NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

IN FIVE VOLUMES

VOLUME 4

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 172.

Real Actions. Proceedings to Quiet Title.

Real Actions.

Sec. 1. Recovery of estates by writ of entry; mode of service. — Any estate of freehold, in fee simple, fee tail, for life or any term of years may be recovered by a writ of entry; and such writs, and the writ in an action of dower, shall be served by attachment and summons, or attested copy of the writ, on the defendant, but if he is not in possession or cannot be found in the county by reasonable diligence, the officer shall give the tenant in hand or leave at his last and usual abode an attested copy of the writ; and if the defendant is not an inhabitant of the state, the service on the tenant shall be sufficient notice to the defendant or the court may order further notice. (R. S. c. 158, § 1.)

Cross references.—See c. 112, § 17, re service by separate summons on attachments; note to c. 165, § 4, re no real action by administrator d. b. n.

The purpose of a real action is to recover possession of land. It is not a proper remedy for one who seeks to recover for the disturbance of the enjoyment of an easement. Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

Process may be writ of attachment or original summons.—In the commencement of real actions, the form of process may be a writ of attachment, or an original summons, at the election of the demandant. Maine Charity School v. Dinsmore, 20 Me. 278.

No other writ otherwise served can be used.—As the provision is that one of two modes of service must be made, it leaves no legal ground for the use of any writ which could properly be served in any other way. Richardson v. Rich, 66 Me. 249.

Service must be made in one of two ways provided.—Writs of entry "shall be served by attachment and summons, or attested copy of the writ, on the defendant;" but if he is not in possession, a further service is to be made upon the tenant. The terms used are so explicit as to leave no room for construction or doubt. So far as the defendant is concerned, the service must be in one of two ways. Richardson v. Rich, 66 Me. 249.

And service by arrest is excluded. — As arrest is not one of the ways of service under this section, it is necessarily excluded. A service by arrest is illegal and a writ which commands it must also be illegal. Richardson v. Rich, 66 Me. 249.

The writ shall not run against the body. —In real actions the law applicable provides that the service shall not be by arrest, and by necessary inference that the writ should not run against the body. Richardson v. Rich, 66 Me. 249.

But writ of attachment alternatively commanding the body to be taken may be served, and amended.—Where a writ is in the alternative, directing the officer to attach property, and for want thereof to take the body, it might be legally served notwithstanding the illegal order found in it. The order is not necessary to the vitality of the writ; it is an unnecessary as well as an illegal addition to it, and may be stricken out. Therefore such writ may be amended. Richardson v. Rich, 66 Me. 249.

Statute prescribes mode of service, and not the form of process in particular case. —The design of the statute evidently was not to determine in what cases one form of writ or another should be used, but only to prescribe the mode of service, when a particular form of writ was used. Maine Charity School v. Dinsmore, 20 Me. 278.

Estoppel by former judgment requires determination of title therein.—In general, a judgment is conclusive only as to facts without proof of which the action could not have been maintained. In a real action on a plea of estoppel by a former judgment, it must appear that the issue of title was not merely submitted, but was determined. It is for this reason that it is uniformly held that a judgment in trespass

quare clausum is not a bar to a real action. The only fact necessarily determined by such a judgment is that the plaintiff at the time had rightful possession of the particular locus where the alleged acts of trespass were committed. Although the defendant in the trespass action may have pleaded and proved title, the plaintiff may have had rightful possession. Title would not therefore necessarily be determined. Susi v. Davis, 134 Me. 308, 186 A. 707.

Section takes writs of entry out of c. 120, § 1.—This section has the effect of relieving writs of entry from, or taking them out of, the general provisions of c. 120, § 1. Richardson v. Rich, 66 Me. 249.

Stated in part in Wyman v. Brown, 50 Me. 139.

Sec. 2. Declaration. — The demandant shall declare on his own seizin within 20 years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the tenant. (R. S. c. 158, § 2.)

The demandant may allege his own seizin and a disseizin by the tenant as occurring within the last twenty years. Smiley v. Merrill Plantation, 84 Me. 322, 24 A. 872; Hewes v. Coombs, 84 Me. 434, 24 A. 896.

An allegation of an ouster or a disseizin is necessary, and without it the declaration is undoubtedly demurrable. Roberts v. Niles, 95 Me. 244, 49 A. 1043.

But the word "disseized" need not be used.—It is not necessary that the word "disseized" should be used in the declaration. It is sufficient if the declaration contains an allegation to the effect that before the commencement of the action the defendant had wrongfully deprived the plaintiff of the seizin of the demanded premises to which he was entitled. Roberts v. Niles, 95 Me. 244, 49 A. 1043.

Stated in Morse v. Sleeper, 58 Me. 329.

Cited in Eastman v. Fletcher, 45 Me. 302.

Sec. 3. Demandant to set forth estate he claims in premises.—The demandant shall set forth the estate which he claims in the premises, whether in fee simple, fee tail, for life or for years; and if for life, then whether for his own life or that of another; but he need not state in the writ the origin of his title, or the deduction of it to himself; but, on application of the tenant, the court may direct the demandant to file an informal statement of his title, and its origin. (R. S. c. 158, § 3.)

To a good declaration in a writ of entry four things are necessary: 1. The premises demanded must be clearly described. 2. The estate which the demandant claims in the premises must be stated, whether it be a fee simple, a fee tail, for life, or for years; and, if for life, then whether for his own life or that of another. 3. An allegation that the demandant was seized of the estate claimed within twenty years; and, 4. A disseizin by the tenant. Wyman v. Brown, 50 Me. 139.

Demandant must set forth estate claimed, and must show title.—This section requires the demandant to set out the nature of the estate which he claims in the premises, and he cannot recover unless he shows a title to such an estate as he has alleged. Forsyth v. Rowell, 59 Me. 131.

Failure to set forth estate claimed would not authorize pleading in bar matter in abatement.—An omission of the demandant to comply with the order of court to file an informal statement of his title, according to this section, would not authorize matter in abatement to be pleaded in bar. Warren v. Miller, 33 Me. 220.

But the action would not be maintainable.—By this section the demandant is to set forth the estate claimed. If he fails to do this, the action is not maintainable. Hamilton v. Wentworth, 58 Me. 101.

Informal statement of title need only show better title than defendant.—It is not always indispensable that the plaintiff in a real action should trace his title back to the first person named as owner in an informal statement of title filed by him, under the direction of the court, in pursuance of this section. It is sufficient if he goes back in the line indicated far enough to show a better title than the defendant. To hold otherwise would often needlessly protract and complicate trials. Hatch v. Brown, 63 Me. 410.

Recovery is according to allegations.—By §§ 3 and 8 the estate claimed must be set out and the recovery, if any, must be according to the allegations. Parker v. Murch, 64 Me. 54.

Declaration held not defective because of general descriptive terms.—A declara-

tion in a writ of entry is not defective because it alleges the demandant's ownership in the demanded premises to be a fee, instead of a fee simple; nor because the premises are described without metes and bounds as "the mill and milldam, with the appurtenances, and the land under and adjoining them and used therewith," a general description of the locality of the premises being added. Baker v. Bessey, 73 Me. 472.

Applied in Rawson v. Taylor, 57 Me. 343.

Cited in Eastman v. Fletcher, 45 Me. 302.

Sec. 4. Proof of seizin.—The demandant need not prove an actual entry under his title; but proof that he is entitled to such an estate in the premises as he claims, and that he has a right of entry therein, is sufficient proof of his seizin. (R. S. c. 158, § 4.)

Section contemplates that title has already been acquired.—The cases provided for by this section are those in which a formal entry was required by the common law to restore the seizin to one who was disseized, or otherwise deprived of it. The section does not in terms, and was not intended to apply to cases, where an entry was required not as matter of form, but for the purpose of causing a change of title, or a forfeiture of the estate, such as an entry under a mortgage for condition broken, or an entry upon a conditional estate to cause a forfeiture. The section contemplates a case, where the party has already acquired a title, and an entry is necessary only to perfect the remedy. Marwick v. Andrews, 25 Me. 525; Clifford v. Androscoggin & Kennebec R. R., 119 Me. 577, 112 A. 669.

Though an actual possession of the premises at any time is not required to enable the demandant to maintain his action. Proof of title and of a right of entry are made sufficient proof of seizin by the provisions of this section. Sargent v. Roberts, 34 Me. 135; Hovey v. Hobson, 51 Me. 62.

Demandant must show legal title and immediate right of possession.—An equitable title or estate will not sustain a writ of entry, for whatever may be the equitable interests of the demandant in the demanded land, or whatever interest or title he might acquire therein through appropriate equity proceedings, he cannot recover judgment in a real action unless at the date of his writ he then had vested in himself the legal title and immediate right of possession. Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

But defendant may disprove plaintiff's title by showing title in third party.—The demandant is bound to prove the seizin upon which he counts, and it is competent for the defendants under the general issue to disprove this allegation of seizin by showing title in a third party, even though the defendants do not claim under him. Stetson v. Grant, 102 Me. 222, 66 A. 480.

Title in another may be shown to rebut plaintiff's seizin within twenty years. A deed from the plaintiff to a stranger, within that time, under whom the defendant does not claim, would not do it; but a deed from the plaintiff to such stranger more than twenty years prior to his writ would do it; because, having parted with his title before the twenty years began to run, he would not have been seized within the twenty years, a prerequisite under the statute for the maintenance of a writ of entry against anybody, even a trespasser in possession without any pretense of title. Hewes v. Coombs, 84 Me. 434, 24 A. 896.

If seizin within twenty years is shown by the plaintiff in a writ of entry, the tenant cannot show a subsequent conveyance by the plaintiff to a third party under whom the tenant does not claim, for no such issue is raised in the case. Stetson v. Grant, 102 Me. 222, 66 A. 480.

Such evidence is received only to show no title in demandant.—Evidence to rebut the demandant's seizin within twenty years is received not for the purpose of proving a better title in the defendant, but to show no title in the demandant within that time. Stetson v. Grant, 102 Me. 222, 66 A. 480.

This statute dispenses with the formality of livery of seizin, required by the common law. Hovey v. Hobson, 51 Me. 62.

Applied in Austin v. Stevens, 24 Me. 520; Hewes v. Coombs, 84 Me. 434, 24 A. 896; Daly v. Lewiston & Auburn Children's Home, 113 Me. 526, 95 A. 219.

Stated in Morse v. Sleeper, 58 Me. 329.

Cited in Mitchell v. Persons Unknown, 59 Me. 448.

Sec. 5. Demandant must have right of entry.—No such action shall be maintained unless, at the time of commencing it, the demandant had such right

of entry; and no descent or discontinuance shall defeat any right of entry for the recovery of real estate. (R. S. c. 158, § 5.)

Demandant must have title and right of entry when action commenced.—The demandant, who prevails in a writ of entry, must have had title and a right of entry when he commenced his action. Purrington v. Pierce, 41 Me. 529.

Proof of both the right of entry at the time of the commencement of the action, and of such an estate in the premises as they have alleged, is necessary before they can recover, although the defendants show no title in themselves. Stetson v. Grant, 102 Me. 222, 66 A. 480; Powers v. Hambleton, 106 Me. 217, 76 A. 675; Spencer v. Bouchard, 123 Me. 15, 121 A. 164.

The plaintiff must show seizin and right of entry within twenty years before the date of his writ. Hewes v. Coombs, 84 Me. 434, 24 A. 896.

The demandant must prove a subsisting right of entry. Eastman v. Fletcher, 45 Me. 302; Weston v. McLain, 127 Me. 218, 142 A. 773.

To sustain a writ of entry the plaintiff must not only prove that he has such an estate in the demanded premises as he claims, but he must also prove that at the time of suing out his writ, he had a right of entry in the demanded premises. Sylvester v. Sylvester, 83 Me. 46, 21 A. 783.

