CHAPTER XXXII.

Of the Punishment of Fraudulent Debtors.

§ 589. Not to be imprisoned in suits on contract, except, etc. —"No person shall be arrested or imprisoned on any civil process issuing out of any court of law, or on any execution issuing out of a court of equity, in any suit or proceeding instituted for the recovery of any money due upon any judgment or decree founded upon contract, or due upon any contract expressed or implied, or for the recovery of any damages for the non-performance of any contract."[1]

"The preceding section shall not extend to proceedings as for contempts to enforce civil remedies; nor to actions for fines, penalties, or forfeitures, or on promises to marry, or for mon-

1—C. L., § 9553. The constitutionality of this act was attacked in Dummer v. Nungesser, 107 Mich., 481; 65 N. W., 564, upon the following grounds: 1—As in conflict with art. 6, sec. 33, of the constitution prohibiting imprisonment for debt founded upon contract; 2—As in conflict with art. 6, sec. 31, prohibiting the imposition of cruel and unusual punishment; 3—As in conflict with art. 6, sec. 28, guaranteeing certain rights to one charged with crime, and 4—as in conflict with art. 6, sec. 1, vesting judicial power in certain courts not including circuit court commissioners. The act was upheld as against the first attack because the constitutional provision expressly excepted cases of fraud; as against the second because the debtor has it in his own power to secure his release by complying with the terms of the statute; as against the third because the proceeding is not criminal, and as against the fourth, upon the authority of Streetor v. Paton, 7 Mich., 341, because they were not "courts" within the meaning of that term as used in the constitution. See, Fuller v. Bowker, 11 Mich., 204. A party against whom a judgment for costs in an action or contract was rendered is protected from imprisonment by this section: Phelps v. Barton, 13 Wend., 68. A person cannot be held for false imprisonment for suing out a proceeding under this act, unless the proceeding was actually void, notwithstanding he may have acted from bad and indefensible motives, and the process may have been irregular and improvidently issued: Johnson v. Maxon, 23 Mich., 129.

eys collected by any public officer, or for any misconduct or neglect in office, or in any professional employment.''[2]

Nor does it extend to suits founded in *tort*, although a contract may be set forth as the inducement to the plaintiff's right of action.[3] Nor to a case of bailment, where the bailee has rendered himself liable to be, and is sued in trover instead of assumpsit on the contract of bailment.[4] Where the plaintiff recovered, on a declaration containing counts in trover and assumpsit, upon all the counts, the defendant cannot be imprisoned on the judgment.[5] But in such case the plaintiff may be imprisoned for the costs.[6]

An attorney prosecuted in assumpsit for not paying over money collected for his client, is within the exception of § 9554. His omission to pay over the money collected to his client is professional misconduct and neglect.[7]

Suits against physicians, surgeons, &c., for misconduct or neglect in any professional employment, are also excepted. Actions for wrongs, to persons individually, or to their relative rights, to their personal or real property, actions of trover, trespass or replevin, are not within the first section, for these do not arise upon any contract.[8]

§ 590. When a warrant may be applied for.—''In all cases, where by the preceding provisions of this chapter a defendant cannot be arrested or imprisoned, it shall be lawful for the plaintiff who shall have commenced a suit against such defend-

2—C. L., § 9554. Since the enactment of this statute, this exemption from imprisonment has been extended by the constitution, so that there is now no power to arrest in some of the cases mentioned in this section. The statute has not been altered to conform to the constitution: Badger v. Reade, 39 Mich., 771. As to whether the proceedings under the fraudulent debtors' act are of a civil or criminal character was left in doubt in Bromley v. People, 7 Mich., 472. But in Johnson v. Maxon, 23 Mich., 129, it was held that the proceedings under this act are not criminal in such a sense as to render the act unconstitutional because of its authorizing the proceedings to be had before a judicial officer without a jury, and in Wayne County v. Randall, 43 Mich., 137; 5 N. W., 75, the proceedings under this act were specifically held not to be criminal. See, also, Bronson v. Newberry, 2 Doug., 38.

3—McDuffie v. Beddoe, 7 Hill, 578.

4—Suydam v. Smith, 7 Hill, 182.

5—Brown v. Treat., 1 Hill, 225; Suydam v. Smith, 7 *Ibid.*, 182.

6—Miller v. Scherder, 2 Comst., 262.

