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Chapter 114.
Trustee Process.

Law liberally construed.—The policy of the law of trustee process is to render the effects and credits of the principal debtor in the hands of the trustee available for the benefit of the creditor. The law should receive a liberal construction in furtherance of this object. Whitney v. Munroe, 19 Me. 42.

A trustee suit is in substance an equitable proceeding for the settlement of the ownership of a fund, especially where a claimant to the fund has appeared and become a party to the proceeding (§ 32), though arising in an action at law. Jenness v. Wharff, 87 Me. 307, 32 A. 908; Foss v. Hume, 130 Me. 22, 153 A. 181.

A proceeding under the trustee process statute is really an equitable interference for the settlement of the ownership of a fund, although the question arises in an action of law. White v. Kilgore, 78 Me. 323, 5 A. 70.

And the court has frequently applied equitable principles in determining the rights of the parties upon trustee process, even though in form it is an action at law. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

The trustee process is created by statute. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

And regulated by the statutory requirements. Bean v. Ingraham, 128 Me. 238, 147 A. 191.

Trustee process or, as it is termed in some states, the garnishee process, is unknown to the common law. It is a creature of statute, and the rights as well as the procedure are governed by statute. Davis v. United States Bobbin & Shuttle Co., 118 Me. 285, 107 A. 865.

Attachment of property of the principal debtor in the hands of trustees is wholly regulated by statute. Quimby v. Hewey, 92 Me. 129, 42 A. 344.

And course prescribed by statute must be pursued.—If a creditor would make the goods, effects or credits of his debtor in the hands and possession of an alleged trustee available for the payment of his debt, he must pursue the course prescribed by the statutes regulating trustee process. Jordan v. Harmon, 73 Me. 259.

Procedure must conform to rules of civil pleading.—While trustee process is regulated by statutory requirements, its procedure must conform to the rules of civil pleading. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

There is nothing in the nature of the process which authorizes a departure from technical pleading if the trustee raises for himself an issue of law. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

Trustee process is simply a form of attachment, the purpose of which is to place a lien on the goods, effects or credits of the principal defendant in the hands of the trustee. Smith v. Davis, 131 Me. 9, 158 A. 359.

Whatever may be the nature of trustee process in other jurisdictions, it is clearly recognized as one of attachment in this state under the statute authorizing its use and prescribing its form. Smith v. Smith, 120 Me. 379, 115 A. 87.

Which cannot be created by consent.—An attachment by common-law garnishment or trustee process, as it is called under our statute, cannot be created by consent. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057.

And is not available if property attachable in ordinary method.—It is evident that the trustee process statute was not intended for any case in which the property could, without difficulty or risk, be attached in the ordinary method. Pettingill v. Androscoggin R. R., 51 Me. 370.

Rights of parties determined as of time writ served.—The rights of the parties in trustee process must be determined by the conditions as they existed at the time of the service of the writ. Thompson v. Shaw, 104 Me. 85, 71 A. 370. See Norton v. Soule, 75 Me. 385.

Whether trustees are to be charged as such must depend upon the state of facts existing at the time when service was made upon them. Mace v. Heald, 36 Me. 136.

The liability to trustee process must be

determined by the relations existing at the time when the process was served upon the alleged trustee, and no subsequent act of the trustee could render him chargeable. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

The validity of trustee process depends upon the state of facts existing at the time of the service of the writ on the alleged trustee. Holmes v. Hilliard, 130 Me. 392, 156 A. 692.

A trustee's liability depends on the state of facts as it existed when the process was served on him. But this rule is not universally applicable. Some apparent liability may be necessary at that time; but it may be materially modified and even wholly discharged by subsequent events on the score of equitable setoff. Donnell v. Portland & Ogdensburg R. R., 76 Me. 33.

The suing out of a trustee suit is not a bar to the commencement of a suit by the principal defendant against the trustee. If it were to be so held, the defendant might lose an opportunity of securing his debt against the trustee, or it might become barred by the statute of limitation, by reason of the pendency of the trustee process. Ladd v. Jacobs, 64 Me. 347. See § 76 and note, re judgment against trustee as bar to suit by principal defendant.

The suit does not cease to be a trustee process, because the trustee is discharged. Leighton v. Colby, 56 Me. 79.

Chapter applied in Ingalls v. Dennett, 6 Me. 79; Smith v. Barker, 10 Me. 458; Portland Bank v. Hyde, 11 Me. 196; Manufacturer's Bank v. Osgood, 12 Me. 117; Chase v. Bradley, 17 Me. 89; Hooper v. Day, 19 Me. 56; Morse v. Holt, 22 Me. 180; Foster v. Libby, 24 Me. 448; Lyford v. Holway, 27 Me. 296; Mayhew v. Paine, 42 Me. 296; Humphrey v. Warren, 45 Me. 216; Bailey v. Loud, 46 Me. 167; Whittier v. Prescott, 48 Me. 367; Flagg v. Bates, 65 Me. 364; Pike v. Bangor & Calais Shore Line R. R., 68 Me. 445; McDonald v. Gillett, 69 Me. 271; Johnson v. Hersey, 73 Me. 291; Weymouth v. Penobscot Log Driving Co., 75 Me. 41.

Procedure.

Sec. 1. Actions in which trustee process used.—All personal actions, except those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking and for assault and battery, may be commenced by trustee process in the superior court; or when the amount demanded in damages is not less than $5 nor more than $20, before a municipal court or a trial justice unless otherwise limited in the act establishing such court (R. S. c. 101, § 1.)

"Personal actions" defined.—"Personal actions" are those brought for specific recovery of goods and chattels, or for damages or other redress; for breach of contract or other injuries, of whatever description; the specific recovery of lands, tenements and hereditaments, only excepted. Linscott v. Fuller, 57 Me. 406.

Trespass quare clausum may be commenced by trustee process.—Trespass quare clausum fregit is to be regarded as a personal action, and may be commenced by trustee process. Linscott v. Fuller, 57 Me. 406.

As may action for wrongful death.—This section does not forbid bringing an action for death by wrongful act by trustee process. Ames v. Adams, 128 Me. 174, 146 A. 257.

And libel for divorce may be inserted in writ.—The trustee process provided in this state being a writ of attachment in fact and in name, it is a proper mode of service of libels for divorce under c. 166, § 56. Smith v. Smith, 120 Me. 379, 115 A. 87. See § 5.

For a case concerning the erroneous printing of the word "except" as "expect" in this section, see Woodworth v. Grenier, 70 Me. 242.

Sec. 2. Form of writ.—The writ shall be in the form established by law, authorizing an attachment of goods and estate of the principal defendant in his own hands and in the hands of the trustees. (R. S. c. 101, § 2.)

Quoted in part in Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Cited in Pettingill v. Androscoggin R. R., 51 Me. 370.

Sec. 3. Service of writs.—The officer serving said writ shall attach the goods and estate of the principal and give to him in hand or leave at his last and

usual place of abode a summons of the form hereinafter prescribed, which is sufficient service on the principal whether any trustee is held or not. The summons shall be in substance as follows:

"STATE OF MAINE

..... ss.

To ....

Greeting:

We command you that you appear at our ..... court, next to be holden at ..... within and for the county of ..... aforesaid, on the..... day of ..... next, then and there to answer to ..... in a plea of ..... which plea the said plaintiff has commenced, to be heard and tried at said court and your goods or estate are attached to the value of ..... dollars for security to satisfy the judgment which the said plaintiff may recover upon said trial. Fail not of appearance at your peril.

And to ....., trustee of said ..... We command you to appear before our said court to be holden as aforesaid, to show cause if any you have, why execution to be issued upon such judgment as the said plaintiff may recover against the said principal defendant in said action, if any, should not issue against his goods, effects or credits in your hands or possession as trustee of said principal defendant.

Witness ..... Justice of our said court at ..... this..... day of ..... in the year of our Lord one thousand nine hundred and .....

Clerk."

(R. S. c. 101, § 3.)

See note to § 36, re legacy need not be mentioned as such in writ.

Sec. 4. Effect of service on trustee; service on partnership.—A like service on the trustee binds all goods, effects or credits of the principal defendant entrusted to and deposited in his possession, to respond to the final judgment in the action, as when attached by ordinary process. When a partnership is made a trustee in a trustee suit, service upon 1 member of the firm shall be a sufficient attachment of the property of the principal defendant in the possession of the firm, provided that such service be made at any place of business of the firm or, if such service is made elsewhere, that legal service be afterward made upon the other members of the firm. (R. S. c. 101, § 4.)

Person held as trustee must be liable to principal on contract.—That a person may be holden as trustee, he must be liable to the principal by virtue of some contract, express or implied. The process is a mode by which such contract may be enforced for the benefit of the creditor of the principal debtor. The one summoned as trustee, being indifferent between the parties, is allowed to disclose under oath the state of dealings between him and the principal defendant. Denny v. Metcalf, 28 Me. 389.

To constitute the relation of trustee, there must be a privity of contract, express or implied, between the principal debtor and the supposed trustee, or the former must have entrusted and deposited goods and effects with the latter. Skowhegan Bank v. Farrar, 46 Me. 293.

And mere possession of property is not sufficient.—The mere possession of property, without any claim to hold it against the owner by virtue of any contract or agreement, would not seem to be sufficient to hold one as trustee. Skowhegan Bank v. Farrar, 46 Me. 293.

Whether principal has right of action against trustee is usual test where credits are involved.—With respect to credits, one of the usual tests to determine the question, whether trustee or not, is whether the principal has, or has not, a right of action against the supposed trustee. But this test is not in all cases necessarily decisive, as there are exceptions to its application. Whitney v. Munroe, 19 Me. 42; Stowe v. Phinney, 78 Me. 244, 3 A. 914.

Trustee's liability to plaintiff measured by liability to defendant.—The sole ground upon which a trustee is chargeable is his

liability to the principal defendant by virtue of some contract between them, express or implied, or deposit of goods and effects. His liability to the plaintiff is measured by his liability to the defendant. Beyond that the trustee process does not reach. Davis v. United States Bobbin & Shuttle Co., 118 Me. 285, 107 A. 865.

And plaintiff has same rights as defendant.—The attaching creditor in a trustee suit has all the rights to protect and recover the fund attached that the owner would have were he pursuing his claim in his own name. The plaintiff becomes a substituted owner. Fogler v. Marston, 83 Me. 396, 22 A. 249.

But no greater rights.—A fundamental doctrine of trustee process is that the plaintiff does not, as a general rule, acquire any greater rights against the trustee than the defendant himself possesses. Stowe v. Phinney, 78 Me. 244, 3 A. 914.

Personal property exempted from execution by statute is not liable to attachment by the trustee process. Bridgton v. Lakin, 53 Me. 106.

And only goods deposited, or a debt due and not contingent, can be the subjects of trustee process. Rundlet v. Jordan, 3 Me. 47. See § 55, sub-§ IV, and note.

And this does not include lands.—By our statute a trustee is chargeable only for goods, effects or credits, in his hands or possession; which provisions do not include lands. He is under no obligation to answer interrogatories to the disparagement of his title to his real estate, and is not chargeable simply because he declines to answer such interrogatories. Moor v. Towle, 38 Me. 133.

Thus, trustees cannot be charged on account of the real estate conveyed to them. Mace v. Heald, 36 Me. 136.

The trustee is not chargeable with the supposed value of buildings and lots in his possession. They are real estate, and not "goods, effects or credits," in the hands of the trustee. Plummer v. Rundlett, 42 Me. 365.

Single question is amount of defendant's goods in trustee's possession.—The single question to be determined in charging a trustee is the amount of the goods, effects or credits belonging to the debtor in the hands of the alleged trustee at the time of service upon the latter. Davis v. United States Bobbin & Shuttle Co., 118 Me. 285, 107 A. 865.

And person not charged if he discloses no such goods.—A person cannot be charged as trustee, if he does not disclose any goods, effects or credits as being in his hands, belonging to the defendants. Rich v. Reed, 22 Me. 28.

Service of writ operates as attachment of goods in trustee's possession.—If the alleged trustee is owing the principal defendant, the suit operates as an assignment of the demand to the plaintiff, to be perfected by demand made by the officer having the execution. But, if he has "goods or effects" of the principal debtor deposited in his hands, liable to attachment, the service of the writ operates as an attachment of the specific articles in his possession. It is only in case he neglects to keep them, and deliver them to the officer having the execution, that he becomes personally liable. Pettingill v. Androscoggin R. R., 51 Me. 370.

The ordinary attachment fastens itself upon the goods or property owned and possessed by the debtor himself, that is the principal defendant. The trustee process reaches and binds all goods, effects or credits of the principal defendant entrusted to and deposited in the possession of the trustee to respond to the final judgment in the action as when attached by ordinary process. Davis v. United States Bobbin & Shuttle Co., 118 Me. 285, 107 A. 865.

And acts of trustee or principal cannot defeat rights acquired.—In a proceeding by trustee process it is the property of the defendant which affords the security and that is a fund equally holden to be appropriated to the payment of the debt secured thereby. No restoration to the owner, or disposition by him or the trustee can defeat the right acquired by the process. Franklin Bank v. Bachelder, 23 Me. 60.

But voluntary appearance without service does not so operate.—The voluntary appearance, without the statutory service upon him, of one named as trustee in a trustee process does not attach the funds of the principal defendant in his hands. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057.

Client's money in hands of attorney may be attached.—Where an attorney, in the exercise of his profession, has received money in satisfaction of a demand in favor of his client, it may be attached in his hands by trustee process. Staples v. Staples, 4 Me. 532.

And bailee may be charged as trustee.—Where goods are deposited for safe keeping, the bailee may be summoned and charged as a trustee. Balkham v. Lowe, 20 Me. 369.

But debt due creditor as agent not attachable as his property.—If the debt due

from a supposed trustee is due to the creditor as agent, or factor, it is not attachable as his property. Granite Nat. Bank v. Neal, 71 Me. 125.

And guardian cannot be trusteed.—Attachments of property in the hands of trustees of the principal debtor are wholly regulated by statute in this state; and the statutes contain no provision that a guardian can be summoned and holden as a trustee, on account of goods, effects or credits belonging to the principal defendant, in a suit against the latter. The guardian cannot be sued for the debt of the ward, though assets may be in his hands. Hanson v. Butler, 48 Me. 81.

Nor can a person indebted for property purchased of a guardian be held as trustee in a suit against the ward. To do so would deprive the guardian of his rightful authority over the ward's estate. Homestead v. Loomis, 53 Me. 549.

And holder of chose in action not charged as trustee.—In a trustee suit, the holding of a chose in action, belonging to the defendant, will not charge the holder as trustee. Clark v. Viles, 32 Me. 32.

And the fees of a juror are not "goods, effects or credits" of the debtor within the meaning of this section. Clark v. Clark, 62 Me. 255.

Servant of debtor not subject to trustee process.—The property must be in fact in the hands of a person other than the debtor. Therefore, the mere servant of the debtor, having care of his goods under his direction, would not be liable upon this process, unless he should do something to prevent them from being attached. Pettingill v. Androscoggin R. R., 51 Me. 370.

Nor is treasurer chargeable as trustee of corporation.—The process is intended for a case in which, for some purpose, the goods are out of the personal possession of the debtor. It is for this reason that the cashier of a bank or the treasurer of any other corporation is not chargeable as the trustee of such corporation, though some of the property in his custody would be attachable. The corporation can have no actual possession except by him. He is the corporation, quoad hoc. Nor does his possession make him the debtor of the corporation, so that he can be chargeable upon that ground. Pettingill v. Androscoggin R. R., 51 Me. 370; Sprague v. Steam Navigation Co., 52 Me. 592; Bowker v. Hill, 60 Me. 172; Donnell v. Portland & Ogdensburgh R. R., 73 Me. 567.

A partnership can be summoned only by a process against the persons composing it. Macomber v. Wright, 35 Me. 156.

Notice to firm when debtor trusteed in suit against individual member.—When one of the members of a firm is sued for his individual debt, and a debtor of the firm is trusteed, notice of the fact must be given to the other members of the firm, or a judgment charging the trustee will not be binding upon them. Henderson v. Cashman, 85 Me. 437, 27 A. 344.

Applied in Mansur v. Coffin, 54 Me. 314.

Quoted in part in Skowhegan Bank v. Farrar, 46 Me. 293; Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Cited in Denny v. Metcalf, 28 Me. 389.

Sec. 5. County in which action must be brought; libel for divorce; banking institution as trustee.—If all the trustees live in the same county, the action shall be brought there; if they reside in different counties, in any county in which one of them resides; and in a trustee process against a corporation, its residence shall be deemed to be in the county in which it has its established or usual place of business, held its last annual meeting or usually holds its meetings; except in a suit in which a railroad corporation is named and alleged as trustee, the action may be brought in any county in which said railroad corporation runs and operates its road; except in a suit in which a banking institution is named and alleged as trustee, the action may be brought in any county in which said banking institution maintains a place of business. Service may be made on the manager of such banking institution in the county having jurisdiction over the parties named in the action.

Provided, however, that when a libel for divorce is inserted in a trustee writ, the action must be brought in the county in which the court has jurisdiction over the parties named in the libel, and the alleged trustee, although residing in another county, may be summoned to appear in the county in which said court has jurisdiction over the parties named in the libel and must answer and make disclosure in such county; and the court sitting therein shall have full power and authority

to award from the funds found to be held by the alleged trustee and belonging to the libelee such sum or sums as it may deem proper as an award for alimony or in lieu thereof. (R. S. c. 101, § 5. 1945, c. 131. 1947, c. 7.)

Jurisdiction dependent upon residence of trustee.—The jurisdiction of the court is made dependent upon the fact that some one or more of the trustees reside in the county. Mansur v. Coffin, 54 Me. 314.

All actions commenced by trustee process must be commenced in a county where some one or more of the trustees reside. Mansur v. Coffin, 54 Me. 314.

And allegation as to residence taken as true.—The declaration that a party is a trustee, and that he resides in a particular place is a declaration of certain facts, and, under the rules of proceeding in such cases, these allegations, for the purpose of charging or discharging him as trustee, are taken to be true until the contrary is made to appear by his disclosure. They are, however, issues that may be raised by a plea in abatement of the action. Mansur v. Coffin, 54 Me. 314.

Jurisdiction determined as of time action entered.—The question of jurisdiction must be settled by the facts existing at the time of the entry of the action. If jurisdiction has been acquired by due personal service, or if goods, estate, effects or credits of any defendant are found within the state, and attached on the original writ, jurisdiction will be sustained in all actions commenced in any court proper to try them. Cassity v. Cota, 52 Me. 380.

