REVISED STATUTES

OF THE

STATE OF MAINE

1954

1961 CUMULATIVE SUPPLEMENT

ANNOTATED

IN FIVE VOLUMES

VOLUME 3

Discard Previous Pocket Part Supplement

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA
1961

Sec. 103. When action is commenced.—An action is commenced when the complaint is either filed with the clerk, deposited in the mail addressed to the clerk, delivered to an officer for service or deposited in the mail addressed to such officer. (R. S. c. 99, § 103. 1959, c. 317, § 151.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 22.

Sec. 105. Renewal of promise in writing.—In actions founded on any contract, no acknowledgment or promise takes the case out of the operation hereof, unless the acknowledgment or promise is express, in writing and signed by the party chargeable thereby. No such acknowledgment or promise made by one joint contractor affects the liability of the others. (R. S. c. 99, § 105. 1959, c. 317, § 152.)

Effect of amendment.—The 1959 amendment deleted "of debt or on the case," formerly appearing after the word "actions" in the first sentence.

Effective date of 1959 amendment.—See note to § 22.

Sec. 107. When nonjoinder of defendants is pleaded.—In an action on a contract, if the defendant pleads that another person ought to have been jointly sued and issue is joined thereon, and it appears on the trial that the action was barred by the provisions hereof against such person, the issue shall be found for the plaintiff. (R. S. c. 99, § 107. 1959, c. 317, § 153.)

Effect of amendment.—The 1959 amendment deleted "in abatement," formerly appearing after the word "pleads" near the beginning of this section.

Effective date of 1959 amendment.—See note to § 22.

Sec. 109. Presumption of payment after 20 years.—Every judgment and decree of any court of record of the United States, or of any state, or of a municipal court, trial justice or justice of the peace in this state shall be presumed to be paid and satisfied at the end of 20 years after any duty or obligations accrued by virtue of such judgment or decree. (R. S. c. 99, § 109. 1959, c. 317, § 154.)

Effect of amendment.—The 1959 amendment added the words "municipal court" in this section.

Effective date of 1959 amendment.—See note to § 22.

Sec. 110. Application of the statutes of limitation to counterclaims.—All the provisions hereof respecting limitations apply to any counterclaim by the defendant. The time of such limitation shall be computed as if an action had been commenced therefor at the time the plaintiff's action was commenced. (R. S. c. 99, § 110. 1959, c. 317, § 155.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 22.

Chapter 113.

Proceedings in Court in Civil Actions.

Sections 75-88. Counterclaim.
Sections 89-94. Referees, Masters and Auditors.

Procedure. General Provisions.

Secs. 1-4. Repealed by Public Laws 1959, c. 317, § 156.

Effective date and applicability of Public Laws 1959, c. 317. — Section 420, chapter 317, Public Laws 1959, provides as follows: "This act shall become effective December 1, 1959. It shall apply to all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular ac-

tion pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."

Sec. 5. Execution stayed one year unless bond given.—Execution shall not issue upon a judgment by default against an absent defendant in a personal action who has no actual notice thereof until one year after entry of the judgment unless the plaintiff first gives bond to the defendant with one or more sureties in double the amount of damages and costs, conditioned to repay to the defendant the amount of the judgment or any part thereof from which he may ultimately be relieved as a result of motion therefor. If a bond is given, any attachment of real or personal property or attachment on trustee process shall continue for 60 days after the bond is filed with the court. If a bond is not given, any such attachment shall continue for one year and 60 days after entry of the default judgment. If the defaulted defendant files within one year of the default judgment a motion for relief therefrom, any such attachment shall continue until 60 days after denial of the motion, if it is denied, and if the motion is granted in whole or in part, shall continue for the same period as the attachment would have continued if the default judgment had not been entered. (R. S. c. 100, § 5. 1959, c. 317, § 157.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317. — Section 420, chapter 317, Public Laws 1959, provides as follows: "This act shall become effective December 1, 1959. It shall apply to all actions brought after December 1, 1959 and also to all further proceedings in actions at law or suits in equity then pending, except to the extent that in the opinion of the court the application of this act in a particular action pending on December 1, 1959 would not be feasible or would work injustice, in which event the laws in effect prior to December 1, 1959 would prevail."

Cited in Southard v. Camden Nat. Bank, 151 Me. 411, 120 A. (2d) 221.

Sec. 6. Bond left with clerk.—The bond shall be deposited with the clerk, who shall decide upon the sufficiency of the sureties, subject to an appeal to a justice of the court. (R. S. c. 100, § 6. 1959, c. 317, § 158.)

Effect of amendment.—The 1959 amendment deleted provisions for a petition for review, which formerly followed the words "justice of the court" at the end of the section.

Effective date of 1959 amendment.—See note to § 5.

Cited in Southard v. Camden Nat. Bank, 151 Me. 411, 120 A. (2d) 221.

Sec. 7. Executions issued upon judgment on default, without deposit of bond, valid after one year.—Whenever through accident, inadvertence or mistake an execution has been issued by the clerk, judge or recorder of any court in any county upon a judgment rendered on default of an absent defendant in a personal action, within one year after the rendition of such judgment, without deposit of the bond specified in sections 5 and 6, all proceedings upon or by virtue of such execution or judgment shall, after one year from the rendition of such judgment, have the same effect and validity as if the bond had been duly given, deposited and approved unless relief from the judgment has been sought within said year. If such relief from the judgment is denied, all such proceedings shall be valid as aforesaid after such dismissal. (R. S. c. 100, § 7. 1959, c. 317, § 159.)

Effect of amendment.—The 1959 amendment substituted the language following the words "deposited and approved unless" for provisions as to the validity of the proceedings if judgment was not reversed on a petition for review.

Effective date of 1959 amendment.—See note to § 5.

Cited in Southard v. Camden Nat. Bank, 151 Me. 411, 120 A. (2d) 221.

Secs. 8, 9. Repealed by Public Laws 1959, c. 317, § 160.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 10. On appeals, original papers sent up; exceptions. — In cases carried from a trial justice or municipal court to a higher court, all depositions

and original papers, except the process by which the action was commenced, the return of service thereon and the pleadings shall be certified by the proper officer and carried up without leaving copies unless otherwise ordered by the court having original cognizance. (R. S. c. 100, § 10. 1961, c. 317, § 358.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" near the middle of the section.

Secs. 11, 12. Repealed by Public Laws 1959, c. 317, § 160.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 13. Complaint lost after service, new one filed.—When in an action pending, the loss or destruction of a writ, complaint or other process after service is proved by affidavit or otherwise, the court may allow a new one to be filed, corresponding thereto as nearly as may be, with the same effect as the one lost or destroyed. (R. S. c. 100, § 13. 1961, c. 317, § 359.)

Effect of amendment.—The 1961 amendment substituted "complaint or other process" for "or process" in this section.

Secs. 14-19. Repealed by Public Laws 1959, c. 317, § 160.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 20. Subsequent attachment.—After service of the summons and complaint upon the defendant, the court on motion without notice, may for cause shown order an additional attachment of real estate, goods and chattels on other property. (R. S. c. 100, § 20. 1959, c. 317, § 161.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 21. Testimony of witnesses in civil actions taken orally in open court.—In all civil actions the testimony of witnesses shall be taken orally in open court, unless otherwise provided by rule. (R. S. c. 100, § 21. 1959, c. 317, § 162.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Secs. 22, 23. Repealed by Public Laws 1959, c. 317, § 163.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 24. Change of venue.—Any justice of the superior court, on motion of either party, shall, for cause shown, order the transfer of any civil action or criminal case pending in said court to the docket thereof in any other county for trial, preserving all attachments. (R. S. c. 100, § 24. 1959, c. 317, § 164.)

