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Chapter 120.

Relief of Poor Debtors. Disclosure Commissioners.

Cross Reference.—See c. 166, § 64, re alimony.

Exemption from Arrest.

Sec. 1. Arrests upon mesne process.—No person shall be arrested upon mesne process in a suit on contract, express or implied, or on a judgment on such contract, except as provided in the following section; and the writ or process shall be varied accordingly; but in all other actions, the original writ or process may run against the body of the defendant and he may be arrested and imprisoned thereon, or give bail as provided in chapter 115. (R. S. c. 107, § 1.)

Cross references.—See c. 92, § 146, re executions issued on a judgment recovered for the collection of a poll tax to run against the body of the judgment debtor; c. 141, § 21, re person committed to jail on warrant for expense of abating nuisance may have benefit of this chapter; c. 166, § 38, and note, re married woman not subject to arrest.

Writ may run against body except in action on contract.—It was the intention of the legislature to provide that the writ shall be permitted to run against the body of the defendant, when the action is not founded on contract or on a judgment on such contract. Cleaves v. Jordan, 34 Me. 9.

All writs may be so framed as to run against the body, except in those cases where the law especially applicable otherwise provides. Richardson v. Rich, 66 Me. 249.

It is evident that, under this section, the writ to be used in a suit upon a contract must be an attachment only, and would never authorize an arrest unless it comes within the exception alluded to. Carter v. Porter, 71 Me. 167.

And use of capias is absolute right of plaintiff.—In view of this section and the authorities and the decisions thereunder, the supreme judicial court recognizes the absolute right of a plaintiff or his attorney to use a writ of capias or attachment as a capias as provided by statute. Davis v. Ingerson, 148 Me. 335, 93 A. (2d) 129.

Which may be exercised in first instance.—Though the order in the writ in the form prescribed is to attach the goods, etc., and "for want thereof," to take the body, yet the plaintiff may, if he choose, direct the body to be taken in the first instance, that is, he may, at once, use the writ as a capias. And the defendant cannot protect himself from arrest, by tendering property sufficient to secure the demand, for that would be to compel the plaintiff to use his writ, as a capias or attachment, when, in fact, he has an election to use it either as such, or as a capias. Davis v. Ingerson, 148 Me. 335, 93 A. (2d) 129.

But plaintiff not required to insert command to arrest.—The latter part of this section must be considered as not im-

perative, but potential in its character, leaving the plaintiff at liberty, but not requiring him to insert a command to arrest the body of the defendant. Cleaves v. Jordan, 34 Me. 9.

Since the provision giving power to arrest the body was made for the benefit of the plaintiff, and the omission to insert it is no detriment but a favor to the defendant. It could not have been the purpose of the legislature to compel a party to pursue a more rigorous course in the institution of his process than his disposition or his interests require. Cleaves v. Jordan, 34 Me. 9.

And the use of the writ of capias is optional with the plaintiff. Davis v. Ingerson, 148 Me. 335, 93 A. (2d) 129.

No distinction between capias and writ of attachment.—There is no distinction in our statutes between a capias and writ of attachment; they are one writ with different powers, according to the will of him who uses them. Davis v. Ingerson, 148 Me. 335, 93 A. (2d) 129.

Applied in Cameron v. Tyler, 71 Me. 27.

Quoted in part in Winchester v. Everett, 80 Me. 535, 15 A. 596.

Cited in Waldron v. Patterson, 71 Me. 232.

Arrests and Disclosures on Leaving the State.

Sec. 2. Debtor about to leave state arrested.—Any person, whether a resident of the state or not, may be arrested and held to bail or committed to prison on mesne process on a contract express or implied, if the sum demanded amounts to $10, or on a judgment on contract if the debt originally recovered and remaining due is $10 or more, exclusive of interest, when he is about to depart and reside beyond the limits of the state with property or means of his own exceeding the amount required for his immediate support, if the creditor, his agent or attorney makes oath before a justice of the peace, to be certified by such justice on said process, that he has reason to believe and does believe that such debtor is about so to depart, reside and take with him property or means as aforesaid, and that the demand or principal part thereof, amounting to at least $10, is due to him. (R. S. c. 107, § 2.)

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I. GENERAL CONSIDERATION.

Arrest on contract not authorized except in accordance with this section.—The law prohibits the arrest of a debtor on a writ declaring on a contract except in accordance with the provisions found in this section. Stern v. Sullivan, 135 Me. 1, 188 A. 719.

And all provisions of section must be strictly complied with.—To justify an arrest on mesne process in an action on a contract all of the provisions of this section must be strictly complied with. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

It is for the party making the arrest to comply in all respects with the requirements of the legislature. Sargent v. Roberts, 52 Me. 590; Bailey v. Carville, 62 Me. 524.

The preparatory steps to the arrest must contain a full and clear compliance with the preliminary requirements of the statute. Whiting v. Trafton, 16 Me. 398; Stern v. Sullivan, 135 Me. 1, 188 A. 719.

The provision of this section for the arrest of a debtor on mesne process, at the instance of his creditor, is a proceeding in invito, contrary to common right, and must be strictly followed. Bailey v. Carville, 62 Me. 524.

If a strict compliance with this section were not required, it would be easy to evade the provisions of the statute and to make use of process to arrest in many cases for which no provision is made. Mason v. Hutchings, 20 Me. 77.

Which compliance must appear on face of certificate.—The provisions of this section must be strictly complied with and compliance must appear on the face of the certificate. Nothing required by statute is to be left to inference. Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

If the certificate may all be true, and the statute not complied with, there is no evidence of authority to arrest. Proctor v. Lothrop, 68 Me. 256.

Section designed to prevent unreasonable detentions.—The design of this sec-

tion is not only to afford prima facie evidence that a debt is due to the plaintiff from the defendant, but also to prevent unreasonable detentions of the person by arrest, when there are no good grounds for believing that an intention exists on the part of the debtor to withdraw himself and his property from the jurisdiction of the state, by establishing his residence beyond its limits. Whiting v. Trafton, 16 Me. 398; Stern v. Sullivan, 135 Me. 1, 188 A. 719.

And writ not justified in absence of overt act indicating debtor about to depart and reside outside state.—If the evidence fails to show any overt act on the part of the debtor indicating that he was about to depart and reside outside the state a writ under this section is unjustified. Stern v. Sullivan, 135 Me. 1, 188 A. 719.

Section does not authorize arrest of debtor preparing for temporary trip out of state.—This section was not meant to give encouragement to capricious arrests, when a person is preparing for a mere journey for a short time, with the intention of returning and maintaining his residence in the state, and to be amenable to the first execution, when it should be recovered against him. Whiting v. Trafton, 16 Me. 398; Stern v. Sullivan, 135 Me. 1, 188 A. 719.

Nor of debtor not taking property with him.—The word "with," used in the provision "when he is about to depart and reside beyond the limits of the state with property or means," must have been used in the sense of having or owning property or means, and not as indicating that he was about to take his property with him, beyond the limits of the state. This is apparent from the subsequent provision in the same section requiring that the oath should state, not only that he had property or means, but also, that he was about to take such property or means with him, beyond the limits of the state. It does not appear to have been the intention of the legislature, that the debtor, having property and being about to depart and reside without the limits of the state, should be liable to arrest on mesne process, if he did not take his property or means with him, but left it within the state and subject to legal process. Bramhall v. Seavey, 28 Me. 45; Furbish v. Roberts, 39 Me. 104.

It is essential not only that the creditor should have reason to believe and did believe that the debtor was about to depart and reside beyond the limits of the state, but also that he was to take with him property or means exceeding the amount required for his immediate support. Stern v. Sullivan, 135 Me. 1, 188 A. 719.

The intention of this section is to authorize the arrest of a debtor, who is the owner of property or means exceeding the amount required for his own immediate support, and who is about to depart and reside beyond the limits of the state, and to take with him the property or means aforesaid, that is, the property or means of which he is the owner. Furbish v. Roberts, 39 Me. 104.

And arrest not authorized for debt of less than $10.—No person shall be arrested on an execution issued on a judgment founded on a contract, when the debt is less than ten dollars. Winchester v. Everett, 80 Me. 535, 15 A. 596.

It was the intention of the legislature that no one should be arrested on mesne process when the "sum demanded" in the writ, or the debt originally recovered and due, exclusive of interest, does not amount to ten dollars. Kelley v. Morris, 63 Me. 57.

Ownership of property outside the state is not sufficient to bring a debtor within the meaning and intention of this section. Gammons v. King, 118 Me. 76, 105 A. 816.

Section applicable only to actions at law.—The exception contained in this section is not applicable to matters in equity —but is applicable and intended solely for suits at law. Its purpose is to authorize the arrest of a debtor about to depart and reside beyond the limits of the state, when the debt is founded upon a contract express or implied, so that he may be held to respond to such judgment as may be obtained, or in case of his failure that his sureties may be held responsible. This is appropriate only when applied to an action at law to recover a debt occurring from a contract, when the debt is the only thing sought to be recovered, and all the subsequent provisions in relation to the disclosure of the debtor and the liability of the sureties are applicable only to suits at law, and judgments obtained therein. Carter v. Porter, 71 Me. 167.

Precept or copy filed with jailer.—When committing a defendant on mesne process under this section there is no provision requiring any precept or copy to be filed with the jailer. But it is the universal practice. Jones v. Emerson, 71 Me. 405.

Applied in Connor v. Madden, 57 Me. 410; Surace v. Pio, 112 Me. 496, 92 A. 621.

II. THE CREDITOR'S OATH.

A. In General.

Oath required as justification for arrest.—To justify arrest upon mesne process, on contract, this section requires "the creditor, his agent or attorney" to make oath to a belief in the facts enumerated in the section. Lewiston Co-operative Society v. Thorpe, 91 Me. 64, 39 A. 283.

Nothing less solemn than the oath of a creditor, his agent or attorney, who, it is supposed, may be in the exercise of some information as to the merits of the demand, and of vigilance as to the movements of the principal debtor, shall authorize an officer to arrest and hold a debtor to bail on mesne process. Whiting v. Trafton, 16 Me. 398.

Debtors by contract are liable to be arrested on mesne process only upon affidavit made by the creditor, his agent or attorney, before a justice of the peace, to be certified on the process, that he has reason to believe and does believe, that such debtor is about to depart and reside beyond the limits of the state, with property or means exceeding the amount required for his own immediate support, and to take with him property, or means as aforesaid, and that the demand in the process, or the principal part thereof, amounting to at least ten dollars, is due to him. Bramhall v. Seavey, 28 Me. 45; Sargent v. Roberts, 52 Me. 590.

Arrests of persons on mesne process on contracts are authorized in this state only when the creditor, his agent or attorney shall have previously made oath for the purpose, according to the requirements of this section. Sawtelle v. Jewell, 34 Me. 543.

And oath must be certified on process.—The oath of the creditor, his agent, or attorney, is required to be certified on such process in proof of the facts to authorize the arrest. Mason v. Hutchings, 20 Me. 77.

And magistrate's certificate must show all requisite facts sworn to.—To authorize the arrest of a contract debtor, the certificate of a magistrate upon the writ must show that all the facts required by the statute were sworn to by the creditor, or someone in his behalf; not necessarily in the language of the statute, but if not, in its equivalent, so that nothing shall be left to inference. Proctor v. Lothrop, 68 Me. 256.

And it must appear that the creditor named in the certificate is the creditor named in the writ.—Though not specifically required by this section, this must necessarily be so. Otherwise the process is not fair on its face. It does not show an oath by the creditor, or his agent or attorney. Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

The arrest is unauthorized if the oath is not in conformity with the requirements of the statute. Sargent v. Roberts, 52 Me. 590.

And a defective oath cannot be supplied by supplemental oath. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

Nor can court interpolate so as to make oath conform to statute.—It is for the legislature to prescribe the conditions under which an arrest may be made, and for the creditor to follow it at his peril. It is not within the province of the court to interpolate words or phrases into a creditor's certificate, so as to make it conform to the requirements of the statute, or to give it a forced or unnatural construction to make it mean something contrary to what its language imports, especially when the personal liberty of a citizen is imperilled. Bailey v. Carville, 62 Me. 524.

Arrest legal if requisite oath made in good faith.—The arrest of either a resident or nonresident of the state is legal, if the certificate indorsed on the writ shows that the plaintiff has made the requisite oath, unless the plaintiff's good faith in so doing is impeached. Adams v. Macfarlane, 65 Me. 143.

In spite of nonexistence of facts.—The validity of the arrest is not affected by the simple nonexistence of the facts where the plaintiff has acted in good faith, when he made oath to his belief and reason to believe therein. Adams v. Macfarlane, 65 Me. 143.

Thus arrest legal even though debtor was not about to depart.—The proof of the facts necessary to the exercise of the right to arrest, is the oath of the creditor, his agent, or attorney, that he has reason to believe and does believe that they exist, and when no fraud is imputable to the creditor, and the certificate required by the section is indorsed upon the writ, an arrest may be legally made, and the obligors in the bond given cannot be permitted to defend by showing that, in point of fact, the debtor was not about to depart and reside beyond the limits of the state. Adams v. Macfarlane, 65 Me. 143. See Marston v. Savage, 38 Me. 128.

But affiant must have had reason to believe statements made.—In an action for false imprisonment of the plaintiff, procured by the defendant's affidavit that he

believed the plaintiff was about to leave the state, verdict for the plaintiff will not be set aside as against the weight of evidence, if it is apparent that the defendant did actually believe the statements in his affidavit, unless it is also evident that he had reason so to believe. Gee v. Patterson, 63 Me. 49.

And the belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath. Gammons v. King, 118 Me. 76, 105 A. 816.

The process is a drastic remedy for the collection of debt, and the oath must be not only practically perfect in form, but it must be based on good faith. Creditors, their agents and attorneys, solemnly swear that they believe and have reason to believe the truth of all statements required by the section. Such belief should be derived from facts and evidence sufficient in themselves to justify a man of ordinary prudence and caution, when calm and not swerved by self interest from the realms of reason and common sense, in believing the truth of the statements to which he makes oath. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717; Stern v. Sullivan, 135 Me. 1, 188 A. 719.

Statements in affidavit taken as true.—On a motion to dismiss for want of sufficient allegation or statement in the affidavit, the statements in the affidavit must be taken to be true so far as they go. Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

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The oath must state that the debtor is about to establish a residence outside of the state, in affiant's belief. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

And that he is about to take property with him.—An oath that the debtor is about to change his residence and abscond is insufficient. The oath must aver that the affiant not only believes, but has reason to believe, that the debtor is about to take property with him out of the state. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

The oath clearly means that, at the time it is made, the debtor has within the state property, tangible or intangible, which he is about to take with him outside of the state. It cannot be claimed that, because the debtor owned real estate outside the state, he would by his departure remove from the state "means". As used in the section, "means" is not method, but portable assets, tangible or intangible. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717; Gammons v. King, 118 Me. 76, 105 A. 816.

An arrest is illegal under this section if, in the oath, as administered and certified, the important words "and take with him" are omitted. Sargent v. Roberts, 52 Me. 590. But see French v. McAllister, 20 Me. 465, wherein it was held that an affirmation of a creditor, certified by a justice, that the principal debtor is about to depart and establish his residence beyond the limits of this state, with property or means more than sufficient for his immediate support, must be regarded as equivalent to an affirmation that he was to take with him such property or means, in the language of this section.

The affidavit upon the writ, by virtue of which a debtor is arrested, is defective by omitting to state that the debtor was about "to take with him property or means as aforesaid;" that is, property or means, exceeding the amount required for his own immediate support. Bramhall v. Seavey, 28 Me. 45.

Which property is "his own."—An arrest of a debtor, on mesne process, made under a creditor's sworn certificate which omits the word "his" in the statute phrase "of his own," is illegal. Bailey v. Carville, 62 Me. 524.

An affidavit which does not allege that the defendant is about to depart and reside beyond the limits of the state, with property or means, etc., that is, having or owning property or means, etc., and to take the same with him, but simply, that he is about to depart and reside beyond the limits of the state, and to take with him property and means exceeding the amount required for his own immediate support is insufficient. Who was the owner of the property which it is alleged he was to take with him does not appear. Therein the affidavit is defective. Furbish v. Roberts, 39 Me. 104.

And exceeds the amount required for his support.—The oath must state that the property or means about to be taken out of the state exceeds the amount required for the debtor's immediate support. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

A statement that the property about to be taken by the debtor is more than is required for "immediate support" is not sufficient. It should appear by apt words that it is the debtor's support referred to, and not that of any other person or persons. Proctor v. Lothrop, 68 Me. 256.

An oath is insufficient to authorize the arrest of a debtor if it omits the essential requirement imposed by this section that the debtor was about "to take with him property or means," exceeding the amount required for his own immediate support. Shaw v. Usher, 41 Me. 102.

The oath of the creditor is defective if it does not state that the debtor, who was arrested, was "about to depart and reside beyond the limits of this state, and to take with him property or means, exceeding the amount required for his own immediate support," and arrest is unauthorized and unlawful. Sawtelle v. Jewell, 34 Me. 543.

It is necessary to allege in the oath the fact of the reason to believe, and the belief that the person to be arrested is about to depart and establish his residence beyond the limits of the state, with property or means exceeding the amount required for his own immediate support. Whiting v. Trafton, 16 Me. 398.

Plural pronoun is sufficient to authorize arrest of one of joint debtors.—To justify the arrest on mesne process of one of the joint debtors, the affidavit need not contain the pronoun in the singular form, the plural form is sufficient. McNamara v. Garrity, 78 Me. 418, 6 A. 668.

In an affidavit to justify the arrest of joint debtors on mesne process, it is not necessary to allege the belief that each one of them is about to take property away. An allegation that they are about to do it is sufficient. Cates v. Noble, 33 Me. 258.

C. By Whom and before Whom Made.

The statute prescribes that the oath may be made by an agent or attorney of the creditor. Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

And if the creditor is a corporation, the oath must be that of some officer, or some other agent or attorney. Lewiston Co-operative Society v. Thorpe, 91 Me. 64, 39 A. 283; Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

Such as its president.—For the purpose of the creditor's oath to authorize arrest, the president of a corporation, in taking the oath, is regarded as representing the corporation; and the oath so taken is to be regarded as the oath of the creditor corporation, within the meaning of this section. Lewiston Co-operative Society v. Thorpe, 91 Me. 64, 39 A. 283.

If the affiant describes himself as agent or attorney, these words afford a presumption of his authority to make the oath. Casavant & Cloutier Co. v. Smith, 115 Me. 168, 98 A. 577.

This section requires that the oath should be made "before a justice of the peace." Bramhall v. Seavey, 28 Me. 45.

By this section the oath is required to be taken before and be certified by a justice of the peace. Duncan v. Grant, 86 Me. 212, 29 A. 987.

Of the state.—The oath required of the creditor, his agent or attorney, must be administered by a justice of the peace of the state. Dunsmore v. Pratt, 116 Me. 22, 99 A. 717.

And oath before justice of the peace of another state is not sufficient.—To authorize an arrest, the affidavit required by this section must be made before a justice of the peace deriving his power to act under the authority of this state, or the arrest will be considered as made without authority of law. An affidavit made before a justice of the peace of another state is not sufficient. Bramhall v. Seavey, 28 Me. 45.

But oath may be made before notary public.—By c. 110, § 26, a notary public is authorized to administer oaths in all cases where a justice of the peace can act. Thus, a creditor desiring to arrest his debtor upon mesne process, in an action of assumpsit as provided by this section, may make the oath and have it certified as therein required before a notary public instead of before a justice of the peace. Duncan v. Grant, 86 Me. 212, 29 A. 987.

And the oath may be administered by the plaintiff's attorney who is also a justice of the peace. He is as competent to administer it as any other magistrate. McLean v. Weeks, 61 Me. 277.

Sec. 3. Disclosure on such arrest.—A debtor arrested or imprisoned, on request to the officer or jailer who has him in custody, may be taken before 2 disinterested justices of the peace, to be selected as provided in section 68, to disclose the actual state of his affairs. (R. S. c. 107, § 3.)

Applied in Wilson v. Gillis, 15 Me. 55.

Sec. 4. Notice given to plaintiff.—Previous to the disclosure, the debtor shall give to the creditor, or one of them if more than one, his agent or attorney, due notice of his intention and of the time and place for said disclosure, that he

may be present and select one of the justices and be heard thereon; such notice shall not be less than 1 day for every 20 miles' travel, exclusive of Sundays. (R. S. c. 107, § 4.)

Not less than full day's notice should be given.—It is apparent that the legislature intended that not less than a full day's notice should be given in proceedings under this section. The words "not . . . less than 1 day" cannot be construed in any other way. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

Applied in Tarr v. Davis, 133 Me. 243, 176 A. 407.

Sec. 5. Justices may adjourn.—The justices may adjourn from time to time, if they see cause; and if either of them is not present at the adjournment, the other may adjourn to another time; but no such adjournments shall exceed 3 days in the whole, exclusive of Sundays. (R. S. c. 107, § 5.)

Payment of fees not condition precedent to right to adjourn.—There is no provision of the statute which makes the payment of fees to the justices or any formal organization a prerequisite condition to the exercise of the power to adjourn, expressly conferred upon the justices by this section. Gould v. Ford, 91 Me. 146, 39 A. 480.

Jurisdiction annulled by adjournment beyond limit.—If the justices go beyond the limit fixed by this section as regards length of adjournments, their jurisdiction must become annulled. Fales v. Goodhue, 25 Me. 423.

Which is 3 days in the whole.—The justices may adjourn from time to time, but their adjournments are not to exceed three days in the whole, exclusive of the Lord's day; not three days at each of several times, exclusive of the Lord's day. Fales v. Goodhue, 25 Me. 423.

The power is given to one justice to adjourn only in a single instance, and that is in a case where there has been organized a tribunal in every respect competent to act. Williams v. Burrill, 23 Me. 144.

And this section makes no provision for an adjournment by one justice, on the day first appointed. If two appear on that day, the section provides that they may adjourn from day to day, and if they should do so, and but one should attend at the adjournment, he may again adjourn. Hovey v. Hamilton, 24 Me. 451.

Applied in Moore v. Bond, 18 Me. 142; Tarr v. Davis, 133 Me. 243, 176 A. 407.

Sec. 6. Mode of making disclosure; adjudication of justices; discharge.—If the debtor at the appointed time and place makes a full disclosure of the actual state of his affairs and of all his property, rights and credits, and answers all proper interrogatories in regard to the same to the satisfaction of said justices, and they are satisfied that the disclosure is true and do not discover anything therein inconsistent with his taking the oath prescribed in section 56, they may administer it to him and certify the fact on the writ; and the debtor shall thereupon be discharged from arrest; and no execution issuing on the judgment in the suit shall run against his body, but against his property only. (R. S. c. 107, § 6.)

Sec. 7. Lien on property disclosed, preserved; § 14 applies. — All attachable property disclosed by the examination, or so much as the creditor designates to satisfy his demand, shall be held as attached from the time of the disclosure until 30 days after final judgment, like other attachments. The officer shall make return thereof on the writ or process, certifying the fact that the property was so disclosed. If it is real estate, he shall certify it to the register of deeds like other attachments; and if the creditor requires it at any time before final judgment, he shall take into his custody any part of the personal property so disclosed sufficient to secure the demand and hold it as in other cases, and the provisions of section 14 are also applicable to this class of disclosures. (R. S. c. 107, § 7.)

Disclosures on Mesne Process before Judgment.

Sec. 8. Disclosure before judgment; notice.—When a person is served with an original writ or other mesne process, founded on such contract or judg-

ment, in any other manner than by arrest of the body, he may, at any time before final judgment, appear before the court or justice before whom such writ or process is pending or a disinterested commissioner or commissioners appointed by said court or justice and submit himself to examination; and such court, justice or commissioner shall give notice and proceed to take his disclosure as provided in sections 4, 5 and 6 and with like effect; and the court may continue the cause to permit such disclosure to be taken. (R. S. c. 107, § 8.)

Cited in Lewis v. Foster, 65 Me. 555.

Sec. 9. Effect; lien on property disclosed.—On such examination, the court, justice or commissioner, except as provided in section 14, may determine that the defendant shall forever thereafter be exempt from arrest on any execution issued on the judgment recovered in the suit, and that such execution shall run against the property only of the defendant, or otherwise, as justice requires, on the facts so disclosed or proved; and all attachable property so disclosed, from the time of the disclosure, shall be held attached as provided in section 7, subject to the provisions of the 2 following sections. (R. S. c. 107, § 9.)

See § 21, re executions on contract.

Sec. 10. Certificate of real estate disclosed filed in registry of deeds. —If the disclosed property is real estate, the court, justice or commissioner shall deliver to the plaintiff a certificate thereof, stating the names of the parties and the amount of the claim in the writ, which the plaintiff shall file with the register of deeds for the county or district where the estate lies within 5 days after its date; and the register shall enter and file it as returns of officers making attachments of real estate and shall be entitled to the same fees from the plaintiff. (R. S. c. 107, § 10.)

Sec. 11. Lien on personal estate preserved.—If personal estate liable to attachment is disclosed, and the plaintiff states that he is apprehensive that it may be removed or concealed so that it cannot be taken on execution, the court in term time or any justice thereof in vacation or the trial justice before whom the suit is pending may issue an order signed and sealed, directing any officer authorized to serve processes in the suit to take such property into his custody and hold it as if originally attached; and he shall execute the order accordingly. (R. S. c. 107, § 11.)