The jurisdiction of the court is determined by the facts existing at the time when the action was commenced. Mansur v. Coffin, 54 Me. 314.

In the trustee process, jurisdiction depends upon the residence of the trustee at the time the action is brought. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

Which is presumed to be date of writ.—The date of a writ is presumed to be the time when the action is brought within the meaning of this section. Biddeford Savings Bank v. Mosher, 79 Me. 242, 9 A. 614.

And removal of trustee before writ served does not abate action.—If the trustee resided in the county where the action was brought and removed before the writ was served, the action would not be abatable for that cause. An action is brought when the writ is sued out with an intention of service. Biddeford Savings Bank v. Mosher, 79 Me. 242, 9 A. 614.

Trustee can raise question of jurisdiction only by plea in abatement.—In this case the trustee seeks to incorporate in his disclosure matters in the nature of a plea in abatement affecting the jurisdiction of the court. This is not admissible unless perhaps where the defect is apparent in the writ or return. The record in such a case would not show whether a discharge of the trustee was granted because the court had no jurisdiction, or because the trustee had in his possession no property of the principal defendant subject to the trustee process. If there is no jurisdiction, the plaintiff ought not to be debarred from maintaining the process in another county, but if the discharge is based upon the facts disclosed it should appear that the subject matter is res adjudicata. Our conclusion is that the trustee can only raise the question of jurisdiction by plea in abatement, or by motion to abate when the essential facts of the defect appear by inspection. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

Provisions of section may be pleaded in abatement by principal defendant.—The provision of this section was not intended merely for the benefit of trustees, but may be pleaded in abatement by the principal defendant in a trustee suit, wherein the only trustees are a corporation aggregate, having their established and usual place of business, and having held their last annual meeting in a county other than that in which the suit is brought. Scudder v. Davis, 33 Me. 575.

Even though plaintiff discontinues as to trustees.—Where all the trustees in a foreign attachment live in one county, and the principal defendant in another, and the action is brought in the latter county, the writ is abatable, notwithstanding the principal defendant was regularly summoned in the action, and the plaintiff discontinues as to all the trustees. Greenwood v. Fales, 6 Me. 405; Biddeford Savings Bank v. Mosher, 79 Me. 242, 9 A. 614.

Applied in Cooper v. Bailey, 52 Me. 230.
Cited in Linscott v. Fuller, 57 Me. 406.

Sec. 6. Insertion of names of additional trustees; suit discontinued, trustee not entitled to costs.—The plaintiff may insert the names of as many persons as trustees as he deems necessary, at any time before the process is served on the principal, but not after; and he may have further service made on any

trustee, if found expedient, if the service is afterwards made or renewed on the principal; but no costs for services shall be taxed for the plaintiff in such case, except for that last made. When a trustee suit is discontinued or settled by the principal parties thereto, the trustee shall be entitled to no costs, provided the plaintiff or his attorney shall notify the trustee in writing 7 days before the return day of the writ that the suit has been discontinued. (R. S. c. 101, § 6.)

A new service upon a trustee is regulated by this section, and it must be made before final service upon the principal defendant. Mansur v. Coffin, 54 Me. 314.

Service may be renewed upon the principal after "further" service on any trustee. Bowler v. European & North American Ry., 67 Me. 395.

The name must be inserted "before" the process is served on the principal and not after, and it does not help the matter that the service was afterwards renewed on the principal. Bowler v. European & North American Ry., 67 Me. 395.

Further service not available if first service effective except for exemption.—The provision authorizing further service upon trustees may have its full and fair effect without applying it to cases in which the garnishee's indebtment would have been securely held by the first service had it not been specially exempted by another section of the same statute. Collins v. Chase, 71 Me. 434.

Cited in Cooper v. Bailey, 52 Me. 230.

Sec. 7. Notice to principal, if absent from state; any trustee may appear for him.—When the principal is out of the state at the time of the service and has no agent therein, notice shall be given as provided in section 21 of chapter 112; or proceedings may be had as provided in section 4 of chapter 113, unless in the meantime he comes into the state before the sitting of the court; and when he does not appear in his own person or by attorney, any one or more of the trustees having goods, effects or credits in their hands, and being adjudged trustees, may appear in his behalf and in his name plead and defend the cause. (R. S. c. 101, § 7.)

This section has reference to a case in which the court has jurisdiction of the suit, between the principal parties. Columbus Ins. Co. v. Eaton, 35 Me. 391.

Suit may be commenced against a nonresident defendant by trustee process. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

As this section has reference to absent residents and nonresidents with property within the state.—The provisions of this section have reference to cases in which a defendant, having a residence within the state, is absent from it at the time of service without having a last and usual place of abode or an agent within the state; and also to cases, in which a suit has been commenced against a person not resident or found within the state, whose property has been found within the state and attached in some form. Lovejoy v. Albee, 33 Me. 414; Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

The court may have jurisdiction over the property of a nonresident defendant, though not over his person. Such jurisdiction will be sustained if goods, effects or credits of a defendant, though a nonresident, are found within the state, and being found are attached. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Applied in Spratt v. Webb, 1 Me. 325; South Boston Iron Co. v. Boston Locomotive Works, 51 Me. 585.

Sec. 8. Corporations summoned as trustees; answer and disclosure.—All domestic corporations and all foreign or alien companies or corporations established by the laws of any other state or country and having a place of business or doing business within this state may be summoned as trustees, and trustee writs may be served on them as other writs are served on such companies or corporations, except that the service shall be by the summons described in section 3; and they may answer by attorney or agent and make disclosures, which shall be signed and sworn to by such attorney or agent or such other person upon whom legal service of the writ may be made; and the same proceedings shall thereupon be had throughout except necessary changes in form, as in other cases of foreign attachment. (R. S. c. 101, § 8.)

Cross reference.—See note to § 55, sub-§ VII, re officer served to use due diligence in notifying officer whose duty it is to make payment.

The object of this section seems to have been to place corporations upon the same footing in relation to trustee process as individuals. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

The creditor may sue out trustee process and attach the property of his debtor in the hands and possession of a corporation. Walker v. Tewksbury, 67 Me. 496.

In the exercise of the privilege of doing business in this state, a foreign corporation subjects itself to the provisions of this section, and is liable to be summoned as trustee. Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

Including goods of nonresident in possession of 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.

But such corporation must be doing business within state.—The court does not have jurisdiction to summon a foreign corporation as trustee, unless it has a place of business, or is doing business, within the state. Brooks Hardware Co. v. Greer, 111 Me. 78, 87 A. 889, holding that the National Home for Disabled Volunteer Soldiers, established under Act of Congress, is not properly regarded as having its place of business "within the state" within the meaning of this section.

Service of a trustee summons may be made on an agent of a foreign insurance company. Ouellette v. City of New York Ins. Co., 133 Me. 149, 174 A. 462.

But service after revocation of agency not effectual. — See Ouellette v. City of New York Ins. Co., 133 Me. 149, 174 A. 462.

Disclosure can only be made by agent or attorney.—The disclosure of a corporation summoned as trustee can only be made by its agent or attorney. The agent or attorney who may be appointed for that purpose is not necessarily a member of the corporation, and he must ordinarily rely to a great extent on the books of the company and on the contracts which purport to have been made between such company and other parties. Head v. Merrill, 34 Me. 586.

But agent need not be general.—The disclosure may be made equally by a special as a general agent; by one not a member as by a member of the company, according to their discretion in the premises. Head v. Merrill, 34 Me. 586.

Effect of repeal of former provision of section.—This section formerly provided that "all corporations except counties, towns, school districts and parishes," may be summoned as trustees. By Public Laws of 1873, c. 131, these exceptions were stricken out and "all corporations" were made liable to the trustee process. But this change of the statute in no way affected the principles in accordance with which corporations were to be adjudged trustees or to be discharged as such. Clark v. Clark, 62 Me. 255.

Applied in Bigelow v. York & Cumberland R. R., 37 Me. 320; Harris v. Somerset & Kennebec R. R., 47 Me. 298.

Sec. 9. Taxes due corporation from defendant exempt.—Any corporation summoned as trustee of a defendant may set off and deduct from any amount found due the defendant from the trustee and attached by trustee process, the amount due from the defendant to the trustee for taxes. (R. S. c. 101, § 9.)

Sec. 10. Trustee about to leave state may disclose before justice.—When a person summoned as trustee is about to depart from the state or go on a voyage and not return before the term of the court where he is summoned to appear, he may apply to a justice of the peace of the county where he resides for a notice to the plaintiff to appear before said justice at a place and time appointed for taking his disclosure. On service made and returned according to the order of the justice, the examination and disclosure shall be taken and sworn to before him; and being certified and returned to the court, the same proceedings may be had thereon as if it had been in court. (R. S. c. 101, § 10.)

Cross reference.—See c. 117, § 30, re stenographers as commissioners to take depositions.

Stated in part in Norris v. Hall, 18 Me. 332.

Sec. 11. Commissioner to take disclosure.—The court before whom a trustee is summoned may appoint a commissioner to take his examination and disclosure when any reasonable cause appears and may prescribe the notice to

be given to the plaintiff of the time and place thereof; and upon return of such service, the examination and disclosure shall be taken and sworn to before the commissioner, and being certified by him and returned to court, the same proceedings may be had thereon as if it had been in court. (R. S. c. 101, § 11.)

Sec. 12. Trustee may disclose by consent.—The examination and disclosure of any person summoned as trustee may be taken, as provided in section 10, when the plaintiff and trustee consent thereto. (R. S. c. 101, § 12.)

Sec. 13. Nonresident adjudged trustee.—A person summoned as trustee may be adjudged trustee by the court although he was not then and never had been an inhabitant of the state; and the writ may be made returnable in the county in which either the plaintiff or principal defendant resides. (R. S. c. 101, § 13.)

Purpose of section.—The purpose of this section appears to have been to provide a remedy in a case where a person, at no time a resident within the state, was indebted to, or had property belonging to, a person resident or found within the state. In such case the court having jurisdiction of a suit against the principal defendant might act upon his personal property and choses in action, entrusted to or due from a person, not an inhabitant of or found within the state, upon the principle, that such property is supposed to follow or accompany the person of the owner. Lovejoy v. Albee, 33 Me. 414; Cousens v. Lovejoy, 81 Me. 467, 17 A. 495.

This section has reference to a case in which the court has jurisdiction of the suit between the principal parties. Columbus Ins. Co. v. Eaton, 35 Me. 391; Lovejoy v. Albee, 33 Me. 414.

And the section should not receive a construction that would make it embrace cases over which the court has no jurisdiction, for it could be of no practical importance. Such a suit might at any time be defeated by the parties defendant, or by the interposition of the court, when the facts came to its knowledge. If judgment should in such a suit be rendered against a trustee and he should make payment thereof to the plaintiff, that would afford him no protection whatever, when called upon in the place of his domicil to pay to the principal defendant. Lovejoy v. Albee, 33 Me. 414.

Sec. 14. Trustee entitled to costs; payment.—If any supposed trustee comes into court at the 1st term and submits himself to an examination, on oath, after having in writing declared that at the time of the service of the trustee process upon him he had no goods, effects or credits of the principal in his possession, he is entitled to his costs as in civil actions where issue is joined for trial; and, if adjudged a trustee, he may deduct his costs from the goods, effects and credits in his hands and he shall be chargeable for the balance only to be paid on the execution. If such goods, effects and credits are not of sufficient value to discharge the costs taxed in his favor, he shall have judgment and execution against the plaintiff for the balance of such costs, after deducting the sum disclosed, in the same manner as if he had been discharged. (R. S. c. 101, § 14.)

Cross references.—See § 23, re no costs for trustee unless he appears; § 24, re trustee living outside county may appear by attorney.

No costs unless trustee comes in at first term.—The trustee proceeding is wholly regulated by the statute, and the provision is plain and positive that the trustee shall not have costs, unless he comes in at the first term. Warren v. Gibbs, 29 Me. 464.

And submits to examination. — Having appeared the first term and filed his denial, in the absence of both the plaintiff and his attorney, the trustee is not entitled to costs because such an act is not equivalent to submitting himself to examination on oath. Butler v. Starrett, 52 Me. 281.

If a trustee declares, in the language of this section, that at the time of the service of the trustee process upon him, he had not any goods, effects or credits of the principal defendant in his possession, such denial is considered in the nature of a plea and equivalent to an answer in a bill in equity, both of which issues were to be settled on ulterior proceedings. This denial, plea or answer it was necessary for the trustee to make before, and as preliminary to submitting himself to examination on oath. The mere filing of such denial would constitute no submission, no more than a prior filing of a plea of the general issue would of itself constitute a defense, in the absence of the defendant when the case was called up for trial; or, in other words, a plea filed, never, in practice, dis-

penses with the personal attendance of the party so as to prevent a default. Butler v. Starrett, 52 Me. 281.

This section is preemptory that the submission shall be at the first term. Butler v. Starrett, 52 Me. 281.

But right to costs not contingent on will of plaintiff.—Parties summoned as trustees are entitled to costs when they appear at the first term and disclose. This right is not contingent upon the will or action of the plaintiff, or any other conditions than those prescribed in this section. Continental Mills v. Dow, 59 Me. 426.

And cannot be defeated by withdrawal of case. — If the trustees complied with the requirements of this section, they are not barred of their right to recover their costs, because the plaintiff notified them that the suit had been withdrawn. The section does not, in terms or by implication, recognize the right of the plaintiff thus to defeat the trustee's claim for costs. Such right is given by statute, and can be defeated only by a failure of the trustee to conform to the statute or a voluntary relinquishment of his claim. Continental Mills v. Dow, 59 Me. 426. See § 6, re no cost if trustee given notice of settlement or discontinuance.

Or by plaintiff's failure to examine trustee.—The legislature intended to prevent any delay on the part of the trustee, by making his title to costs depend upon his presenting himself for examination at the first term. If he does so, and is not examined, it is the fault of the plaintiff, and the trustee ought not to be deprived of his costs. Callender v. Furbish, 46 Me. 226.

If trustee makes oath to general answer.—If the plaintiff is satisfied with the general denial of effects, in order to be discharged and to have his costs, the trustee must make oath to his general answer. Callender v. Furbish, 46 Me. 226.

Sec. 15. Disclosure sworn to.—The disclosure, when completed and subscribed by the trustee, shall be sworn to by him in open court or before some justice of the peace. (R. S. c. 101, § 15.)

Cross reference.—See c. 117, § 30, re stenographers as commissioners to take depositions.

A just regard for the rights of creditors requires trustees to make full, true, and explicit answers to all questions propounded to them touching their indebtedness to the principal defendant in the suit. And the same rule applies to assignees who claim the funds sought to be held by the attachment. Thompson v. Reed, 77 Me. 425, 1 A. 241; Haynes v. Thompson, 80 Me. 125, 13 A. 276.

The person summoned as trustee is not to determine the question of his liability. It is a fundamental rule that the disclosure of a trustee must be full and complete. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

When one summoned as trustee attempts to account for money, admittedly received from the defendant, as a payment on account of indebtedness, he is bound, if inquired of on examination, to make a full, direct and explicit disclosure of the character and amount of the claimed indebtedness, in order that the court may be able to judge whether the relation of debtor and creditor actually existed, and, if so, the extent of the indebtedness. Doubtful, indefinite and sweeping statements do not satisfactorily supply the omission of details and particulars. Seavey v. Seavey, 114 Me. 14, 95 A. 265.

And the disclosure must be full and complete in itself. The trustee must in his disclosure incorporate, annex, or distinctly identify, any paper or statement he desires to be considered so that the court will need no other identification. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

Statements made to trustee must be adopted on oath.—A person summoned as trustee may incorporate in his disclosure the statements of another made to him, but to give them any force or to have them considered, he must adopt them as his own statements on oath, or must at least declare on oath his belief in their truth. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

The law attributes great weight to the disclosure of a trustee properly made and hence the plaintiff is entitled to have the conscience of the trustee thoroughly searched in the fear of spiritual and temporal penalties for perjury. If a trustee be allowed to introduce into his disclosure the statements of others made to him without making oath at least that he believes them to be true, the plaintiff has no benefit from the conscience of the trustee. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

In trustee process against several trustees, the disclosures cannot be taken in aid or explanation of each other; but each trustee is to be held liable or discharged on his own disclosure only. Rundlet v. Jordan, 3 Me. 47.

Sec. 16. Lien for costs on articles in his hands; payment by officer.—Where any person is adjudged trustee for specific articles in his hands, he has

a lien thereon for his costs; and the officer who disposes thereof on execution shall pay the trustee the amount due him for costs and deduct it from the amount of sale and account to the creditor for the balance; the amount of such fees shall be indorsed on the execution by the clerk and be evidence of the lien. (R. S. c. 101, § 16.)

Section refers to costs legally adjudged to be due.—"Costs" to which parties are entitled in civil actions, is a legal term implying an amount derived from items to be regularly taxed and allowed to be due to the party by the judgment of the court. And it appears from the provision of the statute creating a lien on specific articles in the hands of the trustee for his costs, that the legislature had reference to costs thus legally taxed and adjudged to be due; for it provides that the officer selling the property shall pay his costs according to the certificate of the clerk on the margin of the execution. Norris v. Hall, 18 Me. 332.

Sec. 17. Discharge of trustees; effect upon principal.—If all the persons summoned as trustees are discharged or the suit against them is discontinued, the plaintiff shall not proceed against the principal defendant unless there was sufficient personal service of the writ on him; but he may assume the defense of the suit. (R. S. c. 101, § 17.)

Purpose of section.—This section was plainly introduced for the sole purpose of protecting the principal from having judgment rendered against him, where he had no notice of the suit, and was not represented or defended by anyone whom he had entrusted with his property. Greenwood v. Fales, 6 Me. 405.

Section provides for entry of actions in absence of service.—Manifestly, 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.

And principal cannot file motion in abatement after time allowed therefor.—This section, providing that the principal defendant in a trustee process, on whom no personal service of the writ has been made, "may assume the defense of the suit," does not permit him, after the time allowed therefor by the rule of court, to file a motion in abatement for the want of service upon him. Steward v. Walker, 58 Me. 299.

For he is held to waive objections as to notice when he assumes defense.—If the defendant designs to come in and assume the defense under this section, he must necessarily be held to waive objections arising out of the want or insufficiency of notice, and to plead to the merits of the case. Steward v. Walker, 58 Me. 299.

