

# MAINE STATE LEGISLATURE

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SEVENTH REVISION

THE  
REVISED STATUTES

OF THE  
STATE OF MAINE

PASSED AUGUST 5, 1930, AND TAKING  
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By the Authority of the Legislature

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## ERRATA

1. Page 60 in headnote of Chapter 2, third line, "Boards" should read "Bonds."
2. Page 454, Line 20, should read "and the said Department may declare any and all of its rules and regulations."
3. Page 534, Section 113, in note, "c. 63" should be "c. 64."
4. Page 549, Section 32, Line 4, should read "templated in the six preceding sections for the building of state aid highways." (See Chap. 28, Sec. 32.)
5. Page 845, Section 4, Line 2 should read "employers who employ five or less workmen or operatives regularly in the same."
6. Page 877, Line 10, change first word "or" to "of."
7. Page 1339, Section 59 in headnote, "count" should read "court."

## CHAPTER 96.

### Proceedings in Civil Actions in Court.

Sections 1- 65	General Provisions as to Procedure.
Sections 66- 71	Defense of Suits by Subsequent Attaching Creditors.
Sections 72- 75	Suits By and Against Bankrupts and Insolvents.
Sections 76- 89	Set-Off.
Sections 90- 93	Auditors.
Section 94	Referees.
Sections 95-111	Juries.
Sections 112-139	Witnesses and Evidence.
Sections 140-160	Costs.
Section 161	Action for Damages Arising from Perjury.
Sections 162-168	Executions.
Sections 169-174	Stenographers.
Section 175	Crier.

### General Provisions as to Procedure.

**Sec. 1. Entry of actions; further service; orders of notice.** R. S. c. 87, § 1. No action can be entered after the first day of the session of the superior court without special permission. When it appears that the defendant has not had sufficient notice, the court may order such further notice as it deems proper. Any justice of the supreme judicial court or of the superior court may order notice concerning any civil proceeding, in or out of term time, directing how it shall be given; and such order, when made in vacation, shall be indorsed on the process. Any order of notice that the court may grant may be ordered by a justice in vacation.

See c. 95, § 23; c. 103, § 2; \*56 Me. 425; 79 Me. 42; 93 Me. 251; 100 Me. 547; \*104 Me. 81; \*107 Me. 276; 111 Me. 69.

**Sec. 2. Appointment of auditor, surveyor, and referee, in vacation.** R. S. c. 87, § 2. In all civil cases pending in the supreme judicial court, or in the superior court, any justice of either court in vacation may appoint and commission an auditor or surveyor, and upon the written agreement and request of the parties or their attorneys of record such justice may, in vacation, appoint a referee and make any other order or decree, interlocutory or final, in any such case, and the clerk of said court in each county shall enter upon the docket either in term time or vacation, all such appointments and orders in any pending case.

**Sec. 3. When default may be recorded; when taken off.** R. S. c. 87, § 3. When service of the writ has been made, and the defendant does not appear by himself or attorney within the first three days of the term, his default may be recorded, and the charge in the declaration taken to be true. If the defendant, before the juries are dismissed for the term, enters his appearance and pays to the plaintiff such costs as the court orders, the default shall be taken off. The court may permit it to be taken off for sufficient cause.

16 Me. 228; 17 Me. 426; 21 Me. 45; 23 Me. 485; 26 Me. 340; 30 Me. 557; 33 Me. 102, 251; 41 Me. 439; 45 Me. 105.

**Sec. 4. Continuance if defendant is out of state.** R. S. c. 87, § 4. When the defendant was an inhabitant of the state and absent from it at the time of service, and it does not appear that he has returned, or has had actual notice of the suit, the court may continue the action, not exceeding twice unless for special cause, or enter judgment on default. If the defendant was not an inhabitant of the state or within it, and had actual notice of the suit, the court may order a continuance if he does not appear at the first term.

63 Me. 360; 72 Me. 337; \*81 Me. 475.

**Sec. 5. Execution to be stayed one year, unless bond is given; continuance of attachment on original writ.** R. S. c. 87, § 5. When judgment is rendered on default of an absent defendant in a personal action as provided in the preceding section, execution cannot be issued thereon within one year thereafter, 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 the amount to the defendant if the judgment is reversed on review, to which he is entitled of right, if brought within one year, or so much of the amount recovered as is recovered back on such review, and any attachment made on the original writ continues for one year and thirty days after said judgment is so rendered, when no bond is given; and when a bond is given, it continues for thirty days after said bond is filed with the clerk of said court.

See c. 90, § 51; 5 Me. 386; 57 Me. 599; 59 Me. 567; 63 Me. 360; 66 Me. 166;

72 Me. 337.

**Sec. 6. Bond to be left with clerk; petition for review.** R. S. c. 87, § 6. 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, and if the review of right is not so prosecuted, the defendant may, within one year after he first has notice of the judgment, petition the court for a review, and the court may grant it on such terms as it deems reasonable.

72 Me. 338.

**Sec. 7. Executions issued upon judgment on default, without deposit of bond, are valid after one year.** R. S. c. 87, § 7. 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 five and six, 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 a petition for review has been brought within said year; and, in case such judgment is not reversed on review if brought within said year, all such proceedings shall be valid as aforesaid, after final judgment for the defendant in review.

72 Me. 338.

**Sec. 8. Court may allow entry of appeals at another term.** R. S. c. 87, § 8. When an appeal is taken from a judgment of a trial justice or municipal or police court, and the action by mistake or accident is not entered, and the judgment has not been affirmed, the court may, on petition of either party, allow the action or complaint to be entered at another term of the court, upon reasonable terms, with the same effect as if it had been entered at the proper term.

45 Me. 306; 46 Me. 499; 111 Me. 342.

**Sec. 9. Petition to be within one year; attachment or bail not revived.** R. S. c. 87, § 9. Such petition must be presented to the court, or filed in the clerk's office within one year after the term at which the action ought to have been entered; and no attachment or bail shall be revived or continued by such proceedings.

**Sec. 10. On appeals, original papers sent up, except writ and pleadings.** R. S. c. 87, § 10. In cases carried from a trial justice, municipal, or police court, to a higher court, all depositions and original papers, except the process by which the suit 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.

39 Me. 136.

**Sec. 11. Proceedings not abated, etc., for want of form.** R. S. c. 87, § 11. No process or proceeding in courts of justice shall be abated, arrested, or reversed, for want of form only, or for circumstantial errors or mistakes which by law are amendable, when the person and case can be rightly understood. Such errors and defects may be amended, on motion of either party, on such terms as the court orders.

3 Me. 30; 6 Me. 325; 10 Me. 285; 13 Me. 309; 15 Me. 402, 466; 16 Me. 265, 268, 283; 18 Me. 250; 22 Me. 311; 23 Me. 507; 25 Me. 333; 26 Me. 212, 288; 29 Me. 167; 30 Me. 31, 170; 39 Me. 231; 45 Me. 284; 46 Me. 331; 47 Me. 158, 185; 48 Me. 35, 253; 51 Me. 607; 53 Me. 174; 54 Me. 202, 496; \*57 Me. 156; 58 Me. 41; 63 Me. 153; 74 Me. 113, \*491; 75 Me. 47, 600; 77 Me. 343; 78 Me. 113; 87 Me. 483; \*92 Me. 100; 93 Me. 187; 111 Me. 92; \*112 Me. 499; \*116 Me. 416.

Amendment of declaration; 2 Me. 49; 3 Me. 249; 4 Me. 480; 11 Me. 500; 13 Me. 89, 249, 419; 14 Me. 50; 15 Me. 138; 16 Me. 173, 234, 283, 449; 17 Me. 225, 411; 18 Me. 174, 413; 19 Me. 358; 20 Me. 148; 23 Me. 77; 24 Me. 17, 247; 25 Me. 252, 311; 26 Me. 28, \*212; 54 Me. 496; 65 Me. 320; 66 Me. 94, 388; 67 Me. 490, \*553; 69 Me. 30, 126; 71 Me. 28; 74 Me. 142; \*95 Me. 131, 203, 258; 99 Me. 409; 103 Me. 265; 108 Me. 356; 109 Me. 331; 110 Me. 535; 111 Me. 189.

Ad damnum; 6 Me. 325; 15 Me. 432; \*57 Me. 155; 58 Me. 331; \*90 Me. 310.

Seal of writ; 3 Me. 30; 12 Me. 196; 19 Me. 208; 30 Me. 170; 125 Me. 4.

Date of writ; 14 Me. 396; 71 Me. 266.

Of changing a writ of original summons, to a writ of attachment; 15 Me. 401, 466; 51 Me. 607; 71 Me. 28.

Teste of writ; 15 Me. 433.

Return day of writ; \*16 Me. 267; 17 Me. 417; 35 Me. 123; 54 Me. 202; 63 Me. 409.

**Sec. 12. Writs may be amended.** R. S. c. 87, § 12. In all civil actions the writ may be amended by inserting additional plaintiffs, or by striking out one or more plaintiffs when there are two or more, and the court may impose reasonable terms.

67 Me. 500; 69 Me. 85; 77 Me. 578; \*103 Me. 137; \*112 Me. 496; 114 Me. 125; 116 Me. 416.

**Sec. 13. Writ or process lost after service, new one may be filed.** R. S. c. 87, § 13. When in an action pending, the loss or destruction of a writ or 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.

15 Me. 427.

**Sec. 14. Names of defendants may be struck out on terms or new ones inserted, and service made.** R. S. c. 87, § 14. When there are two or more defendants, the writ may be amended by striking out one or more of them, on payment of costs to him to that time. A writ founded on contract, express or implied, may be amended by inserting additional defendants; and the court may order service to be made on them, and their property to be attached as in case of original writs; and on return of due service, they become parties to the suit, but are not liable to costs before service.

2 Me. 120; 11 Me. 127; 13 Me. 389; 20 Me. 420; 25 Me. 333; 34 Me. 34; 35 Me. 535; 45 Me. \*444; 58 Me. 41; 59 Me. 344; \*60 Me. 208, 352; 75 Me. 86; 82 Me. 227; \*87 Me. 435; 112 Me. 498; 117 Me. 481.

**Sec. 15. In actions of law, court may require parties to plead in equity.** R. S. c. 87, § 15. When, in an action at law in the superior court, it appears that

the rights of the parties can be better determined and enforced by a judgment and decree in equity, the court may, upon reasonable terms, strike out the pleadings at law, and require the parties to plead in equity in the same cause and may hear and determine the cause in equity.

