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Chapter 171.

Title to Real Estate by Levy of Execution.

Levies upon real estate are to be construed by the same rules as conveyances by deed. As the proceeding is in invitum, the language of the levy is to be construed most strongly against the creditor and his grantees. The words used are the language of the creditor whose duty it is to ascertain the title and boundaries of the land before he causes the levy to be made. The court will give to the language of a deed or levy its usual signification and meaning, and not a forced or unusual construction in order to relieve a party from the effects of its obvious and ordinary import. Young v. McGown, 59 Me. 349.

Levy by Appraisement.

Sec. 1. What real estate levied on; levy by appraisal; appraisers.—Real estate attachable, including the right to cut timber and grass as described in chapter 112, may be taken to satisfy an execution, by causing it to be appraised by 3 disinterested persons, one chosen by the creditor, one by the debtor and the other by the officer having the execution for service, who shall give notice to the debtor or his attorney, residing in the county where the land lies, to choose an appraiser, and shall allow him a reasonable time therefor, and if he neglects, appoint one for him. (R. S. c. 157, § 1.)

Cross references.—See § 5 and note, re contents of return; c. 112, § 60, re real estate and interests subject to attachment.

Only attachable realty can be taken to satisfy execution.—It is provided by this section that real estate attachable may be taken to satisfy an execution. The implication necessarily is that real estate not attachable cannot be so taken. Ripley v. Harmony, 111 Me. 91, 88 A. 161.

Procedure under section is not sale to satisfy execution.—The procedure under this section is not a sale to satisfy the execution, and the transfer of the title by the officer to the purchaser, but the taking of the real estate and title thereto by the creditor on appraisement in satisfaction and payment of the execution. Jones v. Buck, 54 Me. 301.

Giving notice to debtor to choose appraiser is beginning of service of execution.—The act of the officer in giving the notice to the debtor to choose an appraiser must be deemed a good beginning of the service of the execution. Fitch v. Tyler, 34 Me. 463.

And constitutes a seizure of the land.—No particular ceremony is required by an officer in seizing real estate on execution, and it is not made essential that he shall enter upon it during any stage of the proceedings. When he is notified by the creditor to levy the execution upon real estate, and he informs the debtor of his purpose, and requests him to appoint an appraiser, he may be considered as having seized the land in execution. Fitch v. Tyler, 34 Me. 463.

Owner of realty should have opportunity to appoint appraiser.—It is obvious that the legislature intended that the owner of real estate, about to be taken upon execution, should have the opportunity of appointing an appraiser to assist in the proceedings. Harriman v. Cummings, 45 Me. 351.

And he must be notified to so appoint.—It is necessary to the validity of the levy that the debtor, whose land is alleged in the return to have been seized, should be notified, or that he should have refused to choose an appraiser. Ware v. Barker,

49 Me. 358. See note to § 5, re return must show notice given.

If the owner of the real estate about to be taken on execution is not notified that he can appoint one appraiser, provided his residence is such as to be entitled to the notice, the levy will be void, not withstanding another debtor in the same execution might make the appointment without the authority of the owner of the real estate. Harriman v. Cummings, 45 Me. 351.

And reasonable time therefor must be allowed.—The statute requires that a debtor should be allowed a reasonable time within which to appoint an appraiser. Dwinel v. Soper, 32 Me. 119.

And specified in the notice.—The time, which the officer may deem reasonable to give, shall be specified in the notice, so that the debtor may know when it will expire. Fitch v. Tyler, 34 Me. 463.

What time may be given is submitted to judgment of officer.—The statute requires that the officer shall give notice to the debtor, and allow him a reasonable specified time, within which to appoint an appraiser. What time may be given to the debtor for that purpose, is submitted to the judgment of the officer. Fitch v. Tyler, 34 Me. 463.

The "notice" and "reasonable time" for an execution debtor to select an appraiser under this section is submitted to the discretion of the levying officer. Fowle v. Coe, 63 Me. 245.

Officer not required to give notice outside his county.—The debtor is to be duly notified by the officer, if he is living within the county. As the authority of the officer, through whose agency the levy is made, is limited to his own county, the law does not require him to perform an act of official duty elsewhere. Buck v. Hardy, 6 Me. 162.

If the debtor is not to be found in the county which limits the range of the officer's power, he is not required to give him notice. Dodge v. Farnsworth, 19 Me. 278.

Nor leave notice at place of abode of absent debtor.—When the debtor is absent from the county, it might be reasonable that the officer should leave notice at the last and usual place of abode of the debtor, but the law imposes no such duty upon him. Dodge v. Farnsworth, 19 Me. 278.

The debtor might have a domicil in the county, while on a distant voyage. In such case, the officer is neither obliged to give notice, nor to await his return. As the officer is to appoint disinterested persons who are to be under oath, and the debtor has a year to redeem the estate, his interest is protected, although absent. Dodge v. Farnsworth, 19 Me. 278.

And if neither debtor nor attorney resides in county officer may appoint appraiser for him.—If the officer's return shows that the debtor did not reside in the county where the land levied on was situated, and that he had no attorney residing there, the officer may appoint an appraiser for the debtor without notifying the debtor or his attorney to do so. Bingham v. Smith, 64 Me. 450.

If, by the return of the officer, it appears that the judgment debtor is resident without the county and has no attorney within the same, no notice is required to be given. In such case, the duty devolves on the officer to choose two appraisers. Rawson v. Clark, 38 Me. 223.

But notice must be given attorney for nonresident if he resides in county.—If a nonresident debtor has an attorney living in the county where the land lies, it is the duty of the officer to give him notice before proceeding to make his levy. Such must be the construction of this section. The insertion of the words, "or his attorney," in this section must have been for some purpose and with some design. Unless it was the intention of the legislature, in case of the absence of the debtor, that notice should be given the attorney, if there is one, these words are utterly without a meaning. Wellington v. Fuller, 38 Me. 61.

For a case, prior to the provision of this section as to the attorney, holding that a debtor might delegate his power, to receive notice and appoint an appraiser, to an agent, see Roop v. Johnson, 23 Me. 335.

Which notice is sufficient.—By this section notice is to be given to the "debtor or his attorney, residing in the county where the land lies." The attorney residing in the county, notice to him would seem to be sufficient, wherever the debtor himself might have his residence. Knight v. Taylor, 67 Me. 591.

Section prescribes no particular form of notice.—It is sufficient that it appears substantially that the debtor had notice. No particular form of giving it is prescribed, and therefore none need be specified in the officer's return. Roop v. Johnson, 23 Me. 335.

Notice to choose appraiser held sufficient.—See Pierce v. Strickland, 26 Me. 277.

Officer's return is sufficient evidence of notice.—If the return of the officer shows that he gave the debtor notice to be present at the time and place, to select an appraiser, which he utterly refused to do, this is sufficient evidence of notice as required by the statute. Keen v. Briggs, 46 Me. 467.

The debtor's refusal to choose an appraiser is a waiver of the debtor's rights in that respect. Thomas v. Johnson, 64 Me. 539.

And officer may choose an appraiser for him.—By this section, the officer may appoint an appraiser for the debtor, if he neglects or refuses to choose one, after being duly notified by the officer, if the debtor lives in the county where the land lies. If he is not living in the county, it presents a case in which the officer may appoint in behalf of the debtor. Dodge v. Farnsworth, 19 Me. 278.

In the absence of the debtor, or in case of his refusal to choose an appraiser, the authority to appoint an appraiser for him is vested in the officer. Russell v. Hook, 4 Me. 372.

The statute requires that the appraisers should be disinterested. McKeen v. Gammon, 33 Me. 187.

But no other qualification is demanded.—The appraisers must be disinterested persons. No other qualification is demanded in terms by the statute. Fitch v. Tyler, 34 Me. 463.

For a consideration of a former provision of this section requiring the appraisal to be made "by three discreet and disinterested men," see Glidden v. Philbrick, 56 Me. 222.

And they need not be residents of county where land lies.—For the validity of a levy on land, it is not necessary that the appraisers should be residents of the county where the land lies. Woodman v. Smith, 37 Me. 21.

The officer cannot compel the service of one who resides in the county, as an appraiser; but if he procures those, who are competent, whether of the county or not, the requirement of the statute is answered. Fitch v. Tyler, 34 Me. 463.

For a consideration of this section when it required the appraisers to be freeholders and residents within the county, see Nickerson v. Whittier, 20 Me. 223.

Officer's return conclusive as to disinterestedness.—If the return of the officer states that the appraisers were disinterested, that is conclusive. Grover v. Howard, 31 Me. 546.

Where the officer certifies that the appraisers of land are disinterested, the return is conclusive of that fact, when the validity of the extent is in question. The remedy, if any there be, for an erroneous certificate in that respect, must be sought against the certifying officer. Rollins v. Mooers, 25 Me. 192.

The officer, by declaring that the appraisers are disinterested, thereby affirms that they were not within that degree of relationship which precludes them from acting. McKeen v. Gammon, 33 Me. 187.

Deputies of sheriff whose deputy made the levy are competent to act as appraisers.—That two of the appraisers are deputies of the sheriff whose deputy made the levy, does not render them incompetent to act as appraisers. Grover v. Howard, 31 Me. 546.

Applied in Brown v. Lunt, 37 Me. 423; French v. Allen, 50 Me. 437; Corbett v. Maine & Union Banks, 53 Me. 542.

Cited in Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

Sec. 2. Appraisers sworn; certificate; view of land.—The appraisers may be sworn by the officer without fee or by a justice of the peace, faithfully and impartially to appraise the real estate to be taken, and a certificate of the oath shall be made, stating the date of its administration on the back of the execution by the person who administered it. They shall then proceed with the officer to view and examine the land so far as is necessary for a just estimate of its value. (R. S. c. 157, § 2.)

Cross reference.—See note to § 10, re entire estate need not be appraised when that section applicable.

History of section.—See Hall v. Staples, 74 Me. 178.

Levy not commenced until appraisers sworn.—The first act to be done by the officer, in extending an execution upon real estate, is to cause three disinterested persons to be sworn as appraisers. The statute points out how they are to be designated, in which the creditor, the debtor and the officer have a part to perform; but the duty of causing them to be sworn is the first, which is specially and distinctly enjoined upon the officer. Until

this is done, the levy cannot be considered as commenced. Allen v. Portland Stage Co., 8 Me. 207.

Evidence sufficient to show appraisers legally sworn.—See Smith v. Keen, 26 Me. 411.

Certificate of oath sufficient although words "Before me" are omitted. — If the justice certifies that certain persons named personally appeared and made oath, in proper form, as appraisers of real estate, the certificate furnishes sufficient evidence that the appraisers were sworn by him, although he may omit the words, usual in such cases, preceding his signature, "Before me." Roop v. Johnson, 23 Me. 335.

And certificate may be amended by appending officer's signature.—The officer may amend his certificate of his administration of the oath to the appraisers, by appending his signature to it, when his return and that of the appraisers recite that the appraisers were duly sworn. Glidden v. Philbrick, 56 Me. 222.

But certificate on separate paper is not sufficient.—A certificate of the oath administered to the appraisers, not made upon the back of the execution, but on a separate piece of paper and attached to it, cannot be considered a compliance with the statute. Hall v. Staples, 74 Me. 178.

Though paper is affixed at one point to the execution.—The meaning of the language of this section is unmistakable. That which is written upon a separate piece of paper is not upon the "back of the execution" even though the paper may be, at one corner, affixed to it. If it were affixed throughout so that it could not be removed, it might become a part of the execution and a compliance with the law, but not otherwise. Hall v. Staples, 74 Me. 178.

Debtor cannot take advantage of failure to make certificate on back of execution.—The provision as to the certificate of oath may be considered as directory to the officer, rather than vital to the levy. The oath is the essential thing. It is necessary, to authorize the appraisers to proceed, as much as the execution itself. It is proper, therefore, that the evidence of it should be upon a part of the execution, especially as that is the most certain way of preserving it. Possibly as against a subsequent attaching creditor, or bona fide purchaser, it may be the only legitimate evidence. But in this case it is the debtor himself who seeks to take advantage of the omission. He has suffered no harm, for the evidence is abundant that the oath was duly administered and all that was necessary to secure his rights in this respect was done. On the other hand, so far as appears, the defendant is an innocent purchaser from him in whose behalf the levy was made. The levy was duly recorded and upon that record he had a right to rely. It does not appear that the record disclosed any such omission as is now claimed. Under these circumstances it would be proper to allow an amendment if one were needed. The lapse of time is no objection, for it does not appear that the defendant is responsible for that, but rather the plaintiff. He is the moving party and it is not for him to complain of a delay caused by a neglect on his part to assert his rights. This alleged defect in the levy must therefore fail to assist the plaintiff in maintaining his action. Hall v. Staples, 74 Me. 178.

The provisions of the statute, requiring the certificate of the oath administered to the appraisers, chosen to make a levy, to be written upon the back of the execution, is directory to the officer, and will not be considered as necessary to the validity of the levy in an action between the judgment debtor and an innocent purchaser from him in whose behalf the levy was made. Hall v. Staples, 74 Me. 178.

It is a sufficient proceeding with the officer to view and examine the land, by the appraisers, under this section, if they proceed under the direction and supervision of the officer. Roop v. Johnson, 23 Me. 335.

Applied in Howard v. Turner, 6 Me. 106; Fitch v. Tyler, 34 Me. 463; Symonds v. Harris, 51 Me. 14; Hanly v. Sidelinger, 52 Me. 138.

Quoted in part in Brackett v. McKenney, 55 Me. 504.