If the defendant intervenes upon his own motion, it must be by a plea to the merits. This alone would be assuming the defense of the action. Steward v. Walker, 58 Me. 299.

Applied in Spratt v. Webb, 1 Me. 325; Mansur v. Coffin, 54 Me. 314.

Sec. 18. Compensation, if trustee lives in another county.—When the trustee, at the time when the writ was served on him, did not live in the county where the writ is returnable, the court shall, in case of his discharge, allow him, in addition to his legal fee, a reasonable compensation for his time and expenses in appearing and defending. (R. S. c. 101, § 18.)

Sec. 19. Liability of trustee for not appearing at 1st term.—If a person resident in the county in which the writ is returnable is summoned and neglects to appear and submit to examination at the return term without reasonable excuse, he is liable for all costs afterwards arising in the suit, to be paid out of his own goods or estate if judgment is rendered for the plaintiff, unless paid out of the goods or effects in his hands belonging to the principal. (R. S. c. 101, § 19.)

Cross reference.—See § 62, re proceedings when trustee does not pay costs.

Applied in Warren v. Gibbs, 29 Me. 464; Thompson v. Dyer, 100 Me. 421, 62 A. 76.

Sec. 20. Trustees jointly liable for costs.—When several trustees, resident in the county where the action is pending, are summoned and neglect to appear, the judgment for costs shall be rendered against them jointly. (R. S. c. 101, § 20.)

Sec. 21. Exception in favor of trustees out of their county and those residing out of state.—Persons summoned as trustees, residing out of the county where the suit is pending, are not liable for any costs arising on the original process; and if the person summoned as trustee is out of the state at the time the writ is served on him and appears at the 1st term after his return, he shall be allowed for his costs and charges as if he had appeared at the return term. (R. S. c. 101, § 21.)

Sec. 22. If action fails, costs for defendant and trustee.—When the plaintiff does not support his action, the court shall award costs against him in favor of the principal and in favor of the persons summoned as trustees severally who appeared and submitted to examination on oath, and several executions shall issue accordingly. (R. S. c. 101, § 22.)

Sec. 23. No costs for trustee unless he appears.—When a person summoned as trustee does not come into court and declare that he had no property or credits of the principal in his hands when the writ was served and submit himself to examination on oath, the court shall not award costs in his favor although the suit is discontinued. (R. S. c. 101, § 23.)

Trustee must come in at first term.—The trustee proceeding is wholly regulated by the statute, and the provision is plain and positive that the trustee shall not have costs, unless he comes in at the first term. Warren v. Gibbs, 29 Me. 464. See § 14 and note.

Cited in Cummings v. Garvin, 65 Me. 301.

Sec. 24. Trustee living out of county may appear by attorney.—A person summoned as trustee, and not then living in the county where the writ is returnable, need not appear in person in the original suit or in a suit on scire facias; but he may appear by attorney and declare whether he had any goods or effects of the principal in his hands when the writ was served, and thereupon offer to submit himself to examination on oath. (R. S. c. 101, § 24.)

Trustee not required to submit to examination in first instance.—Under this section, the trustee is not required to submit himself to examination upon oath in the first instance. The section authorizes him to appear by his attorney and declare whether he has any goods or effects of the principal. Macomber v. Wright, 35 Me. 156.

Member of partnership entitled to benefit of section.—When one of the members of a partnership summoned as trustee resides in another county, he is entitled to the benefit of the provisions of this section, which are not limited to any particular character, in which the person is summoned. Macomber v. Wright, 35 Me. 156.

Cited in Cummings v. Garvin, 65 Me. 301.

Sec. 25. Declaration considered true.—If the plaintiff proceeds no further, the declaration shall be considered true. (R. S. c. 101, § 25.)

Sec. 26. Examination of trustee.—If the plaintiff thinks proper to examine such supposed trustee on oath, the answers may be taken in the county in which the trustee resides before a justice of the superior court or a justice of the peace. (R. S. c. 101, § 26.)

Sec. 27. Disclosure sworn to.—When a trustee has submitted himself to examination on oath in court, his disclosure may be sworn to before a justice of the court or a justice of the peace; and being filed in court, shall have the same effect as if sworn to in open court. (R. S. c. 101, § 27.)

Sec. 28. Trustee not appearing defaulted.—When a person summoned as trustee neglects to appear and answer to the suit, he shall be defaulted and adjudged trustee as alleged. (R. S. c. 101, § 28.)

Sec. 29. Trustee may submit a statement of facts.—If a person sum-

moned admits that he has in his hands goods, effects or credits of the principal or wishes to refer that question to the court upon the facts, he may make a declaration of such facts as he deems material and submit himself thereupon to a further examination on oath; and such declaration and further examination, if any, shall be sworn to as before provided for in this chapter. (R. S. c. 101, § 29.)

Cited in Norton v. Soule, 75 Me. 385.

Sec. 30. Disclosure deemed true.—The answers and statements sworn to by a trustee shall be deemed true in deciding how far he is chargeable until the contrary is proved, but the plaintiff, defendant and trustee may allege and prove any facts material in deciding that question. (R. S. c. 101, § 30.)

Cross reference.—See note to § 63, re this section applicable when fraudulent conveyance is alleged.

Answer considered true until contrary proved.—The answer of the trustee is to be considered as true in deciding how far he is chargeable until the contrary is proved. Head v. Merrill, 34 Me. 586; Hamilton v. Hill, 86 Me. 137, 29 A. 956.

The disclosure of the trustee, being uncontradicted, must be taken as true. Otis v. Ford, 54 Me. 104.

The disclosure is to be deemed to be true by the court, and the affirmative statements therein are to receive full credit, unless there are other facts or circumstances disclosed, inconsistent therewith, to overcome such direct and affirmative statements. Plummer v. Rundlett, 42 Me. 365.

And trustee may be discharged on his own declaration.—The unqualified declaration of a trustee that he has no goods, effects or credits of the principal defendant in his hands or possession will discharge him, unless there are such facts stated by him, or proved by other competent evidence, inconsistent with his declarations, as will be sufficient to overcome them. Moor v. Towle, 38 Me. 133; Kelley v. Weymouth, 68 Me. 197.

A trustee will be discharged when he asserts positively and directly that there was nothing due from him to the principal defendant at the time of the service of the trustee writ upon him, although some of his answers are indefinite as to the amounts of his payments to the principal defendant, and also as to the time when a final settlement was had between them, but he asserts positively that such a settlement was had before the service of the trustee writ upon him, and that a balance was then found to be due from the principal defendant to him, and there is no evidence that contradicts him. Steinfieldt v. Jodrie, 89 Me. 65, 35 A. 1008.

And he is entitled to make his defense.—The trustee in relation to the plaintiff is an adverse party in the suit and is entitled to make his defense, as the principal defendant may, either upon issues of law or of fact. Hibbard v. Newman, 101 Me. 410, 64 A. 720.

Judgment on disclosure conclusive if in absence of contrary allegations.—The disclosure under the pleadings is taken to be true with respect to the amount for which the trustee should be charged, and judgment upon it is conclusive upon the plaintiff and defendant if they have not made contrary allegations. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737.

But rights set up and conclusions drawn are subject to revision.—The answers of a trustee are to be regarded as true and conclusive upon all matters of fact stated in them. When the trustee sets up rights or draws conclusions arising out of or resulting from the facts stated, such rights or conclusions are necessarily subject to revision. And when he admits that he holds the property of the principal to a certain amount subject to this process, it must clearly appear from his answers that he has just claims to an equal amount before he can be discharged. Every doubtful statement is to be received as indicative that he could not truly make one, which would relieve the case from doubt. Lamb v. Franklin Mfg. Co., 18 Me. 187.

Additional facts must be alleged.—This section provides that either party "may allege and prove any facts material." Such facts must be alleged in some statement or plea before evidence of them outside of the disclosure can be received. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

If either of the parties desire to contest the truth of the disclosure he should do so at the proper time by alleging and proving facts to the contrary. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737.

Clearly and distinctly.—To enable the plaintiffs to charge the trustee, the allegations must be clear and distinct, setting forth the other facts to be proved. Stedman v. Vickery, 42 Me. 132.

After the disclosure, pertinent evidence may be introduced by the plaintiff and trustee; but the former cannot show by direct proof that any statement of the

trustee in the disclosure is untrue, nor can the latter adduce direct evidence of confirmation of facts disclosed by him. Before "other facts" can be proved, they must be alleged and, to enable the plaintiff to hold the trustee charged, the allegations must be as distinct and specific as the proof expected to be offered in their support. This is necessary to secure the rights of the trustee; he should be able to know whether the facts to be shown are such as are not stated or denied in his disclosure, or whether in his opinion they are relevant to the question, that he may, if he pleases, demur to the sufficiency of such facts, or have an opportunity to offer repelling or explanatory evidence. Pease v. McKusick, 25 Me. 73.

Prior to court's adjudication on trustee's disclosure.—A party invoking the right of alleging and proving facts material in deciding how far a trustee is chargeable, aside from the answers and statements sworn to by the trustee, must move before the adjudication of the court upon the trustee's disclosure, or submit to the discretion of the court in allowing or denying a reopening of the case, if no movement is made in that direction until after such adjudication. Dill v. Wilbur, 79 Me. 561, 12 A. 545.

Allegations not filed until after the court has passed upon the disclosure and adjudged the trustee chargeable for the amount in his hands are made too late. Dill v. Wilbur, 79 Me. 561, 12 A. 545.

For, if no allegations are filed, no issue whatever is raised. Schwartz v. Flaherty, 99 Me. 463, 59 A. 737.

And the statements in the disclosure may not be regarded as an allegation. Such statement is not the allegation contemplated by this section. The term "allegation" has a fixed technical meaning in law. It is a term in pleading, not a term in evidence. Allegation is not contained in the evidence, but precedes it. Allegation is the formal averment of a party setting forth the issue, and what he proposes to prove. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

The disclosure of the trustee is not an allegation by way of pleading. It is a discovery. If the trustee desires to introduce the statements of other persons as evidence he must make them a part of his disclosure by reciting them, or identifying them and by making oath that they are true (see note to § 15) or, at least, that he believes them to be true, or else he must first make the statutory allegation by way of pleading. The allegation required is distinct from the disclosure. Thompson v. Dyer, 100 Me. 421, 62 A. 76.

To charge the trustee, the attaching creditor must allege and prove every material fact necessary to bring his case within the purview of the statute. Quimby v. Hewey, 92 Me. 129, 42 A. 344.

Former provision of section.—For a consideration of this section when it did not allow the principal defendant to allege and prove additional facts, see Tunks v. Grover, 57 Me. 586.

Applied in Fletcher v. Clarke, 29 Me. 485; Butman v. Hobbs, 35 Me. 227; McMillan v. Hobson, 41 Me. 131; Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 304.

Quoted in Webster v. Adams, 58 Me. 317.

Stated in part in Cutter v. Perkins, 47 Me. 557; Quimby v. Hewey, 92 Me. 129, 42 A. 344; Provost v. Piche, 93 Me. 455, 45 A. 506.

Cited in Robinson v. Furbush, 34 Me. 509; Parker v. Wright, 66 Me. 392.

Sec. 31. Questions of fact submitted to court or jury.—Any question of fact arising upon such additional allegations may, by consent, be decided by the court or submitted to a jury in such manner as the court directs. (R. S. c. 101, § 31.)

Cross reference.—See note to § 63, re case may be submitted to court or jury when fraudulent conveyance alleged.

Section gives plaintiff right to be heard.—A trustee is to be regarded as a party with rights adverse to the plaintiff. Having commenced his action and acquired a lien on any indebtedness from the trustee to the defendant, the plaintiff has a right to offer proof and to be heard by himself or counsel before the court or jury, as to the indebtedness of the trustee and as to its amount. This right is given by this section. Webster v. Adams, 58 Me. 317.

Issue decided on preponderance of testimony.—The answer of the trustee with the facts alleged and proved are to be decided by the tribunal to which they are submitted for determination on the preponderance of testimony. Kelley v. Weymouth, 68 Me. 197.

And trustee's testimony weighed according to general principles.—The trustee is to be charged or not, according as, on a

just view of all the facts, the weight of evidence and of conviction shall fairly preponderate. He testifies under the ordinary obligations of an oath and his testimony is to be weighed and its effects determined by the general principles on which conclusions are to be drawn from any other lawful evidence. Kelley v. Weymouth, 68 Me. 197.

And he must fully prove facts authorizing discharge.—When, by the provisions of this section, the jury are to decide upon the truth of the allegations made to procure a discharge, those facts must be fully proved by the trustee. He is in a condition similar to that of a debtor, who must offer full proof of payment. Butman v. Hobbs, 35 Me. 227.

Court or jury should act on comparison of disclosure with facts alleged and proved.—If, on the face of the disclosure, the falsehood of a part of the statements therein contained is apparent, upon comparison with other portions of the disclosure and with facts alleged and proved, the court or jury should act in accordance with their convictions thus derived from such comparison. Kelley v. Weymouth, 68 Me. 197.

And may consider improbability or contradiction contained in disclosure.—If the disclosure of the trustee contains a statement of improbable or contradictory facts, such improbability or contradiction is a proper subject for consideration in arriving at a conclusion. Kelley v. Weymouth, 68 Me. 197.

Issue to be tried cannot be raised by disclosure.—The language of this section indicates a separate, additional allegation in the nature of a plea. No issue of fact to be tried under the section can be raised by any statement in the disclosure since that statement is to be taken as true until overcome by allegation and evidence to the contrary. If no such allegation is made there is no occasion for additional evidence. It is difficult to see how an issue of fact can be framed for trial under this section upon uncontradicted statements in the disclosure. Thompson v. Dyer, 100 Me. 421, 62 A. 76. See note to § 30.

Right to except must be reserved when action submitted to court.—No exceptions lie to the rulings of the court in matters of law when an action is submitted to it, unless there is an express reservation of the right to except. Reed v. Reed, 70 Me. 504. See note to c. 106, § 17.

Applied in Fletcher v. Clarke, 29 Me. 485; McMillan v. Hobson, 41 Me. 131.

Sec. 32. If trustee discloses an assignment of the principal's claim.—When it appears by the answers of a trustee that any goods, effects or credits in his hands are claimed by a third person by virtue of an assignment from the principal debtor or in some other way, the court may permit such claimant to appear, if he sees cause. If he does not appear voluntarily, notice may be issued and served on him as the court directs; if he appears, he may be admitted as a party to the suit so far as respects his title to the goods, effects or credits in question, and he may allege and prove any facts not stated or denied in the disclosure of the trustee; but if he does not appear in person or by attorney, the assignment shall have no effect to defeat plaintiff's attachment. (R. S. c. 101, § 32.)

Purpose of section.—The object of this section is to determine whether the assignment disclosed ought to prevail against an attaching creditor. As the rights of the assignee cannot be affected or precluded by an action between other parties, he is called in and made a party, and a full opportunity is given to him to be heard upon the question, in order that he might, without violating the principles of justice, be bound by the decision. Fisk v. Weston, 5 Me. 410.

The very question contemplated by this section to be tried and determined is whether there is any valid contract upon which the assignee can claim, and he is to become a party to the suit in which that question is to be determined. Legro v. Staples, 16 Me. 252.

Section protects trustee.—The course of proceeding prescribed by this section is directed for the trustee's protection, as well as to benefit the attaching creditor. Fisk v. Weston, 5 Me. 410.

And if debt assigned he is entitled to discharge.—If the debt had been legally assigned to a third person before service was made upon the trustees, they will be entitled to be discharged. Porter v. Bullard, 26 Me. 448.

If the defendants had disclosed all the facts within their knowledge and upon such facts there had been even strong suspicions that the assignment was fraudulent, still, the court would not have charged them as trustees, if the plaintiff in that suit had not requested the assignees to be summoned, so that its validity might have

been tried by a jury. Bunker v. Gilmore, 40 Me. 88.

When trustees disclose a sum due the defendant and an assignment of the same, unless the assignee is summoned, or voluntarily appears and claims the fund, the trustees must be discharged. Brunswick Gas Light Co. v. Flanagan, 88 Me. 420, 34 A. 263.

And a creditor cannot have an adjudication against the trustee which will expose the trustee to litigation with any third party whose claim to the fund by virtue of an assignment from the principal debtor, or in any other way, has been made known by the trustee in his disclosure. Jordan v. Harmon, 73 Me. 259.

If the plaintiff fails to put the case into such a position that there may be a conclusive determination as to the validity of the assignee's claim before the trustee's disclosure is presented to the court for final adjudication, the court must discharge the trustee. He must not put the possible burden of a future controversy with the claimant on the trustee. It was for the plaintiff to have that question settled, and the validity of his attachment so far as that might affect it, ascertained before he called upon the court to pass upon the disclosure. Jordan v. Harmon, 73 Me. 259.

This section applies only where the relation of trustee arises. Skowhegan Bank v. Farrar, 46 Me. 293.

Section embraces all transfers and assignments.—The language of this section must be regarded as embracing all written transfers or assignments, whatever may be their form. The law must decide what is an assignment, and if decided to partake of that character it will be included in the class of instruments contemplated by this section. Legro v. Staples, 16 Me. 252.

The language of this section is sufficiently comprehensive to include assignments of every description. Wheeler v. Evans, 26 Me. 133.

The words of this section, "or in some other way," are sufficiently broad to include any way in which the claimant can show a title, no matter how it may have arisen, or in what form it may be presented, provided it is such as the law will uphold. Parker v. Wright, 66 Me. 392.

Including equitable assignments. — The court has jurisdiction to enforce an equitable assignment of a part of a demand or chose in action, as against a creditor who, after such assignment, attaches upon trustee process the whole of the demand or fund, the assignee having become, under the statutory provision therefor, a party to the trustee suit. All parties interested are in this case before the court. National Exchange Bank of Boston v. McLoon, 73 Me. 498.

Equity recognizes the validity of an assignment of a part of a claim, and the assignee may avail himself of the equitable principle in a trustee process, in which he appears as claimant of a part of the fund. Horne v. Stevens, 79 Me. 262, 9 A. 616.

As between the plaintiff and a claimant, equitable considerations must prevail so far as the nature of the process will admit. The claim is an equitable interference to defeat the plaintiff's claim to the fund in the hands of the trustees. Haynes v. Thompson, 80 Me. 125, 13 A. 276; Jenness v. Wharff, 87 Me. 307, 32 A. 908; Foss v. Hume, 130 Me. 22, 153 A. 181. See note preceding § 1.

