinary route, in season for legal service. Jewett v. Greene, 8 Me. 447.

This section applies only to the actions mentioned which are limited to six years. Jewett v. Greene, 8 Me. 447.

And this section has been held not to apply to actions on bond or other specialty. Brown v. Houdlette, 10 Me. 399.

Sec. 100. Death of either party before suit is commenced. — If a person entitled to bring or liable to any action before mentioned dies before or within 30 days after the expiration of the time herein limited therefor, and the cause of action survives, the action may be commenced by the executor or administrator at any time within 20 months after his appointment, and not afterwards if barred by the other provisions hereof; actions on such claims may be

commenced against the executor or administrator after 1 year, or within 1 year subject to continuance without costs, and within 20 months after he has qualified as such executor or administrator, and not afterwards if barred by the other provisions hereof, except as provided in section 19 of chapter 165. (R. S. c. 99, § 100. 1953, c. 157.)

Cross reference. — See c. 120, § 75, re provisions of § 100 applicable to suits on bonds, limitation.

If the statute of limitation has never begun to run, the provisions of this section cannot be applied. This section is intended to reach only those cases in which the statute has begun to run, and in which, but for this provision for extension, such cases would be barred in six years. Brown v. Nourse, 55 Me. 230.

Expiration of 20 months may bar action, whether administrator gave notice of appointment or not.—If a creditor permits 20 continuous months of existing legal administration to elapse without commencing any suit against the administrator, and if he should thereupon sue out his writ, his suit would be barred against the alleged debtor if living; his action is barred by virtue of this section, whether the administrator gave public notice of his appointment or not. Lancey v. White, 68 Me. 28.

Administrator can shorten time for bringing action, but cannot indefinitely prolong it.—The time within which an action must be commenced may be shortened in many cases, if the representative of the deceased debtor gives the legal notice of his appointment; but it cannot be indefinitely prolonged by his failure to give it, for any creditor may have administration committed to some suitable person, if he can find property of the deceased debtor. Lancey v. White, 68 Me. 28.

As to administrator of nonresident plaintiff, limitation may attach when administration taken out in Maine.—Where the defendant, residing in Maine, gave his unwitnessed promissory note in 1868 to the plaintiff's intestate, residing in another state, who died in 1869, and his administrator was there appointed in 1870, but no administration was taken out in Maine till the appointment of the plaintiff in 1877, who commenced this suit during the next year; it was held, under this section, that the suit was not barred, although administration had been taken out on the estate in the foreign state more than the length of time then specified in this section before the commencement of the action. Holmes v. Brooks, 68 Me. 416.

Applied in Carpenter v. Hadley, 118 Me. 437, 108 A. 679.

Cited in McPhetres v. Halley, 32 Me. 72.

Sec. 101. Rights of alien enemies in time of war.—If a person is disabled from prosecuting an action in this state by reason of being an alien subject or citizen of a country at war with the United States, the time during which such war continues shall not be a part of the period herein limited for the commencement of any of said actions. (R. S. c. 99, § 101.)

Sec. 102. Limitation of suits for penalties.—Actions and suits for any penalty or forfeiture on a penal statute, brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within 1 year after the commission of the offense; and if no person so prosecutes, it may be recovered by suit, indictment or information in the name and for the use of the state at any time within 2 years after the commission of the offense, and not afterwards. (R. S. c. 99, § 102.)

Cross references.—See note to c. 92, § 120, re limitation applicable to action for recovery of penalty against tax collector; note to c. 114, § 77, re action against trustee giving false disclosure must be brought within one year; note to c. 120, § 78, re one year limitation not applicable to action for aiding debtor in fraudulent concealment of his property; note to c. 124, § 5, re that statute not "penal" within the meaning of this section; note to c. 139, § 8, re section applicable to suit by third party to recover gambling loss.

History of section.—See State v. Hobbs, 39 Me. 212.

Section limits state prosecutions to 2 years after offense.—By this section the legislature intended to limit all prosecutions by the state on penal statutes to two years next after the offense has been committed. State v. Hobbs, 39 Me. 212.

And complaint or indictment inconsistent therewith is insufficient.—A complaint or indictment, which alleges the offense to have been committed more than two years before the complaint is made or in-

dictment found, is insufficient to sustain a conviction, unless the statute contains an exception preventing the operation of it upon a certain class of persons, such for example as those out of the state. State v. Hobbs, 39 Me. 212.

Section comprehends only such statutes as authorize state prosecution. — Under this section only such statutes are to be considered penal statutes as would authorize the commencement of a suit, indictment or information in the name and for the use of the state. Hall v. Hall, 112 Me. 234, 91 A. 949.

And a statute giving a right to recover multiplied damages may be remedial or it may be penal within the meaning of this section. If the right of action be given to the injured party, and the increased damages are only incidental to the general right to recover, the statute and action are remedial. And it is immaterial whether the statute says that the injured party may recover, or that the offending party shall forfeit to the injured party; the meaning is the same. But if the right of action be given to others than the injured party, the statute and action are penal. Hall v. Hall, 112 Me. 234, 91 A. 949.

Limitation attaches when offense committed, unless continuances of act penalized.—Where a penalty is given for an injurious act done, the right of action accrues when the prohibited act is done, and the statute of limitation begins to run at that time. If no penalty is imposed for the continuance of the act, the running of the statute is not stayed. Cumberland & Oxford Canal Corp. v. Hitchings, 57 Me. 146.

Applied in Moore v. Smith, 5 Me. 490; State v. Gray, 39 Me. 353; Beals v. Thurlow, 63 Me. 9.

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

Cited in Warren v. Miller, 38 Me. 103; Gerry v. Dunham, 57 Me. 334; Cumberland & Oxford Canal Corp. v. Hitchings, 59 Me. 206; Gilmore v. Woodcock, 69 Me. 118; Gilmore v. Woodcock, 70 Me. 494.

Sec. 103. Making writ begins suit.—A suit is commenced when the writ is actually made, with intention of service. (R. S. c. 99, § 103.)

The presumption is that the date of the writ is the true time when the action is brought; but this presumption may always be rebutted and the true time settled by actual proof of the fact. The date is not conclusive, and if the writ is antedated, the defendant will be allowed to show the time when it was actually issued. Johnson v. Farwell, 7 Me. 370; Biddeford Savings Bank v. Mosher, 79 Me. 242, 9 A. 614.

In the absence of all evidence to the contrary, a writ is presumed to have been made at the time it purports to be dated. Sargent v. Hampden, 38 Me. 581.

The time when a writ is made, with an intention of service, is deemed the commencement of a suit in respect to the limitations prescribed in this chapter. Sargent v. Hampden, 38 Me. 581.

Applied in Hubbard v. Johnson, 77 Me. 139; Dodge v. Hunter, 85 Me. 121, 26 A. 1055; Larrabee v. Southard, 95 Me. 385, 50 A. 20.

Quoted in Russell v. Russell, 69 Me. 336; Densmore v. Hall, 109 Me. 438, 84 A. 983.

Sec. 104. Limitation extended in cases of fraud.—If a person liable to any action mentioned herein fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within 6 years after the person entitled thereto discovers that he has just cause of action. (R. S. c. 99, § 104.)

Cross reference.—See note to c. 114, § 77, re section applicable to action against trustee for false disclosure.

"Just cause of action" must arise from fraud committed and discovered.—If a fraud has been committed, which would entitle the plaintiff to an action, "the action may be commenced anytime within six years after the person entitled thereto discovers that he has just cause of action." But the "just cause of action" must be one arising from the fraud committed and discovered. It is for the fraud committed. Penobscot R. R. v. Mayo, 65 Me. 566.

