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Chapter 107.

Concurrent Jurisdiction of Supreme and Superior Courts.

Section 1. Habeas Corpus and Extraordinary Remedies.
Sections 2-37. Equity.
Sections 38-50. Uniform Declaratory Judgments Act.
Sections 51-57. Miscellaneous Provisions. Legal Holidays.

Habeas Corpus and Extraordinary Remedies.

Sec. 1. Habeas corpus and extraordinary proceedings. — The supreme judicial court and the superior court shall have and exercise concurrent original jurisdiction in proceedings in habeas corpus, writs of prohibition, error, mandamus, quo warranto and certiorari. (R. S. c. 95, § 1.)

No statute confers upon the law court original jurisdiction over proceedings in habeas corpus. Original jurisdiction over such proceedings is in the supreme judicial court at nisi prius. Gerrish v. Lovell, 146 Me. 92, 77 A. (2d) 593. See note to c. 126, § 6.

Equity.

History of §§ 2-37. — See Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Sec. 2. Equity.—The supreme judicial court and the superior court shall have and exercise concurrent original jurisdiction in all equity cases and proceedings; and causes in equity originating in either court or any proceeding therein may be heard and determined by a justice of the supreme judicial court or of the superior court as though the cause originated in the court of which such justice is a member. There shall be only 1 equity docket in each county, and all equity cases commenced in a county shall be entered consecutively on the equity docket in that county. (R. S. c. 95, § 2.)

Cited in Liberty v. Pooler, 134 Me. 115, 182 A. 216; Eastern Maine General Hospital v. Harrison, 135 Me. 190, 193 A. 246.

Sec. 3. Rules of practice. — The supreme judicial court shall make all proper rules for the regulation of equity practice necessary to simplify proceedings, discourage delays and lessen the expense of litigation, and it has full power for that purpose; but no rule of court now existing is repealed, except so far as it is inconsistent herewith. (R. S. c. 95, § 3.)

Sec. 4. Equity powers. — The supreme judicial court and the superior court have jurisdiction as a court of equity in the following cases:

I. For the foreclosure of mortgages of real and personal property and for redemption of estates mortgaged.

Cross reference.—See c. 177, § 30, re claimant of mortgagor's interest.

The power conferred over mortgages by this subsection is only in cases of foreclosure and redemption. Gardiner v. Gerrish, 23 Me. 46.

In regard to mortgages, the equity jurisdiction of the court is confined to suits for the redemption or foreclosure thereof. Shaw v. Gray, 23 Me. 174.

And the court is not vested with the power to decree a foreclosure in any case. The acts which are to foreclose a mortgage are, in every case, to be those of the mortgagee, or of those standing in the place of the mortgagee. It is not presumable that the legislature intended to superadd a power in the court to adjudge or decree a foreclosure upon grounds other than what they have specifically enacted to be such. Shaw v. Gray, 23 Me. 174.

Nor does equity jurisdiction attack

where statutory methods of foreclosure are sufficient.—Although the foreclosure of mortgages is a subject of general equity jurisdiction, the trend of legislation plainly shows that it was not intended to confer equity jurisdiction upon the subject, except in particular cases, where the statute methods were insufficient to give a complete remedy. Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935.

The redemption of mortgaged estates is within the jurisdiction of courts of equity. The court, as a court of equity of limited power, has jurisdiction in such cases, specially conferred by this subsection. Farwell v. Sturdivant, 37 Me. 308.

But suits for redemption must comply with prescribed proceeding. — As to suits for redemption, the power delegated must have reference to the mode of proceeding particularly prescribed for the purpose. Shaw v. Gray, 23 Me. 174; Brown v. Snell, 46 Me. 490.

The modes of redemption established by statute embrace all the authority conferred upon the court by this subsection. Brown v. Snell, 46 Me. 490.

And subsection does not repeal statutory periods of redemption.—This subsection, specially giving equity jurisdiction over the foreclosure of mortgages, may not mean more than to declare the law and make it plain in such matters. That is, give an equitable remedy where the nature of the case requires special aid from the equity side of the court, to make the remedy complete and save the parties, perhaps, from irreparable loss. Manifestly the statute periods of redemption are not repealed or otherwise modified. Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935.

Actual possession not prerequisite for redemption.—The actual possession of the lands by plaintiff, at the time of bringing his bill to redeem, is not required by law as a prerequisite thereto. The rights of the parties to a suit under this subsection are the same as mortgagor and mortgagee; and it has always been held that the former, although not in possession of the land, might maintain his bill to redeem against the latter. Morrill v. Everett, 83 Me. 290, 22 A. 172.

But prior tender of performance is necessary.—A bill for redemption from real estate mortgages will not be sustained unless a prior tender of performance has been made, or facts are stated showing that such tender could not be made, as that the mortgagee refused to render an account of the amount due, etc. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

Subsection confers no power over equitable mortgages.—This subsection applies to those conveyances only which are legal mortgages. No power is conferred by the subsection over merely equitable mortgages. Richardson v. Woodbury, 43 Me. 206. See note to sub-§ XIV.

The equity jurisdiction of the court in regard to suits for the redemption of estates mortgaged under this subsection is construed to apply to those conveyances only which are legal, as distinguished from equitable mortgages. Reed v. Reed, 75 Me. 264.

Nor does it give jurisdiction over redemption of chattel mortgages.—There is no statute specifically conferring upon the court jurisdiction in equity for redemption from chattel mortgages, as there is for redemption from real estate mortgages. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

Unless statutory methods will not protect mortgagor's rights. — The court will not entertain a bill of equity to redeem from a chattel mortgage unless facts are stated making it apparent that the mode specifically provided by the statute will not fully protect the mortgagor's rights. Gallagher v. Aroostook Federation of Farmers, 135 Me. 386, 197 A. 554.

Applied in Phillips v. Sinclair, 20 Me. 269; Chase v. Palmer, 25 Me. 341; Kennebeck & Portland R. R. v. Portland & Kennebeck R. R., 59 Me. 9.

Cited in Whitmore v. Woodward, 28 Me. 392.

II. For relief from forfeiture of penalties to the state, from forfeitures in civil contracts and obligations and in recognizances in criminal cases.

A bond given by the principal to procure his release from arrest on mesne process is a "civil obligation," within the meaning of this subsection and equity has jurisdiction to relieve from the forfeiture of such bond. Downes v. Reily, 53 Me. 62.

Subsection applies to oral contracts.—The relief from forfeitures in oral contracts and obligations is a familiar exercise of equity jurisdiction, and a power expressly conferred upon the court by this subsection. Telegraphone Corp. v. Canadian Telegraphone Co., 103 Me. 444, 69 A. 767.

Cited in Lewis v. Warren, 49 Me. 322; Philbrook v. Burgess, 52 Me. 271.

III. To compel the specific performance of written contracts and to cancel and

compel the discharge of written contracts, whether under seal or otherwise, when full performance or payment has been made to the contracting party.

Cross references. — See c. 119, § 14, et seq., re specific performance of contract to convey real estate after death of contractor; c. 177, § 24, re owner of subsequent mortgage may request assignment of prior mortgage under foreclosure.

Court can compel specific performance in absence of adequate remedy at law. — The court has equity jurisdiction in all suits to compel specific performance of contracts in writing, when the parties have not a plain and adequate remedy at law. Haskell v. Allen, 23 Me. 448; Fisher v. Shaw, 42 Me. 32.

But subsection confers no jurisdiction when such remedy exists. — The court does not take jurisdiction in equity under this subsection when the plaintiff had a plain, adequate and complete remedy in an action at law. Porter v. Frenchman's Bay & Mt. Desert Land & Water Co., 84 Me. 195, 24 A. 814.

It should appear, also, that the plaintiff had not a plain and adequate remedy at law. If he has a judgment in his favor, upon the contract in a court of law, he must be regarded as having a plain and adequate remedy upon it. And if the contract be in reference to the personalty, and not to the realty, it is with a few exceptions of a peculiar character, considered that a party has his appropriate remedy at law; and will not be entitled to the aid of a court of equity to enforce the performance of it. Bubier v. Bubier, 24 Me. 42.

If the plaintiff has a right to maintain an action at law for a breach of the contract, to show jurisdiction in equity under this subsection, there should be some allegations in the bill showing that the remedy at law would not be adequate and complete. Porter v. Frenchman's Bay & Mt. Desert Land & Water Co., 84 Me. 195, 24 A. 814.

Contract must be in writing.—No verbal contract even when accompanied by part performance, will enable the court, when sitting as a court of equity, to compel a specific performance under this subsection. Patterson v. Yeaton, 47 Me. 308. See note to sub-§ XIV, re specific performance of oral contract.

The court has no power, under this subsection, to decree the specific performance of a contract to convey real estate which is not in writing. Stearns v. Hubbard, 8 Me. 320.

And in force as such.—In cases presented to the court under this subsection, it must see that the contract is in writing, and in force as such. Bubier v. Bubier, 24 Me. 42.

And if the contract is merged in a judgment it would no longer be a contract in writing, within the purview of this subsection. Bubier v. Bubier, 24 Me. 42.

A chattel mortgage is not a "written contract" which may be ordered cancelled under this subsection. Loggie v. Chandler, 95 Me. 220, 49 A. 1059.

Court can compel specific performance of contract to convey land. — In a proper case the court has jurisdiction to decree specific performance of a contract in writing for the conveyance of land, in a bill brought by the vendor or by the vendee. Porter v. Frenchman's Bay & Mt. Desert Land & Water Co., 84 Me. 195, 24 A. 814.

Where a contract respecting real property is, in its nature and circumstances, unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages; and, generally, a court of equity will decree a specific performance, when the contract is in writing, is certain, and fair in all its parts, and is for an adequate consideration, and is capable of being performed. Hull v. Sturdivant, 46 Me. 34.

And action at law is not adequate remedy for breach of such contract.— Among the equity powers expressly conferred upon the court is the power to compel the specific performance of written contracts. True, this is a discretionary power and, generally, it will not be exercised when the party seeking to have it exercised has a full and adequate remedy by an action at law. But an action at law has never been regarded as an adequate remedy for the breach of an agreement to convey real estate; and when such an agreement is founded on an adequate consideration, and is obtained without fraud or oppression, the duty of the court to compel its specific performance is universally acknowledged. Nugent v. Smith, 85 Me. 433, 27 A. 342; Eastman v. Eastman, 117 Me. 276, 104 A. 1.

Equity jurisdiction does not attach to contract giving option of performing or paying liquidated damages. — In a written contract by which a party agrees to do a certain act for the benefit of another, or to pay a certain sum as liquidated damages for the omission, as the party who is to do one or the other may elect, this is not a case to which the jurisdiction of the court, as a court of equity, will attach. It is not an absolute engagement to do the act, in-

stead of paying the equivalent agreed upon. The essential element in equity jurisdiction is wanting; for by the contract itself there is an adequate remedy at law. And the failure to perform, in either alternative, cannot of itself confer equity power. Fisher v. Shaw, 42 Me. 32.

But party cannot avoid performance of condition of bond by offer to pay penalty. —If the contract appears only in the condition of a bond, secured by a penalty, the court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty. Fisher v. Shaw, 42 Me. 32; Hull v. Sturdivant, 46 Me. 34.

Applied in Jordan v. Fay, 40 Me. 130; Portland Saco & Portsmouth R. R. v. Grand Trunk Ry., 63 Me. 90; May v. Boyd, 97 Me. 398, 54 A. 938; Handy v. Rice, 98 Me. 504, 57 A. 847.

Stated in Frost v. Butler, 7 Me. 225.

IV. For relief in cases of fraud, trust, accident or mistake.

I. General Consideration.
II. Fraud.
III. Trust.
IV. Mistake.

I. GENERAL CONSIDERATION.

Applied in Gould v. Williamson, 21 Me. 273; Devinal v. Smith, 25 Me. 379; Tucker v. Madden, 44 Me. 206; Garnsey v. Gardner, 49 Me. 167; Adams v. Stevens, 49 Me. 362; Doubouy v. Woolf, 127 Me. 269, 143 A. 58.

Stated in Frost v. Butler, 7 Me. 225; Eastern Maine General Hospital v. Harrison, 135 Me. 190, 193 A. 246.

Cited in Foss v. Haynes, 31 Me. 81; Sawyer v. Skowhegan, 57 Me. 500.

II. FRAUD.

The court has by force of this subsection full equity jurisdiction in cases of fraud, limited only by the usage and practice of chancery courts. Taylor v. Taylor, 74 Me. 582.

To give relief in cases of fraud is one of the elementary grounds of the jurisdiction of a court of equity. Woodman v. Freeman, 25 Me. 531.

Courts of equity acquired jurisdiction over almost all matters of fraud at an early date. Burns v. Hobbs, 29 Me. 273.

Cases of fraud are, least of all, those in which the complete exercise of the jurisdiction of a court of equity, in granting relief, ought to be questioned or controlled, since in addition to all other reasons, fraud constitutes the most ancient foundation of its power; and it sifts the conscience of the party, not only by his own answer, under oath, but, by subjecting it to the severe scrutiny of comparison of other competent testimony. Hartshorn v. Eames, 31 Me. 93.

Irrespective of adequate legal remedy.— Special jurisdiction has been conferred upon the court of equity in cases of fraud, irrespective of the question of adequate legal remedy. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

In fraud cases equity has jurisdiction irrespective of whether the injured parties have a remedy at law or whether such a remedy will be effective or whether the loss for want of such an equitable remedy is irreparable. Masters v. Van Wart, 125 Me. 402, 134 A. 539.

And even if there is a plain, adequate and complete legal remedy, equity gives relief in cases of fraud. In such cases, legal and equitable remedies are concurrent, subject to certain exceptions. Masters v. Van Wart, 125 Me. 402, 134 A. 539.

Unless compensation in damages is only relief that can be given. — When compensation in damages is the only relief that can be given in case of an alleged fraud, the court has no jurisdiction in equity. Piscataqua Fire & Marine Ins. Co. v. Hill, 60 Me. 178.

Court may rescind contract procured by fraud. — A court of equity may rescind a conveyance or contract, which has been procured by fraud, when a proper case for it is presented. Woodman v. Freeman, 25 Me. 531.

III. TRUST.

The court, as a court of equity, may hear and determine all cases of trust. Morton v. Southgate, 28 Me. 41. See Bugbee v. Sargent, 23 Me. 269.

The court can always enforce the execution of a trust, when equity requires it. Lawry v. Spaulding, 73 Me. 31.

Whether arising by implication of law, or created by deed or by will. Tappan v. Deblois, 45 Me. 122.

Including resulting trusts. — Resulting trusts are within the equity jurisdiction of the court, and they may be proved by parol, even in opposition to the terms of a deed. Richardson v. Woodbury, 43 Me. 206.

And rule as to adequate legal remedy not applicable.—The rule that if the plaintiffs have a plain and adequate remedy at law they cannot ask relief in equity does

not apply when the court has been given special statutory jurisdiction covering the case. The court in equity in this state is given special statutory jurisdiction by this subsection to grant relief in cases of trusts, and therefore the rule does not apply to such cases. Brackenbury v. Hodgkin, 116 Me. 399, 102 A. 106.

But it is not every case of constructive trust that is, under all circumstances, cognizable in equity. Such trusts embrace a wide field, the remedy in which may, in most cases, be sought at law, and much more appropriately than in equity. Russ v. Wilson, 22 Me. 207.

IV. MISTAKE.

Mistake is one of the fundamental grounds of equity jurisdiction. Cobb v. Dyer, 69 Me. 494.

Where the mistake is of so fundamental a character that the minds of the parties have never in fact met; or where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff either in falling into the error or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in statu quo, equity will interfere in its discretion to prevent intolerable injustice. Stover v. Poole, 67 Me. 217.

And court may reform deeds. — Where the complainant bargained one parcel of land, and, by a mistake of both parties, conveyed another parcel to the respondent, the equitable jurisdiction of the court will authorize it to reform such deed according to the intention of the parties, and, by decree, to protect the interests of such persons as may legally claim to hold the correct premises through and under the respondent. Burr v. Hutchinson, 61 Me. 514.

And correct cancellation or discharge of mortgages. — The cases are numerous wherein courts of equity have corrected the cancellation and discharge of mortgages on the record, when done by mistake, and protected parties from the consequences thereof, especially when such relief would not result prejudicially to third persons. Cobb v. Dyer, 69 Me. 494.