Assignee's title presumed to continue.—When the assignee has proved that the debt due from the trustees had been assigned to him, before service was made upon them, his title to it must be considered as continuing to exist, until there is some proof adduced, from which it can be inferred, that it has been impaired or destroyed. Porter v. Bullard, 26 Me. 448.

Trustee must disclose all claims of which he has notice.—If the assignee, being duly notified, shall not appear, then "the assignment shall have no effect to defeat the plaintiff's attachment." It is, therefore, most manifestly the duty of the trustee to disclose all claims upon the funds in his hands, of which at the time of his disclosure he may have become apprised. It is no part of his duty to determine whether they are valid or not. If he knows of such claims he should state all facts relating thereto, within his knowledge. If he neglects or omits so to do, the responsibility of such neglect or omission is upon him. Bunker v. Gilmore, 40 Me. 88.

If the trustee neglects to disclose facts communicated to him by the assignee and his attorney, so that they might have been notified to appear, he is neither legally nor equitably entitled to protection. Bunker v. Gilmore, 40 Me. 88.

Or his being charged will not bar suit by assignee.—If one summoned as a trustee is notified before making his disclosure that the funds in his hands have been assigned, and he neglects to disclose the assignment, his being charged will not be a bar to a suit against him for the benefit of the assignee. Larrabee v. Knight, 69 Me. 320.

And judgment by default is no protec-

tion for him against assignee.—If the trustee does not disclose an assignment of which he has notice, but suffers judgment to go against himself by default, that judgment furnishes him no protection against the claim of the assignee. Milliken v. Loring, 37 Me. 408.

Trustee must be notified of assignment before or at time of disclosure.—If the assignee of a chose in action would render his claim available against the debtor, who has been summoned as trustee by a creditor of the assignor, the assignee must give notice of such assignment to the trustee before or at the time of the disclosure, that it may be stated therein as a fact. McAllister v. Brooks, 22 Me. 80.

It is not enough that there should be an assignment and delivery of the claim assigned. The assignee should give notice of the interest he has thus acquired to the individual, who by the assignment has become his debtor. If he does not, in case such debtor should be summoned as the trustee of the assignor, and be adjudged trustee, such adjudication, and the subsequent payment of the demand, would constitute a perfect bar to any suit by the assignor. Bunker v. Gilmore, 40 Me. 88.

But not before service of writ.—It is not necessary, to protect the rights of the assignee, that the debtor should have been informed of the assignment before the service of the trustee writ on him. It is enough that it was in fact made before that time. Bunker v. Gilmore, 40 Me. 88.

Trustee bound by result of suit between creditor and assignee.—If the trustee in a foreign attachment discloses an assignment of the debt to a third person, who thereupon is made a party to the suit pursuant to this section, the trustee is bound by the result of the ulterior litigation in that suit between the creditor and the assignee, in the same manner as they are, though he had no agency in making up the issue. Fisk v. Weston, 5 Me. 410.

Validity of assignment not determined from disclosure. — The object of this section is apparent. The adjudication upon the validity of the assignment, when contested, is to be made, not upon the disclosure of the trustee, but upon the issue made, and the proof offered upon that issue, between the plaintiff in the trustee suit and the claimant of the demand or other property in the hands of the trustee, who, as to that question, are the real parties litigant. Bunker v. Gilmore, 40 Me. 88.

The rights of a claimant named in the disclosure cannot be judicially determined until he is made a party to the suit either by his own voluntary act, or by a citation from the court at the instance of the plaintiff. Jordan v. Harmon, 73 Me. 259.

Thus plaintiff must have notice issued and served on trustee. — If the disclosure shows notice to the trustee from a third party of an assignment to him, purporting to have been made prior to the commencement of the process, under such circumstances, before the plaintiff can claim to have the trustee charged, unless the claimant appears voluntarily, the plaintiff must have notice issued and served on him, under the provisions of this section. Burnell v. Weld, 59 Me. 423.

The rights of a claimant cannot be cut off by a process to which he is not a party and of which he has no notice. It is necessary to the protection of the trustee that there should be such proceedings as will settle the question, whether the fund belongs to the principal defendant or to the claimant; and the plaintiff, if he would perfect his attachment, must give the claimant such notice as the court may order, before they will proceed to adjudicate upon a question affecting his rights. Burnell v. Weld, 59 Me. 423.

Unless the party named in the disclosure as asserting a claim to the fund voluntarily appears, it is incumbent upon the plaintiff to cite him in. Jordan v. Harmon, 73 Me. 259.

If it sufficiently appears by the disclosure that the fund is claimed by a third party, it is well settled that the plaintiff in a trustee suit must clear the way of all such obstacles, by citing the claimant if he does not appear voluntarily, so that the question of the validity of the claim may be legally determined before he can have the trustee charged. He cannot put the burden of that possible litigation upon the trustee. If the plaintiff neglects to take the steps which this section points out, the trustee must be discharged. Look v. Brackett, 74 Me. 347.

And when notice has been given, the assignee may appear and protect his rights as against the plaintiff in the trustee process. Bunker v. Gilmore, 40 Me. 88.

But assignment not bar to attachment if assignee fails to appear. — If the assignee, upon being notified that he may be received as a party, declines to avail himself of the privilege, it is expressly provided that the assignment shall have no effect to defeat the plaintiff's attachment. Fisk v. Weston, 5 Me. 410.

Or fails to maintain his claim.—If, after being cited, the party named in the disclo-

sure does not appear in person or by attorney, or, if appearing, he fails to maintain his claim by due proof, the assignment shall have no effect to defeat the plaintiff's attachment. Jordan v. Harmon, 73 Me. 259.

Claimant not estopped by judgment in suit by different plaintiff.—A claimant to the funds in the trustees' hands is not estopped by a judgment against him in a previous suit, in which the defendant, the trustees and the claimant were the same as in the present case, but in which the plaintiff was a different person, in no way connected with the plaintiff in the present suit. Biddle & Smart Co. v. Burnham, 91 Me. 578, 40 A. 669.

When the assignee appears and claims the fund, the burden rests upon him to establish his claim. Haynes v. Thompson, 80 Me. 125, 13 A. 276; Jenness v. Wharff, 87 Me. 307, 32 A. 908; Brunswick Gas Light Co. v. Flanagan, 88 Me. 420, 34 A. 263.

And he must answer fully and explicitly.—A just regard for the rights of creditors requires trustees to make full, true and explicit answers to all questions propounded to them touching their indebtedness to the principal defendant in the suit. And the same rule applies to assignees who claim the funds sought to be held by the attachment. Thompson v. Reed, 77 Me. 425, 1 A. 241; Haynes v. Thompson, 80 Me. 125, 13 A. 276.

As to circumstances connected with assignment. — If examined as a witness, it is the duty of an assignee to state fully and clearly the circumstances connected with the assignment, and the consideration for which it was made. If he refuses to do so, and gives only vague, indefinite and sweeping answers, his claim may be justly viewed with suspicion and declared invalid. Thompson v. Reed, 77 Me. 425, 1 A. 241.

A claimant should make full, true and explicit answers to all questions propounded to him in relation to the indebtedness to him of the principal defendant. Sullivan v. Greene, 92 Me. 102, 42 A. 320.

And must show transaction valid as to attaching creditors.—If the funds in question originally belonged to the defendant, and were by him entrusted to and deposited in the possession of the alleged trustee, and were there remaining when attached by the plaintiff through trustee process, the burden of proof is upon the claimant claiming an assignment. He has to show by evidence a prior title to the fund, acquired through a transaction, not only valid in itself, but also valid against attaching creditors of the defendant. A mere voluntary assignment by the defendant to the claimant would not be valid against attaching creditors. A valuable consideration must be shown. Meserve v. Nason, 96 Me. 412, 52 A. 907.

If a claimant under this section alleges a consideration of goods sold and delivered, but offers no evidence in support of the allegation, he fails to establish his claim. Meserve v. Nason, 96 Me. 412, 52 A. 907.

Claimant cannot have exceptions until issue formed with plaintiff.—Strictly, a claimant of funds attached upon trustee process cannot have exceptions to the decision of the presiding justice charging the trustee, until, by proper allegations, an issue has been formed between him and the plaintiff. Walcott v. Richman, 94 Me. 364, 47 A. 901.

Where a claimant did not file any petition to be "admitted as a party to the suit so far as respects her title to the goods, effects or credits in question," and did not file any pleadings of allegations of fact, nor take any steps to form an issue between her and the plaintiff upon which the court, with or without a jury, could render a judgment which should bind and protect them and the trustee, her exceptions should in strictness be dismissed without further consideration. Walcott v. Richman, 94 Me. 364, 47 A. 901.

But such exceptions may be considered on stipulation of parties.—Where the plaintiff, the trustee and the claimant file a written stipulation that the law court may consider exceptions made by the claimant before an issue is formed between him and the plaintiff, and agree to abide by its judgment, the law court may, in its discretion, proceed to determine the issues thus raised. Walcott v. Richman, 94 Me. 364, 47 A. 901.

If fund divided between plaintiff and claimant, matter of costs is in discretion of court.—Where both the plaintiff and a claimant under this section sustain their claims in part and the fund is divided, the matter of costs is in the discretion of the sitting justice. See White v. Kilgore, 78 Me. 323, 5 A. 70, wherein it was held that it was not an abuse of discretion for the justice to allow costs to neither party.

Applied in Morrell v. Rogers, 1 Me. 328; Robbins v. Bacon, 3 Me. 346; Wentworth v. Weymouth, 11 Me. 446; Emery v. Davis, 17 Me. 252; Littlefield v. Smith, 17 Me. 327; English v. Sprague, 33 Me. 440; Hardy v. Colby, 42 Me. 381; White

Mountain Bank v. West, 46 Me. 15; Dalton v. Dalton, 48 Me. 42.

Cited in Henderson v. Cashman, 85 Me. 437, 27 A. 344.

Sec. 33. Principal defendant may testify.—On the trial between the attaching creditor and such claimant, the principal defendant may be examined as a witness for either party if there is no other objection to his competency except his being a party to the original suit. (R. S. c. 101, § 33.)

Sec. 34. Form of judgment against principal and trustee.—When the plaintiff recovers judgment against the principal and there is any supposed trustee who has not appeared and been discharged by disclosure or discontinuance of the suit against him, the court shall award judgment and execution against the goods, effects and credits in his hands, as well as against the principal, in the usual form. (R. S. c. 101, § 34.)

The enforcement of the lien on the goods in the hands of the trustee must of necessity await the entry of final judgment against the principal defendant. To hold otherwise would defeat the very purpose of the statute, by throwing into complete confusion the procedure contemplated by its terms. Smith v. Davis, 131 Me. 9, 158 A. 359.

Sec. 35. Trustee may appear by consent at another term.—If an agreement is entered on the docket between the plaintiff and supposed trustee that he may appear at a subsequent term of the court with all the advantages that he would have on appearing and answering at the first term, the same shall be allowed him by the court. (R. S. c. 101, § 35.)

Sec. 36. Executor or administrator liable as trustee; also stockholders of corporations.—Any debt or legacy due from an executor or administrator and any goods, effects and credits in his hands, as such, may be attached by trustee process. The amount which a stockholder of a corporation is liable to pay to a judgment creditor thereof may be attached by a creditor of such judgment creditor by trustee process served on such stockholder at any time after the commencement of the judgment creditor's action against him, and before the rendition of judgment therein. (R. S. c. 101, § 36.)

Cross reference.—See note to § 55, sub-§ I, re administrator not chargeable as trustee on account of negotiable note given by intestate.

Legacy need not be mentioned as such in writ. — A legacy due from an executor or administrator may be attached by trustee process and it can be done under the old form of writ, which avers that the supposed trustee has in his hands "goods, effects and credits" of the principal defendant, but makes no mention of the legacy as such. When the legislature declared that legacies might be attached by trustee process, and yet made no mention of any change in the form of the writ, it was equivalent to a legislative declaration that legacies should be regarded as included in one of those terms. And certainly it would be no very great stretch of the meaning of the word "effects" to hold that it includes a pecuniary legacy. Cummings v. Garvin, 65 Me. 301.

Applied in Kimball v. Woodman, 19 Me. 200; Commercial Bank v. Neally, 39 Me. 402; Cutter v. Perkins, 47 Me. 557; Wadleigh v. Jordan, 74 Me. 483; Pinkham v. Grant, 78 Me. 158, 3 A. 179; Holt v. Libby, 80 Me. 329, 14 A. 201.

Quoted in Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Sec. 37. Death of trustee after service, goods held in hands of administrator.—If a person summoned as a trustee in his own right dies before the judgment recovered by the plaintiff is satisfied, the goods, effects and credits in his hands at the time of attachment remain bound thereby, and his executors or administrators are liable therefor as if the writ had been originally served on them. (R. S. c. 101, § 37.)

Applied in Todd v. Darling, 11 Me. 34.

Sec. 38. Death of trustee before judgment, administrator cited.—If he dies before judgment in the original suit, his executor or administrator may

appear voluntarily or may be cited to appear as in case of the death of a defendant in an ordinary action; and further proceedings shall then be conducted as if the executor or administrator had been originally summoned as trustee; except that the examination of the deceased, if any had been taken and filed, shall have the same effect as if he were living. (R. S. c. 101, § 38.)

Applied in Ormsby v. Anson, 21 Me. 23.

Sec. 39. If administrator does not appear, judgment rendered.—If in such case the executor or administrator does not appear, the plaintiff, instead of suggesting the death of the deceased, may take judgment against him by default or otherwise, as if he were living; and the executor or administrator shall pay, on the execution, the amount which he would have been liable to pay to the principal defendant; and he shall be thereby discharged from all demands on the part of the principal defendant in the suit for the amount so paid, as if he had himself been adjudged trustee. (R. S. c. 101, § 39.)

Sec. 40. If he does not pay, scire facias to issue.—If the executor or administrator in the case last mentioned does not voluntarily pay the amount in his hands, the plaintiff may proceed by writ of scire facias as if the judgment in the first suit had been against him as trustee, but if he is discharged, he may recover costs or not at the discretion of the court. (R. S. c. 101, § 40.)

Sec. 41. If trustee dies within 30 days after judgment, proceedings to preserve the attachment.—If any person against whom execution issues as trustee is not living at the expiration of 30 days after final judgment in the trustee suit, the demand, to be made by force of the execution for continuing the attachment as provided in section 73, may be made on his executor or administrator at any time within 30 days after his appointment with the same effect as if made within 30 days after the judgment. (R. S. c. 101, § 41.)

Sec. 42. Manner of issuing execution, if administrator is adjudged trustee.—When an executor or administrator is adjudged trustee on account of goods, effects or credits in his hands or possession merely as executor or administrator in a suit originally commenced against him as a trustee, or against the deceased, or in the original suit or on a writ of scire facias, the execution shall not be served on his own goods or estate or on his person; but he is liable for the amount in his hands, in like manner and to the same extent only, as he would have been to the principal defendant if there had been no trustee process. (R. S. c. 101, § 42.)

The limitations of an executor's liability as trustee of a legatee are defined in this section. Wadleigh v. Jordan, 74 Me. 483.

Sec. 43. Remedy on his bond if he neglects to pay.—If after final judgment against an executor or administrator for any certain sum due from him as trustee he neglects to pay it, the original plaintiff in the foreign attachment has the same remedy for recovering the amount, either upon a suggestion of waste or by a suit on the administration bond, as the principal defendant in the foreign attachment would have had upon a judgment recovered by himself for the same demand against the executor or administrator. (R. S. c. 101, § 43.)

Sec. 44. Articles in trustee's hands delivered to the officer to be sold.—When a person summoned as trustee is bound to deliver to the principal defendant any specific articles, he shall deliver them or so much thereof as may be necessary, to the officer holding the execution; and they shall be sold by the officer and the proceeds applied and accounted for as if they had been taken on execution in common form. (R. S. c. 101, § 44.)

Sec. 45. Remedy if trustee refuses.—If the trustee neglects or refuses

to deliver them, or sufficient to satisfy the execution, the judgment creditor has his remedy on a scire facias as provided in sections 67 to 72, inclusive; and the debtor has his remedy for an overplus belonging to him as at common law. (R. S. c. 101, § 45.)

Sec. 46. Mode of settling value, as between principal and trustee.—When, by the terms of the contract between the trustee and the principal debtor, any mode of ascertaining the value of the property to be delivered to the officer is pointed out, the officer shall, on application of the trustee, notify the principal debtor previous to the delivery that the value may be thus ascertained so far as it may affect the performance of the contract; and in other cases the value of the property, as between the principal and the trustee, shall be estimated and ascertained by the appraisal of 3 disinterested men chosen, one by the trustee, one by the officer and one by the principal if he sees cause; and if he neglects or refuses, by the officer. They shall all be duly sworn to appraise the same and the officer, justice and appraisers shall certify their doings on the execution. (R. S. c. 101, § 46.)

Cited in Cummings v. Garvin, 65 Me. 301.

Sec. 47. If part of goods taken.—When a part of such goods and articles is taken on execution as aforesaid, the trustee may deliver the residue to the principal or tender it to him within 30 days after satisfaction of the execution, as he might have delivered the whole. (R. S. c. 101, § 47.)

Sec. 48. Surplus.—Any surplus money remaining in the hands of the officer after satisfying the execution and fees shall be paid to the principal, if within his precinct; if not, to the trustee. (R. S. c. 101, § 48.)

Sec. 49. Trustee process after commitment of debtor.—When a judgment creditor has caused the debtor to be committed on execution and afterwards discovers goods, effects or credits of the debtor not attachable by ordinary process of law, he may have the benefit of the trustee process like any other creditor if, within 7 days after service of the process, he discharges the debtor from prison by a written direction to the jailer stating the reason therefor; but such discharge shall not annul or affect the judgment. (R. S. c. 101, § 49.)

Notice need not be communicated to debtor.—A judgment creditor may pursue trustee process, if, within seven days after such process is served, he discharges the body of the debtor, in case he is taken in execution upon the same judgment, by a note or memorandum in writing, directed and delivered to the officer who has him in custody, stating the reason and occasion of the discharge of the person of the debtor. This is all which the state requires. It is not made necessary that such notice should be communicated by the plaintiff to the debtor. Thompson v. Taylor, 13 Me. 420.