Effect of amendment.—The 1959 amendment deleted the words "while holding a nisi prius term," formerly appearing after the words "superior court."

Effective date of 1959 amendment.—See note to § 5.

Secs. 26-28. Repealed by Public Laws 1959, c. 317, § 165.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 29. Treasurers may bring actions in their own names. — Treasurers of state, counties, towns and corporations may maintain civil actions in their own names as treasurers on contracts given to them or their predecessors and

prosecute civil actions pending in the names of their predecessors. (R. S. c. 100, § 29. 1961, c. 317, § 360.)

Effect of amendment.—The 1961 amendment substituted "civil actions" for "suits" in two places in this section.

Sec. 30. Actions by unincorporated societies.—Any organized unincorporated society or association may sue in the name of its trustees for the time being and may maintain an action though the defendant or defendants or some of them are members of the same society or association. (R. S. c. 100, § 30. 1959, c. 317, § 166.)

Effect of amendment.—The 1959 amendment deleted the words "at law," formerly appearing after the word "action."

Effective date of 1959 amendment.—See note to § 5.

Sec. 31. Civil action for penalties.—Penalties may be recovered by civil action. (R. S. c. 100, § 31. 1959, c. 317, § 167.)

Effect of amendment.—Prior to the 1959 amendment, this section read "Penalties may be recovered by action of debt when no other mode of recovery is provided."

Effective date of 1959 amendment.—See note to § 5.

Sec. 32. Assignee of grantee may sue on real covenants of first grantor.—The assignee of a grantee or his executor or administrator after eviction by an older and better title may maintain an action on a covenant of seizin or freedom from encumbrance contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might have recovered on eviction, upon filing, with his complaint or at such later time as the court permits, for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon. The prior grantee cannot, in such case, release the covenants of the first grantor to the prejudice of his grantee. (R. S. c. 100, § 32. 1959, c. 317, § 168.)

Effect of amendment.—The 1959 amendment substituted "with his complaint or at such later time as the court permits" for "at the first term in court" in the first sentence.

Effective date of 1959 amendment.—See note to § 5.

Sec. 33. Grantee may defend action.—Grantees may appeal and defend in civil actions against their grantors in which the real estate conveyed is attached. (R. S. c. 100, § 33. 1961, c. 317, § 361.)

Effect of amendment.—The 1961 amendment substituted "civil actions" for "suits" in this section.

Sec. 34. Repealed by Public Laws 1959, c. 317, § 169.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 35. In actions of covenant, if encumbrance right of dower, it may be assigned and be measure of damages.—In an action for breach of covenant against encumbrances contained in a deed of real estate, when the encumbrance is a right of dower, if such dower has been assigned and not released, the value thereof shall be the measure of damages; but if it has been demanded and not assigned, the court, on application of the plaintiff, shall cite the claimant of dower to appear and become a party by personal service made 14 days before the date set for such appearance. If she does not appear or if she appears and refuses to release such right, the court shall appoint 3 commissioners to assign the same, who shall proceed in the manner provided for commissioners appointed under chapter 176 to make partition. When their report is made and accepted by

the court, it is a legal assignment of dower and the value thereof is the measure of damages in said action. (R. S. c. 100, § 35. 1961, c. 317, § 362.)

Effect of amendment.—The 1961 amendment divided this section into three sentences, substituted "the date set for such appearance" for "the term of court to which it is returnable" at the end of the present first sentence and deleted "the provisions of" preceding "chapter 176" near the end of the present second sentence.

Secs. 36-38. Repealed by Public Laws 1959, c. 317, § 169.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 39. Power of court unaffected by existence or expiration of a term.—The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action. (R. S. c. 100, § 39. 1945, c. 136. 1959, c. 317, § 170.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

"Vacation" defined.—Our court has interpreted the word "vacation," as used in this section, to mean one, single, nonrecurring period of time between the end of the term last adjourned and beginning of the very next. Dumais v. Dumais, 153 Me. 24, 134 A. (2d) 371, decided prior to the 1959 amendment.

Sec. 40. Actions on insurance policies. — In all actions on insurance policies, a complaint on an account annexed, with an allegation that the plaintiff has complied with all conditions of the policy of insurance mentioned in the account annexed, shall be deemed sufficient. The account annexed shall state the number of the policy and the amount claimed as due, both as principal sum and interest, if any. The fact that the amount claimed in the account annexed varies from the amount found to be due the plaintiff shall not defeat the action unless there be a fraudulent claim of an excessive amount. If the defendant relies upon the breach of any condition of the policy by the plaintiff as a defense, it shall set the same up by brief statement or special plea at its election; and all conditions, the breach of which is known to the defendant and not so specially pleaded, shall be deemed to have been complied with by the plaintiff. The plaintiff by counter brief statement or replication may set up any matter waiving or legally excusing his noncompliance with conditions as alleged by the defendant. Nothing herein shall be construed as changing in any way the common law burden of proof as to such matters as are so put in issue under the pleadings. (R. S. c. 100, § 40. 1959, c. 317, § 171.)

Effect of amendment.—The 1959 amendment deleted "at law" following "actions" and substituted "complaint" for "declaration in indebitatus assumpsit" near the beginning of the section.

Effective date of 1959 amendment.—See note to § 5.

Limitation of actions. — The usual six year statute of limitation is not applicable to statutory actions upon insurance policies where other applicable law applies. Hubert v. National Casualty Co., 154 Me. 94, 144 A. (2d) 119.

Sec. 41. Trespass on land; tender.—In actions for trespass on lands, the defendant may by answer disclaim all title to the land described, and allege that the trespass was involuntary, or by negligence or mistake, or in the prosecution of a legal right, and that before action brought he tendered sufficient amends therefor or that he brings money into court to satisfy the damages with costs to that time. If on trial he establishes the truth of his allegations, he recovers costs. (R. S. c. 100, § 41. 1959, c. 317, § 172.)

Effect of amendment.—The 1959 amendment divided the section into two sentences, substituted "for" for "of" following "actions," substituted "by answer disclaim" for "file a brief statement disclaiming" and substituted "allege" for "alleging" in the first sentence.

Effective date of 1959 amendment.—See note to § 5.

Secs. 42, 43. Repealed by Public Laws 1959, c. 317, § 173.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 44. Town may make an offer of judgment. — In actions against towns for injury to the person or damage to property from defect in ways, a town may make an offer of judgment in the same manner and with the same effect as defendants in other civil actions. (R. S. c. 100, § 44. 1959, c. 317, § 174.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date of 1959 amendment.—See note to § 5.

Sec. 45. Partial failure of consideration of note. — In any civil action in which the amount due on a promissory note given for the price of land conveyed is in question and a total failure of consideration would be a defense, partial failure of consideration may be shown in reduction of damages. (R. S. c. 100, § 45. 1961, c. 317, § 363.)

Effect of amendment.—The 1961 amendment substituted "civil action" for "proceeding at law or in equity" near the beginning of this section.