Mere breach of moral or legal duty not within section.—It is no answer to a plea of the statute of limitations that the action is founded on a violation of an engagement amounting to a mere breach of moral and legal duty. Cole v. McGlathry, 9 Me. 131.

Meaning of "conceal."—The word "conceal" signifies to withhold, or keep secret

mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Gerry v. Dunham, 57 Me. 334.

In order to take a case out of the statute under this section, there must be proof of actual fraud and concealment by the party to be charged. Cole v. McGlathry, 9 Me. 131.

Unless the fraud is per se concealment.—To bring a case within the authority of this section, actual fraud and concealment must be shown unless the fraud itself is per se concealment. Deake, Appellant, 80 Me. 50, 12 A. 790.

Statute begins to run when fraud discovered, though no special effort to conceal by defendant.—When the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or effort on the part of the party committing the fraud to conceal it from the knowledge of the other party. Deake, Appellant, 80 Me. 50, 12 A. 790.

And fraudulent concealment may concur with accrual of cause.—It is not necessary that the fraudulent concealment should occur subsequently to the time the cause of action accrued. There is no such provision in the terms of the statute, nor does it admit of such construction; both may take place at the same time. Gerry v. Dunham, 57 Me. 334.

The operation of the statute is unaffected, if the party upon whom the fraud is practiced had full means of detecting it. Cole v. McGlathry, 9 Me. 131.

Relief from the statute of limitations under this section cannot extend to a plaintiff, who had direct and ample means, in the exercise of ordinary prudence, to detect the fraud. McKown v. Whitmore, 31 Me. 448.

Unless the fraud perpetrated by fiduciary.—While it has been held that the mere omission to disclose a cause of action, when no fiduciary relation exists between the parties, and the plaintiff has had the means of discovering the facts, and nothing has been done by the defendant to mislead him, does not constitute a fraudulent concealment; yet such is not the law when a fiduciary relation, or one of confidence and trust, exists between the parties, which makes it the special duty of the defendant to report the facts truly. In such cases an omission to disclose what it is the special duty of the defendant to disclose is a fraudulent concealment. Kelley v. Nealley, 76 Me. 71.

Violation of agreement to deposit proceeds of check in bank for plaintiff not fraudulent concealment.—Where the defendant received the plaintiff's check and cashed it under an agreement to deposit the amount of the check in the bank to the credit of the plaintiff, but such deposit was not in fact made; such conduct would not constitute a fraudulent concealment of the fact from the knowledge of the plaintiff, for the plaintiff knew, or had ample means of knowing, by the exercise of common prudence, whether the money had been paid or withheld. McKown v. Whitmore, 31 Me. 448.

Nor is denial by debtor of ownership of vessel.—In an action against a part owner of a vessel for repairs made from time to time, a portion of which was more than six years prior to the commencement of the suit, evidence indicating that when that part of the account was presented to the defendant for payment, he denied any ownership in the vessel does not show a fraudulent concealment of the cause of action so as to prevent the operation of the limitation bar; for the ownership of the vessel was a fact open to the investigation of all interested, and capable of proof without resorting to any admission of the defendant. Rouse v. Southard, 39 Me. 404.

Nor violation by administrator of agreement to attend to plaintiff's account.—Evidence that the defendant promised that he would see to the plaintiff's account against the estate of which the defendant was administrator, and that he neglected to do so, is not sufficient to show fraudulent concealment within the meaning of this section. The making of such a promise and its nonfulfillment could not conceal from the plaintiff his cause of action. Given v. Whitmore, 73 Me. 374.

Nor fraudulent settlement of known cause of action.—The fraudulent settlement of an existing cause of action, by means of false representations and by the concealment of the truth, is not the concealment of the cause of action which is thereby settled. It is the settlement of a known and existing cause of action, not the concealment of an existing but unknown cause of action. It is in and of itself a substantive grievance, for which redress may be sought, but not the original cause of action. Penobscot R. R. v. Mayo, 65 Me. 566.

Though fraudulently procured surrender of note may itself escape the limitation until discovery.—Where the defendant procured the surrender of his note by fraud without payment, it was held that the plaintiff could maintain an action of tort for the fraud, and the statute of limitations commences to run from the discovery of the fraud or the time when the plaintiff may discover it in the use of due diligence; or if the defendant by the fraud procured the surrender of his note for money then overdue without payment, plaintiff may waive the tort and maintain an action for money had and received, and the same rule of limitation applies that is applicable to an action of tort. Penobscot R. R. v. Mayo, 67 Me. 470.

As will trustee's fraudulent representations as to relationship between him and plaintiff's debtor.—By his fraudulent representations concerning the relation of debtor and creditor subsisting between him and the plaintiff's debtor, a trustee thereby furnished the plaintiff with a cause of action against him; and by withholding from the plaintiff all knowledge of the falsity of such representations, he at the same time concealed from him the cause of action, within the meaning of this section. Gerry v. Dunham, 57 Me. 334.

Concealment of plaintiff's logs contrary to duty to account constitutes fraudulent concealment.—A concealment of the plaintiff's logs by the defendant, where the latter agreed to account for such property, was held to constitute a fraudulent concealment of a just cause of action within this section, and not barred by the statute of limitations. Kelley v. Nealley, 76 Me. 71.

Cited in Bishop v. Little, 3 Me. 405; Brown v. Edes, 37 Me. 318; Thurston v. Lowder, 40 Me. 197; Blethen v. Lovering, 58 Me. 437; Peacock v. Ambrose, 121 Me. 297, 116 A. 832.

Sec. 105. Renewal of promise in writing.—In actions of debt or on the case founded on any contract, no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing, and signed by the party chargeable thereby. No such acknowledgment or promise made by one joint contractor affects the liability of the others. (R. S. c. 99, § 105.)

This statute should be construed strictly in favor of the bar which it was intended to create and not liberally in favor of a promise, acknowledgment, or waiver. Doubts, uncertainties and equivocal expressions are not by construction to be converted into promises or acknowledgments. Gray v. Day, 109 Me. 492, 84 A. 1073; Shaw v. Bubier, 119 Me. 83, 109 A. 373.

Since statutes of limitations are statutes of repose, to be interpreted and applied to effect that purpose, any act, such as this section, imposed to defeat or postpone that effect is to be closely scrutinized. Gray v. Day, 109 Me. 492, 84 A. 1073.

The theory of this section is, where a debt is barred by the statute, that the promise upon which assumpsit would before lie is not dead, but suspended, and that by certain things done by the debtor the suspension may be removed and the promise revived. Such things are "acknowledgment" of the debt, and an "express promise" to pay it, each, of course, in writing. Shaw v. Oliver, 112 Me. 512, 92 A. 652.

Absolute or conditional promise or acknowledgment may revive cause.—To take a case out of the statute of limitations, there must be either an absolute promise to pay, or an acknowledgment of indebtedness, or a conditional promise to pay, with proof of the performance of the condition. Lunt v. Stevens, 24 Me. 534; Gray v. Day, 109 Me. 492, 84 A. 1073.

Though condition performed must be proved to recover on conditional promise.—When a new promise is relied on to take a debt out of the operation of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of the promise only is not sufficient. Thus, a promise to pay "as soon as I can," or "as soon as convenient," or "when of ability," or "as soon as it is in my power to do so," or "if I could," or "prove it by E. and I will pay for it," will not take a case out of the statute, except upon proof of performance of the condition. Mattocks v. Chadwick, 71 Me. 313.