Debtor may be rearrested when trustee process unsuccessful.—The intent of the law was to give a creditor, whose debt was in execution, an opportunity to make an experiment to save the debt by collecting it from funds which he might believe were deposited in the hands of some trustee, so as to be unattachable by the ordinary process of law. But it was not considered proper that the debtor should be continued in prison while the creditor was making this experiment. The section, therefore, provides for the release of the debtor from confinement, and that this release shall not discharge or impair the validity of the judgment. When the experiment on the trustee process proves unsuccessful and useless, the debtor's body may again be arrested, and committed on the execution issued upon a new judgment which may be rendered upon such process. Cutts v. King, 1 Me. 158.

Sec. 50. If trustee discloses property mortgaged to him.—When a trustee states in his disclosure that he had, at the time when the process was served on him, in his possession property not exempted by law from attachment, mortgaged, pledged or delivered to him by the principal defendant to secure the pay-

ment of money due to him and that the principal defendant has an existing right to redeem it by payment thereof, the court or justice before which the action is pending shall order that on payment or tender of such money by the plaintiff to said trustee within such time as the court orders and while the right of redemption exists, he shall deliver the property to the officer serving the process, to be held and disposed of as if it had been attached on mesne process; and in default thereof, that he shall be charged as the trustee of the principal debtor. This order shall be entered on the records of the court or justice. (R. S. c. 101, § 50.)

Cross reference.—See c. 119, § 9, re conditional sales.

Mortgagee not chargeable unless he has actual possession of property. — This section requires that the mortgagee shall have possession of the mortgaged property in order to render him chargeable as trustee. It appears to have contemplated an actual possession, so that the trustee should have the control of the property, and to have made this the ground of his liability. If the trustee were held upon a constructive possession merely, he might suffer loss, when he ought not to be subjected to it. Pierce v. Henries, 35 Me. 57.

A mortgagee of goods is not chargeable as trustee of the mortgagor, if he has neither had possession of the goods nor exercised control over them. Wood v. Estes, 35 Me. 145.

A mortgagee of personal property is not liable as the trustee of the mortgagor, when he has not taken possession. Not being the debtor of the principal defendant, he has no credits to be charged; and he has no goods or effects in his hands to be surrendered to the officer. Reggio v. Day, 37 Me. 314.

If the trustee had merely a constructive, and not an actual possession of the mortgaged goods, he cannot be charged as trustee. Stedman v. Vickery, 42 Me. 132.

Mortgagees, not having the possession of the goods mortgaged, cannot be charged as trustees. Callender v. Furbish, 46 Me. 226.

And mere recording of mortgage is not sufficient.—A mortgagee, whose mortgage has been recorded, but who has never had the actual possession of the goods mortgaged before the service of the trustee process upon him, cannot be considered in possession so as to be liable to the trustee process. Pierce v. Henries, 35 Me. 57.

Trustees cannot be charged as trustees for any of the personal property conveyed to them in mortgage, of which they had no possession at the time of service upon them. The record of the mortgage is equivalent to actual possession for the preservation of their title, but not to make them accountable for the property as trustees. Mace v. Heald, 36 Me. 136.

Nor is presentment of claim to attaching officer. — The presentment of a claim under the mortgage, on the part of the mortgagees, to an attaching officer cannot be considered as equivalent to the actual taking of possession by the mortgagees, so as to make them chargeable as trustees, unless they thereupon go into actual uncontrolled possession. Emmons v. Bradley, 56 Me. 333.

And mortgagee not chargeable if mortgage and goods sold prior to service of process.—In a trustee process, the taking of a chattel mortgage from the principal defendant to secure a debt due from him to the mortgagee, though the chattel is of greater value than the amount of the debt, will not bind the mortgagee as trustee of the mortgagor, if, prior to the service of the process, he has made a sale and transfer of the debt and mortgage. Wood v. Estes, 35 Me. 145.

If some of the property of the principal defendant in the hands of the trustee has been sold by him, in such case, the provisions of this section are not applicable. Stedman v. Vickery, 42 Me. 132.

Or goods surrendered to mortgagor. — In the case of goods mortgaged, the surrender of them by the mortgagee to the mortgagor, prior to the service of the trustee process, furnishes no pretense for holding the mortgagee as trustee of the mortgagor. Wood v. Estes, 35 Me. 145.

Agent of mortgagee not chargeable as trustee.—If the trustee holds the property mortgaged as the agent of the mortgagees, and is accountable to them, the principal debtors have neither intrusted nor deposited any goods or effects in his hands, so far as relates to the mortgaged goods, and he cannot be charged as their trustee on account of them. Skowhegan Bank v. Farrar, 46 Me. 293.

Trustee may take steps to foreclose mortgage. — When the process of foreign attachment is served, the law lays its hand upon the principal debtor's interest and he is thereby precluded from making an effectual tender, and his right to redeem is in the hands of the court, to be

made available to his creditor under the provisions of this section. It will always be in the power of the mortgagee to save all his own rights, by seasonably taking the proper steps to foreclose his mortgage. Woods v. Cooke, 58 Me. 282.

But disclosure must state fact of foreclosure.—If mortgagees of personal property, when summoned as trustees to the mortgagor, would rely upon a foreclosure of the mortgage, they must, in the disclosure, show what were the conditions of the mortgage, and state that a foreclosure had occurred. Dexter v. Field, 32 Me. 174.

Plaintiff must move court to order sum to be paid.—If the plaintiff wishes to avail himself of goods in the possession of the mortgagee, under the provisions of this section, he should move the court to order and decree the sum of money, upon payment of which, "within such time as the court orders and while the right of redemption exists," the alleged trustee "shall deliver over the property to the officer serving the process, to be held and disposed of as if it had been attached on mesne process." If the plaintiff neglects to do this, he has no right to claim that the mortgaged property shall be exposed to the officer having the execution which may finally issue in the case. Stedman v. Vickery, 42 Me. 132.

And must tender amount of debt to mortgagee. — The mortgagee, or pledgee, is not bound to deliver the property until the amount of his debt is tendered to him. Woods v. Cooke, 58 Me. 282.

Judge may fix reasonable time within which tender to be made.—The judge may fix such reasonable time, during the life of the equity of redemption, as he thinks proper, within which the plaintiff may tender, and the attachment will hold good for thirty days after the tender is made, and the trustee becomes bound to deliver. Woods v. Cooke, 58 Me. 282. See § 73 and note.

Averment of tender within time fixed by court is sufficient.—The law court will not presume, upon a demurrer, that the court made an order in disregard of the requirements of this section. Hence, an averment of a tender, within the time limited by the court in the order, is equivalent to an averment of a tender while the equity of redemption existed. Woods v. Cooke, 58 Me. 282.

Applied in Witherell v. Milliken, 13 Me. 428; Shreve v. Fenno, 49 Me. 78; Daniels v. Marr, 75 Me. 397.

Sec. 51. On return of scire facias, excess determined by court or jury.—On return of the scire facias against such trustee, if it appears that the plaintiff has complied with the order of the court or justice and that the trustee has refused or neglected to comply therewith, the court or justice shall enter up judgment against him for the amount due and returned unsatisfied on the execution if there appears to be in his hands such an amount of the property mortgaged over and above the sum due him; but if not, then for the amount of said property exceeding that sum, if any; and the amount of this excess shall, on the trial of the scire facias, be determined by the court or jury. (R. S. c. 101, § 51.)

Sec. 52. On disclosure, trustee to deliver property to officer.—If, by the disclosure, it appears that the property in the hands of the supposed trustee was mortgaged, pledged or subject to a lien to indemnify him against any liability or to secure the performance of any contract or condition and that the principal defendant has an existing right to redeem it, the court may order that, upon the discharge of such liability or the performance of such contract or condition by the plaintiff, within such time as the court or justice orders and while the right of redeeming exists, such trustee shall deliver the property to the officer, to be by him held and disposed of as if it had been attached. (R. S. c. 101, § 52.)

Applied in Bowker v. Hill, 60 Me. 172.

Sec. 53. Property sold on execution.—The officer, having sold on execution any personal property delivered to him by virtue of the provisions of this chapter, after deducting the fees and charges of sale, shall pay to the plaintiff the sum by him paid or tendered to the trustee or applied in the performance of such contract or condition or discharge of such liability and the interest from the time of such payment, tender or application to the time of sale; and so much of the residue as is required therefor, he shall apply in satisfaction of the plaintiff's judgment and pay the balance, if any, to the debtor, first paying the trustee his costs accru-

ing before the service of the scire facias as provided in section 14. (R. S. c. 101, § 53.)

Sec. 54. Trustee not prevented from selling property mortgaged.—Nothing contained in this chapter shall prevent the trustee from selling the goods in his hands for the payment of the sum for which they were mortgaged, pledged or otherwise liable, at any time before the amount due to him is paid or tendered as aforesaid, if the sale would have been authorized by the terms of the contract between him and the principal defendant. (R. S. c. 101, § 54.)

Sec. 55. When not adjudged trustee.—No person shall be adjudged trustee:

I. By reason of any negotiable bill, draft, note or other security drawn, accepted, made or indorsed by him, except in the cases provided in section 63;

Exemption applicable to administrator. The intestate, while alive, could not have been adjudged to be trustee on account of having given a negotiable note. It could not have been the intention by § 36 to make an administrator liable in such a case as trustee for he could be no more certain than his intestate could, that the note was due to the promisee. Commercial Bank v. Neally, 39 Me. 402.

But it does not apply when note controlled by maker and divested of its negotiability.—The provision of this subsection that no person shall be adjudged trustee by reason of any negotiable note made by him, does not apply to a case where the note is effectually controlled by its maker and is divested of its negotiability by depositing it in the hands of a third party under a written agreement of the parties and to be thus held until notified that a contract for the sale of goods between the parties has been complied with; and it further appears from the facts and circumstances that the note was not intended, and did not operate, as payment of any definite amount of goods. Woodman v. Carter, 90 Me. 302, 38 A. 169.

Nor where trustee converts goods to negotiable securities after service of writ. —If the property, at the time of the service of the writ on the trustee, was in specific articles, he cannot bring himself within the exemption of this subsection by subsequently voluntarily converting the goods into negotiable securities. Brunswick Bank v. Sewall, 34 Me. 202.

Applied in Winslow v. Crocker, 17 Me. 29; Larrabee v. Walker, 71 Me. 441.

II. By reason of any money or other thing received or collected by him as an officer, by force of a legal process in favor of the principal defendant in the trustee process, although it has been previously demanded of him by the defendant;

III. By reason of any money in his hands as a public officer for which he is accountable to the principal defendant;

Subsection applies only to cases of official accountability. — This subsection was evidently intended to apply only to money or other things coming into the hands of a public officer in such manner that the same should be regarded as being, in some sense, within the custody of the law. It applies only to cases of official accountability. It is not intended to apply to cases of personal indebtedness on the part of such officers, arising from their contracts with third persons, even though such contracts were made in connection with the performance of their official duties. Tyler v. Winslow, 46 Me. 348.

IV. By reason of any money or other thing due from him to the principal defendant unless, at the time of the service of the writ upon him, it is due absolutely and not on any contingency;

A debt must be payable absolutely; if it is, then it may be attached, though solvendum in futuro; otherwise not. Sayward v. Drew, 6 Me. 263.

Under this subsection, the precise and only point to be determined is whether at the time of the service of the process upon it the trustee had in its hands money or other property due or belonging to the principal defendant absolutely and without any contingency. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

And a contingent debt is not attachable by trustee process. Sayward v. Drew, 6 Me. 263.

The adjective term "due," as used in this subsection, has reference to a debt, or something in the nature of an obligation to discharge, resting upon someone, in favor of another. And this debt or obligation, to come within the meaning of this provision of the statute, must not depend upon any contingency, but must be free therefrom; that is, "absolute" or unconditional. From this, it follows that "the money or other thing due," in order to be reached by this process, must be something which is not a contingent debt or obligation. Cutter v. Perkins, 47 Me. 557.

If at the time of the service of the plaintiff's writ, it is uncertain and contingent whether the alleged trustee will ever be liable upon his contract, the trustee is properly discharged. Bryant v. Erskine, 50 Me. 296; Webber v. Doran, 70 Me. 140.

The trustee is not to be charged where his liability rests upon a contingency. Larrabee v. Walker, 71 Me. 441.

Trustee process is not designed to attach that to the possession and enjoyment of which the principal defendant may never succeed. Holmes v. Hilliard, 130 Me. 392, 156 A. 692.

Contingency referred to is that which would prevent principal from having any claim against trustee.—The contingency referred to in this subsection is not a contingency which may often exist before a settlement of an account, or other business transaction, whether anything may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement, but is a contingency which may prevent the principal from having any claim whatever, or right to call the trustee to account or settle with him. Dwinel v. Stone, 30 Me. 384; Wilson v. Wood, 34 Me. 123; Cutter v. Perkins, 47 Me. 557; Davis v. Davis, 49 Me. 282; Jordan v. Jordan, 75 Me. 100; Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

And which arises from contract between debtor and trustee.—By the term "contingent" is intended an uncertainty whether anything will ever come into the hands of the trustee, or whether he will ever be indebted, the uncertainty arising from the contract, express or implied, between the debtor and the trustee. Jewett v. Barnard, 6 Me. 381.

Contingency as to time of payment not within exemption. — If the only contingency is as to the time of payment, and not as to the payment itself, the debt is not within the exemption of this subsection. Marrett v. Equitable Ins. Co., 54 Me. 537.

And right to decide between two modes of fulfilling agreement does not render liability contingent. — The right to decide in which of two modes provided, he would fulfil his agreement, does not leave the trustee's liability in any degree contingent within the meaning of this subsection. Smith v. Cahoon, 37 Me. 281, wherein it was held that the trustee's right to elect to restore the property purchased, within a time not then expired, and thereby discharge his obligations to pay the stipulated price in money, was not the contingency referred to.

But right of insurer to rebuild instead of paying money renders it exempt.—The right of the insurance company to rebuild instead of paying the money, within the terms of the policy, exempted the company from being charged as trustee because no absolute liability to pay the insurance money existed at the time of serving the trustee process. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

And insurer cannot be charged as trustee in absence of proof of loss. — If the preliminary proof required by a fire policy is a condition precedent to the right of the insured to recover, until such proof is furnished, the claim is contingent, and the company cannot be charged as trustee of the insured in an action commenced after a loss, but before proof. Davis v. Davis, 49 Me. 282. See note to c. 60, § 112.

Fact that payment to be made on estimate and certificate of third person is not contingency.—When labor contracted for is performed, and there remains only to fix its amount and value, the fact that by the contract the payment is to be made on an estimate and certificate of a third person, does not constitute a contingency within the meaning of this subsection. Ware v. Gowen, 65 Me. 534.

Nor is necessity of adjustment of accounts to determine if trustee had goods of principal.—Where property is put into the hands of the trustee by the principal defendant, to be sold, and, after the sale, an adjustment of accounts alone is necessary to determine whether the trustee has goods, effects or credits in his hands belonging to the principal, and the right exists with the latter to call upon the trustee to render an account and make the settlement, and thereupon something is found due from the trustee, that debt is absolute and does not depend upon any contingency, as well before the sale and

settlement as afterwards. The trustee is bound to make such sale, settlement and adjustment, after the service made upon him, if not done before, and, if anything is in his hands as determined by that settlement, he is holden as trustee. Cutter v. Perkins, 47 Me. 557.

Right of legatee or heir not contingent prior to determination that assets sufficient to pay same.—It was early decided that the right of a legatee to a legacy and the interest of an heir in the distributive share of an intestate estate was subject to being attached on trustee process before it was ascertained that there would be sufficient assets to pay the same, notwithstanding the general provision of the trustee statute that no person should be adjudged a trustee "by reason of any money or other thing due from him to the principal defendant, unless it is at the time of the service of the writ on him due absolutely and not on any contingency." Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

A residuary bequest is subject to trustee process, the uncertainty as to its amount not clothing it with the contingency contemplated by this subsection. The residuary legatees have a right to call upon the trustee to render his account in probate and make the settlement, and this, notwithstanding it might in the end turn out that the estate was all absorbed, without leaving anything for them. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

And the distributive share of a widow of the intestate is subject to trustee process. The uncertainty as to whether anything would be eventually payable to her is not a "contingency" within the meaning of this subsection. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

But prior to the decree of the judge of probate granting the widow's allowance it is not subject to trustee process. Resting in the sound discretion of the judge of probate and not a matter of right, it is contingent and uncertain. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Agreement to pay principal "when note collected" is contingent.—The trustee, by his contract, agreed to pay the principal a certain sum, when the note received of him was collected. The words "when the same is collected" do not have reference to the time only when payment was to be made, but they embrace the fact of collection. If the note received had never been, and could not have been collected, the principal would have had no claim upon the trustee, and he was not therefore indebted to the principal absolutely, until after the note had been collected. Wilson v. Wood, 34 Me. 123.

Employer not subject to trustee process until contract completed. — The trustee contracted with the principal defendant to do a job of work for him at a stipulated price, to be paid upon the completion of the work. The trustee process was served upon the trustee while the principal defendant was in the act of performing the contract, and before he had completed it. By the terms of the contract the price was payable upon the completion of the work. There was, therefore, nothing due from the trustee to the principal defendant, when service of the trustee process was made upon him; non constat that there ever would be. Otis v. Ford, 54 Me. 104.

A teacher was hired "for the winter term" which, at the time of the service of the writ to charge the district as trustee of the amount due the teacher, he had not completed, and he might neglect or refuse to complete it in a way that would deprive him of his right to compensation for the service which he had rendered. Here was a contingency which would prevent the school district, if otherwise liable, from being charged as trustee in this suit. Norton v. Soule, 75 Me. 385.

Where money is to be paid on the contingency that work be well performed, trustee process is premature until the work has been duly performed. Holmes v. Hilliard, 130 Me. 392, 156 A. 692.

Thus he is not liable if contract abandoned.—If a person contracts to perform a job for another at a stipulated price, payable when completed, the employer cannot be held as trustee to the employee if the latter abandons the work before its completion. Otis v. Ford, 54 Me. 104.

Trustees not chargeable for commissions on goods sold where price has not been paid to them.—Where the defendant agreed with the alleged trustees to sell their goods for a certain specified commission upon the goods sold and paid for, the trustees cannot be charged for the commissions on goods sold where the price has not been paid over to the trustees. Jordan v. Jordan, 75 Me. 100.

And rent payable monthly cannot be attached until the complete expiration of the month. The liability of the tenants to pay the rent does not become absolute until then. It is contingent upon their being undisturbed in their possession and holding throughout the remainder of the month. They might, after the service of

the writ and before the full expiration of the month, be evicted under a superior title, or by their own landlords. Mason v. Belfast Hotel Co., 89 Me. 381, 36 A. 622.