Even if it is conceded that the plaintiff has the legal title to a life estate in the land, to maintain a real action, he must be entitled to possession as well. One may retain his title to real estate while debarring himself from right of entry and possession. Hurd v. Chase, 100 Me. 561, 62 A. 660; Calkins v. Pierce, 112 Me. 474, 92 A. 529.

The plaintiff cannot have a right of entry while another is rightfully in possession under an unexpired life estate. Sylvester v. Sylvester, 83 Me. 46, 21 A. 783.

One entitled to an estate in remainder only, subject to an existing life estate in another, cannot maintain a writ of entry against one rightfully in possession under the life estate. Sylvester v. Sylvester, 83 Me. 46, 21 A. 783.

Action for possession held not maintainable by mortgagee. — Where, in a mortgage given for the support of the mortgagee, it is provided that the support shall be furnished upon the premises described in the mortgage, the implication is clear that it was the intention of the parties that the mortgagor should retain possession until a breach of the condition, because possession is absolutely necessary for performance of the condition, and the mortgagee cannot maintain an action for possession, so far as it is based upon the mortgage, unless it be shown there was a breach of the condition. Weston v. McLain, 127 Me. 218, 142 A. 773.

Sec. 6. Who considered as disseizor; disclaimer in abatement, but not in bar.—Every person alleged to be in possession of the premises demanded in such writ, claiming any freehold therein, may be considered a disseizor for the purpose of trying the right; but the defendant may plead in abatement, but not in bar, that he is not tenant of the freehold, or he may plead it by a brief statement under the general issue filed within the time allowed for pleas in abatement; but by leave of court the time therefor may be enlarged or permission to file such disclaimer may afterwards be granted by the court; and he may show that he was not in possession of the premises when the action was commenced, and disclaim any right, title or interest therein, and proof of such fact shall defeat the action; and if he claimed or was in possession of only a part of the premises when the action was commenced, he shall describe such part in a statement signed by him or his attorney and filed in the case, and may disclaim the residue; and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part. (R. S. c. 158, § 6.)

The language of the statute is peremptory and applies equally to all tenants of the freehold whether holding in severalty or in common. Billings v. Gibbs, 55 Me. 238.

One who ousts demandant or withholds possession is disseizor.—In general the action must be against a person claiming an estate not less than a freehold; but if the person in possession has actually ousted the demandant, or withheld the possession, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, though he claims an estate less than a freehold. Wyman v. Brown, 50 Me. 139.

Under general issue without disclaimer, question is one of superior title.—Under

the plea of the general issue and in the absence of disclaimer, the question of notice to quit is not open to the defendant. The only inquiry in such case is, under this section, which of the parties has the better title? Clarke v. Hilton, 75 Me. 426.

And tenant is secure in possession until superior right shown.—Under the general issue, the tenant may rest upon his possession until the plaintiff has shown some right to disturb it, and may put in such evidence to rebut the proofs adduced by the plaintiff as is found admissible under the specifications he had filed. Chaplin v. Barker, 53 Me. 275.

But he cannot prove certain evidence.—Under the plea of the general issue, the tenant cannot give in evidence a conveyance by the demandant of any portion of the premises to one under whom he does not claim, and which does not show that the demandant was not seized according to his writ. Putnam Free School v. Fisher, 38 Me. 324.

In the trial of a real action between tenants in common, the defendant, under the general issue alone pleaded, cannot give in evidence that he "had never ousted the plaintiff of his portion of the demanded premises, nor in any way hindered his taking possession, but had only been in possession of the same as tenant in common with the demandant." Billings v. Gibbs, 55 Me. 238.

Without actual occupation of some portion of the premises by the grantee under a recorded deed, the real owner is not disseized. Putnam Free School v. Fisher, 38 Me. 324.

The general issue admits the tenant to be in possession of all the land not specially disclaimed. Perkins v. Raitt, 43 Me. 280; Billings v. Gibbs, 55 Me. 238.

Under general issue alone, actual ouster need not be proved.—When the general issue is pleaded, and a brief statement of the special matters of defense is filed, not embracing, however, nontenancy or tenancy in common, no actual ouster need be proved, as the general issue admits the tenant to be in possession of the premises as tenant of the freehold. Colburn v. Grover, 44 Me. 47; Billings v. Gibbs, 55 Me. 238.

The case must be tried upon the general issue if the special brief statements relied upon were not seasonably filed. Colburn v. Grover, 44 Me. 47.

Judgment for entire premises, or portion thereof, upon verdict for demandant.—In the trial upon a writ of entry, under our statute, on the general issue, the rendition of a general verdict in favor of the demandant entitles him (where no cause is found to disturb the verdict) to judgment for the demanded premises, as described in his writ when no part has been disclaimed; where some portion has been disclaimed, to judgment for the remainder. Russell v. Brown, 56 Me. 94.

The plea of non-tenure is required to be in abatement and not in bar of the action. Colburn v. Grover, 44 Me. 47; Hatch v. Brier, 71 Me. 542.

Disclaimer pleaded is a plea of non-tenure, and must be pleaded in abatement. May v. Labbe, 114 Me. 374, 96 A. 502.

It is not available under general issue.—If the tenant would defeat the action on the ground that he was not tenant of the freehold, and had not actually ousted the demandant, or withheld the possession, he must plead non-tenure in abatement. He cannot avail himself of such a defense under the general issue. Wyman v. Brown, 50 Me. 139.

Where the tenant would disclaim a portion of the premises demanded, it must be made up and filed according to the provisions of the laws of this state, or it cannot be available. Such disclaimer cannot be incorporated into the plea of the general issue. Putnam Free School v. Fisher, 38 Me. 324.

Nor by joining with another defendant under plea of nul disseizin.—The statute requires non-tenure to be pleaded in abatement, and the defendants, who neglect so to plead, cannot avail themselves of that defense, by joining with another defendant in a plea of nul disseizin. Wyman v. Brown, 50 Me. 139.

When disclaimer filed.—The docket entries show no enlargement of the time for filing by leave of court, without which, to be effective, disclaimers should have been filed at the first term and within two days after entry of the action. Rule V, Supreme Judicial and Superior Courts. Susi v. Davis, 134 Me. 308, 186 A. 707.

The disclaimer allowed by this section, to be filed by way of brief statement under the general issue, is to "be filed within the time required for filing pleas in abatement, and not after, except by special leave of the court, and on such terms as the court shall direct." Colburn v. Grover, 44 Me. 47.

Non-tenure, or disclaimer, must be seasonably interposed if at all. — If the defendant, instead of meeting the plaintiff upon the merits under the plea of nul disseizin and trying the title under that issue, desires to interpose a special plea of

non-tenure, or disclaimer, it must be done within the time allowed for filing pleas in abatement. But the statute authorizes the court in its discretion, even in such cases, to enlarge the time and allow the defendant to make such special answer. Craven v. Turner, 82 Me. 383, 19 A. 864.

And such plea not seasonably filed is bad on demurrer, or may be stricken out. —Before the enactment of the statute prohibiting the plea of general non-tenure and disclaimer in bar, and requiring defense to be made in abatement, such pleas presented traversable facts, that if proved, might defeat the action. But since that statute, such defense cannot be interposed at all after the lapse of the time for pleas in abatement. So that any plea of that character, not seasonably filed, sets up no legal defense whatever, and may be held bad on demurrer, or stricken out, and judgment entered for want of plea. Hazen v. Wright, 85 Me. 314, 27 A. 181.

Nature of brief statement as disclaimer. —The naked plea of the general issue admits the tenant to be in possession of the premises described in the declaration. A brief statement is utterly nugatory as a disclaimer, if it is not seasonably filed. It is inconsistent with the general issue, and the mater it contains, in order to be available as special matter of defense, must, if not pleaded in abatement, be filed in the form of a brief statement within the time allowed for pleas in abatement, unless the time is enlarged by the court. Chaplin v. Barker, 53 Me. 275.

Defendant may disclaim in part.—When a tenant claims, or is in possession of a part only of the premises he may describe such part in a statement filed in the case, and disclaim the remainder, and if the facts contained in such statement are proved on trial, the demandant shall recover judgment for no more than such part, and not for the portion disclaimed. May v. Labbe, 114 Me. 374, 96 A. 502.

And demandant must prove title to part not disclaimed. — Pleading disclaimer as to part, and the general issue as to part, does not relieve the demandant from the necessity of proving title to the part not disclaimed. He can recover only upon the strength of his own title, and not upon the weakness of the tenant's. May v. Labbe, 114 Me. 374, 96 A. 502.

But where the disclaimer does not extend to the whole of the demandant's land, the tenant is guilty of disseizin, and has no right to retain the possession of any portion of it, however minute, which is capable of admeasurement. Perkins v. Raitt, 43 Me. 280.

Demandant may be required to join issue under plea of general issue and disclaimer.—Under this section, entitling the defendant in a real action to plead by a brief statement under the general issue, filed within the time allowed for pleas in abatement, that he was not a tenant of the freehold, or, if he claimed or was in possession of only a part of the premises when the action was commenced, to describe such part in a statement filed in the case and disclaim the residue, it is proper, in writ of entry, to require the plaintiff to join issue upon defendant's plea of general issue and disclaimer, under a ruling that replication was unnecessary. Lancaster v. Augusta Water District, 108 Me. 137, 79 A. 463.

Upon disclaimer, if tenant was in possession, judgment for demandant. — Upon a plea of disclaimer in a real action, if the tenant, at the commencement of the suit, was in possession of any part of the land disclaimed, the demandant must be the prevailing party. Putnam Free School v. Fisher, 34 Me. 172.

But if he was not in possession, action is defeated.—If, under a plea of disclaimer, the tenant shows that he was not in possession of the premises when the action was commenced, the action is entirely defeated. But if he was in possession of any part of the land disclaimed, the demandant prevails. May v. Labbe, 114 Me. 374, 96 A. 502.

Inaccurate disclaimer may defeat such defense. — If the tenant disclaims as to part, and pleads nul disseizin as to the remainder, the plea admits the tenant to be in possession of all land not specially disclaimed, and if it appears that he has not in his disclaimer described the true boundary line and has failed to disclaim some part of the demandant's land, the demandant may have judgment for the part disclaimed, as well as for the part of his land not disclaimed. May v. Labbe, 114 Me. 374, 96 A. 502.

Applied in Warren v. Miller, 33 Me. 220; Ayer v. Phillips, 69 Me. 50; Brown v. Webber, 103 Me. 60, 68 A. 456; Hardison v. Jordan, 142 Me. 279, 50 A. (2d) 447.

Stated in Morse v. Sleeper, 58 Me. 329.

Cited in Mudgett v. Emery, 38 Me. 255.

Sec. 7. Defendant ousting demandant deemed disseizor. — If the person in possession has actually ousted the demandant or withheld the posses-

sion, he may, at the demandant's election, be considered a disseizor for the purpose of trying the right, although he claims an estate therein less than a freehold. (R. S. c. 158, § 7.)

Tenant may be treated as disseizor although holding under lease.—If one who has the title and right of entry into lands, makes an actual entry upon the tenant in possession, who resists the entry, and persists in the occupation, this is a disseizin at the election of the owner, upon which a writ of entry may be maintained, although the tenant may show on the trial that he held by lease under one without title. Dow v. Plummer, 17 Me. 14.

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

Cited in Matthews v. Demerritt, 22 Me. 312.

Sec. 8. Proof to entitle demandant to recover.—In the trial upon such writ, on the general issue, if the demandant proves that he is entitled to such estate in the premises as he has alleged and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better title in himself. (R. S. c. 158, § 8.)

This section regulates the rights of the demandant and tenant, where the general issue only is pleaded. Matthews v. Demerritt, 22 Me. 312.

Recovery must be according to allegations.—By §§ 3 and 8 the estate claimed must be set out, and the recovery, if any, must be according to the allegations. Parker v. Murch, 64 Me. 54.