7—Stage v. Stevens, 1 Denio, 267. But the failure of an agent to pay over moneys which he has been employed to collect, is not misconduct or neglect in a professional employment within the meaning of § 9554, unless the agent is an attorney at law: Bronson v. Newberry, 2 Doug., 38.

8—Prac. Directions, &c., under Non. Imp. Act., p. 4.

ant, or shall have obtained a judgment or decree against him in any court of record, or justice's court, to apply to any judge of the court in which such suit is brought, or to any circuit judge or circuit court commissioner, or to any justice of the peace before whom such suit is pending or judgment obtained, or before whom such proceedings shall have been transferred, for a warrant to arrest the defendant in such suit."[9]

§ 591. The affidavit for the warrant.—"No such warrant shall issue unless satisfactory evidence shall be adduced to such officer, by the affidavit of the plaintiff, or of some other person or persons, that there is a debt or demand due to the plaintiff from the defendant, and specifying the nature and amount thereof as near as may be, for which the defendant, according to the provisions of this chapter, cannot be arrested or imprisoned, and establishing one or more of the following particulars:

1. That the defendant is about to remove any of his property out of the jurisdiction of the court in which the suit is brought, with intent to defraud his creditor or creditors; or,

2. That the defendant has property or rights in action, which he fraudulently conceals, or that he has rights in action, or some interest in any public or corporate stock, money, or evidence of debt which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the complainant; or,

3. That he has assigned, removed or disposed of, or is about to dispose of any of his property, with the intent to defraud his creditor or creditors; or,

4. That the defendant fraudulently contracted the debt, or incurred the obligation, respecting which such suit is brought."[10]

9—C. L., § 9555. The "preceding provisions" referred to are C. L., §§ 9553, 9554. As to when a suit shall be deemed to be commenced, see, *ante*, § 20; Johnson v. Comstock, 6 Hill, 11. It is no objection to proceeding under this statute that the time for issuing execution upon the judgment has not yet arrived: People v. The Recorder, &c., 6 Hill, 429. Nor that an execution has been issued and a levy made upon the property of the judgment debtor: Johnson v. Maxon, 23 Mich., 129. These proceedings must be taken before the justice before whom the civil action is pending: Stensrud v. Delamater, 56 Mich., 145; 22 N. W., 272. As to competency of the justice to act in proceedings under this section, see, Clark v. Wickesell, 81 Mich., 45; 45 N. W., 377.

10—C. L., § 9556. It is not necessary

The demand must be a judgment founded upon contract, or a demand due upon a contract express or implied, or for the recovery of damages for the nonperformance of a contract.[11]

Affidavits of other persons beside the applicant may be taken to substantiate the facts relied upon to prove the alleged fraud.[12]

The affidavit will vary according to the class of frauds which are alleged against the defendant. As many, whether one or more, as can be substantiated, should be stated. The affidavit as to these must not be in the disjunctive; that is, it must not charge that the debtor has "rights in action, *or,* some interest in some public *or* corporate stocks, money, *or* evidences of debt." It should state that there are effects in all the forms mentioned in the statute, or in some one or more of them, specifying which. This may not in *all* cases be necessary, where the creditor gives the reason why he cannot comply with such requirement. When he shows that there was tangible property which had been converted into something else which he cannot trace, he may then add his belief that the avails exist in some of the forms mentioned in the statute, without specifying the particular one. If he *knows* that the debtor has property in such a form that it cannot be reached by execution, he must of necessity be able to specify the particular form in

that the creditor sought to be defrauded should be a judgment creditor: People v. Underwood, 16 Wend., 546; Johnson v. Maxon, 23 Mich., 129. Nor in demanding choses in action of the debtor under the second subdivision of this § 9556 is it necessary to specify to him particularly what choses in action he is required to appropriate to pay the judgment: Stewart v. Bidlecum, 2 Comst., 103. Something more than immoral conduct must be shown, and more than mere constructive fraud: Watson v. Hinchman, 42 Mich., 29; 3 N. W., 236. It is no legal objection to the affidavit that it is made by the plaintiff's attorney; nor that the affiant does not specifically state that it is made on his personal knowledge if it does not appear that the facts are such that he could not have personal knowledge of them: Dummer v. Nungesser, 107 Mich., 481; 65 N. W., 564. The jurisdiction to issue the warrant is made by the statute to depend on the proof being satisfactory to the officer to whom the application for the warrant is made. And the warrant will not be void, provided there is evidence, however slight, in the affidavit for the warrant, tending to show each of the statutory requisites or grounds for issuing the same: Johnson v. Maxson, 23 Mich., 129.