A covenant to pay rent creates no debt or legal demand for the rent which is liable to be attached by trustee process, until the time stipulated for payment arrives; for the debt is contingent, and may never become due. Sayward v. Drew, 6 Me. 263.

Events subsequent to service on trustee will not make absolute debt contingent.— When a person has, on the day of the service of the process upon him, the entire control, disposition and management of goods and effects, made over to him by his principal, but to which he has no title against an attaching creditor, he is trustee and has no claim to be discharged, because the property may be exposed to subsequent hazards and contingencies. Arnold v. Elwell, 13 Me. 261.

Nor contingent debt absolute. — The liability of the defendant as trustee depends upon the condition of things as they existed at the time of service. A contingent liability to the principal defendant at the time of service, although changed into an absolute indebtment or liability after service and before judgment, will not render the trustee chargeable. Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

The rights of the parties depend upon the condition of things as they existed at the time of the service of the original writ on the trustees, and cannot be modified or changed by subsequent transactions. The fact that a contract is finally completed and the contingency removed cannot change the result. Williams v. Androscoggin & Kennebec R. R., 36 Me. 201.

Applied in Lane v. Nowell, 15 Me. 86; Libby v. Brainard, 63 Me. 65; Donnell v. Portland & Ogdensburg R. R., 73 Me. 567; Nickerson v. Nickerson, 80 Me. 100, 12 A. 880.

Quoted in Murphy v. Delano, 95 Me. 229, 49 A. 1053.

V. By reason of any debt due from him on a judgment while he is liable to an execution thereon;

The judgment and orders of the court are not to be contravened by the issuing of a trustee process. Clark v. Clark, 62 Me. 255.

Cited in Huntress v. Hurd, 72 Me. 450.

VI. By reason of any amount due from him to the principal defendant as wages for his personal labor or that of his wife or minor children, for a time not exceeding 1 month next preceding the service of the process and not exceeding $30 of the amount due and payable to him as wages for his personal labor, and $10 shall be exempt in all cases; moreover, wages of minor children and of women are not, in any case, subject to trustee process on account of any debt of parent or husband; if, after wages for personal labor or services have been attached and before entry of the writ, the defendant tenders to the plaintiff or to his attorney the whole amount due and recoverable in the action and the fees of the officer for serving the writ, the plaintiff shall recover no costs except the fees of the officer; and if the defendant is defaulted without an appearance or if he files an offer of judgment on the return day of the writ and the plaintiff accepts such offer or fails to secure more than the amount thereof and of the interest thereon from its date, the plaintiff shall recover no costs except the entry fee and the officers' fees. The trustee shall pay to the defendant the amount exempt from attachment at the same time and in the same manner as if no process had been served; (1951, c. 169)

The intention of this subsection is to enable persons whose earnings are small and often payable to receive the whole of them, without the risk of their being intercepted by the trustee process. Howard Coal Co. v. Savage, 116 Me. 115, 100 A. 369.

The history of this subsection, as shown in its various amendments and the decisions of the court, make it clear that this subsection exempts the amount due the principal defendant for his personal labor, or that of his wife or minor children, earned during a period not exceeding one month next prior to service of process with the limitation that the amount so exempt shall not, when the amount in the hands of the trustee is due the principal defendant as wages for his personal labor, exceed the sum of $30, and when earned within a period more than one month prior to such service the amount shall be

limited to ten dollars. Pike v. Bannon, 115 Me. 124, 98 A. 68; Howard Coal Co. v. Savage, 116 Me. 115, 100 A. 369.

The trustee cannot be charged for the sum exempted for personal labor by this subsection. Haynes v. Thompson, 80 Me. 125, 13 A. 276; Howard Coal Co. v. Savage, 116 Me. 115, 100 A. 369.

And he is duty bound to pay such sum to employee.—A trustee is duty bound to pay his employee the amount of wages due at the time of service of a trustee process and exempted from attachment thereunder at the same time and in the same manner as if no process had been served. McIntosh v. Bramson, 130 Me. 420, 157 A. 234.

And service of trustee process does not relieve him from liability to employee. — The mere service of a trustee process does not relieve the trustee from liability to the principal defendant for any part of the wages due at the time of service. Regardless of the pendency of the process, the principal defendant may, at any time, commence action against the trustee for the full amount of the wages due him and may recover the amount due him for exempted wages in any event, as also the balance of his wages due, unless a judgment obtained against the trustee for the full amount thereof is satisfied. McIntosh v. Bramson, 130 Me. 420, 157 A. 234.

Nor does payment to creditor not made to satisfy judgment against trustee. — No payment to the creditor without authority of the principal defendant will relieve the trustee from his liability to the latter unless the payment is made to satisfy a judgment against the trustee, and then only to the extent of the judgment exclusive of exempted wages. McIntosh v. Bramson, 130 Me. 420, 157 A. 234.

Trustee must disclose necessary facts to discharge himself.—If the trustee, after disclosing the indebtedness, would discharge himself, he must further disclose that the indebtedness accrued for personal labor performed during the month next preceding the service of the writ. Daniels v. Marr, 75 Me. 397.

It must appear by the disclosure that the money is due as the wages of personal labor, in order to bring it within the exemption of this subsection. Brainard v. Shannon, 60 Me. 342.

And laborer's claim cannot be defeated by trustee's failure to disclose.—This subsection secures to the laborer his claim of payment for one month's labor, and places it beyond the reach of his creditors, and his debtor cannot deprive him of it by his neglect to disclose the whole matter, when summoned as his trustee. Lock v. Johnson, 36 Me. 464.

Or by creditor making second service.—A creditor who has procured the detention of a laborer's wages in the hands of his employer by the first service of a trustee process, cannot, by making a second service under § 6 after the lapse of a month, deprive the laborer of the exemption of an amount not exceeding thirty dollars, out of the wages due him for his personal labor for a time not exceeding one month next preceding the first service. Collins v. Chase, 71 Me. 434.

Where successive trustee attachments are made, the amount so attached cannot be added to avoid the exemption allowed the principal debtor by this subsection, but shall be treated separately and the exemptions allowed the debtor shall apply to each amount so trusteed. Howard Coal Co. v. Savage, 116 Me. 115, 100 A. 369.

Failure to disclose exemption renders trustee liable to both creditor and defendant. — If the suit is prosecuted to judgment, the trustee is liable to the creditor bringing suit for the full amount of the wages due, unless he discloses the amount of the indebtedness to the employee exempted by the statute and thereby discharges himself to the extent thereof. A failure to make full disclosure in such a case renders the trustee liable to pay the amount of the exempted indebtedness to both the creditor and the principal defendant. McIntosh v. Bramson, 130 Me. 420, 157 A. 234.

Exemption not applicable to sum due principal for wages or work of others.—This subsection does not exempt that which is due to the principal for the wages or work of other men employed by him, or due to him upon jobs into which other matters besides his personal labor, not capable of being distinguished from it, go to form the price which he is to receive, even though the amount thus due to him at the time of the service of the process does not exceed the amount of his wages for his own personal labor during the time specified. Brainard v. Shannon, 60 Me. 342.

Or to wages collected and deposited with attorney.—Where the defendant has in effect collected his wages, and intrusted and deposited the money with his attorney, it is then liable to attachment by trustee process. Ayer v. Brown, 77 Me. 195.

And the subsection restricts the exemption to work done the month next preceding the service of the process. If the

defendant's labor was not done within that time, the trustee must be charged. Haynes v. Hussey, 72 Me. 448.

If there is more than one month's labor due the employer may be chargeable as trustee for some amount. Bradbury v. Andrews, 37 Me. 199.

For a case holding that, under this section as it formerly read, the provision that "no person shall be adjudged a trustee by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month," was not restricted to the month immediately preceding the service of the process on the supposed trustee, see Parks v. Knox, 22 Me. 494.

Trustee has no interest in determination of question of exemption.—Where there is no claimant for the funds in the trustee's possession, and no controversy as to the amount due, and where the only question is whether or not the funds in the trustee's hands are exempted from attachment by trustee process, because of the provision of the statute that an amount due the principal defendant as wages for his personal labor performed within one month next before the service of the process cannot be thus attached, the principal defendant is the only one, except the plaintiff, who has any real interest in the determination of the question. Provost v. Piche, 93 Me. 455, 45 A. 506.

Subsection exempts $10 in all cases. — By this subsection it is expressly provided that in "all cases" ten dollars of the wages for the personal labor of a debtor should be exempt from attachment under the trustee process. That is in effect a general exemption from attachment of that much of a debtor's wages, since the trustee process is the only appropriate proceeding under our statutes for the attachment of such a property right. Jumper v. Moore, 110 Me. 159, 85 A. 485.

The intention of the legislature, when it amended the trustee process by adding the $10 exemption to this subsection, was to make $10 of a debtor's wages secure and available to him for the immediate succor of himself and family. Jumper v. Moore, 110 Me. 159, 85 A. 485.

But not independently of $30 limitation. —There is nothing in this subsection to warrant the conclusion that the exemption of ten dollars is independent of the limitation of thirty dollars and additional thereto. Thus, a contention that forty dollars is exempt cannot be sustained. Pike v. Bannon, 115 Me. 124, 98 A. 68.

Former provision of section. — For a consideration of a former provision of this subsection that the wages of a laborer were "not exempt in any suit for necessaries furnished him or his family," see McAuley v. Tracy, 61 Me. 523; Brown v. West, 73 Me. 23; Pullen v. Monk, 82 Me. 412, 19 A. 909; Quimby v. Hewey, 92 Me. 129, 42 A. 344; Provost v. Piche, 93 Me. 455, 45 A. 506; Fisher v. Shea, 97 Me. 372, 54 A. 846.

Applied in Meserve v. Nason, 96 Me. 412, 52 A. 907.

VII. Where service was made on him by leaving a copy or a summons and before actual notice of such service or reasonable ground of belief that it was made, he paid the debt due to the principal defendant or gave his negotiable security therefor;

Exemption applicable where service made on one officer of corporation and payment made by another. — This subsection applies to a corporation summoned as trustee, when the service of the writ is made on an officer of the corporation, away from its office and place of business, and the debt due the principal defendant is paid by another officer of the corporation, whose duty it is to pay it, acting in his ordinary course of business, if he had no actual notice of the service, or reasonable ground of belief that it was made before payment, and the corporation, or its officer on whom the service was made, was guilty of no negligence in not giving such notice. Lyon v. Russell, 72 Me. 519.

But officer served must use diligence in notifying officer whose duty it is to make payment. — The corporation, or officer on whom the service is made, must use diligence in giving notice of the service of the writ to the officer or agent whose duty it is to make the payment. Lyon v. Russell, 72 Me. 519.

VIII. By reason of any amount due for board furnished a member of the legislature while in attendance thereon;

See c. 31, § 24, re claims under Workmen's Compensation Act; c. 60, §§ 159, 232, re life and accident policies and money due thereon; c. 60, § 187, re policies in fraternal beneficiary associations.

IX. By reason of the renting as a national bank, trust company, savings bank

or safe deposit company of any safe deposit box or on account of the contents thereof. [1953, c. 197]. (R. S. c. 101, § 55. 1951, c. 169. 1953, c. 197.)

Sec. 56. If defendant summoned as trustee of plaintiff.—When an action is brought for the recovery of a demand and the defendant is summoned as a trustee of the plaintiff, the action shall be continued to await the disclosure of the trustee unless the court otherwise orders, and if the defendant is adjudged trustee, the disclosure and the proceedings thereon may be given in evidence on the trial of the action between the trustee and his creditor. (R. S. c. 101, § 56.)

This section relates to cases where the defendant in a pending suit has been summoned as trustee of the plaintiff, long enough before the first suit has proceeded to trial and verdict to make his disclosure, and give the proceedings in evidence at the trial. It is not imperative; but the granting of a continuance, rests in the discretion of the court. Huntress v. Hurd, 72 Me. 450.

Section provides only method whereby defendant can avail himself of trustee proceedings.—No opportunity is given to the defendant in an action as principal, to avail himself of his disclosure and proceedings thereon in an action against the plaintiff, in which he is summoned as trustee, excepting in the mode pointed out by the statute. This mode is by introducing the disclosure and proceedings in evidence, on the trial of the action against him as principal as provided by this section. Holt v. Kirby, 39 Me. 164.

Prior judgment conclusive on trustee suit.—Where the trustee suit is subsequent in time to that of the defendant therein against the trustee, the judgment obtained in the suit first, in order of time, would seem to be conclusive upon the plaintiff in the trustee suit under the provisions of this and the two following sections. Webster v. Adams, 58 Me. 317.

History of section.—See Huntress v. Hurd, 72 Me. 450.

Sec. 57. Costs.—If the amount disclosed is as large as the sum recovered in the action, the trustee is liable to no costs after service of the trustee process upon him; otherwise, he is liable to legal costs. (R. S. c. 101, § 57.)

Applied in Webster v. Adams, 58 Me. 317.

Sec. 58. If defendant in action pending is summoned as trustee of plaintiff.—If, during the pendency of an action, the defendant is summoned as trustee of the plaintiff, the first suit may nevertheless proceed so far as to ascertain by a verdict or otherwise, what sum, if any, is due from the defendant; but the court may, on motion of the plaintiff in the trustee suit, continue it for judgment until the termination of the trustee suit, or until the attachment therein is dissolved by the discharge of the trustee or satisfaction of the judgment otherwise. (R. S. c. 101, § 58.)

Continuance is not imperative. — Under this section and §§ 59 and 60, there is a discretionary power in the presiding judge to continue the first suit, or to render judgment in it, and discharge the trustee. Were it otherwise, and the continuance imperative, it would be in the power of any defendant against whom a verdict had been rendered, or an award presented, to prevent the rendition of any judgment thereon, so long as he could induce parties to commence trustee suits against his adversary, and summon him as trustee. It would be only a question of tenacity of purpose and ability to pay costs and counsel fees. Huntress v. Hurd, 72 Me. 450.

Applied in Webster v. Adams, 58 Me. 317.

Sec. 59. Defendant not adjudged trustee after judgment in 1st suit.—If the first suit is not continued and judgment is rendered therein, the defendant shall not afterwards be adjudged a trustee on account of the demand thus recovered against him while he is liable to an execution thereon. (R. S. c. 101, § 59.)

The policy of the law, is to relieve the party summoned as trustee, unless the plaintiff in the trustee suit, actively intervening, presents his motion to continue the first case for judgment under § 58, and such is the express provision of this section. Huntress v. Hurd, 72 Me. 450.

Sec. 60. If, before final judgment, defendant adjudged trustee on other suit.—If, before final judgment is rendered in the first suit, the defendant in that suit is adjudged trustee in the other and pays thereon the money demanded in the first suit or any part of it, the fact shall be stated on the record of the first suit and judgment therein shall be rendered for the costs due to the plaintiff and for such part of the debt or damages, if any, as remains due and unpaid. (R. S. c. 101, § 60.)

Cited in Huntress v. Hurd, 72 Me. 450.

Sec. 61. Money, etc., trusteed before it is payable.—Any money or other thing due absolutely to the principal defendant may be attached before it has become payable, but the trustee is not required to pay or deliver it before the time appointed therefor by the contract. (R. S. c. 101, § 61.)

Debt must be due absolutely.—Under this section, money due absolutely from the trustee to the principal defendant may be attached before it has become payable, but to be so attachable it must be due absolutely and not upon any contingency. Mason v. Belfast Hotel Co., 89 Me. 381, 36 A. 622. See § 55, sub-§ IV, and note.

Applied in Foxton v. Kucking, 55 Me. 346; Ware v. Gowen, 65 Me. 534.

Stated in Cutter v. Perkins, 47 Me. 557.

Cited in Wadleigh v. Jordan, 74 Me. 483.

Sec. 62. If trustee does not pay costs when liable.—If the person summoned as trustee and liable for costs as provided in section 19 does not voluntarily pay them when demanded by the officer serving the execution, the officer shall state the fact in his return thereon; and if it appears thereby that the costs have not been paid by anyone, the court shall award execution against such trustee for the amount thereof. (R. S. c. 101, § 62.)

Sec. 63. Goods fraudulently conveyed, trusteed.—If an alleged trustee has in his possession goods, effects or credits of the principal defendant which he holds under a conveyance fraudulent and void as to the defendant's creditors, he may be adjudged a trustee on account thereof, although the principal defendant could not have maintained an action therefor against him. (R. S. c. 101, § 63.)

This section is applicable only to conveyances fraudulent and void as to creditors at common law. — Hanscom v. Buffum, 66 Me. 246.

And it is not applicable to conveyance of real estate.—A trustee cannot be directly charged for the value of real estate which has been conveyed to him. Even if the conveyance is fraudulent as to creditors, he cannot be charged, unless he has received something by way of rents and profits. If fraudulent, the proper remedy is by attachment and levy on execution. Shreve v. Fenno, 49 Me. 78.

Court to determine question of fraud as if sitting in equity. — This section clearly contemplates that the courts shall decide upon examination of a disclosure, made by a person attempted to be charged in a process of foreign attachment, for any goods, effects or credits conveyed to him by the principal defendant, whether they were or were not so conveyed in contravention of the provisions of the statute of frauds. If they were, the conveyance, so far as creditors are concerned, is to be held null and void. This determination must be made by courts, doubtless, as if sitting in equity. Page v. Smith, 25 Me. 256.

And trustee's denial given force of answer to bill in equity.—The denial of the trustee of any fraudulent design must be allowed the force it would have in an answer to a bill in equity charging him with the fraud. In either case, if the facts disclosed show the denial to be untrue, he must be rendered chargeable. Page v. Smith, 25 Me. 256.

Section not limited to cases where trustee discloses fraud.—It could not have been the intention of the legislature, in this section, to provide only for a case where the supposed trustee should disclose in totidem verbis, that he held goods, effects or credits of the principal defendant, in fraud of the rights of creditors. Fletcher v. Clarke, 29 Me. 485.

But creditor can allege and prove other facts and have case submitted under § 31. —If the creditor supposes that he may obtain payment of his debt by a resort to a suit under this section, it is competent for him, also, if the supposed trustee makes

disclosure, to apply the means referred to § 30. After he has alleged and proved other facts by virtue of that provision, in addition to those furnished by the disclosure, the whole is to be submitted to the court or a jury for examination under § 31. All the statements in the disclosure may be compared one with another; and the other evidence adduced is to be viewed in connection therewith, and from the whole, the question is to be settled, whether the supposed trustee holds fraudulently against the creditors of the principal defendant, any goods, effects or credits. Fletcher v. Clark, 29 Me. 485.