And proof must support estate claimed.—If, in the declaration, the demandant claims an estate in fee, and proof utterly fails to support it, the action cannot be sustained without an amendment. Rawson v. Taylor, 57 Me. 343.

It is settled law in this jurisdiction that a plaintiff cannot recover in a real action without proving the title to the premises as alleged in the declaration. Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

If the plaintiff alleges in the declaration that he has an estate of fee simple in the premises, he cannot recover by showing that he has an easement. Rogers v. Biddeford & Saco Coal Co., 137 Me. 166, 16 A. (2d) 131.

Upon the pleadings, the demandant can only recover the premises described in his writ and to which he proves legal title at the date of the commencement of his action. Hardison v. Jordan, 142 Me. 279, 50 A. (2d) 447.

And right of entry at time action commenced.—Proof of both the right of entry at the time of the commencement of the action and of such an estate in the premises as is alleged is necessary before a demandant can recover, although the defendants show no title in themselves. Stetson v. Grant, 102 Me. 222, 66 A. 480; Powers v. Hambleton, 106 Me. 217, 76 A. 675.

Warranty deed to plaintiff or his grantor will authorize verdict in his favor, unless defendant proves better title.—In a real action tried upon the plea of nul disseizin, a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient prima facie evidence of ownership, and will authorize a verdict for the plaintiff, unless the defendant proves a better title. Rand v. Skillin, 63 Me. 103.

Real issue is which party can show the better title.—The real struggle, under the general issue in a real action, is to see which party can show the better title in himself. Wyman v. Brown, 50 Me. 139.

The burden of proof is upon the plaintiff to show such a title as will give him a better right to the possession than the defendants have. It is a question of title between the parties. Rowell v. Mitchell, 68 Me. 21.

And proof of better title in third person is no defense.—Proof of a better title in some third party, even if the tenant holds under such third party, will be no defense under the general issue; the tenant must prove that he has a better title in himself. Wyman v. Brown, 50 Me. 139.

The demandant's seizin as alleged, and his right of entry being made to appear, the question then is, which of the two litigating parties has the better title—not whether some third person, who presents no claim, might prevail against either or both of them. Morse v. Sleeper, 58 Me. 329.

Unless tenant derives title from such person.—When the demandant has established his title and seizin within the time alleged, the tenant shall not be permitted to show title in a third person unless he can derive title from such person to himself by legal conveyance or operation of law. Morse v. Sleeper, 58 Me. 329.

But defendant may rebut demandant's proof by showing title in himself, etc.—In a real action, under the general issue, the burden is on the plaintiff to show the title he has alleged. If he shows no title he cannot prevail, even though the defendant has none. The defendant may rebut the plaintiff's proof, by showing title in himself, or in another, or merely that the plaintiff has none, and this may all be shown under the general issue. Brown v. Webber, 103 Me. 60, 68 A. 456; Powers v. Hambleton, 106 Me. 217, 76 A. 675.

Or by showing that demandant's grantor previously conveyed title to third person.—It is competent for the tenant, under the general issue, to disapprove the seizin of the demandant, as alleged in the writ, by showing that the demandant's grantor had previously conveyed the title to a third person, even though the tenant does not claim under such grantee. Morse v. Sleeper, 58 Me. 329.

The demandant must recover upon the strength of his own title. He is bound to prove the seizin upon which he counts. Bussey v. Grant, 20 Me. 281; Derby v. Jones, 27 Me. 357.

And not upon the weakness of that of the tenant. Webster v. Hill, 38 Me. 78; Hewes v. Coombs, 84 Me. 434, 24 A. 896; Stetson v. Grant, 102 Me. 222, 66 A. 480; Powers v. Hambleton, 106 Me. 217, 76 A. 675; Spencer v. Bouchard, 123 Me. 15, 121 A. 164; Hardison v. Jordan, 142 Me. 279, 50 A. (2d) 447.

And if the demandant fails to show any title to the real estate demanded, a nonsuit is to be entered. Derby v. Jones, 27 Me. 357.

Demandant entitled to recover portion not disclaimed.—In the trial upon a writ of entry, under our statute, on the general issue, the rendition of a general verdict in favor of the demandant entitles him (where no cause is found to disturb the verdict) to judgment for the demanded premises, as described in his writ when no part has been disclaimed; or where some portion has been disclaimed, to judgment for the remainder. Ketchum v. Moores, 122 Me. 166, 119 A. 202.

Where there is a statement of the part claimed, and a disclaimer of the residue under § 6, the demandant, if entitled, is to recover judgment for no more than such part. Russell v. Brown, 56 Me. 94.

Applied in Goodwin v. Sawyer, 33 Me. 541.

Sec. 9. Joinder of demandants.—Persons claiming as tenants in common or joint tenants may all, or any two or more, join in a suit for recovery of lands, or one may sue alone. (R. S. c. 158, § 9.)

One tenant in common may bring action.—One tenant in common may bring an action against a stranger for the recovery of possession of the property without joinder of his co-tenant. Webster v. Ballou, 108 Me. 522, 81 A. 1009.

But he can recover no more than his own proportion.—This section, while allowing tenants in common to join or sever in an action of this sort, does not mean that one suing alone can recover the whole or any more than his own proportion of the estate, even against one who shows no title. Clarke v. Hilton, 75 Me. 426.

Cited in Lamb v. Danforth, 59 Me. 322; Thompson v. Gaudette, 148 Me. 288, 92 A. (2d) 342.

Sec. 10. Demandant may recover specific or undivided part.—The demandant may recover a specific part or undivided portion of the premises to which he proves a title, although less than he demanded. (R. S. c. 158, § 10.)

Demandant may recover less than demanded.—Under our statute, the demandant can recover any specific part of the premises to which he proves a title, though less than he demanded. Stewart v. Davis, 63 Me. 539; May v. Labbe, 114 Me. 374, 96 A. 502.

If the plaintiff in his writ claims an undivided half, he will be entitled to judgment for so much as he shows title to, less than one-half. Hudson v. Webber, 104 Me. 429, 72 A. 184.

If the plaintiff shows title to an undivided half of the demanded premises, the other half having descended to another, judgment in her favor can go only under this section for that undivided portion to which she shows title in herself. Clarke v. Hilton, 75 Me. 426.

But the demandant cannot recover more than he shows title to. May v. Labbe, 114 Me. 374, 96 A. 502.

Nor more than estate claimed.—See Parker v. Murch, 64 Me. 54. See also § 8 and note.

Applied in Searle v. Preston, 33 Me. 214; Peabody v. Hewett, 52 Me. 33; Hazen v. Wright, 85 Me. 314, 27 A. 181; Day v. Philbrook, 89 Me. 462, 36 A. 991; Spencer v. Bouchard, 123 Me. 15, 121 A.

164; Crockett v. Borgerson, 129 Me. 395, 152 A. 407; Richardson v. Richardson, 146 Me. 145, 78 A. (2d) 505.

Quoted in Johnson v. Merithew, 80 Me. 111, 13 A. 132.

Cited in Roberts v. Richards, 84 Me. 1, 24 A. 425; Susi v. Davis, 134 Me. 308, 186 A. 707; Thompson v. Gaudette, 148 Me. 288, 92 A. (2d) 342.

Sec. 11. May recover damages in same action.—When a demandant recovers judgment in a writ of entry, he may therein recover damages for the rents and profits of the premises from the time when his title accrued, subject to the limitation herein contained; and for any destruction or waste of the buildings or other property for which the tenant is by law answerable. (R. S. c. 158, § 11.)

Section gives demandant no new rights.—This section gave the demandant no new rights but merely enabled him to accomplish in one action what had previously required two. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

The statute gives the demandant, in a writ of entry, no new rights; it only changes the remedy by which he should recover the rents and profits, which have accrued before the date of his writ, and enables him to accomplish, in one suit, that for which two actions had been previously necessary, Purrington v. Pierce, 41 Me. 529.

Plaintiff may recover damages for rents and profits.—The general rule is that when a plaintiff recovers judgment in a writ of entry, he may recover damages for the rents and profits of the premises. Harkness v. McIntire, 76 Me. 201.

The action for mesne profits is an action of trespass, and during the continuance of a disseizin cannot be maintained by one disseized. Hence, a recovery in a writ of entry is necessary to reinvest the owner with the seizin of his estate. When possession is regained, the owner is deemed to have been seized from the time of the unlawful entry of his disseizor, and, except so far as he may be barred by the statute of limitations, may recover for mesne profits to the time of his entry under his writ of possession. Larrabee v. Lumbert, 36 Me. 440.

And for destruction or waste.—In a real action, the plaintiff may recover for rents and profits, which are defined to be the clear annual rental value of the premises while the defendant is in possession, and for any destruction or waste. These are the limitations of the statute. Rollins v. Blackden, 112 Me. 459, 92 A. 521.

At common law, the demandant could not recover for rents and profits or waste in his real action, but, after obtaining judgment under a writ of entry, he could bring an action to recover for rents and profits during the entire occupancy by the wrongdoer or for any destruction or waste committed during his wrongful possession. The common law was radically changed by this section. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

Which accrued before commencement of action.—As it is required that the demandant, in his writ of entry, should set forth his claim for mesne profits in his writ, it must show the extent and limits of his claim. He can only demand damages for the past. He cannot, by an anticipatory count, set forth future contingent and uncertain or unknown damages. The demandant, therefor, in a writ of entry can only recover for damages which accrued before the commencement of his suit. Larrabee v. Lumbert, 36 Me. 440.

By this section, no new rule is given as to the time to which damages are to be computed. The general rule of the common law consequently remains, by which the demandant is limited in his recovery to those accruing before the purchase of his writ. Larrabee v. Lumbert, 36 Me. 440.

It is a well settled doctrine of the common law that, after a recovery in ejectment, the plaintiff may maintain a new suit of trespass and recover thereby the mesne profits. By our statutes, he can now recover such profits in the original suit for the land, up to the date of his writ, if he makes the claim in his writ. But, for those rents and profits accruing after the date of the writ, he must resort to a new action of trespass. Soper v. Pratt, 51 Me. 558.

If he has made a claim therefor in his writ.—When a demandant recovers judgment in a writ of entry, he is not entitled to recover, in the same action, damages against the tenant for the rents and profits of the premises, under the provisions of this section, unless he has made his claim therefor in his writ. Pierce v. Strickland, 25 Me. 440.

To entitle the demandant to recover for mesne profits in a writ of entry, under the provisions of this section, he must set forth his claim for them in his writ. Larrabee v. Lumbert, 36 Me. 440.

The demandant must specifically include in his declaration a claim for damages or he cannot recover them. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

If damages for destruction and waste are not declared for, they cannot be recovered. Rollins v. Blackden, 112 Me. 459, 92 A. 521.

Under this section the demandant may recover for mesne profits and waste. Whether he will claim either or both is uncertain. If he claims either or both, the same reasons exist for giving the defendant notice of his several claims and of their extent, so that he may know to what he is called to answer, as in any other case; and this notice should be furnished by the declaration. The verdict of a jury is based upon and is their response to the several counts in the writ. It would be an anomaly in judicial proceedings for a plaintiff to recover for damages not declared for, and when the record would not disclose the grounds of action, for and on account of which damages have been rendered. Although a change is made in the remedy, it could hardly have been intended that a recovery should be had for that which is not set forth in the declaration, any more in this than in any other action. Larrabee v. Lumbert, 36 Me. 440.

Notwithstanding claim of betterments.—In all real actions brought to recover land, the demandant may now insert a claim for mesne profits. He is not bound to anticipate a claim of betterments, and he cannot be deprived of his rights by the interposition of such a request or claim. Soper v. Pratt, 51 Me. 558.