Sec. 48. Mitigation of damages in action for libel.—The defendant in an action for libel may prove in mitigation of damages that the charge was made by mistake or through error or by inadvertence and that he has in writing, within a reasonable time after the publication of the charge, retracted the charge and denied its truth as publicly and as fully as he made the charge. He may prove in mitigation of damages that the plaintiff has already recovered or has brought action for damages for, or has received or has agreed to receive compensation for, substantially the same libel as that for which said action was brought. (R. S. c. 100, § 48. 1959, c. 317, § 175.)

Effect of amendment.—The 1959 amendment divided the section into two sentences, deleted the words "under the general issue" after the word "prove" in the first sentence and deleted the word "also" after the words "He may" at the beginning of the second sentence.

Effective date of 1959 amendment.—See note to § 5.

Secs. 50-52. Repealed by Public Laws 1959, c. 317, § 176.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 54. Sureties on official bond may defend. — Sureties upon official bonds may appear and defend in actions against their principal whenever such sureties may ultimately be liable upon such bonds. (R. S. c. 100, § 54. 1961, c. 317, § 364.)

Effect of amendment.—The 1961 amendment substituted "actions" for "suits" near the middle of this section.

Sec. 57. Repealed by Public Laws 1959, c. 317, § 176.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 58. Guardian of incompetent party entitled to compensation.—A guardian appointed to prosecute or defend an action for an incompetent party is entitled to a reasonable compensation and is not liable for costs. (R. S. c. 100, § 58. 1959, c. 317, § 177.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Secs. 59, 60. Repealed by Public Laws 1959, c. 317, § 178.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 61. In trespass, jury to find if willful. — In action for trespass on property, the court and jury or magistrate shall determine whether the trespass was committed willfully. If so found, a record thereof shall be made and a memorandum thereof minuted on the margin of the execution. (R. S. c. 100, § 61. 1961, c. 317, § 365.)

Effect of amendment.—The 1961 amendment divided this section into two sentences and substituted "for" for "of" near the beginning of the section.

Sec. 63. Repealed by Public Laws 1959, c. 317, § 178.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 64. No action on demands discharged by partial payment.

Section modifies common law, etc.

In accord with original. See Larsen v. Zimmerman, 153 Me. 116, 135 A. (2d) 270.

This section applies to demands, etc.

In accord with original. See Larsen v. Zimmerman, 153 Me. 116, 135 A. (2d) 270.

It must be shown that the debtor, etc.

In accord with original. See Farina v. Sheridan Corp., 155 Me. 234, 153 A. (2d) 607.

Accord and satisfaction is a question, etc.

In accord with original. See Farina v. Sheridan Corp., 155 Me. 234, 153 A. (2d) 607.

Defense of Suits by Subsequent Attaching Creditors.

Sec. 65. Petition to defend prior actions by subsequent attaching creditor.—When property has been attached, a plaintiff who has caused it to be attached in a subsequent action may, by himself or attorney, move the court for leave to defend the prior action and set forth therein the facts as he believes them to be, under oath. The court may grant or refuse such leave. (R. S. c. 100, § 66. 1961, c. 317, § 366.)

Effect of amendment.—The 1961 amendment divided this section into two sentences, substituted "action" for "suit" in two places in the present first sentence and substituted "move" for "petition" in that sentence.

Sec. 66. If leave granted, bond given.—If leave is granted, the petitioner shall give bond or enter into recognizance with sufficient surety in such sum as the court orders, to pay the plaintiff in the prior action all damages and costs occasioned by such defense. An entry of record shall be made that he is admitted to defend such action. (R. S. c. 100, § 67. 1961, c. 317, § 367.)

Effect of amendment.—The 1961 amendment divided this section into two sentences and substituted "action" for "suit" in both of the present sentences.

Sec. 69. When judgment in prior action rendered, petition to seek relief.—When judgment in such prior action has been rendered, the plaintiff in such subsequent action may petition for leave to seek relief from the judgment, first giving bond to each party as provided in section 66 and such leave may or may not be granted. (R. S. c. 100, § 70. 1959, c. 317, § 179.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Suits by and Against Bankrupts and Insolvents.

Sec. 71. Actions by bankrupts or insolvents.—A person who has been declared a bankrupt or an insolvent may maintain an action respecting his former property in his own name, unless objection is made, if before final judgment the assent of his trustee or assignee is filed in the office of the clerk of the court in which the action is pending. (R. S. c. 100, § 72. 1961, c. 317, § 368.)

Effect of amendment.—The 1961 amendment deleted "by plea in abatement" following "objection is made" near the middle of the section.

Sec. 73. Other actions against bankrupts or insolvents.—All other actions for recovery of a debt provable in bankruptcy or insolvency, when it appears

that any defendant therein has filed his petition in bankruptcy or insolvency or has been adjudged a bankrupt or an insolvent, on petition of his creditors before or after the commencement of the action, shall be continued until the bankrupt or insolvent proceedings are closed unless the plaintiff strikes such defendant's name from the action, which he may do without costs; but when such defendant does not use diligence in the prosecution of his bankrupt or insolvent proceedings, after 30 days' notice to him in writing from the plaintiff, the court may refuse further delay. (R. S. c. 100, § 74. 1961, c. 317, § 369.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" in two places in this section and substituted "30 days' notice" for "1 term's notice" near the end of the section.

Counterclaim.

Sec. 75. Repealed by Public Laws 1959, c. 317, § 180.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 76. Counterclaim for unpaid taxes.—A city or town in an action by a delinquent taxpayer may assert a counterclaim for any unpaid taxes against any properly authorized payment to which the taxpayer is entitled, provided prior to trial the amount shall have been paid to the tax collector and a receipt in writing shall have been given to the person taxed, as prescribed in chapter 91-A, section 106. (R. S. c. 100, § 77. 1957, c. 397, § 53. 1959, c. 317, § 181.)

Effect of amendments. — The 1957 amendment substituted "section 106 of chapter 91-A" for "section 86 of chapter 92" at the end of this section.

Prior to the 1959 amendment, the section related to demands which might be set off. The amendment eliminated the former first sentence, substituted "assert a counterclaim for" for "set off" near the beginning of the former second sentence and changed the form of the reference at the end of the section.

Effective date of 1959 amendment.—See note to § 5.

Secs. 77-81. Repealed by Public Laws 1959, c. 317, § 182.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 82. Demands due from deceased person, counterclaim.—Demands against a person belonging to a defendant at the time of the death of such person may be asserted by counterclaim against claims prosecuted by his executor or administrator. If a balance is found due to the defendant, judgment shall be in like form and of like effect as if he had commenced an action therefor. If the estate is insolvent, it must be presented to the commissioners or added to the list of claims like other judgments. (R. S. c. 100, § 83. 1959, c. 317, § 183.)

Effect of amendment.—The 1959 amendment divided the section into three sentences, substituted "asserted by counterclaim" for "set off" in the first sentence and substituted "an action" for "a suit" in the second sentence.

Effective date of 1959 amendment.—See note to § 5.

Sec. 83. Counterclaim in actions against persons in a representative capacity.—In actions against executors, administrators, trustees or others in a representative capacity, they may assert by counterclaim such demands as those whom they represent might have so asserted in actions against them; but no demands due to or from them in their own right can be asserted by counterclaim in such actions. (R. S. c. 100, § 84. 1959, c. 317, § 184.)

Effect of amendment.—The 1959 amendment substituted "assert by counterclaim" for "set off" near the beginning of the section, substituted "so asserted" for "set off" near the middle of the section and substituted "asserted by counterclaim" for "set off" near the end of the section.