But mistake must be clearly proved.—To authorize the court to reform a deed, there should appear to have been a plain mistake clearly proved. The precise mistake or error should be clealy ascertained. Farley v. Bryant, 32 Me. 474.

And must ordinarily be one of fact not imputable to plaintiff's negligence.—Ordinarily the mistake from which relief will be given must be one of fact and not of law. And it must not be imputable to the plaintiff's culpable negligence. And it must appear that his conduct was determined by the mistake; but this need not be established by direct evidence when the facts can be fairly implied from the nature of the transaction. Cobb v. Dyer, 69 Me. 494.

A mistake, or ignorance of the law, forms no ground of relief from contracts fairly entered into, with full knowledge of the facts, under circumstances raising no presumption of fraud, imposition, or undue advantage taken. Stover v. Poole, 67 Me. 217.

But equity can act in case of mutual mistake of law.—Where both parties to a contract labor under the same mistake of the law, so that the written instrument does not express the meaning of the parties, a court of equity will upon a proper bill reform it. Stover v. Poole, 67 Me. 217.

V. In cases of nuisance and waste.

Cross references. — See c. 124, § 7, re waste on lands; c. 141, §§ 1, 22, re nuisances.

Equity may enjoin threatened nuisance. —When the alleged nuisance is prospective and threatened, a court of equity may interfere to prevent its being brought into existence. Varney v. Pope, 60 Me. 192.

And equity will take jurisdiction for the threatened violation of a municipal ordinance when such violation contemplates an act which amounts to a nuisance in law, not because the act is a violation of the ordinance but because it is a nuisance. Houlton v. Titcomb, 102 Me. 272, 66 A. 733.

But if condition already exists it must be determined a nuisance at law. — When what is claimed to be a nuisance already exists, the general rule is, that the fact that it is a nuisance must be established by a suit at common law before a court of equity will interfere to abate. Porter v. Witham, 17 Me. 292; Varney v. Pope, 60 Me. 192.

Jurisdiction is expressly given in the case of waste. Leighton v. Leighton, 32 Me. 399.

But such jurisdiction is confined to cases of technical waste. Leighton v. Leighton, 32 Me. 399.

VI. In cases arising out of the law providing for the application of receipts and expenditures of railroads by trustees in possession under mortgage.

Cross reference.—See c. 46, § 53, re purchaser at sale of mortgage of steam railroads.

Quoted in Stratton v. European & North American Ry., 76 Me. 269.

VII. In cases of partnership, and between partners or part owners of vessels and of other real and personal property to adjust all matters of the partnership and between such part owners, compel contribution, make final decrees and enforce their decrees by proper process in cases where all interested persons within the jurisdiction of the court are made parties.

Cross references.—See c. 99, § 5, re ship owners' liability to freighters; c. 154, § 87, re equitable remedies between executors and administrators; c. 181, § 17, et seq, re limited partnerships.

Jurisdiction is conferred by this subsection in cases of partnership. The basis of jurisdiction under this clause is that the case is a case of partnership. It is not given in all cases, where a partnership or partners may be a party, or interested. Such a construction would permit all cases to be carried into equity, when a partnership was a party, or interested in the suit. This jurisdiction was doubtless conferred to provide a remedy in certain cases for persons, or the representatives of their interests, who were or had been partners with other persons, and who on that account had either no remedy, or an imperfect one, by the common law. It is obvious, that such cases would be cases of partnership. Reed v. Johnson, 24 Me. 322.

But it does not extend to case of partnership property taken by person not a partner. — It is not a case of partnership within the equity jurisdiction of the court, where the bill alleges that one, not a partner or representing a partner's interest, has taken goods belonging to the partnership, which goods such person denies to be partnership property. Reed v. Johnson, 24 Me. 322.

The court of equity has jurisdiction of matters of account between owners in common of personal property; and when such a case is presented, wherein is involved a variety of adjustments, limitations, cross claims or other complications, it will afford to parties the superior facilities of equity in effecting distributive justice among them, although as a court of law it also has jurisdiction of the subject matter. But when the account is simple, and all upon one side, and can be fully and readily adjusted by a judgment in an action of assumpsit, and no discovery is sought, the necessity for entertaining equity jurisdiction of the case does not exist, and the court will decline it. Carter v. Bailey, 64 Me. 458.

But this subsection does not apply in a case where the defendant is not a part owner of the vessel. Bird v. Hall, 73 Me. 73.

Although jurisdiction not defeated by part owner's acting as agent and master. —A bill may be maintained under this section although it alleges and the evidence shows that a portion of the funds were received by the defendant as part owner and a portion in the capacity of agent and master of the vessel. Mustard v. Robinson, 52 Me. 54.

Court can direct accounting for rents and profits.—When one tenant has received more than his share of the rents and profits, an accounting may be directed and reimbursement decreed under this subsection. Nash v. Simpson, 78 Me. 142, 3 A. 53.

Former provision of subsection.—For a case under this subsection when it applied only to partners and not to joint owners, see Woodward v. Cowing, 41 Me. 9.

Applied in Knowlton v. Reed, 38 Me. 246; Crooker v. Crooker, 46 Me. 250; Wilson v. European & North American R. R., 62 Me. 112.

VIII. Of bills of interpleader notwithstanding the complainant is a common carrier and as such has a lien for carriage or storage upon the property which is described in the bill. No complainant in interpleader shall be denied relief by reason of any interest in the fund or other subject matter in dispute. Nothing herein contained shall be construed to dispense with any of the other requisites for a bill of interpleader.

IX. To hear and determine property matters between wife and husband or husband and wife as provided in section 40 of chapter 166 and to make all necessary orders and decrees relating to such matters, and to issue all necessary

process to enforce such orders and decrees, and to cause all such orders and decrees to be enforced.

Applied in Whiting v. Whiting, 114 Me. 382, 96 A. 500; Vassar v. Vassar, 142 Me. 150, 48 A. (2d) 620.

X. To determine the construction of wills and whether an executor, not expressly appointed a trustee, becomes such from the provisions of a will; and in cases of doubt, the mode of executing a trust and the expediency of making changes and investments of property held in trust.

I. General Consideration.
II. Construction of Wills.
III. Trusts.

Cross References.

See c. 160, § 10, re trust estates to be sold; c. 163, § 12, re proceeds of estate invested by guardian for wife.

I. GENERAL CONSIDERATION.

Purpose of subsection.—The benign purpose of this subsection is to prevent litigation, to avoid a multiplicity of suits, or to remove clouds that may rest upon titles, that their owners may be enabled to deal with the property more understandingly, and if need be to sell it for its true value. Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

The design of the equitable proceeding under this subsection is to prevent litigation, not to make it a substitute for litigation. If a legal cause of action between the interested parties has already arisen through transactions subsequent to the will, they must litigate their claims through the proper legal channel. Wilder v. Wilder, 115 Me. 408, 99 A. 37.

Suit under this subsection is privileged.—This subsection accords to the court jurisdiction to determine the construction of wills, and, in cases of doubt, the mode of executing a trust. Being a privileged suit, the ear of the court should be open to it, to relieve parties from tedious and expensive family litigations. Richardson v. Richardson, 80 Me. 585, 16 A. 250; Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

Court not authorized to construe deed.—The court is not empowered by this subsection to give a construction of a deed given by the executors and trustees under the will. Wilder v. Wilder, 115 Me. 408, 99 A. 37.

Applied in Howard v. American Peace Society, 49 Me. 288; Kimball v. Crocker, 53 Me. 263; Goodwin v. Hardy, 57 Me. 143; Swasey v. American Bible Society, 57 Me. 523; Everett v. Carr, 59 Me. 325; Baxter v. Baxter, 62 Me. 540; Nutter v. Vickery, 64 Me. 490; Nason v. First Bangor Christian Church, 66 Me. 100; Jones v. Bacon, 68 Me. 34; Slade v. Patten, 68 Me. 380, overruled in Pulitzer v. Livingston, 89 Me. 359, 36 A. 635; Richardson v. Knight, 69 Me. 285; Weld v. Putnam, 70 Me. 209; Morse v. Morrell, 82 Me. 80, 19 A. 97; Bangor v. Beal, 85 Me. 129, 26 A. 1112; Merrill v. Hayden, 86 Me. 133, 29 A. 949; Webber Hospital Ass'n v. McKenzie, 104 Me. 320, 71 A. 1032; Gilman v. Burnett, 116 Me. 382, 102 A. 108; Morrill v. Roberts, 117 Me. 465, 104 A. 818; Porter v. Porter, 138 Me. 1, 20 A. (2d) 465: Hoyt v. Hubbard, 141 Me. 1, 38 A. (2d) 135.

Cited in Mattocks v. Moulton, 84 Me. 545, 24 A. 1004; Cary v. Talbot, 120 Me. 427, 115 A. 166.

II. CONSTRUCTION OF WILLS.

Authority to construe wills not limited to provisions relating to trusts.—The court has never considered its jurisdiction under this subsection limited to the construction of wills only in connection with the provisions which relate to trusts. Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

Court may construe will in advance of actual controversy.—It was the intention of the legislature to secure to the parties in interest the right, in all cases of doubt, to have the opinion of the court as to the legal effect of a will, even in advance of any actual controversy. Baldwin v. Bean, 59 Me. 481; Burgess v. Shepherd, 97 Me. 522, 55 A. 415; Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

The court has jurisdiction to construe a will upon the bill of a devisee, and to determine the character of the estate received by him under a devise, and the extent of his powers thereunder, as between himself and other devisees who claim, or may claim, adversely to him. It is not necessary that the claim should be controversial and litigious. It is sufficient, if doubts exist, out of which litigious claims may arise between devisees. Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

But must give rise to reasonable doubts.—In order to invoke the provisions of this subsection, the language of the will must be such that the parties may reasonably have doubts concerning its true construction. Wilder v. Wilder, 115 Me. 408, 99 A. 37.

The court will not feel itself bound to answer all questions which can possibly be asked by a devisee. It must appear that the language of the will is such that the parties may reasonably have doubts concerning its true construction. Other parties should not be subjected to the trouble and expense of appearing in court, or the possible hazard of not appearing, in cases where there is no doubt. Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

And question to be determined must relate to certain and immediate problem.—Courts are reluctant to construe a will in order to decide any question which does not relate to some certain and immediate problem facing either a beneficiary or a fiduciary of an estate. Moore v. Emery, 137 Me. 259, 18 A. (2d) 781.

As court will not act upon matter which is future, contingent and uncertain.—Courts of equity will never entertain a suit to give a construction to or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain. Moore v. Emery, 137 Me. 259, 18 A. (2d) 781.

The court is not called on to decide in advance every future question which may arise under a will merely because to do so may be helpful to a beneficiary or other interested party in determining a present course of conduct. Moore v. Emery, 137 Me. 259, 18 A. (2d) 781.

Courts have consistently refused during the existence of a particular estate to construe wills in order to determine future rights, and it makes no difference whether the event which may give rise to a future controversy is certain to happen, as the death of a life tenant, or depends on a state of facts which is contingent and uncertain. Moore v. Emery, 137 Me. 259, 18 A. (2d) 781.

Bill cannot be maintained by person not interested.—The statute is silent as to who may bring a bill under this subsection. But it is a bill in equity, and on general principles, such a bill cannot be maintained by one who has no interest in the subject matter of the controversy. Burgess v. Shepherd, 97 Me. 522, 55 A. 415.

The party asking the questions must have interest in having the questions answered. Haseltine v. Shepherd, 99 Me. 495, 59 A. 1025.

A bill for the construction of a will cannot be maintained unless the plaintiff has such interest, personal or official, legal or equitable, in the estate, or under the will, as would be served by a construction of the will. Burgess v. Shepherd, 97 Me. 522, 55 A. 415.

Even if he is executor.—The court, under this subsection has no jurisdiction to construe a will on a bill brought by an executor who has no interest as such in the estate, nor any duties to perform with relation to it, which may be affected by a construction of the will, and whose rights and duties will remain the same whatever may be its proper construction. Burgess v. Shepherd, 97 Me. 522, 55 A. 415.

A bill to construe a will cannot be sustained upon the complaint of any person, executor or otherwise, unless the construction may affect his rights in person or property, or unless it may affect the performance of his duties under the will as executor, trustee or otherwise. Burgess v. Shepherd, 97 Me. 522, 55 A. 415.

All legatees and devisees should be made parties.—Before the court should be called upon to give a construction to a will, the meaning of which is disputed, all the legatees or devisees, whose rights and interests are involved, should be made parties thereto, so that they see to the due protection of their respective rights and interests. Hawes v. Bragdon, 66 Me. 534.

And one contingent remainderman without a vested interest cannot represent a subsequent remainderman or tenant in tail. This rule is based upon reason as well as authority. If the subsequent contingent remaindermen were not made parties and were bound by the judgment, in a suit represented by the first remainderman, they might lose their rights, through want of proper defense, or even by a collusive judgment intended to defeat their interests. Hichborn v. Bradbury, 111 Me. 519, 90 A. 325.

Court will not pass on transaction completed by parties interested in estate.—The court will not assume jurisdiction under this subsection when it is apparent that, under the guise of a request to construe the provisions of a will, the real object sought is to have the validity of completed transactions carried through by parties interested in the estate passed upon. Albee v. Loring, 115 Me. 418, 99 A. 43.

Thus it will not pass on validity of past sales.—In a bill in equity praying for the construction of a will the court will decline to express any opinion as to the validity of past sales. Albee v. Loring, 115 Me. 418, 99 A. 43.

III. TRUSTS.

Court has jurisdiction to determine mode of executing trust.—This section gives jurisdiction in equity to determine the "mode of executing" and "expediency of making changes" in a trust estate. United States Trust Co. v. Boshkoff, 148 Me. 134, 90 A. (2d) 713.

Which is right given fiduciary for his protection.—The provisions of this subsection granting the court the power to determine, in cases of doubt, the mode of executing a trust, is a right primarily given to the fiduciary for his protection. Moore v. Emery, 137 Me. 259, 18 A. (2d) 781.

But court will not act until necessity arises.—The court has jurisdiction under this subsection upon a bill by testamentary trustees, to instruct them as to the proper mode of executing their trust, and to construe a will so far as necessary for that purpose. But a trustee has no interest in the construction of the will under which he is acting except as it affects his powers and duties in the administration of his trust, and it is not within the intent of this subsection for the court to assume jurisdiction to advise trustees, and to construe wills for their guidance until the time comes when they need instructions. The fact that the question may arise sometime in the future is ordinarily not enough. Such a question should not be decided until the anticipated contingency arises, or at least until it is about to arise, until it is imminent. Then if the trustee needs present advice to know how to meet the contingency, it will be given to him. Huston v. Dodge, 111 Me. 246, 88 A. 888.

Where no controversy has arisen, if any trust officer is in doubt, it will be sufficient for him to point out the nature of the doubt. It is accordingly clear that if a controversy has arisen, then the proper allegation would be to point out the controversy, and the issue raised thereby. Hichborn v. Bradbury, 111 Me. 519, 90 A. 325.

XI. In suits for redelivery of goods or chattels taken or detained from the owner and secreted or withheld so that the same cannot be replevied, and in bills in equity, by creditors, to reach and apply in payment of a debt any property, right, title or interest, legal or equitable, of a debtor or debtors, which cannot be come at to be attached on writ or taken on execution in a suit at law, and any property or interest conveyed in fraud of creditors.

Cross reference.—See c. 120, § 33, re property held in trust or in fraud of creditors.

This subsection authorizes what is generally termed an equitable trustee process. Haley v. Palmer, 107 Me. 311, 78 A. 368.

And equitable trustee must be made defendant.—In a proceeding under this subsection, there must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. Donnell v. Portland & Ogdensburgh R. R., 73 Me. 567.

In a proceeding under this section there must be some third party summoned in—an equitable trustee. If it were not for this necessity, creditors might too much embarrass debtors, before obtaining execution against them, against the policy of the law. Lord v. Collins, 79 Me. 227, 9 A. 611.