Action is founded on original cause.—Where a new promise is relied on as an answer to the plea of the statute of limitations, the declaration is founded on the original cause of action; and the new promise is set forth in the replication, or adduced in evidence. Barrett v. Barrett, 8 Me. 353.

Promise or acknowledgment is denied from whole writing.—A promise, acknowledgment or waiver, whether express or conditional, is to be determined upon an examination of the whole writing; the plain and fair meaning of the party making use of the expression should be sought for, and then permitted to have its legitimate influence, and nothing further, in the decision of the question. Gray v. Day, 109 Me. 492, 84 A. 1073.

Evidence of an acknowledgment or express promise may be sought from all the documents in which the acknowledgment or promise may be alleged to be contained. Accordingly, if from all the written evidence an acknowledgment can be found of such a character that upon it may be predicated an implied promise to pay the debt acknowledged, such acknowledgment alone will relieve the debt from the application of the statute. Shaw v. Oliver, 112 Me. 512, 92 A. 652.

For an express promise or acknowledgment might be modified by other parts of a writing.—Even though a part of a writing taken by itself would amount to an express promise or acknowledgment, and take the case out of the statute of limitations, yet it might be so modified by other parts of the writing as to completely nullify the express promise, or convert it into a conditional one. Gray v. Day, 109 Me. 492, 84 A. 1073.

The writing alleged to contain a promise is alone to be searched for evidence of the promise. Johnston v. Hussey, 89 Me. 488, 36 A. 993.

The search for the promise, alleged to be contained in a writing, is to be made by the court, not by the jury. The opinion of the jury is immaterial. Johnston v. Hussey, 89 Me. 488, 36 A. 993.

An acknowledgment must at least savor of a promise to pay. It is not enough that a jury could, or probably would, infer a new promise from the terms of the acknowledgment. The terms must be such that the court itself will infer a new promise from them. Johnston v. Hussey, 89 Me. 488, 36 A. 993.

And court may direct nonsuit if promise insufficient.—In an action of assumpsit if the jury would not be authorized from the evidence introduced by the plaintiff to infer a promise from the defendant to pay the demand in suit, so as to avoid the statute, the judge may direct a nonsuit. Pray v. Garcelon, 17 Me. 145.

Acknowledgment must be express, in writing.—The acknowledgment must be in writing. It must be an "express" acknowledgment also. It is not enough that the original promise is proved. The new promise or acknowledgment must be proved to have been expressly made, and the proof of this must be in the signed writing. Johnston v. Hussey, 89 Me 488, 36 A. 993.

In terms that infer new promise.—It is not enough to prove an admission of the debt if it is accompanied by circumstances which repel such inferences, or leave it in doubt whether the debtor intended to make a new promise. The terms must be such that the court itself will infer a new promise from them. Shaw v. Bubier, 119 Me. 83, 109 A. 373.

And if a writing fails to show an express promise or acknowledgment, it cannot be read into the writing by means of oral testimony. Johnston v. Hussey, 92 Me. 92, 42 A. 312.

But extrinsic evidence admissible for interpretation of ambiguous writing.—While extrinsic evidence is admissible to explain a writing of doubtful or ambiguous meaning, or to disclose the circumstances surrounding the parties, or to apply language of description and designation to the parties and subjects intended, yet these are aids to interpretation. But the interpretation in the end must be of the writing itself. Nothing can be added to it nor incorporated within it. Johnston v. Hussey, 92 Me. 92, 42 A. 312.

Acknowledgment or promise must be intentional.—Independent of any requirement of this section regarding the new acknowledgment or promise, such acknowledgment or promise to be effective must have been intentional; it must have been deliberately made and not inadvertently; and it will not affect the bar of the statute where the accompanying facts and circumstances are such as to repel the the inference, or leave in doubt the question whether the party intended thereby to prolong the period of legal limitation or to remove the bar already attached. Davis v. Davis, 98 Me. 135, 56 A. 588.

And those merely implied or inferable not sufficient.—Since this section requires the acknowledgment or promise to be "express," it rules out "implied" or "inferable" acknowledgments or promises. The acknowledgment or promise must not only be in writing and "express," but it must also be absolute, unambiguous and deliberately and intentionally made. Davis v. Davis, 98 Me. 135, 56 A. 588.

An acknowledgment of present indebtedness is but evidence from which a prom-

ise to pay may be implied. The acknowledgment itself is not a promise. Shaw v. Oliver, 112 Me. 512, 92 A. 652.

The acknowledgment must be of an existing legal cause of action. It must show a recognition of a legal obligation and an intention, or at least a willingness, to be bound by it. It must be an acknowledgment of a legal debt, a legal duty. Johnston v. Hussey, 89 Me. 488, 36 A. 993; Lord v. Jones, 108 Me. 381, 81 A. 169; Shaw v. Bubier, 119 Me. 83, 109 A. 373.

And a mere acknowledgment that a cause of action once existed is not enough. There must appear a recognition of the legal duty. In fine, it must appear from the writing alone that the defendant promised within six years. Johnston v. Hussey, 89 Me. 488, 36 A. 993; Shaw v. Bubier, 119 Me. 83, 109 A. 373.

Nor is acknowledgment of moral obligation.—The most profuse acknowledgment of gratitude, or of any other moral obligation, for articles or services furnished is not sufficient under this section. Johnston v. Hussey, 89 Me. 488, 36 A. 993.

Acknowledgment must fairly imply that debtor intended to renew promise.—The plaintiff may take a case out of the statute of limitations by showing an acknowledgment in writing by the defendant that the debt was due, made under such circumstances and in such terms as reasonably and by fair implication lead to the inference that the debtor intended to renew his promise of payment, and thus make a new and continuing contract. Lord v. Jones, 108 Me. 381, 81 A. 169; Shaw v. Bubier, 119 Me. 83, 109 A. 373.

It is not enough to prove an admission of the debt, if it is accompanied by circumstances which repel the inference that the debtor intended to renew his promise, or leave it in doubt whether the debtor intended to make a new promise. Lord v. Jones, 108 Me. 381, 81 A. 169.

An acknowledgment, to take a debt out of the statute, must satisfactorily appear to refer to the very debt in question. Lord v. Jones, 108 Me. 381, 81 A. 169.

If there is only one transaction, a reference in the alleged acknowledgment or promise to "the debt" is sufficient as to its identity. Lord v. Jones, 108 Me. 381, 81 A. 169.

And plaintiff may show that no other claim exists.—Where an alleged acknowledgment on the face of it evidently refers to some claim or demand which the plaintiff had against the writer, and to a single claim, though no particular claim is identified, it is competent for the plaintiff to show, in order to identify the claim in suit, that he had no other claim than the note in suit. Lord v. Jones, 108 Me. 381, 81 A. 169.

Note given in payment of interest on barred note constitutes new promise and removes bar.—When the maker of a negotiable promissory note, after the same has become barred by the statute of limitations, gives his negotiable promissory note to the payee of the barred note in payment of interest, it constitutes a new promise on his part to pay the barred note, and revives such note. Medomak Nat. Bank v. Wyman, 100 Me. 556, 62 A. 658.

As will indorsement of renewal on barred note.—Where the maker of a witnessed promissory note added at the bottom of the note the words, "I hereby renew the above promise," and subscribed his name thereto, it was held that the new promise was sufficient to take the cause of action out of the statute of limitations. Warren Academy v. Starrett, 15 Me. 443.

And written promise to pay a proposed new note given for one barred.—Where a debtor in writing expressed a willingness to pay a note, proposed to give a new note for the old one, and expressly promised to pay the new note before a time certain, which would be payment, the writing is sufficient. Lord v. Jones, 108 Me. 381, 81 A. 169.