Sec. 12. Disclosure on mesne process by consent of parties. — At any time before or after the return day of such writ or process, the parties to the suit, by a written agreement, may appear before a justice of the peace in the county where the suit is pending; and the defendant shall make the disclosures and submit to the examinations and proceedings required in section 8, and the record thereof shall, before final judgment, be returned to the court or justice before which the suit is pending, where the proceedings shall be the same as if the disclosure had been before a commissioner appointed for the purpose. (R. S. c. 107, § 12.)

Sec. 13. When execution issues against body.—If the result of such disclosure and examination is adverse to the defendant's right to exemption from arrest, the execution shall run against his body. (R. S. c. 107, § 13.)

Sec. 14. Property which cannot be attached delivered up or assigned by debtor.—If, on any disclosure and examination before judgment, it appears that the debtor possesses, has in his power, or with intent to protect the same from his creditors, has assigned, secreted or otherwise disposed of any bank bills, notes, accounts, bonds or other contracts or property not exempt from attachment, but which cannot be reached to be attached from its nature or otherwise, the debtor, if under arrest, shall not be released nor shall he be exempted from arrest on execution on judgment in such suit, unless he assigns and delivers

to such person as the examining magistrate, court or commissioner appoints, all such property, or so much of it as they adjudge sufficient security for the creditor, to be held by him, under the direction of the court or justice before whom the suit is pending, in trust for the parties that it may be applied and appropriated as provided in sections 57 and 58. (R. S. c. 107, § 14.)

See § 7, re preservation of lien on property disclosed.

Bonds on Mesne Process and Disclosures after Judgment.

Sec. 15. Debtor arrested, may give bond to disclose after judgment. —When a person is arrested or imprisoned on mesne process in a civil action, he may disclose as provided in sections 3, 4, 5, 6 and 7 or he may be released by giving bond to the plaintiff in a sum not exceeding the ad damnum of the writ upon which he is arrested or imprisoned, with surety or sureties, said bond to be approved by him or by 2 or 3 justices of the peace of the county where the arrest or imprisonment is made, and selected and proceeding as prescribed in section 68, conditioned that within 15 days after rendition of judgment or after the adjournment of the court in which it is rendered, he will notify the creditor, his agent or attorney to attend at a certain place in the county at a time not less than 15 days nor more than 30 days after such notice, for the purpose of disclosure and examination; that he will then and there submit himself to examination; make true disclosure of his business affairs and property on oath, and abide the order of the justices thereon; and if the officer serving the writ takes such bond, he shall return it to the court or justice where the suit is pending. (R. S. c. 107, § 15.)

Cross references.—See note to § 66, re that section not applicable to bond under this section; c. 166, § 64, re decree of alimony.

The provisions of this section apply to arrests on mesne process in all civil actions, whether originating in tort or contract. Hence the bond is not to the creditor, a term before judgment only applicable to actions in contract, but to the plaintiff, a term at all times equally applicable, whether the action originates in contract or tort. The condition of the bond is to notify the judgment creditor, after the rendition of judgment, which applies as well to actions in tort as in contract. Richards v. Morse, 36 Me. 240.

And bond given in action of tort is obligatory as statute bond.—A bond given in accordance with this section to procure a discharge from arrest of a defendant in an action of tort, is obligatory as a statute bond. Waldron v. Patterson, 71 Me. 232.

To authorize the discharge of the debtor there must be a strict compliance with the statutory requirements unless performance is prevented by the obligee, or the law, or the act of God. Tarr v. Davis, 133 Me. 243, 176 A. 407.

In a suit on a bond given under this section, the proceedings for a performance of the condition should be in conformity to the provisions of the statutes. Burbank v. Berry, 22 Me. 483.

And disclosure must be in compliance with statute.—The disclosure of a poor debtor, who has procured his release from arrest on mesne process by giving the bond mentioned in this section, is a statute proceeding. To be effectual, the provisions of the statute relating thereto and the condition of the bond must be complied with. Marr v. Clark, 56 Me. 542.

The simple fact of bankruptcy is not a "true disclosure of his business affairs and property" within the meaning of this section. Marr v. Clark, 56 Me. 542.

And does not entitle debtor to discharge.—If the debtor discloses and shows that he has filed his petition in bankruptcy and has been duly declared a bankrupt, and thereupon refuses to "submit himself to" further "examination," and to "make true disclosure of his business affairs and property on oath;" and the justices refuse to hear any other legal and pertinent evidence adduced by the creditor, the debtor will not thereby entitle himself to a discharge. Marr v. Clark, 56 Me. 542.

No action on bond if arrest was unlawful.—If the arrest was unlawful, the bond executed to obtain the debtor's release must be considered as obtained by duress, and no action can be maintained upon it. Bramhall v. Seavey, 28 Me. 45.

If the oath given by the creditor was not in compliance with the requirements of § 2, the arrest of the debtor was un-

authorized (see note to § 2), and a bond given under this section to procure his discharge is obtained by duress and is not binding. See Sargent v. Roberts, 52 Me. 590.

If the bond negatives a legal arrest by its very terms, it must have been given to procure a discharge from an illegal arrest, and it was a bond given under duress, and therefore the defendants may well avoid it. Gibson v. Ethridge, 72 Me. 261.

Obligors cannot avoid bond by showing creditor was not about to depart, etc.—When the creditor has the legal power to hold his debtor in prison, if he fails to provide a bond, with no other evidence of his intention to take up his residence in another state, and of the amount of his means, than his own oath, it cannot be supposed that the legislature designed that, in a case where no fraud was suggested, the obligors can avoid the bond, by showing that the debtor was not in fact about to depart and reside beyond the limits of the state. &c. Marston v. Savage, 38 Me. 128. See note to § 2.

Bonds taken to liberate one from arrest on mesne process are subject to chancery. Burbank v. Berry, 22 Me. 483; Call v. Foster, 52 Me. 257. See note to c. 107, § 4, sub-§ II, re equity jurisdiction to relieve from forfeiture of bond.

And only actual damages may be recovered for breach.—The damage actually sustained is the equitable and proper measure of the plaintiff's claim in a suit on a bond given under this section. Burbank v. Berry, 22 Me. 483. See Call v. Foster, 52 Me. 257.

Where there has been a breach of the condition of a bond given under this section, the damage actually sustained is the proper and equitable measure of the claim of the creditor. Wilson v. Gillis, 15 Me. 55.

Only the actual damage is recoverable in a suit for the breach of a bond given under this section. Webster v. Bailey, 57 Me. 364.

But recovery not limited to nominal damages unless debtor worthless in property.—If a debtor, having failed to disclose in accordance with the conditions of a bond given under this section, would reduce the amount of damages to be recovered thereon to a nominal sum, he must satisfy the court upon the hearing in chancery, that, during the thirty days next after judgment in the original suit, he was utterly worthless in property, so that the plaintiff suffered no damages by the debtor's failure to disclose. Proof that he was insolvent, during that time, is insufficient. Webster v. Bailey, 57 Me. 364.

Bond held to impose condition that debtor will abide order of justices.—A condition of the bond that the debtor should notify the creditor to attend to the making of the disclosure and the oath, and that he should further do and perform all that is required in and by the acts in such cases made and provided, imposes the condition, required by this section, that the debtor should abide the order of the justices. French v. McAllister, 20 Me. 465.

It is the officer and not the plaintiff who is required to return the bond. Soule v. Goodrich, 119 Me. 280, 110 A. 808.

Section silent as to effect of failure to return bond.—This section provides that "if the officer serving the writ takes such bond, he shall return it to the court or justice where the suit is pending." The section is silent as to the effect of failure to return the bond. Soule v. Goodrich, 119 Me. 280, 110 A. 808.

And requirement that it be returned to court is directory.—The statutory requirement that the officer shall return the bond to the court or justice where the suit is pending is directory rather than mandatory. Soule v. Goodrich, 119 Me. 280, 110 A. 808.

And failure to return is not defense to suit on bond.—The mere fact that a fifteen-day bond, given under this section, is not returned to court during the pendency of the action in which it was given, is not a defense to a suit upon the bond. Soule v. Goodrich, 119 Me. 280, 110 A. 808.

Bond commonly delivered to creditor's attorney.—It is for the benefit of the creditor that the bond is required to be returned to court, and it is undoubtedly a more or less common practice for officers to deliver them to the creditor's attorney. Soule v. Goodrich, 119 Me. 280, 110 A. 808.

Bond requiring oath prescribed by § 56 is not statute bond.—A bond given by a person for his release from arrest on mesne process, stipulating, in addition to the conditions prescribed by this section, that the obligor will "take the oath prescribed in the 56th section of said chapter," is invalid as a statute bond. Bell v. Furbush, 56 Me. 178.

If the bond is not a statute bond, it matters not that the requirements of the statute were disregarded in the selection of the justices. Bell v. Furbush, 56 Me. 178.

And if such bond is given only its con-

ditions need be performed.—In fulfilling the conditions of a bond which is not a statute bond, the obligor is not required to perform any statute provisions in relation to poor debtors, except those recited in the bond given. Bell v. Furbush, 56 Me. 178.

Former provision of section.—For a case concerning a former provision of this section that the notice had to be given within 15 days after the last day of the term of the court at which judgment was rendered, see Parsons v. Hathaway, 40 Me. 132; Hunkins v. Palmer, 48 Me. 251.

Applied in Holmes v. Chadbourne, 4 Me. 10; Sargent v. Pomroy, 33 Me. 388; Downes v. Reily, 53 Me. 62; McNamara v. Garrity, 78 Me. 418, 6 A. 668.

Cited in Woodard v. Herbert, 24 Me. 358.

Sec. 16. Proceedings, if debtor has given bond on mesne process.—After judgment, the debtor may apply in writing to a justice of the peace of the county where he was arrested, who shall issue a citation to the creditor, his agent or attorney; and an examination and disclosure may be had before 2 justices of the peace within the time specified in the bond; and the same proceedings shall be had and the same results shall follow as in disclosures on bonds given on execution, except as provided in the following section. (R. S. c. 107, § 16.)

Applied in Burbank v. Berry, 22 Me. 483; Tarr v. Davis, 133 Me. 243, 176 A. 407.

Cited in Downes v. Reily, 53 Me. 62.

Sec. 17. Debtor at large for 30 days, during lien on property disclosed.—If the debtor, on such examination, does not, in the opinion of the justices, entitle himself to the benefit of the oath hereinafter provided and it appears that at that time he has real or personal estate liable to attachment or any such property as is described in section 57, they shall permit him to go at large on his bond during the 30 days that the creditor's lien exists on the property disclosed; and during that time, the creditor may elect to arrest him on execution or to enforce his lien on the property. (R. S. c. 107, § 17.)

It is fairly deducible from the statutes that the election to take the body should be made within thirty days, although it may not be necessary to give notice to the sureties on the bond to produce the body of the principal within that time, if the execution remains in force. French v. McAllister, 20 Me. 465.

Applied in Sargent v. Pomroy, 33 Me. 388.

Sec. 18. Creditor's election to arrest on execution or otherwise.—If the creditor elects so to arrest him and the officer having the execution returns that the debtor is not found, his bond shall be forfeited; and on judgment thereon, execution shall issue for the amount of judgment in the original suit, and interest. If the debtor is not arrested within that time and does not avoid arrest, no execution, issued or founded on such judgment, shall run against his body, but against his property only. (R. S. c. 107, § 18.)

Applied in Sargent v. Pomroy, 33 Me. 388.

Disclosure Commissioners.

Sec. 19. Appointment of disclosure commissioners; qualification and tenure; seal; number appointed; renewal of former executions.—The governor shall from time to time appoint disclosure commissioners in different localities within and for each county of the state who shall have jurisdiction within the county for which they are appointed. Such commissioners shall be attorneys at law and shall hold office for the term of 7 years. They shall have an official seal which shall have engraved thereon the name of the commissioner, the words "disclosure commissioner" and the word "Maine" and the name of the county and the town or city where the commissioner resides. Each town or city of not more than 4,000 inhabitants, as shown by the last preceding census of the United States, shall be entitled to one such commissioner and not more than one,

and for every additional 5,000 inhabitants thus shown or fraction thereof an additional commissioner shall be allowed, provided that the total number of commissioners in any 1 town or city shall in no case exceed 6. Any commissioner appointed under the provisions of this section shall have power to renew executions issued by any former commissioner within and for the same county and executions issued by himself. (R. S. c. 107, § 19.)

Commissioners not required to take oath. —The office of commissioner whose appointment and duties are prescribed in this and the following sections is a statute office; and neither this nor any general statute requires him to take an official oath. Lewis v. Foster, 65 Me. 555.

Quoted in part in West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

Stated in part in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 20. Disclosure commissioners vacate.—The removal of a disclosure commissioner from the state, or from the county for which he is appointed, or his acceptance of any appointment under the federal government shall vacate his office. This, however, shall not apply to cases of disclosure commissioners called into the military or naval service of the United States under the selective service act. (R. S. c. 107, § 20.)

Sec. 21. Executions on contract not to run against body of debtor. —No execution issued on a judgment founded on a contract, express or implied, or on a prior judgment on contract, shall run against the body of the judgment debtor, except as hereinafter provided, unless otherwise determined in proceedings under section 8 or unless the debtor was arrested on the original writ as provided in section 2. (R. S. c. 107, § 21.)

Sec. 22. Owner of judgment may have disclosure any time.—The owner of any judgment remaining unsatisfied in any part may have a disclosure of the business and property affairs of any judgment debtor, including corporations, at any time, by proceedings as hereinafter provided, but married women, and officers of judgment debtor corporations, and judgment debtors not liable to arrest as provided in section 146 of chapter 92 or by virtue of proceedings under sections 6 or 8, thus cited, shall not be arrested except for contempt or upon capias issued to bring them before the magistrate as provided by section 34. (R. S. c. 107, § 22.)

Stated in part in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 23. Application for subpoena to debtor to make disclosure.— The owner of any judgment described in the preceding section, or his attorney, may make application in writing to a disclosure commissioner, judge of probate, register of probate, judge of a municipal court in the county in which the judgment debtor resides, or, if the judgment debtor is a nonresident of this state, in the county in which he is commorant, or in case of a corporation, in which said corporation has an established place of business or in which any officer of the corporation, on whom the subpoena is served, resides, stating the amount of the debt and of the costs for which said judgment was rendered, the court and term at which it was rendered, the names of the original parties, the title of the petitioner, and praying for subpoena to issue to the debtor or to an officer of a debtor corporation to appear and make disclosure. (R. S. c. 107, § 23.)

The statute does not restrict the attorney who may apply for the subpoena to the creditor's attorney of record or an attorney authorized by power of attorney. West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

Applied in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 24. Subpoena to issue to debtor to appear and disclose; errors in application or subpoena amended.—Such magistrate as described in the preceding section shall thereupon issue under his hand and seal a subpoena to the debtor commanding him, or in case the debtor is a corporation commanding

an officer thereof, to appear before any such disinterested magistrate within said county in the town in which the debtor, the petitioner or his attorney resides, or the corporation has an established place of business, or in which any officer thereof on whom the subpoena is served, resides, or in the nearest town in which there is such a magistrate or in the shire town of said county, at a time and place therein named to make full and true disclosure, on oath, of all the business and property affairs of such debtor. A judge of any municipal court may hold disclosure court upon a subpoena returnable as aforesaid in any town in which the regular terms of the court of which he is judge are held. The application shall be annexed to the subpoena. Any town in which the regular sessions of the superior court are held shall be considered a shire town for the purpose of this section. No application or subpoena shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, when the person and the case can be rightly understood. Such errors and mistakes may be amended on application of either party. (R. S. c. 107, § 24. 1951, c. 306.)

Service of subpoena commanding appearance in wrong town does not give jurisdiction over debtor.—If the subpoena erroneously commands the debtor to appear before the magistrate in the wrong town, it does not, by the service upon him, give to the magistrate issuing it or the substituted magistrate jurisdiction over him at that place without his consent. West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

But debtor may waive irregularity by appearing. — See West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

History of section.—See Stuart v. Chapman, 104 Me. 17, 70 A. 1069.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227; Stuart v. Smith, 101 Me. 397, 64 A. 663.

Sec. 25. Service of subpoena. — The subpoena may be served by any officer qualified to serve civil process in said county by giving to the debtor or to an officer of a debtor corporation in hand an attested copy of the petition and subpoena, which said service shall be at least 24 hours before the time of said disclosure for every 20 miles' travel from his home or place of abode at the time of service to the place of disclosure. (R. S. c. 107, § 25.)

If it appears that there was neither service nor an appearance, the commissioner has no jurisdiction to proceed further. The commissioner cannot revive his jurisdiction, nor can the debtor give him jurisdiction. Brooks v. Clifford, 144 Me. 370, 69 A. (2d) 825.

Stated in Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 26. Debtor to appear and submit to examination.—At such time and place, the debtor or the officer of the debtor corporation shall appear and submit himself to examination on oath concerning his estate and effects or the estate and effects of the debtor corporation, their disposal and his ability or the ability of the debtor corporation to pay the judgment. Should the owner of said judgment or his attorney neglect to have the original petition and subpoena before said magistrate at the time therein designated for said disclosure, upon prayer therefor, said magistrate shall issue an execution against said judgment owner in favor of said debtor for his travel at 6¢ per mile and attendance at $1.50, if he actually attends at said time and place, and said debtor or the officer of the debtor corporation shall not thereafter be compelled to disclose on said judgment until said execution has been satisfied. (R. S. c. 107, § 26.)

See § 35, re refusal of debtor to testify.

Sec. 27. Proceedings at examination.—The petitioner may propose to the debtor or the officer of the debtor corporation any interrogatories pertinent to the inquiry, and if either party requires it, the examination shall be in writing and signed and sworn to by the debtor or the officer of the debtor corporation. If

the petitioner is absent or does not propose interrogatories, the magistrate shall conduct the examination. (R. S. c. 107, § 27.)

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 28. When magistrate may administer oath.—If, on such examination and hearing, the magistrate is satisfied that the debtor's disclosure is true and does not discover anything therein inconsistent with his taking the oath, the magistrate may administer to him the oath prescribed by section 56. (R. S. c. 107, § 28.)

Sec. 29. Attachable property disclosed, appraised and set off; debtor not required to assign wages.—When from such disclosure it appears that the debtor or the officer of the debtor corporation possesses or has under his control any bank bills, notes, accounts, bonds or other contracts or property, not exempted by statute from attachment which cannot be come at to be attached, and the petitioner and debtor or the officer of the debtor corporation cannot agree to apply the same towards the debt, the magistrate hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, cost and charges; and the petitioner or his attorney, if present, may select the property to be appraised. If the petitioner accepts it, it may be assigned and delivered to him by the debtor or the officer of the debtor corporation and applied towards the satisfaction of his demand. The debtor shall not be required to assign any sums due him as wages for his personal labor which would be exempt from attachment on trustee process under the provisions of section 55 of chapter 114. If any particular article of such property, necessary or convenient to be applied in satisfaction of the execution, exceeds the amount due thereon and is not divisible in its nature, the petitioner may take it, by paying the overplus to the debtor or the officer of the debtor corporation or securing it to the satisfaction of the magistrate. (R. S. c. 107, § 29.)

Section does not authorize sale of property by petitioner's attorney.—Undoubtedly, the debtor's property, if sufficient is disclosed, must pay all the legitimate costs and charges of disclosure, but such costs and charges do not belong to the commissioner nor the petitioner's attorney. They belong to the petitioner, himself, as much as any part of the debt, and consequently any property disclosed, representing such costs and charges, would be the property of the petitioner. There is, therefore, no authority implied from this section authorizing the sale of property by the attorney, to pay the costs and charges over which neither the commissioner nor the attorney has any control, express or implied. Davis v. Ferrin, 97 Me. 146, 53 A. 1006.

At least $10 of debtor's wages is exempt.—Under the provisions of c. 114, § 55, sub-§ 6, in all cases at least ten dollars of the debtor's wages is exempt. This ten dollars' exemption is applicable to proceedings under this section. Jumper v. Moore, 110 Me. 159, 85 A. 485.

Applied in Hathorn v. Robinson, 98 Me. 334, 56 A. 1057.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 30. Petitioner may demand within 30 days; if not demanded, returned to debtor.—If the petitioner is absent or does not so accept it, the debtor or the officer of the debtor corporation shall deposit with the magistrate a written assignment to the petitioner of all the property thus appraised and set off; and the magistrate shall make a record of such proceedings and cause such property to be safely kept and secured for the term of 30 days thereafter, to be delivered to the petitioner with the assignment, on demand, within that time. If not so demanded, they shall be returned to the debtor or the officer of the debtor corporation. (R. S. c. 107, § 30.)

Sec. 31. Preservation of petitioner's lien on real estate disclosed.—If an execution debtor or the officer of the debtor corporation discloses real estate liable to be seized on execution, the magistrate shall give the petitioner a

certificate thereof, stating the names of the parties and the amount of the execution; and the petitioner shall have a lien thereon for 30 days thereafter if he files the certificate with the register of deeds of the county or district where the real estate lies within 5 days from the date of the disclosure; and the register shall enter and file it like officers' returns of attachments. (R. S. c. 107, § 31.)

Sec. 32. Lien on personal estate disclosed; if debtor or other person conceals.—If the debtor or the officer of the debtor corporation discloses personal estate liable to be seized on execution, the petitioner shall have a lien on it, or so much of it as the magistrate in his record judges necessary, for 30 days; and if the debtor or the officer of the debtor corporation transfers, conceals or otherwise disposes of it within said time, or suffers it to be done, or refuses to surrender it on demand to any proper officer having an execution on the same judgment, the debtor shall have no benefit from the certificate described in section 38; and the petitioner may recover, in an action on the case against him or any person fraudulently aiding in such transfer, concealment or disposal, double the amount due on said execution; and any execution on a judgment in such action shall run against the bodies of the debtor and other persons so aiding, but the payment thereof is a satisfaction of the original debt. (R. S. c. 107, § 32.)

The mere fact that the creditor may recover double the amount does not of itself determine the section to be penal. Quimby v. Carter, 20 Me. 218.

But the section is penal as well as remedial, and is not to be extended by construction beyond the reasonable meaning of its terms. The rule of strict construction is applicable; and this signifies that an act of a penal nature is not to be regarded as including anything which is not within its letter as well as its spirit, which is not clearly and intelligibly described in the very words of the statute as well as manifestly intended by the legislature. Wing v. Weeks, 88 Me. 115, 33 A. 779.

Third person not liable for refusing to surrender property.—This section makes a clear distinction between the liability of the debtor and that of a third person. The petitioner may recover the penalty of the debtor himself if he transfers, conceals, or otherwise disposes of the property within thirty days, or refuses to surrender it on demand, etc., but he can only recover the penalty of a third person for fraudulently aiding in such transfer, concealment or disposal. Such third person is not made liable for simply "refusing to surrender" property which he claims as his own, which has not been "transferred, concealed or disposed of" during this period of thirty days, but has been exposed to seizure on execution during that period, and for eight months prior to that time. Wing v. Weeks, 88 Me. 115, 33 A. 779.

And declaration against him must allege fraudulent aid.—A declaration in an action under this section against a third person is defective that contains no averment of any specific act of the defendant whereby the debtor was "fraudulently aided" in transferring, concealing or disposing of the property during that period or at any other time; nor a general allegation that the defendant "fraudulently aided" in the transfer, concealment or disposal of the property at any time. Wing v. Weeks, 88 Me. 115, 33 A. 779.

Third person's aid must have been given knowingly.—The fraudulent concealment or transfer must be designed to secure or conceal the property from creditors, to prevent the same from attachment or execution. And the person, other than the debtor, who is made liable, must knowingly aid or assist in effecting it. Quimby v. Carter, 20 Me. 218.

The plaintiff in an action under this section must prove facts before he can recover, which the law determines to be essentially detrimental to his interest, viz. that he has a just debt or demand, that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution to satisfy it, and that the person sued has knowingly aided or assisted the debtor to defeat his rights as a creditor. Quimby v. Carter, 20 Me. 218.

Plaintiff must prove just debt remaining unpaid.—The plaintiff, to entitle him to recover under this section, must not only prove such concealment or transfer, but that he has a just debt or demand remaining unpaid. Quimby v. Carter, 20 Me. 218.

Amount of recovery. — The creditor's right of recovery is limited to double the amount of the property concealed or transferred, if it is less than the amount of the debt; or to double the amount of his debt, if that is less than the value of the property concealed or transferred. Quimby v. Carter, 20 Me. 218.

When the creditor has recovered and the judgment has been satisfied, the debt is regarded as extinguished in law pro tanto, although the payment may not have been made by the debtor himself. The recovery was had on account of the debt, and he has received money because he was a creditor. Quimby v. Carter, 20 Me. 218.

Sec. 33. Persons holding property in trust or in fraud of creditors, compelled to appear and testify; lien.—If said magistrate finds reasonable cause to believe that any other person holds any property or credits of the debtor in trust for him or in fraud of his creditors, or if the petitioner shall make oath that he believes that such other person so holds property of the debtor, the magistrate shall issue a similar subpoena to such person to appear and testify in relation thereto, the same to be served as subpoenas in civil suits. The testimony of such witness may be reduced to writing and signed by him, and if it shall satisfactorily appear to the magistrate from all the evidence in the case that such person so holds property or credits of the debtor, he shall so certify upon the execution; and the petitioner shall have a lien upon said property or credits for 30 days succeeding such disclosure, to be enforced by bill in equity or trustee process, and if upon such bill in equity or trustee process, the court finds such property or credits to be so held as aforesaid, it may order the same, or so much of them as may be necessary to satisfy the judgment and all costs, to be conveyed, transferred or assigned to the petitioner; and if the parties cannot agree upon the value of such property or credits, they shall be assigned to the petitioner, if he shall give such trustee a bond with sufficient surety, accepted by the court, to account for and pay over to said trustee the surplus of the proceeds of such property or credits, after satisfying said judgment and costs. (R. S. c. 107, § 33.)