The intent of this subsection is to enable a single creditor alone, without first fruitlessly exhausting all legal remedies or reducing his claim to judgment, by this one proceeding in the nature of an equitable trustee process, to establish the validity and amount of his claim against his debtor and compel the appropriation of the debtor's property of whatever kind, provided it is not exempt or within the reach of legal process, in the hands of some third person, to the payment of his debt. Donnell v. Portland & Ogdensburgh R. R., 73 Me. 567; Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

Court's powers not restricted by subsec-XIV.—The equity powers committed to the court by this subsection are not restricted by subsection XIV which provides that full equity jurisdiction shall be exercised by the court "in all other cases" where there is not a plain, adequate and complete remedy at law. Brown v. J. Waylan Kimball Co., 84 Me. 492, 24 A. 1007.

And remedies need not be exhausted.—The remedy in equity granted by this subsection can be resorted to at once on the occurrence of the wrong. The plaintiff need not first exhaust all other remedies unavailingly before resorting to remedies in equity. Farnsworth v. Whiting, 104 Me. 488, 72 A. 314.

Thus, claim need not be reduced to judgment.—In order to pursue the remedy provided by this subsection, the creditor need not first reduce his claim to judgment. Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

If a creditor brings himself within the purview of this subsection, he can maintain a bill in equity, without having first reduced his claim to a judgment and alleging the issue of an execution and a return

of nulla bona. Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

Essentials for jurisdiction.—The essentials for jurisdiction under this subsection are a creditor, a debtor in this state having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it cannot be reached by common-law process against the debtor; and the property sought to be reached held by some third person who may be considered an equitable trustee of the debtor. Donnell v. Portland & Ogdensburgh R. R., 73 Me. 567.

Must be alleged.—A proceeding under this subsection is in the nature of an equitable trustee process and if a creditor would bring himself within the purview of the subsection, he must allege that the complainant is a creditor, the principal defendant a debtor having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it cannot be reached by common-law process against the debtor, and the property is held by some third person who may be considered an equitable trustee of the debtor. These allegations are jurisdictional. If lacking, as in all other suits in equity, the error is fatal in every stage of the cause and cannot be cured by consent of the parties. Darling Automobile Co. v. Hall, 135 Me. 382, 197 A. 558.

A bill is insufficient under this subsection if it sets forth only that the "plaintiff is informed" that the defendant has in its possession certain properties of the principal defendant which cannot be reached by legal process, and there is no positive averment that such is a fact. Darling Automobile Co. v. Hall, 135 Me. 382, 197 A. 558.

An allegation that property located outside state not sufficient.—A bill which contains no allegation that brings the case within this subsection, except that the property sought to be reached is situated in a foreign country, beyond the jurisdiction of the court, and which nowhere alleges that the property cannot be attached and appropriated in a suit at law instituted in the jurisdiction in which it is situated, is not sufficient. Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

The fact that the land sought to be reached is located in a foreign jurisdiction is not sufficient to authorize relief under this subsection. It is incumbent upon the plaintiff to allege the same jurisdictional facts to give equity jurisdiction, in a proceeding involving a decree affecting the control or appropriation of land in a foreign country or another state, as would be required if the land was situated within the jurisdiction of the court. Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

But allegation and proof of fraud not necessary.—Neither allegation nor proof of fraud is essential to the granting of the equitable relief under this subsection. Reid v. Cromwell, 134 Me. 186, 183 A. 758.

A finding by the trial court that fraud as alleged in the bill in equity has not been proven, does not oust the court of equity jurisdiction under this subsection, for in it there is need neither to allege nor prove fraud to confer such jurisdiction and such allegation of fraud may be regarded as surplusage. Reid v. Cromwell, 134 Me. 186, 183 A. 758.

And bill need not ask for discovery.—This subsection provides a remedy for a single creditor by an attachment in equity of some specific property, without asking for a discovery under the bill. Baxter v. Moses, 77 Me. 465, 1 A. 350.

Subsection applicable to nonresidents. — Formerly this subsection was available only against debtors, "residing or found within the state," but, by the act of 1883, chapter 169, this clause was eliminated with the evident intention of making the subsection apply to nonresidents. Manson v. Maxcy, 114 Me. 115, 95 A. 515.

Bonds, notes and stock certificates are goods and chattels within the true meaning of this subsection authorizing suits in equity to compel delivery when so situated they cannot be replevied. Farnsworth v. Whiting, 104 Me. 488, 72 A. 314; Reid v. Cromwell, 134 Me. 186, 183 A. 758.

Stock certificates are within the true meaning of the statutes authorizing suits in equity to compel delivery when so situated that they cannot be replevied. Such possession and withholding, though not fraudulent, are enough to give the equity court the right to compel the surrender of the certificates. Equity has jurisdiction both under the statutes . . . and under general equity jurisdiction. Strout v. Burgess, 144 Me. 263, 68 A. (2d) 241.

And equity has jurisdiction both under this subsection to compel a surrender to a guardian of a stock certificate owned by his ward but issued in the name of the ward, his stepdaughter and survivor, when detained and withheld from the owner so that it cannot be replevied. Reid v. Cromwell, 134 Me. 186, 183 A. 758.

The equitable remedy granted by this subsection is limited to creditors. Annis v. Butterfield, 99 Me. 181, 58 A. 898.

And is not available to determine and

enforce the rights of either a pledgee or a pledgor. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

Nor to owner trying to maintain title obtained by purchase.—The remedy provided by this subsection is not available to a plaintiff claiming to be an owner striving to maintain a title which he obtained by purchase, and not a creditor seeking to obtain a title by legal proceedings. Annis v. Butterfield, 99 Me. 181, 58 A. 898.

Treasurer of corporation cannot be charged as trustee.—A person cannot be held as trustee for any kind of property belonging to a corporation in his official custody as treasurer; for that is the way and the only way that a corporation can hold its funds. The possession of the treasurer is the possession of the corporation; and the treasurer cannot be charged as the trustee of his corporation for its property in his official custody, for the reason that he is quoad hoc the corporation. If its officers can be summoned as trustees of the corporation then the action is in substance against the corporation as debtor with the corporation as trustee. Donnell v. Portland & Odgensburgh R. R., 73 Me. 567.

Subsection affords remedy in case of fraudulent transfer.—The holder of a matured obligation has his equitable remedy under this subsection in case of a fraudulent transfer of his debtor's property. Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

Without prior judgment and levy.—Under this subsection an equitable proceeding lies generally to reach property conveyed in fraud of creditors, without prior judgment and levy at law. Annis v. Butterfield, 99 Me. 181, 58 A. 898.

And regardless of whether property is attachable.—The design of the amendment which added the words "and any property or interest conveyed in fraud of creditors" was to afford the equitable remedy in cases where property cannot be attached or seized, and also in cases of property fraudulently conveyed whether attachable and seizable or not. Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 A. 1007.

And claim need not have been mature at time of transfer.—A creditor's remedy exists under this subsection notwithstanding at the time of the fraudulent transfer his claim was unmatured or even contingent. Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

But it must be mature when suit brought.—A bill cannot be sustained under this subsection if the obligation upon which the plaintiff bases the bill has not matured when the suit is brought and he prays not that present payment be compelled but that ultimate payment, rendered precarious by the transfer, be in a manner secured. Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

The mere fact that a debtor has fraudulently transferred his property will not justify the beginning of a suit either at common law or in equity under this subsection before the debt is due. Kautz v. Sheridan, 118 Me. 28, 105 A. 401.

Applied in Roberts v. Stevens, 84 Me. 325, 24 A. 873; Trefethen v. Lynam, 90 Me. 376, 38 A. 335; Bessey v. Cook, 92 Me. 261, 42 A. 405; Tarbox v. Palmer, 110 Me. 436, 86 A. 847; Palmer v. Palmer, 112 Me. 149, 91 A. 281; Arizona Commercial Mining Co. v. Iron Cap Copper Co., 119 Me. 213, 110 A. 429.

Cited in Stowe v. Phinney, 78 Me. 244, 3 A. 914.

XII. In cases where the power is specially given by statute and for discovery when a discovery may be lawfully required according to the course of chancery proceedings.

The court cannot entertain bills for discovery which do not pray for relief and which seek a discovery only in aid of an action at law. Warren v. Baker, 43 Me. 570.

And if a bill prays for discovery and relief, if the party is not entitled to relief, he is not entitled to a discovery. Coombs v. Warren, 17 Me. 404; Warren v. Baker, 43 Me. 570.

Bills are brought under this subsection primarily for relief and incidentally for discovery. Under such bills, if the complainant is not entitled to relief, he cannot have discovery. Darling Automobile Co. v. Hall, 135 Me. 382, 197 A. 558.

Cited in Russ v. Wilson, 22 Me. 207.

XIII. When counties, cities, towns, school districts, village or other public corporations, for a purpose not authorized by law, vote to pledge their credit or to raise money by taxation or to exempt property therefrom or to pay money from their treasury, or if any of their officers or agents attempt to pay out such money for such purpose, the court shall have equity jurisdiction on petition or

application of not less than 10 taxable inhabitants thereof, briefly setting forth the cause of complaint.

Cross reference.—See c. 91, § 80, et seq., re enforcing certain duties of municipal officers.

Subsection gives remedy to taxpayer to secure equal and legal taxation.—Among the adequate remedies which are available to property-owners and taxpayers to secure equal and legal taxation, is that prescribed in this subsection, in which, on application of not less than ten taxable inhabitants of a town, full equity jurisdiction is conferred upon the court to hear and determine all complaints relating to any unauthorized votes of such town to raise money by taxation or to exempt property therefrom. Emery v. Sanford, 92 Me. 525, 43 A. 116; Norton v. Emery, 108 Me. 472, 81 A. 671.

And individual taxpayer may apply for preventive relief.—Individual taxpayers of a municipal corporation have not ordinarily the right to sue for remedial relief, where the wrong, for which they seek redress, is one which affects the entire community and not specifically those bringing the action. This rule has its origin in a sound public policy, which holds that municipal officers should not be subjected to litigation at the suit of every dissatisfied taxpayer. This restriction, however, does not apply where the taxpayer seeks to prevent the commission by town officers of an illegal act. Both under the special provisions now embodied in this subsection and under the general equity powers given to the supreme judicial court in 1874 (sub-§ XIV), the individual taxpayer has the right to apply for preventive relief. Bayley v. Wells, 133 Me. 141, 174 A. 459.

But taxpayers may be heard only when they bring themselves within the subsection. Copeland v. Starrett, 127 Me. 18, 140 A. 689.

And there are two classes of cases, and only two, where the court is authorized to interfere under this subsection; where the city or town attempts to raise or pay money, or pledge its credit for a purpose not authorized by law, and where any agent or officer thereof attempts to pay out the money of such city or town without authority. Johnson v. Thorndike, 56 Me. 32.

Purpose of act complained of must be one not authorized by law.—The essential words in this subsection are "for a purpose not authorized by law." In order to successfully bring a case within the equity jurisdiction of the court it is necessary to establish the proposition that the defendants, in their official capacity, are seeking to carry out a purpose not authorized by law. Bullard v. Allen, 124 Me. 251, 127 A. 722.

When the allegation is that the agent or officer is about to pay out money without authority, the only inquiry which the court can properly make, is whether the "purpose" for which the money is to be paid is within the legal sphere of the town, and the officer has been duly authorized by law or by the proper vote. Johnson v. Thorndike, 56 Me. 32.

And results of purpose or way in which it is accomplished not material.—The "purpose," the object to be accomplished, is the test by which is to be judged the right of the court to interfere, and not the results of that "purpose" when accomplished, nor the ways and means by which it is to be accomplished. Johnson v. Thorndike, 56 Me. 32.

There are no words in this subsection indicating in the slightest degree an intention on the part of the legislature to require or to authorize the court to interfere with towns so long as they keep within their legitimate sphere and make such contracts as the law authorizes, and raise money or loan their credit for the purpose of carrying out such contracts, whether in so doing they act with prudence and wisdom, or otherwise. Johnson v. Thorndike, 56 Me. 32.

And it is not a matter of inquiry with the court whether the town may or may not have a good defense in law to an action brought against it, founded upon the subject matter in regard to which complaint is made. If the money to be raised is voted in good faith to pay any liability or contract within the contemplation of law, process under this subsection will not lie, but the town will be left to its legal remedies and defenses. Johnson v. Thorndike, 56 Me. 32.

Court should not entertain bill by water district.—While the right of citizens and taxpayers to apply to the court for preventive relief in the case of threatened unlawful action by municipal officers is and should be upheld, the practice of entertaining bills by citizens and rate payers should not be extended to organizations like a water district, for remedial relief by way of restitution after the commission of an alleged illegal act which affects the entire community, and is not a special wrong to particular individuals. Eaton v. Thayer, 124 Me. 311, 128 A. 475.

History of subsection.—See Tuscan v. Smith, 130 Me. 36, 153 A. 289.

Applied in Clark v. Wardwell, 55 Me. 61; Allen v. Jay, 60 Me. 124; Marble v. McKenney, 60 Me. 332; McFadden v. Dresden, 80 Me. 134, 13 A. 275; Farmington Village Corp. v. Sandy River Nat. Bank, 85 Me. 46, 26 A. 965; Hubbard v. Woodsum, 87 Me. 88, 32 A. 802; Knight v. Thomas, 93 Me. 494, 45 A. 499; Blood v. Beal, 100 Me. 30, 60 A. 427; Laughlin v. Portland, 111 Me. 486, 90 A. 318; Jones v. Portland, 113 Me. 123, 93 A. 41; Hamilton v. Portland Pier Site District, 120 Me. 15, 112 A. 836; Milliken v. Gilpatrick, 130 Me. 498, 157 A. 714; Kelley v. Brunswick School District, 134 Me. 414, 187 A. 703; Donna v. Auburn, 148 Me. 356, 93 A. (2d) 484.

XIV. And have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law. (R. S. c. 95, § 4.)

In construing this subsection, the dual capacity of the court must always be borne in mind. At the time this subsection was first enacted, the law court was exercising limited equity powers, and at the same time had jurisdiction of actions at law, and this phrase was undoubtedly used to direct that the then newly granted "full equity jurisdiction" should be according to the usage and practice in equity, rather than according to the procedure followed in the same court in actions of law. It would be illogical and inconsistent to construe this phrase as a limitation on the full equity jurisdiction granted by the legislature. A granted power could not be both full and limited at the same time and in the same field. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Before the enactment of this subsection, it was held that the court had no general chancery powers. Hayford v. Dyer, 40 Me. 245.

And that the equity powers conferred by this section and enumerated therein were exclusive. York & Cumberland R. R. v. Myers, 41 Me. 109. See Butler v. Mace, 47 Me. 423.

Equity jurisdiction not limited by acts conferring power over special subjects.—The full equity jurisdiction of the law court is not limited by legislative acts conferring equity powers over certain special subjects, incorporated in statutes enacted before and after the grant of full equity jurisdiction to the court in 1874, or by a recital of the phrase "in all other cases." Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

But it is limited to cases where there is not adequate remedy at law.—The court's general equity jurisdiction under this subsection is limited to cases where there is not a "plain, adequate and complete remedy at law." Hayden v. Whitmore, 74 Me. 230.

With some possible exceptions, the statute conferring full equity powers upon the court excludes all cases where there is a "plain, adequate and complete remedy at law." Such cases are beyond the equity jurisdiction of the court. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

A court in equity cannot retain a bill in order to itself afford legal relief, when it appears that the nature of the plaintiff's claim is not cognizable by an equity court and that the relief sought is merely legal in its nature. In other words, while some claims based upon a legal right may be cognizable by an equity court for the purpose of the granting of equitable relief, and while in some cases the court in equity may grant monetary damages where the subject matter of the cause is within its jurisdiction, equity has no jurisdiction over causes where neither the subject matter of the cause nor the relief sought are equitable in their nature. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And if such remedy exists appeal must be sustained even if question not raised below.—When the absence of equity jurisdiction becomes apparent due to the fact that the plaintiff had a plain, adequate and complete remedy at law, an appeal must be sustained even though the question of equity jurisdiction on that ground was not raised by the defendant. The fact that he did not raise the question does not confer jurisdiction upon the court when its absence for such reason is apparent. To hold otherwise would in effect confer upon the parties to the cause, by inaction upon their part, the power to confer equity jurisdiction upon the court. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

But limitation does not apply to jurisdiction conferred by other subsections.—As this subsection is but an addition to the previous specifications named in the section, it is evident that the clause limiting the jurisdiction to those cases where there is not an adequate remedy at law applies only to the additional jurisdiction given and in no respect affects that given before. Taylor v. Taylor, 74 Me. 582; Masters v. Van Wart, 125 Me. 402, 134 A. 539.