And entire evidence is to be examined.—It was manifestly the intention of the authors of this section that the question of fraud should be settled by a full examination of the evidence in the same manner that it would be if presented to them as a court of equity; or if presented to a jury, it would be determined as an issue of fact is ordinarily settled between one who represents an attaching creditor, and the purchaser of property, where the latter is alleged to have made the purchase in fraud of the rights of the former. Fletcher v. Clarke, 29 Me. 485.

Rule that there must be clear admission by trustee not applicable to case under this section.—Although as a general principle, there must be a clear admission of goods, effects or credits, not disputed or controverted, by the supposed trustee, in order to charge him, yet this principle does not apply to a case coming under this section, by which the supposed trustee may be charged, "if he has in his possession goods, effects or credits of the principal defendant which he holds under a conveyance fraudulent and void as to the defendant's creditors." Page v. Smith, 25 Me. 256.

If the trustee comes into court and sets up a fraudulent claim of title, he cannot invoke equity. If the decree will be a hardship to him, it results from the position he has voluntarily and deliberately assumed, and which, if he should be permitted to succeed, would defraud the plaintiff. Thompson v. Pennell, 67 Me. 159.

Section applies where conveyance fraudulent in law only.—While this section was originally enacted to cover cases of transfers actually fraudulent as to creditors, there is no reason why it should not apply in cases when the conveyance was only fraudulent in law. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

Thus it applies to sale in violation of bulk sales law.—While there is some conflict of authority as to whether trustee or garnishment process is the proper remedy in cases where goods have been sold in violation of a bulk sales law, the weight of authority supports the rule that garnishment or trustee process is a proper remedy to reach goods in the hands of the purchaser which have been sold in violation of such a law, and especially the proceeds if they have again been sold by the purchaser. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308. See c. 119, §§ 6-8, and notes, re sales in violation of bulk sales law generally.

In which case goods or proceeds thereof are held as trust fund.—In case of a conveyance of goods in violation of the bulk sales law, the goods so conveyed or the value thereof in case of resale, at least in equity or upon trustee process, should be treated as held by the vendee as in the nature of a trust fund for all the creditors, and in case of proceedings in equity or upon trustee process, the vendee having in good faith paid any of the creditors their respective share of the value of the goods, shall be entitled to be subrogated to the rights of such creditor therein. Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

Trustee must have had knowledge of fraud.—The motives of the vendors of the goods may have been fraudulent; but to hold the trustee chargeable under this section, he must have had knowledge of the designs of the vendors, and have aided them in carrying those designs into execution. Blodgett v. Chaplin, 48 Me. 322.

Subsequent creditor can avail himself of section if fraud is actual.—Where such fraud as is referred to in this section is found either by the court or the jury, nothing remains but the application of the law to the fact so found. If the fraud is one of law merely, and the plaintiff in the suit became a creditor after the transfer by the principal defendant, the supposed trustee may with propriety be discharged. But if the fraud was actual, prior and subsequent creditors may avail themselves of the statute. Fletcher v. Clarke, 29 Me. 485.

Applied in Glass v. Nichols, 35 Me. 328; Skowhegan Bank v. Farrar, 46 Me. 293; Bunker v. Tufts, 57 Me. 417; American Buttonhole, etc., Co. v. Burgess, 75 Me. 52; Thompson v. Shaw, 104 Me. 85, 71 A. 370; Seavey v. Seavey, 114 Me. 14, 95 A. 265.

Sec. 64. Trustee may retain pay due him, but not for unliquidated damages.—Every trustee may retain or deduct out of the goods, effects and credits in his hands, all his demands against the principal defendant, of which he could have availed himself if he had not been summoned as trustee, by way of setoff on trial or by a setoff of judgments or executions between himself and the principal defendant, except unliquidated damages for wrongs and injuries; and he is liable for the balance only, after their mutual demands are adjusted. (R. S. c. 101, § 64.)

An alleged trustee's right of setoff as against the principal defendant is regulated by this section. Wadleigh v. Jordan, 74 Me. 483.

Excepting clause does not apply to claim arising out of contract on which debt is founded.—The provision excepting from the privilege of deduction by way of setoff claims for "unliquidated damages for wrongs and injuries," refers to independent claims, and not to such as arise out of the contract itself, upon which the debt is founded. Cota v. Mishow, 62 Me. 124.

And trustee can deduct damages for breach from amount due on contract.—When the amount attached arises from a contract which has been broken by the principal defendant, the trustees, if liable at all, are only liable for the sum due under the contract after deducting the amount of damages suffered in consequence of the breach of it, by way of recoupment. Cota v. Mishow, 62 Me. 124.

And he can set off debt due jointly from defendant and others.—Where the supposed trustee has a debt due from the defendant jointly with others, whether partners or not, he may set it against what is due from him to the defendant, as the latter would be liable for the joint debt, and the demands would be mutual. Robinson v. Furbush, 34 Me. 509.

And he can set off debt due him against his joint liability to defendant.—When one of several jointly indebted to the defendant, is summoned as his trustee, having several demands against him, he may be allowed to set it against his joint liability, whether the joint debtors be summoned or not, and whether they be partners or not; upon the principle that any one liable for it, may discharge a debt. Yet, one thus summoned may object to answering, on account of the non-joinder of the joint debtors; and those not summoned may discharge the joint indebtedness, unaffected by the trustee process. Robinson v. Furbush, 34 Me. 509.

But trustee of partnership cannot set off debt due from individual partner.—One summoned as trustee of several defendants, not general partners, to whom he is indebted, having a claim against a part of them, may set it against his indebtedness to those who are thus indebted to him. But when the defendants are partners, his indebtedness would constitute partnership funds, which he could not appropriate to the payment of the private debts of the individual partners, and the setoff could not be allowed. Robinson v. Furbush, 34 Me. 509.

Trustee may set off his liability as indorser of defendant's note.—Where a supposed trustee, when the process was served on him, was indebted to the principal defendant, but he had previously, at the request and for the benefit of the defendant, indorsed without indemnity the latter's note which, the defendant having failed, he was legally compelled to pay, the trustee might be allowed to set off the sum paid on the note against the apparent indebtedness. Donnell v. Portland & Ogdensburg R. R., 76 Me. 33.

Note barred by statute of limitations cannot be set off.—It is not sufficient to entitle an executor, summoned as trustee of a legatee named in the will of his testator, to be discharged, that he has a promissory note, greater in amount than the legacy, payable to himself, and signed by the principal defendant in the trustee suits as principal and by the testator as surety, when the note was barred by the statute of limitations, as against both the promisors before the death of the testator, and the testator never paid anything as surety for the legatee therefor. Wadleigh v. Jordan, 74 Me. 483.

Applied in Stedman v. Vickery, 42 Me. 132; Plummer v. Rundlett, 42 Me. 365; Marrett v. Equitable Ins. Co., 54 Me. 537; Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

Sec. 65. Form of judgment against trustee.—When a person is adjudged trustee on disclosure in the original suit, the amount for which he is chargeable shall be fixed by the court, subject to exceptions, and be conclusive on scire facias unless, for cause shown, an additional disclosure is allowed; but on default,

the amount need not be expressed in the judgment; and in all cases on scire facias, if he is adjudged trustee, the amount for which he is chargeable shall be expressed in the judgment. (R. S. c. 101, § 65.)

Cross reference.—See note to § 71, re judgment by default not conclusive.

Applied in Bickford v. Flannery, 70 Me. 106; Townsend v. Libbey, 70 Me. 162.

Stated in part in McMillan v. Hobson, 46 Me. 91.

Sec. 66. Discharge no bar to claim of principal.—If an alleged trustee is discharged, the judgment shall be no bar to an action brought by the principal defendant against him for the same demand. (R. S. c. 101, § 66.)

Quoted in Webster v. Adams, 58 Me. 317.

Scire Facias.

Statute must be complied with. — Scire facias actions to enforce judgments rendered in trustee suits are authorized only upon compliance with the requirements of statute. Bean v. Ingraham, 28 Me. 238, 147 A. 191.

Sec. 67. Scire facias against trustee.—When a person adjudged a trustee in the original action does not, on demand of the officer holding the execution, pay over and deliver to him the goods, effects and credits in his hands and the execution is returned unsatisfied, the plaintiff may sue out a writ of scire facias against such trustee, from the court or justice that rendered the judgment, to show cause why judgment and execution should not be awarded against him and his own goods and estate for the sum remaining due on the judgment against the principal defendant. (R. S. c. 101, § 67.)

Cross reference. — See note to § 73, re action of scire facias barred by failure to make demand within 30 days.

Scire facias to issue from court which rendered judgment.—It is provided in this section that the writ of scire facias against a trustee shall issue from the court which rendered the judgment. No limitation as to amount is imposed in such a case. Kennebec Steam Towage Co. v. Rich, 100 Me. 62, 60 A. 702.

Demand should be made on trustee.— The statute clearly indicates the intention of the legislature that a demand should be made by an officer after judgment and before the attachment expires, by virtue of an execution in the usual form against the principal and his goods, effects and credits in the hands of a trustee, upon the trustee for such goods, effects and credits. This is done, that the property, if a subject of sale, may be converted into money by the officer which may be applied towards satisfying the execution; or if not delivered, that the foundation for a writ of scire facias may be laid. Bachelder v. Merriman, 34 Me. 69.

In person. — The word "demand," as used in this section, denotes a request in person and implies personal presence. Clark v. Gray, 113 Me. 443, 94 A. 881.

Refusal of which renders trustee's own estate liable.—If the plaintiff sues out his execution and, within thirty days after judgment (see § 73), causes a legal demand to be made upon the trustee to pay over an amount sufficient to satisfy the same, and he refuses or neglects to do so, he thereby renders his own goods and estate liable for such an amount as he might be properly charged for. Tyler v. Winslow, 46 Me. 348.

The original trustee suit is a process in law. It can have no other effect upon the trustee than to obtain a judgment charging him, without the specification of any sum, or of discharging him. If he is charged, the execution runs only against the goods, effects and credits of the principal debtor, in the hands of the trustee. If the trustee fails upon proper demand to expose the goods, effects and credits of the debtor, he is subject to the process of scire facias, which is an action at law; and upon a judgment thereon, he is liable in all respects as a debtor, for a certain amount and to have his lands or goods taken, or his body arrested on execution. Denny v. Metcalf, 28 Me. 389.

And after such refusal nothing short of full payment of judgment will exonerate trustee. — Scire facias is not a process to obtain the goods, effects and credits deposited by the principal debtors with the trustee, as they existed at the time of the service of the original writ upon him. The writ of scire facias is not provided in the statute for such a purpose. No

surrender of goods or effects, or any other property, short of full payment of the judgment, after the refusal of the defendant to answer the demand on the execution, can exonerate him from his liability. The plaintiffs have no further interest in the property. By his refusal the trustee appropriates the property to his own use, and is bound to answer for the value. He no longer holds it, to be disposed of, as he did before his refusal. Franklin Bank v. Bachelder, 23 Me. 60.

And debtor's discharge in bankruptcy is no defense.—If the creditor has recovered judgment in a trustee process against his debtor, and against the trustee for the goods, effects and credits of the principal in his hands, and has taken out execution, and a demand has been made thereof of the trustee by the proper officer in due season, and he has refused to deliver up the same, and afterwards the original debtor files his petition in bankruptcy and obtains his discharge as a bankrupt under the law of the United States on that subject, such discharge furnishes no valid defense to a scire facias to recover of the trustee the value of the goods, effects and credits of the principal in his hands. Franklin Bank v. Bachelder, 23 Me. 60.

But trustee may show lack of legal service on principal in original writ.—A trustee on scire facias is permitted to show that there was no service on the principal in the original writ or that the service was voidable and, if those facts are shown, he is entitled to his discharge. Cota v. Ross, 66 Me. 161.

The sum remaining due is to be ascertained by the judgment, or if the same has been in part satisfied, by that and the officer's return on the execution issued thereon. The sum remaining due from the principal defendant, and that for which the trustee is to be charged, is one and the same. Sawyer v. Lawrence, 40 Me. 256.

Before a writ can be sued out under this section, the execution must be returned unsatisfied. Until that is done, it is uncertain whether it may not be satisfied by the principal defendant. Roberts v. Knight, 48 Me. 171.

This section is express that, before scire facias can issue, it must be shown that "the execution is returned unsatisfied." Austin v. Goodale, 58 Me. 109.

A writ of scire facias cannot be lawfully issued against a trustee, before his default is shown by the officer's return on the execution against him. Cota v. Ross, 66 Me. 161.

By this section the plaintiff in a trustee suit may sue out a writ of scire facias to enforce his judgment against a trustee only when the trustee does not, on demand of the officer holding the execution, pay over and deliver to him the goods, effects and credits of the principal defendant in his hands, and the execution is returned unsatisfied. Bean v. Ingraham, 128 Me. 238, 147 A. 191.

And writ cannot issue before return day of execution.—A writ of scire facias cannot be lawfully issued against one who has been adjudged a trustee, before the return day of the execution against the principal defendant. Roberts v. Knight, 48 Me. 171.

It is only when the officer has used the powers conferred by the process, during the whole time given to him, that he can return it unsatisfied within the meaning of this section. Roberts v. Knight, 48 Me. 171; Austin v. Goodale, 58 Me. 109.

The return contemplated by this section can only be made on or after the return day. The date of the writ of scire facias is not the material point, but the date of the return. Austin v. Goodale, 58 Me. 109.

A return before the return day would not authorize the issuing of the writ. Cota v. Ross, 66 Me. 161.

Because creditors should look primarily to property in hands of debtor.—The reason why scire facias cannot issue until after the execution is returned unsatisfied is that the law intends that the creditors shall look primarily to the property in possession of the debtors, and that the trustee shall not be called upon, until it is shown by a return of nulla bona that the execution could not be satisfied otherwise during the time it was in force. Austin v. Goodale, 58 Me. 109.

Return made prior to return day does not authorize writ after such day.—The return of "unsatisfied" made before the return day upon an execution against the principal defendant does not authorize the issuing of a writ of scire facias after the return day against the person adjudged trustee. Cota v. Ross, 66 Me. 161.

In scire facias against the trustee, the creditor revives no judgment against the debtor. The defendant in the trustee process is no party in the process to obtain judgment against the trustee. The amount of the judgment against the debtor is of no moment to the trustee. Before it is revived against the debtor it would be an anomaly to revive it against the trustee. Sawyer v. Lawrence, 40 Me. 256.

A judgment against the debtor cannot

be revived indirectly in a suit against the trustee to which he is not a party. Sawyer v. Lawrence, 40 Me. 256.

Applied in McMillan v. Hobson, 46 Me. 91; Bowker Fertilizing Co. v. Spaulding, 93 Me. 96, 44 A. 371; Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Sec. 68. Judgment on scire facias.—After such writ has been served on him, if he neglects to appear and answer thereto, he shall be defaulted; and if he was not examined in the original suit, judgment shall be rendered against him for the whole sum remaining due on the judgment against the principal defendant. (R. S. c. 101, § 68.)

Sec. 69. Judgment when all defendants defaulted.—When all the defendants in a writ of scire facias are defaulted, not having been examined in the original suit, the court may enter up joint or several judgments, as the case requires, and issue execution in common form. (R. S. c. 101, § 69.)

Sec. 70. If trustee defaulted on scire facias, examined in 1st suit.—If a trustee defaulted on the scire facias was examined in the original suit, judgment shall be rendered on the facts stated in his disclosure or proved at the trial, for such part of the goods, effects and credits for which he is chargeable as trustee as remain in his hands, if any, or so much thereof as is then due and unsatisfied on the judgment against the principal defendant; but if it appears that such person paid and delivered the whole amount thereof on the execution issued on the original judgment, he is not liable for costs on the scire facias. (R. S. c. 101, § 70.)

Cited in McMillan v. Hobson, 41 Me. 131.

Sec. 71. Liability for costs, if discharged on scire facias, not before examined.—If the trustee appears and answers to the scire facias and was not examined in the original suit, he may be examined as he might have been in the original suit; and if, on such examination, he appears not chargeable, the court shall render judgment against him for costs only, if resident in the county where the original process was returnable; but if not resident in such county, he shall not pay or recover costs. (R. S. c. 101, § 71.)

Cross reference. — See § 78, re trustee exempt from costs in certain cases on scire facias.

Judgment by default against trustee not conclusive.—If the plaintiff obtains a judgment against the trustee by default, this makes out a prima facie case of indebtedness, but the judgment is not conclusive between the parties. It is not final. On scire facias, the trustee may disclose further, and a judgment in that suit on disclosure or by default would be binding on him. Townsend v. Libbey, 70 Me. 162.

Applied in Hanson v. Butler, 48 Me. 81; Hussey v. Titcomb, 127 Me. 423, 144 A. 218.

Quoted in part in Bowker v. Hill, 60 Me. 172.

Sec. 72. If examined in original suit, trustee examined again.—If he had been examined in the original suit, the court may permit or require him to be examined anew in the suit of scire facias; and he may then prove any matter proper for his defense; and the court may enter such judgment as law and justice require, upon the whole matter appearing on such examination and trial. (R. S. c. 101, § 72.)

Object of section. — The object of this section seems to have been to enable the court to render such judgment "as law and justice require," and it cannot be doubted that the judge presiding has the power, on motion, for good cause shown, in his discretion, to permit a further disclosure. McMillan v. Hobson, 41 Me. 131.

Trustee's liability determined by facts existing at time of original service. — Under this section, the question of the trustee's liability is to be determined by the state of facts existing at the time of the service of the original writ upon him, unless some fact has since occurred which may legally operate as a discharge therefrom. Tyler v. Winslow, 46 Me. 348.

But facts disclosed in original process

to be considered with those introduced on scire facias. — In scire facias against one who has been charged as trustee, the facts disclosed in the original process are properly to be taken into consideration with those subsequently introduced in the disclosure on the scire facias, in order to determine whether the trustee was rightly chargeable, as well as in reference to the amount, if any, which the plaintiff is entitled to recover of him. Page v. Smith, 25 Me. 256.

Former provision of section. — For a former provision of this section "that where any trustee has come into court upon the original process, and been examined upon oath as aforesaid; and upon such examination, it has appeared to the court that such trustee had goods, effects or credits of the principal in his hands, at the time of serving the original writ, such trustee shall not be again examined upon the scire facias, but judgment shall be rendered upon his examination had as aforesaid," see Crocket v. Ross, 5 Me. 443; Taylor v. Day, 7 Me. 129.