Effective date of 1959 amendment.—See note to § 5.

Sec. 84. Counterclaim in actions brought by executors or administrators of insolvent estates.—In joint or several actions by the executor or administrator of an estate represented insolvent against 2 or more persons having joint or several demands against such estate, the demands may be asserted by counterclaim by either of the defendants. If, on trial, a balance is found due to the defendants jointly or to either of them, judgment shall be entered for such balance as the jury finds or the court orders, and it shall be treated and disposed of as other judgments against insolvent estates. (R. S. c. 100, § 85. 1959, c. 317, § 185.)

Effect of amendment.—The 1959 amendment divided the section into two sentences, substituted "asserted by counterclaim" for "filed in setoff" in the present first sentence, and deleted "at the first term of the court or at the first term after such representation of insolvency if made after the commencement of such actions," preceding what is now the second sentence.

Effective date of 1959 amendment.—See note to § 5.

Secs. 85-88. Repealed by Public Laws 1959, c. 317, § 186.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Referees, Masters and Auditors.

Secs. 89-92. Repealed by Public Laws 1959, c. 317, § 186.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 93. Referees, masters and auditors.—In all cases in the supreme judicial or in the superior court in which the court appoints one or more persons, not exceeding 3, as referees, masters or auditors, to hear the same, their fees and necessary expenses, including stenographic services upon a per diem basis, shall be paid by the county on presentation of the proper certificate of the clerk of courts for the county, or by such of the parties, or out of any fund or subject matter of the action, which is in the custody and control of the court, or by apportionment among such sources of payment, as the court shall direct. The amount thereof shall be fixed by the court upon the coming in of the report. They shall notify the parties of the time and place of hearing and have power to adjourn; witnesses may be summoned and compelled to attend and may be sworn by the referees, masters or auditors. When there is more than one referee, master or auditor, all must hear, but a majority may report, stating whether all did hear. Their report may be recommitted. They may be discharged and others appointed.

No fee or compensation other than his necessary expenses shall be paid any justice of the supreme judicial or of the superior court for his services as referee, master or auditor, but this provision shall not apply to an active retired justice. (R. S. c. 100, § 94. 1957, c. 182. 1959, c. 317, § 187. 1961, c. 317, § 370.)

Effect of amendments. — The 1957 amendment inserted "including stenographic services upon a per diem basis," in the first paragraph.

The 1959 amendment rewrote this section.

The 1961 amendment divided the first sentence of this section into two sentences and added "or by such of the parties, or out of any fund or subject matter of the action, which is in the custody and control of the court, or by apportionment among such sources of payment, as the court shall direct" at the end of the present first sentence.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

It is not given to supreme court of probate.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

And reference of equity case, etc.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Reference of disputes, etc.

In accord with original. See Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Referees are special tribunal, etc.

A referee is not a court. Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Assessment appeals under the sales and use tax law are of statutory origin and must be construed strictly according to the statute. Jurisdiction is precisely and definitely granted to the superior court. There is no interpretation of the specific directions as to hearing that permits of reference. Morrill v. Johnson, 152 Me. 150, 125 A. (2d) 663.

Sec. 94. Repealed by Public Laws 1959, c. 317, § 188.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Juries.

Sec. 95. Impaneling of jury; challenges; alternate jurors. Whenever by reason of the prospective length of a trial or other cause the court in its discretion shall deem it advisable, it may direct that not more than 2 jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Such alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Such alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges and be subject to the same obligations and penalties as jurors on the regular panel. An alternate juror who does not replace a juror on the regular panel shall be discharged when the jury retires to consider its verdict. If one or more alternate jurors are called, each party shall be entitled to one peremptory challenge in addition to those otherwise allowed by law, except as already provided as to alternate jurors under chapter 148, section 13. (R. S. c. 100, § 96. 1961, c. 17, § 1.)

Effect of amendment.—The 1961 amendment added the exception at the end of the last sentence. As the first paragraph of the section was not affected by the amendment, it is not set out.

Sec. 101. Challange of jurors.—The court, on motion of either party in an action, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion or is sensible of any bias, prejudice or particular interest in the cause. If it appears from his answers or from any competent evidence that he does not stand indifferent in the cause, another juror shall be called and placed in his stead. (R. S. c. 100, § 102. 1961, c. 317, § 371.)

Effect of amendment.—The 1961 amendment divided this section into two sentences and substituted "an action" for "a suit" near the beginning of present first sentence.

Sec. 102. Challenge from panel; right regulated.—In addition to challenges otherwise provided, either party may, before the trial commences, peremptorily challenge one juror from the panel unless the right of challenge provided in section 95 and chapter 148, section 13, has been exercised. The court may, by rules, prescribe the manner in which such right shall be exercised. (R. S. c. 100, § 103. 1961, c. 17, § 2.)

Effect of amendment.—The 1961 amendment divided the section into two sentences and added "and chapter 148, section 13".

Sec. 104. Justice to charge jury on matters of law but not to express opinion on issues of fact.—During a jury trial the presiding justice shall rule and charge the jury, orally or in writing upon all matters of law arising in the case but shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case, and such expression of opinion is sufficient cause for a new trial if either party aggrieved thereby and interested desires it; and the

same shall be ordered accordingly by the law court upon exceptions in a criminal case or on appeal in a civil case. (R. S. c. 100, § 105. 1959, c. 317, § 189.)

I. GENERAL CONSIDERATION.

Effect of amendment.—The 1959 amendment added the words "in a criminal case or on appeal in a civil case" at the end of this section.

Effective date of 1959 amendment.—See note to § 5.

When failure to note exceptions does not result in waiver of objections.—Where a jury has been given instructions which were plainly erroneous or which justified a belief that the jurors might have been misled as to the exact issue, or issues which were before them to be determined, the rule that failure to note exceptions results in waiver of objections will not be applied. Thompson v. Franckus, 150 Me. 196, 107 A. (2d) 485.

II. SUBSTANCE OF CHARGE TO JURY.

The correctness of a charge is not to be determined from isolated statements, but, rather, from the charge as a whole. Dulac v. Bilodeau, 151 Me. 164, 116 A. (2d) 605.

Charge held good under section.

See Dulac v. Bilodeau, 151 Me. 164, 116 A. (2d) 605.

III. OPINIONS UPON ISSUES OF FACT.

Procedural remarks to counsel not opinions.

In accord with original. See Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

Expressions held not error.

The remark of the presiding justice that cross-examination designed to show interest was "a bit far fetched," if it could be considered as an expression of opinion, was not on an "issue of fact," such as is referred to in this section. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

The examination of a witness by the presiding judge must be conducted without prejudice to an accused, and in such a manner as to impress the jury that the judge is impartial and is not indicating his opinion on the facts. State v. Dipietrantonio, 152 Me. 41, 122 A. (2d) 414.

In prosecution for rape, it was held that there was no abuse of the right on the part of the presiding justice to ask questions, and no violation of the statutory prohibition relative to expressing an opinion. State v. Dipietrantonio, 152 Me. 41, 122 A. (2d) 414.

Sec. 106. Repealed by Public Laws 1959, c. 317, § 190.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Witnesses and Evidence. Uniform Judicial Notice of Foreign Law Act.