86 Me. 60; 113 Me. 262; 116 Me. 389; 124 Me. 185.

**Sec. 16. In equity proceedings, court may require parties to plead at law.** R. S. c. 87, § 16. When in any equity proceeding in the supreme judicial court, or in the superior court, it appears that the remedy at law is plain, adequate, and complete and that the rights of the parties can be fully determined and enforced by a judgment and execution at law, the court may upon reasonable terms strike out the pleadings in equity, and require the parties to plead at law in the same cause in the superior court, which court may hear and determine the cause at law.

87 Me. 452; \*95 Me. 256; 124 Me. 185.

**Sec. 17. In actions at law pending in law court, court may require parties to plead in equity.** R. S. c. 87, § 17. When in an action at law commenced in the superior court and pending in the supreme judicial court, sitting as a law court, it appears that the rights of the parties can be better determined and enforced by a judgment and decree in equity, the supreme judicial court may, upon reasonable terms, strike out the pleadings at law, and require the parties to plead in equity in the same cause; and thereupon the action shall be transferred to the equity docket for the same county, and be heard and determined in equity.

102 Me. 32; \*106 Me. 190; 116 Me. 389; 117 Me. 211; 124 Me. 185.

**Sec. 18. Defendant in action at law may plead equitable defense; plaintiff may reply with equitable relief.** R. S. c. 87, § 18. Any defendant may plead in defense to any action at law in the superior court, any matter which would be ground for relief in equity, and shall receive such relief as he would be entitled to receive in equity, against the claims of the plaintiff; such matter of defense shall be pleaded in the form of a brief statement under the general issue. And, by counter brief statement, any plaintiff may plead any matter which would be ground for relief in equity against any defense set up by any defendant in an action at law in said court, and shall receive such relief as he would be entitled to receive in equity against such claim of the defendant.

\*88 Me. 611, 615; 94 Me. 306; 100 Me. 564; 101 Me. \*277, 589; \*102 Me. 31; 104 Me. 207; \*106 Me. 190; 113 Me. 74, 262; \*117 Me. 211, 495; 120 Me. 494; 124 Me. 185; 126 Me. 193; 127 Me. 383.

**Sec. 19. Court may make necessary decrees to preserve equitable rights.** R. S. c. 87, § 20. Whenever in such action any matter which would be ground for relief in equity is so pleaded by any party, the court may make such decrees and restraining orders, as may be necessary to protect and preserve such equitable rights, and may issue injunctions, according to the usual practice of courts of equity.

100 Me. 564; \*101 Me. 277; 113 Me. 262; 124 Me. 185.

**Sec. 20. Attachments not affected; order for attachment of property.** R. S. c. 87, § 21. No attachments shall be affected by proceedings under the five preceding sections. Either party to a cause may, upon petition, obtain from the court an order for the attachment of property of a party to the suit to secure any judgment which may be obtained, to be made on such precept as the court may order and to be recorded as in case of other attachments.

100 Me. 564; \*101 Me. 277; 124 Me. 185.

**Sec. 21. Rules and principles of equity to prevail in all proceedings.** R. S. c. 87, § 22. In all proceedings under the six preceding sections, when there

appears to be any conflict or variance between the principles of law and those of equity, as to the same subject matter, the rules and principles of equity shall prevail. At the hearing of all equity causes, oral testimony shall be received as in trials at common law.

87 Me. 275; 94 Me. 307; 98 Me. 442; 100 Me. 564; \*101 Me. 277; 104 Me. 53;  
113 Me. 262; 124 Me. 185.

**Sec. 22.** Either party may file any document material to issue, and give notice to other party; no denial, genuineness admitted. R. S. c. 87, § 23. A party to any action in the supreme judicial court or the superior court, may file in the clerk's office of the court in the county where such action is pending, any document which he may deem material to the issue, and give to the adverse party notice of such filing and that he desires the execution of said document to be admitted. If within seven days after such notice, unless the time is enlarged by the court or a justice thereof, the adverse party shall not file in said clerk's office a denial of the genuineness of the execution of said document, he shall be held to have admitted the same.

104 Me. 81.

**Sec. 23.** Court may order production of books, papers, or written instruments. R. S. c. 87, § 24. Where books, papers, or written instruments material to the issue in any action at law pending in the superior court, are in the possession of the opposite party, and access thereto refused, the court upon motion, notice, and hearing, may require their production for inspection. In case of unreasonable delay or refusal in complying with such requirement the court may order a nonsuit or default as the case may require.

102 Me. 151.

**Sec. 24.** Change of venue. R. S. c. 87, § 25. Any justice of the superior court, while holding a nisi prius term, 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.

75 Me. 368; 80 Me. 22; 107 Me. 276; 126 Me. 505.

**Sec. 25.** Minors may be excluded from court-room. R. S. c. 87, § 26. Any court or trial justice may exclude minors as spectators, from the court-room, during the trial of any cause, civil or criminal, when their presence is not necessary as witnesses or parties.

**Sec. 26.** Trespass and case. R. S. c. 87, § 27. The distinction between actions of trespass and trespass on the case is abolished. A declaration in either form is good.

\*70 Me. 220; \*77 Me. 342; 80 Me. 33.

**Sec. 27.** Action of assumpsit; plea of non-assumpsit. 1929, c. 286. The action of assumpsit shall lie in any case in which either an action of debt or an action of covenant is now maintainable; under the plea of non-assumpsit, the defenses available under the plea of general issue in either of said actions shall be available.

**Sec. 28.** Declarations upon a contract in writing. 1929, c. 333. No declaration in an action at law upon any contract in writing shall be adjudged insufficient if it sets forth the making of said contract, the full contract relied upon with an allegation that the plaintiff has complied with all the terms and conditions thereof and the further allegation of the specific breach or breaches upon which the plaintiff relies, and that the plaintiff is thereby damaged.

**Sec. 29.** Treasurers may sue in their own name. R. S. c. 87, § 28. Treasurers of state, counties, towns, and corporations, may maintain suits in their



own names as treasurers on contracts given to them or their predecessors, and prosecute suits pending in the name of their predecessors.

74 Me. 219.

**Sec. 30. Actions by unincorporated societies.** R. S. c. 87, § 29. Any organized unincorporated society or association may sue in the name of its trustees for the time being, and may maintain an action at law, though the defendant or defendants or some of them are members of the same society or association.

92 Me. 212; 99 Me. 433; 123 Me. 227.

**Sec. 31. Penalties.** R. S. c. 87, § 30. Penalties may be recovered by action of debt, when no other mode of recovery is provided.

56 Me. 78; 84 Me. 433; 87 Me. 476.

**Sec. 32. When assignee of a grantee may sue on real covenants of first grantor.** R. S. c. 87, § 31. 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, at the first term, in court, 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.

50 Me. 453; \*51 Me. 567; 68 Me. 193; 72 Me. 376; 102 Me. 338.

**Sec. 33. Grantee may defend suit.** R. S. c. 87, § 32. Grantees may appear and defend in suits against their grantors in which the real estate conveyed is attached.

See §§ 66 to 71; \*76 Me. 418; 106 Me. 114; 127 Me. 380.

**Sec. 34. Assignment of breaches; pleadings.** R. S. c. 87, § 33. In actions on contract in a penal sum for performance of covenants or agreements, and in actions of covenant, several breaches may be assigned, and in defense, performance generally, both in affirmative and negative covenants, may be alleged.

58 Me. 130; 77 Me. 111; 80 Me. 362.

**Sec. 35. In actions of covenant, if encumbrance is a right of dower, it may be assigned and be the measure of damages.** R. S. c. 87, § 34. 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 fourteen days before the term of court to which it is returnable; if she does not appear, or if she appears and refuses to release such right, the court shall appoint three commissioners to assign the same, who shall proceed in the manner provided for commissioners appointed under chapter one hundred two to make partition; and 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.

See c. 102, §§ 14, 15, 21.

**Sec. 36. General issue to be pleaded with brief statement.** R. S. c. 87, § 35. The general issue may be pleaded in all cases, and a brief statement of special matter of defense, or a special plea, or double pleas in bar, may be filed. The plaintiff must join a general issue, and may file a counter brief statement.

10 Me. 260; 11 Me. 166. \*215; \*13 Me. 38; 16 Me. 86, 425; 29 Me. 472; 47 Me. 350, 489; 49 Me. 333; 53 Me. \*134, 429; 55 Me. 159; \*65 Me. 496; 71 Me. 401; 78 Me. 295; 87 Me. 26; 108 Me. 140; 112 Me. 175; 125 Me. 113.

**Sec. 37.** When plea in abatement overruled defendant may answer over on merits. 1929, c. 292. When a plea or motion in abatement or to the jurisdiction has been overruled the defendant shall have the right to answer over on the merits. Nothing herein contained shall be construed as affecting the provisions of existing law relative to the filing of appearances.

**Sec. 38.** Demurrers, when filed, to be joined, and not be withdrawn; amendments may be made; further proceedings. R. S. c. 87, § 36. A general demurrer to the declaration may be filed; and in any stage of the pleadings either party may demur, and the demurrer must be joined, and it shall not be withdrawn without leave of court, and of the opposite party; but the justice shall rule on it, and his ruling shall be final unless the party aggrieved excepts; and before exceptions are filed and allowed, he has the same power as the full court to allow the plaintiff to amend, or the defendant to plead anew. If the law court deems such exceptions frivolous, it shall award treble costs against the party excepting from the time the exceptions were filed. If the declaration is adjudged defective and is amendable, the plaintiff may amend upon payment of costs from the time when the demurrer was filed. If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered. At the next term of the court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the law court to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the amendment or new pleadings filed on the second day of the term; but by leave of court the time therefor may be enlarged, or further time may be granted by the court within which to pay said costs and to file such amendment or new pleadings.

29 Me. 110; 51 Me. \*390, 416; 52 Me. 22; 54 Me. \*574; 58 Me. 129; 60 Me. \*500; 63 Me. 152; 65 Me. 94; 66 Me. 286, \*459; 67 Me. 27, 38, \*490, 553; 112 Me. 176; 113 Me. 526; \*117 Me. 423; 119 Me. 530; 122 Me. 62; 126 Me. 16.