Applied in Hanson v. Butler, 48 Me. 81.

Quoted in part in Bowker v. Hill, 60 Me. 172.

Stated in part in Stedman v. Vickery, 42 Me. 132; Cutter v. Perkins, 47 Me. 557.

Miscellaneous Provisions.

Sec. 73. Goods and effects liable to another attachment, if not demanded within 30 days.—When a person is adjudged trustee, if the goods, effects and credits in his hands are not demanded of him by virtue of the execution within 30 days after final judgment, their attachment by the original process is dissolved and they are liable to another attachment as though the prior attachment had not been made; but when the debt due from the trustee to the principal defendant is payable at a future day or specific property is in his hands which he is bound to deliver at a future day, the attachment continues until the expiration of 30 days after such debt is payable in money or the property aforesaid is demanded of the trustee. (R. S. c. 101, § 73.)

Cross reference. — See note to § 50, re attachment holds for 30 days after tender made to mortgagee.

The attachment under trustee process expires in thirty days after judgment thereon, unless measures are taken within that time to make it available. McAllister v. Furlong, 36 Me. 307.

Unless a demand is made within thirty days after judgment, the lien created by the attachment will expire. Ladd v. Jacobs, 64 Me. 347.

And principal defendant may recover his goods, etc.—By this section and § 74 the demand must be made within thirty days after final judgment in the trustee suit. At the expiration of that period, the attachment by the original process, as against the trustee, is dissolved, and, if no second attachment has intervened, the principal defendant may recover his goods, effects and credits in the hands of his trustee "as if they had not been attached." Bean v. Ingraham, 128 Me. 238, 147 A. 191.

The statute as here written casts the penalty of delay in demand upon the plaintiff in the trustee suit, remitting the principal defendant to his original right in his goods, effects and credits in the hands of the trustee, with a right of action for their recovery. Bean v. Ingraham, 128 Me. 238, 147 A. 191.

Demand to be made on trustee. — The statute clearly indicates the intention of the legislature that a demand shall be made by an officer after judgment and before the attachment expires, by virtue of an execution in the usual form against the principal and his goods, effects and credits, in the hands of a trustee, upon the trustee for such goods, effects and credits. This is done, that the property, if a subject of sale, may be converted into money by the officer which may be applied towards satisfying the execution; or if not delivered, that the foundation for a writ of scire facias may be laid. Bachelder v. Merriman, 34 Me. 69.

In person. — The word "demand," as used in this section, denotes a request in person and implies personal presence. Clark v. Gray, 113 Me. 443, 94 A. 881.

And until then goods are property of principal.—The goods, effects and credits for which a trustee is holden, if charged as trustee in the original suit, until after a demand in the legal mode, are the property of the principal. Bachelder v. Merriman, 34 Me. 69.

Demand should be made within 30 days after tender under § 50. — A demand by

the officer having the execution, within the thirty days next after the tender by the attaching creditor under § 50, is necessary to fix the liability of the trustee, who might otherwise well suppose that the debt had been discharged by the principal defendant, and that without such demand scire facias could not be maintained. Woods v. Cooke, 58 Me. 282.

Applied in Smith v. Davis, 131 Me. 9, 158 A. 359.

Cited in Bean v. Ingraham, 128 Me. 462, 148 A. 681.

Sec. 74. If no second attachment, principal may recover.—If there is no second attachment, the principal defendant may recover the goods, effects and credits, if not so demanded, as if they had not been attached. (R. S. c. 101, § 74.)

Applied in Bean v. Ingraham, 128 Me. 238, 147 A. 191.

Sec. 75. Demand, how made if trustee is out of state or has no dwelling in state.—When the officer holding an execution cannot find the trustee in the state, a copy of the execution may be left at his dwelling house or last and usual place of abode, with notice to the trustee indorsed thereon and signed by the officer, signifying that he is required to pay and deliver, towards satisfying such execution, the goods, effects and credits for which he is liable. When such trustee has no dwelling house or place of abode in the state, such copy and notice may be left at his dwelling house or place of abode without the state or be delivered to him personally by the officer or other person by his direction; and such notice in either case is a sufficient demand for the purposes mentioned in the 2 preceding sections. (R. S. c. 101, § 75.)

Stated in Clark v. Gray, 113 Me. 443, 94 A. 881.

Sec. 76. Effect of judgment against trustee.—A judgment against any person as trustee discharges him from all demands by the principal defendant or his executors or administrators for all goods, effects and credits paid, delivered or accounted for by the trustee thereon; and if he is afterwards sued for the same by the defendant or his executors or administrators, such judgments and disposal of the goods, effects and credits as above stated, being proved, shall be a bar to the action for the amount so paid or delivered by him. Such payment, delivery or accounting for may be made either to the officer holding the execution or to the plaintiff or his attorney of record, and may be proved by the officer's return upon the execution, by indorsement made thereon by the plaintiff or his attorney of record or by any other competent evidence. (R. S. c. 101, § 76.)

Judgment protects trustee against claim of principal defendant.—The trustee, by judgment against him, is protected against the claim of the principal defendants, provided such claim does not exceed the amount of the judgment. Noble v. Merrill, 48 Me. 140.

For amount needed to satisfy judgment. — If the trustee is indebted to the principal in an entire sum, beyond the amount wanted to satisfy the judgment recovered by the attaching creditor, he will remain liable to the action of his principal for the residue. Whitney v. Munroe, 19 Me. 42.

If judgment satisfied.—If the trustee did not pay the money or any part thereof, after being adjudged trustee, as he might have done and thereby have discharged a part of his liability, the judgment against him is no bar to further action. McAllister v. Furlong, 36 Me. 307. But see Norris v. Hall, 18 Me. 332, wherein it was held that a judgment against a trustee was a protection against a suit by his principal although not satisfied, and McAllister v. Brooks, 22 Me. 80, wherein it was said that, where there is a subsisting judgment against a trustee, it constitutes a good defense for him, in an action by his principal against him, for the same cause, without proof of satisfaction.

Hence defendant has interest in adjudication of trustee's liability.—Under our statutes a principal defendant has a legal interest in the adjudication of the alleged trustee's liability to be charged, and in a subsequent suit brought by such defendant he is estopped by the previous judgment, followed by a delivery or payment by the trustee of the goods, effects and credits for which he was charged. Pro-

vost v. Piche, 93 Me. 455, 45 A. 506; Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

And may appeal therefrom.—Under the statutes of this state relative to trustee process, a principal defendant is estopped, in a subsequent suit brought by him against the trustee, by the previous judgment against the trustee followed by a delivery or payment by him of the goods, effects and credits for which he was charged. Such a defendant, therefore, has a legal interest in the adjudication of the trustee's liability, and may appeal from such an adjudication in a lower court to the appellate court. Provost v. Piche, 93 Me. 455, 45 A. 506.

Judgment bars action by defendant's trustee in bankruptcy. — A judgment against the trustee in a trustee process, the principal defendant having been defaulted, and all the goods, effects and credits in the hands of the trustee having been paid on execution against the trustee, bars a subsequent action by a trustee in bankruptcy of the principal defendant brought more than four months after the trustee process was begun. Such property only as the bankrupt can control and collect at the time his rights pass to his trustee in bankruptcy can be recovered by the trustee. The estoppel created by the judgment against the trustee in the trustee process, effective against the principal defendant before his bankruptcy proceedings, is effective also against his trustee in bankruptcy. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

But does not bar assignee's claim if assignment not disclosed.—It is settled law in this state that, if one summoned as a trustee is notified before making his disclosure that the funds in his hands have been assigned, and he neglects to disclose the assignment, his being charged will not be a bar to a suit against him for the benefit of the assignee. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612. See note to § 32.

While the law generally protects a trustee in those cases where it appears that he has once paid a judgment rendered against him, at the same time it exacts the utmost good faith on his part and requires the disclosure of all the material facts affecting his liability and the legal and equitable rights of other claimants of the funds in his hands, and if the trustee fails fully to discharge the duty which the law imposes upon him in regard to making his disclosure, and therein setting forth all the facts within his knowledge which would affect his liability as trustee in the suit, he might be adjudged trustee and such judgment not be a protection against the collection of the indebtedness in a suit brought in favor of a transferee of the claim. Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

History of section.—See Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

Applied in Bachelder v. Merriman, 34 Me. 69.

Quoted in part in Ladd v. Jacobs, 64 Me. 347.

Sec. 77. False disclosure.—Whoever, summoned as trustee, upon his examination willfully and knowingly answers falsely, shall be deemed guilty of perjury; and shall pay to the plaintiff in the suit so much of the judgment recovered against the principal defendant as remains unsatisfied, with interest and costs, to be recovered in an action on the case. (R. S. c. 101, § 77.)

Trustee answering falsely subjected to pay whole debt. — The party who knowingly answers falsely is not only to be punished for the crime of perjury, but, however trifling may be the amount supposed to be entrusted to him, is subjected to pay the whole debt, be it ever so large. Mansfield v. Ward, 16 Me. 433.

And plaintiff need not have been injured by false answer.—Under this section, it is not necessary that the plaintiff should show that he has suffered any loss or injury by reason of the false answer. It is sufficient for him to prove such falsehoods, and that the judgment remains unsatisfied. Mansfield v. Ward, 16 Me. 433.

Section allows impeachment of judgment in trustee process.—The plaintiff, in the mode provided by this section, is allowed to impeach the judgment rendered in the trustee process. Bunker v. Tufts, 57 Me. 417.

This section is a penal statute and an action upon it is a penal action which must be brought within one year, under the provisions of c. 112, § 102. Mansfield v. Ward, 16 Me. 433.

But statute giving six years after fraud discovered is also applicable. — By his fraudulent representations concerning the relation of debtor and creditor subsisting between him and the plaintiff's debtor, the trustee furnishes the plaintiff with a cause of action against him, and by withholding from him all knowledge of the falsity of such representations he at the same time

conceals from him the cause of action, within the meaning of c. 112, § 104, which provides that, if the person liable to any action fraudulently conceals the cause thereof from the person entitled thereto, the action may be commenced at any time within six years after the person entitled thereto discovers that he has a just cause of action. Gerry v. Dunham, 57 Me. 334.

Quoted in Otis v. Springfield Fire & Marine Ins. Co., 122 Me. 239, 119 A. 612.

Sec. 78. Trustee exempt from costs on scire facias.—If a person summoned as trustee is prevented from appearing in the original suit by absence from the state or any other reason deemed sufficient by the court and a default is entered against him, he is not liable for costs on the scire facias; but, on his disclosure, the court may allow him his reasonable costs and charges, to be retained or recovered as if he had appeared in the original suit. (R. S. c. 101, § 78.)

Cross reference. — See § 71, re liability for costs on scire facias.

Reason for failure to appear held not sufficient.—See Brainard v. Shannon, 60 Me. 342.

Sec. 79. On exceptions, whole case reexamined by law court.—Whenever exceptions are taken to the ruling and decision of a justice as to the liability of a trustee, the whole case may be reexamined and determined by the law court and remanded for further disclosure or other proceedings, as justice requires. (R. S. c. 101, § 79.)

This section applies alike to scire facias and original proceedings in trustee process. Thompson v. Shaw, 104 Me. 85, 71 A. 370.

The duty is devolved on the law court to ascertain what may be the requirements of justice. To their judgment the matter is referred. Head v. Merrill, 34 Me. 586.

And the whole matter comes before the law court on exceptions. Blodgett v. Chaplin, 48 Me. 322.

Upon exceptions the whole record is before the law court. Barker v. Osborne, 71 Me. 69.

And it may re-examine the whole case.— Upon exceptions, the law court is authorized to re-examine and determine the whole case, both as to fact and law. Robinson v. Furbush, 34 Me. 509.

Upon exceptions in a trustee process the law court has full power, not only to sustain or overrule the exceptions, but also to re-examine and determine the whole case, to remand it for further proceedings, or to make such final disposition of it as justice requires. Walcott v. Richman, 94 Me. 364, 47 A. 901; Holmes v. Hilliard, 130 Me. 392, 156 A. 692.

The whole matter, as to law and fact, as far as the papers disclose, is properly before the law court, for re-examination and determination. McMillan v. Hobson, 46 Me. 91.

Upon this bill of exceptions the law court can review and determine the whole case between the plaintiff and the claimant and the alleged trustee. Meserve v. Nason, 96 Me. 412, 52 A. 907.

Including the disclosure.—The tribunal of ultimate resort cannot form an opinion whether or not justice has been done without re-examining the disclosure to determine for itself both the law and the fact. To exercise a sound judicial discretion, a knowledge of the law and the facts, to which that discretion is to be applied, would seem to be indispensable. The disclosure, therefore, must in all cases be reexamined and is properly before the law court for that purpose. Head v. Merrill, 34 Me. 586.

And correct any error. — Under exceptions, the law court has authority to correct any error in the judgment below whether of law or of fact. Thompson v. Shaw, 104 Me. 85, 71 A. 370; Ticonic Nat. Bank v. Fashion Waist Shop Co., 123 Me. 509, 124 A. 308.

And the exceptions need not specify the extent to which the law court may examine the case. Thompson v. Shaw, 104 Me. 85, 71 A. 370.

But facts cannot be varied by new testimony.—The facts upon which the sitting justice passed cannot be varied by new testimony before the law court. The exceptions are only to try the correctness of his decisions, as to the law, and as to the facts upon the evidence before him. Wood v. Estes, 35 Me. 145.

And new questions cannot be raised by surmise. — It is true that the whole case comes up under this section, to be re-examined and determined by the law court; but questions which have no foundation in the papers before the court cannot be raised by surmise at the suggestion of

counsel. Brainard v. Shannon, 60 Me. 342.

Trustee cannot disclose further while exceptions pending. — A trustee, who has made one disclosure, and been charged, and has filed exceptions to the action of the court in charging him, does not have a right to disclose further at a subsequent term, and before his exceptions have been acted upon by the law court, or been withdrawn. The effect of holding otherwise would be to have the question of his liability pending before two different courts at the same time, and upon two different disclosures. American Buttonhole, etc., Co. v. Burgess, 75 Me. 52.

Case remanded for further disclosure only when justice would be promoted. — The law court has the power to remand the case for a further disclosure. But this is a power to be exercised only when the court can see that justice would probably be thereby promoted. American Buttonhole, etc., Co. v. Burgess, 75 Me. 52.

Applied in Wilson v. Wood, 34 Me. 123; Simpson v. Bibber, 59 Me. 196; Steinfieldt v. Jodrie, 89 Me. 65, 35 A. 1008; Sullivan v. Greene, 92 Me. 102, 42 A. 320; Foss v. Hume, 130 Me. 22, 153 A. 181.

Quoted in Rockland Savings Bank v. Alden, 104 Me. 416, 72 A. 159.

Municipal Courts and Trial Justices.

Sec. 80. Form and service of trustee process for inferior courts.— When a trustee process is issued by a municipal court or a trial justice, the writ shall be in the form now in use and may contain a direction to attach property of the principal in his own hands as well as in the hands of the person named as trustee, and be served as a trustee process issued by the superior court 7 days before the return day; and shall be brought in the county where either of the supposed trustees resides; and if not so brought, it shall be dismissed and the trustees shall recover their costs. (R. S. c. 101, § 80.)

Sec. 81. Default if trustee does not appear; costs.—When the person summoned does not appear and answer to the suit, he shall be defaulted, adjudged trustee and be liable to costs on scire facias; if he appears at the return day and submits to an examination on oath and is discharged, he shall be allowed his legal costs; but if he is charged, he may retain the amount of his costs; and when the plaintiff discontinues his suit against him or the principal, the trustee shall be allowed his costs. (R. S. c. 101, § 81.)

Sec. 82. Subsequent proceedings; discharge of trustee if judgment is less than $5, save in setoff.—All subsequent proceedings in such causes shall be the same as in the superior court, varying the forms as circumstances require; but when, in a trustee process before such municipal court or trial justice, the debt recovered against the principal is less than $5, the trustee shall be discharged unless the judgment is so reduced by means of a setoff filed. (R. S. c. 101, § 82.)

Sec. 83. How execution shall issue, if principal or trustee removes. —If, after a judgment is rendered in such trustee process, the principal defendant or trustee removes from the county in which it was rendered, such court or justice may issue execution against either, directed to the proper officer of any other county where he is supposed to reside. (R. S. c. 101, § 83.)

Sec. 84. If trustee living in another county is discharged.—When an action is brought against a trustee in a county where he resides but where neither the plaintiff nor defendant resides, and the trustee is discharged or the action is discontinued as to him, the action shall still proceed if there was legal service on the principal defendant, unless it appears by plea in abatement that the trustee was collusively included in the writ for the purpose of giving the court in such county jurisdiction. (R. S. c. 101, § 84.)

Trustee Action on Judgment Abated.

Sec. 85. Trustee suit on judgment abated; costs.—When an action is

commenced by trustee process on a judgment on which execution might legally issue and it appears to the court or justice that, at the time of bringing it, the defendant openly had visible property liable to attachment sufficient to satisfy such judgment, or that it was brought for the purpose of vexation or to accumulate costs, it shall at any time on motion be abated, with costs to the defendant. (R. S. c. 101, § 85.)

Demand Against Trustee Assigned.

Sec. 86. Demands assigned as security trusteed and redeemed.—When it appears that a person summoned as trustee is indebted to the principal defendant on any demand on which he might be held as trustee, but that it has been conditionally assigned as security and the principal defendant has a subsisting right to redeem it, the court may order that on fulfillment of such conditions by the plaintiff within the time fixed by the court and while the right to redeem exists, the trustee shall be held for the full amount of such demand; and when the court is satisfied that its order has been complied with, it may charge the trustee accordingly. (R. S. c. 101, § 86.)

Sec. 87. Plaintiff's rights in case of redemption.—The officer making demand on the trustee upon the execution shall first deduct from the amount received by him the sum paid by the plaintiff to redeem, if any, with interest and shall apply the balance on the execution; but if the demand has been redeemed otherwise than by the payment of money, the plaintiff shall be subrogated for the holder thereof and have the same rights and remedies against the principal defendant, and may enforce them, at his own expense, in the name of such holder or otherwise. (R. S. c. 101, § 87.)

See c. 112, § 82, re proceedings to dissolve attachment on trustee process by application to court; c. 112, § 84, re by bond properly approved; c. 113, § 156, re costs taxable for trustee.