See c. 107, § 4, sub-§ XI, re equity powers.

Sec. 34. Contempt for refusal to appear.—If the debtor or the officer of the debtor corporation or any other person duly served with subpoena refuses or neglects to appear, the magistrate shall upon the request of the petitioner issue a capias to bring said debtor or the officer of the debtor corporation or other person before him, and if upon hearing, said debtor or the officer of the debtor corporation or other person does not show good cause for his failure to appear, he may be ordered to pay the costs of issuing and serving said capias. After the question of costs of issuing and serving said capias has been thus determined, such debtor or the officer of the debtor corporation or other person shall submit himself to the examination required by his original subpoena. (R. S. c. 107, § 34.)

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 35. Contempt for refusal to testify.—If the debtor or the officer of the debtor corporation or other person duly served with subpoena refuses to testify in obedience thereto, or refuses to answer any proper questions, or if the debtor or the officer of the debtor corporation refuses to make full disclosure upon all matters named in section 26, or if said debtor or the officer of the debtor corporation refuses to comply with any proper order of the magistrate or perform the duty imposed upon him by section 30, he shall be adjudged to be in contempt and be committed to jail until he purges himself of such contempt by compliance, or is otherwise discharged by due process of law. The warrant of commitment shall state specifically the contempt of which the prisoner is guilty. If said officer complies with the requirements of section 34, no execution shall run against his body. (R. S. c. 107, § 35.)

Sec. 36. Magistrate unable to attend.—In case the magistrate who issued the summons is unable to attend, any justice of the peace may continue the case not exceeding twice, or any other magistrate qualified to take disclosures

may attend and take the disclosure, and, for cause shown by either party, the examination may be adjourned from time to time. (R. S. c. 107, § 36.)

Judge of probate acting ex officio as commissioner may take disclosure.—When a disclosure commissioner having jurisdiction of the subject matter has issued a summons to a debtor to appear before him and make disclosure, and such disclosure commissioner is unable to attend, the judge of probate acting ex officio as disclosure commissioner, may attend at the time and place named in the subpoena and take the disclosure of the debtor. West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

Applied in West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 37. Evidence introduced by either party.—After the examination of the debtor or the officer of the debtor corporation, other competent evidence may be introduced by either party, and the debtor or the officer of the debtor corporation may then be further examined. Depositions may be used in such disclosures, and the magistrate may, at the request of either party, issue subpoenas to witnesses, who are entitled to the same fees as witnesses before a trial justice. (R. S. c. 107, § 37.)

Sec. 38. When property disclosed is secured and debtor has complied with all orders; body of debtor free from arrest.—After the oath mentioned in section 56 is administered, and the property disclosed is secured, and the debtor or the officer of the debtor corporation has complied with all proper orders of such magistrate, a certificate of the fact of such disclosure shall be indorsed by the magistrate under his hand and seal on the execution issued upon the judgment upon which the disclosure is had, and a copy of said certificate shall be indorsed on every subsequent execution issued on said judgment or on any judgment founded thereon, and the body of the debtor shall thereafter be forever free from arrest on any execution so issued, except as provided in sections 32 and 77. (R. S. c. 107, § 38.)

Sec. 39. If debtor fails to obtain benefit of oath.—If upon such disclosure the debtor fails to obtain the benefit of the oath provided for in section 56, the magistrate shall, under his hand and seal, indorse a certificate of that fact upon the execution in force at the time of said disclosure, and a copy of said certificate shall be indorsed on every subsequent execution issued on said judgment, or on any judgment founded thereon, and such subsequent execution shall run against the body of said debtor, where the original debt exclusive of costs exceeds $10 and not otherwise. The magistrate shall also issue a capias under his hand and seal, and annex the same to said execution in force at the time of said disclosure, and the debtor may be arrested and imprisoned on said capias and execution, the same as upon executions issued in actions of tort, where the original debt exclusive of costs exceeds $10 and not otherwise. No execution shall run against the body of a judgment debtor who is exempt from arrest by the provisions of section 22. (R. S. c. 107, § 39.)

This section gives the debtor no appeal from the decision of the commissioner that he is not entitled to the benefit of the oath, but authorizes that magistrate to issue a capias at once and attach it to the execution in force at the time of the disclosure; and upon this execution the debtor may be at once arrested. Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Certificate and capias must be signed by magistrate.—This section requires the magistrate to indorse the certificate and issue the capias "under his hand and seal." The phrase "under his hand" in legal parlance is often used to designate handwriting or written signature. It follows that the signature of the magistrate should be handwriting or written signature. An official certificate not signed by the officer himself in his own hand is not a certificate. It is the signature which authenticates it and gives it its official character. Mahoney v. Ayoob, 124 Me. 20, 125 A. 146.

And facsimile signature not sufficient.—A capias issued by the magistrate, signed with his facsimile signature, impressed thereon with a rubber stamp, is not a capias issued under his hand and seal un-

der this section. Mahoney v. Ayoob, 124 Me. 20, 125 A. 146.

Commissioner acting without jurisdiction liable for false imprisonment.—When a disclosure commissioner, acting in a disclosure matter, without jurisdiction, refuses the execution debtor the benefit of the oath provided by § 56, and indorses upon the execution the certificate required by this section, and annexes to the execution the capias required by this section, and such debtor is arrested and committed to jail on such capias and execution, such disclosure commissioner is liable in an action for false imprisonment. Stuart v. Chapman, 104 Me. 17, 70 A. 1069.

Section applicable to proceedings under § 40.—This section requires the magistrate, when the debtor fails to obtain the poor debtor's oath, to endorse a certificate of that fact upon the execution then in force and issue and annex thereto a capias, with the further provision that a copy of such certificate shall be endorsed on every subsequent execution issued on the same judgment or any judgment founded thereon. And this requirement is applicable to proceedings under § 40. Trafton v. Hoxie, 134 Me. 1, 180 A. 800.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 40. If debtor fails to appear, default recorded. — If a debtor, cited to disclose on a judgment where the original debt exclusive of costs exceeds $10, fails to appear and submit himself to examination at the time and place named in subpoena, the petitioner may have a default recorded and then proceed as in the preceding section or have a capias to bring in such debtor and proceed as in section 34. (R. S. c. 107, § 40.)

The adoption by reference of the rules of procedure of § 39 into this section makes them part of it as if originally enacted therein. Trafton v. Hoxie, 134 Me. 1, 180 A. 800.

Certificate not void because it refers to § 39 instead of this section.—To be strictly correct, the magistrate, in his certificate, should refer to the adopting not the adopted statute (this section and not § 39) as the authority under which he acted. It is unnecessary, however, to make the reference. The form of the certificate is not prescribed by statute. All that is required is a certificate of the facts. An erroneous reference to the statute is surplusage which cannot vitiate the process. Trafton v. Hoxie, 134 Me. 1, 180 A. 800.

Cited in Alden v. Thompson, 92 Me. 86, 42 A. 227.

Sec. 41. Release of debtor when arrested.—When a debtor is arrested upon said capias and execution or upon any subsequent execution upon which a copy of either of the certificates required by the 2 preceding sections has been indorsed, all subsequent proceedings for his release shall be the same as in case of arrest or imprisonment on executions in actions of tort; but if said debtor fails to obtain his discharge at any subsequent examination before justices of the peace, he shall not a second time disclose before such justices, but may thereafter apply to a justice of the superior court and disclose as provided in section 72. (R. S. c. 107, § 41.)

Sec. 42. Fees; costs taxed and indorsed on execution.—The magistrate shall be entitled to 25¢ for each subpoena, $1 for entry, 50¢ for capias, 50¢ for certificate and $3 for each day in hearing the disclosure and other testimony, and for entering default, 25¢. The fees of officers shall be the same as for service of other process of similar nature. The petitioner may, if the magistrate authorized it, procure an officer to be in attendance during the proceedings, and the fees for such attendance shall be 75¢ a day. The above fees shall be paid by the petitioner, and in case the oath named in section 56 is administered, shall be added to the costs on the judgment and execution and taxed in detail thereon by the magistrate. In case said oath is not administered to the debtor, the petitioner shall recover his costs and said fees, as in actions before a trial justice. Whenever the petitioner recovers costs or costs and fees against the judgment debtor, either on hearing, default or otherwise, the magistrate shall tax such costs or costs and fees in detail and make a record thereof, and under his hand and official seal shall indorse upon or annex to the execution in force at the time of disclosure, hearing or default, a certificate certifying that the peti-

tioner has recovered costs or costs and fees and stating therein, in detail, the costs or costs and fees recovered, and also the date of such recovery. A copy of said certificate shall be indorsed upon or annexed to every subsequent execution issued upon the same judgment, or upon any judgment founded thereon. Costs or costs and fees recovered, taxed and certified, as aforesaid, shall be deemed a part of the original judgment for costs recovered against the judgment debtor. (R. S. c. 107, § 42. 1951, c. 1.)

The costs and charges become the absolute property of the creditor. Davis v. Ferrin, 97 Me. 146, 53 A. 1006.

Former provision of section.—For a consideration of a former provision of this section requiring the magistrate to issue a separate execution for costs and fees, see Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Sec. 43. Debtor required to disclose again after 3 years, and while judgment remains in force.—At any time after the expiration of 3 years from the termination of any such proceedings, and while the judgment remains in force, the judgment creditor may again avail himself of all the provisions of the 22 preceding sections, where the original debt exclusive of costs exceeds $10, and may cause like proceedings to be had as if there had been no previous proceedings under the provisions of this chapter. (R. S. c. 107, § 43.)

Sec. 44. Magistrate who once refused oath incompetent to again hear disclosure.—Any magistrate, who has once refused to administer to the debtor the oath named in section 56, shall be incompetent to sit as a justice of the peace or commissioner under the provisions of section 72, to hear the disclosure of the debtor in any subsequent proceedings upon the same judgment or any judgment founded thereon. (R. S. c. 107, § 44.)

Sec. 45. Commissioner to keep full record of all proceedings.—Every magistrate shall keep a correct and sufficient record of the proceedings under each citation, stating the names of the parties, the amount of the judgment on which the disclosure is sought, the dates of application, of the issuance of subpoena and of the return day thereof, and of all hearings, adjournments and continuances; also whether the debtor appeared or was brought in on capias or was defaulted; whether a disclosure was had and if so what property was disclosed; whether the oath was administered or refused, and if refused the record shall state the reason for such refusal. (R. S. c. 107, § 45.)

Arrests and Bonds on Execution and Disclosures Thereon.

Sec. 46. When execution to run against body.—In actions of tort and in all other cases, except where express provision is by law made to the contrary, an execution shall run against the body of the judgment debtor; and he may be arrested and imprisoned thereon for the purpose of obtaining a discovery of his property wherewith to satisfy it, as hereinafter stated. (R. S. c. 107, § 46.)

Cross references.—See § 77, re false disclosure; § 81, re willful trespass; c. 166, § 38, re liability of wife for her debts.

Arrest on execution is for purpose of obtaining discovery.—At the old common law an arrest upon an execution was largely designed as a punishment of the debtor for not paying his debt, and he could be held in imprisonment until he did pay it. On the contrary, our very humane system is one in no respect involving punishment or degradation, but seeks only to obtain a discovery of the debtor's property and its situation, in order that the creditor may be the better enabled to satisfy his judgment out of such property. Jones v. Jones, 87 Me. 117, 32 A. 779.

The sole purpose for which it is proper to give a creditor power over his debtor's body, is to secure a true disclosure of the state of the debtor's affairs and his means of payment and the honest appropriation of such means as he actually has, not exempt by law from attachment and execution, to the payment of the debt. Farrington v. Farrar, 73 Me. 37.

And this is all creditor entitled to.—The opportunity to ascertain by a personal examination, legally conducted, whether his debtor can pay, and to compel payment if the debtor has the means, is all the creditor has a right to ask in this direction.

Nothing but his debtor's dishonesty can give him any power beyond this under our laws. Farrington v. Farrar, 73 Me. 37.

Arrest not satisfaction of debt.—Imprisonment of a judgment debtor on execution of the judgment against him is now, under our statutes, solely for the purpose of obtaining a discovery of the debtor's property and is no longer regarded as a satisfaction of the debt. Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

Precept or copy filed with jailer.—When committing a defendant on execution under this section, there is no provision requiring any precept or copy to be filed with the jailer. But it is the universal practice. Jones v. Emerson, 71 Me. 405.

Applied in Hussey v. Danforth, 77 Me. 17.

Cited in Sweeney v. Dahl, 140 Me. 133, 34 A. (2d) 673.

Sec. 47. Debtor may disclose without bond. — When so arrested, he may, without giving bond, disclose as provided in section 52 and the following sections, by serving the citation provided for in said section 52 upon the creditor or his attorney, allowing at least 24 hours for every 20 miles' travel from the residence of such creditor or attorney to the place of disclosure. The debtor shall pay the officer for serving the notice and keeping him from the arrest until the disclosure, before he can be discharged. (R. S. c. 107, § 47.)

Debtor must pay for his support, etc.— If the debtor prefers to go to jail rather than give bond, or disclose while in the custody of the officer making the arrest, he must pay the sum to which the jailer is entitled for his support as well as other legal charges, before he can rightfully claim to be discharged. McPheters v. Morrill, 66 Me. 123.

Sec. 48. Disclosure in jail.—A debtor committed on execution may disclose thereon at the jail, in the manner and on the notice aforesaid, which may be served by the jailer or other officer. (R. S. c. 107, § 48.)

Applied in McPheters v. Morrill, 66 Me. 123.

Sec. 49. Debtor remanded, or oath allowed.—If, in either case, the debtor is not permitted to take the oath, he shall be remanded; otherwise, the justices shall administer the oath prescribed in section 56 and give him the certificate provided in section 59; and the officer shall make return thereof on the execution; and no subsequent execution shall authorize his arrest. (R. S. c. 107, § 49.)

Sec. 50. Bond given on such arrest.—When a debtor is arrested or imprisoned on execution, he may be released by giving bond to the creditor, in double the sum due thereon, with surety or sureties approved in writing by the creditor or by 2 or 3 justices of the peace in the county where he is arrested or imprisoned, selected and proceeding as provided in section 68, or a justice of the supreme judicial or superior court in term or vacation; conditioned that he will, within 6 months thereafter, cite the creditor before 2 justices of the peace, submit himself to examination and take the oath prescribed in section 56, pay the debt, interest, costs and fees arising in said execution, or deliver himself into the custody of the keeper of the jail to which he is liable to be committed under said execution. (R. S. c. 107, § 50. 1953, c. 49.)

I. General Consideration.

II. Approval of Bond.

III. Conditions of Bond.

IV. Performance of Conditions.

- A. In General.
- B. By Submitting to Examination and Taking Oath.
- C. By Delivery of Debtor to Custody of Jailer.
  - 1. In General.
  - 2. Necessity of Delivering Evidence of Jailer's Authority to Receive Debtor.

Cross References.

See note to § 67, re bond of person arrested for taxes should run to persons who were assessors when arrest made; § 75 and note, re action on bond mut be commenced within a year.

I. GENERAL CONSIDERATION.

A bond executed in accordance with the provisions of this section is a statute bond. Colton v. Stanwood, 68 Me. 482.

But if the bond is signed by more than one debtor, it cannot be regarded as a statute bond. All the acts to be done and performed in the condition are personal acts, to be done and performed alone, and not jointly. Every stipulation in the condition looks to a performance by the obligor alone. The various provisions of the statute have reference to a several bond and a several performance. The arrest of each debtor is a separate and distinct act of the officer. The citation to the creditor and the selection of the justices, are the individual acts of the debtor thus citing and selecting. The examination of the debtor, the oath to be administered and the certificate of discharge which may be given by the magistrates are all several in their nature, as well as by the language of the statute. If there is fraudulent concealment, the person so fraudulently concealing is to be deemed guilty, and to be punished for his own acts. From the arrest to the final conclusion by discharge or imprisonment, every provision of the act specially applies to several acts of each debtor and to several bonds to enforce their performance, and to several disclosures and certificates by which each is to be relieved from the penalties attached to the nonperformance of the conditions therein specified. Hatch v. Norris, 36 Me. 419.

Section assumes previous arrest.—This section, authorizing the giving of a bond for the release of a debtor from arrest or imprisonment on execution, assumes a previous arrest or imprisonment from which release is thereby to be had. Bradley v. Pinkham, 63 Me. 164.

The giving of the bond assumes a new state of engagements which the debtor has the right to make. Williams v. McDonald, 18 Me. 120.

And his release is involuntary act of officer.—The release provided for by this section is one to which the debtor is entitled by the provisions of the section. It is not a voluntary one by the creditor, but an involuntary one made by the officer in obedience to law. Bates v. Tallman, 35 Me. 274.

It is the duty of the officer having the debtor in his keeping to release him on his giving to such officer a sufficient bond, conformable to the provisions of this section, running to the creditor. Wilson v. Gillis, 15 Me. 55.

Which does not depend upon will of creditor.—The debtor has the right, without the consent of the creditor, to give a bond to relieve himself from arrest on the execution. It does not depend upon the will of the creditor. It is a legal incident attached to the judgment and execution. The arrest is one mode authorized by law for the collection of the debt, and the bond is a substitute for the custody of the debtor. Hobson v. Watson, 34 Me. 20.

The officer who makes the arrest is bound to accept a bond made in all respects in conformity to the true intent and meaning of this section, with sufficient surety or sureties, approved, etc. Dyer v. Woodbury, 24 Me. 546.

But the creditor has a right to require a statute bond and the jailer cannot legally release the debtor without one. Hotchkiss v. Whitten, 71 Me. 577.

The bond is given to the plaintiff as a statutory equivalent for the security afforded him by the arrest of the debtor. Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

And it is a substitute for the detention of the body of the debtor. Noyes v. Perkins, 129 Me. 385, 152 A. 405.

A judgment creditor is permitted in certain cases to arrest the body of his debtor, who is to be released upon giving a bond in a prescribed form to the creditor. The design is to compel a disclosure of the debtor's means of making payment. And to give him time to arrange his affairs and make payment, or to disclose them fully, he is authorized to substitute the bond for a detention of his person. Morse v. Rice, 21 Me. 53.

And is not satisfaction of judgment.—The bond is only a substitute for the detention of the body; and is not intended to be a satisfaction of the judgment. It only changes the form of the remedy. Spencer v. Garland, 20 Me. 75.

Nor is it a promise to pay the debt absolutely. It is subject to three conditions, defeasible upon the performance of either. Hussey v. Danforth, 77 Me. 17.

Creditor can discharge bond without relinquishing debt.—Bonds are only collateral security for the debt and the creditor may refuse to prosecute them or may discharge them without relinquishing his

debt. Bates v. Tallman, 35 Me. 274; Norridgewock v. Sawtelle, 72 Me. 484.

Defendant can avoid bond given for discharge from illegal arrest.—If the bond negatives a legal arrest by its very terms, it must have been given to procure a discharge from an illegal arrest, and it was a bond given under duress, and therefore the defendants may well avoid it. Gibson v. Ethridge, 72 Me. 261.

The bond which is the basis of the case, proves the jurisdiction of the magistrates. Fuller v. Davis, 73 Me. 556.

Declaration in action of bond need count only on its penal provisions.—In debt on a bond, it is not necessary for the plaintiff, in his declaration, to count upon any other than the penal part of the instrument; leaving the condition to be pleaded by the defendant, if it affords him any defense. For the penal part of the instrument alone constitutes, prima facie, a right of action, the breach being the nonpayment of the money. Colton v. Stanwood, 68 Me. 482.

The penal sum in the bond is by this section to be in double the amount for which the execution debtor was imprisoned. Gooch v. Stephenson, 15 Me. 129. See §§ 51 and 74, and notes.

And section 74 does not operate as a repeal of this section so far as it determines the penal sum of the bond. That provision will continue to be binding upon the debtor and the officer. A violation of it is only excused in case of mistake or accident. This section and § 74 may well exist together, and the provisions of both have their appropriate and designed effect. The latter seems to have been intended to secure to the judgment creditor the same rights to which he would have been entitled if no such mistake or accident had occurred. Horn v. Nason, 23 Me. 101.

Officer's fees may be inserted as part of bond.—The insertion of the officer's fees as a component part of a bond, one of the conditions of which, in case of forfeiture, is that they shall be paid, can hardly be regarded as destructive of its statutory character, especially when in case of suit on the bond, the statute requires that the judgment should include such fees. Bradley v. Pinkham, 63 Me. 164.

Applied in Kimball v. Preble, 5 Me. 353; Pease v. Norton, 6 Me. 229; Grimes v. Turner, 16 Me. 353; Wallace v. Carlisle, 20 Me. 374; Burnham v. Howe, 23 Me. 489; Ware v. Jackson, 24 Me. 166; Fales v. Dow, 24 Me. 211; Hovey v. Hamilton, 24 Me. 451; Wyman v. Wood, 25 Me. 436; Kimball v. Irish, 26 Me. 444; Baker v. Holmes, 27 Me. 153; Ayer v. Fowler, 30 Me. 347; Brookings v. Cunningham, 33 Me. 103; Ledden v. Hanson, 39 Me. 355; Blake v. Blanchard, 48 Me. 297; Leighton v. Pearson, 49 Me. 100; Norridgewock v. Solon, 49 Me. 385; Hopkins v. Fozler, 60 Me. 266; Rice v. Murphy, 109 Me. 101, 82 A. 842; Mahoney v. Ayoob, 124 Me. 20, 125 A. 146; Miller v. Wiseman, 125 Me. 4, 130 A. 504; Beaupre v. Schlosberg, 131 Me. 407, 163 A. 653; Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

II. APPROVAL OF BOND.

Bond not properly approved is not statute bond.—If there is no approval of the surety in writing by the persons mentioned in this section, it is not a statute bond. And the acceptance of it by the plaintiff, and bringing a suit upon it does not make it a statute bond. Randall v. Bowden, 48 Me. 37.

Thus, a bond not approved in writing is not a statute bond. Hotchkiss v. Whitten, 71 Me. 577.

And statutory method of approval not waived by creditor's acceptance.—The act of the creditor in accepting the bond and bringing a suit upon it is not deemed a waiver of the statutory method of approval, and it is not sufficient to estop the creditor from asserting that it is not a statute bond. Gould v. Ford, 91 Me. 146, 39 A. 480.

If approved by the creditor in writing, the bond is sufficient. Poor v. Knight, 66 Me. 482.

And approval by the attorney for the creditor is sufficient. McDougall v. Ricker, 115 Me. 357, 98 A. 1025.

Whether he signs his own name as attorney, or uses the name of the creditor. Poor v. Knight, 66 Me. 482.

But mere retention by attorney is not sufficient.—The mere retention of the bond by the creditor's attorney is not equivalent to its written approval by the creditor or his attorney, or its approval by two justices selected according to the requirements of the statute. Hotchkiss v. Whitten, 71 Me. 577.

Bond may be approved by justices of the peace.—When the creditor does not approve the bond of a poor debtor taken upon his arrest or imprisonment on execution, it may be approved by two justices of the peace, selected in accordance with § 68. Guilford v. Delaney, 57 Me. 589.

But to be a statute bond they must have been selected according to law.—If the approval of a poor debtor's bond does not show that the justices approving it were selected according to law, the bond is good

only at common law. Smith v. Brown, 61 Me. 70.

If it does not appear that the justices approving the bond were selected according to the directions of § 68, it cannot be treated as a statute bond, and it can only be held good at common law. Hotchkiss v. Whitten, 71 Me. 577; Gould v. Ford, 91 Me. 146, 39 A. 480; McDougall v. Ricker, 115 Me. 357, 98 A. 1025.

The object of having an approval of the sureties by two justices is, doubtless, twofold: firstly, to protect the officer against the claim of the creditor, in case the sureties should prove insufficient; and secondly, to prevent oppression, on the part of the officer, by captiously objecting to the sufficiency of the sureties. Dyer v. Woodbury, 24 Me. 546.

Creditors may approve bond after release of debtor.—An approval by the creditor of the bond may be express or implied; it may be before or after the discharge of the debtor; for, if after, it is a ratification of the act done by the prison keeper, in releasing the debtor from his custody. Coffin v. Herrick, 10 Me. 121.

Even though it was approved by only one justice.—The creditor has a right to approve and accept the bond after the debtor has been released, notwithstanding one justice only had approved at the time it was given, and, if he exercises that right, and does approve and accept it, then he is bound by that act. Coffin v. Herrick, 10 Me. 121.

Officer not bound to receive bond with insufficient sureties though approved by justices.—An officer knowing, or having good reason to believe, that the sureties on the bond are insufficient is not bound to receive the bond, though the sureties are approved by two justices. Dyer v. Woodbury, 24 Me. 546.

III. CONDITIONS OF BOND.

The conditions of the bond should be made in conformity to the provisions of this section. Woodman v. Valentine, 24 Me. 551.

Or it cannot be regarded as statute bond.—A bond must be made in conformity to the statute provisions, in all its material parts, or it cannot be regarded as a statute bond. Woodman v. Valentine, 24 Me. 551.