As to what the affidavit must show: Marble v. Curran, 63 Mich., 283; 29 N. W., 725; Proctor v. Prout, 17 Mich., 475; Badger v. Reade, 39 Mich., 771; Sheridan v. Briggs, 53 Mich., 569; 19 N. W., 189; Paulus v. Grobben, 104 Mich., 42; 62 N. W., 160.

11—C. L., § 9553.

12—C. L., § 9556. See, Marble v. Curran, 63 Mich., 285; 29 N. W., 725.

which the property exists; and he should specify instead of swearing in the alternative. If he does not know, and only arrives at his conclusions by a process of reasoning, he should give the facts on which his inference is based.[13]

§ 592. Warrant to issue, when.—"Upon such proof being made to the satisfaction of the officer to whom the application shall be made, he shall issue a warrant under his hand, in be-

13—People v. Van Valkenburgh, 6 Hill, 429; Vredenburgh v. Hendricks, 17 Barb., 179; Broadhead v. McConnell, 3 Barb., 175. The officer should, as a matter of propriety and prudence, require clear and cogent evidence before issuing the warrant: Johnson v. Maxon, 23 Mich., 137. The affidavit must make out a *prima facie* case: Matter of Teachout, 15 Mich., 346. But the warrant will not be void for want of jurisdiction, if the affidavit has a legal tendency to make out a proper case in all its parts, though the proof is slight and inconclusive: *Ibid.* See same principle: People v. Lynch, 29 Mich., 280; Horn v. Wayne Circuit Judge, 39 Mich., 20; Supe v. Francis, 49 Mich., 266; 13 N. W., 584.

The affidavit must set forth such facts and circumstances within the knowledge of the affiant as will authorize the justice who is to issue the warrant to *find* such a state of facts as is required by the statute to authorize the proceeding; and if the complainant is not personally acquainted with and cognizant of the facts and circumstances relied on, he must procure the affidavit of some one who is. And the affidavit must show on its face with reasonable certainty, that the affiant has personal knowledge of the facts set forth. The warrant cannot issue upon hearsay, nor upon statements however positive, founded merely on hearsay: Proctor v. Prout, 17 Mich., 473; Brown v. Kelley, 20 Mich., 23; Marble v. Curran, 63 Mich., 283; 29 N. W., 725. But see, Dummer v. Nungesser, 107 Mich., 481; 65 N. W., 564, holding that it is sufficient if the allegations are positive in character though there be no specific allegation that affiant is making the statement upon personal knowledge: See, also, Paulus v. Grobben, 104 Mich., 42; 62 N. W., 160. This section does not require the affiant to attach documentary evidence of facts within his own knowledge: Paulus v. Grobben, *supra*.

The affidavit must set up facts on knowledge, and not on belief, and if complainant does not know the facts, other affidavits must be produced from those who do know them. And the facts must be specified and not general, so that a defendant may know precisely what he is called on to controvert: and they must be stated as a witness would be allowed to state them on the stand, not inferentially, but directly and positively: Badger v. Reade, 39 Mich., 771.

The affidavit will be insufficient if it sets forth merely by way of recital that the respondent is indebted to the parties commencing the proceeding; Matter of Lee, 49 Mich., 629; 14 N. W., 683.

It is not necessary that creditors proceeding under the first, third or fourth clauses of C. L., § 9556, have carried their suits to judgment before applying for a warrant: Johnson v. Maxon, 23 Mich., 138-9. But if the claim is in judgment it is necessary to set forth such a judgment as will authorize the proceeding, and to confer jurisdiction it must be brought distinctly within the statute. The judgment must be accurately identified, and while the affidavit may stand in lieu of an exemplified copy, it should give the same information as to its identity. The form of the action, the claim upon which the judgment was rendered and its date, must be set forth: Badger v. Reade, 39 Mich., 771. For further cases bearing upon the requisites of the affidavit, see notes to C. L., §§ 722-724, 9996, 9999. No one can be held under this statute for a constructive fraud: Watson v. Hinchman, 42 Mich., 29; 3 N. W., 236. Nor where he is

half of the people of this state, directed to the sheriff or any constable of the county within which such officer shall reside, therein briefly setting forth the nature of the complaint, and commanding the officer to whom it shall be directed, to arrest the person named in such warrant, and bring him before such officer without delay; which warrant shall be accompanied by a copy of all affidavits presented to such officer, upon which the warrant issued; which shall be certified by such officer, and shall be delivered to the defendant at the time of serving the warrant by the officer serving the same."[1]

The justice must deliver to the officer with the warrant, certified copies of all affidavits presented to him upon which the warrant issued, to be delivered by the officer to the defendant at the time of serving the warrant.