In which case damages may be deducted from value of improvements.—When the demandant inserts in his writ a claim for mesne profits, and the defendant interposes a claim for betterments, and both are to some extent sustained, the rents and profits of the land and of all the real estate in the premises, which is not included in the improvements made by the tenant or by those under whom he claims, or owned by him, may be offset or deducted from the estimated value of such improvements. Soper v. Pratt, 51 Me. 558.

But damages recoverable only when plaintiff recovers judgment.—The right to recover damages for rents and profits is a mere incident to the right to the land itself. Under this section, it is only when the plaintiff "recovers judgment in a writ of entry" that he may therein recover damages for the rents and profits of the premises from the time when his title accrued. Hilliker v. Simpson, 92 Me. 590, 43 A. 495.

And the right to recover rents and profits is defeated by the failure of the suit itself. Hilliker v. Simpson, 92 Me. 590, 43 A. 495.

Profits not recoverable by equitable grantor.—In a real action by the equitable grantor against his grantee, mesne profits are not recoverable, the grantee being in possession, by the permission of the grantor, without any agreement or expectation to pay rent. Jewell v. Harding, 72 Me. 124.

And the plaintiff cannot recover for trespasses not amounting to destruction or waste. Rollins v. Blackden, 112 Me. 459, 92 A. 521.

Title and incidental rights should be determined in one suit.—The intention of the legislature appears to have been that the title, and all incidental and derivative rights, should, as far as practicable, be determined in one suit, as in this mode the conflicting rights of the parties might be better adjusted, in pursuance of the new rules introduced, and might be sooner determined, and with diminished expense. Larrabee v. Lumbert, 36 Me. 440.

And remedy by writ for rents and profits or waste prior to commencement of action is exclusive.—The demandant not only may now recover under his writ of entry for any rents and profits accruing, or for waste committed, prior to the date of his writ, but for such damages, his remedy under his writ of entry is exclusive. In other words, he must either recover under his writ of entry for all damages for rents and profits or waste accruing prior to the date of his writ or be barred from ever recovering for that period. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

That the claim for mesne profits, so far as they have accrued, must be enforced in the writ of entry, if at all, is abundantly manifest from § 15, which provides, that "nothing herein contained shall prevent the demandant from maintaining an action for mesne profits or for damage to the premises against any person except the tenant in a writ of entry who has had possession of the premises or is otherwise liable to such action." Larrabee v. Lumbert, 36 Me. 440.

And separate action cannot be sustained.—A separate action for mesne profits cannot now be sustained for any rents before the date of the writ in the original action—and they cannot be recovered in that action for any time after such date,

although declared for in that suit. Soper v. Pratt, 51 Me. 558.

In this section, new rights are granted, and so far as regards those rights, to the extent of what the demandant might have recovered, he is inhibited from commencing a new suit, and no further. Larrabee v. Lumbert, 36 Me. 440.

Ample provision is made for the trial in the writ of entry for all claims which had then arisen, and for all within the purview of this section, no subsequent suit can be brought. Larrabee v. Lumbert, 36 Me. 440.

But rents and profits accruing after date of writ may be recovered in separate action.—For rents and profits accruing subsequently to the date of the writ of entry, and prior to the time when possession is taken by the demandant, a recovery may be had in trespass for mesne profits. Larrabee v. Lumbert, 36 Me. 440.

And section does not preclude subsequent action against trespasser other than the tenant.—The prohibition against bringing a separate action in case no claim is made in the real action for rents and profits or waste is not express, but as construed by the court, a necessary implication and being in derogation of his common-law rights should not be extended farther. Such appears to have been the intent of the legislature, as it expressly preserved the demandant's right of action against any other trespasser or person causing damage to the premises. (§ 15). Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

Or against third person for conversion of fruits of waste committed by tenant.—The statute does not deprive the demandant of the right to recover damages in trover against a third person for the conversion of the fruits of the waste committed by the tenant when the demandant has not included in his real action any clause for damages by reason of the waste. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

Or against tenant if trespass does not amount to destruction or waste.—This statute is strictly construed, and the demandant is not prohibited by the statute from bringing an action even against the tenant for any form of trespass that does not amount to destruction or waste, even though committed prior to the date of his writ of entry. Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

And right given is not substitute for action for use and occupation.—The right to declare for damages is permissive and not compulsory. It was given to avoid the necessity of bringing trespass for mesne profits after a recovery of the premises. In no view can it be deemed a substitute for the action for use and occupation, which would not lie under such circumstances, or as authorizing that action to be brought, when before it would not lie. Larrabee v. Lumbert, 34 Me. 79.

Applied in Stewart v. Davis, 63 Me. 539.

Sec. 12. Estimation of rents and profits. — The rents and profits for which the tenant is liable are the clear annual value of the premises while he was in possession, after deducting all lawful taxes paid by him and the necessary and ordinary expenses of repairs, cultivation of the land or collection of the rents and profits. (R. S. c. 158, § 12.)

Section establishes new rule for estimation of damages.—A new rule for the estimation of damages is established by this section, favorable to the tenant, yet just to the demandant. Larrabee v. Lumbert, 36 Me. 440.

If the demandant is entitled to recover rents and profits, the liability of the tenant therefor is defined and measured by this section, both as to the amount and time, and limited to the clear annual net value of the premises, for the time, during which he was in possession thereof. Purrington v. Pierce, 41 Me. 529.

The measure of damages, to which the demandant would otherwise be entitled, is by this provision limited and restrained. At common law the possession of the tenant was treated as tortious, and vindictive damages were allowed. Larrabee v. Lumbert, 36 Me. 440.

Applied in Rollins v. Blackden, 112 Me. 459, 92 A. 521.

Stated in Pierce v. Strickland, 25 Me. 440.

Cited in Larrabee v. Lumbert, 34 Me. 79; Soper v. Pratt, 51 Me. 558.

Sec. 13. Allowance for improvements. — In estimating the rents and profits, the value of the use by the tenant of improvements made by himself or by those under whom he claims shall not be allowed to the demandant. (R. S. c. 158, § 13.)

The plaintiff can claim only for rents and profits of the land, independently of improvements. Soper v. Pratt, 51 Me. 558.

Where all the improvements were made by the tenant, the equitable view is that the owner of the land should have rent for his land, but not for the improvements which are the result of the labor and expenditures of the tenant, or of those under whom he claims. It would be unjust, on one hand, to allow the owner of the land to exact the value of rents which come from such improvements, made without his aid, and equally unjust, on the other hand, to exonerate the man, who has wrongfully dispossessed him, from any liability for the use of the land on which his improvements were made. The rule laid down in this section seems the equitable and just one. Soper v. Pratt, 51 Me. 558.

But tenant cannot retain value of improvements under this section. — Under this section, the tenant is allowed to retain only the value of the use of improvements made by himself or those under whom he claims the land. A person having made improvements upon another's land, without consent of the owner, or being in possession under one who made them, without such consent, does not become entitled to the value of the improvements themselves, unless he sustains to the proprietor the relation which brings him within the provision of § 20. Pierce v. Strickland, 25 Me. 440.

Sec. 14. Tenant not liable for over 6 years' rents.—The tenant is not liable for the rents and profits for more than 6 years, nor for waste or other damage committed before that time, unless the rents and profits are allowed in setoff to his claim for improvements. (R. S. c. 158, § 14.)

Section recognizes right to set off.— This section distinctly recognizes, by clear implication, a right thus to set off. It refers to a claim of betterments, for it provides for a setoff of rents and profits against a claim for improvements of more than six years standing, and such improvements are those recognized as coming within the legal right of betterments. Soper v. Pratt, 51 Me. 558.

And contemplates a fair adjustment between the parties. — The statute contemplates that there may and should be a fair adjustment of rents and profits and improvements between the parties; that the demandant should have a just allowance for land rent, and the tenant should have a proper estimation of the value of his improvements; and that the land rent should be offset or deducted from the sum found as the value of the improvements. This can be done by the jury, as well on the first trial, as it could be in a separate action, and thus justice can be done to both parties. Soper v. Pratt, 51 Me. 558.

Cited in Larrabee v. Lumbert, 36 Me. 440.

Sec. 15. Recovery of damages against other persons. — Nothing herein contained shall prevent the demandant from maintaining an action for mesne profits or for damage to the premises against any person except the tenant in a writ of entry who has had possession of the premises or is otherwise liable to such action. (R. S. c. 158, § 15.)

Object of section. — The only apparent object of this section was to prevent the impression, which seems to have been anticipated as likely to arise, that the action of trespass for mesne profits had been prohibited, in all cases, by the sections which precede. The obvious purpose was to prevent the misconstruction of previous provisions of the statute. Larrabee v. Lumbert, 36 Me. 440. See note to § 11.

Applied in Bemis v. Diamond Match Co., 128 Me. 335, 147 A. 417.

Sec. 16. No abatement by death or intermarriage.—No real action shall be abated by the death or intermarriage of either party after its entry in court; but the court shall proceed to try and determine such action, after such notice as the court orders has been served upon all interested in his estate, personally, or by publication in some newspaper. (R. S. c. 158, § 16.)

Section remedies inconvenience of abatement.—In respect to real actions, the inconvenience of abatement, by the death of parties, is remedied by this section. Dwinal v. Holmes, 37 Me. 97.

At common law, upon the death of either party the action abated. To avoid this result, the legislature enacted this section. The object of this legislation was to prevent the abatement of a real action

by summoning in, in the event of the death of one of the parties, "all interested in his estate." Burleigh v. Prentiss, 95 Me. 192, 49 A. 919.

But all interested in deceased's estate should have notice.—When, at trial, it is represented to the court that one of the parties is dead, the court should order notice served upon all interested in the estate of the decedent. The service of such notice seems a prerequisite to a valid judgment. Consolidated Rendering Co. v. Martin, 128 Me. 96, 145 A. 896.

And his representatives and heirs must have notice. — Upon the death of one of the plaintiffs, the court has no authority to proceed any further in relation to the writ of entry, which he commenced, without notice to his legal representatives, and all others interested in his estate, as heirs. Bridgham v. Prince, 33 Me. 174.

A judgment against the administrator would not affect the heirs, who alone appear to be interested in the land demanded. A decision without notice to them could have no legal effect upon the title to the property in controversy. Bridgham v. Prince, 33 Me. 174.

And heirs are not restricted, in their defense, to title of ancestor.—Where, pending a real action, the tenant dies and his heirs are summoned in under this section, the heirs are not restricted in their defense to the title of their ancestor, but may set up any title they have from any other source. Brunswick Savings Institution v. Crossman, 76 Me. 577; Burleigh v. Prentiss, 95 Me. 192, 49 A. 919.

At common law, a real action would abate upon the death of the tenant, but, by this section, it may be further prosecuted upon notice to all interested in the estate. That is, notice to the individuals interested, served as the court may order. Upon their appearance, they may set up title in themselves, acquired either from the deceased tenant, or from any other source. Trask v. Trask, 78 Me. 103, 3 A. 37.

Notice not required if deceased's only interest in premises was for life. — The motion of a plaintiff in a real action, under this section, for the court to order notice upon the children of one of several defendants who had died after the entry of the action in court, cannot be granted, if it appears from the plaintiff's allegations and formal admissions upon the hearing of the motion, that the defendants were sued as trustees and that the deceased defendant had no interest whatever in the demanded premises, except for her life. Under such circumstances there is no one interested in her estate, no one claiming under her any interest in the demanded premises, who should be summoned in to enable the court to try and determine the action. Burleigh v. Prentiss, 95 Me. 192, 49 A. 919.

The provisions of this section do not embrace petitions for partition. Dwinal v. Holmes, 37 Me. 97.

Applied in Ryder v. Robinson, 2 Me. 127; Treat v. Strickland, 23 Me. 234; Mudgett v. Emery, 38 Me. 255.

Sec. 17. Guardians for minors.—In such case, if any heir is a minor, the court shall order notice to the guardian, and may appoint a guardian ad litem, if necessary, and direct all necessary amendments in the forms of proceeding. (R. S. c. 158, § 17.)