Sec. 3. Value and description of estate made in return. — The appraisers shall in a return made and signed by them on the back of the execution, or annexed thereto, state the value of the estate appraised, and describe it by metes and bounds, or in such other manner that it may be distinctly known and identified, whatever the nature of the estate may be. (R. S. c. 157, § 3.)

History of section.—See Stinson v. Rouse, 52 Me. 261.

Appraisers presumed to have made return on back of execution.—In the absence

of satisfactory proof to the contrary, the court will presume that the appraisers made their return upon the "back of the execution." Brackett v. Ridlon, 54 Me. 426.

And presumption not rebutted by fact that copy is on separate paper.—That a copy of the return is on a separate sheet of paper will not warrant the inference that the original is in the same condition. Brackett v. Ridlon, 54 Me. 426.

Return must state value of estate.—In a levy of an execution upon real estate the appraisers' return must state the value of the estate appraised. Saying that they set it off as in full satisfaction of the execution and costs of levy is not equivalent. Nor does the return of the officer, that they appraised the property at a certain sum, remedy the defect. Chase v. Williams, 71 Me. 190.

There is a radical defect in the levy, if the appraisers do not in their return "state the value of the estate appraised," as required by this section, and say nothing from which its value can be inferred by necessary intendment. Chase v. Williams, 71 Me. 190.

The vital matter of the value of the estate taken to satisfy the execution and costs of levy in the estimation of the appraisers, must appear in both the returns —that made by the appraisers, as well as that of the officer. Chase v. Williams, 71 Me. 190.

And what the debtor's interest is.—The appraisers are to fix the value of the debtor's interest in the premises; and their return should state what that interest is. Stinson v. Rouse, 52 Me. 261.

So that parties may know what rights pass to creditors.—The estate levied upon shall be so distinctly described that the parties may know, with certainty, what rights pass to the creditor. Thayer v. Mayo, 34 Me. 139.

But no particular form of words is required.—The statute does not require the use of any particular form of words, but simply that the nature and interest of the debtor appraised should be distinctly described and set out. Patterson v. Chandler, 55 Me. 53.

And debtor's title need not be correctly stated.—The statute does not require that the title of the debtor should be correctly stated in the appraisers' return, only that there should be no doubt as to the interest appraised. Patterson v. Chandler, 55 Me. 53.

And levy is not void because estate described is larger than that actually owned.—A levy is not rendered invalid by the fact that the estate described in the appraisers' return is larger than that owned by the debtor. See Swanton v. Crooker, 49 Me. 455; Patterson v. Chandler, 55 Me. 53.

Land should be so described that there can be no mistake as to its location.—The legislature intended that the land should be described with such certainty, that there can be no mistake as to its location. Buck v. Hardy, 6 Me. 162; Rollins v. Mooers, 25 Me. 192.

And that it may be known and identified.—The true construction of this section is that, whatever the nature of the estate may be, it shall be described by metes and bounds, or in such other mode, as that the same may be distinctly known and identified. Roop v. Johnson, 23 Me. 335.

Description sufficient in deed is sufficient under this section.—Any mode of describing the estate set off, that is sufficient to identify it in a deed of conveyance, will come within the purview of this section. Rollins v. Mooers, 25 Me. 192.

And land need not be described by metes and bounds.—It is not necessary for the appraisers to describe the premises by metes and bounds. Any other description by which they may be identified is sufficient. Peaks v. Gifford, 78 Me. 362, 5 A. 879.

Nor by measure and monuments.—It is not necessary under this section that the land set off should be described by measure and by monuments. It is sufficient, if it is so described, "that the same may be distinctly known and identified." Inconvenience in ascertaining the boundary, if it is susceptible of ascertainment, can form no objection to the levy. Rollins v. Mooers, 25 Me. 192.

And use of improper terms is not necessarily fatal.—If the appraisers, in describing the part of the premises set out, use certain improper terms, but the other part of their description is not only sufficient without these terms, but it is sufficient to correct the erroneous use of them, and enable one, by the whole description, to ascertain the premises levied upon, the return is sufficient. Such an error will not render either a deed or a levy invalid. Forbes v. Hall, 51 Me. 568.

Description of land held sufficient.—See Cowan v. Wheeler, 31 Me. 439.

Nature of estate held sufficiently de-

scribed.—See Boynton v. Grant, 52 Me. 220; Stinson v. Rouse, 52 Me. 261; Brackett v. Ridlon, 54 Me. 426.

Return may be amended.—Amendments may be made to the return of appraisers, when the rights of third persons acquired bona fide, and without notice by the record or otherwise, would not be destroyed or lessened thereby, according to the facts; that is, when the proceedings were regular and sufficient and only the return defective. Chase v. Williams, 71 Me. 190.

Notwithstanding intervening interest of subsequent purchaser.—If the return contains sufficient matter to indicate that in making the extent the requisites of the statute have been complied with, an amendment may be made notwithstanding any intervening interest of a subsequent purchaser or creditor. Chase v. Williams, 71 Me. 190.

But adverse party should be notified.—Permission to amend a return ought not to be given as a matter of course, nor should it be granted without first notifying the adverse party and giving him an opportunity to show cause against the amendment. Chase v. Williams, 71 Me. 190.

Applied in Jewett v. Whitney, 43 Me. 242; Hall v. Staples, 74 Me. 178.

Cited in French v. Allen, 50 Me. 437.

Sec. 4. Appraisal, when several parcels taken.—When several parcels of land are taken, they may be appraised separately or together. When taken at different times, there may be different sets of appraisers. A levy is valid when the return is signed by two of the appraisers, the other appearing to have been sworn and to have acted. (R. S. c. 157, § 4.)

Two parcels may be taken at separate appraisal.—A levy is not void for taking, at the same time as one act, two parcels of a farm, the parcels lying side by side, at separate instead of joint appraisal. Hathorn v. Corson, 77 Me. 582, 1 A. 738.

Failure of appraiser to sign does not invalidate levy. — There being evidence that all the appraisers acted and viewed, the levy cannot be regarded as void because one omitted or refused to sign. Munroe v. Reding, 15 Me. 153.

A levy may be effectual to pass the estate, though one of the appraisers neglected to sign the certificate of appraisement. McLellan v. Nelson, 27 Me. 129.

Sec. 5. Officer's return, contents.—The officer, in his return on the execution, shall state substantially the time when the land was taken on execution; how the appraisers were appointed; that they were duly sworn; that they appraised and set off the premises, after viewing the same, at the price specified; that he delivered seizin and possession to the creditor or his attorney, or assigned the same to him as in case of remainder or other incorporeal estate; and the description of the premises by himself or by reference to the return of the appraisers. If the appraisers' return is signed by two only, he must state whether all were present and acted. He may refer to and adopt, in his return, the return of the appraisers, and the subsequent proceedings will be valid though made after the return day of the execution or after the removal or disability of the officer. (R. S. c. 157, § 5.)

I. General Consideration.

II. Contents of Return.

A. In General.

B. Appointment and Qualification of Appraisers.

III. Amendment of Return.

I. GENERAL CONSIDERATION.

Return operates as statute conveyance.—It is the return of the officer of the appraisal and proceedings, which operates as a statute conveyance of land set off on execution, and divests the debtor of his title; and the delivery of seizin is an acceptance of that title by the creditor in satisfaction of the debt as of the date of those proceedings. Pope v. Cutler, 22 Me. 105; Jones v. Buck, 54 Me. 301.

And party must rely upon it.—In case of a grant by deed, the law presumes the party intended to convey something; but there is no presumption in case of a levy, and the party must rely upon the return of the appraisers and the officer to give him an estate not invalidated or rendered

void by exceptions or qualifications. Jewett v. Whitney, 51 Me. 233.

Officer must deliver seizin and possession to creditor.—The statute requires an officer making a levy of an execution on real estate to deliver seizin and possession thereof to the creditor or his attorney. This formality is a necessary prerequisite to constitute a valid levy. Bingham v. Smith, 64 Me. 450. See this note, analysis line II A, re return must show delivery of seizin and possession.

If this not done, new levy may be made of same execution. — When the officer making a levy of an execution does not deliver seizin and possession to the creditor or his attorney, it is not necessary to apply to the court to have the execution superseded before a new levy can be made, but a new levy may be made on the same execution, if in life, the previous proceedings being void ab initio. Bingham v. Smith, 64 Me. 450.

As it may be if creditor rejects land levied upon.—When a creditor's rejection of the land levied upon is evidenced by the officer's return and his own certificate upon the execution, no title to the land passes to him by the levy and the proceedings in making it become void, in the same manner as in the case where the officer's return shows that he did not deliver seizin and possession to the creditor. There is no substantial reason for requiring the creditor to sue out a writ of scire facias for an alias execution, or of debt for a new judgment before he can make another levy in the former case, and allowing him to make another levy on the same execution in the latter one. To make such distinction, on the contrary, is to subject a creditor, who thus exercises his legal right to reject a levy, to great expense, vexation and delay, as well as the risk of losing his debt altogether, for no legal purpose. Bingham v. Smith, 64 Me. 450.

Return is prima facie evidence that attorney received seizin and possession. — The return of the levying officer that he "delivered seizin and possession to" a person named, "attorney for the said" creditor "for the purpose of receiving seizin and possession," etc., as per his receipt hereon, is prima facie evidence that the person named was the attorney, and received seizin and possession of the premises. Wilson v. Gannon, 54 Me. 384.

Return is conclusive between creditor and debtor. — The return of the officer, who made the levy, in reference to matters in the line of his official duty, is conclusive between the creditor and debtor. McLellan v. Nelson, 27 Me. 129. See note to § 10, re return conclusive as to advisability of dividing land.

The sheriff's return is conclusive as to the formal proceedings by the appraisers and himself. Mansfield v. Jack, 24 Me. 98.

Whether true or false.—The return of the officer, whether true or false, is conclusive as to what is done under the execution. Allen v. Portland Stage Co., 8 Me. 207.

And it cannot be controverted by the parties.—The officer's return cannot be controverted by the parties to the levy, but must be taken to be true. If his return is not true, the remedy is by an action against him for a false return. McKeen v. Gammon, 33 Me. 187.

Generally the truth of an officer's return, in reference to duties enjoined upon him by law, cannot be controverted, except in an action against himself, or where strangers are concerned. Mansfield v. Jack, 24 Me. 98.

Nor is parol evidence admissible to vary its language.—Parol evidence is not admissible to explain or vary the effect of the language used in the return of the officer. Grover v. Howard, 31 Me. 546.

Part of proceedings may be after return day of execution.—By this section, it is provided that, in levying an execution upon land, the proceedings may be valid, although a part of them are made after the return day of the execution. Robinson v. Williams, 80 Me. 267, 14 A. 67.

Applied in Brown v. Lunt, 37 Me. 423; Chadbourne v. Mason, 48 Me. 389.

Cited in French v. Allen, 50 Me. 437.

II. CONTENTS OF RETURN.

A. In General.

Return must show compliance with every statute requirement.—The return of the extent must expressly show a compliance with every requirement, which the statute makes essential to its validity. Glidden v. Philbrick, 56 Me. 222.

Whatever is necessary to constitute a legal levy of an execution, must appear on the return of the officer making the levy. Sturdivant v. Frothingham, 10 Me. 100.

Whether all the requisites of the statute have been complied with, so as to vest the debtor's title in the creditor, must be ascertained by an examination of the officer's return. Means v. Osgood, 7 Me. 146, overruled on another point in Bugnon v. Howes, 13 Me. 154.

Everything that is made necessary by statute to pass the property in real estate, taken in execution, must appear by the return of the officer to have been done. Howard v. Turner, 6 Me. 106.

But strict verbal conformity to statute is not required.—While it is necessary that the language of the return should be explicit to a common intent and understanding, leaving nothing that is essential to mere argument or probable inference, strict verbal conformity to the language of the statute has never been required. While it may be desirable to adhere carefully to the phraseology of the governing statute, the levy will be sustained if the return imports by necessary intendment the actual performance of all the statute requisites. The letter of the statute is not solely to be regarded. Brackett v. McKenney, 55 Me. 504.

Return must state that premises were set off.—Among the facts which must be "substantially" stated in the return is that the appraisers "appraised and set off the premises, after viewing the same, at the price specified." Brackett v. McKenney, 55 Me. 504.

Which means to separate or assign.—To "set off," as used in this section simply means to separate or assign for the purpose of satisfying the execution and officer's fees so far as the appraised value of the land will go. Brackett v. McKenney, 55 Me. 504.

And it must show that officer delivered seizin and possession.—The return of the officer must show, that he delivered seizin and possession of the land appraised, to the creditor or his attorney, or no title will pass to the creditor. This is one of the essential particulars required by the statute to be returned by an officer. Jackson v. Woodman, 29 Me. 266. See this note, analysis line I.

What is surplusage in return may be rejected.—What is surplusage, and useless, and unnecessary in the return may be rejected or disregarded, if what remains contains all that the statute requires. Jones v. Buck, 54 Me. 301.

And levy not invalidated by insertion of name of person who cannot derive title therefrom.—A levy, perfect in all respects to give title to the creditor, with seizin delivered to the creditor, will not be rendered nugatory by the insertion in the return, by mistake or ignorance, or other cause, of the name of a person who could not, in any event, derive any title or interest therefrom to himself, and when the whole sentence, in which the name is inserted, might be struck out as unnecessary, even if it had correctly named the creditor. Jones v. Buck, 54 Me. 301.

The statute does not require the return of an officer making a levy upon real estate, to specifically declare that the land appraised is "set off" to the creditor, "to have and to hold to him, his heirs," etc.; and, if the name of a person other than the creditor be inserted, the whole phrase may be rejected as surplusage. Jones v. Buck, 54 Me. 301.