**Sec. 39.** Hearings and judgments in vacation. R. S. c. 87, § 37. 1929, c. 234. Any justice of the superior court on application of either party and on notice, may in vacation hear and determine a demurrer or any interlocutory motion in any cause pending, and may make any order therein which the court could make if in session; and by agreement of parties, he may, at any time or place, try and determine issues of fact and of law submitted to him and render any judgment therein which the court could render if in session. Any such justice may in vacation render judgment in any case heard by him in term time. Parties shall have the right of exception to such orders and judgments, and to other rulings on questions of law, as if judgment had been rendered in term time. Bills of exceptions in such cases shall be filed within thirty days from the rendition of judgment, unless the time is further extended by any justice of such court. When a judgment for the plaintiff is rendered in vacation, all pending attachments of property shall continue in force for thirty days after the order of final judgment is entered upon the docket.

\*114 Me. 511; \*116 Me. 125; \*120 Me. 281; 121 Me. 512; 124 Me. 288, 437; 125 Me. 138, \*430.

**Sec. 40.** Actions on insurance policies. R. S. c. 87, § 38. In all actions at law on insurance policies a declaration in indebitatus assumpsit 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 non-compliance 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.

118 Me. 191; 121 Me. 248; \*122 Me. 361; \*124 Me. 232.

**Sec. 41. Tender may be made, or money brought into court, in case of trespass on land. R. S. c. 87, § 39.** In actions of trespass on lands, the defendant may file a brief statement disclaiming all title to the land described, and alleging 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; and if on trial he establishes the truth of his allegations, he recovers costs.

30 Me. 467; 71 Me. 287; 76 Me. 357.

**Sec. 42. Offer to be defaulted, and its effect. R. S. c. 87, § 40.** In any personal action the defendant may in writing entered of record with its date, offer to be defaulted for a specified sum. If accepted, interest may be added from that date to date of judgment. If not accepted within such time as the court orders, it shall not be offered in evidence, or have any effect upon the rights of the parties, or the judgment to be rendered, except as to the costs; but no costs shall be allowed the defendant, if the offer is accepted within the time fixed by the court, or if accepted when no time has been so fixed. If the offer is not so accepted and the plaintiff fails to recover a sum as due at the time of the offer, greater than the sum offered, he recovers such costs only as accrued before the offer, and the defendant recovers costs accrued after that time, and his judgment for costs may be set off against the plaintiff's judgment for debt and costs.

4 Me. 276; 5 Me. 394; 9 Me. 112; 13 Me. 313; 19 Me. 208; 20 Me. 40, 313; 21 Me. 531; 30 Me. 458; 31 Me. 414; 33 Me. 220; 39 Me. 72, \*474; 42 Me. 54, \*290; 46 Me. 545; 47 Me. 354; 48 Me. 301; 51 Me. 383; 55 Me. 533; 71 Me. 287; 72 Me. 442.

**Sec. 43. Offer of judgment against plaintiff; proceedings and effect. R. S. c. 87, § 41.** In any personal action the plaintiff may, in like manner, offer to have judgment rendered against him for a specified sum, and the proceedings thereon and the effect of such offer upon his rights and liabilities shall be the same as is provided in respect to the defendant in the preceding section.

**Sec. 44. Tender before entry; town may tender, or offer to be defaulted. R. S. c. 87, § 42.** A tender, with the costs then accrued, may be made after action brought and before its entry, to the plaintiff or his attorney, with the same effect as if made before action brought. In actions against towns for injury to the person or damage to property from defect in ways, a town may make a tender before commencement or entry of the action, or offer to be defaulted for a specified sum, with the same effect as in actions on contract.

9 Me. 112; 39 Me. 435.

## CHAP. 96

**Sec. 45. Partial failure of consideration of note.** R. S. c. 87, § 43. In any proceeding at law or in equity 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, a partial failure of consideration may be shown in reduction of damages.

<sup>24</sup> Me. 120; <sup>34</sup> Me. 146; <sup>43</sup> Me. 490; <sup>75</sup> Me. 293; <sup>88</sup> Me. 460; <sup>98</sup> Me. 321; \*<sup>99</sup> Me. 353.

**Sec. 46. Property of deceased debtor on joint contract liable.** R. S. c. 87, § 44. The goods and estate of a deceased debtor in a joint contract, express or implied, or in a judgment on contract, are liable in the same manner, and the creditor has the same remedy, as in case of a joint and several contract.

\*<sup>60</sup> Me. 353.

**Sec. 47. Truth justifies in libel; save in case of malice.** R. S. c. 87, § 45. In an action for writing and publishing a libel, evidence shall be received to establish the truth of the matter charged as libelous. If its truth is established, it is a justification, unless the publication is found to have originated in corrupt or malicious motives.

<sup>30</sup> Me. 467; \*<sup>95</sup> Me. 348; <sup>96</sup> Me. 24; <sup>118</sup> Me. 360.

**Sec. 48. Mitigation of damages in action for libel.** R. S. c. 87, § 46. The defendant in an action for libel, may prove under the general issue, 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; and he may also 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.

**Sec. 49. Unproved allegations; effect.** R. S. c. 87, § 47. In actions for libel or slander, an unproved allegation in the pleadings that the matter charged is true, shall not be deemed proof of malice unless the jury on the whole case find that such allegation or the defense thereunder, is made with malicious intent.

**Sec. 50. Burden of proof on defendant in certain cases of negligence; contributory negligence to be pleaded.** R. S. c. 87, § 48. In actions to recover damages for negligently causing the death of a person, or for injury to a person who is deceased at the time of trial of such action, the person for whose death or injury the action is brought shall be presumed to have been in the exercise of due care at the time of all acts in any way related to his death or injury, and if contributory negligence be relied upon as a defense, it shall be pleaded and proved by the defendant.

\*<sup>112</sup> Me. 96; \*<sup>115</sup> Me. 361; <sup>116</sup> Me. 191, 447; <sup>117</sup> Me. 262; <sup>119</sup> Me. 597; <sup>120</sup> Me. 371; <sup>123</sup> Me. 305; <sup>124</sup> Me. 158, 410; <sup>125</sup> Me. 161; <sup>126</sup> Me. 558; <sup>127</sup> Me. 316.

**Sec. 51. No reversal for wrong joinder.** R. S. c. 87, § 49. When in a civil action, the declaration contains a good count and bad ones, or a wrong joinder of counts, and no written objection is made until after the cause is committed to the jury, and a general verdict has been recorded, the judgment cannot for such cause be reversed on writ of error.

<sup>55</sup> Me. 417.

**Sec. 52. No motions in arrest.** R. S. c. 87, § 50. No motion in arrest of judgment in a civil action can be entertained.

\*<sup>44</sup> Me. 42; <sup>53</sup> Me. 109; \*<sup>54</sup> Me. 357; <sup>69</sup> Me. 456; <sup>70</sup> Me. 253.

**Sec. 53. On certain bonds and recognizances, jury to assess damages.** R. S. c. 87, § 51. In actions on bond or contract in a penal sum, for the performance of covenants or agreements, or on a recognizance to prosecute an appeal, when

the jury finds the condition broken, they shall estimate the plaintiff's damages, and judgment shall be entered for the penal sum, and execution shall issue for such damages and costs.

17 Me. 452; \*21 Me. 209; 22 Me. 486, 487; 24 Me. 168; 39 Me. 414; 49 Me. 325; \*52 Me. 275; 77 Me. 111; 80 Me. 362; \*83 Me. 32; \*123 Me. 119.

**Sec. 54. Sureties on official bond may defend.** R. S. c. 87, § 52. Sureties upon official bonds may appear and defend in suits against their principal, whenever such sureties may ultimately be liable upon such bonds.

**Sec. 55. Interest.** R. S. c. 87, § 53. Interest shall be allowed on the amount found due for damages and costs in actions on judgments of a court of record.

19 Me. 460; 22 Me. 120; 60 Me. \*256, 257; \*63 Me. 62.

**Sec. 56. Judge may sit by consent, although his town or county is a party.** R. S. c. 87, § 54. A justice or judge may sit in the trial or disposal of an action, in which the county or town where he resides is a party or interested, if the party adverse to such county or town enters on the docket a waiver of all objections.

See c. 91, § 1; \*105 Me. 418; \*110 Me. 199.

**Sec. 57. Death of party suggested, executor or administrator may appear, or be summoned; heirs also, in equity.** R. S. c. 87, § 55. When a party to a suit dies, and his death is suggested on the record, and the cause of action survives, his executor or administrator may become a party, or at the request of the other party, be summoned to appear and become a party. Service of the summons shall be made on him fourteen days before the term to which it is returnable. If he neglects to appear, judgment may be entered by nonsuit or default according to chapter one hundred one. If the suit is in equity, his executor, administrator, or heirs at law, may in like manner appear or be summoned without a bill of revivor.

See c. 91, § 12; c. 95, § 58; c. 101, § 7; 6 Me. 429; 44 Me. 76; \*59 Me. 343; 66 Me. 446; 76 Me. 99; 77 Me. 141.

**Sec. 58. Guardian ad litem may be appointed for insane party.** R. S. c. 87, § 56. When a party becomes insane, the suit may be prosecuted or defended by his guardian, who, on application of his friend, or of the other party, may be appointed for that purpose by a justice of the court in term time or in vacation. He is entitled to a reasonable compensation, and is not liable for costs.

\*68 Me. 432.

**Sec. 59. Motions to set aside verdicts on report to full count.** R. S. c. 87, § 57. 1925, c. 170. When a motion is made in the superior court to have a verdict set aside as against law or evidence, a report of the whole evidence shall be signed by the presiding justice or authenticated by the certificate of the official court stenographer. When the motion is founded on any alleged cause not shown by the evidence presented at the trial, the testimony in support of the allegations of the motion and in rebuttal or impeachment may be taken out and a report of the same, together with that presented at the trial, shall be signed by the justice or authenticated by the certificate of the official court stenographer, and the case shall be marked "Law." When the law court is of the opinion that any such motion is frivolous or intended for delay it may award double or treble costs.