All the requirements of this section must be contained in the condition; and if defective in that respect, it is not a statute bond. Howard v. Brown, 21 Me. 385.

If important statutory provisions are omitted, the bond can be treated only as a bond at common law. Longfellow v. Scammon, 21 Me. 108.

Condition to "deliver himself and go into close confinement" is sufficient.—One of the conditions required by the statute is, that the debtor shall within six months, "deliver himself into the custody of the keeper of the jail." The language of the bond is said to be, "deliver himself and go into close confinement." If there is a substantial compliance with the law, it will be sufficient, although the form should vary. It is the duty of the keeper of the jail, to put into close confinement those who may be in his custody under executions. And to go into close confinement under a voluntary surrender of himself is not essentially different from the delivery of himself to the jailer, when the result must be the same. Hatch v. Lawrence, 29 Me. 480.

Condition to take oath prescribed in § 56 is material part of bond.—It is a material part of the condition of the bond provided for by this section that it should require the debtor, as one of the alternatives for his discharge, to "take the oath prescribed in section 56." It is material for the purpose of making the oath certain, which is to be administered to the debtor. It is material to prevent delay and difficulty at the time of the examination, and to remove all doubts from the minds of the justices respecting the oath which they are to administer. Woodman v. Valentine, 24 Me. 551.

And bond with condition citing wrong section is not statute bond.—If, among the conditions of the bond, there is one that the debtor will take the oath prescribed in a section of the chapter wherein no oath is prescribed, the bond given is not in conformity with the requirements of this section, and is not a statute bond. Such a mistake or accident is not one which is cured by § 74. Chase v. Collins, 68 Me. 375.

Bond may be good at common law.—A bond from a debtor, in the custody of the sheriff, voluntarily offered to obtain his release, accepted by the creditor, imposing the same conditions as those required by law or conditions similar thereto, not forbidden by the statute or public policy, though varying from the bond prescribed for such purpose by the statute, is a good bond at common law. Skinner v. Lyford, 73 Me. 282.

But plaintiff can recover only actual damage.—If a bond given on execution is not a statute bond under this section,

the plaintiff can recover only his actual damage. See Call v. Foster, 52 Me. 257.

IV. PERFORMANCE OF CONDITIONS.

A. In General.

Performance renders bond void.—A bond in the usual form can be rendered void if the debtor within six months should do one of three things: (1) cite the creditor before two justices of the peace and submit to examination as provided by law and take the oath prescribed; (2) pay the debt, interest, costs and fees arising on said execution; or (3) deliver himself into the custody of the keeper of the jail to which he was liable to be committed under the execution. Noyes v. Perkins, 129 Me. 385, 152 A. 405.

But complete fulfillment of one of conditions is only bar to action on bond.—The only bar to an action on a poor debtor bond is a complete fulfillment on the part of the debtor, of one of the three alternative conditions mentioned in this section. Hackett v. Lane, 61 Me. 31; Poor v. Knight, 66 Me. 482.

Obligors in bonds given under this section, to avoid the penalty, are bound to comply with one of the alternatives contained in the condition, unless prevented by the obligee, or the law, or the act of God, from so doing. Fales v. Goodhue, 25 Me. 423.

And this must be shown affirmatively.—If he would prevent a forfeiture, the debtor must show affirmatively a performance of one of the conditions of his bond. Gilligan v. Spiller, 29 Me. 107.

Even if performance of some conditions impossible.—If there are several alternative conditions, one or more of which are, at the execution of the bond, impossible to be performed, the condition of the bond will be broken, if none of the others is performed. Skinner v. Lyford, 73 Me. 282.

And statute must be followed implicitly.—Where the defendants on a poor debtor's bond rely in defense upon the distinct ground that the principal obligor has fully performed one of the alternative conditions of the bond, it must appear that he followed the statute implicitly in all its requirements. Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

In a suit on a bond given under this section, the proceedings for a performance of the condition should be in conformity to the provisions of the statutes. Burbank v. Berry, 22 Me. 483.

But only one condition need be performed.—It is at the election of the debtor which of the three alternatives, mentioned in the condition of the bond, he will perform. If he performs the one attempted, no breach occurs. Clark v. Metcalf, 38 Me. 122.

The defendants' plea of performance is sustained if it is shown that one of the alternative conditions of the bond has been performed. Blanchard v. Blood, 87 Me. 255, 32 A. 891.

The conditions of a bond given under this section are in the alternative. If either has been performed the defense of performance is sustained. Rollins v. Dow, 24 Me. 123.

The provisions permitting the debtor to give bond that he will disclose at a future day are not to be perverted into contrivances to make the sureties upon such bond responsible for the payment of the debt if the principal substantially fulfils either of the other conditions. Farrington v. Farrar, 73 Me. 37.

The sureties on a poor debtor's bond can be discharged only by a literal fulfilment of the conditions of the bond. Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

And voluntary acts of debtor or his insanity will not relieve them.—If the debtor voluntarily places himself in a situation to be exempt from arrest, or absconds, or even if he becomes insane and incapable of making a disclosure of his property affairs so as to fulfil that condition of the bond, neither of these events will relieve the sureties from liability. Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

Proof that the principal in a bond given by a debtor arrested on execution was afterwards wholly deprived of his reason, and thus remained until after the time limited in the bond for taking the debtor's oath, and was thereby rendered incapable of taking it, furnishes no valid defense to an action on the bond. Haskell v. Green, 15 Me. 33.

But there may be circumstances which would constitute an equitable defense to a suit on the bond if happening within the period of the six months in which its conditions are to be fulfilled. The death of the principal, his voluntary release by the creditors, or a change of statute making performance of the conditions of the bond unlawful, would discharge the sureties. Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

And discharge in bankruptcy may release principal and sureties.—See Almon

H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380.

In order to save a forfeiture of a common-law bond, there must have been a performance of one of its alternative conditions. Guilford v. Delaney, 57 Me. 589.

But statutory provisions need not be complied with.—If the bond has no validity as a statute bond, it creates no obligation in the debtor to comply with statutory provisions, further than the terms used in the condition provided. Clark v. Metcalf, 38 Me. 122; Merchants' Bank v. Lord, 49 Me. 99; Ross v. Berry, 49 Me. 434; Smith v. Brown, 61 Me. 70; Gould v. Ford, 91 Me. 146, 39 A. 480.

Plea of performance estops debtor from denying bond is statutory.—A plea of performance of the conditions of the bond, according to the statute, estops the debtor from claiming it to be, by reason of its variance from the requirements of the statute, a common-law bond. Hackett v. Lane, 61 Me. 31.

Performance must be within 6 months.—The bond is subject to three conditions. The defendant must take care to perform one of them within six months, if he would protect himself and his sureties. White v. Estes, 44 Me. 21; Hussey v. Danforth, 77 Me. 17.

To save the forfeiture of the bond some one of the alternative conditions must be performed within six months. Morrison v. Corliss, 44 Me. 97.

And the magistrates, for their own convenience, are not authorized to extend the time of the bond. Morrison v. Corliss, 44 Me. 97.

The day of the date of the bond should be excluded in the computation of the six months. It was the intention of the legislature to allow the debtor six months to fulfill the conditions of the bond. The principle that to save a forfeiture the court should adopt a liberal construction requires that the day should be excluded. Moore v. Bond, 18 Me. 142.

Obligors bound by date of bond.—In computing the time for the performance of the conditions of a bond given under this section, the obligors are bound by the date of the bond. Scribner v. Mansfield, 68 Me. 74. See Wing v. Kennedy, 21 Me. 430.

And parol evidence is inadmissible to show that the bond was in fact executed on a subsequent date. Scribner v. Mansfield, 68 Me. 74.

Surety not relieved because misinformed as to time of performance.—Where the surety in such bond did not read it, and was truly informed of the date of the bond and of the day of the arrest of the debtor, but was misinformed as to the time when by its terms the conditions must be performed, and where there was no fraudulent design, he cannot be relieved from his liability by the terms of the bond. Wing v. Kennedy, 21 Me. 430.

But agreement for payment of debt beyond 6 months discharges surety.—The surety on a poor debtor's six months' relief bond is discharged by a contract made, for a valuable consideration, between the creditor and the principal, without the knowledge of the surety, that the bond should be discharged, if the principal at a time beyond the six months shall pay a specified part of the amount due. Thomas v. Dow, 33 Me. 390.

B. By Submitting to Examination and Taking Oath.

Debtor must follow statute implicitly.—If the debtor would fulfill the first condition, requiring him to "cite the creditor before 2 justices of the peace, submit himself to examination and take the oath prescribed in section 56," he must follow the statute implicitly in all its requirements. Hackett v. Lane, 61 Me. 31; Poor v. Knight, 66 Me. 482.

And must show that he has been admitted to take oath.—The debtor, before he can be relieved from the penalty, on the plea of performance in this particular, in case of a statute bond, must show that he has been admitted to take the oath by a legally constituted tribunal, acting throughout in accordance with the law. Ross v. Berry, 49 Me. 434.

By justices selected according to law.—If the justices who heard the disclosure of the debtor, and allowed him to take the oath prescribed in § 56, were not selected in the mode prescribed in § 68, they had no jurisdiction of the matter, and their proceedings therein were consequently void, and would constitute no defense to an action on the bond. Hackett v. Lane, 61 Me. 31.

It is the right of the creditors to choose one of the justices to take the disclosure of a poor debtor under this section and § 68, and when this right is denied him the justices taking the disclosure have no jurisdiction and their proceedings are void. Parol evidence is admissible to prove that the justices had no jurisdiction. Spaulding v. Record, 65 Me. 220.

Oath must be taken within 6 months.—The oath prescribed, in order to be a compliance with this section, should be taken

before the close of the six months next after the giving of the bond. Fales v. Goodhue, 25 Me. 423.

This section requires that the oath should be taken within six months from the time of giving the bond. Longfellow v. Scammon, 21 Me. 108.

The creditor must be cited, the examination had, and the prescribed oath taken within the required time. Morrison v. Corliss, 44 Me. 97.

Or defense fails even though creditor cited within 6 months.—Although the creditors were cited within six months from the date of the bond, if the oath was not attempted to be taken until afterwards, the defense fails. Longfellow v. Scammon, 21 Me. 108.

And disclosure seasonably commenced.—If it appears that the oath was taken after the expiration of the time specified in the condition of the bond, within which it was to have been done, it matters not that the disclosure was seasonably commenced. It was for the debtor to take care that he cited the creditor in such season as would enable him to finish his disclosure within the time specified in the bond, given upon his enlargement from arrest. Morrison v. Corliss, 44 Me. 97.

The only condition claimed to have been performed is that which provides for a disclosure before two justices of the peace, etc., within six months from the date of the bond. This was not done. Although the disclosure was commenced within, it was not completed, nor was the oath taken, until after the six months had expired. Guilford v. Delaney, 57 Me. 589.

Unless delay caused by adjournment procured by creditor.—That the debtor did not take the oath within the required six months will not cause a forfeiture if the creditor procured an adjournment and thereby occasioned the delay. Moore v. Bond, 18 Me. 142.

Creditor's participation in examination after 6 months is not waiver.—When a bond has been forfeited, a creditor's participation in the examination of the debtor after the expiration of the six months does not constitute a waiver of the forfeiture. Hotchkiss v. Whitten, 71 Me. 577.

Oath named in common-law bond sufficient although not same as required by statute.—Where a debtor, to be released from arrest on execution, had given a bond which did not conform to the requirements of the statute, but was valid as a common-law bond, a forfeiture of it will be saved, if he takes the oath named therein, notwithstanding, before the expiration of six months, and before the taking of the oath, a new statute is in force by which the poor debtor's oath to be taken is materially changed. Randall v. Bowden, 48 Me. 37; Smith v. Brown, 61 Me. 70.

Condition not fulfilled if property not appraised under § 57.—The conditions of a statute bond are not fulfilled if the debtor disclosed notes and accounts which were not appraised and secured to the creditors, as required by § 57. Smith v. Brown, 61 Me. 70.

And creditor entitled to damages under § 79.—If the debtor follows the statute in the citation and selection of the justices, and the tribunal thus legally and fairly constituted omits some of the requirements, such, for instance, as the appraisal of the property disclosed by the debtor as contemplated in § 57, but allows him to take the oath, then the creditor would be entitled to be heard in damages under § 79. Hackett v. Lane, 61 Me. 31.

But such appraisal not necessary under common-law bond.—A disclosure of notes which are not appraised and secured to the creditor, as required by § 57, does not constitute a breach of a common-law bond, where no such appraisal and assignment are therein provided for. Smith v. Brown, 61 Me. 70.

C. By Delivery of Death to Custody of Jailer.

1. In General.

Forfeiture saved only by actual surrender and receipt into custody.—A poor debtor, enlarged from arrest upon giving the six months' bond as provided by statute, who seeks to save forfeiture of his bond by surrendering himself into jail, can only do so by actually surrendering himself into the custody of the jailer and being received by him into actual custody. Goodrich v. Senate, 92 Me. 248, 42 A. 409.

Or surrender in such manner as will obligate jailer to receive debtor.—One of the conditions of the bond given by a debtor is that within six months he will deliver himself into the custody of the keeper of the jail to which he is liable to be committed upon the execution. To comply with this condition, so as to save the penalty of his bond, it is necessary for him, within the time named, either to deliver himself into the custody of the jailer and be received into jail, or to deliver himself to the jailer at the jail in such a manner as would make it the duty of the jailer to receive him into custody. Jordan v. McAllister, 91 Me. 481, 40 A. 324; Putnam v. Fulton, 131 Me. 232, 160 A. 775. See

this note, analysis line IV, B, 2, re jailer not obligated to receive debtor without evidence of authority.

And mere offer to deliver is insufficient.—The condition of the bond is that the debtor will deliver himself to the custody of the jailer, not that he will offer to do so. A mere offer to deliver is not sufficient unless the offer is made in such a manner and under such circumstances as compel acceptance. Putnam v. Fulton, 131 Me. 232, 160 A. 775.

The debtor's offer to deliver himself to the jailer was insufficient if he merely informed the jailer what he came to do and asked for information. He might as well claim to make a tender of money by telling the person to whom it was due that he came to make a tender, and asking how much was due without offering any money in fact. Jones v. Emerson, 71 Me. 405.

And surety cannot surrender debtor against his will.—The language of this section clearly requires the act of surrender to be performed by the principal. There is no provision of law authorizing the surety, by implication or otherwise, to surrender his principal against the will of such principal. Woodman v. Valentine, 24 Me. 551, wherein is discussed former provisions of this section for the surrender of the debtor by the surety.

The penalty of the bond is saved by the debtor's voluntary surrender to the jailer and his actual confinement in jail. Blanchard v. Blood, 87 Me. 255, 32 A. 891; Jordan v. McAllister, 91 Me. 481, 40 A. 324.

By "delivering himself into the custody of the jailer" the debtor has done everything he obligated himself to do, and thus saves the penalty of his bond. Jones v. Emerson, 71 Me. 405; Hussey v. Danforth, 77 Me. 17.

If the debtor submits himself to the control of the jailer, and goes into actual confinement, he has done all that is in his power, and the penalty of the bond is saved. Hussey v. Danforth, 77 Me. 17.

Regardless of debtor's intention.—The conditions of the bond relate to the acts rather than the intention of the party. If the debtor in fact delivered himself into the custody of the jailer, whatever may have been his intention or expectation as to his release, or as to the manner in which it was to be effected, the court will not be warranted in saying that the intention should overrule the act and that he had not complied with the condition named in the bond. Hussey v. Danforth, 77 Me. 17.

And regardless of prior attempt to disclose.—Where a debtor, having given a bond in the usual form, attempted to disclose, but did not complete his disclosure, and thereupon, within six months from the date of the bond, surrendered himself to the custody of the jailer, and went into close confinement, the penalty of the bond is saved. White v. Estes, 44 Me. 21.

And debtor need not make complaint that he is unable to support himself.—If the debtor surrendered himself into jail and delivered to the jailer copies of the execution and bond, and the jailer accepted the papers and committed the debtor into the jail, this is all the bond required him to do and his defense is made out. He did not obligate himself to make a written complaint that he was unable to support himself in jail according to the provisions of § 82. Blanchard v. Blood, 87 Me. 255, 32 A. 891.

The jailer's misconduct or negligence in the performance of his duties can in no wise affect the rights of the debtor. Rollins v. Dow, 24 Me. 123.

And is not in question.—If the debtor did what was incumbent on him, by way of complying with the condition of his bond, according to the just import of its terms, whether the jailer, thereupon, neglected the performance of his duties or not is out of the question. Rollins v. Dow, 24 Me. 123.

Thus, improper discharge will not prevent performance.—If, after having delivered himself up to the jailer, and gone into close confinement, the defendant was discharged by the jailer, improperly, still the forfeiture is saved, and the plea of performance established. White v. Estes, 44 Me. 21.

Whether or not the debtor's liberation by the jailer was irregular and unauthorized is an inquiry which does not affect the rights of the sureties on this bond. Blanchard v. Blood, 87 Me. 255, 32 A. 891.

Whether the jailer upon any representations of the debtor or otherwise, after his custody had commenced, neglected the performance of his duties, or, with no intention of neglect on his part, improperly discharged the debtor is not before the court for consideration in a suit on the bond. Hussey v. Danforth, 77 Me. 17.

And sureties not liable if sheriff refuses to receive debtor who properly delivers himself.—Even if the sheriff refuses to receive the debtor, the sureties on the bond will nevertheless be discharged, if the debtor does all that he can in presenting

himself to the sheriff. Noyes v. Perkins, 129 Me. 385, 152 A. 405.

Delivery not affected by fact that debtor already in jail.—The fact that, at the time of the attempted surrender or delivery of himself under the bond, the debtor was in the same jail, under arrest for commitment to the state prison, does not affect the sufficiency of the delivery. There is no reason or law to prevent a sheriff holding the same man at the same time in his custody in jail under different and separate processes. Noyes v. Perkins, 129 Me. 385, 152 A. 405.

Mode of confinement determined by jailer.—If the debtor surrenders himself to the custody of the jailer, it is for the latter to dispose of him as he should deem it his duty to do. The debtor cannot prescribe the mode in which he should be confined. Submitting himself to the control of the jailer, at the jail, is all that is within his power. Whatever confinement it is deemed proper to impose is with the jailer. In surrendering himself, therefore, to the control of the jailer the penalty of the bond is saved. Rollins v. Dow, 24 Me. 123, holding that the words "and go into close confinement," contained in the bond following the condition as to delivery to the jailer, added no duty not prescribed by this section.

Creditor can show sheriff's calendar wrong as to debtor's surrender.—Notwithstanding the sheriff's calendar may contain an entry of such surrender, the creditor in a suit upon the bond may be allowed to prove that the entry is erroneous, and that the debtor did not, within the time limited in the bond, in fact surrender himself into custody and was not so received by the jailer. Goodrich v. Senate, 92 Me. 248, 42 A. 409. See note to c. 89, § 185.

Agreement extending time of surrender no defense to suit on bond.—Where a poor debtor's bond had been given, and the debtor appeared at the town wherein the jail was situated to surrender himself to the jailer on the last day of the six months, and the creditor then agreed in writing that if the debtor would surrender himself at a certain subsequent day, everything should be considered the same as if the surrender had then been made, and that all matters and things in regard to the bond should be done on the latter day, as if the bond had expired on that day, and have the same effect, it was held that the agreement, without performance on the part of the debtor, or offer to perform, furnished no defense to an action on the bond. Washburn v. Mosely, 22 Me. 160.

2. Necessity of Delivering Evidence of Jailer's Authority to Receive Debtor.

The bond does not require the debtor to furnish any precepts or copies, but only to "deliver himself." March v. Barnfield, 107 Me. 40, 76 A. 958; Noyes v. Perkins, 129 Me. 385, 12 A. 405.

And statute says nothing of filing written evidence with jailer.—The statute authorizing the debtor to save the penalty of his bond by delivering himself into the custody of the keeper of the jail does not prescribe the mode and manner of doing it. Nothing is said of filing any written evidence with the jailer when he delivers himself. Jones v. Emerson, 71 Me. 405.

But practice is to deliver copy of either execution and return or of bond.—The universal practice has been for the debtor to deliver to the jailer, at the jail, when he delivers himself up to custody, either an attested copy of the execution and return thereon, or of the bond. Jones v. Emerson, 71 Me. 405; Hussey v. Danforth, 77 Me. 17; Jordan v. McAllister, 91 Me. 481, 40 A. 324; Putnam v. Fulton, 131 Me. 232, 160 A. 775.

And jailer not obliged to receive debtor without such evidence.—The jailer is not obliged to receive the debtor unless he produces and delivers to the jailer sufficient evidence of his authority to keep and hold him until discharged by authority of law, such as an attested copy of the bond or of the execution and officer's return thereon. Jones v. Emerson, 71 Me. 405; Jordan v. McAllister, 91 Me. 481, 40 A. 324; Putnam v. Fulton, 131 Me. 232, 160 A. 775, wherein it was held that, in a suit by a judgment creditor against a jailer for damages because of his not having received the debtor into custody, a declaration alleging that the debtor offered to so deliver himself but not alleging that he did deliver himself, nor that he accompanied the offer with evidence of the authority of the jailer to receive him, is bad on demurrer.

But he may do so.—A jailer may receive one who offers to place himself in custody without being presented with an attested copy of the execution and return thereon or of the bond. Jordan v. McAllister, 91 Me. 481, 40 A. 324; Putnam v. Fulton, 131 Me. 232, 160 A. 775.

Without committing actionable wrong.—The jailer commits no actionable wrong, for which either he or his principal becomes liable in damages, in receiving a

debtor without written evidence of his authority to receive or keep him. Jordan v. McAllister, 91 Me. 481, 40 A. 324.

If a jailer may receive a debtor who voluntarily surrenders himself without a copy of bond or execution, so as to make the delivery a sufficient compliance with the condition of his bond, it follows that the acceptance by a jailer of a debtor under these circumstances cannot be an actionable wrong. He need not receive a debtor without sufficient evidence, he may very properly require a certified copy of execution and return, or of the bond; but, if he sees fit, he may waive this without making himself, or the sheriff under whom he is serving, liable for any consequences that may follow. The creditor whose debtor is in jail under these circumstances should see that the jailer is supplied with proper evidence upon which to hold him. Jordan v. McAllister, 91 Me. 481, 40 A. 324.

In which case the delivery is sufficient.—The production of an attested copy of the execution and return, or of the bond, may be waived, and if the jailer receives the debtor without either, or upon the production of such data as may be satisfactory to him, the delivery is undoubtedly sufficient. Hussey v. Danforth, 77 Me. 17; Jordan v. McAllister, 91 Me. 481, 40 A. 324; Noyes v. Perkins, 129 Me. 385, 152 A. 405. See Jones v. Emerson, 71 Me. 405; Putnam v. Fulton, 131 Me. 232, 160 A. 775.

The bond allowed to obtain the release of a debtor from arrest upon execution is satisfied if and when the debtor seasonably and actually does "deliver himself into the custody of the keeper of" the proper jail, even though he does not furnish the jailer with a copy of the bond, or execution, or with any other precept. March v. Barnfield, 107 Me. 40, 76 A. 958.

Sec. 51. Bond, when valid.—The bond described in the preceding section is a valid statute bond although the penalty varies not exceeding 5% from the sum aforesaid; and judgment in a suit thereon shall be rendered according to the provisions of section 66. (R. S. c. 107, § 51.)

Cross reference.—See § 74, re validity of certain bonds.

The percentage of difference is to be computed upon the penalty of the bond. Keith v. Bolier, 92 Me. 550, 43 A. 499.

Prior to the enactment of this section, it was held that, if the bond was not taken for precisely double the amount for which the debtor stood liable, it was not a statute bond. See Barrows v. Bridge, 21 Me. 398; Dyer v. Woodbury, 24 Me. 546; Woodman v. Valentine, 24 Me. 551; Clark v. Metcalf, 38 Me. 122; Flowers v. Flowers, 45 Me. 459; Ross v. Berry, 49 Me. 434; Call v. Foster, 49 Me. 452.

Sec. 52. Application by debtor under bond or imprisoned; citation to creditor.—A debtor who has given such bond may apply in writing within the time limited in his bond to a justice of the peace in the county where he was arrested, claiming the benefit of the oath authorized in section 56; or, if he is committed or has delivered himself into the custody of the jailer, he may apply to a justice of the same county, or, at his request, the jailer shall apply in his behalf, and in either case the justice shall appoint a time and place for his examination and issue a citation to the creditor, under his hand and seal, which citation may be in substance as follows:

"STATE OF MAINE.

....., ss. To .... You are hereby notified of the desire of the debtor as expressed in the foregoing application, and that I have appointed ....., the ..... day of ....., A. D., 19.., at ..... o'clock in the ..... noon, and the ..... of .... in ....., in said county, as the time and place for said examination. And you are hereby notified to be present and select one of the justices, and be heard in said examination.

Given under my hand and seal at ....., in said county, the ..... day of ....., A. D., 19...

...., Justice of the Peace."

(R. S. c. 107, § 52.)

Cross reference.—See note to § 54, re signing of citation does not disqualify justice from acting.

Section applies to debtor committed after creditor's death.—The provisions of this section apply as well to a debtor commit-

ted after the death of the creditor, as to one committed before; it recognizes the legality of the commitment in either case, and provides for the debtor a remedy for his release. Wing v. Hussey, 71 Me. 185.

Any justice of the peace of the county is authorized by this section to issue the citation. Ayer v. Woodman, 24 Me. 196.