§ 593. **Arrest of the defendant.**—"The officer to whom such warrant shall be delivered, shall execute the same by arresting the person named therein, and bringing him before the officer issuing such warrant; or in case of the absence or inability of such officer, before some other officer, having jurisdiction in the case, and shall keep him in custody until he shall be duly discharged, or committed as hereinafter provided."[2]

§ 594. **Proceedings after arrest.**—Upon being brought before the officer, unless the defendant controvert the facts and circumstances on which the warrant issued, or comply with some of the requirements of the tenth section, the officer must commit him. In such case, the case is made out on the part of the plaintiff by the evidence on which the warrant is issued. The allegations of the defendant controverting or denying the facts on which the warrant issued, must be verified by his own oath or by proof introduced on his part; he may verify his allegations by his own affidavit, or he may introduce his proof

guilty of no personal delinquency himself, and the act complained of is that of another, as a partner, etc.: *Ibid.*

1—C. L., § 9557. Johnson v. Maxon, 23 Mich., 136. A warrant issued after suit commenced by attachment, is not made void by the fact that there is a preceding levy under the attachment; but as to whether the proceedings under the warrant should continue in such case; see, Johnson v. Maxon, 23 Mich., 141-2; Willison v. Desenberg, 41 Mich., 156; 2 N. W., 201.

2—C. L., § 9558. The officer cannot make the arrest out of the county in which the justice resides: Moak v. DeForest, 5 Hill, 605.

without being sworn himself; but unless he make the affidavit, or introduce the proof, he must be committed. A mere denial, without affidavit or proof, amounts to nothing. The complainant is not required to produce proof to substantiate his charges until after they have been controverted by the defendant's affidavit or proof.[3]

In case the defendant verifies his allegations by his own affidavit, the complainant proceeds to prove his allegations. For this purpose he may examine the defendant on oath, touching any fact or circumstances material to the inquiry. The answer of the defendant on such examination must be reduced to writing, and subscribed by him.[4] It would be advisable to reduce to writing the whole of the testimony taken on the hearing.

During the proceedings on the complaint, an adjournment of the hearing of the allegations and proofs of the parties may be made for reasonable cause. What shall be deemed such cause, rests, of course, much in the discretion of the officer. Probably the rules that prevail in courts of record respecting the postponement of trials would afford a satisfactory guide. Such adjournment is not limited as to time. In case of an adjournment the justice may take recognizance, with *surety*, from the defendant for his appearance, etc.[5]

"The officer conducting such inquiry shall have the same authority to issue subpoenas for witnesses and to enforce obedience to such subpoenas, and to punish witnesses refusing to testify, as are conferred by law upon such officers in case [cases] of other proceedings before them, and the defendant shall be entitled to a jury of six jurors, if he demand one, to try the issue joined in the matters charged or alleged against

3—*Ex parte*, Spencer v. Hilton, 10 Wend., 608; see, C. L., § 9559. The tenth section referred to is C. L., § 9562. When the respondent is brought in he may controvert the allegations and verify his denial by affidavit, in which case only a further examination is had on the facts. The whole issue is upon the allegations of the complaint and the result depends upon those and their truth, which is held admitted if not denied: Badger v. Reade, 39 Mich., 773.

4—C. L., § 9559. When complainant examines the defendant, his answers must be signed; but when examined on his own behalf, it is not required: Willison v. Desenberg, 41 Mich., 158-9; 2 N. W., 201.

5—Prac. Directions, p. 23, see, C. L., § 9559. If defendant refuses to give the recognizance, he may be committed to jail during the adjournment: *Ibid.*

him in the affidavit or affidavits exhibited to or before the said officer conducting such inquiry, which jury shall be selected and summoned in the same manner, as near as may be, as in the trial of criminal cases before justices of the peace, and the said officer shall have the same power in relation to the selection, summoning and swearing such jury and conducting such jury trial, as near as may be, as is given to justices of the peace in the trial of criminal causes before them."[6]

§ 595. The judgment.—If, after a hearing of the evidence on either side, the justice is satisfied that the allegations of the complainant are substantiated, etc., he is to commit the defendant,[7] unless prevented by the defendant in some of the modes prescribed by the next section.