Return must state time when land was taken.—It is one of the statute requisites of a levy that the officer shall state, in his return on the execution, the time when the land was taken in execution. Boynton v. Grant, 52 Me. 220.

And all subsequent proceedings relate back to that time.—The time named in the officer's return when he "seized and took in execution" the lands, was the commencement of the service of the execution, and all subsequent proceedings relate back to that time. French v. Allen, 50 Me. 437.

But it is not necessary for the officer to state the items of his charges. Keen v. Briggs, 46 Me. 467.

Where the officer's return does not state specifically the items of his charges and fees, nor the gross amount, but that the land levied upon was appraised at a certain sum, "which is the amount of the execution, fees and charges," it is sufficient, as the execution and return, taken together, furnish data for ascertaining the amount of charges. Keen v. Briggs, 46 Me. 467.

And section requires no particular description of land set off.—The statute requires no particular description of the land set off upon execution in the officer's return; but the description and appraisement of the land shall be indorsed on the execution and signed by the appraisers. Woodman v. Smith, 37 Me. 21.

And reference to certificate of appraisers is sufficient.—Under the provisions of this section relating to levies on real estate, the return of an officer that, on a day and hour named, he "seized and took in execution" certain lands of the debtor, and set off the same by metes and bounds to the creditor in satisfaction of an execution, referring to the annexed certificate of the appraisers for a description of the premises set off, is sufficiently definite. French v. Allen, 50 Me. 437.

Officer's return inconsistent with appraisers' return.—An officer's return stating that the appraisers set off the estate "with metes and bounds" is inconsistent with the appraisers' return setting off an

undivided part. Chase v. Williams, 71 Me. 190.

B. Appointment and Qualification of Appraisers.

Return should show that appraisers were disinterested.—The statute authorizing the levy of an execution upon land requires that the appraisers should be disinterested; and the law requires that it should appear by the return of the officer making the levy, that they were so. If, therefore, the officer merely states that the appraisers were freeholders and discreet men, wholly omitting to certify that they were disinterested, the levy is void. Pierce v. Strickland, 26 Me. 277. See note to § 1, re return conclusive as to appraisers' disinterestedness.

And defect cannot be supplied by parol.—Where, by the return of the officer, it does not appear that the appraisers were disinterested, that defect cannot be supplied by parol testimony. Munroe v. Reding, 15 Me. 153.

Return must show appraisers appointed in conformity with statute.—A levy made upon the demanded premises is bad, if it does not appear either in the return of the officer, or the accompanying documents, that the appraisers were appointed in conformity with the statute. The requirements of the law upon this point are too important to be disregarded. Banister v. Higginson, 15 Me. 73.

And by whom they were appointed.—If the return omits to state by whom one of the appraisers was appointed, this is certainly not a compliance with the statute requisition, and is fatal to the validity of the levy, unless the defect can be supplied. Fitch v. Tyler, 34 Me. 463.

And that one was appointed by the debtor.—The levy of an execution, against two judgment debtors, upon real estate, is void, unless the officer's return thereof shows that the debtor, whose estate is taken, chose one of the appraisers, or neglected to do so upon being duly notified. Boynton v. Grant, 52 Me. 220; Morse v. Sleeper, 58 Me. 329.

But it need not state time allowed for appointment.—It is not necessary that the officer should state in the return, the time allowed for the choosing of an appraiser. Fitch v. Tyler, 34 Me. 463.

Return must show debtor was notified to choose an appraiser.—It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser. Means v. Osgood, 7 Me. 146, overruled on another point in Bugnon v. Howes, 13 Me. 154. See note to § 1, re return as evidence of notice.

When an execution against two debtors is levied upon the land of one of them, a return, that "the debtor" refused to choose any appraiser, fails to show that the owner of the land had the requisite notice to do so, and the levy is therefore void. Ware v. Barker, 49 Me. 358.

Or such facts as authorize officer to appoint without notice to debtor.—There are cases in which our statute does not require that the debtor should have notice to appoint, and in those cases it is necessary that the officer should return such facts as would prove his authority to appoint without notice to the debtor. Nickerson v. Whittier, 20 Me. 223; Bingham v. Smith, 64 Me. 450. See § 1 and note.

When the officer in his return of an extent, stated that he chose two of the appraisers, the debtor not being within the state, nor within his knowledge, the return was held sufficient. Rawson v. Clark, 38 Me. 223.

If notice is required, return must show debtor neglected to appoint to prove officer's authority to appoint.—When the officer is required to notify the debtor to appoint an appraiser, he must return that he has neglected or refused to appoint, to prove his authority to appoint one for him. Nickerson v. Whittier, 20 Me. 223; Bingham v. Smith, 64 Me. 450.

But neglect need not be shown if notice not required.—The officer, as a prerequisite of his authority to appoint an appraiser for the debtor, is not required to return that the debtor "neglected" to appoint an appraiser, when the statute does not require the officer to give the debtor notice to appoint one. Bingham v. Smith, 64 Me. 450.

There can be no "neglect" of a debtor to choose an appraiser when he is not entitled to notice to choose one; nor can the officer be required by the statute "to allow the debtor a reasonable time therefor," when he is not bound to notify him at all. The "reasonable time," mentioned in the statute, is the time that elapses between giving notice and appointing an appraiser. It is impossible to determine whether "reasonable time to choose an appraiser" was "allowed," in a given case, when either date is wanting. The "neglect" of the debtor to choose an appraiser, in the meaning of the statute, commences at the expiration of the "reasonable time" "allowed therefor"; when that is indeterminate, there is no criterion for determining the question of neglect. To hold, therefore, that an officer's return is fatally

defective because it does not show that the debtor "neglected to choose an appraiser" when he was neither bound by law, and did not undertake to notify him to do so, is to require such officer to commit a palpable absurdity. Bingham v. Smith, 64 Me. 450.

Return showing neglect of debtor to appoint implies that he was notified.—Although it is essential to the validity of the return that it should show that the debtor was duly notified to choose an appraiser, such notice may be implied from the return of the officer that the debtor has neglected to choose an appraiser. Bugnon v. Howes, 13 Me. 154, overruling Means v. Osgood, 7 Me. 146.

An officer's return, stating that the debtor neglected to choose an appraiser, is sufficient, there being a necessary implication, that he was notified. Smith v. Keen, 26 Me. 411.

The return of the officer, that the debtor neglected to appoint, etc., implies that he had been notified; for the officer would be guilty of a false return in saying the debtor neglected, if he had not been notified. Roop v. Johnson, 23 Me. 335.

And notice need not be stated in express terms.—It is sufficient for the officer to return, that the debtor "neglected," or "neglected and refused" to choose an appraiser, without saying, in express terms, that he notified him to do so. Pierce v. Strickland, 26 Me. 277.

If officer chose 2 appraisers, return must show debtor had no attorney in the county.—Where the officer's return of a levy upon the land of an absent debtor discloses that the officer selected 2 appraisers, and does not show that the debtor had no attorney within the county, or that the attorney neglected to appoint an appraiser, the levy will be invalid. Williamson v. Wright, 75 Me. 35.

Return may be sufficient without date.—Where the return of a levy shows that the officer actually gave notice to the debtor after the seizure and before the choice of an appraiser, and the debtor refused to choose an appraiser, that is sufficient, without any date, to show that the officer had done all that was required in that respect. Peaks v. Gifford, 78 Me. 362, 5 A. 879.

And it need not name magistrate who administered oath.—If the return is that the appraisers were duly and legally sworn faithfully and impartially to appraise such real estate as should be shown to them, this is sufficient. It is not essential, that the officer should name the magistrate, by whom the oath was administered, or that his certificate should appear in the proceedings. Dodge v. Farnsworth, 19 Me. 278.

And court will not look beyond return to take notice of defect in its administration.—Where the officer, in his return of the extent of an execution, states that the appraisement was made under oath, but does not refer to the certificate of the magistrate; the court, in an action between other persons touching the title acquired by the extent, will not look beyond the officer's return to take judicial notice of any defect in the administration of the oath, though apparent on the face of the magistrate's certificate indorsed on the execution. Bamford v. Melvin, 7 Me. 14.

Clerical error in appraiser's name not fatal.—Where the papers clearly show that the person chosen and sworn as appraiser was the same as he who acted in that capacity, a clerical error in the initial letter of his name in the officer's return is not fatal to the levy. Hall v. Staples, 74 Me. 178.

III. AMENDMENT OF RETURN.

Return may be amended.—Amendments may be made to the return of the officer, when the rights of third persons acquired bona fide, and without notice by the record or otherwise, would not be destroyed or lessened thereby, according to the facts; that is, when the proceedings were regular and sufficient and only the return defective. Chase v. Williams, 71 Me. 190.

When no rights of third parties have intervened.—An officer will be permitted to amend his return, in order to perfect the title according to the justice and truth of the case, when no rights of third persons have intervened. Glidden v. Philbrick, 56 Me. 222.

The court will permit returns to be amended or completed, where no one will be affected by such amendment except the parties in the original suit. Means v. Osgood, 7 Me. 146, overruled on another point in Bugnon v. Howes, 13 Me. 154.

Thus that person swearing appraisers was justice of peace may be shown by amendment.—If the return fails to show that the person swearing the appraisers was a justice of the peace, this may be amended by stating the fact, even after registry, and pending an action for the land, if the rights of third persons are not thereby affected. Howard v. Turner, 6 Me. 106.

But amendment not allowed unless adverse party notified.—Permission to amend the officer's return ought not to be given

as a matter of course, nor should it be granted without first notifying the adverse party and giving him an opportunity to show cause against the amendment. Chase v. Williams, 71 Me. 190.

And an officer will not be permitted to amend his return when the rights of the third persons have intervened. Berry v. Spear, 13 Me. 187.

An amendment to the return cannot be allowed to affect any other persons than the original parties. Banister v. Higginson, 15 Me. 73.

An officer's return of a levy cannot be amended according to the facts, after having been recorded, to the injury of intervening bona fide purchasers. Boynton v. Grant, 52 Me. 220.

Unless the requisites of the statute were complied with.—If the officer's return contains sufficient matter to indicate that in making the extent the requisites of the statute have been complied with, an amendment may be made, notwithstanding any intervening interest of a subsequent purchaser or creditor. Chase v. Williams, 71 Me. 190.

The return of an officer may be amended as against a subsequent purchaser, when the record shows that all the requirements of the law were probably complied with, if it is satisfactorily shown to the court that they were actually complied with. Knight v. Taylor, 67 Me. 591.

Or the third person had knowledge of the facts.—The return of an officer levying an execution upon real estate, may be amended as against a subsequent purchaser with knowledge of the facts. Knight v. Taylor, 67 Me. 591.

And an attaching creditor must have had such knowledge at time of attachment.—An amendment to an erroneous return will not be allowed where there is a subsequent attaching creditor who has levied upon the same property, even though he had notice of the facts to be stated in the amendment at the time of making his levy, if he did not have notice of such facts at the time of making his attachment. Williamson v. Wright, 75 Me. 35.

Amendment does not relate back to time of registry.—The amendment of an officer's return of an extent after it has been recorded will not, it seems, relate back to the time of its registry; but will take effect only from the time of the amendment. Means v. Osgood, 7 Me. 146, overruled on another point in Bugnon v. Howes, 13 Me. 154.

Officer need not continue in office until proceedings complete.—To make a valid levy, it is not required that the person, who acts as a sheriff, deputy sheriff or other officer, should continue in office, until the proceedings are complete, if they were commenced by him, when he had official power for the purpose. Fitch v. Tyler, 34 Me. 463.

And he may amend return after his removal.—It follows, if a return may be made entirely after the officer's removal, that he may be permitted to make an amendment by supplying defects if proper in other respects. Every act connected with the return, is supposed to be done under the sanctions of his office, without reference to the time. Fitch v. Tyler, 34 Me. 463.

Return held cured by amendments.—See Symonds v. Harris, 51 Me. 14.

Sec. 6. Estates tail.—Estates tail shall be taken, appraised and held as estates in fee simple. (R. S. c. 157, § 6.)

Cross reference.—See c. 168, § 10, re entailments may be barred by conveyance in fee simple.

Quoted in Swanton v. Crooker, 49 Me. 455.

Sec. 7. Estate held in joint tenancy taken on execution.—The whole or part of an estate held in joint tenancy or in common may be taken to satisfy an execution, in the same manner as other real estate is now taken and held in common, but the whole estate must be described and the share owned by the debtor must be stated. (R. S. c. 157, § 7.)

Whole estate must be described.—If the land levied upon is held in common by the debtor with others, the whole estate must be described by the appraisers and the debtor's share or part thereof, so held, be so stated by them. Thayer v. Mayo, 34 Me. 139.

And levy must specify what interest the debtor holds.—A levy of an undivided part of the interest, which the execution debtor holds in a tract of land jointly with others, is void, unless it specifies what the interest is, which the debtor holds. Rawson v. Lowell, 34 Me. 201.

The provisions of this section apply when the debtor's apparent or known title extends only to an undivided part or portion of the estate. In such cases it is necessary that the whole estate should be described by the appraisers, and the debtor's share

or part thereof stated by them. Howe v. Wildes, 34 Me. 566; Swanton v. Crooker, 49 Me. 455.

Levy valid though debtor owns larger estate than that described.—A levy made upon an undivided fifth of the execution debtor's estate held in common, is valid under this section, provided the return states the debtor's ownership of the part taken, although it should appear that the debtor actually owned more. Morse v. Sleeper, 58 Me. 329.

Cited in Brown v. Clifford, 38 Me. 210.

Sec. 8. Debtor's interest passes by levy.—All the debtor's estate, interest or share in the premises, whether held in tail, reversion, remainder, for life, years or otherwise, passes by a levy, unless it is larger than the estate mentioned in the appraisers' return. (R. S. c. 157, § 8.)