Application must conform to statute.—The application, being the foundation of all subsequent proceedings, must be in conformity to the statute provisions to give jurisdiction to the justices. Neil v. Ford, 21 Me. 440.

And be in writing.—It appears to have been the intention of the framers of the statute that all the proceedings for this purpose should be exhibited by written documents duly authenticated; and the application of the debtor should therefore be made in writing and be by him subscribed. Neal v. Paine, 35 Me. 158.

Citation must be in prescribed form.—It is well settled that a citation by a justice of the peace to a creditor in poor debtor proceedings must be issued under the hand and seal of the magistrate and substantially in the form prescribed by statute. Beaupre v. Schlosberg, 131 Me. 407, 163 A. 653.

And must be under seal.—When a person, arrested on execution and released upon giving a poor debtor's bond, desires to disclose, the law requires that the citation to the creditor should be under seal. Lewis v. Brewer, 51 Me. 108.

The absence of which renders it void.—A citation to the creditor which fails to follow this section in the positive requirement of a seal is void and the justices have no authority to proceed further. Miller v. Wiseman, 125 Me. 4, 130 A. 504.

Although now affixed to legal instruments principally to furnish evidence of their authenticity, so long as a seal is required to be affixed, it cannot be dispensed with. The citation is void if issued without a seal. Beaupre v. Schlosberg, 131 Me. 407, 163 A. 653.

But it is not requisite that either the date of the judgment or of the execution should be stated in the citation. Rand v. Tobie, 32 Me. 450.

Justice issuing citation need not be disinterested.—This section does not require that a justice of the peace who issues a citation to the creditor shall be disinterested. He performs no judicial duties, but acts ministerially. Gray v. Douglass, 81 Me. 427, 17 A. 320.

And citation may be issued by justice who was surety on bond.—A citation is not invalid because it was issued by a justice of the peace who was one of the sureties on the debtor's bond. Gray v. Douglass, 81 Me. 427, 17 A. 320.

Copy of citation not admissible in evidence.—The justice acts ministerially when he issues the citation. It forms no part of his records as a judicial officer, and a copy of it, and of the proceedings of others upon it, certified by him, cannot be admitted as evidence. Ayer v. Fowler, 30 Me. 347.

Justices' adjudication conclusive as to sufficiency of citation.—The justices having been duly selected had jurisdiction, and their adjudication that the debtor "has caused the aforesaid creditor to be notified according to law" is conclusive as to the sufficiency of the citation. Gray v. Douglass, 81 Me. 427, 17 A. 320.

Deficiency in citation may be waived by appearance, etc.—See Fuller v. Davis, 73 Me. 556.

For cases concerning the sufficiency of the citation prior to the inclusion of the form in this section, see Poor v. Knight, 66 Me. 482; Farrington v. Farrar, 73 Me. 37.

Applied in Knight v. Norton, 15 Me. 337; Hanson v. Dyer, 17 Me. 96; Stevens v. Manson, 87 Me. 436, 32 A. 1002; Karam v. Marden, 128 Me. 451, 148 A. 691; Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

Sec. 53. Citation; service.—The citation shall be served on the creditor, or one of them if there is more than one, or the attorney of record in the suit, or any known authorized agent of the creditor, by any officer qualified to serve civil process between the same parties, by reading it to him, or leaving an attested copy thereof at his place of last and usual abode, or by giving an attested copy of it thereof to him in hand 15 days at least before the time appointed for the examination, if the creditor is alive; otherwise, it shall be so served on his executor or administrator, if found in the state, and if not, such copy shall be left in like time with the clerk of the court or magistrate who issued the execution. (R. S. c. 107, § 53.)

Cross reference.—See note to c. 89, § 207, re constable may serve citation although amount due creditor is more than $100.

Section applies to debtor committed after creditor's death.—The provisions of this section apply as well to a debtor committed after the death of the creditor, as to one committed before. It recognizes the legality of the commitment in either case, and provides for the debtor a remedy for his release. Wing v. Hussey, 71 Me. 185.

The object of the notice to the creditor is to afford him an opportunity to appear and examine the debtor. Moore v. Bond, 18 Me. 142.

And notice must conform to statutory requirements.—The notice to the creditor lies at the foundation of the proceedings. It must be substantially according to the requirements of the statutes, before the justices proceed to take the disclosure, and in order that they may have jurisdiction so to do. Perry v. Plunkett, 74 Me. 328.

In order to show valid hearing.—In order to show that there was a valid hearing on the application made by the debtor for the benefit of the oath, it must appear that he caused to be served on the creditor "15 days at least before the time appointed for the examination" of the execution debtor, a citation to attend the examination as required by this section. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

But creditor may waive right to notice.—Though this section prescribes the mode of notifying a creditor of the intention of an execution debtor to take the poor debtor's oath, yet such creditor may waive his right to such notice. Page v. Plummer, 10 Me. 334.

And a defective service of the citation becomes immaterial when the creditor appears without objection. Moore v. Bond, 18 Me. 142.

Any illegality of the service of the citation is waived by an appearance. Fuller v. Davis, 73 Me. 556.

Eleven days' notice to the creditor of a poor debtor's disclosure, although the statute prescribes fifteen, is sufficient, if the creditor appears at the disclosure, and does not then object to the notice. The insufficiency of the notice is thereby waived. Folsom v. Cressey, 73 Me. 270.

And illegality may be waived by attorney.—It is sufficient to serve the citation upon the attorney of record, and it is competent for him to waive any illegality in the service. Patten v. Kimball, 73 Me. 497. See Page v. Plummer, 10 Me. 334.

A service upon one of the creditors, if there be more than one, is sufficient. Smith v. Brown, 61 Me. 70.

And service of the citation upon the attorney of record of the creditors is authorized by this section. Clement v. Wyman, 31 Me. 50; Patten v. Kimball, 73 Me. 497.

For a case under this section when it allowed a service of the citation to be made upon the attorney only when the creditor resided without the state, see Holmes v. Baldwin, 17 Me. 398.

Officer who is surety on bond may serve citation.—An officer may serve a citation upon the creditor although such officer is one of the sureties on the debtor's bond. Patterson v. Eames, 54 Me. 203. See note to § 68, re such officer may appoint one of justices.

And service valid though officer had not given required bond.—It is not a valid objection to the service of a citation in a poor debtor's disclosure that the constable who made the service had not given the bond required by law, the acts of an officer de facto, so far as third persons are concerned, being as valid as the acts of an officer de jure. Bliss v. Day, 68 Me. 201. See note to c. 89, § 207.

It is immaterial, so far as the service of citation is concerned, whether the bond is a valid statute bond or a bond good only at common law. If the bond is silent as to how the creditors are to be notified, notice according to the statute in force at the time the bond was given, and also according to the statutes in force at the time the citation was served, is sufficient. Smith v. Brown, 61 Me. 70.

Seal need not be reproduced in copy served.—A copy of the seal is not an essential part of the "attested copy" of the citation to be served upon the creditor as provided by this section. The general and universal rule seems to be that the seal of an original process need not be reproduced in the copy for service. There is no mandate which warrants the adoption of a different rule in poor debtor proceedings. Beaupre v. Schlosberg, 131 Me. 407, 163 A. 653.

Creditor's assignee in bankruptcy need not be notified if debtor has no notice of bankruptcy.—If the execution creditor, after the debtor has been arrested and given a poor debtor's bond, becomes a bankrupt, but the debtor has received no notice thereof, a citation to the creditor is good, without notice to his assignee. Hayes v. Kingsbury, 22 Me. 400.

Notice must be served 15 days before examination.—This section requires the citation to be served "15 days at least before the time appointed for the examina-

tion" of the debtor. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

But each of 15 days need not be full day. —There is nothing in this section to indicate that the legislature intended that each of the required 15 days should be a full day. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

The fact that this section requires the citation to be served 15 days at least before the time appointed for the examination, does not call for the application of any different rule in reckoning the time. The use of the words "at least" is no indication of a legislative intent that a 15 days' notice of twenty-four hours each must be given. The words "15 days at least" mean only that at least 15 days' notice must be given, computed in the manner in which time is usually reckoned in connection with service of process. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

The fact that at least a twenty-four hour notice is required under § 25 has no tendency to show that a 15-day notice of twenty-four hours each is required under this section. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

And whole of day of service is counted without regard to fractions. — The method of computing time where a process or notice is required to be served a certain number of days before the return day is not regulated by the Maine statutes and, by the weight or authority and in the absence of statute to the contrary, the whole of either the day of service or the return day is counted without regard to fractions of a day. Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

Former provision of section. — Prior to the inclusion in this section of the provision as to reading, it was held that the service of the notification by reading the same to the creditor, instead of leaving a copy, was insufficient. See Hanson v. Dyer, 17 Me. 96.

Applied in Smith v. Bragdon, 48 Me. 101.

Sec. 54. Examination before 2 justices; remedy for errors and defects in citation.—The examination shall be before 2 disinterested justices of the peace for the county, who may adjourn as provided in section 5, and shall examine the citation and return, and if found correct shall examine the debtor on oath concerning his estate and effects, their disposal and his ability to pay the debt for which he is committed. No citation shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, when the person and case can be rightly understood. Such errors and defects may be amended on motion of either party. (R. S. c. 107, § 54.)

Cross references.—See § 5 and note, re adjournments; § 59 and note, re justices' disinterestedness should appear on face of certificate; note to § 68, re justices must be selected in accordance with that section.

Purpose of examination.—The examination required is designed for the purpose of enabling the magistrates to determine whether the oath prescribed can be permitted to be taken by the debtor; and also to secure to the creditor, by means of the arrest, imprisonment or bond, such a disclosure as will present the pecuniary condition of the debtor, and the history of the property, which he may have owned since the debt was contracted, and the disposal of the same so far as it may have been disposed of, and that of which he may still be the owner, and of which he may have the control. Ledden v. Hanson, 39 Me. 355.

One object of the statute in providing for the disclosure of a debtor arrested on execution is that the creditor may know his pecuniary means, and if property subject to attachment is disclosed, what it is, and where it may be found, that it may be taken and disposed of, in partial or full satisfaction of the debt. Hatch v. Lawrence, 29 Me. 480.

The inquiry to be made is limited to transactions which occurred at the time the debt was contracted and afterwards. Ledden v. Hanson, 39 Me. 355.

Justices constitute tribunal of judicial character. — The two magistrates, when duly selected for the purpose, constitute a tribunal of a judicial character, with powers and duties conferred and regulated by statute. They are empowered to examine and adjudicate upon the notification and return; to examine the debtor on oath, concerning the state of his affairs, and his ability to pay the debt; to administer oaths, and hear other legal and pertinent evidence, and to decide upon it. Ayer v. Fowler, 30 Me. 347.

Two disinterested justices of the peace may, under the law, become a court, for the purpose of examining the debtor who has applied for this statutory procedure.

They are empowered to "examine the citation and return" provided for in § 52 and if that is "found correct," the authority of a tribunal may be assumed by them. Karam v. Marden, 128 Me. 451, 148 A. 691.

And their judgment is as conclusive as that of other courts. — The judgment of the justices of the peace, who hear a debtor's disclosure, having jurisdiction, cannot be contradicted as between the parties, upon any point judicially determined by them. They are a special tribunal with judicial powers, and their judgment, within their jurisdiction, is as conclusive as that of other courts. Cannon v. Seveno, 78 Me. 307, 4 A. 789. See § 79 and note, re determination as to legal service of citation not conclusive.

Single justice cannot act alone.—Both justices constitute the tribunal; both may adjudicate and decide, but neither can do it separately from the other. So copies may be authenticated by both, but not by one of them. Ayer v. Fowler, 30 Me. 347.

Justices need not reside in town where disclosure made. — There is no provision of law requiring the justices selected for taking the disclosure of a poor debtor to reside in the town where the disclosure is made, or an adjoining town. Blake v. Brackett, 47 Me. 28.

But they must be authorized to act in county where arrest made. — The debtor is to have the examination before magistrates, authorized to act in the county in which the arrest was made, and he cannot cite his creditor and be heard with effect before those for any other county. Houghton v. Lyford, 39 Me. 267.

And they must be disinterested.—If the examination of the debtor did not take place "before 2 disinterested justices of the peace for the county," as required by this section, the condition of the board has not been performed. Ware v. Jackson, 24 Me. 166.

At the time of disclosure.—The question of "disinterestedness" must be determined upon the facts existing at the time of the disclosure. If the magistrate was then competent to act, his subsequent action and relations could not deprive a poor debtor of the benefit of his discharge. Cummings v. York, 54 Me. 386.

A justice is disinterested within the meaning of this section unless he has an interest in the question—not an intellectual, moral or sympathetic interest, but a legal, positive interest, either by way of relationship to some of the parties, or by way of some accruing pecuniary gain or loss from the result. McGilvery v. Staples, 81 Me. 101, 16 A. 404.

Father of debtor cannot act as justice. —In a disclosure upon a poor debtor's bond, the father of the debtor, being objected to by the creditor, is incompetent to act as one of the justices of the peace. Baker v. Carleton, 32 Me. 335.

Nor can inhabitant of town in whose favor execution exists. — Upon a poor debtor's disclosure on an execution in favor of the inhabitants of a town, a justice who is an inhabitant of the town is not disinterested as required by this section. Norridgewock v. Sawtelle, 72 Me. 484.

But justice issuing citation not disqualified.—The mere fact that a justice has issued a citation cannot prevent his being regarded as disinterested, and, being otherwise qualified, he will come within the provision of this section and be authorized to act. Ayer v. Woodman, 24 Me. 196.

That a justice acting under this section issued the citation to the creditor, and that he, as a justice of the peace, signed the citation, does not make him "interested" within the meaning of the section. This was a mere ministerial act, requiring no exercise of judgment, and touching in no way the question whether the debtor was entitled to his discharge on the disclosure to be afterwards made. Cummings v. York, 54 Me. 386.

Nor is one who aided debtor in preparing disclosure.—A justice selected by a poor debtor to hear his disclosure, if he is not related by consanguinity or affinity, and has no pecuniary interest in the result, may be considered "disinterested;" and his official act will not be rendered void, because he had counselled and aided the debtor in preparing for his disclosure, — although this should have deterred him from acting as one of the justices. Lovering v. Lamson, 49 Me. 334.

Or one who heard prior disclosure of same debtor.—A justice of the peace who has heard one disclosure of a poor debtor arrested upon execution, and formed an opinion upon the evidence there presented, is not thereby disqualified to hear and determine a second disclosure by the debtor upon the same execution. McGilvery v. Staples, 81 Me. 101, 16 A. 404.

The justices are to determine the mode and extent of the examination. Burnham v. Howe, 23 Me. 489.

And pass on sufficiency of return. — By this section, the justices are authorized and empowered to examine the return of

the notification, and in their discretion to proceed further, if it appears to them to have been duly made. It is specially made a part of their jurisdiction to examine and pass upon the sufficiency of the return. It is an act of judicial discretion, entrusted to them by law for their definitive determination. Agry v. Betts, 12 Me. 415. See Lewis v. Brewer, 51 Me. 108.

Notwithstanding curative provisions of section. — This section provides that "no citation shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes, where the person and case can be rightly understood. Such errors and defects may be amended on motion of either party." This provision, as well as the section to which it is appended, relates to the proceedings before the magistrates. They are not absolved from the duty of examining the citation and return, and finding them correct before they proceed to examine the debtor, administer the oath, and grant the certificate. Perry v. Plunkett, 74 Me. 328.

And if preliminary proceedings were not regular they cannot proceed. — The preliminary proceedings must be in conformity to the provisions of the statute to give the justices jurisdiction, and authorize them to act. This appears to have been the intention of that provision in this section, which declares that the justices shall examine the citation and return, implying that if not regular and in due form, they have no authority to proceed. Knight v. Norton, 15 Me. 337. See Lewis v. Brewer, 51 Me. 108.

By this section the justices are required to adjudicate upon the correctness of the notice to the creditor. If they adjudge it correct, they are to proceed further; otherwise, their action is at an end. Lowe v. Dore, 32 Me. 27.

If the record shows that the justices sitting did not have before them the citation, under the hand and seal of its author, any pronouncement by them in the premises is a nullity. The statute was not followed; the law was disregarded. Karam v. Marden, 128 Me. 451, 148 A. 691.

But the decision of the justices as to the sufficiency of the citation and return is conclusive. Lowe v. Dore, 32 Me. 27; Lewis v. Brewer, 51 Me. 108. See § 79 and note, re receipt of evidence to show no legal service of citation.

Where the justices have examined the notification to the creditor, and have found it to be in conformity with the law, their decision upon this point is conclusive, and it is not competent for the plaintiff to go behind their certificate, and raise subsequently any question as to the sufficiency of the notice. Cunningham v. Turner, 20 Me. 435.

It is for the justices to judge the sufficiency of the notification and the return. And their judgment in that matter is conclusive in a suit upon the bond. Burnham v. Howe, 23 Me. 489.

It appears to have been the intention of the framers of the statutes to submit the question of the legality and sufficiency of the notice to the decision of the justices, and to make their decision conclusive. Baker v. Holmes, 27 Me. 153.

And plaintiff cannot invalidate record by proving citation not under seal.—If the justices have certified in their record that they examined the citation and return and found the same correct, it is not competent for the plaintiff to invalidate the record, by proof that the citation was not under seal. If a party desires to take advantage of such a defect, he should call the attention of the justices to it, in which case they would undoubtedly hold the citation to be insufficient. If not, the aggrieved party could apply for a writ of certiorari to quash their proceedings. But the justices' record cannot be impeached collaterally, when offered in evidence in a suit upon the bond. Lewis v. Brewer, 51 Me. 108.

Want of form and circumstantial errors may be amended.—In hearings to liberate debtors, mere want of form and circumstantial errors count as nothing when the situation may be rightly understood, and are amendable on motion. Miller v. Wiseman, 125 Me. 4, 130 A. 504.

But proceedings cannot go through without requisite amendments. — The magistrates are, by virtue of the last provision of this section, authorized, in cases where the person and case can be rightly understood, to allow amendments in matters of form, or of circumstantial errors or mistakes, and thus make the proceedings correct. But the section was not designed to give immunity to such a want of care as would permit the proceedings to go through without the requisite amendments, and then have the same effect as if the requirements of the statute had been complied with. The design of it was to prevent the attempted performance by the principal of this condition in his bond from failing, whenever there was so far a compliance with statute requirements that the person and case could be rightly understood, provided the applicant for the

oath and discharge bestowed sufficient care upon the proceedings to make them correct, by amendments within the purview of the act. Perry v. Plunkett, 74 Me. 328.

And citation cannot be amended after suit presented to law court. — When the citation to the creditor given by a poor debtor, who has given bond on arrest conditioned as by law required, incorrectly states the amount of the judgment, and the error is not amended before the magistrates under the provisions of this section, it is too late to move for an amendment in a suit on the bond which has been presented to the law court upon an agreed statement of facts. Perry v. Plunkett, 74 Me. 328.

Citation may be amended to correct erroneous date.—Where the citation to the creditor in a poor debtor's disclosure gives an erroneous date of the judgment the justices properly allowed an amendment correcting the error. Driscoll v. Stanford, 74 Me. 103.

But the omission of the seal from the citation does not fall in the class of defects cured by this section. Miller v. Wiseman, 125 Me. 4, 130 A. 504.

Applied in Williams v. Burrill, 23 Me. 144; Hovey v. Hamilton, 24 Me. 451; Fales v. Goodhue, 25 Me. 423; Stevens v. Manson, 87 Me. 436, 32 A. 1002.

Stated in Sargent v. Salmond, 27 Me. 539.

Cited in Chase v. Collins, 68 Me. 375.

Sec. 55. Examination in writing and sworn to.—The creditor may propose to the debtor any interrogatories pertinent to the inquiry and, if he requires it, they shall be answered in writing and the answers signed and sworn to by the debtor; and the creditor may have a copy certified by the justices on paying therefor 12¢ a page. (R. S. c. 107, § 55.)

A debtor need not swear to his disclosure taken in writing unless requested by the creditor so to do. Folsom v. Cressey, 73 Me. 270.

No limit on time within which interrogatories and answers may be reduced to writing.—There is no limit during the examination, beyond which the creditor cannot proceed to reduce to writing the interrogatories and answers, where no objection is interposed, but the request is granted. Jewett v. Rines, 39 Me. 9.

Property disposed of prior to debt not subject of inquiry. — The property which the debtor purchased, or owned, and the disposal of the same, before the origin of the debt, which was the cause of his arrest and imprisonment, whatever may have been his conduct, or intentions in reference thereto, is not made in any degree the test of his right to take the oath, and cannot be subject of inquiry pertinent to the question before the justices of the peace. Ledden v. Hanson, 39 Me. 355. See note to § 54.

The creditor's attorney is not prohibited by this section from writing the debtor's answers to the creditor's interrogatories. Jewett v. Rines, 39 Me. 9.

In absence of original, copy of disclosure is admissible to prove its contents.— The law requiring the disclosure to be in writing if desired by the parties, and giving the creditor a right to a certified copy of that disclosure, such copy, in the absence of the original, is the legitimate evidence to prove the contents of the disclosure, and parol proof of the contents is not admissible until it is shown that neither the original nor a copy duly certified is attainable. Winsor v. Clark, 39 Me. 428.

Applied in Marr v. Clark, 56 Me. 542.

Stated in Ayer v. Fowler, 30 Me. 347.

Sec. 56. Oath.—If, on such examination and hearing, the justices are satisfied that the debtor's disclosure is true and they do not discover anything therein inconsistent with his taking the oath, they may administer it to him as follows: "I, ..., solemnly swear" (or "affirm") "that I have no real or personal estate, or interest in any, except what is exempted by statute from attachment and execution, and what I have now disclosed; and that since any part of this debt or cause of action accrued, I have not directly or indirectly sold, conveyed or disposed of, or entrusted to any person, any of my real or personal property to secure it or to receive any benefit from it to myself or others with an intent to defraud any of my creditors. So help me God." (or, "This I do under the pains and penalties of perjury.") (R. S. c. 107, § 56.)

The justices are to examine the debtor and judge conclusively upon the propriety of administering the oath. Burnham v. Howe, 23 Me. 489.

Oath not administered until all duties performed. — It was not the intention to permit the oath to be administered to the debtor until he has performed all the duties which the statute required of him. Harding v. Butler, 21 Me. 191.

And it is not to be administered if anything inconsistent with it is discovered.— The justices are not to administer the oath prescribed by this section, if they discover by the examination anything inconsistent with that oath. Little v. Cochran, 24 Me. 509.

The debtor is not required by the oath to declare only that he has not conveyed property with intent to defraud the creditor, on whose execution he has been committed or arrested, but that he has not, since that debt was contracted, conveyed or entrusted to any person all or any part of the estate, real or personal with an intent to secure the same or to receive any benefit therefrom, with an intent to defraud any of the creditors. Little v. Cochran, 24 Me. 509.

Liability of justice acting without jurisdiction and refusing to administer oath. — When a justice, acting in a disclosure matter, without jurisdiction, refuses the execution debtor the benefit of the oath provided by this section, and indorses upon the execution the certificate required by § 39, and annexes to the execution the capias required by said § 39, and such debtor is arrested and committed to jail on such capias and execution, such justice is liable in an action for false imprisonment. Stuart v. Chapman, 104 Me. 17, 70 A. 1069.

Applied in Moore v. Bond, 18 Me. 142; Morse v. Rice, 21 Me. 53; Longfellow v. Scammon, 21 Me. 108; Fales v. Goodhue, 25 Me. 423; Hatch v. Lawrence, 29 Me. 480; Ayer v. Fowler, 30 Me. 347; Baker v. Carleton, 32 Me. 335; Merchants' Bank v. Lord, 49 Me. 99; Hackett v. Lane, 61 Me. 31; Poor v. Knight, 66 Me. 482; Emery v. Brann, 67 Me. 39; Gould v. Ford, 91 Me. 146, 39 A. 480; Casco Mercantile Trust Co. v. Seidel, 127 Me. 286, 143 A. 101; Beaupre v. Schlosberg, 131 Me. 407, 163 A. 653.

Stated in Spaulding v. Fisher, 57 Me. 411.

Cited in Bunker v. Hall, 23 Me. 26; Randall v. Bowden, 48 Me. 37; Leighton v. Pearson, 49 Me. 100; Chase v. Collins, 68 Me. 375; Stevens v. Manson, 87 Me. 436, 32 A. 1002; Almon H. Fogg Co. v. Bartlett, 106 Me. 122, 75 A. 380; Tarr v. Davis, 133 Me. 243, 176 A. 407; Durstin v. Dodge, 138 Me. 12, 20 A. (2d) 671.

Sec. 57. Attachable property disclosed, appraised and set off.— When, from such disclosure, it appears that the debtor possesses or has under his control bank bills, notes, accounts, bonds or other contracts or other property, not exempted by statute from attachment, which cannot be come at to be attached, and the creditor and debtor cannot agree to apply the same towards the debt, the justices hearing the disclosure shall appraise and set off enough of such property to satisfy the debt, cost and charges; and the creditor or his attorney, if present, may select the property to be appraised. If the creditor accepts it, the property may be assigned and delivered by the debtor to him and applied toward the satisfaction of his demand. If any particular article of such property, necessary or convenient to be applied in satisfaction of the execution, exceeds the amount due thereon and is not divisible in its nature, the creditor may take it by paying the overplus to the debtor or securing it to the satisfaction of the justices. (R. S. c. 107, § 57.)