Sec. 114. Parties, husbands, wives and others interested as witnesses.—No person is excused or excluded from testifying in any civil action by reason of his interest in the event thereof as party or otherwise, except as otherwise provided, but such interest may be shown to affect his credibility, and the husband or wife of either party may be a witness. (R. S. c. 100, § 115. 1961, c. 317, § 372.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit or proceeding at law or in equity" and substituted "otherwise" for "hereinafter" preceding "provided" in this section.

Section abrogates common-law rule. — This section, subject to the exception therein, abrogates the common-law rule of exclusion of the the testimony of parties, interested persons, and that of the husband or wife of either party. Wilson v. Wilson, 157 Me. 119, 170 A. (2d) 679.

Interest defined.—Interest signifies the specific inclination which is apt to be produced by the relation between the witness and cause at issue in the litigation. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238.

The interest of a witness, and its extent, may always be shown on cross-examination, and the limit of such inquiry is within the discretion of the court. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me. 423, 114 A. (2d) 238, holding that exclusion of cross-examination designed to show interest was not abuse of discretion and was not prejudicial.

And taken into consideration by jury.—Any motive which the witness may have, the manner in which the witness testifies

and the temptation he might have to color his testimony should be taken into consideration by the jury. The jury has the right in both civil and criminal cases to consider the interest which the witness may have in the result of the litigation in which he is testifying. It is within the province of the jury to pass upon the weight of the testimony given by an interested witness. Page v. Hemingway Bros. Interstate Trucking Co., 150 Me 423, 114 A. (2d) 238.

Quoted in State v. Jutras, 154 Me. 198, 144 A. (2d) 865.

Sec. 115. Exemption when action implies an offense. — No defendant shall be compelled to testify in any action when the cause of action implies an offense against the criminal law on his part. If he offers himself as a witness, he waives his privilege of not criminating himself, but his testimony shall not be used in evidence against him in any criminal prosecution involving the same subject matter. (R. S. c. 100, § 116. 1961, c. 317, § 373.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" in this section.

Sec. 117. Testimony of party out of state. — When a party to a civil action resides without the state or is absent therefrom during the pendency of the action and the opposite party desires his testimony, a commission under the rules of court may issue to take his deposition. Such nonresident or absent party, upon such notice to him or his attorney of record in the action of the time and place appointed for taking his deposition, as the court orders, shall appear and give his deposition. If he refuses or unreasonably delays to do so, the action may be dismissed or defaulted by order of court unless his attorney admits the affidavit of the party desiring his testimony as to what the absent party would say, if present, to be used as testimony in the case. (R. S. c. 100, § 118. 1961, c. 317, § 374.)

Effect of amendment.—The 1961 amendment divided the former first sentence of this section into two sentences and substituted "civil action" for "suit" near the beginning of the first sentence and "action" for "suit" near the middle of such first sentence. It also substituted "action" for "suit" in the present second sentence and substituted "the action may be dismissed" for "he may be nonsuited" in the present third sentence.

Sec. 119. Not applicable to executors, administrators or heirs, save in special cases.

I.

I. GENERAL CONSIDERATION.

And living party may not testify, etc.

In accord with original. See Wilson v. Wilson, 157 Me. 119, 170 A. (2d) 679.

II.

It is not the intention of the legislature to exclude wife of personal representative as a witness, under subsection II. Her situation is quite unlike that of the wife of the other party to the suit, who, by this section, is rendered incompetent as a witness. This incompetency is passed along to his wife. The personal representative, however, is not an incompetent witness, but may, if he chooses, give testimony as to any fact admissible under the general rules of evidence. His wife, however interested she may be in the outcome of the case, should be under no more disability to testify than other competent witnesses. Wilson v. Wilson, 157 Me. 119, 170 A. (2d) 679.

Where representative party has testified, etc.

In cases coming within the meaning of subsection II, the personal representative is the only person who can open the door to the allowance of testimony on the part of the other party to the suit, sometimes called the living party, as to facts happening prior to the death of the deceased. In the absence of testimony on the part of the personal representative as to such facts, the other party is incompetent to testify thereto. Wilson v. Wilson, 157 Me. 119, 170 A. (2d) 679.

But he is confined to facts, etc.

In the event that the personal representa-

tive testifies as to facts happening prior to death of the deceased under the provisions of subsection II, the other party is confined in his testimony to the specific facts testified to by the representative party. Wilson v. Wilson, 157 Me. 119, 170 A. (2d) 679.

Sec. 127. Certain convictions affect credibility.

Stated in State v. Trask, 155 Me. 24, 151 A. (2d) 280.

Sec. 128. Fees of witnesses.—Witnesses in the supreme judicial court or the superior court or in the probate courts and before a trial justice or a municipal court shall receive $5, and before referees, auditors or commissioners specially appointed to take testimony or special commissioners on disputed claims appointed by probate court, $5, or before the county commissioners $5 for each day's attendance and 8¢ a mile for each mile's travel going and returning home. The court in its discretion, may allow at the trial of any cause, civil or criminal in said supreme judicial court or the superior court, a sum not exceeding $50 per day for the attendance of any expert witness or witnesses at said trial, in taxing the costs of the prevailing party, except that the expense of all expert witnesses for the state in murder cases shall be in such amounts as the presiding justice shall allow and shall be paid by the state and charged against the appropriation for the department of the attorney general. Such party or his attorney of record shall first file an affidavit within 30 days after entry of judgment and before the cause is settled, stating the name, residence, number of days in attendance and the actual amount paid or to be paid each expert witness in attendance at such trial. No more than $5 per day shall be allowed or taxed by the clerk of courts in the costs of any civil action for the per diem attendance of a witness, unless the affidavit is filed, and the per diem is determined and allowed by the presiding justice. (R. S. c. 100, § 129. 1947, c. 20. 1955, c. 412, § 2. 1961, c. 317, § 375.)

Effect of amendments.—The 1955 amendment, which was made effective June 1, 1956, increased the fees throughout the section.

The 1961 amendment divided the former first sentence of this section into three sentences and substituted "within 30 days after entry of judgment" for "during the term at which such trial is held" in the present third sentence. It also substituted "civil action" for "suit" in the present fourth sentence and deleted "herein provided" following "affidavit" in that sentence.

Sec. 130. Not obliged to attend court unless fees paid or tendered.—No person is obliged to attend any court as a witness in a civil action or at any place to have his deposition taken unless his legal fees for travel to and from the place and for one day's attendance are first paid or tendered. His fees for each subsequent day's attendance must be paid at the close of the preceding day if he requests it. (R. S. c. 100, § 130. 1961, c. 317, § 376.)

Effect of amendment.—The 1961 amendment divided this section into two sentences and substituted "action" for "suit" in the present first sentence.

Sec. 132. Affidavit of plaintiff prima facie evidence. — In all actions brought on an itemized account annexed to the complaint, the affidavit of the plaintiff, made before a notary public using a seal, that the account on which the action is brought is a true statement of the indebtedness existing between the parties to the action with all proper credits given and that the prices or items charged therein are just and reasonable shall be prima facie evidence of the truth of the statement made in such affidavit and shall entitle the plaintiff to the judgment unless rebutted by competent and sufficient evidence. When the plaintiff is a corporation, the affidavit may be made by its president, secretary or treasurer. If the said affidavit be made without the state before a notary public using a seal, a certificate of a clerk of a court of record or by a deputy or assistant clerk of the same with the seal of said court attached thereto stating that said notary public is duly authorized to act as such and to administer oaths shall be prima facie evidence of the authority of said notary public to act and to administer an oath

and that the signature of said notary affixed thereto is genuine. (R. S. c. 100, § 132. 1959, c. 317, § 191.)