The levy can pass no greater estate than it describes; and if it is less than that to which the debtor has title, it is restricted to the description. Brown v. Clifford, 38 Me. 210.

But it will pass estate smaller than that described.—If the debtor's interest in the premises is smaller than that mentioned in the appraisers' description, it therefore passes by the levies. Butterfield v. Haskins, 33 Me. 392.

When the record shows that the debtor's title covers the whole land in fee, a levy of the whole will transfer whatever title he may have, though it is but a life estate in an undivided part. Howe v. Wildes, 34 Me. 566.

And no deed or words of grant are necessary.—No deed or instrument of conveyance from the sheriff is required, as it is in case of a sale of an equity of redemption (§ 35). No words of grant are necessary in a levy. The title passes, not by deed, but by the levy, from the debtor to the creditor. When that is complete by the performance of all the statute requisites, and seizin is delivered and accepted, the title is perfect. All that the sheriff is authorized or required to do, after the levy is completed, is to deliver seizin and possession to the creditor, and to make a return of all his doing on the execution. The title rests on the return, and if that shows that all the statute requirements have been complied with, the title is good under it. Jones v. Buck, 54 Me. 301. See note to § 5.

A levy is a statute conveyance, and vests the title and seizin in the creditor without other conveyance. Jones v. Buck, 54 Me. 301.

Conveyance is as good as if made freely by the debtor.—It was not the intention of the legislature to allow estates to be created, or transferred in any new manner, altogether repugnant to the principles of the common law, but to put a conveyance under the statute on as good a footing as if made freely by the debtor. Chase v. Williams, 71 Me. 190.

Applied in McKeen v. Gammon, 33 Me. 187.

Quoted in Burnham v. Howard, 31 Me. 569.

Stated in Abbott v. Sturtevant, 30 Me. 40; Swanton v. Crooker, 49 Me. 455.

Cited in Patterson v. Chandler, 55 Me. 53; Morse v. Sleeper, 58 Me. 329; Bowman v. Pinkham, 71 Me. 295.

Sec. 9. Levy on rents and profits.—When the estate cannot be described as provided in section 3, the execution may be levied on its rents and profits, and the officer may give seizin thereof to the creditor, and cause a person in possession to become tenant to him or, on his refusal, may turn him out and give possession to the creditor. (R. S. c. 157, § 9.)

Applied in Hilton v. Hanson, 18 Me. 397.

Sec. 10. When part cannot be taken without damage to whole.—When the premises consist of a mill, mill privilege or other estate more than sufficient to satisfy the execution, which cannot be divided by metes and bounds without damage to the whole, an undivided part of it may be taken and the whole described, or it may be levied on as provided in the preceding section. (R. S. c. 157, § 10.)

Section applies only to estates that would be injured in like manner as mill.—It is not every estate, the value of which may in some measure be diminished by such a levy, that falls within the provisions of this section. The words "other estate which cannot be divided by metes and bounds without damage to the whole" have reference to such other estate as would be injured in like manner as a mill or mill privilege would be by such a levy, and not to real estate liable to some, but not to

such kind of injury by separating a portion of it by metes and bounds. Hilton v. Hanson, 18 Me. 397.

Officer must determine whether setting off portion would be prejudicial to whole.—It is undoubtedly a part of the duty of officers, employed in the levying of executions, before proceeding to levy upon an undivided portion of the estate of the debtor, to ascertain whether it presents a case, in which the setting off of a portion of it, by metes and bounds, will be prejudicial to, or spoil the whole. If he should persist in setting it off in severalty, when by so doing he would injure the whole, he might subject himself to an action, as for a misfeasance, and the like would be the case, if he should unreasonably persist in setting it off in undivided portions, when it could, with propriety, be set off in severalty. The officer in such cases must act at his peril. Mansfield v. Jack, 24 Me. 98.

And his return must show premises could not be divided.—It is essential to the validity of a levy made upon an undivided portion of the land, of which the execution debtor is seized in fee and in severalty, that it appears by the return that the premises levied on could not be "divided by metes and bounds without damages to the whole." Morse v. Sleeper, 58 Me. 329.

Upon which question the return is conclusive.—The return of an officer that the land, upon which an execution is to be levied, "cannot be divided without prejudice to, or spoiling the whole," is conclusive of the fact, as between the creditor and debtor, and those claiming under them; and can be controverted only in an action against the officer, or his principal, for misfeasance. Mansfield v. Jack, 24 Me. 98. See note to § 5.

Entire estate need not be appraised when undivided part taken.—While this section requires the whole estate to be described, it does not require it to be appraised, nor are the appraisers sworn to appraise the whole. They are, however, sworn to appraise the part taken to satisfy the execution. The appraisal of the whole estate is unnecessary and irrelevant where this section is applicable and must be treated as surplusage. Symonds v. Harris, 51 Me. 14.

Applied in Gregory v. Tozier, 24 Me. 308.

Sec. 11. Levy on an estate for life.—A levy may be made on an estate for life as on other real estate, and its value appraised; or it may be made on its rents and profits, and an appraisement of them made for a term of time, if the life so long continues, computing interest on the execution, and deducting the rents and profits from time to time when due; and when the estate expires before the end of the term for which it was taken, the creditor by an action on the judgment may recover the balance due. (R. S. c. 157, § 11.)

Cross reference.—See § 28, re regulation of costs.

Return should inform debtor of precise value of rents and profits set off.—When an execution is levied on the rents and profits of a life estate, under the provisions of this section, the debtor is entitled to a specific statement of what has been done, in order that he may see whether more of his property has been taken than an amount equal to the debt and costs. The return should either state in dollars and cents the precise value of the rents and profits set off; or else there should be a reference to other papers that will make the amount certain. Bachelder v. Thompson, 41 Me. 539.

And statement that amount set off will satisfy execution is not sufficient.—The mere statement in the return that the rents and profits set off for a certain time will be sufficient, in the estimation of the appraisers, to satisfy the execution and all fees, is not sufficiently definite to meet the requirements of the statute. Bachelder v. Thompson, 41 Me. 539.

Applied in Sturdivant v. Forthingham, 10 Me. 100; McLellan v. Nelson, 27 Me. 129.

Sec. 12. Levy on an estate under lease; disposal of rent.—When the levy is made on the whole of an estate under lease, the rent shall be paid to the creditor from the time of the levy. When made on part of it, the appraisers shall determine what portion of the rent is to be paid to him, and it shall be paid to him accordingly. (R. S. c. 157, § 12.)

Sec. 13. Seizin and possession delivered; when debtor not ousted.—The officer shall deliver to the creditor or his attorney, seizin and possession of an estate levied on, so far as the nature of the estate and the title of the debtor admit. When a remainder, reversion or right of redemption is taken, the debtor

in possession shall not be ousted, but his right therein shall be assigned to the creditor, and a return made accordingly. (R. S. c. 157, § 13.)

Sec. 14. Levy on land fraudulently conveyed, or in case of disseizin.—A levy may be made on land fraudulently conveyed by a debtor, or of which he has been disseized and into which he has a right of entry. In such case, the tenant in possession shall not be ousted, but the officer shall deliver to the creditor a momentary seizin, sufficient to enable him to maintain an action for its recovery in his own name. (R. S. c. 157, § 14.)

Cross reference.—See note to c. 112, § 60, re attachment on mesne process of land fraudulently conveyed.

History of section.—See Corey v. Greene, 51 Me. 114.

Levy may be made on land fraudulently conveyed.—By this section, it is provided that a levy may be made on land fraudulently conveyed by a debtor. This right to levy seems to be the same, and to be enforced by levy in the same manner as if no conveyance had been made. The theory of the law is, that the fraudulent conveyance is no transfer of the title against creditors. Wyman v. Fox, 55 Me. 523.

By virtue of this section, a levy may be made upon land fraudulently conveyed by a debtor, and the officer shall deliver to the creditor a momentary seizin, which may be sufficient to enable him to maintain an action for its recovery in his own name. Morse v. Sleeper, 58 Me. 329.

It is well settled by numerous decisions that, where the title to real estate was once in the debtor, but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted, a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. The right to make a levy upon premises thus fraudulently conveyed being expressly given by this section. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110; Michaud v. Michaud, 129 Me. 282, 151 A. 559. See Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

And levy is necessary to sustain bill in equity.—If the debtor at any time has had the legal title to the estate, and, after the debt was contracted, conveyed it for the purpose of defrauding his creditors, such deed is void in contemplation of law, and the creditor may still levy his execution upon it, and then establish the fraud by proceedings in equity. In such a case a levy is necessary; and, without it, a court of equity will make no inquiry into the question of fraud. Corey v. Greene, 51 Me. 114.

Unless debtor gives creditor a deed.—The levy is essential to transfer to the creditor the debtor's title. The proceedings in equity are necessary to divest the fraudulent grantee of any title. A deed from the debtor to the creditor will transfer his title, the same as a levy, and be sufficient to sustain a bill in equity. Corey v. Greene, 51 Me. 114.

Levy gives creditor such seizin as enables him to maintain real action.—If a conveyance is fraudulent and void as to creditors, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seizin as enables him to maintain a real action against the fraudulent grantee. Stickney & Babcock Coal Co. v. Goodwin, 95 Me. 246, 49 A. 1039; Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

It is well settled by numerous decisions that where the title to real estate was once in the debtor but has been conveyed by him for the purpose of defrauding his creditors, an attachment may be made and the property subsequently seized upon execution, precisely as if no such conveyance had been made or attempted, a conveyance under these circumstances being regarded as void as to a creditor who was intended to be defrauded. After title has been acquired by the levying creditor, he may maintain an action at law to recover possession of the premises, or he may resort to equity to have the apparent cloud upon his title removed. Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

Unless party in possession shows better title.—Where land has been fraudulently conveyed by a debtor, a further conveyance by the fraudulent grantee will not so completely purge the fraud as to prevent the levying creditor from acquiring the momentary seizin necessary to enable him to try the title with the party in possession; otherwise two successive conveyances, both of which may be fraudulent and designed to secure the property for the debtor's benefit, would effectually place it beyond the creditor's reach, in contravention of the spirit and intent of the stat-

ute. We do not say that a conveyance by the fraudulent grantee to a bona fide purchaser for value without notice of the fraud would not give the latter a better title than the creditor would derive from a subsequent levy, but only that the momentary seizin which the officer gives the creditor will enable him to maintain his action, unless the party in possession shows a better title in himself; in fine, that proof of such conveyances does not rebut the evidence of the levying creditor's seizin. Morse v. Sleeper, 58 Me. 329.

Or unless title passed by bona fide conveyance prior to attachment.—It is only when the legal title has once been in the husband, and has been conveyed by him in fraud of creditors, that a levy will avail to give a creditor such a seizin as will enable him to maintain a writ of entry against the wife. The creditor can acquire no legal seizin by the levy, if before the attachment, the title which the husband once had has passed from him by a bona fide conveyance, any more than he could in a case where the husband never has had a legal title. Webster v. Folsom, 58 Me. 230.

A creditor cannot acquire title by a levy under this section, if neither the legal estate, nor any remains of it were in his debtor when the debt was contracted or when the attachment and levy were made. Webster v. Folsom, 58 Me. 230.

Section does not authorize levy in case of resulting trust.—This section does not apply to any case of resulting trust so as to require or authorize a levy thereon, where the debtor never had the legal title. Corey v. Greene, 51 Me. 114.

In cases where the debtor has never had the legal estate, but has paid the purchase money, and caused the land to be conveyed by the grantor to a third person, whether the deed is regarded as valid, or invalid, he has never had any title that could be seized on execution. A levy in such case is therefore unnecessary. A return of nulla bona is all that is required to lay the foundation for a suit in equity. Corey v. Greene, 51 Me. 114.

Creditor is placed in same situation as disseized debtor.—The legislature has provided, that the creditor should be placed in the same situation after the levy, that the debtor was before, and has afforded him the opportunity to try the title with the tenant, upon the seizin obtained from the officer, but has restrained him from substituting himself without judgment of law, in the place of one having peaceable possession. Abbott v. Sturtevant, 30 Me. 40.

And he is not placed in possession.—Where the debtor is not seized of the land, upon which an extent is made, the creditor is not to be put into the actual possession of the land as he would be by virtue of a writ of possession, so that he could maintain trespass against the one in its occupation, but is to have a momentary seizin, so as to be able to sustain an action upon his own seizin to obtain possession, if he has the title. Abbott v. Sturtevant, 30 Me. 40.

Nor can the officer expel the tenant against his will.—When an execution is levied upon land, into which the debtor has, or is supposed to have the right of entry, and of which any other person is then seized, the officer shall deliver to the creditor a momentary seizin and possession of the land, so far as to enable the creditor to maintain an action therefor in his own name, and on his own seizin. But he shall not actually expel and keep out the tenant then in possession, against his will. Abbott v. Sturtevant, 30 Me. 40; Burnham v. Howard, 31 Me. 569.

If debtor disseized by possession adverse to his title.—The disseizin of the debtor, which will operate to prevent the creditor from obtaining actual possession of real estate by virtue of a levy is that when the debtor was disseized by a possession adverse to his title, and not by a conveyance made by him. Abbott v. Sturtevant, 30 Me. 40.

Applied in Hall v. Sands, 52 Me. 355.

Cited in Gile v. Boardman, 117 Me. 52, 102 A. 567.

Sec. 15. When debt assigned, estate held in trust for assignee.—When the debt has been previously assigned for a valuable consideration, the creditor named in the execution holds an estate levied on to satisfy it in trust for his assignee, who is entitled to a conveyance thereof, which may be enforced by a bill in equity. (R. S. c. 157, § 15.)