Court assists creditor in reading debtor's property. — Since the enactment of this section the court has assisted, through its equity powers, judgment creditors in discovering and reaching their debtors' property which could not be seized on execution at law, and especially such as had been fraudulently transferred and secreted. Pulsifer v. Waterman, 73 Me. 233.

Creditor has benefit of all claims of debtor against other persons.—The intention appears to have been to afford the creditor the benefit of all claims which the debtor might have against other persons. Robinson v. Barker, 28 Me. 310.

And condition of bond not performed if property not appraised.—If the debtor discloses notes, accounts and executions as his property, this section requires them to be appraised, and if without any appraisal, the oath is administered to him, the proceeding is void, and the condition of the bond is not performed by taking the oath under such a state of facts. Fessenden v. Chesley, 29 Me. 368.

To prevent a forfeiture of the debtor's bond, the property disclosed, so far as it is embraced by this section should be appraised. Baldwin v. Doe, 36 Me. 494.

If notes were shown to be owned by the

debtor, the omission to have them appraised is a breach of the bond. Jewett v. Rines, 39 Me. 9.

Justices to judicially determine existence of property mentioned in section.—Whether it does or does not appear from the disclosure that there is any such property as mentioned in this section disclosed by the debtor may embrace matters of law and fact, and such matters are within the jurisdiction of the justices, and they must necessarily determine them. It is a matter which they must determine judicially, and their determination is binding until set aside by proper process. Cannon v. Seveno, 78 Me. 307, 4 A. 789.

Chose in action must be appraised.—It is well settled that a debtor, having an interest in a chose in action, must cause it to be appraised, before he is entitled to an administration of the oath. Remick v. Brown, 32 Me. 458.

But not unliquidated claim for damages.—An unliquidated claim for damages for a malicious prosecution, the amount of which is unascertained and unascertainable by the magistrates, is not an item of property within the meaning of this section, which the justices are to appraise and set off, in whole or in part, to satisfy the debt. Hopkins v. Fogler, 60 Me. 266.

What constitutes "accounts." — By the use of the term "accounts" in this section, the legislature intended to describe such claims as the debtor might have against other persons, which were the proper subjects of charge as book debts, and for the payment of which no written contract or security had been taken. And by the use of the term "notes, bonds or other contracts," to include all other securities and evidences of debts due. That could not properly be denominated an account, in the sense of the statute, upon which nothing was due at the time of making the disclosure, any more than that could be considered a note or bond, which might exist in that form, but had been previously paid. Robinson v. Barker, 28 Me. 310.

When the debtor discloses claims against other persons once justly due to him and states that they have not been settled or paid unless canceled by accounts or claims to be applied in offset or discharge of them, they would seem, until the offset or discharge has been made, to be accounts in common parlance, and in the sense in which that word is used in this section, unless it should also appear, that upon an adjustment, nothing could be due or recoverable upon them. Robinson v. Barker, 28 Me. 310.

Duty of debtor as regards accounts.—When a debtor, in a case like the present, ascertains that he must make a disclosure, and knows that he has unsettled accounts against other persons, he should either have them settled; take measures to inform himself that there is nothing due upon them, so that he can state it as a fact, and not as a mere expression of an opinion formed without any competent knowledge; or should cause them to be appraised according to the provisions of the statute. This does not impose upon him a greater burden or duty, than it was the design of the statute to impose. Robinson v. Barker, 28 Me. 310.

It is the duty of the debtor, when he discloses unsettled accounts, to cause his interest therein to be appraised, unless he will swear that such accounts are of no value. Bachelder v. Sanborn, 34 Me. 230.

Setoff by justices does not transfer debtor's property.—It does not appear to have been intended that the debtor's interest should be transferred to the creditor by a setoff made by the appraisers, for he is in all cases required to assign his interest (see § 58). The only purpose of the setoff appears to be to designate the property to be assigned, when the debtor discloses more than sufficient to pay the creditor. When the whole of such property is assigned, a formal setoff made by the appraisers could be of no importance. Its omission does not infringe upon the rights of the creditor, or prevent the administration of the oath. Clement v. Wyman, 31 Me. 50.

Former provision of section.—For a former provision of this section requiring the debtor to select appraisers, see Harding v. Butler, 21 Me. 191; Metcalf v. Hilton, 26 Me. 200.

Applied in Call v. Barker, 27 Me. 97; Wingate v. Leeman, 27 Me. 174; Patten v. Kelley, 38 Me. 215; Smith v. Brown, 61 Me. 70.

Quoted in Leighton v. Pearson, 49 Me. 100.

Stated in Sargent v. Salmond, 27 Me. 539; Spaulding v. Fisher, 57 Me. 411.

Cited in Hackett v. Lane, 61 Me. 31

Sec. 58. Creditor may accept within 30 days; if not, returned to debtor.—If the creditor is absent or does not so accept it, the debtor shall deposit with the justices a written assignment to the creditor of all the property

thus appraised and set off; and they shall make a record of such proceedings, and cause such property to be safely kept and secured for 30 days thereafter, to be delivered to the creditor with the assignment, on demand, within that time. If not so demanded, they shall be returned to the debtor. (R. S. c. 107, § 58.)

Creditor may prove demand and refusal by parol.—Where a poor debtor makes a disclosure before two justices of the peace, of property liable to attachment, and the same is demanded by the creditor within thirty days from the disclosure, the creditor is not restricted to the officer's return on the execution, for proof of a demand and refusal to deliver the property, but may show those facts by parol evidence. Torrey v. Berry, 36 Me. 589.

In an assignment under this section no conditions can be inserted which are not required by the statute. If the debtor qualifies the assignment, by requiring indemnity against all cost before the creditor shall institute suits on demands thus assigned, the justices have no authority to make out and deliver to the debtor a certificate that they have administered to him the oath prescribed in § 56, and such certificate is invalid. Patten v. Kelley, 38 Me. 215.

Applied in Clement v. Wyman, 31 Me. 50; Jewett v. Rines, 39 Me. 9.

Sec. 59. Justices' certificate of discharge.—After the oath is administered and the property disclosed is secured, the justices shall make out and deliver to the debtor a certificate under their hands and seals in the form following:

"STATE OF MAINE.

....., ss. To the sheriff of the county of ....., or his deputy, and to the keeper of the jail at ....." (or to any constable.)

[L. S.] "We, the subscribers, two disinterested justices of the peace in
[L. S.] said county of ....., hereby certify, that ....., a poor debtor arrested on a certain execution issued by" (here insert the name and style of the court, or of the trial justice, the amount of the judgment, and date of the judgment and execution,) "and committed to the jail at ..... aforesaid," (or, "enlarged on giving bond to the creditor," as the case may be,) "has caused ...., the creditor, to be notified, according to law, of his desire to take the benefit of chapter one hundred and twenty of the revised statutes; that in our opinion he is clearly entitled to the benefit of the oath prescribed in section fifty-six thereof; and that we have, after due caution, administered it to him.

Witness our hands and seals, this ..... day of ....., A. D., 19...

...., chosen by the .....

...., chosen by the ....."

(R. S. c. 107, § 59.)

Certificate not made out until property secured.—The justices are not authorized by this section to make out a certificate for the discharge of the debtor, until the property disclosed by him has been disposed of or secured as provided in the two preceding sections. Call v. Barker, 27 Me. 97.

If the property disclosed is not secured to the use of the creditor, in accordance with the provisions of this section, the justices are not authorized to make out and deliver the certificate. Patten v. Kelley, 38 Me. 215. See Leighton v. Pearson, 49 Me. 100.

Certificate is notice to prison keeper of what has been done. — The certificate of the justices is intended merely as a notice to the prison keeper of what has been done, that he may set the debtor at liberty, if in his custody. Murray v. Neally, 11 Me. 238.

And is evidence on which debtor to be discharged and of his exemption from imprisonment.—The statute provides that the justices shall make out a certificate and deliver it to the debtor; and it makes it the evidence upon which the prison keeper is required to discharge him, and the evidence of his exemption from imprisonment on that or any other execution to be issued on the same judgment or any other judgment founded thereon. Granite Bank v. Treat, 18 Me. 340.

Disinterestedness of justices must appear on face of certificate.—By § 54, the examination of a poor debtor is required to be "before 2 disinterested justices of the peace for the county." According to the form of the certificate prescribed by

this section, the fact of the disinterestedness of the magistrates by whom the oath is administered, should appear on the face thereof. Scamman v. Huff, 51 Me. 194.

And it must include time from which an adjournment was had.—A certificate by the justices that a poor debtor made a disclosure and that they administered to him the oath required, on a day named, and that such hearing before them was in pursuance of a previous adjournment without certifying any time from which such adjournment was had, is invalid. Bowker v. Porter, 39 Me. 504.

Certificate to state at what court judgment recovered and amount thereof. — This section requires that a certificate of discharge shall state at what court the judgment was recovered, and specify the amount of the judgment. Hathaway v. Stone, 33 Me. 500.

And this section requires that the certificate delivered to the debtor by the justices, shall describe the judgment. Poor v. Knight, 66 Me. 482.

Failure to insert date of execution in certificate not fatal.—Where it appears by the certificate of the justices to what debt the proceedings related, their omission to insert the date of the execution, on which the arrest was made, will not render the proceedings void. Burnham v. Howe, 23 Me. 489.

Nor is erroneous statement of date of judgment. — See Warren v. Davis, 42 Me. 343.

Or insertion of fact not prescribed in form. — The statement of a fact which must exist, if the proceedings were legal, though not required by the prescribed form, would seem to be appropriate and desirable, and its insertion would not destroy the effect of a certificate otherwise formed. Ayer v. Woodman, 24 Me. 196.

But certificate erroneously stating amount and date of judgment no defense to suit on bond. — The certificate of two justices of the peace of the administration of the poor debtor's oath to one who has given bond on arrest, conditioned as by law required, will not support a plea of performance of the condition of the bond in a suit thereon, if it incorrectly states the amount of the judgment and date of its rendition. Perry v. Plunkett, 74 Me. 328.

It is necessary that the date and the amount of the judgment be correctly stated in the certificate in order to show that the execution is the same upon which the oath was taken. Perry v. Plunkett, 74 Me. 328.

It must appear that the justices who signed the certificate had jurisdiction. Williams v. Burrill, 23 Me. 144.

And certificate not conclusive as to this. —The certificate is not conclusive on the point of jurisdiction, and it is competent for the plaintiff in an action on a debtor's bond to prove that the justices did not have jurisdiction. Granite Bank v. Treat, 18 Me. 340.

In an action on a poor debtor's bond, where the certificate or record of persons acting as justices of the peace, stating that they had administered the poor debtor's oath to the debtor, is introduced in evidence by the defendants, it is competent for the plaintiff to prove by parol testimony that such persons had no jurisdiction of the subject. Williams v. Burrill, 23 Me. 144.

While it has been held, that the justices' certificate and their record was evidence of their jurisdiction, it has also been held that neither was conclusive evidence; and that it was competent for the creditor to prove that they had no authority to proceed in the matter. Williams v. Burrill, 23 Me. 144.

Nor as to form and regularity of papers issued.—The certificate of the magistrates is conclusive as to the fact of notice, but not as to the form and regularity of the papers issued. Knight v. Norton, 15 Me. 337.

But it is conclusive as to regularity of preliminary proceedings. — The justices are made the judges of the regularity of the preliminary proceedings and their judgment upon them as exhibited in their certificate is conclusive. No testimony can be legally admitted to prove that judgment to have been incorrect. Neal v. Paine, 35 Me. 158.

And as to fact of examination. — When the certificate of the justice states that the debtor was examined prior to his taking the oath, it is conclusive in that respect; and parol evidence is inadmissible to show that there was in fact no examination. Burnham v. Howe, 23 Me. 489.

The certificate is prima facie evidence that one of the alternative conditions of the bond has been performed. Farrington v. Farrar, 73 Me. 37.

The certificate will at once, of itself, on being filed with the proper officer, relieve the debtor from all further liability to arrest for the debt, and serve as proof of the fulfillment of one of the conditions of his bond. Perry v. Plunkett, 74 Me. 328.

Thus, it is evidence of legal service of citation on creditor.—If the certificate of

the justices states that the debtor has caused the creditor to be notified according to law it is prima facie evidence of a legal service. Fuller v. Davis, 73 Me. 556.

Prior to the enactment of § 79, it was held that the certificate was conclusive as to notice to the creditor. See Brown v. Watson, 19 Me. 452; Baker v. Holmes, 27 Me. 153; Clement v. Wyman, 31 Me. 50.

And that oath administered. — The certificate is merely the evidence of the proceedings recited therein, and the statute has not made the certificate indispensable, as proof that the oath has been taken. But it is a species of proof, which is sufficient, unless in some measure controlled, to show that the oath has been taken, and if done before a forfeiture of the bond has been incurred, to prevent it afterwards. Hatch v. Lawrence, 29 Me. 480.

And the certificate, unless invalidated, would constitute a bar to an action on the bond of the debtor. Ayer v. Fowler, 39 Me. 347.

The certificate of the justices, when in due form, is prima facie evidence that the provisions of the statute have been complied with, and, unless invalidated, such certificate constitutes a bar to an action upon the bond given under § 50. Bachelder v. Sanborn, 34 Me. 230.

If a certificate, regular in form, is produced by the debtor in a suit on his bond, the burden of proof to show want of jurisdiction in the magistrates, or irregularity in the proceedings, is upon the creditor. Bachelder v. Sanborn, 34 Me. 230.

But certificate is not proof of facts not required to be inserted therein. — By inserting in a poor debtor's certificate of discharge, matter not required by law to be inserted therein, such matter does not thereby become a part of the record and cannot be proved by a copy thereof. Though by inserting in such certificate facts or matters not required by law, the certificate will not thereby be invalidated, yet such irrelevant facts and matters will be treated as surplusage, and if it should become necessary to prove them upon trial they must be established in the same manner that they would have been, had they not appeared in the certificate. Winsor v. Clark, 39 Me. 428.

Thus, waiver of justice's interest not proved by certificate. — The fact whether the parties to a poor debtor's disclosure, did or did not expressly waive all objections on account of the interest of one of the magistrates who heard the disclosure, is not proved by being included in the certificate of discharge to the debtor, such fact constituting no part of the certificate required by law. Winsor v. Clark, 39 Me. 428.

Certificate may be amended. — Whenever certificates first made are defective, and do not contain all the facts, they may be amended conformably to the truth of the case. Burnham v. Howe, 23 Me. 489. See Kimball v. Irish, 26 Me. 444.

Secondary evidence of certificate's contents is admissible.—The certificate of the magistrates is the result of their judicial action upon the debtor's disclosure. They are not required to issue it but once, nor are they required to keep a copy of it. Its existence being clearly established, secondary evidence of its contents is properly admissible. Angier v. Smalley, 56 Me. 515.

Applied in Ayer v. Fowler, 30 Me. 347; Garland v. Williams, 49 Me. 16.

Cited in Bunker v. Hall, 23 Me. 26; Smith v. Bragdon, 48 Me. 101.

Sec. 60. Effect of such certificate.—The debtor, on delivering the certificate to the prison keeper or filing it in his office, if imprisoned, shall be set at liberty so far as relates to such execution; and his body forever after shall be free from arrest thereon and on every subsequent execution issued on the judgment or on any other judgment founded thereon, except as provided in sections 64 and 77. (R. S. c. 107, § 60.)

Certificate to be lodged with prison keeper. — In conformity to the provisions of this section, the certificate that the debtor has taken the oath should be lodged with the prison keeper, instead of with the clerk or magistrate issuing the execution. Knight v. Norton, 15 Me. 337.

But a neglect to file the certificates with the prison keeper is no breach of the bond. Granite Bank v. Treat, 18 Me. 340.

And no defense to a suit on the bond. Brown v. Watson, 19 Me. 452.

Section does not apply to cause not existing at time of first arrest.—This section provides that after the debtor has obtained the certificate referred to in § 59, his body shall be free from arrest on the same or on every subsequent execution issued on the same judgment or any judgment founded thereon. This provision was obviously intended to secure a debtor from a second arrest upon the same cause on which he had been arrested and had taken the poor debtor's oath, and had obtained

a certificate; and it cannot extend to another cause, which did not exist at the time of the first arrest, or imprisonment. McLaughlin v. Whitten, 32 Me. 21.

Applied in Rollins v. Richards, 36 Me. 485; Garland v. Williams, 49 Me. 16.

Quoted in Howe v. Moulton, 87 Me. 120, 32 A. 781.

Stated in Angier v. Smalley, 56 Me. 515.

Cited in Kimball v. Irish, 26 Me. 444; Clement v. Wyman, 31 Me. 50.

Sec. 61. Release by creditor.—A creditor may discharge his debtor from arrest or imprisonment on execution by giving to the officer or jailer having him in custody written permission to go at large; with the same effect as a discharge or disclosure. (R. S. c. 107, § 61.)

Cross reference.—See c. 114, § 49, and note, re release of debtor when creditor desires to proceed by trustee process.

Section does not refer to release obtained on giving bond.—The release provided for by this section is not one which takes place after the debtor has been by law released upon giving bond. It is one made to release him from arrest or imprisonment, before he has otherwise obtained it. Bates v. Tallman, 35 Me. 274.

Release of a debtor from custody by the oral direction of the creditor does not constitute a satisfaction of the judgment. The validity of the judgment does not depend solely on release by the creditor's written permission. Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

History of section. — See Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

Quoted in Clement v. Garland, 53 Me. 427; Howe v. Moulton, 87 Me. 120, 32 A. 781.

Sec. 62. After discharge judgment still in force.—A certificate of a discharge on execution in any of the modes authorized and of the cause of it shall, at any time at the creditor's request, be indorsed on the execution by the officer who had such debtor in custody; and if it is before the return day of the execution, it may still be levied on his property; if after, it may be renewed like other executions against his property only; and the judgment may be revived or kept in force, with said execution, as judgments in other cases. (R. S. c. 107, § 62.)

Discharge of debtor not satisfaction of judgment. — The discharge of a poor debtor from arrest or imprisonment by giving a bond according to the provisions of § 50, is not a satisfaction of the judgment, and does not impair the rights of the creditor to obtain satisfaction out of any property or estate of the debtor not exempted by law. Spencer v. Garland, 20 Me. 75.

Arrest on an execution is not regarded as a satisfaction of the debt. As a consequence, a judgment remains valid and enforcible even though the debtor may have been released from custody. Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

The purpose of this section was merely to lay down a procedure by which, after the discharge of the debtor, the original execution or an alias execution might be enforced, no longer against the body, but against the property of the debtor. The reference to the judgment being "revived or kept in force" is merely declaratory of the law. It most certainly was not the intent of the legislature to imply that a release of a debtor in any other way than by written permission would discharge the debt and the judgment. Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

And it does not bar collection of claim out of debtor's property.—An arrest of a debtor and his subsequent discharge from arrest cannot have the effect to bar the creditor from collecting his claim out of the debtor's property. Jones v. Jones, 87 Me. 117, 32 A. 779.

History of section. — See Vesanen v. Pohjola, 140 Me. 216, 36 A. (2d) 575.

Applied in Rollins v. Richards, 36 Me. 485.

Quoted in Clement v. Garland, 53 Me. 427.

Sec. 63. Creditor's lien on real estate disclosed. — If an execution debtor discloses real estate liable to be seized on execution, the justices shall give the creditor a certificate thereof, stating the names of the parties and the amount of the execution; and the creditor shall have a lien thereon for 30 days thereafter, if he files the certificate with the register of deeds of the county or district where the real estate lies within 5 days from the date of the disclosure; and the

register shall enter and file it like officers' returns of attachments. (R. S. c. 107, § 63.)

This section requires nothing to be done by the debtor. It is for the benefit of the creditor if he desires to avail himself of it. It imposes a duty upon the justices toward the creditor, which he may or may not desire them to perform. Cannon v. Seveno, 78 Me. 307, 4 A. 789.

Creditor should apply for certificate.— When the debtor discloses real estate, if the creditor desires to avail himself of his rights under this section, he should apply to the magistrates for the certificate provided for in this section. Bachelder v. Sanborn, 34 Me. 230.

And the justices are not required to make and deliver to the creditor the certificate if not requested to do so. Cannon v. Seveno, 78 Me. 307, 4 A. 789.

Certificate need not be given unless person authorized to receive it is present.— It was not the intention of the legislature to require the justices, by the provisions of this section, to give such a certificate, unless some person authorized to receive it was present, or unless application was subsequently made for it. Clement v. Wyman, 31 Me. 50.

Sec. 64. Lien on personal estate disclosed; if debtor or other person conceals.—If an execution debtor discloses personal estate liable to be seized on execution, the creditor shall have a lien on it for 30 days, or so much of it as the justices, in their record, judge necessary; and if the debtor transfers, conceals or otherwise disposes of it within said time, or suffers it to be done, or refuses to surrender it on demand to any proper officer having an execution on the same judgment, the debtor shall have no benefit from the certificate described in section 59; and the creditor may recover, in an action on the case against him or any person fraudulently aiding in such transfer, concealment or disposal, double the amount due on said execution; and any execution on a judgment in such action shall run against the bodies of the debtor and other persons so aiding; but the payment thereof is a satisfaction of the original debt. (R. S. c. 107, § 64.)

Bond forfeited by debtor's refusal to surrender property. — Where a poor debtor, under bond given to liberate himself from arrest, duly cites his creditor, discloses personal property not exempted from attachment, and takes the oath prescribed; but within thirty days afterwards refuses to deliver the property to an officer, having a renewed execution to take it, his bond is thereby forfeited. Hatch v. Lawrence, 29 Me. 480.

Applied in Butman v. Holbrook, 27 Me. 419.

Stated in part in Philbrook v. Hardley, 27 Me. 53.

Cited in Thacher v. Jones, 31 Me. 528.

Sec. 65. Bond taken on execution returned, and creditor may have bond.—Every officer, taking a bond on an execution, shall return it with the execution for the benefit of the creditor, who may receive it on filing a copy with the clerk of court, judge or justice to whom it is returned. He may also receive from the jailer any such bond in his hands on the like terms. (R. S. c. 107, § 65.)

Cited in Moulton v. Jose, 25 Me. 76.

Sec. 66. Amount recoverable, if forfeited.—If the debtor fails to fulfill the condition of such bond, judgment in a suit thereon shall be rendered for the amount of the execution, costs and fees of service, with interest thereon, against all the obligors; and a special judgment against the principal for a sum equal to the interest on said amount at the rate of 20% a year after breach of the bond. (R. S. c. 107, § 66.)

If the bond sued on is a statute bond, judgment should be entered in accordance with the provisions of this section. Colton v. Stanwood, 68 Me. 482.

And liability of sureties becomes fixed at expiration of 6 months.—At the expiration of the six months named in the bond, if neither of the alternative conditions of the bond has been performed, the liability of the sureties becomes fixed. It is no longer contingent, but has become, by reason of the breach of the bond, absolute and definite under the terms of this section. Rice v. Murphy, 109 Me. 101, 82 A. 842.

Damages assessed under this section

where creditor not legally notified or justices not properly selected.—Where there has been a failure to give a substantially correct notice to the creditor according to the requirements of the statute, or to have the justices selected as the statute provides, it has been well held that the justices had no jurisdiction of the case, and that the damages for the breach of the bond must be assessed according to this section because the provisions of § 79 apply only to cases where "the principal had legally notified the creditor" and taken the oath before two justices of the peace "having jurisdiction and legally competent to act in the matter." Perry v. Plunkett, 74 Me. 328.

The twenty per cent interest is in the nature of a penalty, and can be recovered only of the principal debtor. For this the other obligors are in no event liable. Call v. Lothrop, 39 Me. 434.

Section not applicable to bond under § 15.—A bond given for the release of the debtor from arrest on mesne process, as authorized by § 15, does not come within the provisions of this section, for it is not "such bond" as is herein specified. Downes v. Reily, 53 Me. 62.

Applied in Knight v. Norton, 15 Me. 337; Barnard v. Bryant, 21 Me. 206; Bunker v. Hall, 23 Me. 26; Horn v. Nason, 23 Me. 101; Call v. Barker, 27 Me. 97; Carr v. Mason, 44 Me. 77; Blake v. Brackett, 47 Me. 28; Poor v. Beatty, 78 Me. 580, 7 A. 541; Jordan v. McAllister, 91 Me. 481, 40 A. 324; Goodrich v. Senate, 92 Me. 248, 42 A. 409; West Cove Grain Co. v. Bartley, 105 Me. 293, 74 A. 730.

Stated in Bradley v. Pinkham, 63 Me. 164.

Cited in Burbank v. Berry, 22 Me. 483; Remick v. Brown, 32 Me. 458.

Arrest for Taxes.

Sec. 67. Persons arrested for taxes and officers for not collecting taxes treated as poor debtors.—Any person arrested or imprisoned on a warrant for the collection of a public tax and every constable, collector or deputy sheriff arrested or imprisoned for default in collecting taxes committed to him has the privileges and is subject to the obligations of this chapter as if arrested or imprisoned on execution for debt; and for all purposes relating thereto, the assessors of the town for the time being where the tax was assessed shall be deemed the creditors, and corresponding verbal alterations shall be made in the oath and certificate of discharge; but nothing herein exempts any property from distress for taxes, except those implements, tools and articles of furniture which are exempt from attachment for debt. (R. S. c. 107, § 67.)

The bond in cases of commitments for taxes should be given to the assessors, and they must become the prosecutors and collectors in such cases. Hoxie v. Weston, 19 Me. 322.