Sec. 18. Writs of possession; judgment conclusive.—If the demandant recovers judgment in any such case, the court may order one or more writs of possession to issue, as may be necessary, against all such as have been so notified, whether they appeared and defended or not; and such judgment is conclusive on them.

Within 30 days after said judgment is recovered, the clerk of the court from which said judgment issues shall forward to the registry of deeds in the county where the real estate is situated a true copy of the property described in said judgment, together with the names of the parties, the date of judgment and the term of court in which said judgment was rendered, and said register of deeds receiving such copy shall forthwith file the same, minuting thereon the time of the reception thereof as aforesaid, and record in the same manner as a deed of real estate, and the fee of the clerk of the said court for preparing said copy shall be $1 and the register of deeds shall be paid $1 for entering and recording the same. Such sums shall be paid by the demandant in said judgment. (R. S. c. 158, § 18. 1945, c. 55.)

Sec. 19. Allowance of costs and stay of execution in such cases.—The prevailing party shall recover full cost in all such cases, and the court may order one or more executions to be issued therefor against the goods and estate of a deceased party in the hands of his executor or administrator, or otherwise, according to the legal rights and liabilities of the parties, and may stay any such execution if the situation of the estate requires it. (R. S. c. 158, § 19.)

Sec. 20. Betterments allowed after 6 years' possession.—When the demanded premises have been in the actual possession of the tenant or of those under whom he claims for 6 successive years or more before commencment of the action, such tenant shall be allowed a compensation for the value of any buildings and improvements on the premises made by him or by those under him whom he claims, to be ascertained and adjusted as hereinafter provided. (R. S. c. 158, § 20.)

This section has become a rule of distributive justice, which has commended itself to the favor of the public, for the equity of its provisions. It relaxes the rigor of extreme right, and is intended generally to extend some indulgence to those who penetrate the wilderness, subdue the soil and render it productive, and who usually have families, depending upon the fruits of their labor. It has not accorded with the moral sense and enlightened justice of the state to suffer a proprietor to strip the occupant of these fruits, so far as they have given additional value to his land, without compensation. This increased value is not considered as of right belonging to him. Fisk v. Briggs, 12 Me. 373.

The intention of the statute manifestly was to provide for those settlers upon land, who had entered against the will, or without the knowledge, of the proprietors. Comings v. Stuart, 22 Me. 110.

And tenant entitled to benefit of improvements made by those under whom he claims.—The betterment acts, based both upon twenty and six years' possession, presuppose that the party is in possession claiming title to the land, and such party is entitled to the benefit, in proper cases, not only of improvements made by himself, but by those under whom he claims. Clarke v. Hilton, 75 Me. 426.

Betterments allowed only when possession was such as would have matured into title. — A claim to betterments can arise only out of an adverse possession of such a character that it could, by lapse of time, mature into a title. United States v. Burrill, 107 Me. 382, 78 A. 568.

If the tenant could gain no title to the fee by adverse possession, so neither could he acquire the lesser right of compensation for betterments. Pratt v. Churchill, 42 Me. 471.

Betterment rights are acquired by adverse possession which, continued for twenty years, ripens into a perfect title by disseizin. United States v. Burrill, 107 Me. 382, 78 A. 568.

If an occupation of twenty years would give title to the land which would include the improvements, the legislature deemed it fair that after an occupation of six years by such a tenant, he should be compensated for his improvements if compelled to leave the land. United States v. Burrill, 107 Me. 382, 78 A. 568.

Thus it must have been open, notorious, exclusive and adverse. — To entitle the tenant to betterments under this section, his possession must be such, that if prolonged for a period of twenty years, it would, by disseizin, give him the fee. It must be open, notorious, exclusive and adverse. Pratt v. Churchill, 42 Me. 471; Cary v. Whitney, 50 Me. 322; United States v. Burrill, 107 Me. 382, 78 A. 568. See Davis v. Dudley, 70 Me. 236.

The acts authorizing tenants in real actions to claim for the value of the improvements on lands require that such holding should be adverse to the legal title. Treat v. Strickland, 23 Me. 234; Bent v. Weeks, 46 Me. 524.

The "actual possession" as used in this section is that which is adverse to the legal title. Peabody v. Hewett, 52 Me. 33; Clarke v. Hilton, 75 Me. 426.

And a tenant holding under a bond for a deed from the owner, is not entitled to claim the value of such improvements. Treat v. Strickland, 23 Me. 234.

Possession must have been for 6 years immediately preceding suit. — To entitle the tenant to betterments, the actual possession for the term of 6 years or more before the commencement of the action, required by the statute, should be immediately preceding the commencement of the suit, and not at some remote period. Kelley v. Kelley, 23 Me. 192.

If an action is brought against the tenant to dispossess him, he can enforce

his claim to betterments by way of defense. If he is dispossessed by an entry without suit, then he may himself bring an action to enforce his claim under this section. But, in either case, the character of the possession, which will support his claim to betterments, is the same, and must have continued for the same length of time. The only difference is that, in the one case it is computed from the commencement of the action, and in the other from the entry. In either case, the six years' actual possession must immediately precede the event which secures to the tenant a valid claim for betterments. Page v. Finson, 74 Me. 512.

Section not applicable to petitions for partition.—The legislature did not design that, in a petition for partition, the respondents can avail themselves of the provisions of the statute, by which a tenant may be allowed compensation for the value of buildings and improvements, made by them, or those under whom they claim. Thornton v. York Bank, 45 Me. 158.

Or to actions for forcible entry and detainer. — This section applies only to real actions, and cannot be made to fit an action of forcible entry and detainer. United States v. Burrill, 107 Me. 382, 78 A. 568. See c. 122, § 1 and note.

Applied in Williams v. Kinsman, 21 Me. 521; Brown v. Ware, 25 Me. 411.

Quoted in Thompson v. Gaudette, 148 Me. 288, 92 A. (2d) 342.

Cited in Pierce v. Strickland, 25 Me. 440; Merithew v. Ellis, 116 Me. 468, 102 A. 301.

Sec. 21. Premises clearly defined and described.—In such action, the demanded premises shall be clearly described in the declaration, otherwise the court may direct a nonsuit. If the tenant or person under whom he claims has been in possession of a tract of land lying in one body for 6 years or more before the commencement of the action, and only part of it is demanded, and the tenant alleges that the demandant has as good a title to the whole as to such part, he may request the jury to inquire and decide that fact; and if they so find, they shall proceed no farther; but the court shall enter judgment that the writ abate, unless the declaration is amended so as to include the whole tract, which the court may allow without costs. (R. S. c. 158, § 21.)

If the demanded premises in a real action are not clearly described in the declaration the court may direct a nonsuit. Ramsey v. O'Leary, 61 Me. 366.

The criterion as to definiteness in description is fixed by the statute governing real actions. "In such action, the demanded premises shall be clearly described in the declaration, otherwise the court may direct a nonsuit." Merrow v. Norway Village Corp., 118 Me. 352, 108 A. 325.

Description must enable defendant to know what lands are intended.—The description must be such as to enable the defendant to know with reasonable certainty what lands or tenements are intended, so that he may intelligently protect his rights by pleadings or disclaimer. He, not the sheriff, is the party needing a clear description in order that he may not be obliged to act in the dark. Merrow v. Norway Village Corp., 118 Me. 352, 108 A. 325.

Without reference to records dehors the writ.—The declaration in a writ of entry should describe the demanded premises clearly, and without reference to papers or records dehors the writ; but such a reference will not vitiate the declaration if the description is complete without it. Willey v. Nichols, 59 Me. 253.

But verdict will not be set aside for want of description if trespass is proved, etc.—If the demanded premises are not clearly described in the declaration in a real action, the statute provides that a nonsuit may be entered. A verdict, however for the demandant, defective for want of definite description of the premises recovered, will not be set aside, where the evidence shows that, at least, a trespass was committed by the tenant upon the close of the demandant, which would render him liable for nominal damages and costs. Nor where it finds the disseizin by the tenant of the demandant's entire premises, when the evidence would warrant a finding of the disseizin of a small portion only, the disclaimer in the case not being seasonably filed, and the result being in such respect immaterial. Ramsey v. O'Leary, 61 Me. 366.

Description may be sufficient if it gives number of lot.—A description of the demanded premises in a writ of entry is sufficient if it gives the number of the lot, when the lot has been actually run out and numbered, the number of the lot in such case becoming, for the purpose of identification, its name. Willey v. Nichols, 59 Me. 253.

Sec. 22. Consent to recovery of specified part; effect.—If the tenant enters notice on record in open court that the demandant may recover a specified part of the demanded premises by consent of the demandant, judgment may be rendered in his favor for such part, and for the tenant for the residue; but if he does not consent, and recovers only such part, he shall recover no costs, but the tenant shall recover his costs from the time of such notice. (R. S. c. 158, § 22.)

Sec. 23. Tenant may have betterments, upon demurrer or default.—The tenant shall have the benefit of the provisions in the following sections as to the increased value of premises when the cause, including all real actions brought by a reversioner or remainderman, or his assigns, after the termination of a tenancy in dower, or any other life estate, against the assignee or grantee of the tenant of the life estate, or against his heirs or legal representatives, is determined in favor of the plaintiff upon demurrer, default or by verdict. (R. S. c. 158, § 23.)

Tenant must claim under widow or as assignee or grantee of life tenant.—If the tenants do not claim under the widow, or as assignees or grantees of one holding a life estate, they cannot invoke the provisions of this section. Bent v. Weeks, 46 Me. 524.

Assignee or grantee is entitled to improvements made by life tenant.—By this section, in any action brought by a reversioner or remainderman, or his assigns, after the termination of a life estate, against the assignee or grantee of the tenant of the life estate, or against his heirs or legal representatives, such assignee or grantee, heir or legal representative, shall be entitled to the increased value of the premises by reason of improvements made by the life tenant. Folsom v. Clark, 72 Me. 44.

And no adverse possession is required.—By this section, in a writ of entry against the grantee or assignee of a tenant for life, the tenant shall have the benefit of all the improvements made during the tenancy for life. No adverse possession or possession for any particular period is required. Reed v. Reed, 68 Me. 568.

Section not retroactive. — See Poor v. Larrabee, 58 Me. 543; Folsom v. Clark, 72 Me. 44.

Sec. 24. Request of either party for appraisal of improvements.—The tenant may file a written claim to compensation for buildings and improvements on the premises and a request for an estimation by the jury of the increased value of the premises by reason thereof; and the demandant may file a request, in writing, that the jury would also estimate what would have been the value of the premises at the time of trial if no buildings had been erected, improvements made or waste committed; both these estimates they shall make and state in their verdict; and the jury shall allow for no buildings or improvements, except those that they find were made by the tenant, his grantor or assignor, and were judicious and proper under the circumstances. (R. S. c. 158, § 24.)

No allowance made if improvements were not "judicious and proper under the circumstances."—The statute provides that estimation shall be made of the increased value of the premises, by reason of the improvements, but that no allowance shall be made except for such improvements as "were judicious and proper under the circumstances." Proctor v. Maine Central R. R., 101 Me. 459, 64 A. 839.

And nothing can be deemed an "improvement" which does not benefit the land, nor increase its value to the true owner. It matters not how much a so-called improvement may have benefited the adverse occupier. The real question is, has it been judicious and proper and pecuniarily beneficial, as regards the owner. Proctor v. Maine Central R. R., 101 Me. 459, 64 A. 839.

Case may be remanded so that proper claim may be filed.—If the case on appeal does not show that the tenant filed a written claim for compensation for improvements, as provided by this section, nor that the demandant filed a request in writing under the same section for an estimation of what would have been the value of the premises, at the time of trial, if no improvements had been made, such a claim for the value of improvements being of an equitable character, if it is necessary and justice requires it, the court will remand the case to nisi prius that the proper claim and request might be filed, and a statutory determination thereof be made. Proctor v. Maine Central R. R., 101 Me. 459, 64 A. 839.