See § 171; c. 91, § 72; 15 Me. 73; 16 Me. 204; 19 Me. 30, 405; 20 Me. 199, 352; 40 Me. 245; 43 Me. 468, 538; 45 Me. 284; 48 Me. \*242, 439; 53 Me. 172; 54 Me. 260; 56 Me. 233, 250; 58 Me. 351; 70 Me. 334; \*100 Me. 273; 104 Me. \*80; \*107 Me. 276; 112 Me. 290; \*113 Me. 281; \*116 Me. 12; 118 Me. 123; 119 Me. 14, 414; \*124 Me. 244; 127 Me. 321.

**Sec. 60. Verdict may be set aside by presiding justice.** R. S. c. 87, § 58. 1923, c. 70. Any justice of the superior court may set aside a verdict and grant

## CHAP. 96

a new trial in a civil case tried before him, when in his opinion the evidence demands it. But such verdict shall not be set aside by a single justice when two verdicts have been rendered against the applicant.

A motion to so set aside a verdict must be filed at the same term at which such verdict is rendered and shall be heard by the presiding justice either in term time or in vacation at his discretion; if such motion is heard in term time the presiding justice may render his decision in vacation.

\*59 Me. 580; 64 Me. 131; \*73 Me. 225; 79 Me. 217; 83 Me. 452; \*115 Me. 205.

**Sec. 61. In trespass, jury to find if it was wilful.** R. S. c. 87, § 59. In actions of trespass on property, the court and jury, or magistrate, shall determine whether the trespass was committed wilfully; if so found, a record thereof shall be made, and a memorandum thereof minuted on the margin of the execution.

See c. 124, § 80.

**Sec. 62. Damages on protests of bills.** R. S. c. 87, § 60. Damages on protests of bills of exchange of a hundred dollars or more, payable by the acceptor, drawer, or indorser of a bill in this state, are, if payable at a place seventy-five miles distant, one per cent; if payable in the state of New York or in any state northerly of it, and not in this state, three per cent; if payable in any Atlantic state or territory southerly of New York and northerly of Florida, six per cent; and in any other state or territory, nine per cent.

**Sec. 63. Legal day's work.** R. S. c. 87, § 61. In all contracts for labor, ten hours of actual labor are a legal day's work, unless the contract stipulates for a longer time; but this rule does not apply to monthly labor or to agricultural employments.

62 Me. 527; 96 Me. 221.

**Sec. 64. Action by a public officer is not abated by his ceasing to act.** R. S. c. 87, § 62. No action, commenced in his official capacity by a public officer, is abated by his ceasing to hold the office; but it may be prosecuted by his successors to the same uses; and the necessary amendments may be made and notices given.

**Sec. 65. No action on demands discharged by a partial payment.** R. S. c. 87, § 63. No action shall be maintained on a demand settled by a creditor, or his attorney entrusted to collect it, in full discharge thereof, by the receipt of money or other valuable consideration, however small.

46 Me. 434; \*47 Me. 546; 48 Me. 434; 56 Me. 582; \*57 Me. 492; 59 Me. 358; 61 Me. 563; 62 Me. 12; 63 Me. 443; 77 Me. 530; 86 Me. 184; 88 Me. 222; 92 Me. 432; 95 Me. 397; 97 Me. 588; \*102 Me. 505; 103 Me. 106; \*106 Me. 405; 107 Me. 165; \*119 Me. 383; 124 Me. 150.

### Defense of Suits by Subsequent Attaching Creditors.

**Sec. 66. Subsequent attaching creditor may petition to defend prior suits.** R. S. c. 87, § 64. When property has been attached, a plaintiff, who has caused it to be attached in a subsequent suit, may, by himself or attorney, petition the court for leave to defend the prior suit, and set forth therein the facts as he believes them to be, under oath; and the court may grant or refuse such leave.

See § 33; 64 Me. 319; \*74 Me. 580; 79 Me. 535.

**Sec. 67. If leave is granted, bond must be given.** R. S. c. 87, § 65. If leave is granted, he shall give bond, or enter into recognizance with sufficient surety, in such sum as the court orders, to pay the plaintiff in the prior suit all damages and costs occasioned by such defense; and an entry of record shall be made that he is admitted to defend such suit.

**Sec. 68. Judgment, how to be entered when defense fails.** R. S. c. 87, § 66. When the petitioner enters into recognizance, and fails in his defense, execution

on his recognizance shall be issued against him for the damages found by the court, and costs; and judgment shall be rendered between the original parties as if no such defense had been made.

**Sec. 69. How to be entered when defense prevails.** R. S. c. 87, § 67. When the petitioner prevails, judgment shall be rendered against the plaintiff and in favor of the petitioner, and execution issued thereon for his costs; and costs may or may not be awarded to the original defendant.

12 Me. 506.

**Sec. 70. When judgment in such prior suit is rendered at the first term, creditor may have review; proceedings.** R. S. c. 87, § 68. When judgment in such prior suit is rendered at the first term of the court, the plaintiff in such subsequent suit, within one year thereafter, first giving bond to each party as provided in section sixty-seven, may petition as provided in section sixty-six for leave to sue out a writ of review of such action; and such leave may or may not be granted. If it is granted, and on final judgment the sum originally recovered is reduced, judgment shall be entered and execution issued for the difference, not exceeding the amount due from the original defendant to the petitioner, with costs for his sole use; which operates as a payment of his debt to the amount of damages recovered.

82 Me. 97.

**Sec. 71. Prior attachment to delay or defraud creditors, is void.** R. S. c. 87, § 69. When it appears by the verdict, or otherwise, that such prior attachment was made with intent to delay or defraud creditors, or that there was collusion between the plaintiff and defendant for that purpose, such attachment is void.

\*64 Me. 320.

#### Suits By and Against Bankrupts and Insolvents.

**Sec. 72. Actions by bankrupts or insolvents.** R. S. c. 87, § 70. 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 by plea in abatement, 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.

**Sec. 73. Attachments made four months before bankruptcy or insolvency.** R. S. c. 87, § 71. Actions in which an actual attachment of property was made four months prior to the filing of a petition in bankruptcy or insolvency by any defendant therein, shall be disposed of under the ordinary rules of proceedings in court.

56 Me. 561; 67 Me. 19.

**Sec. 74. Other actions against bankrupts, or insolvents, procedure.** R. S. c. 87, § 72. 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 suit, shall be continued until the bankrupt or insolvent proceedings are closed, unless the plaintiff strikes such defendant's name from the suit, which he may do without costs; but when such defendant does not use diligence in the prosecution of his bankrupt or insolvent proceedings, after one term's notice to him, in writing, from the plaintiff, the court may refuse further delay.

67 Me. 19; 85 Me. 198; 109 Me. 563.

**Sec. 75. Discharge in bankruptcy, how pleaded.** R. S. c. 87, § 73. A discharge in bankruptcy may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, and a certificate of such

discharge under seal of the court granting the same, shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.

### Set-Off.

**Sec. 76.** Defendant must file set-off during the first term, and clerk must enter the same on the docket. R. S. c. 87, § 74. Demands between plaintiffs and defendants may be set off against each other as follows:

The defendant, during the term to which the writ is returnable, must file a brief statement of his demand, in substance as certain as in a declaration, which by leave of court may be amended. The clerk shall enter on it the date of filing and on the docket under the action the date and notice of the filing.

6 Me. 240; 10 Me. 139; 15 Me. 269; 19 Me. 26; 20 Me. 423; 25 Me. 129; 31 Me. 133; 32 Me. 285; 35 Me. 81; \*38 Me. 117; 47 Me. 369; 78 Me. 465.

What claims may be set off; 29 Me. 426; 31 Me. 161; 32 Me. 285; 33 Me. 231; 34 Me. 510; 35 Me. 81, 535; \*37 Me. 75; 39 Me. 421, \*447; 53 Me. 176; 57 Me. 166; 69 Me. 381; 124 Me. 117; 128 Me. 307.

How presented and allowed; 35 Me. 180; 36 Me. 224; 41 Me. 264.

Set-off of judgment and executions; 29 Me. 15; 34 Me. 123.

**Sec. 77.** What demands may be set off. R. S. c. 87, § 75. A demand originally payable to the defendant in his own right, founded on a judgment, or contract express or implied, for the price of real or personal estate sold, for money paid, or had and received, for services done, for a liquidated sum, or for one ascertainable by calculation, may be set off.

5 Me. 416; 7 Me. 84; 11 Me. 352; 13 Me. 288; 16 Me. 62; 18 Me. 181; 20 Me. 423; 22 Me. 462; 24 Me. 38, 352; 39 Me. 421, \*447; 78 Me. 469; \*94 Me. 211; \*123 Me. 276; 124 Me. 18.

**Sec. 78.** Demand must be due from all plaintiffs to all defendants. R. S. c. 87, § 76. The demand must be due from all the plaintiffs to all the defendants jointly. When there is a dormant partner, claims due from the ostensible one may be set off as if there were no dormant partner.

15 Me. 269; 85 Me. 445; 90 Me. 121; \*97 Me. 26.

**Sec. 79.** Demands assigned may be set off by agreement. R. S. c. 87, § 77. When a plaintiff had received notice that a demand against him had been assigned to the defendant, and had, before his suit was commenced, agreed to pay it to him, or to receive it as payment towards his demand, it may be set off.

19 Me. 72; 26 Me. 118; 56 Me. 168; 85 Me. 167.

**Sec. 80.** Demands acquired after notice. R. S. c. 87, § 78. When a defendant had notice of the assignment of a demand, he cannot have any demand set off that accrued or was acquired after such notice.

3 Me. 465; 17 Me. 271.

**Sec. 81.** Suits by one for another. R. S. c. 87, § 79. When an action is brought by one person for the use of another, a demand against the latter may be set off.

57 Me. 166.

**Sec. 82.** Equitable dues, set off. R. S. c. 87, § 80. When the demand to be set off is a bond or contract with a penalty, only the sum equitably due can be set off.

57 Me. 166.

**Sec. 83.** Demands due from a deceased person, how to be set off. R. S. c. 87, § 81. Demands against a person belonging to a defendant at the time of the death of such person, may be set off against claims prosecuted by his executor or administrator; and if a balance is found due to the defendant, judgment shall be in like form and of like effect as if he had commenced a suit therefor;



but if the estate is insolvent, it must be presented to the commissioners or added to the list of claims, like other judgments.