At time arrest was made.—A poor debtor's bond given to obtain a release from an arrest for taxes should run to those persons who are assessors of the town at the time the arrest was made, to be a valid statute bond; but if it runs to those persons who were assessors at the time the tax was assessed, it will be a valid bond at common law. Skinner v. Lyford, 73 Me. 282. See note to § 50.

But it may be good common-law bond if given to treasurer, etc.—The requirement of the statute that the bond should be given to the assessors does not prevent the person thus lawfully imprisoned from making a bond or contract with his creditor which will be good at common law. A bond by one thus imprisoned, given to the treasurer or to an inhabitant of the town, is good at common law—and if the obligee accepts the bond, he is regarded as assenting to the transaction and agreeing to execute the trust apparent in the contract. Hoxie v. Weston, 19 Me. 322.

Applied in Athens v. Ware, 39 Me. 345.

General Provisions.

Sec. 68. Selecting the justices to take disclosure.—One of the justices to hear a disclosure may be chosen by the debtor and the other by the creditor, his agent or attorney; and if at the time appointed, he refuses or unreasonably neglects to appoint or to procure his attendance, the other may be chosen by an officer who has the debtor in charge, or if the debtor is not in charge, the officer who might serve the precept on which he was arrested; and in such case, the

justice chosen by the debtor, if he deems it necessary, may adjourn once, not exceeding 24 hours, Sundays excluded, to enable the debtor to procure the attendance of another justice. If the justices do not agree, they may choose a third; if they cannot agree on a third, such officer may choose him and a majority may decide. (R. S. c. 107, § 68.)

I. General Consideration.
II. Selection of Justice by Officer.
III. Third Justice Called in Case of Disagreement.

I. GENERAL CONSIDERATION.

Justices must be selected according to statute. — The persons composing the tribunal should be justices of the peace and should be selected according to the statute. Hackett v. Lane, 61 Me. 31.

Or they have no jurisdiction.—Justices selected otherwise than by the statute mode have no jurisdiction in the matter, and all proceedings before them are coram non judice. Hackett v. Lane, 61 Me. 31.

If the justices are not selected in the manner pointed out in this section, they have no authority to administer the oath, and make the certificate as provided in §§ 56 and 59. Bunker v. Hall, 23 Me. 26.

And proceedings will be invalid.—The statute contemplates that, on the return of the citation and at the time fixed therein, a tribunal shall be constituted as provided in this section. The proceedings will be invalid, unless the steps here pointed out shall be followed. Williams v. Burrill, 23 Me. 144.

Creditor has right to select justice.—It is clearly the right of the creditor to select one of the justices, and the debtor has no right to select more than one of them. Barnard v. Bryant, 21 Me. 206.

The denial of which defeats justices' jurisdiction.—It is the right of the creditors to choose one of the justices to take the disclosure of a poor debtor, and when this right is denied him the justices taking the disclosure have no jurisdiction and their proceedings are void. Parol evidence is admissible to prove that the justices had no jurisdiction. Spaulding v. Record, 65 Me. 220.

And it is the duty of the creditor to procure the attendance of the justice selected by him. Stanley v. Reed, 28 Me. 458.

This section is not complied with by a mere nomination of a justice by the creditor, but he must go further and procure his attendance. Tarr v. Davis, 133 Me. 243, 176 A. 407.

At first meeting and at every lawful adjournment.—The clear design of this section was not only to provide for the selection of justices by the debtor and the creditor, but to place on the creditor the burden of procuring the attendance of the justice selected by him not only at the first meeting of the tribunal but at every lawful adjournment thereof. If the justice chosen by the creditor fails to attend, the contingency contemplated by the section has arisen; and the officer may choose another to fill the vacancy as provided in the section. Tarr v. Davis, 133 Me. 243, 176 A. 407.

The statute does not prescribe a time within which the selection shall be made. It is not perceived, that the rights of a creditor can be impaired by a selection made by a debtor, at any time after the citation has been prepared, and before the tribunal has been organized. Chamberlain v. Sands, 27 Me. 458.

And each party is entitled to a reasonable time within which to exercise the right of selecting one of the justices. Foss v. Edwards, 47 Me. 145, overruled on another point in Hachett v. Lane, 61 Me. 31.

No power is given to coerce the attendance of the justices. The officer has no authority to compel them to appear. Stanley v. Reed, 28 Me. 458.

If the debtor wishes to avail himself of the benefit of an examination and the poor debtor's oath, it is for him to take measures that a legal tribunal for the purpose shall be constituted. It is necessary that a justice be selected in his behalf, who shall attend at the time and place appointed. No precept, or written request to such a justice, has been required by the statute or practice. Burnham v. Howe, 23 Me. 489.

Party cannot revoke authority of justice. —When the tribunal has been organized according to the provisions of this section and has entered upon the performance of its duties, neither party can interrupt the performance of them by denying or attempting to revoke the authority of one of the justices without the consent of the parties interested. Ayer v. Woodman, 24 Me. 196.

History of section.—See Tarr v. Davis, 133 Me. 243, 176 A. 407.

Applied in Perley v. Jewell, 26 Me. 101; Randall v. Bradbury, 30 Me. 256; Bowker

v. Porter, 39 Me. 504; Blake v. Brackett, 47 Me. 28; Bell v. Furbush, 56 Me. 178; Hotchkiss v. Whitten, 71 Me. 577; Perry v. Plunkett, 74 Me. 328; Stevens v. Manson, 87 Me. 436, 32 A. 1002.

II. SELECTION OF JUSTICE BY OFFICER.

If the creditor neglects or refuses to select a justice, the officer may select one. Guilford v. Delaney, 57 Me. 589.

By this section, in case of a refusal or of unreasonable neglect on the part of the creditor to choose a justice, he may be chosen by the officer who has the debtor in charge, etc. Hopkins v. Fogler, 60 Me. 266.

And he need not have absolute knowledge of the failure of the creditor to make his own selection. If the officer acted under erroneous information, and made an appointment, when the creditor had procured the attendance of a justice of his own selection, the appointment by the officer would be void. Burnham v. Howe, 23 Me. 489.

And precept need not have been directed to officer.—The words, "who might legally serve the precept," in this section were used to designate the class of precepts, on which the arrest had been made, and the cases, in which a constable or other officer might select a justice; and not to require that the particular precept, on which the debtor had been arrested, should have been directed to such constable or other officer. Worthen v. Hanson, 30 Me. 101.

The meaning of the statute is to confer the authority to make the selection on the officer who might serve the precept, or a precept of that class; that is, on him who had the power to do so, when the opportunity might offer, when a legal precept was put into his hands, and the debtor or his property was within his jurisdiction. Those events might never happen, but still the power would exist. Daggett v. Bakeman, 33 Me. 382.

A constable is authorized by this section to make a selection, if he could have legally made a service of the precept. Gilligan v. Spiller, 29 Me. 107.

Selection may be made by officer who is surety on debtor's bond.—The officer who served the citation upon the creditor may, upon the latter's neglect or unreasonable refusal, appoint one of the justices to hear the disclosure of the debtor, although such officer is one of the sureties in the debtor's bond. Patterson v. Eames, 54 Me. 203. See note to § 53, re such officer may serve citation.

Debtor to cause appointment to be made by officer.—If the creditor omits to appear and make selection of another, the debtor must cause the appointment to be made by an officer. He has the same means to cause the officer to act, and to procure the attendance of the magistrate after his appointment, that he has to obtain the services of the one of his own selection, and no greater. Burnham v. Howe, 23 Me. 489.

But the statute points out no mode in which the officer may be called upon to make an appointment, where the same becomes necessary. Burnham v. Howe, 23 Me. 489.

And no valid precept can issue to require him to act.—If an officer is present, the justice appointed by the debtor cannot issue any valid precept, or in any manner require that he should make a selection and appointment for the creditor. The statute has pointed out no record, document or precept, which an officer is bound to regard or to notice. Burnham v. Howe, 23 Me. 489.

III. THIRD JUSTICE CALLED IN CASE OF DISAGREEMENT.

Third justice may be called in case of disagreement.—Whenever there is a disagreement on any point or question, which must be decided before the case can proceed, the third justice may be called in. Ross v. Berry, 49 Me. 434.

And this not limited to time of final adjudication.—Whenever there is a disagreement on any point or question, which must be decided before the case can proceed, a third justice may be called in. This section does not in terms limit the right to call in the third justice to the time of final adjudication. Ross v. Berry, 49 Me. 434.

But he may be called on disagreement as to preliminary matters.—It is evident that the legislature, by this section, intended to make such provision that the case might proceed to a final adjudication. A disagreement as to citation, notice, or other preliminary matters would necessarily end the proceedings, if the third justice could not be called in at that stage. Ross v. Berry, 49 Me. 434.

No time prescribed for calling third justice.—The law has not prescribed any time that must intervene between that when it is ascertained that a third magistrate must be called, and the time when an officer can proceed to make the choice;

nor what the two shall do or omit to do, to constitute an inability to agree. Moody v. Clark, 27 Me. 551.

New justice to act in all questions until final decision.—After the new justice is called in, he must act in all questions until a final decision. The court thus constituted of three, is the same court, with the same powers, and is to act in the same manner as the first organization with two members, except that "a majority may decide." Ross v. Berry, 49 Me. 434.

The two justices who first constitute the tribunal, in case of disagreement, may select a third, and "a majority may decide." The decision, which a majority are empowered to make, is not limited to any particular question which may arise. It is manifest that it was intended that the new magistrate should act, until the final decision. Moody v. Clark, 27 Me. 551.

And his withdrawal leaves court deficient.—The new court of three members is like the court of two in every respect, except the requirement of the action of a majority, instead of unanimity. If one of the three withdraws, he leaves the court as imperfect and deficient as when one of two retires and refuses to act. Ross v. Berry, 49 Me. 434.

But withdrawal after decision to administer oath is harmless.—When the three justices take part in the discussion of the law, upon the agreement of the third justice with one of the others that the oath should be administered, that is the final decision, in which all have taken part, and the withdrawal of a justice after this final decision has been made does not invalidate the proceedings even though the oath be administered and the certificate signed by the remaining justices only. McDougall v. Ricker, 115 Me. 357, 98 A. 1025.

In absence of disagreement as to facts debtor need not be re-examined by third justice.—Where two justices have been chosen and a third justice is called in, because of a disagreement as to the law governing the case but no disagreement as to the facts, it is not necessary that the debtor should be re-examined under oath upon the facts by the third justice. McDougall v. Ricker, 115 Me. 357, 98 A. 1025.

Sec. 69. Municipal court judges. — The judge of a municipal court has the same powers, duties and obligations under the provisions of this chapter as a justice of the peace in his county. (R. S. c. 107, § 69.)

Sec. 70. Criminal not precluded from oath. — No conviction or other disqualification to be a witness precludes a debtor from relief under the provisions of this chapter. (R. S. c. 107, § 70.)

Sec. 71. Costs for creditor, if debtor not discharged. — If a debtor fails in an application for a discharge from arrest or imprisonment, the creditor shall recover his costs as in actions before a trial justice, and the justices shall issue execution therefor; but no such failure shall prevent his obtaining a discharge at any future examination, except as provided in sections 64 and 77. (R. S. c. 107, § 71.)

This section was intended to embrace equally those who, having been arrested, have given bond, and those under arrest. No reason is perceived for making any distinction between those under arrest and those arrested and enlarged. City Bank v. Norton, 48 Me. 73.

Sec. 72. When debtor twice refused discharge. — A debtor who has been twice refused a discharge shall not again disclose before such justices; but may apply to a justice of the superior court, who in term time or vacation, after notice to the creditor or his attorney and a hearing of the parties, may appoint a commissioner to take his examination and disclosure; and shall then fix his compensation, which shall be paid by the debtor before commencing his disclosure. The commissioner shall give to the creditor or his attorney 7 days' notice of the time and place appointed by him for such hearing; and all proceedings relating to such disclosure, oath, discharge and disposal of the property disclosed shall be the same as in disclosures before such justices, and shall have like effect. (R. S. c. 107, § 72.)

Former provision of section.—For a case construing the words "arrest or imprisonment" as they were used in a former provision of this section that any debtor

who "shall have twice been refused his discharge from an arrest or imprisonment", etc., see City Bank v. Norton, 48 Me. 73.

Sec. 73. Other evidence or depositions used.—In disclosures on mesne process or execution, after the examination of the debtor, other competent evidence may be introduced and the debtor may then be further examined by either party. Depositions may be used in such disclosure; and in any subsequent disclosure or proceeding on that or another arrest or imprisonment for the same cause of action, the same depositions may be used. (R. S. c. 107, § 73.)

Sec. 74. Bond, when valid.—If by mistake or accident the penalty of a bond taken by an officer under this chapter varies from the sum required by law, it is still valid; and the officer is not responsible to either party beyond the actual damage. (R. S. c. 107, § 74.)

Cross references.—See note to § 50, re citation of wrong section as to oath requirements not cured by this section; § 51, re validity of certain bonds.

This section does not operate as a repeal of § 50 so far as it determines the penal sum of the bond. That provision will continue to be binding upon the debtor and the officer. A violation of it is only excused in case of mistake or accident. This section and § 50 may well exist together, and the provisions of both have their appropriate and designed effect. The latter seems to have been intended to secure to the judgment creditor the same rights to which he would have been entitled, if no such mistake or accident had occurred. Horn v. Nason, 23 Me. 101.

And it applies only where variance is due to mistake or accident.—If the case discloses nothing which shows that the departure from the statute as to amount of penalty was by reason of any mistake or accident, it is not within the provision of this section. Flowers v. Flowers, 45 Me. 459.

If the departure from the statute was not by reason of any mistake or accident, the bond is not brought within the provision of this section. Merchants' Bank v. Lord, 49 Me. 99.

And the section was not intended to cover every mistake by which the bond was made in a wrong sum. Nor is it enough to show only that the officer intended to take the bond according to the statute and verily supposed that his charges were legal and correct. Ross v. Berry, 49 Me. 434.

Nor is mere ignorance of the law and his duty by the officer taking the bond enough to show accident or mistake within the meaning of this section. If it were, then all possible errors might be covered. Call v. Foster, 49 Me. 452.

It is not difficult to suggest cases which clearly come within the words of the statute, such as a mistake in casting the interest due after judgment; a mistake in addition or multiplication; or in stating the columns or sums; or any mere matters of calculation where the intent and effort was to make a statute bond. Ross v. Berry, 49 Me. 434.

Charge of illegal item must be unintentional.—Where a charge is made of an illegal item, there should be definite proof, as to that item, of facts or circumstances which clearly show that it was made unintentionally, or by some mistake of fact, or miscalculation. Call v. Foster, 49 Me. 452.

And deliberate charge of illegal fees is not accident or mistake.—A charge deliberately and purposely made of an item of fees, wholly unauthorized and illegal, cannot be regarded as an "accident or mistake," such as this section contemplates. Ross v. Berry, 49 Me. 434.

Officer taking erroneous bond is guilty of misfeasance.—This section clearly contemplates that the officer taking the bond in the wrong amount is guilty of a misfeasance, and only guards against a recovery of damages against him, beyond the actual injury sustained from his failure in the discharge of his duty. Dyer v. Woodbury, 24 Me. 546.

But not liable for amount of debt.—This provision in the statute was made in view of the principle that, in an action of debt for a voluntary escape, the creditor would be entitled to recover the amount of his debt. If the officer, in such case, should, by accident or mistake, take a bond not in the amount required, the provision would, doubtless, relieve him from such liability. Dyer v. Woodbury, 24 Me. 546.

Applied in Kimball v. Preble, 5 Me. 353; Lambard v. Rogers, 31 Me. 350; Chase v. Collins, 68 Me. 375.

Sec. 75. Limitation of suits on bonds.—No suit on any bond herein authorized shall be sustained unless commenced within 1 year after the forfeiture; except that the provisions of sections 99 and 100 of chapter 112 are applicable to such suits. (R. S. c. 107, § 75.)

Section applies to suit on common-law bond.—Even though the bond taken is not technically a statute bond, if it was taken under and by force of this chapter, the limit provided in this section is applicable and, if the action is not commenced within a year, it cannot be maintained. Patten v. Kimball, 73 Me. 497.

Applied in Brown v. Houdlette, 10 Me. 399; Spencer v. Garland, 20 Me. 75.

Quoted in Coffin v. Herrick, 10 Me. 121.

Sec. 76. Creditors not cited to hear disclosures on islands. — In no case under the provisions of this chapter shall a creditor be cited or notified to attend a disclosure upon any island not connected with the mainland by a bridge, unless, at the time of said disclosure, the debtor resides upon such island and was arrested in the county where the same is situated; and disclosures made in violation of this section are void. (R. S. c. 107, § 76.)

False Disclosures and Aiding in Fraudulent Conveyances.

Sec. 77. False disclosures; liability.—When a debtor, herein authorized or required to disclose on oath, willfully discloses falsely or withholds or suppresses the truth, the creditor of record or in interest may bring a special action on the case against him, whether he is criminally prosecuted or not, particularly alleging the false oath and fraudulent concealment of his estate or property; and on oath before a justice of the peace he may declare his belief of the truth of the allegations in the writ; such justice shall certify the oath on the writ; and thereupon the debtor shall be held to bail, or in default thereof be committed to jail to abide the judgment in the suit; and if the creditor prevails in the suit, judgment shall be rendered against the debtor for double the amount of the debt and charges on the former judgment; and the debtor may be arrested and committed to jail on any execution issued on the judgment last recovered, without the privilege of release or discharge except by payment or consent of the creditor. (R. S. c. 107, § 77.)

An action for a false disclosure is provided by this section. Such a right of action does not exist at common law. Golder v. Fletcher, 71 Me. 76.

And the right of action is given only when the proceedings are by and under this chapter. It is "when a debtor, herein authorized or required to disclose on oath, willfully discloses falsely or withholds or suppresses the truth," that "the creditor of record or in interest may bring a special action on the case against him," etc. Golder v. Fletcher, 71 Me. 76.

And writ must conform to statute.—The word "thereupon" in this section, following immediately the requirement of what shall be the allegations in the writ and declaration, and the oath of the belief of their truth by the creditor certified thereon, according to grammatical construction and rules of punctuation, refers equally to the allegations and the required evidence of their truth, as essential to the suit to be instituted under the section. A writ must conform to this requirement of the statute before the debtor can with propriety be called upon to answer thereto, by a mode of service which is imperative, and for which no substitute is provided. Dyer v. Burnham, 41 Me. 89.

It is necessary to allege in the writ the false oath of the debtor and fraudulent concealment of his estate or property. Doughty v. Sullivan, 113 Me. 243, 93 A. 738.

And the evidence must be clear and convincing.—To entitle the plaintiff to a verdict for such highly punitive damages as are allowed by this section, the evidence must be clear and convincing that the defendant on oath wilfully disclosed falsely, or withheld or suppressed the truth upon a material issue, material to the subject being investigated. Doughty v. Sullivan, 113 Me. 243, 93 A. 738.

The oath required is necessary to make the allegations in the writ and declaration effectual, under this section. Opposed as they are to the oath of the debtor, without the verification required, they are a

nullity. They become material only in the mode specified. Dyer v. Burnham, 41 Me. 89.

The purpose of the legislature in enacting this section was that the creditor should not institute the suit against his debtor, when the disclosure, sworn to by the latter, until met by the oath of the former that he believed it untrue, might be presumed to be founded in truth. Dyer v. Burnham, 41 Me. 89.

No action against debtor for expression of opinion.—No action can be maintained against the debtor under this section for the expression of an opinion in his disclosure, without proof that it was at variance with his actual knowledge at the time, and wilfully expressed. Robinson v. Barker, 28 Me. 310.

Stated in Sargent v. Salmond, 27 Me. 539; Spaulding v. Fisher, 57 Me. 411.

Sec. 78. Fraudulent concealment or transfer; liability. — Whoever knowingly aids or assists a debtor or prisoner in a fraudulent transfer or concealment of his property, to secure it from creditors and to prevent its attachment or seizure on execution, is liable to any creditor suing therefor in an action on the case, in double the amount of property so fraudulently transferred or concealed, not exceeding double the amount of such creditor's demand. (R. S. c. 107, § 78.)

I. General Consideration.
II. Against Whom and by Whom Action Maintained.
III. Pleading and Practice.
A. In General.
B. Evidence.

I. GENERAL CONSIDERATION.

Object of section.—The object of this section is to afford a remedy to the creditor against anyone to whom the property of his debtor, no matter in what it consisted, or how situated, has been fraudulently transferred for the purpose, and with the intent on the part of the debtor transferring, and the individual receiving such transfer to conceal the same, so as to secure it from creditors and prevent its attachment or seizure on execution. Spaulding v. Fisher, 57 Me. 411.

This section was originally introduced in an act for the relief of poor debtors, and to prevent debtors or prisoners from making fraudulent transfers of their property, to secure or conceal it from their creditors; and to punish those, who should aid or assist them in it. Pullen v. Hutchinson, 25 Me. 249.

This section is a remedial and not a penal enactment. Frohock v. Pattee, 38 Me. 103; Lewiston Trust Co. v. Cobb, 115 Me. 264, 98 A. 756.

This section is remedial to enable creditors to recover their debts. Platt v. Jones, 59 Me. 232; Pulsifer v. Waterman, 73 Me. 233.

And one-year limitation not applicable to action under this section.—Section 102 of chapter 112, limiting to one year the time in which actions may be brought for a forfeiture upon a penal statute, does not apply to suits brought under this section for aiding a debtor in the fraudulent concealment of his property. Thacher v. Jones, 31 Me. 528.

But, though remedial, the section is also penal in its character. Herrick v. Osborne, 39 Me. 231.

And must be strictly construed.—This section, though technically a remedial one, is penal in its character, and must be strictly construed. It must not be so construed as to impose a greater penalty than the plain meaning of its terms requires. Fogg v. Lawry, 71 Me. 215; Lewiston Trust Co. v. Cobb, 115 Me. 264, 98 A. 756.

Section applies to case provided for in § 64.—The provisions of this section are sufficiently comprehensive, so far as they respect those aiding or assisting the debtor to embrace the case specially provided for by § 64. Thacher v. Jones, 31 Me. 528.

And it applies to all property which could not be taken prior to enactment of § 57.—All those kinds of property not specially exempted from attachment, and which before the enactment of § 57 could not be taken on execution, are deemed property for the fraudulent transfer of which the fraudulent transferee is liable under the provisions of this section. Pulsifer v. Waterman, 73 Me. 233.

And to transfers of money or choses in action.—Money and choses in action are property for the fraudulent transfer of which the debtor and the person knowingly aiding him in such transfer would be liable

under this section. Spaulding v. Fisher, 57 Me. 411.

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

At time when relation of debtor and creditor commenced.—Whether the property transferred was attachable or seizable depends not upon its situation when the plaintiff's action was commenced upon the note or the judgment recovered, but when the relation of debtor and creditor commenced, viz.: When the note was executed and delivered. From that moment the creditor, although his debt was not payable, had a right to complain against any fraudulent transfer of any property of his debtor which was then attachable; for he had an interest in it as a fund out of which the debt ought to be paid. Pulsifer v. Waterman, 73 Me. 233.

Where the maker of a promissory note, before its maturity, conveyed his farm to his son in fraud of his creditors and died, and his estate was decreed insolvent before judgment was recovered on the note, in an action by the payee against the fraudulent grantee, founded on this section, it was held that the fact that the farm could not be attached or seized on execution by the payee is no defense, the farm having been attachable or seizable when the relation of debtor and creditor was created. Pulsifer v. Waterman, 73 Me. 233.

And debtor's taking note in settlement of account is not a transfer.—The taking of a negotiable promissory note by the debtor, in settlement of a debt due him on account, even if done to prevent its attachment upon trustee process, is not a "transfer" within the meaning of this section. Skowhegan Bank v. Cutler, 49 Me. 315.

Judgment against debtor not necessary to maintenance of action.—It is not necessary that the creditor should first have obtained judgment against his debtor, in order to maintain an action under this section. Aiken v. Kilburne, 27 Me. 252.

Recovery operates as payment of debt.—Whatever is recovered in an action under this section operates pro tanto as payment of the debts of the debtor, although not paid by the debtor. Pulsifer v. Waterman, 73 Me. 233.

Plaintiff can recover more than pro rata share of his debt.—It is no legal objection to the maintenance of an action under this section that the plaintiff will recover more than a pro rata share of his debt. Pulsifer v. Waterman, 73 Me. 233.

Plaintiff not entitled to interest from date of writ.—In an action by a creditor against the defendant for aiding a debtor in the fraudulent transfer and concealment of his property, the jury is not authorized to give the plaintiff interest from the date of the writ. Skowhegan Bank v. Cutler, 52 Me. 509.

Debt must be established by judgment at law before bill in equity available.—A bill in equity against several persons, alleging that one of them was indebted to the plaintiff, and that such debtor had, by a confederacy with the other defendants fraudulently transferred property to them, for the purpose of hindering the collection of the debt, cannot be sustained, unless the indebtment had previously been established by a judgment at law. Skeele v. Stanwood, 33 Me. 307.

Applied in Bunker v. Tufts, 55 Me. 180; Bunker v. Tufts, 57 Me. 417; Warner v. Moran, 60 Me. 227; Fogg v. Lawry, 68 Me. 78; King v. Ward, 74 Me. 349; Thayer v. Usher, 98 Me. 468, 57 A. 839.

Stated in Sargent v. Salmond, 27 Me. 539.