The general provision of this subsection

as to remedy at law applies not to all cases, but to all cases other than those previously enumerated. In particular cases the court has special jurisdiction. The general powers of the court are in addition to those, and not in conflict with them. Brown v. J. Wayland Kimball Co., 84 Me. 492, 24 A. 1007.

Nor does it confer more power on courts of law.—The want of a legal remedy always gave jurisdiction to courts of equity, and the limitation of this subsection, where the remedy at law is not plain, adequate and complete, means no more than the usual limitation applied to all equity jurisdictions. It does not mean that the court's equity jurisdiction shall be limited and shorn by conferring more plenary powers upon courts of law to grant relief, unless the statute plainly says so or intends it. Rockland v. Rockland Water Co., 86 Me. 55, 29 A. 935.

Remedy at law must be afforded by courts of state where party resides.—One has no plain, adequate remedy at law within the meaning of this section, if no remedy at law is afforded him in the domestic court of the state where he resides. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

A legal remedy, to be adequate, must be one which the domestic courts can apply and does not compel the party to go into the courts of a foreign jurisdiction to avail himself of it. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Court may compel specific performance of oral contracts.—Since the enactment of this subsection, specific performance of oral contracts is within the equity powers of the court. Pulsifer v. Waterman, 73 Me. 233.

Including those for conveyance of land.—Until the St. 1874, c. 175, which embodied this subsection, took effect, the court, on account of limited equity jurisdiction, could not decree specific performance of unwritten agreements for the conveyance of land, under any circumstances. But now that this broad, general power is conferred, jurisdiction extends to the enforcement of all oral agreements when the parties have not a "plain, adequate and complete remedy at law," and the circumstances are such as bring them within the established rules of equity governing such matters. Woodbury v. Gardner, 77 Me. 68. See Douglass v. Snow, 77 Me. 91.

A part performance by the purchaser, of an oral contract for the sale and purchase of land, may take the contract out of the operation of the statute of frauds, and authorize a court of general equity powers, in the exercise of sound discretion, to decree specific performance of the contract on the part of the vendor. Pulsifer v. Waterman, 73 Me. 233.

And court has jurisdiction over equitable mortgages. — This subsection gives the court full equity jurisdiction in case of equitable mortgages as in case of mortgagee under the statutes. Lewis v. Small, 71 Me. 552. See Rowell v. Jewett, 69 Me. 293.

Since the enactment of St. 1874, c. 175, embodying this subsection, conferring full jurisdiction in equity, the court has had complete power over equitable mortgages. Reed v. Reed, 75 Me. 264.

And may declare absolute deed to be a mortgage.—Since the enactment of this subsection, the court is authorized to declare an absolute deed to be a mortgage, allowing the equitable mortgagor the right to redeem. The jurisdiction is exercised upon the ground that to take an absolute conveyance as a mortgage without any defeasance is in equity a fraud. Stinchfield v. Milliken, 71 Me. 567.

Applied in Loggie v. Chandler, 95 Me. 220, 49 A. 1059; Skowhegan v. Heselton, 117 Me. 17, 102 A. 772; Eaton v. Thayer, 124 Me. 311, 128 A. 475.

Sec. 5. Jurisdiction between partners and part owners; extent and effect on other parties.—The court has jurisdiction of cases mentioned in subsection VII of the preceding section, notwithstanding persons interested not within the jurisdiction of the court are not made parties; but, in such cases, no decree affects the right of any person not a party to the suit, unless he voluntarily becomes a party before final decree, except as hereinafter provided. In all such cases the court has jurisdiction, if the case requires it, over all property of the partnership or cotenancy within the state, and the other partners or cotenants, out of the jurisdiction, may protect their interests by coming in at any time as parties to the bill; but, if there is no such property within the state, the jurisdiction of the court is limited to the adjustment of accounts and compelling contribution between the parties over whom the court has jurisdiction. (R. S. c. 95, § 5.)

Sec. 6. Property of debtor out of state or of uncertain value ap-

plied.—The court has jurisdiction of cases mentioned in subsection XI of section 4, notwithstanding the fact that the property sought to be reached and applied is in the hands, possession or control of the debtor independently of any other person, or that it is not within the state, or that it is of uncertain value, provided the value can be ascertained by a sale or appraisal, or by any means within the ordinary procedure of the court, or that it cannot be reached and applied until a future time. (R. S. c. 95, § 6.)

Applied in Arizona Commercial Mining Co. v. Iron Cap Copper Co., 119 Me. 213, 110 A. 429.

Sec. 7. Interest of a copartner applied in payment of plaintiff's debt.—In such suit the interest of a copartner in the partnership property may be reached and applied to the payment of the plaintiff's debt; provided, however, that unless the plaintiff's debt is in judgment, the business of the partnership shall not be interfered with by injunction or otherwise, farther than to restrain the withdrawal of any portion of the debtor's share or interest therein, until the plaintiff's debt is established; and provided further, that if either copartner shall give to the plaintiff a sufficient bond with sureties approved by the clerk, conditioned to pay to the plaintiff the amount of his debt and costs, within 30 days after the same is established, the court shall proceed no further therein save to establish the debt; and any injunction previously issued shall be dissolved upon the filing of such bond. But no provision of subsection XI of section 4, or of this section, or of section 6 shall be so construed as to reach and apply in payment of a debt, any property exempted by the provisions of sections 6, 7, 8 and 20 of chapter 58 and by chapter 112. (R. S. c. 95, § 7.)

Sec. 8. Masters in chancery; appointment; tenure; duties; fees.—The supreme judicial court by majority shall appoint masters in chancery, not more than 5 in a county, and make all needful rules relating to proceedings before them. Such masters shall be sworn and hold their offices for 5 years, unless sooner removed by the court; perform the duties pertaining to their offices according to equity practice and be entitled to the fees therefor allowed by the court. Unless the parties agree upon another person, all cases shall be committed to them. The fees and necessary expenses of masters so appointed, and of masters who shall act in any cause by agreement of parties, shall be fixed and allowed by the court upon the coming in of the report and, if the court in its discretion shall so order, shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county. Hearings before masters in chancery shall be subject to the established rules for the admission of evidence. Evidence may be presented wholly or partly by oral testimony or depositions. When oral testimony is used, unless it is otherwise stipulated in writing by the parties, it shall be reduced to writing by the stenographer. The depositions and a transcript of the evidence shall be admissible on behalf of either party on hearings on the acceptance of the master's report and in all further proceedings in the cause. (R. S. c. 95, § 8.)

Applied in State v. McIntyre, 53 Me. 214; Pierce v. Faunce, 33 Me. 351.

Sec. 9. Court always open for equity proceedings.—Said court shall always be open in each county for equity proceedings, except upon days on which, by law, no court is held, and in the first instance, except as hereinafter provided, all hearings shall be had, all orders and decrees made and all process issued by a single justice, except on appeal or exceptions as hereinafter provided, and said court shall establish rule-days for the return of subpoenas and the transaction of business relating to equity cases. (R. S. c. 95, § 9.)

There are no terms of court in equity proceedings. Allan v. Allan, 101 Me. 153, 63 A. 654.

There are no terms in equity proceedings and final decrees, as well as other decrees and orders, may be made upon any

day except the few upon which no court can be held. Parsons v. Stevens, 107 Me. 65, 78 A. 347.

And the court is always open in each county for equity proceedings, except upon days in which, by law, no court is held. Allan v. Allan, 101 Me. 153, 63 A. 654.

Hearings must be had by single justice. —All hearings in equity, with one exception, must be had, in the first instance, by a single justice of the court, upon whom is conferred full power to hear and decide all motions and causes, and to make and enter the necessary orders and decrees (§ 20). The only exception to this requirement is found in § 24, which authorizes the justice on hearing a cause to report it to the law court under certain circumstances. All causes not thus reported are to be not only heard but decided, subject to appeal and exceptions, by a single justice and thus save delay and expense, the two great mischiefs at which the legislature aimed in enacting the equity procedure act. Springer v. Austin, 75 Me. 416.

The equity procedure act intended the equity court to be held by a single justice, with power to hear and determine causes, and make final decrees, substantially as by a chancellor. Hagar v. Whitmore, 82 Me. 248, 19 A. 444.

And the court held by a single justice is the equity court of original jurisdiction, where the sufficiency of the pleadings can be promptly considered, amendments readily made, and the cause then speedily heard on its merits. Merrill v. Washburn, 83 Me. 189, 22 A. 118.

The law court is not the equity court of the first instance. The single justice is that court. He has all the powers of the court in equity to hear cases and to make all decrees, final as well as interlocutory. He can make all orders and decrees the law court can make. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

Sec. 10. Causes in equity, return of subpoena and service. — Causes in equity shall be begun by bill of complaint filed in the clerk's office, upon which subpoena shall issue as matter of course returnable on the 1st day of a term of court for the county where it is filed or upon a rule-day, which in either case shall be held within 60 days after the filing of such bill, and such subpoena shall be served at least 14 days before the return day thereof; or, by order of court, such subpoena may be made returnable on any day in or out of term and be served as directed in such order; or such bill may be inserted in a writ of attachment, upon which property may be attached and which shall be made returnable as writs at common law. In all cases, service shall be made by copy of the subpoena and bill or writ of attachment. The bill of complaint shall state the material facts and circumstances relied on by the plaintiff, with brevity, omitting immaterial and irrelevant matters, and may be amended or reformed at the discretion of the court, with or without terms, at any time before final decree is entered in said cause.

Within 10 days after the service of a bill of complaint or other application in equity, the defendant, prior to the filing of his answer thereto, may petition in writing for good cause shown to the chief justice of the supreme judicial court for the assignment of a justice to preside on the matter other than the justice to whom the original complaint or application was presented; upon the receipt of such petition the chief justice may assign another justice to hear the matter. After such assignment, all petitions and motions relating thereto shall be presented to, and all matters relating to said cause shall be considered by, said justice in the manner prescribed by law for equity matters. (R. S. c. 95, § 10. 1953, c. 368.)

The subpoena may be made by the clerk returnable at a rule day, or it may be made returnable on any day in or out of term, by order of court. Allan v. Allan, 101 Me. 153, 63 A. 654.

Bill must contain allegations showing equity jurisdiction.—It is a well established rule of equity pleading that the bill must contain allegations showing that the court has equity jurisdiction. Porter v. Frenchman's Bay & Mt. Desert Land & Water Co., 84 Me. 195, 24 A. 814.

And failure cannot be cured by waiver or consent.—It is a fundamental and indispensable rule that the allegations of the bill must state a case within the jurisdiction of a court of equity. If the bill fails in this respect the error is fatal in every

stage of the cause, and cannot be cured by consent of the parties. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Even in courts of general equity jurisdiction, the bill must state a cause within the appropriate jurisdiction of a court of equity. If it fails in this respect the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties. Chase v. Palmer, 25 Me. 341.

Authority to insert bill in writ of attachment gives no jurisdiction until judgment obtained.—The statute authority to insert a bill in equity into a writ of attachment gives no jurisdiction in equity before the obtainment of a judgment. The attachment may be intended to respond to the decree. Skeele v. Stanwood, 33 Me. 307.

Bill may be amended.—If the language of the original bill is not sufficiently explicit, the plaintiff, at any time before final decree, can file an amendment under this section. Sawyer v. White, 125 Me. 206, 132 A. 421.

And such amendments liberally allowed.—In judicial proceedings in this state, and particularly those which are governed by equity practice, it is the policy of the legislature and the uniform rule adopted by our court that amendments should be liberally allowed in the futherance of justice, and to insure that every case, so far as possible, may be determined on its merits. Norway Water District v. Norway Water Co., 139 Me. 311, 30 A. (2d) 601.

Equity is always liberal in permitting the amendment of a bill where such a course will prevent a forfeiture or an inequitable result. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

All that is required in amendments is that the cause of action should remain the same. Within this limit, amendments, to reach the merits of the case, are most liberally allowed. Norway Water District v. Norway Water Co., 139 Me. 311, 30 A. (2d) 601.

Thus, a declaration so defective that it would exhibit no sufficient cause of action may be cured by an amendment, without introducing any new cause of action. Norway Water District v. Norway Water Co., 139 Me. 311, 30 A. (2d) 601.

But matter of amendments is within discretion of court.—In equity proceedings, the court has ample power to allow proper amendments at any time, but it also has as ample power to refuse them at any time. The whole matter of amendments is within the discretion of the court. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285; Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

And not subject to review.—This section specifically provides that the bill "may be amended or reformed at the discretion of the court, with or without terms, at any time before final decree is entered in said cause." This discretionary power vested in the court by positive and express enactment is not subject to review by the law court upon exceptions. Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166.

The refusal of the amendment on the part of the sitting justice is an exercise of discretionary power, and the exercise of such discretionary power is not open to exception. Lakin v. Chartered Co. of Lower Calif., 111 Me. 556, 90 A. 427.

The court is disinclined to allow amendments after the pleadings have been completed, the evidence taken out, and the case sent to the law court for final determination. It certainly will not allow them as a matter of course, but only when necessary to save some material right, and then usually only upon terms. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

And an event which occurred since the filing of the bill cannot be engrafted therein. Birmingham v. Lesan, 77 Me. 494, 1 A. 151.

Former provision of section.—For a consideration of a former provision of this section that "the bill may be inserted in a writ to be served as other writs," see Carter v. Porter, 71 Me. 167.

Applied in Stephenson v. Davis, 56 Me. 73; Hubbard v. Johnson, 77 Me. 139.

Cited in Marco v. Low, 55 Me. 549.

Sec. 11. Certificate recorded in registry of deeds.—No action commenced by bill in equity not inserted in a writ of attachment, in which the title to real estate is involved, is effectual against any person not a party thereto or having actual notice thereof until a certificate, setting forth the names of the parties, the date of the bill and the filing thereof and a description of the real estate in litigation as described in said bill, duly certified by the clerk of courts in and for the county where said bill is pending, is recorded in the registry of deeds in the county or district in which such real estate is situated. (R. S. c. 95, § 11.)

Sec. 12. Verification of bill. — Verification by the oath of a party for whose benefit the bill sets forth that it is prosecuted is equivalent to such verification by the plaintiff. (R. S. c. 95, § 12.)

Sec. 13. Bills of discovery and answers.—If discovery is sought, it may be by bill, with or without interrogatories annexed thereto, for the purpose of such discovery. Answers thereto shall be made within 30 days after the return day of such bill or within such time as the court orders, and questions arising thereon shall be determined by the rules established by said court as herein provided, and in the absence thereof, by the rules applicable to bills of discovery in equity procedure. (R. S. c. 95, § 13.)

Sec. 14. Appearance by defendant; default.—When process is made returnable at any regular term, the defendant shall appear within the first 3 days thereof; otherwise on the return day of such process; and in default thereof, on motion of the plaintiff in writing, the bill shall be taken pro confesso, as matter of course, at the expiration of 10 days after the filing of such motion, but such decree for good cause shown, on motion of the defendant, may be opened within 10 days after it is made and in such case the court shall fix the time for making a defense. (R. S. c. 95, § 14.)

Cross reference.—See § 18, re court may fix time limits.

Motion need not be served on defendant failing to appear.—There is in this section no provision requiring the motion to be served on the respondent when he has failed to appear at all, and there is no rule of equity practice requiring notice of such a motion to be given to the defendant under such circumstances. Glover v. Jones, 95 Me. 303, 49 A. 1104.

Cited in Mininni v. Biddeford, 144 Me. 336, 68 A. (2d) 822.

Sec. 15. Defense; default; answer.—Defense shall be made by answer, plea or demurrer within 30 days after the time for appearance has elapsed or within the time ordered by the court, as provided in the preceding section; but for good cause shown the court may in either case enlarge the time therefor. In default of such defense the bill shall be taken pro confesso, as matter of course, on motion of plaintiff in writing, filed on any day after such default and served on the defendant. But such decree may be opened, on motion of defendant within 10 days thereafter, as provided in said section. All answers shall be signed by the defendant and sworn to by him, if the plaintiff in his bill asks for an answer upon oath, otherwise it may be signed by the defendant, his agent or attorney, but in such case it has no effect as evidence, except to cast the burden of proof upon the plaintiff. (R. S. c. 95, § 15.)