6 Me. 242; 34 Me. 147; 38 Me. 118; 49 Me. 572.

**Sec. 84. Set-off in actions against persons in a representative capacity.** R. S. c. 87, § 82. In actions against executors, administrators, trustees, or others in a representative capacity, they may set off such demands as those whom they represent might have set off in actions against them; but no demands, due to or from them in their own right, can be set off in such actions.

See c. 79, § 16; 1 Me. 183; 3 Me. 371; 24 Me. 38; \*33 Me. 230; 94 Me. 211; 98 Me. 321; 101 Me. 327.

**Sec. 85. Set-off in actions brought by executors or administrators of insolvent estates, and proceedings therein.** R. S. c. 87, § 83. In joint or several actions by the executor or administrator of an estate represented insolvent, against two or more persons having joint or several demands against such estate, the demands may be filed in set-off by either of the defendants, 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; and 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.

See c. 79, § 19.

**Sec. 86. Pleadings and issue in cases in set-off.** R. S. c. 87, § 84. The trial may proceed in cases of set-off on issue joined, without a plea of set-off; and if an issue is not otherwise formed, the defendant may, except in actions of assumpsit, plead that he does not owe the sum demanded; and the plaintiff is entitled to every defense against such set-off, that he might have, by any form of pleading, to an action against him on the same demand.

37 Me. 75; 54 Me. 498; 56 Me. 141; 67 Me. 571.

**Sec. 87. No discontinuance, but by consent; limitations.** R. S. c. 87, § 85. When a demand is filed in set-off, the action cannot be discontinued without consent of the defendant. The statute of limitations applies to demands filed in set-off, as if actions had been commenced on them at the date of the plaintiff's action.

See c. 95, § 109; 68 Me. 472.

**Sec. 88. Costs in set-off.** R. S. c. 87, § 86. When no balance is found due to either party, no costs are recoverable. If a balance is found due to the plaintiff, he shall have judgment therefor with costs, and if a balance is found due from the plaintiff, judgment shall be rendered therefor in favor of the defendant, with costs; but no such judgment shall be rendered against the plaintiff, when the demand sued, had been assigned before the commencement of the action; nor for any balance due from any other person than the plaintiff.

30 Me. 28; 68 Me. 132; 73 Me. 169.

**Sec. 89. Similar proceedings before inferior tribunals.** R. S. c. 87, § 87. Similar proceedings in set-off may take place before municipal and police courts and trial justices, the demand in set-off being filed on the return day of the writ; but judgment cannot be rendered for a defendant for an amount in excess of the civil jurisdiction of such court, exclusive of costs.

#### Auditors.

**Sec. 90. Auditors may be appointed in certain cases; proceedings before auditor; payment of fees.** R. S. c. 87, § 88. When an investigation of accounts, or an examination of vouchers is required, the court may appoint one or more

## CHAP. 96

auditors to hear the parties and their testimony, state the accounts, and make a report to the court upon such matters therein as may be ordered by the court, and the report is prima facie evidence upon such matters only as are expressly embraced in the order. 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 auditor. The fees and necessary expenses of auditors so appointed shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county, and the amount thereof shall be fixed by the court upon the coming in of the report.

Appointment in vacation, § 2; 40 Me. 340; \*57 Me. 61; 64 Me. 154; \*65 Me. 328; 66 Me. 26; 69 Me. 568; 72 Me. 60; 75 Me. 279; 77 Me. 396; 80 Me. 364; 87 Me. 195; 88 Me. 486; 116 Me. 316.

**Sec. 91. All hearing, a majority may report; proceedings on report.** R. S. c. 87, § 89. When there is more than one 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. They shall be allowed a reasonable compensation, to be fixed by the court and paid as provided in the preceding section.

\*57 Me. 61; \*65 Me. 328; 75 Me. 279.

**Sec. 92. Report as evidence.** R. S. c. 87, § 90. Their report may be used as evidence by either party, and may be disproved by other evidence.

57 Me. 61; \*65 Me. 328; 78 Me. 458; 116 Me. 316.

**Sec. 93. If defendant in action of account neglects to account, proceedings.** R. S. c. 87, § 91. When in an action of account, judgment has been entered that the defendant account, and he unreasonably neglects to appear, or appearing, neglects to render an account before auditors appointed to take it, they shall certify the fact, and the court may enter a default and judgment thereon, or cause the damages to be assessed by a jury.

45 Me. 111; \*65 Me. 328.

## Referees.

**Sec. 94. Court may appoint referees.** R. S. c. 87, § 92. In all cases in the supreme judicial or in the superior court in which the parties agree that the same may be tried by one or more persons as referees, the court may appoint the same, not exceeding three, whose fees and necessary expenses shall be paid by the county on presentation of the proper certificate of the clerk of courts for that county, and the amount thereof shall be fixed by the court upon the coming in of the report.

Appointment in vacation, § 2; 64 Me. 154; \*92 Me. 99.

## Juries.

**Sec. 95. Impaneling of jury; challenges.** R. S. c. 87, § 93. When venires for jurors are returned to court the clerk shall, at the commencement of each term, prepare an alphabetical list of the names of the several persons returned as traverse jurors; and before they are impaneled, the court shall cause it to be ascertained whether all so returned are present, and any juror desiring to be excused shall make application therefor when his name is called, and thereupon be heard on said application. The clerk shall then place separately upon tickets in a box, the names of all jurors legally summoned and in attendance, and not excused, and the names shall be drawn from the box by the clerk, after having been thoroughly mixed, one at a time, and the first twelve persons whose names are drawn from the box shall compose the first jury, and shall be im-

paneled by the first two being sworn, and then the other ten in succession as they were drawn, and in such divisions as the court directs, or all at the same time; and the next twelve so drawn shall be impaneled and sworn in like manner, and shall compose the second jury; but before proceeding to the trial of any civil or criminal case, other than for an offense punishable by imprisonment for life, the clerk may, under direction of court, at the request of either party, place the names of all jurors legally summoned and in attendance, and not engaged in the trial of any other cause, separately upon tickets in a box, and the names shall be drawn from the box by the clerk, after having been thoroughly mixed, one at a time, for the purpose of constituting a jury; and each party may peremptorily challenge four jurors; but in such case all peremptory or other challenges and objections to a juror drawn, if then known, shall be made and determined, and the juror sworn or set aside, before another name is drawn, and so on until the panel is completed; provided, that the right to challenge peremptorily any person called or returned to serve as a juror may be exercised after it has been determined that the person so called or returned stands indifferent. A new jury shall be thus drawn for the trial of each cause; and after the panel is thus completed, the presiding justice shall appoint a foreman for the trial of the case.

See c. 146, § 13; 5 Me. 334; 49 Me. 575, 592; 60 Me. 304; 75 Me. 106; 74 Me. 153, \*511; 80 Me. 416.

**Sec. 96. Supernumeraries, transfers and excuses.** R. S. c. 87, § 94. Supernumerary jurors may be excused, from time to time, until wanted, and they may be placed on either jury as occasion requires; jurors may be transferred from one jury to the other when convenience requires it; and for good reason, any juror may be excused.

75 Me. 105.

**Sec. 97. Form of jurors' oath.** R. S. c. 87, § 95. The following shall be the form of oath, administered to traverse jurors in civil causes:

"You, and each of you swear, that in all causes betwixt party and party, committed to you, you will give a true verdict therein according to the law and the evidence given you. So help you God."

When a juror is conscientiously scrupulous of taking an oath, the word "affirm," shall be used instead of "swear," and the words "this you do under the pains and penalties of perjury," instead of the words "so help you God."

62 Me. 304.

**Sec. 98. Foreman, how chosen.** R. S. c. 87, § 96. Each jury, after being thus impaneled and sworn, shall retire and choose their foreman by ballot, or make the choice upon retiring with the first cause with which they are charged; and when a foreman is absent or excused from service, a new foreman shall be chosen as aforesaid; subject in each case to appointment by the court, as provided in section ninety-five.

**Sec. 99. Talesman, when and how to be returned.** R. S. c. 87, § 97. When, by reason of challenge or other cause, a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of a cause, the court shall cause jurors to be returned from the bystanders, or from the county at large, to complete the panel; if there are on the jury not less than seven jurors drawn and returned as before provided. Such jurors shall be returned by the sheriff or his deputy, or such other disinterested person as the court appoints.

3 Me. 216; 48 Me. 438; 51 Me. 396.

**Sec. 100. New jurors, or new juries, may be summoned during term.** R. S. c. 87, § 98. The court may, in term time, issue venires for as many jurors as

are wanted; to be drawn, notified, and returned forthwith, or on a day appointed; and when in any county, the business requires a protracted session, the court may, during the term, excuse all or any of the jurors originally returned, and issue venires for new jurors to supply their places; who shall be drawn and notified to attend at such time as the court directs.

48 Me. 439.

**Sec. 101. Challenge of jurors, how determined.** R. S. c. 87, § 99. The court, on motion of either party in a suit, 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; and 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.

6 Me. 329; 30 Me. 485; 32 Me. 311; 38 Me. 45; 43 Me. 109; 75 Me. 207; 84 Me. 305; \*120 Me. 426.

**Sec. 102. Challenge from the panel; court may regulate right by general rules.** R. S. c. 87, § 100. 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 ninety-five has been exercised; and the court may, by rules, prescribe the manner in which such right shall be exercised.

\*70 Me. 338; 74 Me. 153; 119 Me. 472.

**Sec. 103. Judge may order a view.** R. S. c. 87, § 101. In any jury trial the presiding justice may order a view by the jury.

**Sec. 104. Judge to charge jury on matters of law, but not to express opinion on issues of fact.** R. S. c. 87, § 102. 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.

64 Me. 290; 65 Me. 269, \*324; 66 Me. 550; 67 Me. 76; 69 Me. 416; 70 Me. 286, 472; 73 Me. 317; 78 Me. 306, 501; 79 Me. 124; 80 Me. 208, 394; 85 Me. 252; 87 Me. 315; 93 Me. 356; 95 Me. 367; 104 Me. 396; \*115 Me. 84; \*120 Me. 468; 121 Me. 116; \*125 Me. 44.

**Sec. 105. Separate verdicts as to defendants.** R. S. c. 87, § 103. In actions of contract against more than one defendant, the jury may return a separate verdict as to each defendant, or as to two or more defendants jointly, and judgments shall be entered accordingly. In case of separate judgment against defendants in the same action, the court shall apportion the costs to be taxed against each defendant.