Cited in Moody v. Burton, 27 Me. 427; Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

II. AGAINST WHOM AND BY WHOM ACTION MAINTAINED.

Person made liable for aiding fraudulent transfer.—The defendant is made liable, under this section, not because he has received property from the debtor by a fraudulent transfer, but because he has knowingly aided a debtor in the commission of fraud with a design to injure his creditors. Aiken v. Kilburne, 27 Me. 252.

And transfer need not have been made to him.—One who aids a debtor to make a transfer to a third person comes as fully within the provisions of the statute as he would if such transfer had been made to himself. Aiken v. Kilburne, 27 Me. 252.

And he need not have derived a benefit therefrom.—The statute does not require that it should be made to appear that the person, who knowingly aids a debtor in the fraudulent concealment or transfer of

his property, should derive a benefit therefrom to make him liable to the action of the creditor. Aiken v. Kilburne, 27 Me. 252.

Conveyance need not have been directly from debtor.—A house purchased with the funds of a debtor, to whomsoever conveyed, is, as to his creditors, his property. And its fraudulent transfer is equally established whether the conveyance is directly from the debtor, or from another by the debtor's direction and procurement. Spaulding v. Fisher, 57 Me. 411.

Person assisting in concealment may be liable even though title remains in debtor.—One who knowingly assists the debtor in the fraudulent concealment of his property, to prevent its being attached or seized on execution, is liable to the action of a creditor, although the debtor may never have parted with the legal title to the property. Aiken v. Kilburne, 27 Me. 252.

Only creditor at time of concealment or transfer can maintain action.—The person who is authorized to maintain an action under this section must be a creditor at the time of the fraudulent concealment or transfer. Thacher v. Jones, 31 Me. 528; Abbott v. Joy, 47 Me. 177.

And he must continue to be creditor.—The plaintiff in an action under this section must not only be a creditor at the time of the transfer, but he must continue to be a creditor. It is only in that character that he can recover, and when he ceases to sustain that character he loses the right of action attached to it to recover double the amount of the debt or property. Thacher v. Jones, 31 Me. 528; Abbott v. Joy, 47 Me. 177.

And section not applicable if there were no creditors at such time.—This section was not intended to make every person, who should knowingly aid or assist in making such a fraudulent transfer, liable for double the amount of the property so transferred. The description of persons, who may be so assisted or aided as to occasion the forfeiture, must be ascertained from the words of the section. Those words are "whoever knowingly aids or assists a debtor or prisoner," in such a manner as to violate its provisions, shall incur the forfeiture. A person by assisting another, who had then no creditors, to transfer or conceal his property to enable him to avoid the payment of debts to be contracted, might be morally as guilty as he would be by assisting him to defraud existing creditors; and both might be liable to the charge of a conspiracy with intent to defraud; and yet the forfeiture of this section not be incurred, because the section has not extended that punishment to all cases, in which one person may aid or assist another in making transfers of his property, in fraud of the rights of creditors. Pullen v. Hutchinson, 25 Me. 249.

But the creditor need not have had a present right of action at the time of the transfer. He might be a creditor holding a note or bond not yet payable, and the concealment or transfer might have been designedly made to prevent an attachment, when his right of action should accrue. He might also have a conditional claim against his debtor by being a subsequent indorser on a negotiable promissory note, upon which he was a prior indorser; or by being an indorser on one made by him, and the property might have been concealed or transferred to prevent its attachment on a demand anticipated as about to arise in that manner. When in such cases the right of action accrues, he may be such a creditor as the section contemplates and entitled to maintain an action by virtue of the section. Thacher v. Jones, 31 Me. 528.

And his relation with debtor need not continue unchanged.—While the plaintiff must continue to be a creditor, there does not appear to be any sufficient reason to require that he should continue to be a creditor of the same class, or in one particular mode, or that his relations to the debtor should continue unchanged. If he preserves his character of creditor, whether by an absolute or conditional claim or liability, so that he can, when his claim becomes certain and payable, maintain an action against his debtor, he may also maintain one by virtue of this section against those who have aided or assisted him to conceal or transfer his property to prevent its attachment. Thacher v. Jones, 31 Me. 528.

Indorsee and holder of note against debtor can maintain action.—The indorsee and holder of a negotiable note against a fraudulent debtor has prima facie evidence of a just claim against the debtor, and unless the indorsement is shown to have been conditional, and the condition to have terminated, he may maintain an action against a third person who has knowingly aided the debtor in transferring his property to prevent its being attached, under the provisions of this section. Abbott v. Joy, 47 Me. 177.

Creditor causing suit by assignee in

bankruptcy waives right to prosecute his own suit.—One who has commenced an action to recover the penalty provided for in this section by filing a petition against his debtor and having him declared a bankrupt, and by causing a suit to be commenced against the alleged fraudulent transferee, by the assignee in bankruptcy, to recover the value of the property alleged to have been fraudulently transferred, thereby waives his right to further prosecute his own suit. Fogg v. Lawry, 71 Me. 215.

By first commencing a suit to recover the penalty provided for in this section, a creditor undoubtedly obtains a priority of right to prosecute it to final judgment, not only as against other creditors, but also as against the debtor's assignee in bankruptcy. But this is a right which he may waive. If he requests the debtor's assignee in bankruptcy to pursue the same property, and, in pursuance of such request, the assignee commences a suit against the alleged fraudulent transferee to recover its value for the benefit of all the creditors, the plaintiff in the first suit does thereby waive his right to prosecute it further. Such request, when acted upon, becomes irrevocable while the second suit is pending. To hold otherwise would make the defendant liable to pay three times the value of the property conveyed to him,—once to the assignee, and twice to the pursuing creditor. This is a greater penalty than the statute imposes. The statute makes him liable for double the value of the property fraudulently conveyed to him, but it does not make him liable for three times its value. Fogg v. Lawry, 71 Me. 215.

III. PLEADING AND PRACTICE.

A. In General.

Plaintiff must allege and prove necessary elements.—To entitle the plaintiff to recover in an action under this section, he must allege in his writ and prove that his debtor was possessed of property liable to attachment or levy on execution, which was by him fraudulently concealed or transferred, to secure the same from creditors, and to prevent the seizure of the same by attachment or levy on execution; that the defendant did knowingly aid and assist in such fraudulent concealment and transfer; and that the plaintiff was at the time of such fraudulent concealment and transfer, and at the time the action was commenced, a creditor of such debtor. These elements are substantive and material, and must all exist, to authorize the maintenance of the action. Herrick v. Osborne, 39 Me. 231.

The plaintiff must prove that he has a just debt or demand, that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution to satisfy it, and that the person sued has knowingly aided the debtor to defeat his right as a creditor. Pulsifer v. Waterman, 73 Me. 233.

And stating them argumentatively is not sufficient. — These elements, being material, must be affirmatively and distinctly alleged in the declaration before a party can be put upon his defense. It is not sufficient that they are stated argumentatively, or may be inferred from other allegations in the writ. Herrick v. Osborne, 39 Me. 231.

Declaration insufficient if it fails to allege defendant knowingly aided, etc.—A declaration which does not contain a distinct allegation that the defendant did knowingly aid and assist the debtor in the fraudulent concealment or transfer of property of the debtor, which was liable to seizure by attachment or levy on execution by the plaintiff, is insufficient on demurrer. Herrick v. Osborne, 39 Me. 231.

Or fails to state time of transfer.—A declaration is defective if it does not set out definitely when the several transfers took place. One of the fundamental rules of pleading is that there must be certainty as to time. Platt v. Jones, 59 Me. 232.

Declaration cannot be amended to show transfer of property not embraced in original count.—In an action brought under this section for aiding a debtor in the fraudulent transfer of certain property, an amendment will not be allowed of an additional count alleging a fraudulent transfer of other property under which the damages claimed were not in any part embraced in the first count. Skowhegan Bank v. Cutler, 49 Me. 315.

Debt due plaintiff is fact to be proved. —In an action under this section, the debt due the plaintiff is a fact to be proved and not the foundation of the action. Platt v. Jones, 59 Me. 232.

As is relationship of debtor and creditor. —This section gives the remedy to any creditor, and to render it available the plaintiff must prove the relationship of debtor and creditor, and so much he must allege. Platt v. Jones, 59 Me. 232.

And declaration failing to allege such relationship is defective.—If it does not affirmatively appear that the plaintiffs in an action under this section were creditors of the alleged fraudulent grantor at the date of the several sales and conveyances

complained of, the declaration is defective. Platt v. Jones, 59 Me. 232.

Plaintiff suing vendee must prove a transfer.—If, instead of seizing the property, the creditors sue the fraudulent vendee, under this section, they must prove a transfer. If the property consists of shares in a corporation, of which there can be no manual possession or delivery, they must prove a transfer in writing. And the vendee is not liable until such transfer is consummated, at least so as to be binding upon the parties to it. Skowhegan Bank v. Cutler, 49 Me. 315.

So made as to be valid against all persons except for fraud.—In order to bring any case within the statute, the sale should not only be consummated so as to be valid between the parties, but it should be so made as to be valid against all persons, except on the ground of fraud. Skowhegan Bank v. Cutler, 49 Me. 315.

Not necessary to allege all property liable to attachment.—In an action under this section to recover a penalty for a fraudulent transfer, where the kinds and quantity of property are specifically described, and more of it than "double the amount of the creditors' demand" is not exempt from attachment and seizure, it is not necessary to allege, totidem verbis, that the property is liable to attachment or seizure on execution. Wentworth v. Hinckley, 67 Me. 368.

B. Evidence.

Debtor is competent witness for plaintiff in action under this section.—On the trial of an action on the case brought by a creditor under the provisions of this section against a person for aiding the debtor in the fraudulent concealment or transfer of his property, to prevent it from being attached or seized on execution, such debtor is a competent witness for the plaintiff. Philbrook v. Handley, 27 Me. 53; Aiken v. Kilburne, 27 Me. 252.

Notwithstanding fact that he gave different account of transaction in bankruptcy proceeding.—Nor is the debtor incompetent to testify, in such case, because he had given an entirely different account of the transaction between himself and the defendant, under oath, in his petition to be declared a bankrupt. Aiken v. Kilburne, 27 Me. 252.

And even though he was principal actor in the transfer.—A debtor is not rendered incompetent to testify in an action under this section by the fact that he appears to have been the principal actor in the fraudulent transfer of his property. Aiken v. Kilburne, 27 Me. 252.

And fraudulent acts and declarations of debtor are admissible.—On the trial of an action under this section, proof of fraudulent acts and declarations of the debtor before and after the sale, though in the absence of the defendant, are admissible to contradict evidence previously introduced by the opposing party. Abbott v. Joy, 47 Me. 177.

The acts of a debtor in securing the transfer of the funds in a bank to himself, and from himself to the defendant, together with his written declarations accompanying such acts, are admissible on the question of the fraudulent intent of such debtor, in an action on the case by a creditor against the defendant for aiding such debtor in the fraudulent transfer and concealment of his property. Skowhegan Bank v. Cutler, 52 Me. 509.

But declaration of debtor denying debt is not admissible.—In an action against one for taking from a debtor a fraudulent transfer of property, for the purpose of keeping it away from his creditors, it is not competent for the defendant to prove a declaration of the alleged debtor, made to the defendant at the time of the transfer, but in the absence of the plaintiff, to the effect that he, the debtor, did not owe the plaintiff anything. Such evidence is not admissible. Quinnam v. Quinnam, 71 Me. 179.

Damages on Bonds.

Sec. 79. In action on bond, if debtor has taken oath, only actual damages can be recovered.—In actions on any bond given by a debtor to obtain his release from arrest on mesne process, execution or warrant of distress for taxes, if it appears that, prior to the breach of any of its conditions, the principal had legally notified the creditor or the assessors who issued such warrant and had been allowed by 2 justices of the peace of the county where the arrest was made, having jurisdiction and legally competent to act in the matter, to take and had taken the oath prescribed in section 56, the damages shall be assessed by the jury, at the request of either party; otherwise, by the court. The amount assessed shall be the real and actual damage, and any legal evidence on

that point may be introduced by either party. In any such action, evidence may be received to show that no legal service of the citation was made on the creditor or assessors, although it may contradict the record and certificate of the magistrates who administered the oath. (R. S. c. 107, § 79.)

Cross reference.—See § 66, re actions on forfeited bonds.

Oath must have been taken prior to breach.—The case is not within this section if there was no oath taken prior to the breach of any of the conditions of the bond, so as to entitle the defendant to an assessment of the real and actual damages, by the jury or by the court, as is herein provided. Morrison v. Corliss, 44 Me. 97.

And where the oath taken was not the lawful oath to be administered, this section does not give any relief. Rider v. Thompson, 23 Me. 244.

Oath must have been given by justices having jurisdiction.—The fact that a debtor has been allowed to take the oath before two justices of the peace will not restrict the amount of damages recoverable on the bond to the real and actual damage, unless it also appears that the justices who allowed the oath were "of the county where the arrest was made, having jurisdiction and legally competent to act in the matter." Hackett v. Lane, 61 Me. 31.

To entitle a debtor to have the damages assessed under this section, the justices acting in the premises must be selected according to law, and have jurisdiction over that particular disclosure; otherwise the damages must be assessed according to the provisions of § 66. Blake v. Brackett, 47 Me. 28; Hackett v. Lane, 61 Me. 31; Poor v. Knight, 66 Me. 482; Perry v. Plunkett, 74 Me. 328.

If the justices, who acted had no jurisdiction and were not legally competent to act, their proceedings were not a performance of the condition of the bond, and do not authorize the court or jury to assess the actual and real damage. Blake v. Brackett, 47 Me. 28.

If the evidence does not show that the debtor took the oath prescribed in § 56, on the judgment described in the bond, before two justices of the peace having jurisdiction and legally competent to act in the matter, the case is not within the provisions of this section. Poor v. Knight, 66 Me. 482.

For cases prior to the inclusion in this section of the provision concerning the jurisdiction and competency of the justices administering the oath, which held that the section was applicable if the oath was given, whether the justices had jurisdiction or not, see Bard v. Wood, 30 Me. 156; Sanborn v. Keazer, 30 Me. 457; Baker v. Carleton, 32 Me. 335; Winsor v. Clark, 36 Me. 110; Houghton v. Lyford, 39 Me. 267.

Of disclosure and adjudication thereon.—This section provides that the oath should have been allowed by and taken before justices "having jurisdiction and legally competent to act in the matter." The "matter" here referred to must be the disclosure and adjudication thereon, and not merely the general power of a justice to administer an oath. Blake v. Brackett, 47 Me. 28.

The actual damage is the loss suffered by the nonperformance of the condition of the bond, and not the damages occasioned by the particular cause which produced a breach of the condition. Call v. Barker, 28 Me. 317.

Ability to pay debt considered in assessing damages.—Any legal proof going to show the ability of the debtor to have paid the debt, or a portion of it, is admissible, and should be taken into consideration by the jury in the assessment of damages. Call v. Barker, 28 Me. 317.

This section did not intend to prescribe what should be a legal service of the notice, for it does not determine how many days it shall be served before the time of taking the oath, nor by whom the service shall be made, nor whether it should be made by a copy or otherwise. It must have been the intention that the service, as to time and manner, should be legal, as well as that it should be upon the person designated by law. Holmes v. Baldwin, 17 Me. 398.

And it does not change time, manner or mode of service.—The object of this section, as respects the notice, was to make the notification effectual although issued by a justice or by the party, but it does not appear to have been intended to change the time, manner or mode of serving it, or the person upon whom service should be made as provided by law. Holmes v. Baldwin, 17 Me. 398.

And it does not affect justices' determination of sufficiency of citation in respects other than service.—By this section, it is provided that evidence may be received to show that no legal service of the citation was made, though it may contradict the record and certificate of the magistrates who administered the oath. But

this provision applies only to the service of the citation, leaving adjudications upon the sufficiency of citations in other respects unaffected and conclusive as before. Lewis v. Brewer, 51 Me. 108. See note to § 54.

Section not applicable where seal accidentally fell off citation.—By this section, the court is authorized to receive evidence that no service of a citation of a poor debtor was made upon the creditor, notwithstanding such evidence may contradict the record of the magistrates; but a citation issued with a seal upon it which had accidentally fallen off when it was served by the officer by reading it to the creditor is a good service, and not within the spirit or letter of the statute. Baldwin v. Merrill, 44 Me. 55.

Applied in Robinson v. Barker, 28 Me. 310; Gilligan v. Spiller, 29 Me. 107; Remick v. Brown, 32 Me. 458; Hathaway v. Stone, 33 Me. 500; Bailey v. McIntire, 35 Me. 106; Foss v. Edwards, 47 Me. 145, overruled in Hackett v. Lane, 61 Me. 31; Leighton v. Pearson, 49 Me. 100.

Stated in Lewis v. Warren, 49 Me. 322.

Sec. 80. New judgment on such bond; costs.—If the whole amount due on the execution or warrant of distress is recovered in such action, the new judgment shall be a discharge of said execution or warrant of distress; if only a part is recovered, it shall be a discharge of such part. If the penalty in the bond in such action is more than $20, the plaintiff shall recover full costs although the amount of damages recovered is less than $20. If the verdict or judgment is that the creditor has sustained no damage, neither party recovers costs. (R. S. c. 107, § 80.)

Applied in Hobson v. Watson, 34 Me. 20.

Willful Trespass.

Sec. 81. Disability of persons committed for willful trespass.—When, in the trial of an action of trespass on property, the court, jury or magistrate determines that such trespass was committed willfully and the fact is recorded and noted on the margin of the execution on such judgment and the debtor is thereon arrested and committed to jail, he shall not be entitled to give any bond for his liberation; and if he applies to take the oath described in section 56, no notice shall be issued to the creditor until at least 30 days after his commitment. (R. S. c. 107, § 81.)

See c. 113, § 61, re trespass.

Support of Debtors in Jail.

Sec. 82. Jail keeper may require creditor to support debtor.—When a person is committed to jail on mesne process or execution or delivers himself into the custody of the jailer to save the condition of a bond given on execution and makes a written complaint by him signed and sworn to, stating that he is unable to support himself in jail and has not sufficient property to furnish security for his support, the jailer may require of any one of the creditors, their agent or attorney, security for his support; and, unless it is satisfactorily furnished within 8 days after the request or money is paid in advance therefor from time to time, he may release him; and when a debtor is committed to prison on mesne process or execution, the creditor committing said debtor shall advance to the jailer pay for 1 week's board of said debtor; but when a debtor is committed on more than 1 execution at the same time, the jailer is entitled to pay for board only on the first execution, to be paid equally by all the creditors on whose executions he is committed; and the first creditor may have an action against the other committing creditors for their proportion thereof; and if such debtor is discharged on the first execution, the jailer shall notify the next committing creditor of his liability to pay for his support as on the first execution. (R. S. c. 107, § 82.)

The debtor is primarily as well as ultimately responsible for his own support in jail as elsewhere. McPheters v. Morrill, 66 Me. 123.

And principal-surety relationship exists between debtor and creditor furnishing support.—Every man is under obligation to support himself, and when that support is furnished by another, it must be regarded as beneficial to him. The creditor has a legal right to cause the debtor to be arrested and imprisoned, if he does not pay the debt, or discharge himself by the poor debtor's oath. The debtor's obligation to maintain himself remains, although he is in confinement, and his ability to do it may be lessened. The creditor, by the coercion, is not legally in fault. By the reception of support from the creditor, the parties are to be viewed in the same relation, as if no confinement existed. There is no difference in the liability, arising from a support furnished in prison or out of it. The creditor is to furnish security or pay money in advance, from time to time, or the keeper of the prison may release the debtor. But the security of the creditor does not preclude the debtor from making payment, it is not the less obligatory upon him to do so. The creditor is to make the keeper secure, that he will receive his pay from the debtor, who is the party creating the expense. The debtor is the principal, and the creditor is to be viewed as a surety. Plummer v. Sherman, 29 Me. 555.

With implied promise of debtor to reimburse creditor.—What is paid to support the debtor must be considered as paid for his benefit, and the law raises a promise on his part to reimburse the creditor. Plummer v. Sherman, 29 Me. 555.

It could not have been the intention of the legislature, to require the creditor to support his debtor in prison, without any claim of reimbursement from the debtor. Plummer v. Sherman, 29 Me. 555.

The law does not require the creditor to support his debtor in prison. It gives him the option of doing so, if he would retain him there. It is a mode afforded to him of compelling the debtor to make payment or disclose. It is a part of the remedy provided for the collection of debts, and could, in no sense, be construed as a gratuity. Plummer v. Sherman, 29 Me. 555.

And complaint by debtor need not be shown to enable creditor to recover support.—To enable a creditor to recover of his debtor the sum paid for the support in jail of the debtor, after he has surrendered himself or been committed upon the creditor's execution, it is not indispensable to show a formal complaint by the debtor to the jailer, under this section. Any evidence which satisfies the tribunal which is to pass upon the facts that the debtor knew that the jailer required from the creditor payment of the debtor's board, and that the latter intended the former should pay it, will, upon common-law principles, support an action of assumpsit for the amount paid, a promise of reimbursement being implied from these circumstances. Howes v. Tolman, 63 Me. 258.

Creditor not required to give security for support until debtor makes written complaint.—By this section, the keeper of the jail might require security of the creditor for the payment of the expense of supporting the debtor while in jail. But before such security can be required, the debtor must make complaint in writing, and verified by his oath, of his inability to support himself in jail, and of furnishing security for such support. Plummer v. Sherman, 29 Me. 555. See Solon v. Perry, 54 Me. 493.

By the terms of the statutes the creditor cannot be called upon for the security, until the debtor has made the complaint. He therefore, voluntarily lays the foundation for the call upon the creditor. Plummer v. Sherman, 29 Me. 555.

And filing precept is essential.—The filing of the precept or a copy with the jailer is essential to enable the jailer to make requisition on the creditor for payment of poor prisoner's board. Jones v. Emerson, 71 Me. 405.

Debtor's complaint need not be as formal and technical as special pleading.—In view of the purpose to be accomplished, the "complaint in writing" contemplated by this section is obviously not expected to possess the strict formality and technical precision of special pleading. Blanchard v. Blood, 87 Me. 255, 32 A. 891.

Applied in March v. Barnfield, 107 Me. 40, 76 A. 958.

Sec. 83. Adjustment of price of support.—In case of dispute about the price of such support, the county commissioners may determine it, not exceeding 75¢ a day. (R. S. c. 107, § 83.)

Debtors to the State.

Sec. 84. State debtor may apply to justice of superior court.—Any person committed to jail on execution, warrant of distress or other final civil process for debt, penalty or costs due to the state may make application in writing to a justice of the superior court for relief, whether the court is in session in the county or not, who shall appoint a convenient time and place to inquire into the circumstances of the petitioner; and shall give such notice thereof as he thinks proper to the attorney general, or county attorney for the county where the commitment is made, to attend the hearing in behalf of the state. (R. S. c. 107, § 84.)

Sec. 85. Power to release debtor.—The justice shall consider all proper evidence offered on either side, and may require the oath of the petitioner to all or any of the facts by him stated; and, if satisfied that the prisoner is unable to pay any part of the amount due on such process, may order his discharge from imprisonment, having first administered to him, if he thinks proper, an oath substantially in the form prescribed by section 56. (R. S. c. 107, § 85.)

Sec. 86. Justice may release him or discharge debt on payment or security of part.—If on examination it appears to such justice that the prisoner is able to pay only a part of the amount due, he shall order his release from imprisonment and, if he thinks it more for the interest of the state, he may order the whole debt to be discharged upon his paying or securing such sum of money or assigning to the state such securities or other property, at such time and in such manner and to be deposited with such public officer, as such justice shall direct. (R. S. c. 107, § 86.)

Sec. 87. Jailer to comply with decision.—The jailer having charge of the debtor shall thereupon release him from confinement or give him a full discharge from the demand on the terms prescribed. (R. S. c. 107, § 87.)

Sec. 88. Adjudication recorded.—If such proceedings are had when the superior court is not in session for the county, such justice shall cause his adjudication and discharge to be entered of record as of the last preceding term of the court therein. (R. S. c. 107, § 88.)

Sec. 89. Power of county commissioners. — The county commissioners at a regular session or a majority of them in vacation may, on application, exercise the powers, and their proceedings shall have the effect provided in the 5 preceding sections. (R. S. c. 107, § 89.)

Sec. 90. Application by such debtor to take oath; notice.—A person committed on execution as mentioned in section 84, desiring to take the oath provided in section 56, may apply to the jailer, who shall apply in writing to a justice of the peace in his behalf, and he shall issue a citation as hereinbefore prescribed, to be served on the county attorney for the same county, who shall by himself or a competent substitute attend at the time and place as attorney for the state, and a disclosure may thus be had and all the proceedings and the effect shall be the same as in the disclosures of execution debtors to individual creditors; and the justices of the peace hearing it may, if they see cause, administer an oath and grant a certificate to the debtor as hereinbefore provided, with verbal alterations to conform to the case. (R. S. c. 107, § 90.)

See c. 27, § 35, re proceedings upon judgments against warden of state prison; c. 89, § 169, re sheriffs; c. 105, § 14, re attorney at law; c. 126, § 38, re habeas corpus for insane persons arrested on mesne process or execution; c. 139, § 8, re benefit of c. 120 for debtors in money lost by gambling; c. 141, § 21, re benefit of c. 120 for persons committed for abatement of nuisances; c. 166, § 32, re benefit of c. 120 for respondents in bastardy process.