As well as written promise to pay balance due.—A renewal in writing and signed by the debtor, whereby he promised to pay "whatever balance shall be against us," is a sufficient promise under this section, but is itself subject to the six-year statute. Trask v. Weeks, 81 Me. 325, 17 A. 162.

But acknowledgment with promise to pay in particular manner, not sufficient.—A general promise to pay cannot be implied from an acknowledgment of a debt, containing merely a promise to pay in a particular manner, as by a new note; and it is not sufficient to take the case out of the statute of limitations. Gray v. Day, 109 Me. 492, 84 A. 1073.

Nor is equivocal promise.—A signed writing by a debtor to a creditor stating "when the whole can be settled we are ready; then, if I owe you I will pay every cent that is due," is not a sufficient promise under this section. Lunt v. Stevens, 24 Me. 534.

Nor promise to negotiate settlement.—A signed letter stating, "All sick with

new disease. Will be down the first of the week and fix it up with you," is not a sufficient acknowledgment under this section, from which the law will imply a promise to pay, to remove the bar of the statute of limitations. Shaw v. Bubier, 119 Me. 83, 109 A. 373.

A promise in a letter, in reference to the state of the accounts between the parties, to "talk it over when we meet," and expressing the belief that the other party is indebted to the writer, is no such promise or acknowledgment as to bring the case within the provisions of this section. Perry v. Chesley, 77 Me. 393.

Nor written statement of balance due made for irrelevant purpose.—A written statement by the payor, of the amount that has been paid upon a promissory note and of the consequent balance, and made for another purpose, was held not to constitute an express acknowledgment that any balance was due, nor an express promise to pay it. Davis v. Davis, 98 Me. 135, 56 A. 588.

And written agreement to waive statute of limitations not sufficient to remove bar.—A written agreement to waive all defense which a party might otherwise make under the statute of limitations, is not sufficient under this section as an acknowledgment of indebtedness, or as an express promise, to take the case out of the operation of the statute; though the party may be bound by such an agreement if made for a sufficient consideration. Warren v. Walker, 23 Me. 453.

Nor is written statement that debtor never claimed liability barred by time.—An assertion in writing by the debtor that he had never claimed to be exempted from liability on account of time, does not amount to an acknowledgment of the debt or promise to pay it. Brown v. Edes, 37 Me. 318.

A mere acknowledgment made by an administrator, of the intestate's indebtedness, will not remove the statutory limitation bar. Bunker v. Athearn, 35 Me. 364.

And the executor cannot of his own motion revive a promise to himself against the estate of the testator. Wadleigh v. Jordan, 74 Me. 483.

For cases pertaining to the sufficiency of an oral promise to take a cause of action out of the statute, before the enactment of the provision requiring such promise in writing, see Seaward v. Lord, 1 Me. 163; Perley v. Little, 3 Me. 97; Porter v. Hill, 4 Me. 41; Miller v. Lancaster, 4 Me. 159; Deshon v. Eaton, 4 Me. 413; Morton v. Chandler, 8 Me. 9; Thayer v. Mills, 14 Me. 300; Oakes v. Mitchell, 15 Me. 360; Pike v. Warren, 15 Me. 390; Pray v. Garcelon, 17 Me. 145; McLellan v. Allbee, 17 Me. 184; Dinsmore v. Dinsmore, 21 Me. 433; Peavey v. Brown, 22 Me. 100.

Applied in Hagar v. Springer, 60 Me. 436; Littlefield v. Eaton, 74 Me. 516; Livermore Falls Trust & Banking Co. v. Riley, 108 Me. 17, 78 A. 980.

Quoted in Hodgdon v. Chase, 29 Me. 47; Manson v. Lancey, 84 Me. 380, 24 A. 880; Pond v. French, 97 Me. 403, 54 A. 920; Reed v. Harris, 139 Me. 225, 28 A. (2d) 741.

Sec. 106. Judgment if action barred against some and not others.—In actions against two or more joint contractors, if it appears on trial or otherwise that the plaintiff is barred by the provisions hereof as to one or more of the defendants, but is entitled to recover against any other by virtue of a new acknowledgment, promise or otherwise, judgment shall be rendered for the plaintiff against such other, and for the other defendants against the plaintiff. (R. S. c. 99, §106.)

Sec. 107. When nonjoinder of defendants does not abate writ.—In an action on a contract, if the defendant pleads in abatement that another person ought to have been jointly sued and issue is joined thereon, and it appears on the trial that the action was barred by the provisions hereof against such person, the issue shall be found for the plaintiff. (R. S. c. 99, § 107.)

Sec. 108. Partial payment and indorsement. — Nothing herein contained alters, takes away or lessens the effect of payment of any principal or interest made by any person; but no indorsement or memorandum of such payment made on a promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment is made or purports to be made, is sufficient proof of payment to take the case out of the statute of limitations; and

no such payment made by one joint contractor or his executor or administrator affects the liability of another. (R. S. c. 99, § 108.)

I. General Consideration.

II. Effect of Partial Payment.

III. Evidence of Partial Payment.

IV. Partial Payment by Joint Contractors.

I. GENERAL CONSIDERATION.

Debt barred by statute is sufficient consideration for new promise.—The statute of limitations does not extinguish debts, nor affect them in any way, except to bar suits for them. The debt remains. The obligation to pay it, though not enforceable by action, is subsisting and is a sufficient consideration for a new promise. A partial or full payment of it, after the statute has taken effect, is not a gratuity. Sinnett v. Sinnett, 82 Me. 278, 19 A. 458.

And debtor may renew obligation at any time.—It is not required that the recognition, the reinstatement, be made within six years. The creditor must bring his suit within the six years, but the debtor can pay or renew his obligation at any time. Sinnett v. Sinnett, 82 Me. 278, 19 A. 458.

But declaration should have count upon new promise if made after debt barred.—When the new promise is made or arises after the right to maintain a suit upon the original cause of action has been entirely extinguished, or when the new promise varies from the original, there should be a count upon the new promise, and the original cause of action used as proof of a valuable consideration for it. And in other cases, the declaration may be upon the original promise only. Howe v. Saunders, 38 Me. 350.

Applied in Quimby v. Putnam, 28 Me. 419; Wellman v. Southard, 30 Me. 425; McKenney v. Bowie, 94 Me. 397, 47 A. 918.

Cited in Hodgdon v. Chase, 32 Me. 169; Bunker v. Athearn, 35 Me. 364; Pulsifer v. Pulsifer, 66 Me. 442.

II. EFFECT OF PARTIAL PAYMENT.

If a payment is made within six years upon an account generally, it is a partial payment of a larger demand. Dyer v. Walker, 54 Me. 18.

If a payment is shown to apply upon an indebtedness consisting of many items, all of them will thereby be saved from the effect of the statute. Pond v. French, 97 Me. 403, 54 A. 920.

And renews the demand for 6 years.—A payment upon an unwitnessed note within six years of the commencement of the suit extends its vitality to six years after such payment. Estes v. Blake, 30 Me. 164.

Though a payment made upon a witnessed note gives it new life for the next twenty years. Estes v. Blake, 30 Me. 164.

But if payment not made generally, it is not acknowledgment of larger debt.—Under the first clause of this section it should appear that the payment was made only as a part of a larger debt, as otherwise it would not be deemed an admission of any more debt than it pays; and that it is a payment upon an ascertained or specific sum due, and not upon a mere claim of quantum meruit. Benjamin v. Webster, 65 Me. 170.