65 Me. 499; 72 Me. 55; 93 Me. 549; 108 Me. 242; 127 Me. 188.

**Sec. 106. Juries may find special verdicts for cases of law.** R. S. c. 87, § 104. The traverse jury may, in all cases, find a special or general verdict, subject to the opinion of the court on a case agreed on by the parties and reserved, or on the facts as reported by the justice presiding at the trial.

**Sec. 107. When jurors do not agree, proceedings.** R. S. c. 87, § 105. When a jury, not having agreed, return into court stating the fact, the justice may, in his discretion, explain any questions of law, if proposed to him, or restate any particular testimony, and send them out again for further consideration; but they shall not be sent out a third time in consequence of their disagreement, unless on account of difficulties not stated when they first came into court.

22 Me. 458; 24 Me. 509; 31 Me. 157; 33 Me. 492; 36 Me. 476; 73 Me. 465; 77 Me. 383; 81 Me. 563; 91 Me. 31.

**Sec. 108.** When juror not disqualified by residence. R. S. c. 87, § 106. In prosecutions for recovery of money, or other forfeiture, it is not a cause of challenge to a juror that he is liable to pay taxes in a county, town or plantation, which may be benefited by the recovery.

48 Me. 439; 52 Me. 413; 98 Me. 130; 110 Me. 199.

**Sec. 109.** Objections not stated before trial are waived. R. S. c. 87, § 107. If a party knows any objection to a juror in season to propose it before trial, and omits so to do, he shall not afterwards make it; unless by leave of court for special reasons.

6 Me. 329; 47 Me. 594; 52 Me. 413, 501; 53 Me. 536; 71 Me. 90; \*81 Me. 161; 84 Me. 305.

**Sec. 110.** Verdict is not affected by irregularities. R. S. c. 87, § 108. No irregularity in the venires, or drawing, summoning, returning, or impaneling jurors, is sufficient to set aside a verdict, unless the party objecting was injured by the irregularity; or unless the objection was made before the return of the verdict.

3 Me. 216; 8 Me. 50; 46 Me. 413; 48 Me. 439; 65 Me. 469.

**Sec. 111.** Verdict may be set aside for improper practices with jurors. R. S. c. 87, § 109. If either party, in a cause in which a verdict is returned, during the same term of the court, before or after the trial, gives to any of the jurors who try the cause, any treat or gratuity, or purposely introduces among the papers delivered to the jury when they retire with the cause, any papers which have any connection with it, but were not offered in evidence, the court, on motion of the adverse party, may set aside the verdict and order a new trial.

Setting aside verdict for misconduct, or errors of any juror; 2 Me. 38; 3 Me. 204; 6 Me. 140, 380; 11 Me. 499; 17 Me. 306; 20 Me. 97; 22 Me. 200; 25 Me. 487; 38 Me. 139; 41 Me. 551; 53 Me. 470; 55 Me. 565; 57 Me. 493; 64 Me. 213; 70 Me. 96; 101 Me. 596; 115 Me. 353; 117 Me. 147; 125 Me. 263; 128 Me. 379.

For excessive damages; 3 Me. 282, 312; 12 Me. 311; 16 Me. 191; 42 Me. 248; 50 Me. 223; 86 Me. 552; 92 Me. 454; 93 Me. 201; 95 Me. 103, 149.

### Witnesses and Evidence.

**Sec. 112.** Subpoenas for witnesses. R. S. c. 87, § 110. The clerks of the several courts, trial justices, and justices of the peace may issue subpoenas for witnesses to attend before any court or before persons authorized to examine witnesses, to give evidence concerning any pending matter.

**Sec. 113.** Religious belief affects credibility only; atheists may testify. R. S. c. 87, § 111. No person is an incompetent witness on account of his religious belief, but he is subject to the test of credibility; and a person who does not believe in the existence of a Supreme Being may testify under solemn affirmation, and is subject to the pains and penalties of perjury.

18 Me. 159.

**Sec. 114.** Parties, husbands, wives, and others interested, as witnesses. R. S. c. 87, § 112. No person is excused or excluded from testifying in any civil suit or proceeding at law, or in equity, by reason of his interest in the event thereof as party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility; and the husband or wife of either party may be a witness.

44 Me. 19, \*348; 46 Me. \*237, 248, 325, 379, 471; 47 Me. 252, 478; 50 Me. 592; 55 Me. 490; 59 Me. 180, 260; 63 Me. 211; 64 Me. 573; 77 Me. 75, 93; 90 Me. 548; 97 Me. 86; 114 Me. 105; 117 Me. 427; 120 Me. 345; \*124 Me. 401; 125 Me. 56; 126 Me. 16.

**Sec. 115.** Exemption, when the action implies an offense. R. S. c. 87, § 113. No defendant shall be compelled to testify in any suit when the cause of action

## CHAP. 96

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.

46 Me. 326; 48 Me. 425; 55 Me. 490.

**Sec. 116. Attestation of wills, and instruments, not affected.** R. S. c. 87,

§ 114. Nothing in section one hundred fourteen affects the law relating to the attestation of the execution of last wills and testaments, or of any other instrument, which the law requires to be attested.

48 Me. 194; \*114 Me. 105.

**Sec. 117. Testimony of a party out of the state, how to be taken.** R. S. c.

87, § 115. When a party to a suit resides without the state, or is absent therefrom during the pendency of the suit, and the opposite party desires his testimony, a commission, under the rules of court, may issue to take his deposition; and such non-resident or absent party, upon such notice to him or his attorney of record in the suit 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, he may be nonsuited 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.

**Sec. 118. When testimony of a party may be contradicted by co-plaintiffs or co-defendants.** R. S. c. 87, § 116. When one of the plaintiffs or defendants is used as a witness by the opposite party, testimony may be introduced by his co-plaintiffs or co-defendants to contradict or discredit him, as if he were not a party to the suit.

126 Me. 16.

**Sec. 119. Not applicable to executors, administrators, or heirs, save in special cases.** R. S. c. 87, § 117. The five preceding sections do not apply to cases, where, at the time of taking testimony, or at the time of trial, the party prosecuting, or the party defending, or any one of them, is an executor or an administrator, or is made a party as heir of a deceased party; except in the following cases.

45 Me. 166; 46 Me. 173, \*236, 249, 474; 47 Me. 468; 48 Me. 36; 52 Me. 577; 59 Me. 180, 195, 196, 260; 64 Me. 25, \*26, 573; 65 Me. 534; 67 Me. 197; 69 Me. 290, 292; 71 Me. 75, 504; 72 Me. 325; 73 Me. 342; 74 Me. 192; 77 Me. 75; 78 Me. 523; 79 Me. 323, 484; 80 Me. 113; 83 Me. 177; 90 Me. 548; 95 Me. 262, 526; 101 Me. 323; 110 Me. 345; 113 Me. 325, 510; 117 Me. 428, 445; 118 Me. 468; \*120 Me. 336; \*124 Me. 401.

I. The deposition of a party, or his testimony given at a former trial, may be used at any trial after his death, if the opposite party is then alive, and in that case the latter may also testify.

69 Me. 290.

II. In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate or ancestor; and in reference to such matters the adverse party may testify.

59 Me. 260; 64 Me. 25; 65 Me. 424; 67 Me. 197; 68 Me. 417; 69 Me. 290; 74 Me. 195; 77 Me. 125; 79 Me. 484; 118 Me. 468; \*119 Me. 111; 125 Me. 192, 292.

III. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying, if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying.

59 Me. 508; 78 Me. 435; 124 Me. 399.

IV. In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto.

\*59 Me. 364; 64 Me. 25; 69 Me. 290.

V. In actions where an executor, administrator, or other legal representative is a party, and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator, or other legal representative.

73 Me. 342; 108 Me. 556.

VI. In all actions brought by the executor, administrator, or other legal representative of a deceased person, such representative party shall not be excused from testifying to any facts admissible upon general rules of evidence, happening before the death of such person, if so requested by the opposite party. But nothing herein shall be so construed as to enable the adverse party to testify against the objection of the plaintiff when the plaintiff does not voluntarily testify.

\*119 Me. 111.

Sec. 120. **Insane party.** R. S. c. 87, § 118. The rules of evidence which apply to actions by or against executors or administrators, apply in actions where a person shown to the court to be insane, is solely interested as a party.

65 Me. 534.

Sec. 121. **Rules in special proceedings of civil nature.** R. S. c. 87, § 119. The rules of evidence in special proceedings of a civil nature, such as before referees, auditors, county commissioners and courts of probate, are the same as herein provided for civil actions.

73 Me. 363.

Sec. 122. **Witnesses summoned, neglecting to attend, in contempt; liable for damages.** R. S. c. 87, § 120. When a person, summoned and obliged to attend before any judicial tribunal, fails to do so without reasonable excuse, he is liable to the party aggrieved for all damages sustained thereby. The judge or justice of such tribunal may issue a *capias* to apprehend and bring such delinquent before him; and he shall be punished by a fine of not more than one hundred dollars and costs of attachment, and committed until the same and costs are paid.

96 Me. 25.

Sec. 123. **Penalty for refusal to answer.** R. S. c. 87, § 121. When a witness in court refuses to answer such questions as the court allows to be put, he shall be punished by a fine of not more than one hundred dollars, or by imprisonment for not more than three months.

68 Me. 219.

Sec. 124. **Oaths, how to be administered to witnesses.** R. S. c. 87, § 122. A person, to whom an oath is administered, shall hold up his hand, unless he believes that an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing any

## CHAP. 96

other than the Christian religion may be sworn according to the ceremonies of his religion.

**Sec. 125. Affirmation.** R. S. c. 87, § 123. Persons conscientiously scrupulous of taking an oath, may affirm as follows: "I affirm under the pains and penalties of perjury," which affirmation is of the same force and effect as an oath.

78 Me. 488; 79 Me. 104.

**Sec. 126. Conviction affects credibility only.** R. S. c. 87, § 124. No person is incompetent to testify in any court or legal proceeding, in consequence of having been convicted of an offense; but such conviction may be shown to affect his credibility.

See c. 146, § 19; 47 Me. 108; 48 Me. 328; 51 Me. 112, 125; 55 Me. 215; 63 Me. 136; 65 Me. 79; 102 Me. 315.