Effect of amendment.—The 1959 amendment substituted "complaint" for "writ" at the end of the first phrase in the first sentence and substituted "action" for "suit" near the middle of that sentence.

Effective date of 1959 amendment.—See note to § 5.

Probative effect of affidavit of administrator, etc.

See also Wright v. Bubar, 151 Me. 85, 115 A. (2d) 722.

Where objections were made to statutory affidavit that plaintiff administrator did not have personal knowledge of the items charged and that there was no suppletory oath, it was held that the statute carefully provides for the evidential force of the affidavit and that the suppletory oath had no part in the evidence introduced into the case through the statutory affidavit. Wright v. Bubar, 151 Me. 85, 115 A. (2d) 722.

Applied in Cianchette v. Hanson, 152 Me. 84, 123 A. (2d) 772.

Sec. 133. Accounts not inadmissible because hearsay or self-serving.

A record account book copied from day to day from motel registration cards was properly admitted into evidence under this section, where the presiding justice could properly find that the entries were made in good faith in the regular course of business and before suit. Ouelette v. Pageau, 150 Me. 159, 107 A. (2d) 500.

Sec. 146. Photostatic and microfilm reproductions admissible.—If any business, institution, bank, trust company, member of a profession or calling, or any department or agency of government, in the regular course of his or its business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of his or its business or activity has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, such reproduction, or copy, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction or copy is likewise admissible in evidence if the original reproduction or copy is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original. This section shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence. (R. S. c. 100, § 146. 1955, c. 264.)

Effect of amendment.—The 1955 amendment rewrote this section.

Sec. 148. Adjutant general's certificate as evidence. — The certificate of the adjutant general relating to the enlistment of any person from this state in the United States' service and of all facts pertaining to the situation of such person, to the time of and including his discharge, as found upon the records of his office, are prima facie evidence of the facts so certified in any civil action or proceeding. (R. S. c. 100, § 148. 1961, c. 317, § 377.)

Effect of amendment.—The 1961 amendment substituted "civil action" for "suit" near the end of this section.

Sec. 149. Proof of official record.—An official record or an entry therein, when admissible for any purpose in any civil or criminal case, may be evidenced by a document purporting to be an official publication thereof, or by a copy attested as a correct copy by a person purporting to be an officer or a deputy of an officer having the legal custody of the record. If the office in which the record is kept is without the state, the copy shall be accompanied by a certificate that such officer

or deputy has the custody of the record, which certificate shall be made as follows:

I. By a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court;

II. By any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the court; or

III. By any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in a foreign state or country in which the record is kept, and authenticated by the seal of his office. (R. S. c. 100, § 149. 1959, c. 317, § 192.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 150. Proof of lack of record.—A written statement signed by a person purporting to be an officer or a deputy of an officer, having the official custody of specified official records, that he has made diligent search of the records of the office and has found therein no record or entry of a specified tenor, is admissible as evidence that the records of his office contain no such record or entry, provided that where the record is kept without the state, the statement shall be accompanied by a certificate as provided in section 149. (R. S. c. 100, § 150. 1959, c. 317, § 193.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 152. Testimony of a deceased subscribing witness or magistrate given in subsequent action.—When the testimony of a subscribing witness to a deed or of the magistrate who took the acknowledgment thereof has been taken in the trial of any civil action in relation to the execution, delivery or registry of such deed, and such witness has since died, proof of such former testimony is admissible in the trial of any other civil action involving the same question if the parties are the same or if one of the parties is the same and the adverse party acted as agent or attorney for the adverse party in the former action, but such testimony may be impeached like the testimony of a living witness. (R. S. c. 100, § 152. 1961, c. 317, § 378.)

Effect of amendment.—The 1961 amendment substituted "action" for "cause" in two places in this section and substituted "action" for "suit" near the end of the section.

Costs.

Sec. 156. Costs to parties and attorneys.—Costs allowed to parties and attorneys in civil actions shall be as follows: to parties recovering costs before a trial justice, 33¢ for each day's attendance and the same for every 10 miles' travel; to parties recovering costs in the supreme judicial or superior courts, 33¢ for every 10 miles' travel and $3.50 for attendance at each term until the action is disposed of, unless the court otherwise directs.

Costs for travel shall be taxed for the prevailing party in civil actions according to the distance of said party or his attorney who resides nearest to the place of trial, unless said prevailing party or his attorney who resides farthest from said place of trial actually travels the greater distance for the special purpose of attending court in such cause, in which case costs shall be taxed for the last-named distance, and when the action is in the name of an indorsee and the plaintiff is the prevailing party, such costs for travel shall be taxed according to the

distance of the attorney, payee or indorsee who is nearest to the place of trial, unless the attorney, payee or indorsee residing the greater distance from said place of trial actually travels such greater distance for the special purpose of attending court in said cause. No costs for travel shall be allowed for more than 10 miles' distance from any justice or municipal court nor more than 40 miles' distance from any other court, unless the plaintiff prevailing actually travels a greater distance or the adverse party, if he recovers costs, by himself, his agent or attorney in fact travels a greater distance for the special purpose of attending court in such cause.

For a power of attorney, 50¢; and for the plaintiff's declaration, 50¢ in the superior court, but no fee for a power of attorney shall be taxed before any municipal court or trial justice unless otherwise specially provided in the act establishing such court. For an issue in law or fact, there shall be allowed for an attorney's fee, $2.50 in the supreme judical or superor courts. A fee of $5 shall be taxed in the plaintiff's costs for making up a conditional judgment under the provisions of section 10 of chapter 177.

In cases of forcible entry and detainer, parties shall be allowed the same costs as in ordinary civil actions.

A party summoned as trustee and required to attend court and make a disclosure shall be entitled to costs as follows: if the claim sued for does not exceed $20 such trustee shall be entitled to travel and attendance and 25¢ for the oath; and if the claim sued for exceeds $20 such trustee shall be entitled to $2.50 in addition to the above fee and when required to attend court for further examination such trustee shall be entitled to travel and attendance.

In all municipal courts the amount of costs allowed in civil actions shall depend upon the amount recovered and not upon the ad damnum in the writ; and the allowance for travel and attendance to parties recovering costs in municipal courts or before any trial justice shall be limited to 2 terms, except that the court may, for good and sufficient cause, order such allowance for additional terms.

No costs shall accrue, be taxed or allowed for any precept required in legal proceedings unless the same shall issue from and bear the indorsement of an attorney at law.

The allowance for travel and attendance to parties recovering costs in the superior court shall be limited to 2 terms and every other term at which a trial is had. The court may for good and sufficient cause order such allowance for additional terms in all actions before it. No referee shall allow costs in any proceedings in excess of the above provisions. (R. S. c. 100, § 156. 1949, c. 349, § 130. 1959, c. 317, § 194. 1961, c. 317, §§ 379, 380.)

Effect of amendments.—The 1959 amendment deleted, at the end of the first sentence in the last paragraph, an exception in case a demurrer, plea in abatement or motion to dismiss was filed by the defendant.

The 1961 amendment substituted "actions" for "suits" near the beginning of the first sentence of the second paragraph of this section and deleted "whether in law or equity" following "proceedings" near the middle of the seventh paragraph.