Partial payment is admission of subsisting debt.—The ground on which effect is given to a partial payment and indorsement is that it is a distinct admission that at the time of payment the debt is still unpaid and subsisting. Holmes v. Durell, 51 Me. 201.

Payments made upon a note before the statute of limitations would prevent a recovery thereon are regarded as an acknowledgment that the balance is due. Lincoln Academy v. Newhall, 38 Me. 179.

And payments of interest take the case out of the statute with like effect as payments of principal. Medomak Nat. Bank v. Wyman, 100 Me. 556, 62 A. 658.

Such payment of principal or interest renews the obligation.—The "effect of payment of any principal or interest" made and intended as part payment of a debt is an acknowledgment of that debt and a renewal of the obligation to pay it. Manson v. Lancey, 84 Me. 380, 24 A. 880.

Payment of part of a debt liquidated and ascertained by a contract is an admission that the whole is due. Haven v. Hathaway, 20 Me. 345.

The act of making a partial payment upon a debt operates a renewal of the obligation to pay the balance of it precisely the same as before the passage of the statute of limitations. Pond v. French, 97 Me. 403, 54 A. 920.

As of time of partial payment.—A partial payment on an unattested note is a valid agreement on the part of the maker

that the note for that balance is to be treated as if the sum due became payable at that time, and that an action therefor could be maintained, if commenced within six years. Whatever was the effect of the note, when it first reached maturity, shall be its effect at the time of the acknowledgment; and this principle applies alike to attested and unattested notes. Lincoln Academy v. Newhall, 38 Me. 179; Howe v. Saunders, 38 Me. 350.

And removes the bar.—A partial payment upon a promissory note, after it has become barred by the statute of limitations, operates as a renewal of the note and removes the bar of the statute. Pond v. French, 97 Me. 403, 54 A. 920; Medomak Nat. Bank v. Wyman, 100 Me. 556, 62 A. 658.

A partial payment is an acknowledgment that the debt is an existing one; it destroys the operation of the statute of limitations for that period, and negatives a presumption of payment, from mere lapse of time. Estes v. Blake, 30 Me. 164.

A payment of interest indorsed on a note, which payment was made within six years before the commencement of the suit, although for a year's interest which had become due more than six years before that time, is sufficient to take the case out of the operation of the statute of limitations. Fryeburg Parsonage Fund v. Osgood, 21 Me. 176.

However late the payment.—An intentional part payment of a debt is an acknowledgment of its existence and a renewal of its obligation. It cannot matter how old the debt is. The recognition and the acknowledgment, will restore the legal obligation, however late they are made. Sinnett v. Sinnett, 82 Me. 278, 19 A. 458; Pond v. French, 97 Me. 403, 54 A. 920; Haslam v. Perry, 115 Me. 295, 98 A. 812.

It is not required that the recognition and reinstatement be made within six years. The creditor must bring suit within the six years, but the debtor can pay or renew his obligation at any time. Pond v. French, 97 Me. 403, 54 A. 920.

For a new promise is implied.—While a mere acknowledgment of a debt, or promise to pay it, must be in writing to render it valid, a new promise is implied from the fact of a partial payment of principal or interest. Sibley v. Lumbert, 30 Me. 253; Dyer v. Walker, 54 Me. 18; Manson v. Lancey, 84 Me. 380, 24 A. 880; Reed v. Harris, 139 Me. 225, 28 A. (2d) 741.

Partial payments amount to a new promise, and completely avoid the statute of limitations. Clapp v. Ingersol, 11 Me. 83.

The party making the payment has the right in the first instance of directing the appropriation of his payment. Wetherell v. Joy, 40 Me. 325.

If a payment is made upon an account not due, the creditors are under no obligation to receive it; but receiving it, they are bound to apply it in accordance with the directions of the debtor. Wetherell v. Joy, 40 Me. 325.

But creditor may appropriate payment to any debt if debtor fails to do so.—If a debtor makes a payment to a creditor without specifying which of several debts it should be applied to, the creditor may apply the payment to any debt not already barred by the statute of limitations, and thereby prolong the running of the statute for six years from the time when the payment is made. Blake v. Sawyer, 83 Me. 129, 21 A. 834.

Though if so appropriated to barred debt, it will not remove bar as to balance thereof.—A debtor has the right to determine to which of several debts a payment made by him shall be applied. But if he omits to exercise the right, the law allows the creditor to make the appropriation, and the latter may apply it to a debt already barred by the statute of limitations. Such an application of it will not, however, remove the statutory bar with respect to the balance of the debt. To have that effect the appropriation must be made by the debtor himself. Blake v. Sawyer, 83 Me. 129, 21 A. 834.

Two payments generally, on three notes, held to take all notes out of statute.—Where a debtor made two payments within six years in part satisfaction of three notes, and no direction was made by him upon which of the notes he would have the payments applied, nor were they indorsed upon either of the notes, it was held that the payments were sufficient to take all the notes out of the statute. Dyer v. Walker, 54 Me. 18.

Partial payment to original payee of note is effective in action by indorsee.—A partial payment of a note within six years is sufficient to take it out of the statute of limitations; and the effect is the same, though the payment is made to the original payee of the note, and the action is brought in the name of his indorsee. Howe v. Thompson, 11 Me. 152.

And partial payment by note has same effect as other payment.—A partial payment by note is as effectual to take the original debt out of the operation of the

statute as payment in any other manner. Medomak Nat. Bank v. Wyman, 100 Me. 556, 62 A. 658.

If the debtor makes a partial payment through the agency of another person, the effect is the same as a payment by himself. Haven v. Hathaway, 20 Me. 345.

But such payment by another person must be authorized.—Part payment, in order to take a debt out of the operation of the statute of limitations, must be made by the debtor himself, or someone legally authorized to act for him. Payment by a stranger will have no such effect. Sawyer v. Lufkin, 58 Me. 429.

Payment on note by purchaser of equity of redemption, not effective against debtor.—Payments made on a mortgage note by the purchaser of an equity of redemption in land are not payments made as agent for the maker of the note, and do not interrupt the running of the statute of limitations against the maker of the note. Verrill v. Weinstein, 135 Me. 126, 190 A. 634.

Payment by surety effective as against him.—If a surety on a note indorses thereon a payment as having been made by himself, the statute of limitations will be no bar to an action against him commenced within six years from the time of such payment, notwithstanding he may have paid the money as the agent of the principal, if he did not disclose that fact. Holmes v. Durell, 51 Me. 201.

And thereafter surety may hold principal for reimbursement.—Though an action upon a note against the principal would be barred by the statute of limitation; yet that limitation would be no bar to a suit against the principal for reimbursement, brought by the surety, who, after making a partial payment, had paid the note within six years after such partial payment. Odell v. Dana, 33 Me. 182.

III. EVIDENCE OF PARTIAL PAYMENT.

This section leaves the fact of partial payment to be established in the same manner as was required before this section was passed. Sibley v. Lumbert, 30 Me. 253.

This section does not affect the admissibility of evidence other than that specified tending to show partial payment, where the admission of such evidence does not conflict with the established rules. Small v. Rose, 97 Me. 286, 54 A. 726.

And the language accompanying the act of payment is admissible to show the intent with which the payment is made, just as it was admissible before the enactment of the statute of limitations. Pond v. French, 97 Me. 403, 54 A. 920.

Payment, not indorsement, operates as renewal of promise.—It is the payment that operates as a renewal of the promise and saves the case from the statute of limitations, and not the indorsement of the amount paid on the note. The indorsement is but evidence of payment, and sufficient evidence only when put upon the note by the party liable to pay the note. The effect of the payment is in nowise affected by the indorsement. The indorsement may never be made and the effect of the payment will be the same. Egery v. Decrew, 53 Me. 392; Manson v. Lancey, 84 Me. 380, 24 A. 880; Curtis v. Nash, 88 Me. 476, 34 A. 273.