**Sec. 127. Not obliged to attend court, unless fees are paid or tendered.** R. S. c. 87, § 125. No person is obliged to attend any court as a witness in a civil suit, 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; and his fees for each subsequent day's attendance must be paid at the close of the preceding day, if he requests it.

**Sec. 128. Signature, how proved.** R. S. c. 87, § 126. The signature to an attested instrument or writing, except a will, may be proved in the same manner as if it were not attested.

**Sec. 129. Affidavit of plaintiff prima facie evidence.** R. S. c. 87, § 127. 1925, c. 96. 1929, c. 230. In all actions brought on an itemized account annexed to the writ, 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 suit 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 before a notary public using a seal without the state, his authority as a notary public to act and to administer an oath shall be certified thereto and the genuineness of his signature certified by a clerk of a court of record or by a deputy or assistant clerk of the same and have the seal of said court attached thereto.

\*117 Me. 427; \*120 Me. 333; 120 Me. 468; 124 Me. 112, \*279.

**Sec. 130. Records of other courts are evidence.** R. S. c. 87, § 128. The records and proceedings of any court of the United States, or of any state, authenticated by the attestation of the clerk, or officer having charge thereof, and by the seal of such court, are evidence.

120 Me. 292.

**Sec. 131. Printed copy of laws of U. S., or of any state, is evidence.** R. S. c. 87, § 129. Printed copies of statutes, acts, and resolves of the United States, or of this, or any other state or territory of the United States, purporting to be published under authority of government, may be admitted as evidence; those of this state as sufficient, those of other states as prima facie evidence.

61 Me. 139.

**Sec. 132. Foreign laws and unwritten laws of the states, how proved.** R. S. c. 87, § 130. Foreign laws may be proved by parol evidence, but when such law appears to be existing in a written statute or code, it may be rejected unless



accompanied by a copy thereof. The unwritten law of any other state or territory of the United States may be proved by parol evidence, and by books of reports of cases adjudged in their courts.

120 Me. 293.

**Sec. 133. When office copies are admissible.** R. S. c. 87, § 131. In all actions touching the realty, or in which the title to real estate is material to the issue, and where original deeds would be admissible, attested copies of such deeds from the registry may be used in evidence, without proof of their execution, when the party offering such copy is not a grantee in the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs.

\*54 Me. 138; 55 Me. 171; \*61 Me. 412; 70 Me. 280; 74 Me. 129; 89 Me. 380; 91 Me. 357; 96 Me. 49; 104 Me. \*37, 432; 107 Me. 30.

**Sec. 134. Certain copied records of deeds admissible in evidence.** R. S. c. 87, § 132. P. & S. L. 1921, c. 78. Copies made from any portion of either of the volumes of the early records in the York county registry of deeds published by the authority of the legislature and placed in each registry, when attested by any register of deeds having lawful custody of such printed volume; also records duplicated from originals or from copies of originals in any registry of deeds and filed in such registry of deeds or in any other registry of deeds by authority of law and copies made from such records when attested by the register of deeds of the county or district where such records are filed, may be used in evidence like attested copies of the original records.

As to admissibility of certain traced or copied records in the registry of deeds of Somerset county, see special laws of 1893, c. 514.

As to admissibility of copies of plans of towns deposited in the registry of deeds of Kennebec county, see special laws of 1905, c. 86.

Transcripts from certified copies of proprietors' records may be used in evidence, c. 15, § 19.

**Sec. 135. Copies of consular and custom-house documents and records are evidence.** R. S. c. 87, § 133. Copies of papers and documents belonging to or filed, or remaining in the office, of any consul, vice-consul, or commercial agent of the United States, and of official entries in the books or records of such office, when certified under the hand and official seal of the proper consul, vice-consul, or commercial agent, are evidence. Copies of registers or enrolments of vessels, or of any other custom-house records or documents deposited in the office of the collector of customs, attested by him or his deputy, under seal of office, may be used in evidence, and shall have the same effect as the production of the records in court, verified by the recording officer in person.

**Sec. 136. Adjutant-general's certificate is evidence.** R. S. c. 87, § 134. 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 suit or proceeding.

60 Me. 252; 70 Me. 395; 77 Me. 333.

**Sec. 137. Testimony of a deceased subscribing witness, or magistrate may be given in subsequent suit.** R. S. c. 87, § 135. 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 cause, 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 cause 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 suit; but such testimony may be impeached like the testimony of a living witness.

**Sec. 138. Writings dated on Sunday.** R. S. c. 87, § 136. No deed, contract, receipt, or other instrument in writing, is void because dated on the Lord's Day, without other proof than the date, of its having been made and delivered on that day.

84 Me. 112.

**Sec. 139. Defendant must restore consideration; actions for injury received on Lord's Day.** R. S. c. 87, § 137. No person who receives a valuable consideration for a contract, express or implied, made on the Lord's Day, shall defend any action upon such contract on the ground that it was so made, until he restores such consideration; nor shall the provisions of chapter one hundred thirty-five, relating to the observance of the Lord's Day, affect in any way the rights or remedy of either party in any action for a tort or injury suffered on that day.

See c. 95, § 89; 77 Me. 484; \*79 Me. 156; \*84 Me. 113, 115; 88 Me. 144; 93 Me. 562; 101 Me. 458.

#### Costs.

**Sec. 140. Costs for party prevailing; in law court.** R. S. c. 87, § 138. In all actions, the party prevailing recovers costs, unless otherwise specially provided. If, after a verdict, the party in whose favor the jury found, carries the case into the law court and the decision there is against him, he recovers no costs after the verdict, but the party prevailing in the law court recovers costs accruing after verdict.

When parties recover costs; 2 Me. 399; 5 Me. 24, 281; 6 Me. 117; 12 Me. 346, 459; 15 Me. 53; 19 Me. 23; 20 Me. 124; 26 Me. 75; 30 Me. 557; \*37 Me. 549; \*38 Me. 191; 39 Me. 467; 54 Me. 437; 58 Me. 41; \*61 Me. 24; 68 Me. 132; 75 Me. 414; 76 Me. 548; 78 Me. 323; 86 Me. 509; \*98 Me. 187; 100 Me. 548.

When parties do not recover costs; 13 Me. 51; 19 Me. 210; 35 Me. 19; 38 Me. 256; 43 Me. 286; 78 Me. 324.

Parties liable for costs; 5 Me. 177; 6 Me. 49; 13 Me. 260; 18 Me. 336; 29 Me. 306; \*560; 41 Me. 460.

In law court, 81 Me. 379; \*115 Me. 165.

**Sec. 141. Costs upon appeal in condemnation proceedings.** R. S. c. 87, § 139. In all proceedings for the estimation of damages for the taking of lands or other property, under any general or special law, if the owner of the land, after an award made by the county commissioners enters an appeal therefrom and fails to obtain a final judgment for an amount greater than the amount of the said award with interest thereon to the date of said judgment, he shall be subject to costs accruing after the date of said first award, and the amount thereof may be applied in reduction of the sum required to be paid by said judgment.

**Sec. 142. If plaintiff appeals from judgment in his favor.** R. S. c. 87, § 140. When a plaintiff appeals from a judgment of a municipal or police court, or a trial justice in his favor, and does not recover, in the appellate court, a greater sum as damages, he recovers only a quarter of the sum last recovered, for costs.

1 Me. 16, 17; 4 Me. 67; 7 Me. 361; 10 Me. 69; 54 Me. 437.

**Sec. 143. Costs in actions of replevin.** R. S. c. 87, § 141. In actions of replevin commenced in the superior court, when the jury find that each party owned a part of the property, they shall find and state in their verdict the value of the part owned by the plaintiff when replevied, without regard to the value as estimated in the replevin bond; and if such value does not exceed twenty dollars, the plaintiff recovers for costs only one quarter part of such value.

2 Me. 162; 6 Me. 262; 12 Me. 54; 40 Me. 286; 49 Me. 325.

**Sec. 144. If improperly sued in superior court, quarter costs; on report of referees.** R. S. c. 87, § 142. In actions commenced in the superior court, ex-

cept those by or against towns for the support of paupers, if it appears on the rendition of judgment, that the action should have been commenced before a municipal or police court or a trial justice, including actions of replevin where the value of the property does not exceed twenty dollars, the plaintiff recovers for costs only one quarter part of his debt or damages. On reports of referees, full costs may be allowed, unless the report otherwise provides.

See c. 14, §§ 28, 82; c. 124, § 79; 4 Me. 67; 8 Me. 106, 145; 11 Me. 149; 12 Me. 346; 21 Me. 390; 28 Me. 206; 32 Me. 85, 101; 34 Me. 207; 43 Me. 318; 44 Me. 429; 47 Me. 459; 49 Me. 335; 51 Me. 460; 53 Me. 516; \*60 Me. 547; 63 Me. 268; 72 Me. 442; 82 Me. 97; \*115 Me. 165.

Report of referees; 1 Me. 66; 14 Me. 398; 78 Me. 427; 82 Me. 184.

**Sec. 145. When damages are reduced by set-off, full costs.** R. S. c. 87, § 143. When an account is filed in set-off and the plaintiff recovers not exceeding twenty dollars, 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 in set-off.

5 Me. 76; 31 Me. 130; 44 Me. 429; 56 Me. 71; 72 Me. 442; 82 Me. 185.

**Sec. 146. Costs of evidence not to be doubled.** R. S. c. 87, § 144. When a party recovers double or treble costs, the fees of witnesses, depositions, copies, and other evidence are not doubled or trebled.

**Sec. 147. On petitions for review, etc.** R. S. c. 87, § 145. On application of a private person for a writ of review, certiorari, mandamus, or quo warranto, or like process, the court may or may not allow costs to a person appearing on notice as respondent.

21 Me. 400; 85 Me. 407.

**Sec. 148. Plaintiff nonsuited pays costs; second suit stayed until costs of first are paid.** R. S. c. 87, § 146. When a plaintiff becomes nonsuit, or discontinues his suit, the defendant recovers costs against him, and in all actions, as well those of qui tam as others, the party prevailing is entitled to his legal costs. When costs have been allowed against a plaintiff on nonsuit or discontinuance, and a second suit is brought for the same cause before the costs of the former suit are paid, further proceedings shall be stayed until such costs are paid, and the suit may be dismissed unless they are paid at such time as the court appoints.