This section requires service of a motion for the bill to be taken pro confesso on a defendant who has appeared but made no defense by "answer, plea or demurrer within thirty days." Glover v. Jones, 95 Me. 303, 49 A. 1104.

Answers, even under oath, when an answer under oath is not called for by the bill, are not evidence. Leathers v. Stewart, 108 Me. 96, 79 A. 16.

If the bill does not call for answer upon oath, the answer, although verified by oath, does not operate as evidence, even as to the facts stated in it, responsive to the bill; but, like ordinary pleadings, points out the issues to be determined by evidence. Clay v. Towle, 78 Me. 86, 2 A. 852; Darling Automobile Co. v. Hall, 135 Me. 382, 197 A. 558.

Cited in Mininni v. Biddeford, 144 Me. 336, 68 A. (2d) 822.

Sec. 16. Replication.—The plaintiff shall file a replication within 15 days after notice has been served on him or his counsel that answer or plea has been filed, but such time may be enlarged on such terms as the court orders, or the bill may be dismissed for want of prosecution, on motion filed by defendant at any time after said 15 days or at the expiration of the time ordered by the court for filing such replication. (R. S. c. 95, § 16.)

Sec. 17. Hearing upon bill and demurrer.—When a demurrer is filed,

the court upon motion of either party may set the cause for hearing upon bill and demurrer at any time. When a plea or answer is filed, the court, upon the motion of the plaintiff, may set the cause for hearing upon bill and plea or answer at any time. When a replication is filed, the court, upon the motion of either party, may set the cause for hearing upon bill, answer or plea and evidence, but such hearing shall not be had until after 30 days from the filing of the replication unless by consent or special order of court. When a jury trial is ordered, it shall be had at the next jury term after such 30 days unless otherwise ordered by the court. Any time fixed for hearing or trial may be extended for good cause shown. (R. S. c. 95, § 17.)

A cause in equity may be set down for hearing on bill and demurrer, or bill and answer. In the former case the bill is taken as true; in the latter the answer is taken as true. Hall v. Hamilton, 123 Me. 80, 121 A. 551.

In a case where the hearing is upon bill, answer and replication without evidence, a situation not provided for by this section, the only allegations that can be accepted as true are those concerning which the bill and answer are in accord. Hall v. Hamilton, 123 Me. 80, 121 A. 551.

Applied in Ricker v. Portland & Rumford Falls Ry., 90 Me. 395, 38 A. 338.

Sec. 18. Time limits.—In all causes, the court by special order may fix such time or times for filing answer, plea, demurrer or replication or for hearing of the cause as justice may require. (R. S. c. 95, § 18.)

Sec. 19. Testimony at hearing.—At any hearing or trial in equity, the evidence may be presented wholly or partly by oral testimony or by depositions. When oral testimony is used, it shall be reduced to writing by the stenographer, certified by him and filed with the depositions for use in case of appeal. (R. S. c. 95, § 19.)

Cross reference. — See c. 113, § 189, re appointment of stenographers for hearings in vacation.

Evidence may be taken orally. — Since the enactment of this section, it has been permissible, contrary to the ancient practice in equity, to take out the evidence, in whole or in part, orally in the presence of the court, and not wholly by depositions. McKenney v. Wood, 108 Me. 335, 80 A. 837.

Sec. 20. Justice to decide cause; appeal. — The justice before whom such hearings are had has full power to decide any motion or cause so heard, and shall make and enter such order and decree as seems just and proper to him and in accordance with the established principles of equity jurisprudence, subject to appeal and exceptions as hereinafter provided. (R. S. c. 95, § 20.)

The justice who heard the case must settle and sign the decree. There are no exceptions. Fair dealing to the litigants will not permit any. McKenney v. Wood, 108 Me. 335, 80 A. 837.

Applied in Emery v. Bradley, 88 Me. 357, 34 A. 167.

Stated in Springer v. Austin, 75 Me. 416.

Cited in Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Sec. 21. Appeal, how claimed; proceedings in law court.—From all final decrees of such justice, an appeal lies to the next term of the law court. Said appeal shall be claimed by an entry on the docket of the court from which the appeal is taken, within 10 days after such decree is signed, entered and filed and notice thereof has been given by such clerk to the parties or their counsel. The appellant shall enter such appeal and furnish written or printed copies of the case on the 1st day of said law term, and for good cause shown, the law court may enlarge the time for furnishing such copies. Such appeals shall be heard at the term to which they are taken, unless otherwise agreed or the law court shall for good cause order a further time for the hearing thereof, and shall on such appeal, affirm, reverse or modify the decree of the court below or remand the cause for further proceedings, as it deems proper. All cases in which appeals or exceptions are taken from a final decree shall remain on the docket of the

court below, marked "law," and decree shall be entered therein by a single justice in accordance with the certificate and opinion of the law court. (R. S. c. 95, § 21.)

I. General Consideration.
II. Proceedings on Appeal.
III. Decree Must Follow Mandate of Law Court.

I. GENERAL CONSIDERATION.

Review by appeal and review by exceptions distinguished.—The distinction between the right to a review of a final decision of the court below by the law court on appeal and the right to a review of such decision on exceptions under § 26 is not merely one of nomenclature and procedure. Not only is the procedure different, but the scope of inquiry by the law court is different. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12. See § 26 and note.

Appellant must be party aggrieved.—An appeal cannot, within the spirit of this section, be presented by a party not aggrieved, any more than it could be by a stranger to the record. Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

And generally there is no appeal from decree in appellant's favor.—There are instances where a party may appeal from a favorable decree, as, for instance, where he is not given all to which he is entitled, or, otherwise, there is error or prejudice. But, as a usual thing, a decree in one's own favor is not appealable. Perkins v. Kavanaugh, 135 Me. 344, 196 A. 645.

Section does not provide appeal from judge of probate.—This section does not give a remedy to a party who is aggrieved by the decree of a judge of probate exercising equity jurisdiction. To make this section apply to such a case there must be read into it after the word "justice" the phrase "or any judge of probate exercising equity jurisdiction." Such a clause should not be read into the section by the court unless plainly necessary to effectuate the legislative intention. Norris v. Moody, 120 Me. 151, 113 A. 24.

What constitutes final decree.—A final decree is that which fully decides and disposes of the whole cause leaving no further questions for the future consideration and judgment of the court. Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166.

Final decrees to be formally drawn, signed, entered and filed.—By examination of this section it will be readily seen that it is there contemplated that final decrees are to be formally drawn, signed, entered and filed. Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166.

The final decree referred to in this section from which an appeal may be taken is the final decree formally drawn, signed, entered and filed. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And the time allowed for appeals commences only after the final decree is signed, entered and filed, and notice given. Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166.

By this section an appeal from a final decree in equity may be taken within ten days after such decree is "signed, entered and filed." When the court has finally established and defined the rights of the parties in an equity suit, and indicated what relief should be awarded, it remains to embody this judgment in a suitable decree, which when properly authenticated and enrolled shall be the authoritative expression of the judgment of the court. In our practice, decrees are sufficiently enrolled by being "entered and filed." Cram v. Gilman, 83 Me. 193, 22 A. 106. See § 27 and note.

The ten-day period for claiming an appeal does not commence until "notice (of a decree) has been given by such clerk to the parties or their counsel." Jensen, Appellant, 145 Me. 1, 70 A. (2d) 248.

And mere draft of decree is not sufficient.—The mere draft of a decree, however, even though agreed upon by counsel, and filed, is not the decree of the court. There is no decree, and consequently no appeal from it as a decree until the draft is authenticated and enrolled, or in the words of our statute, "signed, entered and filed." Cram v. Gilman, 83 Me. 193, 22 A. 106.

And appeal prior to its filing is premature.—If an appeal is taken from the findings of the presiding justice and is noted on the docket prior to the filing of the actual decree in the case, it is premature under the provisions of this section. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Applied in Gilpatrick v. Glidden, 81 Me. 137, 16 A. 464; Emery v. Bradley, 88 Me. 357, 34 A. 167; Buswell v. Wentworth, 134 Me. 383, 186 A. 803; United Feldspar & Minerals Corp. v. Bumpus, 142 Me. 230, 49 A. (2d) 473; Semo v. Goudreau, 145 Me. 251, 75 A. (2d) 376.

Cited in Whittemore v. Russell, 78 Me. 337, 5 A. 72; Girouard's Case, 145 Me. 62,

71 A. (2d) 682; A. C. Paradis Co. v. H. W. Maxim Co., 148 Me. 43, 87 A. (2d) 666.

II. PROCEEDINGS ON APPEAL.

The cause in the appellate court is heard anew upon the record. Trask v. Chase, 107 Me. 137, 77 A. 698; Pride v. Pride Lumber Co., 109 Me. 452, 84 A. 989; Sears, Roebuck & Co. v. Portland, 141 Me. 250, 68 A. (2d) 12; Cassidy v. Murray, 145 Me. 207, 74 A. (2d) 230; Tarbell v. Cook, 145 Me. 339, 75 A. (2d) 800; Wolf v. W. S. Jordan Co., 146 Me. 374, 82 A. (2d) 93; Strater v. Strater, 147 Me. 33, 83 A. (2d) 130; Cadorette v. Cadorette, 147 Me. 79, 83 A. (2d) 315.

Ordinarily, an appeal vacates the judgment below and the case when heard on appeal is heard de novo and judgment is entered upon the new decision. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Which consists of the bill and all the pleadings. Katz v. New England Fuel Oil Co., 135 Me. 379, 197 A. 401.

And all questions which appear in the record are open. Upon the whole case the court is required to "affirm, reverse or modify the decree of the court below or remand the cause for further proceedings, as it deems proper." Trask v. Chase, 107 Me. 137, 77 A. 698; Pride v. Pride Lumber Co., 109 Me. 452, 84 A. 989; Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

All questions presented by the record are open for consideration on appeal and such decree is to be directed as the whole case requires. Doyle v. Williams, 137 Me. 53, 15 A. (2d) 65.

All issues raised by the record are open for consideration and determination anew by the law court on appeal. Such is the effect of this section, which provides in part that in an appeal from a final decree in equity the law court shall "affirm, reverse, or modify the decree of the court below, or remand the cause for further proceedings, as it deems proper." Woodsum v. Portland, R. R., 144 Me. 74, 65 A. (2d) 17.

The admission of the evidence below is of no consequence, except so far as it shall be considered competent for consideration on appeal. It is of no consequence when there is an appeal, because the party excepting on questions of the admissibility of evidence and of practice practically takes nothing by his exceptions. Even if the rulings were erroneous, the court does not sustain the exceptions, and send the case back for a new hearing, for it is the duty of the court to determine the whole case on the appeal, on such evidence as it deems admissible. Trask v. Chase, 107 Me. 137, 77 A. 698.

And court not limited to errors claimed by appellant.—The law court is not limited to a consideration of errors in the decree claimed by the parties filing the appeal but may consider issues raised by any party. Woodsum v. Portland R. R., 144 Me. 74, 65 A. (2d) 17.

But findings of the sitting justice are to stand unless shown to be clearly erroneous. Trask v. Chase, 107 Me. 137, 77 A. 698; Wolf v. W. S. Jordan Co., 146 Me. 374, 82 A. (2d) 93.

It is well settled that the decree of a single justice upon matters of fact in an equity hearing will not be reversed unless it clearly appears that the decree is erroneous. Eastman v. Eastman, 117 Me. 276, 104 A. 1.

And, in case of an appeal in equity proceedings, the burden is upon the appellant. He must show the decree appealed from to be clearly wrong, otherwise it will be affirmed. Wilson v. Littlefield, 119 Me. 143, 109 A. 394.

The findings necessarily made by a sitting justice in equity of facts proved, or that there was a lack of proof, are not to be reversed on appeal unless the findings are clearly wrong. The burden to satisfy the law court that they are clearly wrong is upon the appellant, and unless so shown the decree appealed from must be affirmed. Levesque v. Pelletier, 144 Me. 245, 68 A. (2d) 9; Tarbell v. Cook, 145 Me. 339, 75 A. (2d) 800.

Findings of fact by the justice below will be conclusive unless clearly wrong and the burden is on the appellant to prove it. Young v. Witham, 75 Me. 536; Paul v. Frye, 80 Me. 26, 12 A. 544; Cassidy v. Murray, 145 Me. 207, 74 A. (2d) 230; Tarbell v. Cook, 145 Me. 339; 75 A. (2d) 800; Strater v. Strater, 147 Me. 33, 83 A. (2d) 130; Flagg v. Davis. 147 Me. 71, 83 A. (2d) 319; Cadorette v. Cadorette, 147 Me. 79, 83 A. (2d) 315.

In an appeal from the decision of a sitting justice, the appellant has the burden of showing the decree to be clearly wrong, especially when the credibility of witnesses is an issue. In a case where the credibility of the witnesses is an important issue, the sitting justice has the advantage of observation of the persons testifying, and their testimony weighed by him must have aided in forming his judgment. Cadorette v. Cadorette, 147 Me. 79, 83 A. (2d) 315.

The decision of any fact by the court be-

low should not be overruled by the appellate court unless the appellate court is clearly convinced of its incorrectness, the burden being on the appealing party to prove the error, one of the main reasons for support of that principle being that one who sees and hears the witnesses is in a more favorable position to better judge of their credibility than others who merely review the printed testimony, but it, however, sometimes happens that a hurried examination of a long and complicated case by the court below may not be so satisfactory as a deliberate reexamination of the case on appeal with the aid of a printed record. Flagg v. Davis, 147 Me. 71, 83 A. (2d) 319.

But such burden does not require proof beyond a reasonable doubt.—Although the findings of fact by the justice below will be conclusive unless clearly wrong, it does not necessarily require proof beyond a reasonable doubt. And sometimes circumstances and conditions are to be considered which prevent the rule applying so literally as it otherwise would. Leighton v. Leighton, 91 Me. 593, 40 A. 671; Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12; Flagg v. Davis, 147 Me. 71, 83 A. (2d) 319.

And findings need not constitute error of law to justify reversal.—This rule does not mean that the findings of fact of the justice below will not be reversed on appeal unless such findings constitute error in law. They may be disregarded on an appeal when clearly wrong. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12; Flagg v. Davis, 147 Me. 71, 83 A. (2d) 319.

III. DECREE MUST FOLLOW MANDATE OF LAW COURT.

Questions closed after law court's decision certified.—The merits of the controversy and all previous questions are no longer open when the decision of the law court has been certified to the presiding justice. Fenderson v. Franklin Light & Power Co., 121 Me. 213, 116 A. 414.

And decree must follow mandate of law court.—After the mandate is received from the law court a "decree shall be entered therein by a single justice, in accordance with the certificate and opinion of the law court." The decree must follow the mandate. A single justice cannot enlarge or limit or modify the scope of the mandate. He cannot hinder or delay its execution. He must enter the decree in accordance with the mandate, and then he can only cause the decree to be executed. Whitney v. Johnston, 99 Me. 220, 58 A. 1027; Farnsworth v. Whiting, 106 Me. 543, 76 A. 942.

This section provides that the single justice shall enter a decree in accordance with the certificate and opinion of the law court. Such is the extent of power. The justice has no authority to depart in any material respect from the law court mandate. Rose v. Osborne, 136 Me. 15, 1 A. (2d) 225.

A decree which follows the mandate of the law court without attempting to modify or limit or enlarge it, is unobjectionable. Fenderson v. Franklin Light & Power Co., 121 Me. 213, 116 A. 414.

And it should be entered forthwith in accordance with the opinion of the law court. Rose v. Osborne, 135 Me. 467, 199 A. 623.

As sitting justice cannot postpone filing the decree.—This section requires the single justice, when a mandate has been received from the law court, to enter a decree "in accordance with the certificate and opinion of the law court." The sitting justice has no authority to depart from the mandate in any respect or to postpone the filing of the decree. Rose v. Osborne, 135 Me. 467, 199 A. 623.