Whether on written or oral contract.—Under this section the contract upon which the partial payment is made need not necessarily be a written one, but may be an oral contract as well. Benjamin v. Webster, 65 Me. 170; Pond v. French, 97 Me. 403, 54 A. 920.

And partial payment is prima facie evidence of promise.—Partial payment is prima facie evidence of a promise by the debtor to pay the balance of the debt, and conclusive evidence of the same, unless the circumstances under which the payment is made, or some proofs in the case, show to the contrary. Benjamin v. Webster, 65 Me. 170; Pond v. French, 97 Me. 403, 54 A. 920.

Though circumstances of payment must admit of inference that debtor intended to renew promise.—The mere fact of a payment is not alone sufficient as a matter of law to toll the statute. To have this effect, it must be such an acknowledgment as reasonably leads to the inference that the debtor intended to renew his promise of payment. The question is whether the payment was made under such circumstances that it amounted to an admission that the debt was then due. Reed v. Harris, 139 Me. 225, 28 A. (2d) 741.

Court cannot imply promise as inference of law from partial payment.—The court cannot imply a promise, so as to take the contract out of the operation of the statute of limitations as an inference of law from the payment of a part of a debt; but the evidence should be submitted by the court to the jury, with proper instructions, to enable them to do it. White v. Jordan, 27 Me. 370.

And where different inferences may be drawn from the act of payment by a debtor,

the issue is one of fact. And the mere fact that the debtor expected the money to be applied to a mortgage debt is not controlling, for it may be the duty of the creditor so to apply it. Nor is the fact of importance that the debtor consented to the repossession of mortgaged property by voluntarily giving it over, for by so doing he merely recognizes the right of the creditor to retake it; there can be thereby no implication of a new promise. Reed v. Harris, 139 Me. 225, 28 A. (2d) 741.

Intention to renew promise not inferable from application of proceeds of mortgaged property.—The creditor's application to a debt of the proceeds of property sold under a mortgage is not such a payment as leads to an inference that the debtor intended to renew his promise. Reed v. Harris, 139 Me. 225, 28 A. (2d) 741.

Indorsement in debtor's handwriting of part payment is sufficient evidence thereof.—An indorsement on a promissory note of a payment within six years, proved to be in the handwriting of the defendant, is sufficient evidence to authorize a jury to find a payment that would prevent the note from being barred by the statute of limitations. Noble v. Edes, 51 Me. 34; Manson v. Lancey, 84 Me. 380, 24 A. 880.

As well as indorsement made at debtor's direction.—Payment by the maker of a note of a part of it, and causing it to be indorsed thereon, is an act equivalent to an acknowledgment in words that the note is a subsisting debt, and is evidence of a promise to pay it. Coffin v. Bucknam, 12 Me. 471.

But payment may be otherwise proved.—It is not a sound principle that, in order to take a note from the operation of the statute, the indorsement must be made in the handwriting of the debtor. It is the fact of the part payment within six years from the commencement of the suit which has that effect, and such a payment may be shown by oral evidence. Evans v. Smith, 34 Me. 33.

It is well settled that the payment may be proved by parol. Egery v. Decrew, 53 Me 392; Dyer v. Walker, 54 Me. 18.

An indorsement of a payment on a note may never be made thereon, but if the fact of payment is satisfactorily established by other evidence, it is equally effectual to save the case from the operation of the statute. It is well settled that such payment may be proved by parol. Manson v. Lancey, 84 Me. 380, 24 A. 880.

Indorsement not in debtor's handwriting is evidence of payment.—An indorsement made by the recipient of a partial payment on a note is not, by the provisions of this section, "sufficient proof of payment," but it may, however, be considered in connection with other testimony tending to prove an actual payment of the sum indorsed. Howe v. Saunders, 38 Me. 350.

And oral agreements whereby something of value passes may be shown to prove partial payment.—There can be no question that oral agreements are competent to prove that certain payments of money, or that a note, or the transfer of property, or settlement of accounts, or the assuming of certain obligations of a pecuniary character actually performed are, as between the parties, to be taken as payments on account of, or in reduction of, a particular note within the meaning of this section; but such oral agreements must conform and relate and give color to some actual transaction, whereby something of value passes between the parties. Manson v. Lancey, 84 Me. 380, 24 A. 880.

As where maintenance of creditor's child agreed to constitute partial payment.—Where it was agreed between plaintiff and defendant that the future maintenance of the plaintiff's child by the defendant should be taken in part payment of the interest on the defendant's note held by the plaintiff, it was held that such maintenance of the child must be deemed part payment. Manson v. Lancey, 84 Me. 380, 24 A. 880.

Or proceeds of a note collected by creditor applied as partial payment.—Where a debtor committed to his creditor a demand against a third party for collection, with directions to apply the proceeds to the debtor's account for what they should collect upon it the money as soon as collected operated as so much payment on the note and took it out of the statute. Egery v. Decrew, 53 Me. 392.

But indorsement not representing anything of value, not sufficient.—Payment, within the meaning of this section, must be the actual payment of money or its equivalent; it therefore necessarily follows that an indorsement on a note which does not represent such a payment, but is merely intended to stop the running of the statute, and is not signed by the party to be charged, cannot be made, by force of an oral agreement, evidence of a new and continuing contract. Manson v. Lancey, 84 Me. 380, 24 A. 880.

And book entries after statute has run held inadmissible as proof of partial payment.—In an action by a firm to recover the balance of an account, entries of partial payments in the handwriting of a deceased partner, in the firm books, are not ad-

missible in evidence as proof of payments for the purpose of removing the bar of the statute of limitations. Libby v. Brown, 78 Me. 492, 7 A. 114.

Though entries before statute has run are admissible.—Entries in account books of a deceased testator of payments received by him on bills or notes supported by the executor's suppletory oath, made before the statute of limitations has run, would be entries against testator's interest and admissible to prove the fact of payment; but entries made after the statute has run would not be so admissible. Small v. Rose, 97 Me. 286, 54 A. 726.

Payment may be shown as of date of indorsement.—An indorsement on a promissory note of the value of a quantity of lumber delivered to the payee by the maker, made by express agreement of the parties four years after the delivery of the lumber, will be deemed a payment on the note, as of the date of the indorsement, which will prevent the operation of the statute of limitations, it not appearing that there was any agreement, express or implied, to appropriate the lumber to the payment of the note at the time of the delivery. Manson v. Lancey, 84 Me. 380, 24 A. 880.

The identity of the debt sued on with that upon which the payment was made must, of course, be established. Pond v. French, 97 Me. 403, 54 A. 920.

Though it presumptively applies to account shown if no other accounts appear.—If the evidence is clear that a payment was made within six years upon an account, and if it does not appear that the plaintiff had any other account than the one in suit, the presumption is that the payment was upon that. If not so, the burden is upon the defendant to show it. Dyer v. Walker, 54 Me. 18.

And evidence of application of payments may be shown either by direct testimony, or it may be implied from circumstances, if sufficient to satisfy the jury. Curtis v. Nash, 88 Me. 476, 34 A. 273.

But if no proof shown of debtor's appropriation of payment, appropriation by creditor may be shown.—While a debtor may appropriate his payment, made within six years, to any one or more of the items of an account, yet if there is no proof tending to show that he did so, and on the other hand, there is testimony clear and uncontroverted that the payment was appropriated toward the payment of the account as a whole, and not to any one or any number of items, such payment is sufficient to take the whole account out of the statute. Dyer v. Walker, 54 Me. 18.