Upon complying with either of the conditions of the 10th section,[8] the defendant is to be discharged.[9]

As the form and nature of the security mentioned in the second subdivision are not prescribed, it is presumed that any pledge of personal property, or mortgage of real estate, or the undertaking of any responsible person, might, according to the circumstances, be deemed satisfactory. But the most safe and prudent course, would be to take a bond or note for the payment of the amount, which can be very readily ascertained. It will include the plaintiff's debt, the costs of the suit, and the fees of the justice and sheriff or constable on the complaint.[10]

This bond must be in a penalty not *less* than *twice* the amount of the debt or demand claimed, with such surety or sureties as shall be approved by the justice.

Any defendant committed is to remain in prison until he shall have complied with some of the requirements of the eleventh section.[11]

6—C. L., § 9560.

7—C. L., § 9561. The whole issue is upon the allegations in the complaint, the truth of which is held admitted if not denied: Badger v. Reade, 39 Mich., 773.

It is competent for the officer, and good practice to put his determination in writing, and explain upon the record the way he passed upon the facts: Watson v. Hinchman, 42 Mich., 28; 3 N. W., 236. Before the amendment of 1881, see, C. L., § 9561, allowing a jury and appeal, the magistrate's finding as to facts, was conclusive, provided there was any evidence tending to sustain the allegation: Willison v. Desenberg, 41 Mich., 159; 2 N. W., 201.

8—C. L., § 9562. Marble v. Curran, 63 Mich., 287; 29 N. W., 725.

9—Townsend v. Morrell, 10 Wend., 577.

10—Prac. Directions, &c., p. 22.

11—C. L., § 9563, which is as follows: "Any defendant committed as

§ 596. **Proceedings upon application for discharge.**—Upon application by affidavit to the justice for his discharge, it will be prudent to require notice to be given to the complainant, as he may have objections to urge against the application. The mode of effecting the discharge would be by a supersedeas.[12]

The phrase "legal costs and expenses," in the fourteenth section, means only legal taxable costs in criminal cases.[13]

The removal, concealment, or disposal of property exempt from execution cannot be the ground for a complaint or proceeding under the statute.[14]

The sixteenth section gives the measure of damages in an action on a bond given under the tenth section, and the nineteenth compels all persons to testify in relation to any fraud prohibited by that chapter.

above provided, shall remain in custody in the same manner as other prisoners on criminal process until a final judgment shall have been rendered in his favor in the suit prosecuted by the creditor, at whose instance such defendant shall have been committed, or until he shall have assigned his property and obtained his discharge, agreeably to the provisions of either of the one hundred and forty-second or of the one hundred and forty-third chapter of the revised statutes (C. L., 1897, chapters 262 and 263); but such defendant may be discharged by the officer committing him, or any other person authorized to discharge the duties of such officer, on defendant paying the debt or demand claimed, or giving security for the payment thereof, as provided in the tenth section of this chapter, or on his executing the bond mentioned in the third subdivision of said section; but any defendant committed, or ordered to be committed, may at any time within twenty-four hours after the making of such order, appeal therefrom to the circuit court of the county, provided said defendant shall enter into a recognizance to the people of the state of Michigan in a sum not less than five hundred dollars, with one or more sufficient sureties, to be approved by said officer, conditioned to appear before said court on the first day of the next term thereof and prosecute his appeal to effect; and abide the order and judgment of said court, and the officer from whose order or judgment an appeal is taken shall thereupon discharge the said defendant from custody or order his discharge, and shall make a special return of the proceedings had before him, and shall cause the affidavit or affidavits and warrant and the return, together with the recognizance, to be filed in the said circuit court on or before the first day of the next term thereof, to be holden for said county, and as perfecting said appeal by giving such recognizance. The said circuit court shall thereupon have full jurisdiction of said case, the same as was held by the officer below before whom such proceedings were commenced, and may conduct the same to a final hearing and determination in like manner with the same right to the defendant to demand to have a trial by jury." See, Clark v. Mikesell, 81 Mich., 50; 45 N. W., 377.

12—Prac. Directions, p. 25.

13—C. L., § 9569. The provisions of this statute apply only to property that may be removed or concealed, and not to real estate: Atty. Gen. v. Police Justice, etc., 41 Mich., 224; 2 N. W., 25; see, Potter v. Richards, 10 Wend., 607.

14—C. L., § 9567. See, County of Wayne v. Randall, 43 Mich., 137; 5 N. W., 75.