Nor delay its enforcement.—The sitting justice cannot issue a restraining order to prevent or delay the enforcement of the decree. Nothing remains after the mandate is received except to enforce it according to its terms. Whitney v. Johnston, 99 Me. 220, 58 A. 1027.

But he can issue subsidiary process.—While the sitting justice should enter a decree in accordance with the mandate of the law court, he may no doubt issue subsidiary process, if necessary, to enforce such decree. In other words, a single justice should sign such a decree as will effectuate the decision of the court and give to the prevailing party such remedy as the court decides he is entitled to. Farnsworth v. Whiting, 106 Me. 543, 76 A. 942. See Whitney v. Johnston, 99 Me. 220, 58 A. 1027.

Sec. 22. Orders to protect rights of parties while appeal pending.—When an appeal is taken from a final decree, any justice may also make such order for the appointment of receivers for injunction and prohibition or for continuing the same in force, and such other orders as are needful for protection of the rights of the parties or as are usual in equity proceedings in such cases until the appeal is determined by the law court. While the appeal is pending before

the law court, such orders may be modified or annulled either by such justice or by the law court. (R. S. c. 95, § 22.)

Sec. 23. Appeal from interlocutory decree.—An appeal may be claimed and taken in like manner from any interlocutory decree or order, but such appeal shall not suspend any proceedings under such decree or order, or in the cause, and shall not be taken to the law court until after final decree. Upon an appeal from a final decree, all previous decrees and orders are open for revision, reversal or approval. (R. S. c. 95, § 23.)

Appeal from interlocutory decree cannot be taken until after final decree.—In this state, an appeal may be taken from an interlocutory decree in a cause in equity, but such appeal does not suspend any proceedings in the cause "and shall not be taken to the law court until after final decree." Masters v. Van Wart, 125 Me. 402, 134 A. 539; Arico v. Gushee, 134 Me. 495, 182 A. 921.

Appeals and exceptions to interlocutory decrees or orders are not allowed to delay the case, and they cannot be taken to the law court until after final decree in the case. Shaw v. Monson Maine Slate Co. 96 Me. 41, 51 A. 285.

Appeals from interlocutory decrees must await the final decree. Katz v. New England Fuel Oil Co., 135 Me. 379, 197 A. 401.

What constitutes final decree.—A final decree within the meaning of this section is one which fully decides and disposes of the whole case leaving no further questions for the future consideration and judgment of the court. Sawyer v. White, 125 Me. 206, 132 A. 421.

A decree to be final for the purposes of appeal must leave the case in such a condition that if there be an affirmance, the court below will have nothing to do but execute the decree already entered. Sawyer v. White, 125 Me. 206, 132 A. 421.

A decree is final which provides for all the contingencies which may arise and leaves no necessity for any further order of the court to give all the parties the entire benefit of the decision. Sawyer v. White, 125 Me. 206, 132 A. 421.

No decree is a final one, which leaves anything open to be decided by the court, and does not determine the whole case. Sawyer v. White, 125 Me. 206, 132 A. 421.

Decree overruling demurrer is interlocutory.—A decree overruling a demurrer is interlocutory and not final and leaves the cause for further hearing upon answer and proof. Bath v. Palmer, 90 Me. 467, 38 A. 365.

A decree in equity overruling a demurrer and doing nothing more is interlocutory, and cannot be brought to the law court "until after final decree." Masters v. Van Wart, 125 Me. 402, 134 A. 539; Myshrall v. Gadbois, 137 Me. 327, 15 A. (2d) 152.

As is a decree sustaining a demurrer and doing nothing more. Masters v. Van Wart, 125 Me. 402, 134 A. 539; Arico v. Gushee, 134 Me. 495, 182 A. 921.

But decree sustaining demurrer and dismissing bill is final.—A decree sustaining a demurrer and also dismissing the bill, is final within the meaning of this section. It puts the case out of court. Masters v. Van Wart, 125 Me. 402, 134 A. 539.

Applied in Maine Benefit Ass'n v. Hamilton, 80 Me. 99, 13 A. 134; Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Cited in Flint v. Comly, 95 Me. 251, 49 A. 1044; American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676; Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Sec. 24. Justice may report cause. — Upon a hearing in any cause in equity, the justice hearing the same may report the cause to the next term of the law court, if he is of the opinion that any question of law is involved of sufficient importance or doubt to justify the same and the parties agree thereto. The cause shall be entered and copies furnished by the plaintiff and shall be heard and decided by said law court in like manner and with like results as is herein provided in case of appeals. (R. S. c. 95, § 24.)

Cross reference.—See note to c. 103, § 115.

Reports are intended to take up the whole case for the court to make final decision. It should not go up by installments. Cheney v. Richards, 130 Me. 288, 155 A. 642.

And the record includes the bill in equity, the answer, the replication and the evidence, both oral and documentary, and

a case or cause so reported was what the legislature intended for a method of submitting questions involving both law and fact in the most comprehensive manner to the decision of the court. Webber v. Brunk, 147 Me. 192, 85 A. (2d) 79.

The word "cause" as employed in this section, is used in its unrestricted sense; and that term, when applied to legal proceedings, imports a state of facts which furnish an occasion for the exercise of the jurisdiction of a court of justice. Cheney v. Richards, 130 Me. 288, 155 A. 642.

And law court may hear and decide cases involving civil contempt.—By authority of this section, the law court has jurisdiction to hear and decide, on report, cases involving civil contempt. Cheney v. Richards, 130 Me. 288, 155 A. 642.

Newly discovered evidence may be presented to law court.—In an equity cause reported to the law court under the provisions of this section, additional newly discovered evidence may be presented upon such terms as the law court deems proper. Lang v. Chase, 130 Me. 56, 153 A. 353.

In order to report an equity case to the law court two elements must be present; first, one in which the presiding justice is concerned because it is conditional upon his opinion that a question of law is involved of sufficient importance or doubt to justify the report; second, one in which the parties are concerned because they must agree to have the case reported. Wilson v. Littlefield, 119 Me. 143, 109 A. 394.

The law court has jurisdiction to determine causes in equity certified on report only when the presiding justice is of opinion, and so certifies, that a question of law is involved of sufficient importance or doubt to justify the same, and the parties agree thereto. Fenn v. Fenn, 130 Me. 520, 155 A. 803; Hand v. Nickerson, 148 Me. 465, 95 A. (2d) 813.

All parties must agree to report.—Unless all parties agree to a report of the cause in which they are joined, it is the duty of the sitting justice to hear the evidence and make such rules, orders or decrees thereon as the law of the case requires. Fenn v. Fenn, 130 Me. 520, 155 A. 803.

And agreement of counsel alone is not sufficient.—Causes in equity may come before the law court upon report, when the presiding justice is of opinion and so certifies in the record, that any question of law is involved of sufficient importance or doubt, to justify the same, and the parties agree thereto. The law court takes no jurisdiction from a record presented which shows an agreement of counsel alone. Whittemore v. Russell, 78 Me. 337, 5 A. 72.

Defendants in default have right to agree or disagree to report. — Defendants in default in an equity action under a decree pro confesso are still parties and have some rights including the right to agree or disagree to a report of the case under this section. Fenn v. Fenn, 130 Me. 520, 155 A. 803.

Section intended for cases where determination of doubtful question will be decisive.—The provision in this section for reporting an equity cause directly to the law court without any decree by sitting justice was intended in cases depending for determination mainly on some important or doubtful question of law, the decision of which would practically decide the case. Hagar v. Whitmore, 82 Me. 248, 19 A. 444; Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

The provision for reporting cases to the law court after a hearing by a single justice, without ruling or decision by him, was not intended for every case, but for those cases where the solution of the question of law involved would ordinarily dispose of the case. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

And case should not be presented unless opinion of law court will be final.—Parties desiring a speedy adjudication of a cause in equity should not present it to the law court, until it is in such shape that the opinion of the law court will be a final decision. Merrill v. Washburn, 83 Me. 189, 22 A. 118.

Equity causes should not be reported to the law court until the pleadings are sufficiently perfected to enable the law court to make a final decision upon the merits. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

To permit a report of the case to the law court to determine one question, then to be sent back and reported again to determine another question, and so on as long as new questions are raised by amendment or otherwise, would defeat the purpose in equity procedure act and restore all the evil delays of the old practice which made equity procedure a terror to the suitor. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

Parties reporting an equity case must expect that the law court will ordinarily make a final disposition of that particular case at least, upon the pleadings and evidence presented by the report, without permitting it to go back for further pleadings and evidence. Those should be made right and sufficient before the case is

first reported. Shaw v. Monson Maine Slate Co., 96 Me. 41, 51 A. 285.

Cases should not be sent to the law court, even upon report at the request of the parties, except at such stage of the proceedings that a decision of the question may dispose of the case itself, unless the report contains a stipulation which provides that the decision may, in at least one alternative, supersede further proceedings. Cheney v. Richards, 130 Me. 288, 155 A. 642.

Applied in Farwell v. Sturdivant, 37 Me. 308; Fort Fairfield Nash Co. v. Noltemier, 135 Me. 84, 189 A. 415; Shannon v. Shannon, 142 Me. 307, 51 A. (2d) 181.

Quoted in Springer v. Austin, 75 Me. 416.

Sec. 25. Further time for appeal.—If any party, intending to appeal, by accident or mistake fails to do so within the time limited therefor, he may within 30 days after the entry of the decree apply to any justice for leave to take such appeal, which may be granted on such terms as appear just and equitable. (R. S. c. 95, § 25.)

Applied in United Feldspar & Minerals Corp. v. Bumpus, 142 Me. 230, 49 A. (2d) 473.

Sec. 26. Exceptions; justice to give separate findings of law and fact; other proceedings not suspended. — Either party aggrieved may take exceptions to any ruling of law made by a single justice, the same to be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby. Such exceptions shall be claimed on the docket within the time allowed for appeal, and shall be made up, allowed and filed in the time provided therefor, unless further time is granted by the court or by agreement of parties. In all other respects, such exceptions shall be taken, entered in the law court and there heard and decided like appeals, with the same power in the single justice to make orders for injunction and prohibition and the protection of the rights of the parties; and in the law court to make orders and decrees pending the same and upon decision thereof; provided that no question of fact is open to the law court on such exceptions. Upon request of either party, the justice hearing the cause shall give separate findings of law and fact. The allowance and hearing of exceptions shall not suspend the other proceedings in the cause. (R. S. c. 95, § 26.)

Cross references.—See note to § 10, re discretionary power as to amendments not subject to exceptions; note to § 31, re exceptions considered by appellate court only when accompanied by evidence or abstract thereof; note to c. 31, § 41, re section applicable to exceptions to decree in workmen's compensation case.

This section differs materially from the statute with respect to appeals. In all appeals it is necessary that all of the evidence or an abstract thereof be reported in accordance with the provisions of § 31. When the review is sought on exceptions to the decree, the exceptions need "be accompanied only by such parts of the case as are necessary to a clear understanding of the questions raised thereby." Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

If the case comes to the supreme court on exceptions to the decree, it is only required that the exceptions be accompanied by such parts of the case as are necessary to a clear understanding of the questions raised by the exceptions. Although there may be exceptions where a report of all of the evidence in the case would be necessary to clear understanding of the questions raised thereby, yet in many cases the legal questions raised by the exceptions could be clearly understood without a report of all the evidence, and in such cases, the exceptions need not be accompanied by the same. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Exceptions lie to the whole or a part of a final decree, under equity procedure in Maine. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Whether or not under the ancient rules of chancery practice a final decree was subject to exceptions, this section, as interpreted by the supreme judicial court, gives to either party aggrieved the right to take exceptions to a final decree. American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

And an exception to a final decree may often be preferable to a general appeal. The latter opens up the whole case for

rehearing on law and facts (see § 21 and note), and requires the transmission to the law court of copies of all the pleadings, orders and evidence. The former presents solely a question of law for rehearing and requires usually but a very small part of the record to be transmitted to the law court. A party may concede the equity and justice of the greater part of a final decree, and only desire a reversal of it or of a single feature of it. An exception to that feature alone, if it involves a question of law only, is plainly the best mode of obtaining such a result. Emery v. Bradley, 88 Me. 357, 34 A. 167; American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

But exceptions do not suspend other proceedings.—Exceptions may be taken to rulings but the "allowance and hearing of exceptions shall not suspend the other proceedings in the cause." Bath v. Palmer, 90 Me. 467, 38 A. 365.

And this section contemplates exceptions to a final decree, whatever may be the general rule. Emery v. Bradley, 88 Me. 357, 34 A. 167.

And it is irregular to hear exceptions in an equity cause before final hearing, and such hearing should not be allowed unless the question does not admit of delay until then. Maine Benefit Ass'n v. Hamilton, 80 Me. 99, 13 A. 134; Bath v. Palmer, 90 Me. 467, 38 A. 365.

But exceptions to ruling sustaining exceptions for impertinence may be heard before final disposition.—See Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Decision on exceptions not necessarily decisive of case.—In the law court exceptions are "heard and determined like appeals," but they are not appeals. The decisions upon them are not necessarily decisive of the case. No question is open except the points raised by the exception. Trask v. Chase, 107 Me. 137, 77 A. 698.

And exceptions do not vacate judgment to which they are taken.—If exceptions to the decision of a single justice are brought to the law court, the effect of the exceptions is not to vacate the judgment to which they are taken, but to hold it in abeyance until the validity of the exceptions is determined, and if the exceptions are overruled, the judgment rendered by such single justice remains in full force and effect. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Exceptions can only present question of law.—Exceptions to any part of a final decree can only present a question of law. No questions of fact are open for consideration upon exceptions. Emery v. Bradley, 88 Me. 357, 34 A. 167; American Oil Co. v. Carlisle, 144 Me. 1, 63 A. (2d) 676.

Exceptions reach only errors in law. Exceptions when taken to findings of fact by a single justice must attack such findings because of, and reach only errors in law. There is no error in law in a finding of fact by a single justice unless such fact be found without any evidence to support it. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

And exceptor cannot dispute facts well pleaded.—On exceptions to a final decree, the allegations in the bill must be accepted as stating the case presented, without right to the exceptor to dispute any statement of facts well pleaded, thus presenting for determination only the questions of law involved. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Parties may request separate findings of law and fact.—A judge in equity, as when sitting at law without a jury, has two functions to perform, one to make rulings of law and the other to make findings of fact. These two functions are quite separate and distinct. Parties may rightly request rulings of law and fact of the judge sitting in equity for this section so provides. His obligation on request for a ruling of law is to determine the legal issues necessarily involved in the decision of the case. The object of the finding of fact and conclusion of law in a case where the judge is the trier of fact is to ascertain the theory on which he decides the case, in order that the right of review may be preserved. Sacre v. Sacre, 143 Me. 80, 55 A. (2d) 592.

But each request need not be answered.—The court which hears an equity action is not obliged to answer each and every request of counsel for a ruling whether it be of law or fact. Woodsum v. Portland R. R., 144 Me. 74, 65 A. (2d) 17.

It is obvious that should a judge be required to answer each request separately he would be compelled to labor unnecessarily at times answering immaterial and irrelevant matters having no material bearing on the merits of the controversy. It is not necessary to wander over the whole domain of facts and law developed by the case and involved in the requested findings. It is sufficient if the facts found and the law cited adequately cover the material points involved in the case. Sacre v. Sacre, 143 Me. 80, 55 A. (2d) 592.

And findings need not be in any specified form.—This section does not provide that such findings as the court may or does make shall be in a particularly specified form, style or verbiage. It merely re-

quires that, "upon request of either party the justice hearing the cause shall give separate findings of law and fact. It requires no more than that the material and controlling facts and rulings of law found by the court shall be so separated and distinguished from each other as to afford the party an opportunity to except to any particular findings of law or fact, thereby enabling him to assign and point out such findings as error. Sacre v. Sacre, 143 Me. 80, 55 A. (2d) 592.

Where a court dictates into the record in such intelligible manner or form as to render them distinguishable, what the the material facts are as he views them, and what are his conclusions of law in reference thereto, he has substantially complied with this section and given the party his substantial rights under the same. Sacre v. Sacre, 143 Me. 80, 55 A. (2d) 592; Woodsum v. Portland R. R., 144 Me. 74, 65 A. (2d) 17.