For a case relating to this section before the enactment of the provision concerning indorsement of payments by the recipient thereof, see Patch v. King, 29 Me. 448.

IV. PARTIAL PAYMENT BY JOINT CONTRACTORS.

Parties are to be regarded as joint contractors whether the contract results from their individual and separate acts or from the act of one having power to bind the others. True v. Andrews, 35 Me. 183.

Partners are joint contractors.—No exception is made in the statute in relation to partners, and as they are joint contractors, they are embraced within it. True v. Andrews, 35 Me. 183; Blethen v. Murch, 80 Me. 313, 14 A. 208.

And a payment by one partner from his individual funds will not affect his copartners. Blethen v. Murch, 80 Me. 313, 14 A. 208.

But a payment made before dissolution from partnership funds might be regarded as a payment by all the partners, and thus affect them all. But if the payment is in fact made by one of the partners only, and this fact is made to appear, it is immaterial whether it is made before or after dissolution; it will in neither case affect anyone but him who makes it. Blethen v. Murch, 80 Me. 313, 14 A. 208.

Sec. 109. Presumption of payment after 20 years.—Every judgment and decree of any court of record of the United States, or of any state, or of a trial justice or justice of the peace in this state shall be presumed to be paid and satisfied at the end of 20 years after any duty or obligations accrued by virtue of such judgment or decree. (R. S. c. 99, § 109.)

Presumption of payment after 20 years is rebuttable.—After the expiration of twenty years, by the provisions of this section, payment or satisfaction of a judgment shall be presumed. But this presumption may be repelled; it is not conclusive. Jackson v. Nason, 38 Me. 85; Knight v. Macomber, 55 Me. 132.

If the legislature had intended that the presumption should stand uncontrolled by evidence, it would have fixed an absolute bar of twenty years by way of limitation,

as it has done in § 98, in relation to actions on contracts not otherwise limited. Brewer v. Thomes, 28 Me. 81.

Testimony for such purpose is admissible.—This section does not make the twenty years a bar by limitation, but creates a presumption of payment. It is like the common law provision, presuming a bond to be paid after the lapse of twenty years. But the presumption of payment may be rebutted, and therefore testimony, tending to rebut the presumption, is admissible in evidence. Brewer v. Thomes, 28 Me. 81.

And the question is ordinarily referred to a jury.—Circumstances tending to remove the presumption of payment being adduced, they would ordinarily be referred to a jury to determine whether, on the whole, it was reasonable to believe that the debt, notwithstanding the lapse of time, had never been paid. Joy v. Adams, 26 Me. 330.

No legal inference of continued insolvency is shown by evidence of a failure in business.—A judgment, after the lapse of twenty years, is supposed to be satisfied by presumption of law. If that presumption is attempted to be overcome by evidence of the continued insolvency of the judgment debtor, from the fact that soon after its recovery he failed in business, no legal inference will arise that his insolvency continued afterwards. Jackson v. Nason, 38 Me. 85.

But executions returned unsatisfied, and other evidence, may repel presumption of payment.—Evidence that three executions upon the judgment in suit were returned in no part satisfied: That the debtor, upon demand of payment, replied he had no property and could not make payment; that, at the time of the rendition of the judgment, he put his property, real and personal, out of his hands, and claimed not to be the owner of any property since: and his continued reputation of insolvency is sufficient to repel the presumption of payment, arising from a lapse of more than twenty years. Knight v. Macomber, 55 Me. 132.

Where there appeared in evidence the poverty of the debtor, a demand of payment by the creditor, and an answer by the debtor to the demand "that he would come up soon, and do something about it"; it was held that this was sufficient evidence to repel the presumption of payment arising from a lapse of time of more than twenty years. Brewer v. Thomes, 28 Me. 81.

A mortgage security has not been deemed to be within any branch of the statute of limitations. Joy v. Adams, 26 Me. 330.

Applied in Haslam v. Perry, 115 Me. 295, 98 A. 812.

Cited in Edwards v. Moody, 60 Me. 255; Pulsifer v. Pulsifer, 66 Me. 442.

Sec. 110. Application of the statutes of limitation to setoffs. — All the provisions hereof respecting limitations apply to any debt or contract filed in setoff by the defendant; and the time of such limitation of such debt or contract shall be computed as if an action had been commenced therefor at the time when the plaintiff's action was commenced, unless the defendant is deprived of the benefit of the setoff by the nonsuit or other act of the plaintiff; and when he is thus defeated of a judgment on the merits of such debt or contract, he may commence an action thereon within 6 months after the final determination of the suit aforesaid. (R. S. c. 99, § 110.)

Sec. 111. If defendant out of the state, when action commenced; insolvency. — If a person is out of the state when a cause of action accrues against him, the action may be commenced within the time limited therefor after he comes into the state; and, if a person is absent from and resides out of the state, after a cause of action has accrued against him, the time of his absence from the state shall not be taken as a part of the time limited for the commencement of the action; or, if a person is adjudged an insolvent debtor after a cause of action has accrued against him, and such cause of action is one provable in insolvency, the time of the pendency of his insolvency proceedings shall not be taken as a part of the time limited for the commencement of the action. No action shall be brought by any person whose cause of action has been barred by

the laws of any state, territory or country while all the parties have resided therein. (R. S. c. 99, § 111.)

Section applicable to action under c. 139, § 8.—See note to c. 139, § 8.

Section allows 6 full years to bring action while debtor subject to courts of state.—It was obviously the intention of the legislature to give to the creditor six full years and no more in which to bring his action for the recovery of a debt on simple contract, unless the evidence of debt be a witnessed note. And so long as the debtor has such a residence in the state as to make him subject to the jurisdiction of its courts, the statute would continue to run. Bucknam v. Thompson, 38 Me. 171.

It avoids running of statute while creditor cannot sue.—The mischief intended to be provided for in this section is that the statute would in certain cases commence running while the holders of contracts cannot commence suits upon them, or cannot do it without being subjected to the inconvenience of doing it in another state. Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

The object of the second clause of this section obviously was to prevent debtors, against whom the statute of limitations had begun to run, from departing from the state and remaining abroad a sufficient length of time for the statute to run out, and thus enable them to return and interpose this statute as a defense in bar. Drew v. Drew, 37 Me. 389; Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

And section cannot be avoided on ground that action against copromisor is barred.—The provision of this section, that the statute of limitations does not run while the promisor of a note is out of the state, cannot be avoided on the ground that the right to recover against a copromisor is barred. Hapgood v. Watson, 65 Me. 510.

After 6 years burden is on plaintiff to repel presumption of payment of debt.—At the expiration of six years from the maturity of an unattested note, the legal presumption is, in the absence of proof, that the note was barred by the statute of limitations. The burden of repelling or overcoming this legal presumption, by invoking the provisions of this section, is upon the party seeking recovery on the note. Drew v. Drew, 37 Me. 389.

Section applies to causes of action mentioned in §§ 90-114.—The exception in this section, in case the defendant shall be out of the state, applies only to any cause of action mentioned in §§ 90-114, and not to indictments. State v. Gray, 39 Me. 353.

This section applies to actions upon the statute to recover property lost at gambling. Peyret v. Coffee, 48 Me. 319.

Applicability of first clause of section.—The first clause of this section was designed to apply only to cases in which the cause of action shall accrue against a person, and he shall at the time be residing out of the state. Crehore v. Mason, 23 Me. 413.