Applied in Knox v. Lermond, 3 Me. 377; Soper v. Pratt, 51 Me. 558; Pond v. Doug-

lass, 106 Me. 85, 75 A. 320; Pond v. Hussey, 111 Me. 297, 89 A. 14.

Cited in Merithew v. Ellis, 116 Me. 468, 102 A. 301.

Sec. 25. Valuation of betterments.—If the tenant, so claiming, alleges and proves that he and those under whom he claims have had the premises in actual possession for more than 20 years prior to the commencement of the action, the jury may find that fact; and in estimating the value of the premises, if no buildings had been erected or improvements made thereon, they shall find and state in their verdict what was the value of the premises when the tenant or those under whom he claims first entered thereon. The sum so found shall be deemed the estimated value of the premises; and in estimating the increased value by reason of the buildings and improvements, the jury shall find and state in their verdict the value of the premises at the time of the trial, above their value when the tenant or those under whom he claims first entered thereon; and the sum so found and stated shall be taken for the buildings and improvements. (R. S. c. 158, § 25.)

Applied in Cary v. Whitney, 50 Me. 322; Clarke v. Hilton, 75 Me. 426.

Cited in Merithew v. Ellis, 116 Me. 468, 102 A. 301.

Sec. 26. Election by demandant to abandon.—If the demandant after such verdict, at the same or a subsequent term of the court if the cause is continued, makes his election on record to abandon the premises to the tenant at the value estimated by the jury and files with the clerk for the use of the tenant a bond in the penal sum of three times the estimated value of the premises, with sureties approved by the court, conditioned to refund such estimated value, with interest, to the tenant, his heirs or assigns, if they are evicted from the land within 20 years by a title better than that of the demandant, then judgment shall be rendered against the tenant for the sum so estimated by the jury, and costs. (R. S. c. 158, § 26.)

Abandonment has effect of conveyance to tenant.—After the demandant has abandoned to the tenant the land demanded, at the value estimated by the jury, the tenant can no longer be considered as holding it by virtue of a possession and improvement. Such abandonment has the effect of a conveyance of the estate to the tenant, on condition of his paying the estimated value within the periods provided by law. Kennebec Purchase v. Davis, 1 Me. 309.

Tenant failing to pay value cannot have scire facias.—If the tenant does not pay the value within the limited periods, he is considered as yielding to the demandant all his title and claim, both to the soil and his improvements thereon; and he cannot have them again estimated in a scire facias brought to revive the original judgment. Kennebec Purchase v. Davis, 1 Me. 309.

Applied in Knox v. Lermond, 3 Me. 377; Winthrop v. Curtis, 4 Me. 297; Proctor v. Maine Central R. R., 101 Me. 459, 64 A. 839.

Stated in Pond v. Hussey, 111 Me. 297, 89 A. 14.

Cited in Merithew v. Ellis, 116 Me. 468, 102 A. 301.

Sec. 27. Tenant may pay 1/3 value of land, interest and costs 1st year.—At the end of 1 year, execution may issue for such sum with 1 year's interest thereon and costs, unless the tenant shall have deposited with the clerk of the court, or in his office for the demandant's use, 1 year's interest of said sum, and 1/3 of the principal sum, and all the costs, if taxed and filed, and in that case no execution shall issue at the time. (R. S. c. 158, § 27.)

Applied in Knox v. Lermond, 3 Me. 377.

Sec. 28. At end of 2 years, another 1/3 interest.—If within 2 years after the rendition of judgment, the tenant pays 1 year's interest on the balance of the judgment due and 1/3 of the original judgment, execution shall be further stayed; otherwise it may issue for 2/3 of the original amount of the judgment and interest thereon. (R. S. c. 158, § 28.)

Sec. 29. At end of 3 years, may pay balance; effect.—If the tenant, within 3 years after judgment, pays into the clerk's office the remaining 1/3 and

interest thereon, having made the other payments as aforesaid, execution shall never issue; otherwise, it may issue for the 1/3 aforesaid and 1 year's interest thereon; and the premises shall be held as security for the amount of the judgment, liable to be taken in execution for the amount and interest, until 60 days after an execution might have issued as aforesaid, notwithstanding any intermediate conveyance, attachment or seizure upon execution; and such execution may be extended on said land or any part of it; or it may be sold on execution like an equity of redemption; in either case, subject to the right of redemption as in those cases. An execution or writ of possession may issue at any time within 3 months after default of payment by the tenant, in cases mentioned in this and the 2 preceding sections, although it is more than a year after the rendition of judgment. (R. S. c. 158, § 29.)

Sec. 30. Tenant's remedy, if evicted.—If the tenant or his heirs are evicted by a better title from the land so abandoned to him, and they had notified the demandant or his heirs to aid him in his defense against such title, they, their executors or administrators may recover back the money so paid, with lawful interest, of said demandant or his representatives; but if no notice was given, the tenant, in an action against the original demandant to recover the price paid for the premises, may show that he was evicted by a title better than that of the demandant. (R. S. c. 158, § 30.)

Applied in Huckins v. Straw, 34 Me. 166.

Sec. 31. If demandant does not abandon, he pays for improvement. —When the demandant does not elect so to abandon the premises, no writ of possession shall issue on his judgment, nor a new action be sustained for the land unless, within 1 year from the rendition thereof, he pays into the clerk's office or to such person as the court appoints for the use of the tenant, the sum assessed for the buildings and improvements, with interest thereon. (R. S. c. 158, § 31.)

Partition proceedings constitute a new action, within the meaning of the statute, brought by the petitioner for the same land involved in the real action. Although this process is designed to establish the petitioner's legal right of possession in severalty to a part of the property, nevertheless all questions concerning the title of the parties and the nature and extent of the interests, are to be determined before the interlocutory judgment for partition can be made. Pond v. Hussey, 111 Me. 297, 89 A. 14.

Applied in Gilman v. Stetson, 16 Me. 124; Proctor v. Maine Central R. R., 101 Me. 459, 64 A. 839.

Sec. 32. Restriction of right to betterments. — Nothing contained in this chapter concerning rents and profits, or the estimate and allowance of the value of the buildings and improvements, shall extend to any action between a mortgagor and mortgagee, their heirs and assigns; or to any case where the tenant or the person under whom he claims entered into possession of the premises and occupied under a contract with the owner, which was known to the tenant when he entered. (R. S. c. 158, § 32.)

Tenants in possession by virtue of title under plaintiff not entitled to betterments. —If the tenants were in possession, not as disseizors of the plaintiff, but by virtue of a title under him, they are not entitled to betterments. Davis v. Dudley, 70 Me. 236. See note to § 20.

Sec. 33. Tenant not to commit waste after judgment.—No tenant, after judgment is entered against him for the appraised value of the premises, shall unnecessarily cut wood, take away timber or make any strip or waste on the land until the amount of such judgment is satisfied. (R. S. c. 158, § 33.)

Sec. 34. Parties may agree upon reference as to value of improvements.—When the parties agree that the value of the buildings and improvements on the land demanded, and the value of the land, shall be ascertained by

persons named on the record for that purpose, their estimate, as reported by them and recorded, is equal in its effect to a verdict. (R. S. c. 158, § 34.)

Applied in Pond v. Hussey, 111 Me. 297, 89 A. 14.

Sec. 35. Tenant may propose value for premises and betterments; effect.—When the tenant, at any stage of such action, files a statement in open court consenting to a sum at which the buildings and improvements and the value of the demanded premises may be estimated, if the demandant consents thereto, judgment shall be rendered accordingly, as if such sums had been found by verdict; but if the demandant does not consent, and the jury does not reduce the value of the buildings and improvements below the sum offered, nor increase the value of the premises above the sum offered, he shall recover no costs after such offer; but the tenant shall recover his costs after such offer and have judgment and execution therefor, subject to the provisions of the following section. (R. S. c. 158, § 35.)

Tenant's offer cannot be withdrawn. — An offer made by the tenant in a real action under this section cannot afterwards be withdrawn by him, it being in its nature an admission on his part, of the value of the estate. Kennebec Purchase v. Davis, 2 Me. 352.

The statute does not provide that the tenant may withdraw his offer. In its nature it is an admission on his part. It may, in some respects, be compared to the practice of bringing money into court upon the common rule, in which case, though the plaintiff is nonsuited, he shall still be entitled to the money. Kennebec Purchase v. Davis, 2 Me. 352.

And demandant's right to accept may be exercised in appellate court.—See Kennebec Purchase v. Davis, 2 Me. 352.

Sec. 36. Setoff of costs against improvements. — In all cases where the demandant does not abandon the premises to the tenant, the court may, on written application of either party during the term when judgment is entered, order the costs recovered by the demandant to be set off against the appraised value of the buildings and improvements on the land; a record of this order shall be made, and the court shall thereupon enter judgment according as the balance is in favor of one party or the other. (R. S. c. 158, § 36.)

Sec. 37. Juror disqualified, if interested in similar questions.—No person who, as proprietor or occupant, is interested in a similar question shall sit as juror in the trial of a cause when the value of buildings and improvements made on the demanded premises, and the value of the premises, are to be estimated as aforesaid. (R. S. c. 158, § 37.)

Cited in Hardy v. Sprowle, 32 Me. 310.

Sec. 38. What constitutes possession and improvement.—A possession and improvement of land by a tenant are within the meaning of this chapter, although a portion of it is woodland and uncultivated, and although not wholly surrounded by a fence or rendered inaccessible by other obstructions, if they have been open, notorious, exclusive and comporting with the usual management and improvement of a farm by its owner. (R. S. c. 158, § 38.)

The provisions of this section relating to disseizin apply to all land alike, though it is competent for the jury to look at the position of the land, the nature of its soil, and its productions, in connection with all the acts done upon it, in determining whether there has been in fact a possession and improvement, open, notorious, exclusive, and comporting with the usual management of a farm by the owner. Gardner v. Gooch, 48 Me. 487.

This section extends the effects of entry and occupation and improvement by a mere disseizor not having any color of title by record. Without the statute, any title acquired by such disseizor would be limited to the part actually occupied. It would not extend over woodland, etc. With the statute, such disseizor in the open, notorious and exclusive possession of a farm may hold the woodland part of the farm as well as the farm home and fields. Banton v. Herrick, 101 Me. 134, 63 A. 671.

Sec. 39. If either party dies before cause disposed of.—After judgment has been rendered for the demandant in a writ of entry, if either party dies before a writ of possession is executed or the cause is otherwise disposed of according to the foregoing provisions, any money payable by the tenant may be paid by him, his executor or administrator, or by any person entitled to the estate under him, to the demandant, his executor or administrator with the like effect as if both parties were living. (R. S. c. 158, § 39.)

Sec. 40. How writ of possession shall issue in such case.—The writ of possession shall be issued in the name of the original demandant against the original tenant, although either or both are dead; and when executed, it shall inure to the use and benefit of the demandant, or of the person who is then entitled to the premises under him, as if executed in the lifetime of the parties. (R. S. c. 158, § 40.)

Applied in Belcher v. Knowlton, 89 Me. 93, 35 A. 1019.

Sec. 41. Either party may have view by jury.—Either party may have a view by the jury of the place in question, if in the opinion of the court it is necessary to a just decision; the party moving for it shall advance to the jury such sum as the court orders, to be taxed against the adverse party if the cause is decided against him on the merits or through his default. (R. S. c. 158, § 41.)

Sec. 42. If life estate demanded.—If the demandant claims an estate for life only in the premises and pays a sum allowed to the tenant for improvements, he or his executor or administrator, at the termination of his estate, is entitled to receive of the remainderman or reversioner the value of such improvements as they then exist; and shall have a lien therefor on the premises as if they had been mortgaged for its payment, and may keep possession until it is paid; and if the parties cannot agree on the existing value, it may be settled as in case of the redemption of mortgaged real estate. (R. S. c. 158, § 42.)