Findings not restricted to those requested.—This section does not require the court to make just such findings of law as may be requested any more than it would be required of him to give just such instructions as might be requested by a party in a jury trial. Sacre v. Sacre, 143 Me. 80, 55 A. (2d) 592.

Section not applicable to statutory proceedings.—This section, requiring findings of fact when requested, is a statutory rule of practice in equity cases and does not apply to purely statutory proceedings. Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

Such as libel for annulment of marriage.—Since the rules of practice in equity cases do not apply to a libel as for divorce for annulment of marriage, it follows that the provisions of this section, requiring findings of fact to be made and filed in equity cases, when requested, has no application to such a proceeding. Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

Applied in Bennett v. Dyer, 89 Me. 17, 35 A. 1004.

Cited in Whittemore v. Russell, 78 Me. 337, 5 A. 72; Flint v. Comly, 95 Me. 251, 49 A. 1044; Norris v. Moody, 120 Me. 151, 113 A. 24; Masters v. Van Wart, 125 Me. 402, 134 A. 539.

Sec. 27. Date of order and decree.—Every order and decree shall bear date upon the day on which it is filed and entered, and the day of such filing and entering shall be entered by the clerk upon the docket and on the decree. (R. S. c. 95, § 27.)

Decree not operative until entered of record.—This section expressly provides that every order and decree shall bear date upon the day on which it is filed and entered, and the day of such filing and entering shall be entered by the clerk upon the docket and on the decree. By our system of practice, where full power is conferred on the court to make and enter all orders and decrees at such times as the court may deem proper, it follows that such orders and decrees become operative only from the time they are thus entered of record. They then become the definite judgment of the court, forming a part of the record, and equivalent to enrolment under the English practice in chancery. Gilpatrick v. Glidden, 82 Me. 201, 19 A. 166; Parsons v. Stevens, 107 Me. 65, 78 A. 347.

After which it cannot be summarily revoked or vacated.—A decree once deliberately formulated, signed, entered and filed cannot afterward be summarily revoked or vacated on motion for alleged mistakes of a party or even of the court; but relief from such mistakes must be sought for through the more deliberate procedure provided for review, at least where such procedure would be open to the complaining party but for his own fault. Parsons v. Stevens, 107 Me. 65, 78 A. 347.

Sec. 28. Process to enforce final decree.—No process for enforcement of a final decree, save for the appointment of receivers, for injunction or prohibition or for continuing the same shall issue within 10 days from the entry of such decree, unless all parties waive an appeal by entry on the clerk's docket or by writing filed in the cause or consent in like manner to the issue thereof. (R. S. c. 95, § 28.)

Sec. 29. Judgment divesting person of real estate recorded in registry of deeds.—No judgment or decree divesting any person of title to real estate shall be effectual against any person not a party to the action in which such judgment or decree is rendered, and persons not having actual notice thereof, unless a copy of such judgment or decree or so much thereof as relates to the title to such real estate duly certified by the clerk of courts in and for the

county where said judgment or decree is rendered is, within 30 days after the rendering of such judgment or decree, duly recorded in the registry of deeds in the county or district in which such real estate is situated. (R. S. c. 95, § 29.)

Section applicable to decree shortening trust period in realty.—A decree abridging or shortening the trust period in real estate when, by express provision in the will, the trust is yet an active one, divests the trustee of the legal title to the real estate within the meaning of this section and, in the absence of registry record or actual notice, the decree is without force as against third persons. Goodwin v. Boutin, 130 Me. 322, 155 A. 738.

Cited in Laughlin v. Page, 108 Me. 307, 80 A. 753.

Sec. 30. Hearings.—Hearings and trials in equity cases may be had and orders and decrees may be passed at such place in any county as the justice applied to may appoint; and the clerk in the county in which the case is pending shall transmit the papers in the case to the justice to hear the same; and such justice shall return them after hearing with his orders and decrees therein to be filed and entered in such county. (R. S. c. 95, § 30.)

Sec. 31. Evidence in court below reported; no witnesses heard orally in law court.—All evidence before the court below, or an abstract thereof approved by the justice hearing the case, shall on appeal be reported. No witnesses shall be heard orally before the law court as a part of the case on appeal, but the court may, in such manner and on such terms as it deems proper, authorize additional evidence to be taken when the same has been omitted by accident or mistake or discovered after the hearing. (R. S. c. 95, § 31.)

Cross references.—See note to § 24, re presentation of newly discovered evidence when case reported to law court; note to c. 31, § 41, re evidence must be presented on appeal in workmen's compensation case.

Appeal carries with it all the evidence.—An appeal in equity, like a general motion for a new trial in an action at law, carries with it necessarily all the evidence in the case. Its absence is ground for dismissal. Sawyer v. White, 125 Me. 206, 132 A. 421.

And must be dismissed in absence of evidence or abstract thereof.—If neither the evidence nor an abstract thereof approved by the justice who heard the case is presented, the appeal is not properly before the law court and must be dismissed. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738; Girouard's Case, 145 Me. 62, 71 A. (2d) 682; Semo v. Goudreau, 145 Me. 251, 75 A. (2d) 376.

The law court cannot pass upon the merits of an appeal in equity in the absence of a full transcript of all the evidence. Ryan v. Megquier, 130 Me. 50, 153 A. 296.

As this section is mandatory and jurisdictional.—The provision of this section that "all evidence before the court below, or an abstract thereof, approved by the justice hearing the case, shall on appeal be reported," is both mandatory and jurisdictional. Girouard's Case, 145 Me. 62, 71 A. (2d) 682; Semo v. Goudreau, 145 Me. 251, 75 A. (2d) 376.

The parties cannot by agreement dispense with the report or abstract of the evidence or substitute anything therefor. The requirement is jurisdictional and must be strictly complied with. Girouard's Case, 145 Me. 62, 71 A. (2d) 682.

Abstract must be approved by sitting justice.—Any abstract of the evidence before the court below must be approved by the justice hearing the case. Sawyer v. White, 125 Me. 206, 132 A. 421; Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

And an agreed statement not certified by the sitting justice cannot take the place of a full record. Sawyer v. White, 125 Me. 206, 132 A. 421.

On an appeal in equity, a signed agreement or stipulation of counsel as to what the evidence was at the hearing before the sitting justice, unapproved, cannot be accepted as a substitute for "all evidence before the court below, or an abstract thereof, approved by the justice hearing the case," which is required by this section to be produced. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Appellant must secure and present report of evidence or abstract thereof.—The duty of securing and presenting a report of the evidence in equity cases, or an abstract thereof approved by the justice hearing the case, is imposed upon the party who appeals from a decree. Morin v. Claflin, 100 Me. 271, 61 A. 782.

An appeal from a final decree in equity calls for a review of the whole case (see

note to § 21) and the appellant is required to present to the appellant court the pleadings, orders, and "all evidence before the court below, or an abstract thereof, approved by the justice hearing the case..."; otherwise the appeal cannot be sustained. Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

And failure not excused by death of reporter or loss of report.—The failure to furnish the report or abstract of the evidence approved by the justice is not excused by inability to furnish the same. This is true even if such inability be due to death of the reporter or loss of the report. Girouard's Case, 145 Me. 62, 71 A. (2d) 682. See c. 113, § 191, re petition to set aside verdict in case of death or disability of reporter.

When, by reason of the death of an official court stenographer, a party who has taken an appeal in equity is unable to procure a report of the evidence, the law court has no jurisdiction to remand the case for a new trial. It must dismiss the appeal for want of prosecution. Morin v. Claflin, 100 Me. 271, 61 A. 782.

Quoted in Lang v. Chase, 130 Me. 56, 153 A. 353.

Sec. 32. Jury trial in equity.—The court may, in its discretion and upon application of either party, frame issues of fact in equity causes to be tried by a jury in the superior court in the county where such cause is pending. The presiding justice may confirm any verdicts rendered upon such issue or issues as were submitted to the jury and enter appropriate decrees thereon, or he may set aside such verdicts and render such decrees as equity requires, as if such issues had not been framed. Further action may then be taken by such presiding justice or the cause may be further heard by any justice of the supreme judicial court or of the superior court. In all causes where such issues are framed and tried, an appeal may be taken and exceptions had to rulings of law, as hereinbefore provided, and upon such appeal or exception, the law court may confirm or set aside the verdicts rendered in the cause or order a new trial of such issues and make such disposal of the case as equity demands. All such appeals and exceptions shall be taken, heard and determined as provided by sections 21 to 26, inclusive. (R. S. c. 95, § 32.)

Trial by jury is established feature of equity jurisprudence. — This section authorizes the court sitting in equity "upon application of either party" to frame issues of fact to be tried by a jury. Independently of the section, trials by jury, while not guaranteed by the constitution, are a well established feature of equity jurisprudence. Norris v. Moody, 120 Me. 151, 113 A. 24.

Former provision of section.—For a consideration of a former provision of this section that "when a motion is made in the Supreme Judicial Court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding judge," see Thompson, Appellant, 118 Me. 114, 106 A. 526.

Applied in Call v. Perkins, 65 Me. 439; Springer v. Austin, 75 Me. 416.

Cited in Lancy v. Randlett, 80 Me. 169, 13 A. 686.

Sec. 33. Writs of seizin or execution, etc.—Writs of seizin or execution and all other processes appropriate to causes in equity may be issued by the court to enforce its decrees. (R. S. c. 95, § 33.)

Sec. 34. Preliminary injunctions granted plaintiff; perpetual injunctions. — Preliminary injunctions may be granted by a single justice in term time or in vacation, upon the plaintiff filing a bond with sufficient sureties conditioned to pay all damages and costs caused thereby, if he is finally found not entitled to such injunction, unless a single justice, on motion to dissolve the same and hearing on the merits thereof, refuses to dissolve it. Such damages and costs shall be awarded by the court on motion, but if not so awarded before final decree, they may be determined in a suit on such bond. Such injunction may also be granted to either party on hearing without bond, upon oral evidence, depositions or affidavits and upon such notice and with such time for pleading, evidence and hearing as the court directs. No preliminary injunction shall be granted to either party unless his pleadings contain an application therefor; but an injunction may be granted pending the suit, in proper cases, upon motion and

hearing. Perpetual injunctions may be granted by the court or any justice thereof making final decree. (R. S. c. 95, § 34.)

The court has authority to use the extraordinary power or injunction, when it is properly applied for, when justice urgently demands it and when there is no legal remedy, or the remedy at law is inadequate. Levesque v. Pelletier, 144 Me. 245, 68 A. (2d) 9.

And such authority not limited by issue of constitutionality of statute.—The authority of a single justice in equity to issue preliminary injunctions is granted by this section. The fact that the issue involved is the constitutionality of a statute does not limit the power of the court, but the gravity of the situation as well as due and proper respect for the legislative branch of the government would dictate that instead of issuing a preliminary injunction ex parte on bond, it should only be issued after hearing unless there be imminent danger of immediate and irreparable damage, before a hearing may be had. Even in such case a temporary restraining order pending hearing on the application for temporary injunction would better comport with equity practice in this jurisdiction. Opinion of the Justices, 147 Me. 25, 30, 83 A. (2d) 213.

But the process of injunction should be applied with the utmost caution. Morse v. Machias Water Power & Mill Co., 42 Me. 119.

The writ of injunction is, and always has been, granted in Maine with great caution and only when necessary on clear and certain rights. Levesque v. Pelletier, 144 Me. 245, 68 A. (2d) 9.

And injunction must be specifically prayed for.—An injunction will not ordinarily be granted under a prayer for general relief. It must be specifically prayed for. Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402.

In prayer for relief and prayer for process. — The prayer for an injunction must not only be in the prayer for relief, but in the prayer for process. Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402.

When a bill prays for relief by way of injunction, but does not pray for the process of injunction, the process cannot be granted. Lewiston Falls Mfg. Co. v. Franklin Co., 54 Me. 402.

Injunction may be granted by judge sitting in county other than where bill filed. — Where a bill has been filed in one county, and afterwards an application is made for an injunction to a judge sitting in court in another county, and the injunction is granted, it may be upheld, although the statute seems to contemplate that the act is to be done by a judge out of court, unless by the court in the county where the bill is pending. Androscoggin & Kennebec R. R. v. Androscoggin R. R., 49 Me. 392.

Injunction not available if plaintiff could have defended himself in action at law.— It is only when the plaintiff has exercised due precaution to prevent an injury, that he can be relieved by an injunction. Whenever he could have defended himself, in an action at law, by making use of the same matter, and has not done it, or whenever it shall be in his power so to defend himself, he is not entitled to such relief. It is only to prevent mischief, otherwise in a manner irreparable, that this mode of redress can be resorted to. Russ v. Wilson, 22 Me. 207.

This section does not require a written motion for the assessment of damages and costs. It may be oral or in writing. Andrews v. Nalley, 119 Me. 500, 111 A. 804.

Section includes all damages passed on by master. — This section, which provides that in case a temporary injunction is dissolved upon the motion of the defendant that "plaintiff shall pay all the damages, and costs caused thereby," is broad enough to include every element of damage upon which the master passed. Andrews v. Nalley, 119 Me. 500, 111 A. 804.

But counsel fees paid in defense of suit are not recoverable.—The fees paid counsel to defend a suit in equity are not among "the damages and costs caused" by a preliminary injunction. Non consta that the preliminary injunction caused this expenditure. The plaintiff would have resisted the prayer for a permanent injunction, if no preliminary injunction had been obtained. With or without a preliminary injunction, there would have been the same defense, the same pleadings, the same evidence, the same arguments, the same judgment and consequently the same counsel fees. The expenditure was caused by the suit, and not by the preliminary injunction. It must therefore, be excluded in assessing the damages, in an action upon the bond for the preliminary injunction, which bond was only to pay such damages and costs as were caused by the preliminary injunction. Thurston v. Haskell, 81 Me. 303, 17 A. 73.

Signing and filing of formal decree not necessary to maintenance of action on bond. — Where there was a hearing in equity for an injunction and the bill, on its merits, was dismissed, an action may be sustained on the bond given to procure

the preliminary injunction, without a formal decree being signed and filed. Thurston v. Haskell, 81 Me. 303, 17 A. 73.

Condition of non-statute bond must be complied with.—If the bond filed was not a statute bond under the provisions of this section, it was, nevertheless, a binding obligation if it enabled the plaintiff to procure his injunction, and there is no reason why he should not respond to the condition he voluntarily entered into as a prerequisite in that behalf. Barrett v. Bowers, 87 Me. 185, 32 A. 871.

Former provision of section. — For a consideration of a former provision of this section requiring a motion to make a temporary injunction permanent before the end of the next term, see Marble v. McKenney, 60 Me. 332.

Applied in Maine State Raceways v. LaFleur, 147 Me. 367, 87 A. (2d) 674.

Sec. 35. Summary process when decree is disobeyed; contempt. — Whenever a party complains in writing and under oath that the process, decree or order of court, which is not for the payment of money only, has been disregarded or disobeyed by any person, summary process shall issue by order of any justice, requiring such person to appear on a day certain and show cause why he should not be adjudged guilty of contempt; and such process shall fix a time for answer to the complaint and may fix a time for hearing on oral testimony, depositions or affidavits, or may fix successive times for proof, counterproof and proof in rebuttal, or the time for hearing and manner of proof may be subsequently ordered upon the return day or thereafter. The court may for good cause enlarge the time for such hearing. If the person so summoned does not appear as directed or does not attend the hearing at the time appointed therefor as enlarged, or if, upon hearing, he is found guilty of such disregard or disobedience, he shall be adjudged in contempt and the court may issue a capias to bring him before it to receive sentence and may punish him by such reasonable fine or imprisonment as the case requires. The court may allow such offender to give bail to appear at a time certain, when such punishment may be imposed if he continues in contempt; but when a second time found guilty of contempt in disregarding or disobeying the same order or decree, no bail shall be allowed. When such person purges himself of his contempt, the justice may remit such fine or imprisonment or any portion thereof. No appeal lies from any order or decree for such punishment, nor shall exceptions thereto be allowed, save upon questions of jurisdiction; nor in any case shall such exceptions suspend the enforcement of any such order or decree unless the court so directs. (R. S. c. 95, § 35.)