The provision relating to residence of the debtor outside the state was designed for the benefit of the creditor, to afford him protection in case his debtor should, for a series of years, place himself beyond the jurisdiction of our judicial tribunals. Drew v. Drew, 37 Me. 389.

And proof that debtor often returned to state on business, without knowledge of creditor, will not avoid section.—Where the debtor, at the time the cause of action accrued, was residing out of the state, proof that since that time he had often been a few miles within the limits of the state on business, with attachable personal property, without any proof that the plaintiff had knowledge of it, is not sufficient to take the case out of the operation of this section. Crosby v. Wyatt, 23 Me. 156.

Under his section, the maker of a promissory note given in this state, who has not since resided within it, though he may have occasionally been within its limits, cannot avail himself of the statute bar. Hacker v. Everett, 57 Me. 548.

Residence without state when contract executed presumed to continue and avoid statute.—In an action on a contract where the defendant resided out of the state when the contract in suit was executed, such residence, in the absence of any proof to the contrary, is presumed to continue and will prevent the operation of the statute of limitations. Alden v. Goddard, 73 Me. 345.

Meaning of "reside."—To reside, within the meaning of this section, is to dwell permanently, or for a length of time; to have a settled abode for a time. Drew v. Drew, 37 Me. 389.

The phrase "and resides out of the state" has reference to an established residence or home without the state. Bucknam v. Thompson, 38 Me. 171.

To reside in a given place imports something more than merely remaining in that place. Drew v. Drew, 37 Me. 389.

And the absence of the debtor must be something more than a transient departure from his home on business or pleasure,

and a temporary sojourn out of the state. Drew v. Drew, 37 Me. 389; Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

It must be accompanied by establishment of residence.—Mere absence from the state is not sufficient within the meaning of this section. It must be accompanied by the establishment of a residence out of the state. Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

And debtor retains residence though absent for particular purposes.—If a debtor, at the time a cause of action accrues against him, has a home in this state, it remains such, though he is absent for particular purposes, if he retains the intention to return. Bucknam v. Thompson, 38 Me. 171.

But he cannot have residence without state that will toll statute, while retaining residence within state.—In this section the word residence is synonymous with dwelling place, or home; and a man cannot have such a residence out of the state, as will interrupt the running of the statute of limitations, at the same time that he has an established residence, or home, within the state. Drew v. Drew, 37 Me. 389; Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

Place of repose of casual lodger, sojourner, prisoner, not residence.—The casual lodger at a public inn, the sojourner and the wayfaring man, as well as the man who is held in duress against his will, each and all remain in the place where they may repose for the time being, or within which they may be confined; yet such place of repose or confinement could, in no just sense, be called their residence or home. Drew v. Drew, 37 Me. 389.

Applicability of second clause of section.—In order to suspend the operation of the statute of limitations after the cause of action has accrued, and the statute has begun to run, the person who sets it up in defense must not only be absent from, but reside without the state. Bucknam v. Thompson, 38 Me. 171; Connolly v. Serunian, 138 Me. 80, 21 A. (2d) 830.

Action against debtor personally 6 years within state, neither party ever residing therein, not barred after 6 years.—Notes dated out of state, running from defendant to plaintiff, neither party now or ever residing in this state, the defendant being personally in this state more than six years after the date of the notes, when a writ was served on him, are not barred by the statute of limitations. Frye v. Parker, 84 Me. 251, 24 A. 844.

Prior to the enactment of this section, when the period of limitation had commenced to run on a claim provable in insolvency, the subsequent insolvency of the defendant under the insolvent law did not interrupt the running of the limitation, and the right of action on such claim was barred by the general limitation of six years. Trafton v. Hill, 80 Me. 503, 15 A. 64.

For a case, before the enactment of the last sentence of this section, relating to a cause of action barred by another state, see Thompson v. Reed, 75 Me. 404.

Applied in Wellman v. Southard, 30 Me. 425; Keyes v. Winter, 54 Me. 399; Brown v. Nourse, 55 Me. 230; MacNichol v. Spence, 83 Me. 87, 21 A. 748; Talbot v. Hathaway, 113 Me. 324, 93 A. 834.

Quoted in part in Rand v. Nutter, 56 Me. 339.

Cited in Varney v. Grows, 37 Me. 306.

Sec. 112. Foreign corporations entitled to benefit of law relating to limitation of actions. — Any foreign corporation, doing business continuously in this state and having constantly an officer or agent resident herein on whom service of any process may be made, shall be entitled to the benefit of all provisions of law relating to limitation of actions the same as domestic corporations. (R. S. c. 99, § 112.)

Sec. 113. Actions to recover damages for land taken for public purposes. — No action or proceeding shall be brought or maintained to recover damages caused by the taking of any land, rights or other property to be used for a public purpose when such taking has been authorized by the legislature, unless the same is commenced within 3 years after the cause first accrued for which the same or like proceedings might have been commenced; nor shall any compensation be awarded for damages sustained for more than 3 years before the commencement of proceedings to recover the same. (R. S. c. 99, § 113.)

Cross references.—See c. 52, § 13, re owners of property entitled to damages; c. 52, § 19, re proceedings when damages remain unpaid.

Cited in Shurtleff v. Redlon, 109 Me. 62, 82 A. 645.

Sec. 114. Actions barred when no administration for 6 years after death of decedent. — Where no administration is had upon the estate of a deceased person within 6 years from the date of death of said decedent and no petition for administration is pending, all actions upon any claim against said decedent shall be barred. (R. S. c. 99, § 114.)

Purpose of section.—Under our laws all the real estate of a deceased debtor is liable for the payment of his debts. If his estate is insolvent, the real estate must be sold by the administrator in order that the proceeds may be divided ratably among his creditors. If his estate is solvent, each creditor has a lien on the real estate, which he can enforce by law against any person he may find in possession thereof, whether an heir, devisee or grantee of either of them. The claim of the creditor is paramount to every title that can be acquired after the decease of the debtor. This lien, if it were as unlimited in its duration as in its extent, would destroy all security in any title to real estate; as it would in general affect all the land in the country in the course of every successive generation. Such is the underlying reason requiring limitation upon the presentation and enforcement of claims against the estates of deceased persons. Duddy v. McDonald, 148 Me. 535, 97 A. (2d) 445.

Petition "pending" refers to petition filed within 6 years of death of decedent.—A claim does not come within the exception of this section merely because a creditor or someone in his behalf may have filed a petition for administration subsequent to the expiration of the six years from the date of the death of said decedent. Statutes of limitation usually require that actions be commenced within a specified time after the right of action accrues. Actions brought within such period toll the statute. The purpose of the exception in this section is to make provision for tolling this statute of limitations by filing a petition for administration within six years from the date of the death of the decedent. It is to a petition filed within that time that the phrase "no petition for administration is pending" refers. Duddy v. McDonald, 148 Me. 535, 97 A. (2d) 445.

Funeral expenses are "claim against decedent."—Inasmuch as the funeral expenses are a charge upon the estate of the deceased and constitute a preferred claim against the assets of the deceased, it is as important that such claims be subject to the bar of this section as those which are strictly debts of the decedent. Within the meaning of this section, the reasonable funeral expenses of the decedent are "claims against the decedent". Duddy v. McDonald, 148 Me. 535, 97 A. (2d) 445.

Strictly speaking, a claim for funeral expenses is not a claim against the decedent because such expenses are not incurred until after his death. However, a claim therefor is a claim against the estate of the decedent. For the purposes of the statute of limitations against the enforcement of claims against estates, a claim for funeral expenses is a claim "against the decedent" within the meaning of those or similar words when used in such a statute. Duddy v. McDonald, 148 Me. 535, 97 A. (2d) 445.