See c. 177, § 7, re mortgagor may redeem within 1 year.

Sec. 43. If tenant ousted after 6 years' possession, may recover for improvements.—When a person makes entry into lands or tenements of which the tenant in possession, or those under whom he claims, have been in actual possession for 6 years or more, and withholds from such tenant the possession thereof, the tenant may recover of the person so entering, or of his executor or administrator, in an action of assumpsit for money laid out and expended, the increased value of the premises by reason of the buildings and improvements made by the tenant or by those under whom he claims, to be ascertained by the principles hereinbefore provided; these provisions extend to the grantee or assignee of the tenant in dower and of any other life estate; and a lien is created on the premises in favor of such claim, to be enforced by an action commenced within 3 years after such entry; and it is no bar to such action if the tenant, to avoid cost, yields to the superior title. (R. S. c. 158, § 43.)

Possession must have been for 6 years immediately preceding entry.—The 6 years' "actual possession," mentioned in the statute means the six years immediately preceding the entry on which the plaintiff relies to support his action. Page v. Finson, 74 Me. 512.

An action cannot be maintained under this section, if the plaintiff was not in the actual possession of the premises, continuously, for 6 years immediately preceding the entry on which he relies for the maintenance of his action. Page v. Finson, 74 Me. 512.

If an action is brought against the tenant to dispossess him, he can enforce his claim to betterments by way of defense. If he is dispossessed by an entry without suit, then he may himself bring an action to enforce his claim under this section. But, in either case, the character of the possession, which will support his claim to betterments, is the same, and must have continued for the same length of time. The

only difference is that, in the one case it is computed from the commencement of the action, and in the other from the entry. In either case, the 6 years' actual possession must immediately precede the event which secures to the tenant a valid claim for betterments. Page v. Finson, 74 Me. 512.

Applied in Chasse v. Soucier, 118 Me. 62, 105 A. 853.

Sec. 44. Cases in which defendant may impeach plaintiff's title deeds.—In all actions respecting lands or any interest therein, a title deed offered in evidence may be impeached by the defendant as obtained by fraud, where the grantor, if a party, could impeach it, if the defendant has been in the open, peaceable and adverse possession of the premises for 20 years. (R. S. c. 158, § 44.)

See c. 174, § 15, re no action for recovery of land after 40 years' possession.

Sec. 45. If tenant and his grantors have been in possession for 40 years, no costs for plaintiff.—In all real and mixed actions in which the tenant proves that he and those under whom he claims have been in the open, notorious, adverse and exclusive possession of the demanded premises, claiming in fee simple, for 40 years preceding the commencement of the action, and the jury so finds, the demandant recovers no costs. (R. S. c. 158, § 45.)

Cross reference.—See c. 174, § 15, re no action for recovery of land after 40 years' possession.

Quoted in Cary v. Whitney, 50 Me. 322.

Sec. 46. Court may appoint and protect surveyors.—The court may appoint a surveyor to run lines and make plans of lands demanded in a real or mixed action, or in an action of trespass in which the title to land is involved, as shown by the pleadings filed, on motion of either party; and if he is prevented by force, menaces or fear from performing the duties assigned him, the court may issue a warrant to the sheriff, commanding him with suitable aid to prevent such opposition; and in the execution of such warrant, he may exercise all the power pertaining to his office; and all persons refusing their aid when called for by him are liable to the same penalties as in other like cases. (R. S. c. 158, § 46.)

Surveyor appointed in action of trespass.—It has been the practice of the court in this state to appoint a surveyor in actions of trespass quare clausum, and trespass debonis asportatis, when the rights of the parties depend upon the establishment of certain boundaries or lines, if such a measure is deemed useful in the trial of the cause, as well as in writs of entry. Leighton v. Haynes, 58 Me. 408.

To restrict the authority of the court, in the appointment of a surveyor, to actions where land only, or land and something else are demanded, would be to give the statute a different construction from that which it has heretofore received, and to deprive the court, in a large class of cases, of an important instrumentality indicating the truth, and determining the rights of the parties. The legislature intended by the terms "a real or mixed action," to comprehend the action of trespass quare clausum, so far as regards the authority to the court to appoint a surveyor, at least where the title to the land is in issue. Leighton v. Haynes, 58 Me. 408.

Sec. 47. Fees of surveyor; court may determine amount paid by parties.—The amount of the fees and necessary expenses of such surveyor shall be fixed and determined by the court upon the acceptance of the report, and shall be paid as follows: if the court is of the opinion that such fees and expenses, or some portion of the same, ought to be paid by the county, then the amount thereof to be paid by the county, whether the whole or a part, shall be fixed and determined by the court and the amount so fixed and determined shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county. If the court is of the opinion that the whole or any part or portion of such fees and expenses should be paid by the parties to the suit or action, or by either of such parties, then the court may fix and determine the amount to be paid by such parties, or by either of such parties, and the parties shall be liable to

the surveyor in an action of money had and received for the amount to be paid by them jointly, and each of the parties shall likewise be liable to the surveyor in the same kind of an action for the amount to be severally paid. (R. S. c. 158, § 47.)

Proceedings at Law to Quiet Title.

Sec. 48. Summary proceedings to quiet title to real estate.—A person in possession of real property, claiming an estate of freehold therein or an unexpired term of not less than 10 years, or a person who has conveyed such property or any interest therein with covenants of title or warranty, upon which he may be liable, may, if he or those under whom he claims or those claiming under him have been in uninterrupted possession of such property for 4 years or more, file a petition in the superior court setting forth his estate, stating the source of his title, describing the premises, and averring that an apprehension exists that persons named in the petition, or persons unknown claiming as heirs, devisees or assigns, or in any other way, by, through or under a person or persons named in the petition, claim or may claim some right, title or interest in the premises adverse to his said estate; and that such apprehension creates a cloud upon the title and depreciates the market value of the property; and praying that such persons be summoned to show cause why they should not bring an action to try their title to the described premises. If any such supposed claimants are unknown, the petitioner or his attorney shall so allege under oath, but the truth of the allegation shall not after decree has been filed be denied for the purpose of defeating the title established thereby. A person in the enjoyment of an easement is in possession of real property within the meaning and for the purposes of this section. (R. S. c. 158, § 48.)

Section constitutional.—See Webster v. Tuttle, 83 Me. 271, 22 A. 167.

Section creates remedy at law. — The statutory provision and the conditions precedent to its exercise, authorizing the quieting of the actual exclusive retention of realty by an imperative rule that another claimant to the same land bring his action to try his title thereto, creates a remedy, not in equity, nor superseding the jurisdiction of courts of equity to remove clouds from titles, but at law. Hoadley v. Wheelwright, 130 Me. 395, 156 A. 692.

Proceedings to remove a cloud on title are customarily brought under one of two statutory provisions. Under this section, an action may be brought at law in the superior court. Under the provisions of § 52, a suit may be brought in equity. Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

Meaning of "cloud on title."—A cloud on title is something, such as a mortgage, deed or other instrument, which can be pointed out, and which, as a semblance of title, either legal or equitable, has some appearance of casting a valid objection over the true owner's title. Parker v. Vallerand, 136 Me. 519, 8 A. (2d) 594.

Section relieves against defect in common law.—This section was made to relieve against a supposed defect in the common law that did not allow one in possession of land to sue for its recovery from a person claiming title to it, without first surrendering the possession, because a mere right of entry would not work a disseizin of the one in possession. Marshall v. Walker, 93 Me. 532, 45 A. 497.

The statute, by proper application, may serve a useful purpose in quieting titles for those in actual possession, who may be threatened with vexatious claims never meant to be enforced, but held as a menace and threat, thereby working much annoyance and perhaps injuring the value of the estate. Marshall v. Walker, 93 Me. 532, 45 A. 497.

Petition cannot be maintained if respondent subsequently conveys his interest.—A petition to quiet a title to real estate cannot be maintained, when it appears that the respondent, after the filing of the petition, conveyed his interest in the real estate or was adjudged a bankrupt. Allen v. Foss, 102 Me. 163, 66 A. 379.

Possession on the part of the petitioner is essential by the very terms of the statute. Pierce v. Rollins, 83 Me. 172, 22 A. 110.

The statute should only apply to those actually in possession of land, taking the emblements thereof. Of course, the occupation of a part of a tract, under claim to the whole, would suffice, if the possession of the residue is not mixed, or in common with others. There should be no other possession of any part of the

tract. The petitioner's possession should be all the possession there is, whether actual or constructive. Marshall v. Walker, 93 Me. 532, 45 A. 497.

And plaintiff must aver and prove possession.—The plaintiff, to maintain his petition under this section, must aver and prove that he is in possession of land, claiming a freehold therein. Marshall v. Walker, 93 Me. 532, 45 A. 497.

A plaintiff cannot maintain his petition under this section, as he could a writ of entry, on proof of title and right of entry, but he must go further and show not only the entry, but the actual retention of the possession. The statute is to quiet possession, and not to cast the burden of proof upon one of two claimants to land, neither of whom have possession or perhaps title. He who begins the litigation must and ought to carry the burden of proving title. Marshall v. Walker, 93 Me. 532, 45 A. 497.

Upon answer below, denying the plaintiff's possession, he must prove his allegation of possession in order to maintain his petition; and he can only maintain it as to so much of the locus described therein as he shows to have been in his possession with claim of title thereto. Marshall v. Walker, 93 Me. 532, 45 A. 497.

Which is exclusive.—Where the petitioner is not in exclusive possession it has always been held that this proceeding cannot be maintained. Marshall v. Walker, 93 Me. 532, 45 A. 497.

If, between the parties, the possession appears mixed or doubtful, the petition cannot be maintained. The petitioner's possession should be practically exclusive. Marshall v. Walker, 93 Me. 532, 45 A. 497.

The remedy under this section is given to a person having possession, meaning actual possession, exclusive possession and not a mixed possession enjoyed in common with others who may rightly use the premises. Marshall v. Walker, 93 Me. 532, 45 A. 497; Smith v. Libby, 101 Me. 338, 64 A. 612.

What constitutes possession of flats. — See Marshall v. Walker, 93 Me. 532, 45 A. 497.

Allegation of adverse claim in language of statute is sufficient.—If the petitioner uses the language of the statute in alleging the adverse claim of the defendant, it is sufficient. Ginn v. Ulmer, 105 Me. 286, 74 A. 635.

Sufficiency of description.—This statutory proceeding follows the analogies of equity rather than those of law, and the petition, being preliminary only to a suit to be brought and prosecuted as seems to the court "equitable and just," is not governed by the same rules as the action itself. The description need not be so particular and definite as in a writ of entry or other action to try the title. Ginn v. Ulmer, 105 Me. 286, 74 A. 635.

A petition under this section, praying that the respondent be summoned into court to show cause why he should not bring an action to try his alleged title to real estate, should contain a description of the real estate sufficiently definite to give notice to the defendant to what land the petition refers. It is not required to be as particular and definite as the description in a writ of entry, dower or partition. Oliver v. Look, 77 Me. 585, 1 A. 833.

Defendant may be ordered to show cause why he should not bring action.—If the plaintiff brings himself within the statutory requirements, the defendant may be ordered to show cause why he should not bring an action to try his title. Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

But he cannot be required to bring action unless his right can be tried.—A respondent will not be required to bring a suit unless it is made to appear that the right which he claims can be fairly and conclusively tried by such a suit as may be directed. Smith v. Libby, 101 Me. 338, 64 A. 612, holding that one who has only an easement and who does not complain that his rights have been interfered with, cannot be compelled under this section, to bring an action at law or a suit in equity to try his alleged right.