Equitable estate is in assignee.—If, pending a suit in which land had been attached, the plaintiff assigns the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust. Warren v. Ireland, 29 Me. 62.

Applied in Garnsey v. Gardner, 49 Me. 167.

Cited in Mysroll v. Violette, 55 Me. 108.

Sec. 16. Execution returned and recorded within 3 months. — The officer shall return the execution into the clerk's office where it is returnable, and within 3 months after completing the levy cause it, with the return thereon, to be recorded in the registry of deeds where the land lies. (R. S. c. 157, § 16.)

The statute requires that the levy should be recorded within three months after its completion. Berry v. Spear, 13 Me. 187.

The record of the levy of an execution upon land must be made within three months of the date of the officer's return of the seizure on execution, or of the date of his return of the proceedings in making the levy. Pope v. Cutler, 22 Me. 105.

Which means three full months.—The statute intended to give the levying creditor a full three months within which to record his levy. Berry v. Spear, 13 Me. 187.

And day levy made is excluded.—In computing the three months within which an extent on lands is required by the statute to be recorded, the day on which the levy is made should not be included. Berry v. Spear, 13 Me. 187.

Parties may rely on description as it appears of record.—Provision is made by law for recording deeds and levies, as a guide for purchasers and creditors. Such record shows the ownership, and not the occupation. Parties, upon examining the record, regulate their action accordingly, and have a right to rely upon the accuracy and permanency of the description of the premises as it appears of record. Young v. McGown, 59 Me. 349.

Recorded levy has precedence over prior unrecorded levy.—A levy on land duly made, and recorded within the time prescribed by the statute, has precedence over a prior levy not recorded within three months, nor until after making the second levy. Doe v. Flake, 17 Me. 249; Pope v. Cutler, 22 Me. 105.

Record of unsigned return is not sufficient.—The record of the return of the officer, without his signature to authenticate it, cannot be considered such a record as the statute requires to make the levy effectual against subsequent purchasers. Stevens v. Bachelder, 28 Me. 218.

Applied in Balch v. Pattee, 38 Me. 353; Lumbert v. Hill, 41 Me. 475; Boynton v. Grant, 52 Me. 220.

Stated in Hayford v. Rust, 81 Me. 97, 16 A. 372.

Cited in Piscataquis v. Kingsbury, 73 Me. 326.

Sec. 17. Levy not recorded, void against purchaser or creditor, without notice.—When not recorded as provided in the preceding section, the levy is void against a person who has purchased for a valuable consideration, or has attached or taken on execution, the same premises without actual notice thereof. If the levy is recorded after the 3 months, it will be valid against a conveyance, attachment or levy made after such record. (R. S. c. 157, § 17.)

Unrecorded levy invalid except against debtor and persons having knowledge thereof.—A levy of an execution on real estate, not recorded within three months, will be invalid, except against the debtor and his heirs, and those having actual knowledge thereof. Stevens v. Bachelder, 28 Me. 218.

And such knowledge must be proved by indubitable evidence.—Notice of the prior unrecorded levy, sufficient to defeat the operation of this section, must be proved by indubitable evidence. It must be proved either by direct evidence of the fact, or by proving other facts from which it may be clearly inferred. It is not in such a case sufficient that the inference is probable—it must be necessary and unquestionable. Doe v. Flake, 17 Me. 249.

Applied in Lumbert v. Hill, 41 Me. 475; Boynton v. Grant, 52 Me. 220.

Stated in Hayford v. Rust, 81 Me. 97, 16 A. 372.

Sec. 18. When levy waived or held void.—A creditor who has received seizin of a levy not recorded cannot waive it unless the estate was not the property of the debtor, or not liable to seizure on execution, or cannot be held by the levy, when it may be considered void, and he may resort to any other remedy for satisfaction of his judgment. (R. S. c. 157, § 18.)

Applied in Burnham v. Howard, 31 Me. 569; Grosvenor v. Chesley, 48 Me. 369; Piscataquis v. Kingsbury, 73 Me. 326.

Quoted in Prescott v. Prescott, 65 Me. 478.

Sec. 19. When title fails after record, alias execution; debtor may convey title by deed.—When the execution has been recorded and the estate

levied on does not pass by the levy for causes named in the preceding section, the creditor may sue out of the office of the clerk issuing the execution, a writ of scire facias, requiring the debtor to show cause why an alias execution should not be issued on the same judgment; and if the debtor, after being duly summoned, does not show sufficient cause, the levy may be set aside, and an alias execution issued for the amount then due on the judgment, unless during its pendency the debtor tenders in court a deed of release of the land levied on, and makes it appear that the land, at the time of the levy, was and still is his property, and pays the expenses of the levy and the taxable costs of the suit; and the judgment shall be satisfied for the amount of the levy. (R. S. c. 157, § 19.)

Cross reference.—See note to c. 113, § 10, re writ of scire facias amendable.

In a case falling within the provisions of this section, the only remedy is scire facias. Prescott v. Prescott, 65 Me. 478.

And an action of debt will not lie.—Under our present statutes, when an execution has been levied on real estate, and, before it has been returned and recorded, it is ascertained that the levy is invalid for any reason, the creditor may waive the levy, and resort to any other remedy for the satisfaction of his judgment. But, after the execution is returned and recorded, if the levy proves to be invalid, the creditor's only remedy is scire facias to revive the judgment. An action of debt will not lie. Grosvenor v. Chesley, 48 Me. 369.

Debt, as well as scire facias, is a proper remedy to revive a judgment, when a levy is for any cause void. Debt and scire facias are concurrent remedies. However, the action of debt has been abolished or superseded by this section, as far as levies by appraisal and set-off are concerned. Piscataquis v. Kingsbury, 73 Me. 326.

It is "the creditor" who must sue out the scire facias, and to whom a tender of a deed of release is to be made, in order to make an irregular levy good. Piscataquis v. Kingsbury, 73 Me. 326.

Which is to issue from clerk's office issuing execution.—It is still provided that when an execution is levied on real estate and no title obtained, the writ of scire facias shall issue from the clerk's office issuing the original execution. Kennebec Steam Towage Co. v. Rich, 100 Me. 62, 60 A. 702.

Section not applicable if execution was not issued on a judgment.—This section contemplates an execution issued upon a judgment, which has been returned satisfied by a levy and recorded. The section is not applicable if the execution was not issued upon a judgment. Prescott v. Prescott, 65 Me. 478.

There is no occasion for scire facias to set aside a levy not appearing to be a satisfaction of the judgment, and for an alias execution upon the judgment, there having been no first execution issued upon it. Prescott v. Prescott, 65 Me. 478.

And scire facias does not lie where property sold on execution.—Scire facias does not lie under this section where, upon the original execution, real property has been sold and not levied upon by appraisement and set off. Marsh Bros. & Co. v. Bellefluer, 108 Me. 354, 81 A. 79.

And it does not apply to case of levy on equity of redemption.—This section does not seem intended to embrace the case of a levy upon an equity of redemption, where the creditor cannot hold any thing thereby. When the section is examined in connection with others preceding it in the same chapter, the legislature had in view only a levy by appraisal and set-off, and not one where the purchaser at a sale of an equity of redemption or personal chattels failed to obtain a right therein. It refers to cases where the creditor does not obtain what he supposed passed to him as a creditor by the levy directly, and not when the title failed in a stranger who was the purchaser, and who should resort to the creditor for indemnity for the money expended. Pillsbury v. Smyth, 25 Me. 427.

But it does apply where land levied on was mortgaged.—If a creditor extends his execution on land mortgaged for more than its value, he not in fact knowing the existence of the mortgage, though it had been long on record; he may have an alias execution, and satisfaction out of other estate of the debtor; the case being within the meaning of this section. Steward v. Allen, 5 Me. 103.

If an execution is returned satisfied by a levy upon the debtor's land, on which, unbeknown to the creditor, there was, and for a long time had been, an outstanding mortgage, duly recorded, for more than its value, the latter may, on scire facias, by virtue of this section, have the levy set aside and an alias execution issued for the amount of the original judgment. Soule v. Buck, 55 Me. 30.

And this section is not antagonistic to § 29.—Sections 19 and 29 are entirely independent of, and in no way connected with each other. The latter section does not, in its terms, purport to qualify, limit or restrain the other in any respect. The two are not in any sense antagonistic, but each can stand and have its full force and meaning, without, in the slightest degree, interfering with the other and a creditor may avail himself of either section, when his case comes within its provisions. Soule v. Buck, 55 Me. 30.

Creditor can obtain alias execution for portion of debt remaining unsatisfied.—When execution has been satisfied by a levy upon real estate, part of which can, and part of which cannot, be held by the levy, the levying creditor may obtain an alias execution for that portion of the debt which remains unsatisfied by the levy, without surrendering his title to that portion of the estate which he can hold by the levy. Rice v. Cook, 75 Me. 45.

But only for such portion.—Where a levy has been made upon real estate and it is afterwards discovered that the title to a definite portion of the property has failed either through want of ownership or invalid proceedings, the creditor is entitled to a new execution only for the amount remaining unsatisfied. Vermeule v. York Water Co., 112 Me. 437, 92 A. 513.

Sec. 20. Assignee of judgment may sue out writ of scire facias, if estate does not pass by levy. — When a judgment has been assigned for a valuable consideration, and bona fide, in writing, and a levy of an execution issued on such judgment has been made, and the estate does not pass by the levy, and the creditor dies after the levy, the assignee may sue out of the office of the clerk issuing such execution, a writ of scire facias, setting forth the facts aforesaid therein, and requiring the debtor to show cause why another execution should not issue on the same judgment, in the name and for the benefit of the plaintiff in scire facias; and if the debtor, after being duly summoned, does not show sufficient cause why it should not be done, the levy may be set aside; and the court from which said execution issued may order and issue another execution on the same judgment, for the amount of the original debt, interest and costs, in the name and for the benefit of such plaintiff, and against such debtor and his property, in the usual form, with necessary charges. (R. S. c. 157, § 20.)

Sec. 21. Assignee may bring action of debt in own name. — In all cases where a judgment has been assigned as provided for in the preceding section and is not discharged, the assignee may bring an action of debt thereon in his own name; and upon averment and proof of the facts aforesaid, the court may render judgment and execution thereon in his favor; subject, however, to any legal defense which the debtor might have if the action were instituted by the original creditor. (R. S. c. 157, § 21.)

Cross reference.—See note to c. 113, § 170, re assignee may bring action under that section.

Stated in Wood v. Decoster, 66 Me. 542.

Sec. 22. Levy commences when appraisers sworn.—For the purpose of fixing the amount due on the execution and the time when the debtor's right to redeem expires, all levies shall be considered to commence on the day of the date of the administration of the oath to the appraisers, although it may appear, by the return of the officer, that the estate was seized on execution before, or that the proceedings were not completed until after that day. (R. S. c. 157, § 22.)

If it is proposed to make an extent upon the land seized, the seizure is regarded as complete and the extent commenced when the appraisers are chosen and sworn. Swift v. Guild, 94 Me. 436, 47 A. 912.

The proceedings are to be considered as commenced, and the debtor's right to redeem begins to run from the date the oath to the appraisers was administered. Clement v. Garland, 53 Me. 427.

Quoted in French v. Allen, 50 Me. 437.

Sec. 23. Levy made for too much valid, if not over 1%; remedy against officer or creditor.—When, by an error of the officer, the amount for which the levy was made exceeds the amount of debt or damage, costs, interest and costs of levy, by a sum not greater than 1% thereof, it is valid if otherwise

legally made; and the debtor or owner of the estate may maintain an action against such officer or his principal to recover all damages occasioned thereby, or a bill in equity against the creditor to have such error corrected, and the court may correct it, in any just and equitable manner, or it may decree a pecuniary compensation for the injury. (R. S. c. 157, § 23.)

Purpose of section.—This section was passed to remedy the evils resulting from the class of decisions rendering the levy void where there was a trifling excess of the value of the land taken over and above the execution, interest thereon and costs of levy, as taxed on the execution. Wilson v. Gannon, 54 Me. 384.

Section gives no remedy in absence of error by officer.—A case does not fall within the provision of this section by which a remedy is given against the officer or creditor when, through the mistake of the officer, the levy is made for too much, if there was no error on the part of the officer and he only followed the commands of his precept. Prescott v. Prescott, 62 Me. 428.

A charge of illegal fees will not vitiate the levy. Keen v. Briggs, 46 Me. 467.

A levy is not void because the officer taxed and caused to be satisfied in the extent, fees not authorized by law. Rawson v. Clark, 38 Me. 223; Wilson v. Gannon, 54 Me. 384; Coffin v. Freeman, 84 Me. 535, 24 A. 986; Hamant v. Creamer, 101 Me. 222, 63 A. 736.

The officer in such case is liable to the debtor, but the levy is held valid. The creditor is not to suffer by reason of such extortion on the part of the officer. Wilson v. Gannon, 54 Me. 384; Coffin v. Freeman, 84 Me. 535, 24 A. 986.

Levies of executions on real estate, which included officers' fees and charges, not authorized by law, have been sustained, upon the ground that the creditor had no control over the acts or fees of the officer, and ought not to suffer by his official misconduct. Such overtaxation would be for the benefit of the officer solely, and for which the creditor could not be held responsible. Justice and general convenience require that such a levy should be upheld, although the officer would be answerable to the debtor for the excess of fees so taken. Gildden v. Chase, 35 Me. 90.

And this decision not affected by this section.—It was not the purpose of the legislature to render void what by the previous decisions had been declared valid. The levies, therefore, in which illegal fees may have been included, remain unaffected by the statute and are not to be defeated for that cause. Wilson v. Gannon, 54 Me. 384; Coffin v. Freeman, 84 Me. 535, 24 A. 986.