Purpose of section.—The framers of the original equity procedure act, realizing that the authority to punish for contempt was a necessary attribute of a court invested with equity jurisdiction, inserted this section to define and to limit the manner in which such power should be exercised. Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Proceeding under this section differs from summary process for criminal contempt.—Contempts of court are of two kinds. Those committed in the presence of the court by insulting language or acts interrupting the proceedings may be summarily punished by the presiding judge after such hearing as he may deem just and necessary. Such are known as criminal contempts. There is another class of contempts known as civil contempts which are in a sense constructive and arise from matters not transpiring in court but in reference to failures to comply with the orders and decrees issued by the court and to be performed elsewhere. Such refusals or failures are undoubtedly contempts as actual as those committed in open court and liable to be punished under the same law; but the process to bring parties into court and the time given for a hearing by our rules are different from the summary process in case of criminal contempt. Cheney v. Richards, 130 Me. 288, 155 A. 642. See Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Contempt petition must be under oath. —The court is without jurisdiction to render any judgment under this section if the contempt petitions on which the proceedings are founded are not under oath. Such a want of jurisdiction is fatal in every stage of a cause and may be brought to the attention of the court at any time. Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

From earliest times courts have consist-

ently required that the petition or complaint on which the process is issued to bring a contemnor before the court should be under oath or supported by affidavit. There can be no doubt that the purpose of this section is declaratory of what had been the practice from earliest time. Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

And failure cannot be waived.—The requirement of this section that the complaint must be verified is jurisdictional and if not verified the defect is fatal, for jurisdiction cannot be conferred even by consent of the parties. A waiver is unavailing. Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

The oath called for by this section is not merely a procedural requirement which can be waived. It is essential to confer jurisdiction. Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Contempt proceeding is independent. — A contempt proceeding, though arising in a case in equity based on the violation of an injunction, is an independent proceeding. Cheney v. Richards, 130 Me. 288, 155 A. 642.

And separate from original suit. — Proceedings for contempt, based upon disobedience to a decree, are independent and separate from the original suit. Cheney v. Richards, 130 Me. 288, 155 A. 642.

Exception may be taken on question of jurisdiction.—Whatever doubts may be entertained as to the general right to except to the rulings and adjudications of the court in matters of contempt, where the jurisdiction is unquestioned, there is no doubt that an exception may be taken on the question of jurisdiction, where it is distinctly raised and adjudicated upon as a matter of law. Androscoggin & Kennebec R. R. v. Androscoggin R. R., 49 Me. 392.

And case may be reported. — The statute which specifically denies the right of a party to question the findings below on appeal or exceptions (except on the question of jurisdiction) does not deny the right of the judge, with the consent of the parties, to report the case. Cheney v. Richards, 130 Me. 288, 155 A. 642.

History of section. — See Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Applied in Cushman Co. v. Mackesy, 135 Me. 294, 195 A. 365.

Sec. 36. No injunctions in labor disputes without hearing. — No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, except after hearing the testimony of witnesses in open court with opportunity for cross-examination in support of the allegations of a complaint made under oath and testimony in opposition thereto, if offered.

Such hearing shall be held after due and personal notice thereof has been given in such manner as the court shall direct to all known persons against whom relief is sought; provided, however, that if a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be granted upon the expiration of such reasonable notice of application therefor as the court may direct by order to show cause, but in no case less than 48 hours.

Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order and then only upon testimony under oath, or in the discretion of the court upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

Such a temporary restraining order shall be effective for no longer than 5 days and at the expiration of said 5 days shall become void and not subject to renewal or extension; provided, however, that if the hearing for a temporary injunction shall have been begun before the expiration of the said 5 days, the restraining order may in the court's discretion be continued until a decision is reached upon the issuance of the temporary injunction. A temporary restraining order may be issued without notice on condition that complainant shall first file an undertaking with adequate security sufficient to recompense those enjoined for any loss, expense or damage caused by the erroneous issuance of such order, including all reasonable costs and expense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. Nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. (R. S. c. 95, § 36.)

Applied in Cushman Co. v. Mackesy, 135 Me. 490, 200 A. 505.

Sec. 37. Right of those judged in contempt.—In all cases where a person shall be charged with contempt for violation of a restraining order or injunction issued by a court or judge or judges thereof, in any case involving or growing out of a labor dispute, the accused shall enjoy:

I. The rights as to admission to bail that are accorded to persons accused of crime;

II. The right to be notified of the accusation and a reasonable time to make a defense, provided the alleged contempt is not committed in the immediate view or presence of the court;

III. Upon demand, the right to a speedy and public trial by an impartial jury of the county wherein the contempt shall have been committed; provided that this requirement shall not be construed to apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct or disobedience of any officer of the court in respect to the writs, orders or process of the court. (R. S. c. 95, § 37.)

Applied in Cushman Co. v. Mackesy, 135 Me. 294, 195 A. 365.

Uniform Declaratory Judgments Act.

Act does not enlarge courts' jurisdiction. —The purpose of the Uniform Declaratory Judgments Act is not to enlarge the jurisdiction of the courts to which it is applicable but to provide a more adequate and flexible remedy in cases where jurisdiction already exists. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224; Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12; Lewiston v. Johnson, 148 Me. 89, 89 A. (2d) 743.

But it does give a new remedy in cases where jurisdiction exists. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224.

The Uniform Declaratory Judgments Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it manifestly has opened to prospective defendants—and to plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed. In that sense, it has decidedly extended the power of courts to grant relief in cases otherwise within their jurisdiction. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224.

The act provides an entirely new remedy; a form of relief not theretofore possessed by plaintiffs. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Sec. 38. Scope. — Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (R. S. c. 95, § 38.)

A proceeding for a declaratory judgment may be maintained even though another remedy is available. To hold otherwise would do violence to the statute which provides in this section that the remedy is available "whether or not further relief is

or could be claimed." Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224.

But a controversy must exist.—In a case under the Uniform Declaratory Judgments Act, it is essential that a controversy exist; for otherwise the petition would seek only an advisory opinion of the court. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224; LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

And the remedy must be sought in the appropriate court and the nature of the case, not the pleasure of the petitioner, is the test of the forum. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224; Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

And the question must be within court's jurisdiction.—The controversial or doubtful question must be one within the jurisdiction of the court in which the declaratory judgment or decree is sought. A declaration of legal rights may be had only in the courts of law. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224.

But it may be sought either in court of equity or court of law. — A petition for a declaratory judgment is not a proceedings in equity, merely because in form the procedure may be equitable. That the petitioner assumes it to be an action in equity is, however, immaterial if the subject matter is of such a nature that the court to which the petition is addressed may give the desired relief. As a matter of fact the relief may be availed of either in courts of equity or in courts of law, but the action must be brought in that court which has jurisdiction of the subject matter. Maine Broadcasting Co. v. Eastern Trust Banking Co., 142 Me. 220, 49 A. (2d) 224.

Sec. 39. Construction and validity of statutes, etc.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. (R. S. c. 95, § 39.)

Sec. 40. Construction of contracts before or after breach.—A contract may be construed either before or after there has been a breach thereof. (R. S. c. 95, § 40.)

Sec. 41. Rights of executor, etc.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent may have a declaration of rights or legal relations in respect thereto:

I. To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

II. To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

III. To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (R. S. c. 95, § 41.)

Sec. 42. Enumeration not exclusive. — The enumeration in sections 39, 40 and 41 does not limit or restrict the exercise of the general powers conferred in section 38 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (R. S. c. 95, § 42.)

Sec. 43. Discretion of court.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (R. S. c. 95, § 43.)

Sec. 44. Review. — All orders, judgments and decrees under the provisions of sections 38 to 50, inclusive, may be reviewed as other orders, judgments and decrees. (R. S. c. 95, § 44.)

Right of review is same as in other cases of same nature. — This section provides that "all orders, judgments, and decrees," under the act "may be reviewed as other orders, judgments, and decrees." This means that the right of review granted by the act as applicable to a specific case is the same as in other cases of the same nature. The same method must be employed to obtain a review of orders, judgments and decrees of a justice made or rendered in proceedings for a declaratory judgment, as would have to be employed to obtain a review of orders, judgments and decrees made or rendered by a single justice in an action to enforce the right or obligation of which a declaration is obtained or sought to be obtained by declaratory judgment. Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Under this section of the statute, if the case is a decision of a single justice sitting as a court of law as distinguished from equity, the only procedure to review his findings is by a bill of exceptions. Clapperton v. United States Fidelity & Guaranty Co., 148 Me. 257, 92 A. (2d) 336. See c. 106, § 14 and note.

And sufficiency of exceptions determined by same rules.—The sufficiency of bills of exceptions to orders, judgments and decrees of a justice in proceedings to obtain a declaratory judgment is determined by the same rules applicable to bills of exceptions to orders, judgments and decrees of a single justice in other cases. Clapperton v. United States Fidelity & Guaranty Co., 148 Me. 257, 92 A. (2d) 336.

Sec. 45. Supplemental relief. — Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith. (R. S. c. 95, § 45.)

Sec. 46. Jury trial.—When a proceeding under the provisions of sections 38 to 50, inclusive, involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (R. S. c. 95, § 46.)

Sec. 47. Costs.—In any proceeding under the provisions of sections 38 to 50, inclusive, the court may make such award of costs as may seem equitable and just. (R. S. c. 95, § 47.)

Sec. 48. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard. (R. S. c. 95, § 48.)

Section not complied with by making members of city council parties.—The requirements of this section that a municipality be made a party in proceedings involving the validity of a municipal ordinance are not complied with by making the members of the city council parties, since members of the city council are not the municipality. LaFleur v. Frost, 146 Me. 270, 80 A. (2d) 407.

Sec. 49. "Person" defined. — The word "person," wherever used in sections 38 to 50, inclusive, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsoever. (R. S. c. 95, § 49.)

Sec. 50. Uniformity of interpretation; title. — The provisions of sections 38 to 50, inclusive, shall be so interpreted and construed as to effectuate

their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees; and may be cited as the "Uniform Declaratory Judgments Act." (R. S. c. 95, § 50.)

Act liberally construed. — The Uniform Declaratory Judgments Act is remedial and should receive a liberal interpretation in order that the purpose which the legislature had in mind in enacting it may not be thwarted. Maine Broadcasting Co. v. Eastern Trust & Banking Co., 142 Me. 220, 49 A. (2d) 224.

Cited in Sears, Roebuck & Co. v. Portland, 144 Me. 250, 68 A. (2d) 12.

Miscellaneous Provisions. Legal Holidays.

Sec. 51. Proceedings in case of death or disability of presiding justice. — In case of physical or mental disability, death, resignation or removal of the justice presiding at any civil or criminal proceeding before the supreme judicial court or the superior court or at a hearing in equity in which a motion for new trial is made, exceptions presented or appeal taken, any justice of the supreme judicial court or of the superior court may, upon motion and after notice and hearing, allow the exceptions, and upon request of the moving party, order the official stenographer to furnish a certified copy of the evidence required under the motion or appeal and such portion thereof as may be made a part of the exceptions. (R. S. c. 95, § 51.)

This section permits another justice to act in those instances only where there is death, disability, resignation or removal of the one who presided. Bradford v. Davis, 143 Me. 124, 56 A. (2d) 68.

This section authorizes any justice to allow a bill of exceptions involving the rulings of another, on motion, and "after notice and hearing," when that other is not available. Gregoire v. Lesieur, 146 Me. 203, 78 A. (2d) 494.

When a bill of exceptions has been duly presented for allowance, but before allowance the justice presiding at the trial becomes incapacitated for allowing them for any of the reasons assigned in this section, any justice may upon motion and hearing allow them. Borneman v. Milliken, 118 Me. 168, 106 A. 345.

Applied in Hashey v. Bangor Roofing & Sheet Metal Co., 142 Me. 405, 50 A. (2d) 916.

Cited in Chasse v. Soucier, 118 Me. 62, 105 A. 853; State v. Johnson, 145 Me. 30, 71 A. (2d) 316.

Sec. 52. Exceptions certified as frivolous.—When a justice deems any exceptions allowed by him or any appeal in a proceeding in equity frivolous and intended for delay, he may so certify on the motion of the party not excepting, and such exceptions and appeal and the record connected therewith shall be transmitted to the chief justice and be argued in writing on both sides within 30 days thereafter, unless the justice transmitting the same, for good cause, enlarges the time; and they shall be considered and decided by the justices of said court as soon as may be and the decision certified to the clerk of courts of the county where the cause is pending; and if the decision is adverse to the party taking such appeal or exceptions, treble costs may be allowed the prevailing party. (R. S. c. 95, § 52.)

Under this section the appeal or exceptions shall be transmitted when they are certified by the justice as frivolous. The section is mandatory. State v. Edminister, 101 Me. 332, 64 A. 611.

Applied in Poor v. Beatty, 78 Me. 580, 7 A. 541; Webb v. Fuller, 83 Me. 405, 22 A. 384; Rose v. Osborne, 137 Me. 110, 15 A. (2d) 420.

Sec. 53. Exceptions intended for delay, overruled. — When exceptions are certified and transmitted to the chief justice as frivolous and intended for delay and are not argued by the excepting party within 30 days thereafter or within such further time as the presiding justice shall have allowed therefor, they may be at once overruled for want of prosecution. (R. S. c. 95, § 53.)

Sec. 54. Absent defendant not served with process to have review

within 1 year; revisory power of court, save on appeal, not abridged. —In case of any decree, an absent defendant whose property has been attached and who does not appear by the record to have been served with process within the state and has made no appearance before final process shall have a review within 1 year after final decree as of right, with stay or supersedeas of such process. The defendant may in such case apply to any justice by petition setting forth the grounds for such review; whereupon, if such justice orders reasonable notice to the other party to appear at a time and place named therein to show cause why such review should not be granted, when such review is granted, the justice may prescribe the time in which the defendant's defense shall be made. Reviews may also be granted on petition whenever, by fraud, accident or mistake and without fault of the party against whom the decree was ordered, justice has not been done; provided that the petition therefor is filed within 6 years after final decree; and notice may be ordered and served with like rights of stay or supersedeas as herein provided. Upon granting the review, the court may fix a time within which the next proceeding shall be had.

Nothing herein contained abridges the power of the court to hold all interlocutory orders and decrees subject to revision, at any time before final decree, except when they have been decided on appeal. (R. S. c. 95, § 54.)

This section affirms the power of the court to hold all interlocutory orders and decrees subject to revision at any time before final decree. It is noticeable that the power of revision thus saved to the court in a given suit is limited to interlocutory decrees and is to be exercised before the final decree is made. Parsons v. Stevens, 107 Me. 65, 78 A. 347.

Sec. 55. Legal holidays.—No court shall be held on Sunday or any day designated for the annual Thanksgiving; or for the choice of presidential electors; New Year's day, January 1st; Washington's birthday, February 22nd; the 19th day of April; the 30th day of May; the 4th of July; the 1st Monday of September; the day of the state-wide primary election; the day of the state election; the day of any special state-wide election; Armistice day, November 11th; or on Christmas day; and when the time fixed for a term of court falls on any of said days, it shall stand adjourned until the next day, which shall be deemed the 1st day of the term for all purposes. The public offices in county buildings may be closed to business on the above-named holidays. When any one of the above-named holidays falls on Sunday, the Monday following shall be observed as a holiday, with all the privileges applying to any of the days above named. (R. S. c. 95, § 55. 1953, c. 225.)

See c. 3, §§ 16, 26, re boards of registration not to be in session; c. 59, § 155, re bank holidays; c. 112, §§ 87-89, re days on which no arrest made or process served.

Sec. 56. Adjournment of courts because of danger from infection. — When a malignant infectious distemper prevails in any town wherein the supreme judicial court, the superior court or court of county commissioners is to be held, said courts may be adjourned and held in any town in said county, by proclamation made in such public manner as such courts judge best, as near their usual place of meeting as they think that safety permits. (R. S. c. 95, § 56.)

Cited in Brown v. Mosher, 83 Me. 111, 21 A. 835.

Sec. 57. Surety bonds authorized in civil and criminal cases. — In any civil or criminal action or mesne process or other process where a bail bond, recognizance or personal sureties or other obligation is required, or whenever any person is arrested and is required or permitted to recognize with sureties for his appearance in court, the court official or other authority authorized by law to accept and approve the same shall accept and approve in lieu thereof, when offered, a good and sufficient surety bond duly executed by a surety company authorized to do business in this state. (R. S. c. 95, § 57.)