Effective date of 1959 amendment.—See note to § 5.

Sec. 161. When damages reduced by counterclaim, full costs.—When a counterclaim is filed and the plaintiff recovers not exceeding $20, he is entitled to full costs if the jury certify in their verdict that the damages were reduced to that sum by reason of the amount allowed on the counterclaim. (R. S. c. 100, § 161. 1959, c. 317, § 195.)

Effect of amendment.—The 1959 amendment made this section applicable to counterclaim instead of setoff.

Effective date of 1959 amendment.—See note to § 5.

Sec. 163. On petitions for relief, etc.—On application of a private person for relief from a judgment or for a writ of certiorari, mandamus or quo warranto,

or like process, the court may or may not allow costs to a person appearing on notice as defendant. (R. S. c. 100, § 163. 1959, c. 317, § 196.)

Effect of amendment.—The 1959 amendment substituted "relief from a judgment or for a writ of" for "a writ of review" and substituted "defendant" for "respondent."

Effective date of 1959 amendment.—See note to § 5.

Sec. 164. If plaintiff's action dismissed, defendant recovers costs.—When a plaintiff's action is voluntarily or involuntarily dismissed, the defendant recovers costs against him, and in all actions, as well as those of qui tam as others, the party prevailing is entitled to his legal costs. (R. S. c. 100, § 164. 1959, c. 317, § 197.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 165. Action in name of state by individual; costs.—When an action is brought in the name of the state for the benefit of a private person, his name and place of residence shall be indorsed on the summons. If the defendant prevails, judgment for his costs shall be rendered against such person and execution issued as if he were plaintiff. (R. S. c. 100, § 165. 1959, c. 317, § 198.)

Effect of amendment.—The 1959 amendment divided the section into two sentences, substituted "an action" for "a suit" near the beginning of the first sentence and substituted "summons" for "writ" at the end of that sentence.

Effective date of 1959 amendment.—See note to § 5.

Sec. 166. State liable for costs in civil action.—When a defendant prevails against the state in a civil action, judgment for his costs shall be rendered against it and the treasurer of the county shall pay the amount on a certified copy of the judgment. The amount shall be allowed to him in his account with the state. (R. S. c. 100, § 166. 1961, c. 317, § 381.)

Effect of amendment.—The 1961 amendment divided this section into two sentences and substituted "action" for "suit" in the present first sentence.

Sec. 167. No fees for travel taxable for state.—When the state recovers costs in a civil action no fees shall be taxed for the travel of an attorney. (R. S. c. 100, § 167. 1961, c. 317, § 382.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" in this section.

Secs. 168-170. Repealed by Public Laws 1959, c. 317, § 199.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 171. Assignment of accounts.

Section governs application assignment by contractor to surety company.—An application assignment by a contractor to a surety company upon performance and payment bonds of "all rights, privileges, and properties of the principal in said contract" is governed by this section, which by its terms is made applicable to "contracts," so that a subsequent assignee bank holds moneys paid to it upon its subsequent assignment in trust for the benefit of the surety company, even though such bank had no notice of the original application assignment. Aetna Casualty & Surety Co. v. Eastern Trust & Banking Co., 156 Me. 87, 161 A. (2d) 843.

Sec. 174. In divers actions against same party at same term, or in case of division of an account, only one bill of costs allowed plaintiff.—When a plaintiff brings divers actions which might have been joined in one against the same party and which are first in order for trial at the same term of court, or divides an account which might all have been sued for in one action and commences successive actions upon parts of the same or brings more than one action on a

joint and several contract, he shall not recover costs nor have execution running against the body of the same defendant, in more than one such action, unless the court, after notice to the defendant and hearing, shall otherwise direct. (R. S. c. 100, § 171. 1959, c. 317, § 200.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date of 1959 amendment.—See note to § 5.

Sec. 175. If execution could issue, no costs in action on judgment.—A plaintiff shall not be allowed costs in an action on a judgment of any tribunal on which an execution could issue when such action was commenced, except in trustee process. (R. S. c. 100, § 172. 1961, c. 317, § 383.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" in this section.

Sec. 178. When bankrupt recovers no costs.—When a defendant pleads a discharge in bankruptcy or insolvency obtained after the commencement of the action, he recovers no costs before the time when the certificate was produced in court. (R. S. c. 100, § 175. 1961, c. 317, § 384.)

Effect of amendment.—The 1961 amendment substituted "action" for "suit" in this section.

Sec. 179. Hearing on costs; appeal.—When an action is dismissed or defaulted, or judgment rendered on a verdict, or a report of referees is accepted, either party on application to the court within 10 days thereafter may have the costs recoverable taxed by the clerk and passed upon by the court, and any party aggrieved by the decision may appeal therefrom; but if no application is made, the clerk shall determine the costs and either party dissatisfied with his taxation may appeal to the court, from whose decision no appeal shall be taken, and all attachments shall continue in force for 60 days after such appeal is decided. The costs shall be taxed within 30 days from the rendition of judgment. (R. S. c. 100, § 176. 1959, c. 317, § 201.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Action for Damages Arising from Perjury.

Sec. 180. Action for damages when judgment obtained by perjury. — When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may, within 3 years after such judgment or after final disposition of any motion for relief from the judgment, bring an action against such adverse party, or any perjured witness or confederate in the perjury, to recover the damages sustained by him by reason of such perjury; and the judgment in the former action is no bar thereto. (R. S. c. 100, § 177. 1959, c. 317, § 202.)

Effect of amendment.—The 1959 amendment deleted "bring an action on the case" preceding "within 3 years" and substituted "or after final disposition of any motion for relief from the judgment, bring an action" for "or after final judgment in any proceedings for a review thereof."

Effective date of 1959 amendment.—See note to § 5.

Executions.

Sec. 181. Executions issued and returned. — Executions may be issued on a judgment of the superior court after 24 hours from the time the judgment has become final by the expiration of the time for appeal, by dismissal of an appeal, or on certificate of decision from the law court, unless the court has pursuant

to rule ordered execution at an earlier time, and shall be returnable within 3 months after issuance. (R. S. c. 100, § 178. 1959, c. 317, § 203.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 182. Not after one year; exception.—No first execution shall be issued after one year from the time the judgment has become final by the expiration of the time for appeal, by dismissal of an appeal, or on certificate of decision from the law court, except in cases provided for by section 5 in which the first execution may be issued within not less than one year nor more than 2 years from the time of judgment. (R. S. c. 100, § 179. 1959, c. 317, § 204.)

Effect of amendment.—The 1959 amendment rewrote this section.

Effective date and applicability of Public Laws 1959, c. 317.—See note to § 5.

Sec. 184. When execution not so issued, motion against debtor. — When execution is not issued within the times prescribed by sections 182 and 183, a motion against the debtor may be made to show cause why execution on the judgment should not be issued, and if no sufficient cause is shown, execution may be issued thereon. (R. S. c. 100, § 181. 1959, c. 317, § 205.)

Effect of amendment.—The 1959 amendment substituted "sections 182 and 183" for "the 2 preceding sections" and substituted "motion against the debtor may be made" for "writ of scire facias against the debtor may be issued" in this section.

Effective date of 1959 amendment.—See note to § 5.