Redemption of Levies by Appraisement.

Sec. 24. Land levied on redeemed within a year; creditor out of state, or unknown, payment made to clerk.—Real estate levied on may be redeemed within 1 year thereafter, by tendering to the creditor the amount of its appraisement with interest from the time of levy, with reasonable expenses incurred for its improvement or repair, or in saving it from loss by the nonpayment of taxes legally assessed thereon prior to the levy, after deducting rents and profits with which he is chargeable; and the creditor shall thereupon by his deed prepared at the expense of the debtor release to him all his title to the premises. When the creditor resides out of the state, or his residence is unknown, such payment is sufficient if made to the clerk of courts in the county where the real estate levied upon is situated, and such payment has the same effect as if made to the creditor. (R. S. c. 157, § 24.)

Cross reference.—See c. 177, § 28, re redemption of mortgaged real estate by administrator or heir; tender in behalf of nonresident.

Debtor is obliged to make his election.—The debtor, or his assignee, is obliged by the provisions of this section to make his election, and to tender within one year the amount due, if he would redeem. Boothby v. Bangor Commercial Bank, 30 Me. 361.

And sum should be so tendered that there is an opportunity to receive it in a year.—It is necessary that the sum should be tendered, or so ascertained, that there is an opportunity to receive it within the year, in order that the redemption may be effected. Cushing v. Thompson, 34 Me. 496.

But the creditor can extend the time.—The time for redeeming the levy of an execution on real estate may be extended by the creditor by parol. Mayo v. Hamlin, 73 Me. 182.

Debtor must redeem all parcels.—Where

an execution has been extended on two or more parcels of land, the debtor is not entitled to redeem one of them alone, without the others, even though its value is separately stated in the certificate of the appraisers. Foss v. Stickney, 5 Me. 390.

And if only part of debt is paid he cannot recover it.—If a judgment debtor, whose land has been taken by extent, pays part of the debt in order to redeem the land, but fails to pay the residue, whereby the land is lost, he cannot recover back the money thus paid. Morton v. Chandler, 6 Me. 142.

Applied in Gray v. Wass, 1 Me. 257.

Quoted in part in French v. Allen, 50 Me. 437.

Stated in Kidder v. Orcutt, 40 Me. 589.

Sec. 25. Amount due ascertained. — The debtor may have the amount due ascertained by 3 justices of the peace chosen, 1 by the debtor, 1 by the creditor and the other by those 2; if after notice the creditor declines, the debtor may choose 2, and after a hearing before the 3, they or 2 of them shall make in writing and sign a certificate of the sum found due, which is conclusive; and the debtor may tender that sum, which is effectual to redeem, although he had before tendered a different sum. (R. S. c. 157, § 25.)

Stated in Boothby v. Bangor Commercial Bank, 30 Me. 361.

Cited in Cushing v. Thompson, 34 Me. 496.

Sec. 26. If creditor does not release after tender, debtor may recover land.—If the creditor does not release the premises within 10 days after payment or tender of the amount due, the debtor may recover the same by a writ of entry on his own seizin; but before judgment is entered he must bring into court, for the creditor, the money tendered. (R. S. c. 157, § 26.)

Cross reference.—See c. 172, § 1, re writ of entry.

Stated in Boothby v. Bangor Commercial Bank, 30 Me. 361.

Cited in Cushing v. Thompson, 34 Me. 496.

Sec. 27. Debtor may have amount due determined by bill in equity. — The debtor, without tender, may, within 1 year and in season to have the amount ascertained and paid or tendered within the year, file a bill in equity, therein offering to pay the amount due, and the court shall ascertain it and require the debtor to bring it into court for the creditor, and the debtor thereupon shall be entitled to a decree in his favor, and to a writ of possession for the premises. (R. S. c. 157, § 27.)

Section provides same remedy by one process that is provided by §§ 25 and 26. —It appears to have been the intention to provide by this section a remedy by one process to accomplish the same purpose, which could be accomplished by both the remedies prescribed by §§ 25 and 26, that is, the ascertainment of the amount due by the former, and the recovery of the estate by the latter. As a substitute for these proceedings, the debtor or his assignee is authorized by the provisions of this section, to file a bill in equity, without a previous tender, and to have, by virtue of it, the amount ascertained by the court, instead of being ascertained by three justices of the peace, and to have it brought into court for the use of the creditor or his assignee, as equivalent to a tender. This having been done, if the creditor or his assignee refuses to accept it, the debtor or his assignee might proceed under the bill and obtain a decree, that the title and possession should be restored to him as equivalent to a recovery of the estate, by a writ of entry. Boothby v. Bangor Commercial Bank, 30 Me. 361.

Amount must be ascertained and brought into court within the year allowed for redemption.—The debtor or his assignee, if he would elect to proceed by a bill in equity, must do so in sufficient season to have the amount ascertained and brought into court for the acceptance of the creditor or his assignee, before the year allowed to redeem has expired. If he would have any advantage from this section, the debtor must be careful to do it in such season, as to enable him to perform all the other duties, required by other provisions of the statute. Boothby v. Bangor Commercial Bank, 30 Me. 361.

The right to redeem real estate, levied on execution, is limited to one year from the levy (§ 24). This principle is not altered by this section, which merely provides an additional mode of ascertaining the amount to be paid. That mode is by

bill in equity. But such process must be commenced in season to have the amount ascertained and brought into court, before the year, allowed for the redemption, has expired. Boothby v. Bangor Commercial Bank, 30 Me. 361.

Cited in Cushing v. Thompson, 34 Me. 496.

Sec. 28. Costs regulated; provisions applicable to redemption of estates for life.—Costs may be awarded to either party, except not against the creditor, unless he has, on request, unreasonably refused to render an account of rents and profits and of expenses for improvements and repairs, or to execute a deed of release as required in this chapter. When he has tendered such deed to the debtor before his bill was filed, and in his answer relies upon it, and brings the deed into court for the debtor, he shall recover his costs. This section is applicable to the redemption of an estate for life, levied on by taking the rents and profits. (R. S. c. 157, § 28.)

See § 11, re levy on estate for life.

Levies on Equities of Redemption.

Sec. 29. Levies on lands mortgaged; amount due deducted; remedy for errors.—Levies may be made on lands mortgaged as on lands not mortgaged, and the amount due on the mortgage may be deducted by the appraisers from their estimated value, and stated in their return. If the full amount due was not deducted, or if the levy was made in the usual form, and it is ascertained that there was a mortgage on the premises, not including other real estate, and not known to the creditor at the time of the levy, it shall nevertheless be valid, and the creditor may recover of the debtor the amount which should have been and was not deducted, or the amount due on such mortgage. (R. S. c. 157, § 29.)

This section not antagonistic to § 19.—This section and § 19 are entirely independent of, and in no way connected with each other. This section does not in its terms purport to qualify, limit or restrain the other in any respect. The two are not in any sense antagonistic, but each can stand and have its full force and meaning, without, in the slightest degree, interfering with the other and a creditor may avail himself of either section, when his case comes within its provisions. Soule v. Buck, 55 Me. 30.

Levy valid though mortgage overlooked.—The provision of this section that the levy shall be valid was undoubtedly made for the benefit of the creditor. Previous to that, a levy made upon land under mortgage, could only be sustained, when the return showed that the creditor elected to disregard the incumbrance. When it was unknown, this could not be done; therefore, in such cases, the levy was void. Hence, as the law formerly was, if the creditor overlooked a mortgage, on which the amount due was but small in proportion to the value of the land, still he would lose his levy and often his debt. To avoid this, this section was passed to enable him, if he chose, to retain his levy and at the same time recover of the debtor what he might be obliged to pay to relieve his land. Soule v. Buck, 55 Me. 30.

But the creditor is not bound by the levy.—The language in this section, providing, in cases there referred to, that the levy shall be valid, does not mean that the creditor shall be bound by it. He may waive it though valid, as he might do in certain cases under § 19. The meaning is that, notwithstanding his ignorance of the mortgage, he may still avail himself of his levy, and recover of the debtor the amount paid to the mortgagee. Soule v. Buck, 55 Me. 30.

Creditor may take interest of debtor without allowance for debt.—The provision of this section as to deducting the debt refers to a levy upon the right of redeeming from a mortgage, and not to a case where the creditor is willing to treat the land as that of the debtor, unaffected by the mortgage. He may choose to do this on the ground that the mortgage is fraudulent and invalid as against creditors. And it has been held that, if the creditor chooses to take the interest of his debtor, subject to the mortgage, without allowing anything for the debt, he may do so. Brown v. Clifford, 38 Me. 210.

Applied in Abbott v. Sturtevant, 30 Me. 40; Hayford v. Rust, 81 Me. 97, 16 A. 372.

Sec. 30. Redemption; debtor paying on mortgage after levy, and not redeeming, may recover of creditor.—Levies made as provided in the preceding section may be redeemed within 1 year, as in other cases. When the debtor pays on the mortgage after the levy, and does not redeem, he may recover of the creditor the amount so paid, in an action for money had and received. (R. S. c. 157, § 30.)

Levy by Sale.

Sec. 31. Real estate, rights and interests, sold.—Real estate attachable and all rights and interests therein, including the right to cut timber and grass, as described in chapter 112, rights of redeeming real estate mortgaged, rights to a conveyance of it by bond or contract, interests by virtue of possession and improvement of lands as described in chapter 172 and estates for a term of years, may be taken on execution and sold, and the officer shall account to the debtor for any surplus proceeds of the sale, to be appropriated as provided in section 22 of chapter 118. Such seizure and sale pass to the purchaser all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption. This section does not repeal any other modes of levy of execution provided in this chapter. (R. S. c. 157, § 31.)

Cross references.—See c. 53, § 98, re property and franchise of corporation may be taken for debt; c. 112, § 60, re real estate and interests subject to attachment; c. 172, § 20, re in real actions betterments allowed after 6 years' possession.

History of section.—See Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896; Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

Requisites of statute should be complied with.—The sale operates a statute transfer of the interest; and it is essential to the title of the purchaser, that the requisites of the statute should be complied with. Grosvenor v. Little, 7 Me. 376.

And seizure and sale not according to law will not pass title.—A seizure and sale on execution which is not according to law will not pass any title to the purchaser at a sheriff's sale. It is not the "seizure and sale" contemplated by the statute. Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

Seizure is necessary act.—The seizure of property upon execution, with the view to make sale thereof, is regarded as an important and necessary act in making a legal sale. Subsequent proceedings, in order to vest the title in the purchaser, have reference to the time of the seizure, and depend upon the state of the title, as it then was. Benson v. Smith, 42 Me. 414.

Unincumbered land may be sold.—Prior to the enactment of this section, unincumbered land could not be sold on execution. By this section such real estate may be sold as rights of redeeming real estate mortgaged, are taken on execution and sold. Swift v. Guild, 94 Me. 436, 47 A. 912.

But sheriff cannot sell less than entire estate seized.—By the weight of authority, a sheriff cannot sell on execution less than the entire estate which is bound by the lien of the attachment and has been seized. When the defendant in execution owns the entire fee, the officer cannot sell an undivided interest and thus make the purchaser a tenant in common with the defendant in execution. The character of the debtor's estate cannot be so changed at the pleasure of the judgment creditor or of the sheriff. Snell v. Libby, 137 Me. 62, 15 A. (2d) 148.

The interest of a vendor in a bond for a deed in the land is subject to attachment and levy. Lambert v. Allard, 126 Me. 49, 136 A. 121.

An execution sale by the sheriff has the same legal effect as a levy. Hawes v. Nason, 111 Me. 193, 88 A. 538.

And the sale of the whole conveys all the right, title and interest, of every nature, that the debtor has. Hamant v. Creamer, 101 Me. 222, 63 A. 736.

Prior to the enactment of this statute, the right to redeem a debtor's lands under mortgage could be acquired by the creditor by levy of his execution upon the lands, or by seizure and sale of the equity of redemption. If by levy, the amount due upon the mortgage would be deducted from the appraised value of the land taken, (§ 29), so that by either mode, the creditor took the right to redeem only. Under this section, the right of the creditor was enlarged so that he might sell a debtor's

lands instead of making the levy, and in that way take all of the right, title and interest that he has in the lands, of any nature. Millett v. Blake, 81 Me. 531, 18 A. 293.

Whether it is a fee or a less estate.—An attachment of all the right, title and interest which the debtor has in lands, is a good attachment of the land itself. And a seizure and sale of all the debtor's right, title and interest will pass to the creditor the debtor's right of redemption where the land is mortgaged. Such a seizure and sale will pass to the creditor all the debtor's right, title and interest in the land, whether it is a fee or a less estate. Millett v. Blake, 81 Me. 531, 18 A. 293.

And whether recorded or not.—Under the provisions of this section, "seizure and sale pass to the purchaser all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption," and where there are no hostile or intervening rights it is immaterial that the levy or seizure is not recorded. Crockett v. Borgerson, 129 Me. 395, 152 A. 407.

And sale not invalidated because debtor owns only an undivided interest.—An execution sale of the whole of a parcel of real estate conveys all the right, title and interest, of every nature, that the debtor has, and is not invalidated by the fact that he owns only an undivided interest in the land. Hamant v. Creamer, 101 Me. 222, 63 A. 736.

And purchaser is not limited to rights under attachment lien.—The purchaser is not limited to rights of levy or seizure afforded by and under a lien created by the attachment. The seizure and sale passes to him "the right, title and interest" that the debtor had in the real estate at the time of the seizure. Crockett v. Borgerson, 129 Me. 395, 152 A. 407.