Section not applicable to claims of mortgagees.—This section was not intended to apply to the claims of mortgagees or their assignees, and thus compel them to collect the sum secured thereby. If the mortgage is valid and subsisting, equity affords the petitioner a full and complete remedy of redeeming his land without surrendering the possession. If it has become invalid, but simply remains undischarged and thus hangs as a cloud upon the title, still equity gives the fullest power to remove the cloud. Poor v. Lord, 84 Me. 98, 24 A. 583; Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

Applied in Bailey v. Laughlin, 131 Me. 113, 159 A. 561.

Cited in Nash v. Simpson, 78 Me. 142, 3 A. 53; Mitchell v. Emmons, 104 Me. 76, 71 A. 321; Edwards v. Seal, 125 Me. 38, 130 A. 513.

Sec. 49. When easement claimed.—A person in possession of real property, claiming an estate of freehold therein or an unexpired term of not less than 10 years, or a person who has conveyed such property or any interest therein with covenants of title or warranty, upon which he may be liable, may, if he or those under whom he claims or those claiming under him have been in uninterrupted possession of such property for 4 years or more, file a petition in the superior court setting forth his estate, describing the premises and averring that an apprehension exists that persons named in the petition, or persons unknown, claim by continued and uninterrupted use for 20 years or more, by grant, prescription, custom or in any other way, an easement through or on such real property adverse to the estate of the said petitioner and that such apprehension creates a cloud upon the title and depreciates the market value of such property; and praying that such persons be summoned to show cause why they should not bring an action to determine their legal rights in and to such easement over or upon said real estate. If such supposed claimants are unknown, the petitioner or his attorney shall so allege under oath, but the truth of the allegation shall not after the decree has been filed be denied for the purpose of defeating the title established thereby. (R. S. c. 158, § 49.)

See c. 174, §§ 12, 15, re easement acquired by adverse use and no action for recovery of land after 40 years' possession.

Sec. 50. Petition; grantee may become party.—Upon a petition filed under the provisions of either of the 2 preceding sections, the court or any justice thereof in vacation shall order notice returnable at a term of the superior court to be held in the county where the real estate lies. Personal service by copy of the petition and order of notice shall be made upon all such supposed known claimants residing in the state 14 days before the return day; and upon all such supposed unknown claimants residing in the state, and upon all such supposed claimants, known or unkown, residing out of the state, service may be made by personal service of copy of the petition and order of notice; by publication for such length of time in such newspaper or newspapers or by posting in such public places as the court may direct; or in any or all of these ways at the discretion of the court. If the petitioner prefers, the petition may be inserted like a declaration in a writ and served by copy like a writ of original summons. Upon the filing of the petition the clerk of courts in the county where such proceedings are pending shall file a certificate in the registry of deeds in the county or district where said land is situated, setting forth the names of the parties, the date of the petition and the filing thereof and the description of the real estate as given in the petition, which said certificate shall be recorded by the register of deeds, who shall receive therefor the same fee as for recording a deed. The proceedings on the petition shall not be abated by the death of any party thereto, and the issues may be determined after such personal or public notice, as the court orders, has been given to all persons interested in his estate, and they may become or be made parties; nor shall the proceedings be abated by the conveyance of the premises by the respondent by deed recorded after said certificate is recorded. The grantee of any defendant named or described in the petition, or any person claiming under such grantee, may voluntarily appear and become a party, and make any defense that would have been open to the defendant under whom he claims. If any person who becomes such grantee by conveyance recorded after the filing of the certificate aforesaid does not voluntarily appear, no such conveyance by the defendant shall be given in evidence, either in the proceedings on the petition or in any action brought thereunder to try title to the premises as provided in the following section, and the issue shall be determined as though no such conveyance were made. (R. S. c. 158, § 50.)

Sec. 51. If claimant appears; record of decree; action on case by claimant of easement.—If any person so summoned appears and claims title or an easement in the premises, or voluntarily appears as aforesaid and claims

title or such easement, he shall by answer show cause why he should not be required to bring an action and try such title, or his title to such easement; and the court shall make such decree respecting the bringing and prosecuting of such action as seems equitable and just; if any person so summoned appears and disclaims all right and title adverse to the petitioner, he recovers his costs. If the court upon hearing finds that the allegations of the petition are true and that notice by publication has been given as ordered, it shall make and enter a decree that all persons named in the petition and all persons alleged to be unknown claiming by, through or under persons so named, and all persons named as grantees in any deed given by the defendant and recorded after the filing of the certificate aforesaid, and all persons claiming under such grantee who have not so appeared, or who, having appeared, have disclaimed all right and title adverse to the petitioner, or who, having appeared, shall disobey the order of the court to bring an action and try their title, shall be forever debarred and estopped from having or claiming any right or title adverse to the petitioner in the premises described in the petition; which decree shall within 30 days after it is finally granted be recorded in the registry of deeds for the county or district where the land lies, and shall be effectual to bar all right, title and interest, and all easements, of all persons, whether adults or minors, upon whom notice has been served, personally or by publication, as herein provided, and all persons named as grantees in any deed given by the defendant and recorded after the filing of said certificate and all persons claiming under such grantees. The court may in its discretion appoint agents or guardians ad litem to represent minors or other supposed claimants. If any person appears and claims an easement, however acquired, in such premises, he may bring an action on the case to try the title thereto, alleging in his declaration how said easement was acquired and issue shall be framed accordingly. (R. S. c. 158, § 51.)

Section constitutional.—See Webster v. Tuttle, 83 Me. 271, 22 A. 167.

Decree for petitioner based on finding that allegations are true.—The decree, if for the petitioner, must be based upon a finding "that the allegations in the petition are true," that is, the allegations of facts as existing at the date of the petition. Allen v. Foss, 102 Me. 163, 66 A. 379.

Cited in Oliver v. Look, 77 Me. 585, 1 A. 833; Nash v. Simpson, 78 Me. 142, 3 A. 53; Pierce v. Rollins, 83 Me. 172, 22 A. 110; Poor v. Lord, 84 Me. 98, 24 A. 583; Ginn v. Ulmer, 105 Me. 286, 74 A. 635.

Proceedings in Equity to Quiet Title.

The fact that a concurrent remedy at law exists does not oust equity of jurisdiction under these sections. Grant v. Kenduskeag Creamery, 148 Me. 209, 91 A. (2d) 403.

Jurisdiction to quiet title to real estate is expressly given by these sections to courts of equity and the procedure is specifically set forth. Even though a remedy at law may be available, the remedy in equity is still proper, particularly where the legislature may give such remedy as being more flexible or better adapted to the particular circumstances than the remedy at law. Grant v. Kenduskeag Creamery, 148 Me. 209, 91 A. (2d) 403.

Sec. 52. Suits in equity to quiet title; description of defendants; joinder of plaintiffs.—If, in a suit in equity to quiet or establish the title to land situated in this state or to remove a cloud from the title thereto, the plaintiff, or those under whom he claims, has been in uninterrupted possession of the land described in the bill for 4 years or more, claiming an estate of freehold therein, and seeks to determine the claims or rights of any persons who are unascertained, not in being, unknown or out of the state, or who cannot be actually served with process and made personally amenable to the decree of the court, such persons may be made defendants and, if they are unascertained, not in being or unknown, they may be described generally as the heirs or legal representatives of A. B., or such persons as shall become heirs, devisees or appointees of C. D., a living person, or persons claiming under A. B. It shall not be necessary for

the maintenance of such suit that the defendants shall have a claim or the possibility of a claim resting upon an instrument, the cancellation or surrender of which would afford the relief desired; but it shall be sufficient that they claim or may claim by purchase, descent or otherwise, some right, title, interest or estate in the land which is the subject of the suit and that their claim depends upon the construction of a written instrument or cannot be met by the plaintiffs without the production of evidence. Two or more persons who claim to own separate and distinct parcels of land in the same county by titles derived from a common source, or 2 or more persons who have separate and distinct interests in the same parcel, may join as plaintiffs in any suit brought under the provisions of this section. (R. S. c. 158, § 52.)

Cross reference.—See c. 107, § 4, re equity powers.

Proceedings to remove a cloud on title are customarily brought under one of two statutory provisions. Under § 48, an action may be brought at law in the superior court. Under the provisions of this section, a suit may be brought in equity. Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

Equity has no jurisdiction if remedy sought is that provided by § 48.—Equity has no jurisdiction to hear a case which is brought as a bill in equity, but in which the remedy sought is that provided by the statute (§ 48) authorizing a proceeding at law. Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

But equity jurisdiction may be exercised whether plaintiff in or out of possession.—When the estate or interest is equitable only, jurisdiction in equity should be exercised whether the plaintiff is in or out of possession, for the estate or interest being equitable only, legal remedies are not applicable, adequate or sufficient. Hanscom v. Bourne, 133 Me. 304, 177 A. 187.

Meaning of "cloud on title."—A cloud on title is something, such as a mortgage, deed or other instrument, which can be pointed out, and which, as a semblance of title, either legal or equitable, has some appearance of casting a valid objection over the true owner's title. Parker v. Vallerand, 136 Me. 519, 8 A. (2d) 594.

A suit under this section is an action in rem against the land, and under the provisions of § 54, a decree sustaining the bill operates directly on the land and has the effect of a release made by or on behalf of the defendant of all claims inconsistent with the title established or declared by the decree. Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

Applied in Edwards v. Seal, 125 Me. 38, 130 A. 513.

Sec. 53. Service when defendant cannot be found; appointment of agent; expenses.—If in such suit the court finds that actual service cannot be made upon a defendant, it may order notice of the suit to be posted in a conspicuous place on the land or to be published in a newspaper within or without the state, or both, or to be given in such other manner as it considers most effectual, and may also require personal notice to be given. Notice given under the provisions of this section shall be constructive service on all the defendants. If, after notice has been given or served as ordered by the court and the time limited in such notice for the appearance of the defendants has expired, the court finds that there are or may be defendants who have not been actually served with process within the state and who have not appeared in the suit, it may of its own motion, or on the representation of any party, appoint an agent, guardian ad litem or next friend of any such defendant, and if any such defendants have or may have conflicting interests, it may appoint different agents, guardians ad litem or next friends to represent them. The cost of appearance of any such agent, guardian ad litem or next friend, including the compensation of his counsel, shall be determined by the court and paid by the plaintiff, against whom execution may issue therefor in the name of the agent, guardian ad litem or next friend. (R. S. c. 158, § 53.)

Sec. 54. Proceedings in court. — After all the defendants have been served with process or notified as provided in the preceding section, and after the appointment of an agent, guardian ad litem or next friend, if such appointment has been made, the court may proceed as though all the defendants had been

actually served with process. Such suit shall be a proceeding in rem against the land, and a decree establishing or declaring the validity, nature or extent of the plaintiff's title may be entered, and shall operate directly on the land and shall have the force of a release made by or on behalf of all defendants of all claims inconsistent with the title established or declared thereby. The provisions of this and the 2 preceding sections shall not prevent the court from also exercising jurisdiction in personam against the defendants who have been actually served with process and who are personally amenable to its decrees. (R. S. c. 158, § 54.)

Cross reference.—See c. 107, § 4, re equity powers.

Stated in part in Milliken v. Saco & Biddeford Savings Institution, 142 Me. 387, 53 A. (2d) 335.

Sec. 55. Bill by owners of wild land.—Any person or persons claiming an estate of freehold in wild land or in an interest in common and undivided therein, if the plaintiff and those under whom he claims has for 4 years next prior to the filing of the bill held such open, exclusive, peaceable, continuous and adverse possession thereof as comports with the ordinary management of wild lands in this state, may maintain a suit in equity to quiet or establish the title thereto or to remove a cloud from the title thereto, as provided in the 3 preceding sections. (R. S. c. 158, § 55.)

See c. 107, § 29, re judgment divesting any person of title to real estate not effectual unless recorded; c. 124, § 7, re tenant in real action may be enjoined from committing waste; c. 124, § 8, re liability for treble damages for strip or waste.