Sec. 187. Execution upon award to creditor by commissioners on solvent estate.—When the report of commissioners appointed by the probate court to decide upon exorbitant, unjust or illegal claims against a solvent estate has been returned and finally accepted in favor of a creditor, and the amount allowed him is not paid within 30 days thereafter, he may file a certified copy of such report in the office of the clerk of courts and apply in writing to a justice of the superior court for an execution; and such justice shall order a hearing thereon, with or without notice to the adverse party. The application shall be entered on the docket. If no sufficient cause is shown to the contrary, the justice shall direct an execution to be issued for the amount allowed the creditor by such report with interest from its return to the probate court, and costs allowed by the probate court, if any, $3 for clerk's fees, and travel and attendance and expense of copies and service of notices, as in civil actions. (R. S. c. 100, § 184. 1959, c. 317, § 206. 1961, c. 317, § 385.)

Effect of amendments.—The 1959 amendment deleted "of the court if in session, otherwise on the docket of the preceding term" at the end of the second sentence.

The 1961 amendment substituted "civil actions" for "suits at law" at the end of this section.

Effective date of 1959 amendment.—See note to § 5.

Official Court Reporters.

Sec. 188. Official court reporters, their appointment, duties, salary and expenses.—The chief justice of the supreme judicial court may appoint not more than 11 official court reporters to serve for a term of 7 years, who shall report the proceedings in the supreme judicial court and in the superior court and who shall be officials of the court to which they may from time to time be assigned by the chief justice, and be sworn to the faithful discharge of their duties, and each of whom shall receive from the state a salary of $7,500 per year. They shall take full notes of all oral testimony and other proceedings in the trial of civil actions, including the charge of the justice in all trials before a jury and all comments and rulings of said justice in the presence of the jury during the progress of the trial, as well as all statements and arguments of counsel addressed to the court, and during the trial furnish for the use of the court or either of the parties

a transcript of so much of their notes as the presiding justice may direct. They shall furnish a transcript of so much of the evidence and other proceedings taken by them as either party to the trial requires, on payment therefor by such party at the rate of 26¢ for every 100 words. One of said official court reporters designated for the purpose shall perform such clerical services as may be required of him by the chief justice who may allow him reasonable compensation for such clerical services for which he shall be reimbursed.

Official court reporters appointed by the chief justice of the supreme judicial court shall receive, from the county in which the court or proceeding is held, their expenses when in attendance upon such court or proceeding away from their place of residence but not otherwise. A detailed statement of such expenses actually and reasonably incurred shall be approved by the presiding or sitting justice.

(1955, c. 480. 1957, c. 380, § 1. 1959, c. 368. 1961, c. 281, § 1; c. 317, §§ 386, 387.)

Effect of amendments. — The 1955 amendment increased the yearly salary of official court reporters, provided for in the first sentence of the first paragraph, from $5,000 to $5,750.

The 1957 amendment increased the salary of court reporters from $5,750 to $6,500 in the first paragraph.

The 1959 amendment again increased the salary from $6,500 to $7,500.

Chapter 281, P. L. 1961, substituted "civil actions" for "causes, either at law or in equity" near the beginning of the second sentence of the first paragraph and substituted "26¢" for "20¢" near the end of the third sentence of that paragraph. Chapter 317, P. L. 1961, also substituted "civil actions" for "causes, either at law or in equity' in the second sentence of the first paragraph. In addition, c. 317 divided the second paragraph into two sentences, deleted 'also" preceding "receive" and deleted "equity" preceding "proceeding" in two places in the present first sentence of such paragraph.

As the rest of the section was not changed by the amendments, only the first and second paragraphs are set out.

Editor's note.—P. L. 1957, c. 380, which amended this section, provided in § 2 thereof as follows: "There is hereby appropriated from the general fund of the state the sum of $6,875 for the fiscal year 1957-58 and $7,500 for the fiscal year 1958-59, to carry out the purposes of this act."

Sec. 189. Appointment for hearings in vacation.—At any hearing in vacation of a civil action pending in the supreme judicial court or in the superior court, the presiding justice may, when necessary, appoint a court reporter other than his regularly appointed official court reporter to report the proceedings thereof, who shall receive for his services from the treasury of the county in which the civil action is pending a sum not exceeding $10 a day for attendance in addition to actual traveling expenses; but when at such hearings the presiding justice employs his regularly appointed official court reporter, such official court reporter shall receive from said treasury only the amount of his actual expenses incurred in attending the same. (R. S. c. 100, § 186. 1953, c. 420, § 3. 1961, c. 317, § 388.)

Effect of amendment.—The 1961 amendment substituted "civil action" for "cause in law or equity" near the beginning of this section and substituted "civil action" for "cause" near the middle of the section.

Sec. 190. Authentication of evidence.

Read with former sections 15 and 60 to ascertain legislative intent.—See White v. Schofield, 153 Me. 79, 134 A. (2d) 755.

Sec. 191. Death or disability. — When in any criminal case any material part of a transcript of the evidence taken by the official court reporter cannot be obtained because of his death or disability, the justice who presided at the trial of the case shall on motion, after notice and hearing, if it is evident that the lack of such transcript prejudices the respondent in prosecuting his exceptions or appeal, set aside any verdict rendered in the case and grant a new trial at any time

within one year after it was returned. (R. S. c. 100, § 188. 1953, c. 420, § 5. 1961, c. 317, § 389.)

Effect of amendment.—The 1961 amendment rewrote this section.

Sec. 193. Stenographic reports taxed in bill of costs.—Any amount legally chargeable by official court reporters for writing out their reports for use in civil actions and actually paid by either party whose duty it is to furnish them may be taxed in the bill of costs and allowed against the losing party, as is now allowed for copies, if furnished by the clerk. (R. S. c. 100, § 190. 1953, c. 420, § 7. 1961, c. 317, § 390.)

Effect of amendment.—The 1961 amendment substituted "civil actions" for "law cases" near the middle of this section.

Judicial Council.

Sec. 196. Reports.—The judicial council shall report biennially on or before the 1st day of December to the governor upon the work of the various branches of the judicial system. Said council may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable. (R. S. c. 100, § 193. 1961, c. 64.)

Effect of amendment.—The 1961 amendment substituted "biennially" for "annually" in the first sentence.

Sec. 197. Expenses.—No member of said council shall receive any compensation for his services; but said council and the several members thereof shall be allowed, out of any appropriation made for the purpose, such expenses for clerical and other services, travel and incidentals as the chief justice shall approve. The chief justice shall be ex officio chairman of said council, and said council may appoint one of its members or some other suitable person to act as secretary for said council. (R. S. c. 100, § 194. 1957, c. 50.)

Effect of amendment. — Prior to the 1957 amendment the expenses were approved by the governor and council instead of the chief justice.

Chapter 113-A.

Interpleader Compact.

Sec. 1. Approval of compact.—The following interpleader compact is hereby approved, ratified, adopted and entered into by this state as a party state to take effect between this state and any other state or states as defined in said compact when entered into in accordance with the terms of said compact by said other state or states and not disapproved by the governor of this state under subsection III of article 7 of such compact:

The contracting states solemnly agree:

Article 1.

Purpose. The aims of this compact are to promote comity and judicial cooperation among the states party thereto; and to relieve from undue risk and uncertainty, a person who may be subject to double or multiple liability because of the existence of adverse claimants, one or more of whom in the absence of this compact may not be subject to the jurisdiction of the adjudicating court, when such person makes all reasonable efforts to secure judicial determination and discharge of his liability.