But purchaser's title is limited to interest seized and conveyed by deed.—This section, which authorizes the seizure and sale of real estate attachable and all rights and interests therein, including rights of redeeming real estate mortgaged, and contains the provision that "such seizure and sale pass to the purchaser all the right, title and interest that the execution debtor has in such real estate at the time of such seizure, or had at the time of the attachment thereof on the original writ, subject to the debtor's right of redemption," does not pass to the purchaser at such sale all the title which the judgment debtor has in the property described, regardless of the estate, right or interest seized, sold or conveyed by the sheriff's deed. Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825. See note to § 35.

Seizure and sale is good against prior unrecorded deed.—The seizure and sale of all the right, title and interest of the debtor by the officer upon execution, passes to the creditor the title to the land, as against a prior unrecorded deed of the debtor. Millett v. Blake, 81 Me. 531, 18 A. 293.

Purchaser's title not dependent on officer making his return.—Where an extent is made upon lands, the return of the officer must be seasonably made and recorded. Not so where property is sold upon execution. The statute does not require it, and the decisions are that the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever. Cutting v. Harrington, 104 Me. 96, 71 A. 374.

And sale not invalidated by charge of illegal fees.—A levy by appraisement is not avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law (see note to § 23). With much greater force does the principal apply to a levy by sale. In the latter case, whatever the amount of the judgment and costs of levy as taxed, the whole interest of the debtor is sold, and the officer must account to him for any surplus. Hamant v. Creamer, 101 Me. 222, 63 A. 736.

Sale of joint debtors' different interests in different parcels of land is void.—A sheriff's sale on an execution issued on a judgment recovered against debtors jointly, on a levy, of different interests of such debtors in and to different parcels of real estate, owned by them in severalty, is null and void. The right of a judgment debtor to redeem from such a sale as to his interest in one of the parcels sold, independent of the interest in another parcel of another debtor jointly liable on the execution, such interests being held in severalty, would be wrested from him. Barnes v. Hechler, 124 Me. 30, 125 A. 226.

Upon execution against joint debtors, their several interests in separate but contiguous and unitedly occupied lands, cannot be levied and sold for one price, validly. Barnes v. Hechler, 124 Me. 30, 125 A. 226.

And rights in equity of redeeming under several mortgages should be sold sepa-

rately.—Two rights in equity of redeeming several parcels of land from several mortgages, when sold on one execution, ought to be sold separately and not for a gross sum, for the debtor has a right to redeem one equity sold and not the other. Smith v. Dow, 51 Me. 21. See note to § 40.

The statute regards an equity as an entirety and does not authorize the sales of numerous equities for one sum. The equities are several, and the sales must be several. Smith v. Dow, 51 Me. 21.

Several distinct equities cannot be sold upon execution together for a gross sum, but should be sold separately. A debtor has the right of redeeming one equity without redeeming the other. True v. Emery, 67 Me. 28.

And sale of two or more equities for one sum is void.—A sale of two or more equities of redemption for one entire sum is void, not only as against the judgment debtor, but as against any one connected with the title, or against whom it is adversely used. Smith v. Dow, 51 Me. 21.

There is no clause in the statute authorizing or prohibiting the joint sale of two or more equities. But the right to sell an equity on execution, exists only by statute. If there is no statute authorizing the joint sale of two or more equities, there is no authority for such sale. They are invalid without statutory authority. There is no need of a prohibitory statute to render them so. Smith v. Dow, 51 Me. 21.

Unless the mortgages cover the same property.—A sale by an officer upon execution for a gross sum of all the right in equity which the judgment debtor has to redeem a certain parcel of property from two or more mortgages is not a sale of two or more equities when the several mortgages cover the same property and no other, and is not, therefore, void as the joint sale of two or more distinct equities upon execution would be. Bartlett v. Stearns, 73 Me. 17.

And equity cannot be sold jointly on executions of different creditors.—This and the following sections do not permit a sale of an equity of redemption upon two or more executions jointly in favor of different creditors. Chapman v. Androscoggin R. R., 54 Me. 160.

But it may be sold in moieties.—Where two several creditors simultaneously attach a debtor's real estate consisting of an equity of redemption, as between themselves, an undivided half thereof becomes holden as attached on each writ, and the equity may be sold in moieties upon executions recovered upon such writs, one undivided half upon each execution, where neither moiety is sold upon the execution for a sum exceeding the amount due thereon. True v. Emery, 67 Me. 28.

Applied in Jewett v. Whitney, 43 Me. 242; Stewart v. Crosby, 50 Me. 130; Morrill v. Everett, 83 Me. 290, 22 A. 172; Ticonic Nat. Bank v. Turner, 96 Me. 380, 52 A. 793; Poor v. Chapin, 97 Me. 295, 54 A. 753; Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

Cited in Hamlin v. European & North American Ry., 72 Me. 83; Merrill v. Jose, 81 Me. 22, 16 A. 254.

Sec. 32. Notice of sale.—The officer in such case shall give written notice of the time and place of sale to the debtor in person or by leaving the same at his last and usual place of abode, if known to be an inhabitant of the state, and cause it to be posted in a public place in the town where the land lies and in two adjoining towns, if so many adjoin; and if the land is situated in 2 or more towns, then in each of those towns and in 2 towns adjoining each of them; and if the land is in 2 or more counties and is contiguous, an officer in either county may take or seize on execution all the right of the debtor in such land, give, post and cause the notices to be published as herein required, and sell the whole right. When the land is not within any town, the notice shall be posted in 2 public places of the shire town of the county in which the land lies, instead of the posting aforesaid. When the debtor is not a resident of such county, the personal notice may be forwarded to him by mail, postage paid; all to be done 30 days before the day of sale. The notice shall also be published for 3 weeks successively before the day of sale, in a newspaper printed in whole or in part in such county, if any, otherwise in the state paper. (R. S. c. 157, § 32.)

The giving of notice may be shown prima facie by recitals in the sheriff's deeds. Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

Recitals in a sheriff's deed of his doings in giving notice of the sale are themselves evidence. People's Nat. Bank v. Nickerson, 108 Me. 341, 80 A. 849.

The giving of notice of sale, and how given, may be proved, prima facie at

least, by the officer's recitals in his official deed to the purchaser. Cutting v. Harrington, 104 Me. 96, 71 A. 374.

Nature of right taken must be described in notice.—In order to render a seizure and sale on execution legally effective, the nature of the right taken must be truly described in the notification and advertisement and the deed executed by the officer. Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

But notice need not state that debtor is known to be an inhabitant.—The omission of a statement that the debtor was known to be an inhabitant of the state does not vitiate the notice. Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

And officer's return need not show time or place mentioned in notice.—It is not necessary that the return should show the day or hour or particular place which was mentioned in the notice, if it appears that the time required by law to intervene between the notice and sale did intervene. Townsend v. Meader, 58 Me. 288.

But it must show that notice was posted in some public place.—If the officer's return does not state that he caused notifications to be posted up in some public place in the town where the land lies, this is not in compliance with the requirements of the statute. Boothby v. Stanley, 34 Me. 515.

And the omission to post up a notification in two places in the shire is fatal to the title of the purchaser. Grosvenor v. Little, 7 Me. 376.

Notice by mail is effective only when debtor is not an inhabitant.—The privilege accorded the officer of giving the personal notice by mailing, postage prepaid, to an owner not an inhabitant of the state, is a proviso attached, to make effective service in the exceptional case, when the alleged owner is not an inhabitant. Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

Payment of postage inferred from statement that notice was mailed.—This section provides that the notice to the debtor might be "forwarded to him by mail, postage paid." If the officer recites in the deed that he "sent to the said (debtor) a written notice by mail," taking into account the legal presumption as to the correctness of the action of a public officer when the law requires him to do a certain act, it is a fair, and even obvious, inference that the officer prepaid the postage. Cutting v. Harrington, 104 Me. 96, 71 A. 374.

The single word "mailed," as used by a notary in his certificate, is held to imply that the requisite postage was prepaid. The words "sent by mail" would seem to be of as strong import in any connection. Cutting v. Harrington, 104 Me. 96, 71 A. 374.

Former provision of section.—When notice was required by this section to be given by an officer in a "public newspaper," the omission in the officer's return of the word "public" was held not fatal, a "newspaper" being necessarily public. See Bailey v. Myrick, 50 Me. 171.

Applied in Benson v. Smith, 42 Me. 414; Poor v. Chapin, 97 Me. 295, 54 A. 753.

Sec. 33. Mortgagee to disclose amount due.—When a right of redemption has been attached and judgment recovered, and a sale of it is to be made, the creditor may demand of the mortgagee to disclose, in writing under his hand, the condition of the mortgage and the sum due thereon, which shall be furnished within 24 hours, and in case of neglect, he shall be liable for damages. (R. S. c. 157, § 33.)

Sec. 34. If disclosure not made, creditor may compel it by deposition.—If the disclosure mentioned in the preceding section is not furnished within that time, the creditor may apply to any magistrate authorized to take depositions, in the county where the land lies or where the mortgagee resides, who shall take his deposition in relation to the facts required to be disclosed, and may exercise the power to compel attendance and disclosure which is authorized for taking a deposition in perpetuam. (R. S. c. 157, § 34.)

Sec. 35. Officer to sell at auction and convey by deed, debtor's interest.—The officer shall sell such right or interest at public auction to the highest bidder, and execute and deliver to the purchaser a sufficient deed thereof which, being recorded in the registry of deeds of the county or district where the land lies within 3 months after the sale, conveys to him all the title of the debtor in the premises. When such bidder, on demand of the officer, does not pay him the sum for which it was sold, he shall immediately sell it again as before,

and if it does not sell for so much as at the first sale, the person to whom it was struck off at the first sale shall be accountable for the difference to the officer, who may recover it, to be indorsed on the execution, if not satisfied, and if satisfied paid to the debtor. (R. S. c. 157, § 35.)

Cross reference.—See note to § 32, re recitals in deed as evidence of notice.

Nature of right taken must be described in deed.—In order to render a seizure and sale on execution legally effective, the nature of the right taken must be truly described in the notification and advertisement and the deed executed by the officer. Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

And sale does pass title to estate not described.—A seizure and sale upon execution of all the right, title and interest which a debtor has in lands undoubtedly will pass title to any interest of any nature he has at the time, whether it is a fee or a less estate, which necessarily includes an equity of redemption (see § 1 and note). It does not follow, however, that a seizure and sale of a specifically described right or interest in the debtor's lands will pass title to a greater estate not described or conveyed in the sheriff's deed, or to a right or interest which does not exist. Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

Deed need not be made on day of sale.—It is not indispensable that the officer's deed should be made on the day of the sale. If made so soon afterward, that it may be regarded as a part of the sale transaction, the deed and the purchaser's right under it will have relation back, and take effect from the time of the sale. Abbott v. Sturtevant, 30 Me. 40.

Two sales of same property to same purchaser, etc., may be embraced in one deed.—Where there are two sales of the same property, at the same time, to the same purchaser, upon executions in favor of the same creditors, the sales may be embraced in one deed. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

There is no reason why an officer may not embrace in one deed several parcels of land sold separately on the same execution, at the same time and place, to the same purchaser. People's Nat. Bank v. Nickerson, 108 Me. 341, 80 A. 849.

As this does not affect the debtor's right to redeem.—When an officer has made, at the same time, two sales upon two executions, in favor of the same creditors, against the same debtor, the sales being to the same purchaser, he may complete the proceedings by executing and delivering one deed for both sales. If the sales are upheld, the debtor's right of redemption is not affected by the fact that both the sales are embraced in one deed. The sales are separable, and the debtor can redeem from either. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

Deed, to be itself prima facie evidence of sale, must show all essential requirements.—A sheriff's deed, in order to be itself alone prima facie evidence of a sale, must show upon its face that the officer had authority to make the sale, and must show all the essential requirements of a valid sale. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

But the deed may be aided by the return.—The judgment and the execution and return, as well as the deed, are constituent elements of the evidence of title, and the deed may be aided, if necessary, by the return. Hill v. Reynolds, 93 Me. 25, 44 A. 135; People's Nat. Bank v. Nickerson, 108 Me. 341, 80 A. 849.

And deed not showing all requirements is not insufficient if so aided.—A deed is not insufficient because it does not show what court rendered the judgment, nor at what term it was rendered, nor its date, nor its amount, nor the date of the execution, nor that the execution was alive at the time of the sale. If it is conceded that proof of all these particulars is necessary to establish a valid sale, it is not necessary that they be shown by the deed. People's Nat. Bank v. Nickerson, 108 Me. 341, 80 A. 849.

An officer's deed may be aided by a return upon the execution showing that the statute has been duly complied with and the power pursued. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

The omission in a sheriff's deed to state from what court the execution issued does not invalidate the deed nor render it void, if the deficiency in that respect is fully supplied by the writ of execution and the return thereon. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

It is unnecessary that a sheriff's deed should show that the statute requirements in regard to notice have been complied with, when the officer's return on the execution shows that the proper notices have been given. Hill v. Reynolds, 93 Me. 25, 44 A. 135.

Parties may rely on description of premises as recorded.—Provision is made by law for recording deeds and levies, as a guide for purchasers and creditors. Such

record shows the ownership, and not the occupation. Parties, upon examining the record, regulate their action accordingly, and have a right to rely upon the accuracy and permanency of the description of the premises as it appears of record. Young v. McGown, 59 Me. 349.

And execution need not be returned within definite time.—There is no legal necessity of returning the execution to the clerk's office within any definite time, in order to make the sale valid as against a subsequent purchaser. The registry of deeds discloses the state of the title. True v. Emery, 67 Me. 28.

Unrecorded deed is not void.—An officer's deed of an equity of redemption, not recorded within three months, is not void under this section, but is good as against a subsequent purchaser with notice. And much more would it seem to be good against the debtor who had the legal notice of the sale. Hobbs v. Walker, 60 Me. 184.

Priority of sales.—See Hayford v. Rust, 81 Me. 97, 16 A. 372.

Cited in Piscataquis v. Kingsbury, 73 Me. 326; Hawes v. Nason, 111 Me. 193, 88 A. 538.

Sec. 36. Officer may adjourn sale, and another officer may complete it.—When the officer deems it for the interest of all concerned to postpone the sale, he may adjourn it for any time not exceeding 7 days, and so from time to time until a sale is made, giving notice at the time of each adjournment by public proclamation; and when he is unable to attend at the time and place of sale, another officer may adjourn it not exceeding 10 days, and if such inability is not then removed, may sell and make his return as the first officer might. (R. S. c. 157, § 36.)

Return must show officer deemed adjournment for "the interest of all concerned."—The return does not show that the officer deemed it "for the interest of all concerned to postpone the sale." This should appear, for, if not for their interest, the sale should have been made at the time and place appointed. No sufficient cause is shown for the adjournment. Wilson v. Bucknam, 71 Me. 545.

Failure to give notice of adjournment is fatal.—No notice appears to have been given of the time to which the sale was adjourned, by public proclamation as the statute directs. The sale took place at a time of which, for want of such public proclamation, parties interested had no notice. This omission is fatal. Wilson v. Bucknam, 71 Me. 545.

Sec. 37. Seizure when considered made; proceedings after return day, valid.—The seizure on execution is considered made on the day when notice of the sale is given, and if the sale is not completed within 30 days after judgment it holds the right or interest seized within that time; and the subsequent proceedings and return are valid, if made after the return day of the execution or after removal or disability of the officer. (R. S. c. 157, § 37.)

Sale may be made after return day of execution.—The seizure is deemed complete when the notice of sale is given. Subsequent proceedings relate to the time of seizure, and the sale may in fact be made after the return day of the execution, if the seizure was during its life. Swift v. Guild, 94 Me. 436, 47 A. 912.

But estate must be seized and notice given within 30 days.—The implication from the language of this section is that, if the estate is not seized and notice of sale given within the 30 days, the attachment will expire like other attachments. Brown v. Allen, 92 Me. 378, 42 A. 793.

An attachment on mesne process of a right in equity to redeem real estate from a mortgage will not continue for more than 30 days after final judgment in the suit, unless the attaching creditor causes the right attached to be seized upon execution and notice of sale given within the 30 days after the final judgment. Brown v. Allen, 92 Me. 378, 42 A. 793.

Proceedings not arrested by debtor's death after seizure and advertisement for sale.—Where an execution issues after judgment and the land is seized and advertised for sale by the sheriff during the life of the judgment debtor, and the sale is made and the proceedings completed after his death, the proceedings are not arrested by the debtor's death. Coffin v. Freeman, 84 Me. 535, 24 A. 986.

Applied in Bagley v. Bailey, 16 Me. 151.

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

Sec. 38. Titles of banks and corporations, as mortgagees, sold. — The titles of banks or corporations, as mortgagees of land, may be taken on exe-

cution and sold as real estate and interests therein are taken and sold. The officer may by deed convey the same, and a debt secured by such mortgage and remaining unpaid will pass with the mortgagee's title to the purchaser, who may recover the premises or debt in his own name. In such action, a copy of the mortgage, attested by the register of deeds, is prima facie evidence of such deed, and of the contracts secured by it, as remaining due at the time of trial. The cashier of the bank or clerk of the corporation, on reasonable request of the officer, shall furnish him with a certified copy of such contract and of all payments made thereon. (R. S. c. 157, § 38.)

Sec. 39. No transfer of such property, after notice of seizure, valid. —No transfer of such mortgage, or of the debt secured thereby, made by such corporation after notice of the seizure thereof on execution has been filed in the registry of deeds of the county or district where the land lies, or given to the party to be affected thereby, has any validity against the purchaser at such sale. (R. S. c. 157, § 39.)

Cited in Highland Trust Co. v. Hamilton, 134 Me. 64, 181 A. 825.

Redemption of Real Estate. Rights and Interest.

Sec. 40. Rights and interest redeemed.—Real estate, and rights and interests therein, and mortgages and debts so sold, may be redeemed within 1 year, as land levied on by appraisement may be; and the rights and remedies of the parties are the same for this purpose, as those of mortgagor and mortgagee. (R. S. c. 157, § 40.)

Cross references.—See §§ 24-28, and notes, re redemption of land levied on by appraisement; c. 177, § 7, et seq., re redemption of mortgages.

The rights of debtor and purchaser under an execution sale are the same as between mortgagor and mortgagee. Stevens Mills Paper Co. v. Myers, 116 Me. 73, 100 A. 11.

Debtor regarded as owner until time for redemption has expired.—The attachment of real estate is simply security for the debt and a levy or execution sale is but another step in perfecting the security. The debtor can redeem at any time before the expiration of the year, and until that time, he is regarded as the owner of the estate. Hawes v. Nason, 111 Me. 193, 88 A. 538.

And no deed of conveyance is necessary to revest the property in him.—A legal tender within the time prescribed by law, of the amount for which an equity of redemption is held under an execution sale, is sufficient to revest the property without a deed of conveyance from the purchaser. Legro v. Lord, 10 Me. 161.

Estate vests in mortgagee who extends his execution if not seasonably redeemed. —A mortgagee may extend his execution on land mortgaged for the same debt, and, if the debtor neglects to redeem within the year after the extent, the estate becomes absolute in the creditor notwithstanding the mortgage. The debt is the principal thing. The mortgage is designed to secure the ultimate payment of it to the creditor. But if he pleases to waive that security and proceed to collect his debt in the ordinary process of law, it is not for the debtor to complain. Crooker v. Frazier, 52 Me. 405.

One of several equities may be redeemed. —The debtor has a right to redeem one equity, without redeeming the others, when several equities are sold on the same execution. Smith v. Dow, 51 Me. 21. See note to § 31.

A debtor may effect redemption by piecemeal. He may buy back one equity aside from any other. Barnes v. Hechler, 124 Me. 30, 125 A. 226.

Applied in Jewett v. Felker, 2 Me. 339; Morrill v. Everett, 83 Me. 290, 22 A. 172; First Auburn Trust Co. v. Buck, 137 Me. 172, 16 A. (2d) 258.

Sec. 41. Rights to redeem attached and sold.—The right of a debtor to redeem from a sale or from a levy by appraisement may be attached and sold on execution, as an equity of redemption may be, and the parties have the same rights and remedies. Attachments of such estate or equity of redemption, made before such levy or sale, are effectual on such right of redeeming, in the order in

which they were made, in preference to attachments made subsequent to such levy or sale. (R. S. c. 157, § 41.)

See c. 177, § 28, re redemption of mortgaged property by administrator or heir.

Sec. 42. Creditor seizing right of redemption may redeem property, and be repaid from proceeds of sale.—When a creditor has seized on execution a right that would expire within 60 days, to redeem from a mortgage, sale or levy on execution, he may pay or tender to the person entitled thereto the amount which the debtor would have to pay to redeem the same; and the officer selling such right shall first pay from the proceeds of sale the amount so paid by the creditor with interest, unless the debtor has paid it; and the residue, if any, shall be applied in satisfaction of the execution. (R. S. c. 157, § 42.)

Sale of Railroad Franchises.

Sec. 43. Franchises of railroads sold on execution. — When the franchise of a railroad has been sold on execution as provided in section 21 of chapter 118, the officer may convey the same by deed, which shall be recorded in the registry of deeds of each county or district in which any part of such railroad lies; and the debtor has the same right of redemption from such sale as from sales of real estate under the provisions of section 31. (R. S. c. 157, § 43.)

Miscellaneous Provisions.

Sec. 44. Expenses part of execution.—The expenses of levy in any of the modes aforesaid in a levy, sale or redemption are part of the execution. (R. S. c. 157, § 44.)

Sec. 45. Creditor or debtor may act by representative.—Everything which a creditor or debtor is required in this chapter to do may be done by his executors or administrators, or by any person lawfully claiming under him. (R. S. c. 157, § 45.)

Sec. 46. Real estate of deceased person taken by execution. — The real estate of a deceased person may be taken for payment of his debts by an execution issued on a judgment recovered against his executor or administrator, and levied on, sold and redeemed, as if taken in his lifetime; unless prior thereto his estate is decreed insolvent; but such decree made before levy or satisfaction of the execution, dissolves an attachment of real estate. When so levied on or sold, and redeemed by his heirs, devisees or their assigns, it shall not be again subject to levy or sale for debts of the deceased. (R. S. c. 157, § 46.)

Cross references.—See c. 112, § 72, re continuance and dissolution of attachments; c. 170, § 9, re husband or wife may bar right of descent by deed, etc.

Decedent's estate may be levied against unless previously decreed insolvent.—The statute authorizes the levy against a decedent's estate, unless prior thereto the estate is decreed insolvent. Walker v. Newton, 85 Me. 458, 27 A. 347.

For a consideration of this section when it contained no exception as to insolvent estates, see Wyman v. Fox, 55 Me. 523.

Appointment of commissioners constitute decree of insolvency.—By the appointment of commissioners of insolvency, upon the application of the administrator under c. 157, § 3, the estate is "decreed insolvent," within the meaning of those words in this section. Walker v. Newton, 85 Me. 458, 27 A. 347.

And no levy can be made after such appointment.—A decedent's estate is "decreed insolvent" within the meaning of this section, when commissioners of insolvency are appointed upon a representation of insolvency under c. 157, § 3. After such appointment of commissioners, no levy can be made upon the estate. Walker v. Newton, 85 Me. 458, 27 A. 347.

Sec. 47. Lands of debtor to the state sold on execution.—When an execution is issued in the name or for the use of the state, the debtor's real es-

tate may be taken thereby and sold at auction, notice thereof being given as provided in section 32, except that notice shall also be published in the state paper, and the last publication in both papers shall be 6 days before the sale. The officer shall make and execute to the purchaser a deed of the estate sold; and the debtor has the same right to redeem as to redeem lands levied on by appraisement. (R. S. c. 157, § 47.)

See §§ 24-28, re redemption of levies by appraisement.

Sec. 48. Attachment of right to conveyance takes effect on premises.—When the right of a debtor to a conveyance of real estate by bond or contract is attached, and a deed is made to the debtor during its existence, the attachment takes effect upon the premises, which may be levied on as in other cases. (R. S. c. 157, § 48.)

Sec. 49. When deed given to assignee, right sold; remedy of purchaser.—When, during the existence of an attachment, a deed has been given to an assignee, the right of the debtor should be sold on the execution. When the right has been sold, and there has been no previous conveyance to the debtor, the purchaser has the same remedies in his own name against the obligor or contractor as the debtor would have had, by an action at law to recover damages for nonfulfillment, or by bill in equity to compel a specific performance, and when assignment before attachment is alleged, the assignee may be made a party. Upon refusal of the obligor or contractor, on request of the purchaser, to give correct information of the amount due or condition remaining to be performed, the purchaser may maintain his bill without previous payment, performance or tender. Upon a hearing, the court may grant and decree such relief, payment or performance, as is competent in equity. (R. S. c. 157, § 49.)

Purchaser may maintain bill without tender.—A bill in equity may be maintained, under this section, by the purchaser of such right without making any tender, or offer of payment, if the obligor in the bond, on request made by the purchaser, before the expiration of the time for payment or performance, shall refuse to give true and correct information of the amount due, or condition remaining unperformed. And it is not a sufficient excuse for withholding this information, that the purchaser had heard it from others. Jameson v. Head, 14 Me. 34.

Creditor's lien not dissolved by surrender of bond to obligor.—Where the interest in a bond for the conveyance of real estate to a debtor is seized and sold on execution, agreeably to the provisions of this section, the lien of the creditor becomes fixed by the seizure on the execution, and is not dissolved by a voluntary surrender of the bond to the obligor by the obligee or his agent, without consideration. Jameson v. Head, 14 Me. 34.

Applied in Aiken v. Medex, 15 Me. 157; Houston v. Jordan, 35 Me. 520.

Sec. 50. When assignment alleged and contested.—When an assignment of the bond or contract is alleged and the plaintiff in equity contests it, the alleged assignee shall be made a party to the bill, and an issue framed to be tried by a jury, which shall find whether such an assignment existed and was valid; and if the assignee does not appear, the assignment is invalid. (R. S. c. 157, § 50.)

Redemption of Lands of Defaulted Defendants Living Out of State.

Sec. 51. Defendant living out of state, defaulted, may after judgment in review, redeem real estate.—A defendant living out of the state, defaulted in an action without an appearance or other service than a newspaper publication, may, within 6 months after the levy of an execution on his real estate or the sale of a right of redemption, petition for a review of such action, and instead of the year allowed in other cases, he may redeem from such levy or sale at any time within 3 months after the review is denied, or after final judgment on the writ of review. If such judgment is in his favor, the amount

thereof shall be allowed towards such redemption, notwithstanding a conveyance of such estate by the creditor; and if it is larger than the amount of the levy or sale, and interest, he shall have an execution for the balance. (R. S. c. 157, § 51.)

See c. 123, § 1, sub-§ VI, re petition for review.

Sec. 52. Waste not permitted; remedy. — No strip or waste shall be made on such estate before or during the pendency of proceedings under the provisions of the preceding section; and after final judgment in review, the plaintiff in review, besides other remedies, may, within said 3 months, without a tender or demand to account, bring his bill in equity for the redemption of such estate. (R. S. c. 157, § 52.)