32 Me. 36; \*48 Me. 162; 60 Me. 546; 65 Me. 58, 331; 79 Me. 538; 88 Me. 555; 98 Me. 187; 118 Me. 447.

**Sec. 149. A suitor in name of state is liable for costs.** R. S. c. 87, § 147. When a suit 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 writ; and if the defendant prevails, judgment for his costs shall be rendered against such person, and execution issued, as if he were plaintiff.

55 Me. 455.

**Sec. 150. State is liable for costs in a civil suit.** R. S. c. 87, § 148. When a defendant prevails against the state in a civil suit, 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; and the amount shall be allowed to him in his account with the state.

26 Me. 75.

**Sec. 151. No fees for travel taxable for state.** R. S. c. 87, § 149. When the state recovers costs in a civil suit no fees shall be taxed for the travel of an attorney.

**Sec. 152. In suit in name of assignor, writ to be indorsed; costs.** R. S. c. 87, § 150. The name and place of residence of an assignee, if known, shall, at any time during the pendency of the suit, be indorsed by request of the de-

defendant on a writ or process commenced in the name of his assignor, or further proceedings thereon shall be stayed; and if the defendant prevails, judgment for his costs shall be rendered against the plaintiff and such assignee, as if both had been originally joined in the action; but if not so indorsed and proceedings are stayed, the defendant may maintain an action on the case against the assignee for his costs.

59 Me. 199; 62 Me. 12; 69 Me. 82; 72 Me. 56; \*77 Me. 567; 101 Me. 403.

**Sec. 153.** If assignee is not known, defendant may recover costs against him and offset judgment. R. S. c. 87, § 151. If the name of such assignee is not known to the defendant until after he has recovered judgment against the plaintiff for costs, he may maintain an action on the case against such assignee for his costs, within six years from the time of judgment; and such judgment for costs may be set off between such assignee and the defendant, as if the assignee had been plaintiff in the suit.

\*77 Me. 567.

**Sec. 154.** Assignee of choses not negotiable, may sue in his own name. R. S. c. 87, § 152. Assignees of choses in action, not negotiable, assigned in writing, may bring and maintain actions in their own names, but the assignee shall hold the assignor harmless of costs, and shall file with his writ the assignment or a copy thereof; and all rights of set-off are preserved to the defendant.

See c. 60, § 68; c. 76, § 50; c. 95, § 9; 66 Me. 544; 69 Me. 99, 443; 71 Me. 116; 72 Me. 56, 373; 74 Me. 482; 81 Me. 17; 85 Me. 167; \*87 Me. 338; 91 Me. 338; 93 Me. 231; 94 Me. 237; 95 Me. 278; 99 Me. 307, \*432; 101 Me. 319; 103 Me. 481; 109 Me. 67; 111 Me. 508; 112 Me. 237, 398; 114 Me. 474; \*119 Me. 380; 123 Me. 175; \*124 Me. 342.

**Sec. 155.** In divers actions against same party at same term, or in case of division of an account, only one bill of costs allowed plaintiff. R. S. c. 87, § 153. When a plaintiff at the same term of a court brings divers suits which might have been joined in one, against the same party, or divides an account which might all have been sued for in one action, and commences successive suits upon parts of the same, or brings more than one suit on a joint and several contract, he recovers costs in only one of them, and on only one of the judgments shall execution run against the body of the same defendant, unless the court, after notice to the defendant, and hearing, certifies that there was good cause for commencing them.

34 Me. 284; 55 Me. 454; 70 Me. 272; 72 Me. 265.

**Sec. 156.** If execution could issue, no costs in action on judgment. R. S. c. 87, § 154. A plaintiff shall not be allowed costs in an action on a judgment of any tribunal, on which an execution could issue when such suit was commenced, except in trustee process.

See c. 100, § 85; 33 Me. 211; 56 Me. 80.

**Sec. 157.** Travel in actions by a corporation. R. S. c. 87, § 155. In actions of a corporation, its travel is computed from the place where it is situated, if local, otherwise from the place where its business is usually transacted, not exceeding forty miles, unless its agent actually travels a greater distance to attend court.

**Sec. 158.** Power of court over costs. R. S. c. 87, § 156. The power of the court to require payment of costs, or to refuse them as the condition of amendment or continuance, is not affected by this chapter.

**Sec. 159.** When bankrupt recovers no costs. R. S. c. 87, § 157. When a defendant pleads a discharge in bankruptcy, or insolvency, obtained after the commencement of the suit, he recovers no costs before the time when the certificate was produced in court.

**Sec. 160. Hearing on costs; appeal.** R. S. c. 87, § 158. When a nonsuit or default is entered, or verdict rendered, or a report of referees is accepted, in an action, either party on application to the court, may have the costs recoverable taxed by the clerk, and passed upon by the court during the term; and any party aggrieved by the decision, may file exceptions thereto; but if no such application is made, the clerk, after adjournment, shall determine the costs, and either party dissatisfied with his taxation may appeal to the court, or to a judge in vacation from whose decision no appeal shall be taken, and all attachments shall continue in force for thirty days after such appeal is decided; provided, however, that the costs shall be taxed and the appeal taken within thirty days from the rendition of final judgment or within thirty days from the term following the receipt of a rescript from the law court.

\*60 Me. 547; 107 Me. 156; 118 Me. 321.

#### Action for Damages Arising from Perjury.

**Sec. 161. Rights of action for damages, when a judgment has been obtained by perjury.** R. S. c. 87, § 159. 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 bring an action on the case within three years after such judgment or after final judgment in any proceedings for a review thereof, 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.

73 Me. 379; 76 Me. 37; \*78 Me. 214; \*122 Me. 262; \*126 Me. 14.

#### Executions.

**Sec. 162. Issue and return.** R. S. c. 87, § 160. Executions may be issued on a judgment of the supreme judicial court or superior court after twenty-four hours from its rendition, returnable within three months.

Executions in actions in which bail is taken, c. 99, § 5; 2 Me. 112; 8 Me. 209; 11 Me. 178; 15 Me. 66; 24 Me. 306; 27 Me. 560; 49 Me. 414; \*87 Me. 439.

**Sec. 163. Not after one year; exception.** R. S. c. 87, § 161. No first execution shall be issued after one year from the time of judgment, except in cases provided for by section five; in which the first execution may be issued within not less than one year, nor more than two years from the time of judgment.

72 Me. 339.

**Sec. 164. May be renewed in ten years.** R. S. c. 87, § 162. An alias or pluries execution may be issued within ten years after the day of the return of the preceding execution, and not afterwards.

89 Me. 95; 90 Me. 574.

**Sec. 165. When execution is not so issued, scire facias on judgment.** R. S. c. 87, § 163. When execution is not issued within the times prescribed by the two preceding sections, a writ of scire facias against the debtor may be issued to show cause why execution on the judgment should not be issued, and if no sufficient cause is shown, execution may be issued thereon.

69 Me. 88.

**Sec. 166. Interest on judgments.** R. S. c. 87, § 164. On executions, issued on judgments, interest shall be collected from the time of judgment.

\*60 Me. 258; 101 Me. 228.

**Sec. 167. New, may be issued, on proof of loss.** R. S. c. 87, § 165. A justice of the court in which the judgment was rendered, upon proof by affidavit or otherwise of the loss or destruction of an execution unsatisfied in whole or in part, may order a new execution to be issued for what remains unsatisfied.

**Sec. 168. Execution upon award to creditor by commissioners on a solvent estate.** R. S. c. 87, § 166. 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 thirty 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 of the court if in session, otherwise on the docket of the preceding term. 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, three dollars for clerk's fees, and travel and attendance, and expense of copies and service of notices, as in suits at law.

61 Me. 239, \*243; 67 Me. 117.

### Stenographers.

**Sec. 169. Stenographers, their appointment and duties.** R. S. c. 87, § 167. 1917, c. 260, § 11. 1921, c. 160. 1927, c. 71, § 3. 1929, c. 141, § 17. The chief justice of the supreme judicial court may appoint not more than eleven stenographers to serve for a term of seven 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 three thousand dollars per year. They shall take full notes of all oral testimony, and other proceedings in the trial of causes, either at law or in equity, 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 also 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 fifteen cents for every one hundred words. One of said stenographers 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.

100 Me. 273.

**Sec. 170. Appointment for hearings in vacation.** R. S. c. 87, § 168. At any hearing in vacation of a cause in law or equity pending in the supreme judicial court or in the superior court, the presiding justice may, when necessary, appoint a stenographer other than his regularly appointed court stenographer to report the proceedings thereof, who shall receive for his services from the treasury of the county in which the cause is pending a sum not exceeding six dollars a day for attendance in addition to actual traveling expenses; but when at such hearings the presiding justice employs his regularly appointed stenographer, such stenographer shall receive from said treasury only the amount of his actual expenses incurred in attending the same.

**Sec. 171. Authentication of evidence, by official stenographer.** R. S. c. 87, § 169. In all cases coming before the law court from the supreme judicial

court or from the superior court, in which a copy of the evidence is required by statute, rule of court, or order of the presiding justice, a certificate signed by the official court stenographer, stating that the report furnished by him is a correct transcript of his stenographic notes of the testimony and proceedings at the trial of the cause, shall be a sufficient authentication thereof without the signature of the presiding justice.

\*116 Me. 12; 124 Me. 247.

**Sec. 172. Upon death or disability of official stenographer, proceedings.** R. S. c. 87, § 170. When a verdict has been rendered or a decree made in any cause, in law or equity, in the supreme judicial court or in the superior court, and a certified copy of the evidence taken by the official stenographer cannot be obtained by reason of the death or disability of such stenographer, the justice who presided at the trial of such cause may, if a motion for a new trial has been filed during the term at which the verdict was rendered, on petition therefor, after notice and hearing thereon, set aside such verdict and grant a new trial at any time within one year after it was returned, when in his opinion the evidence demands it; and exceptions allowed by such justice, when the evidence or any portion thereof is made a part of the exceptions, or an appeal taken from any decree in equity made by him, may be heard and determined by the law court either upon a statement of facts agreed upon by counsel and certified by such justice, or upon a report signed and certified by him as a true report of all the material facts in the case.

**Sec. 173. Testimony may be proved by certified copy of notes of former testimony.** R. S. c. 87, § 171. Whenever it becomes necessary, in any court in the state, to prove the testimony of a witness at the trial of any former case in any court in the state, the certified copy of the notes of such testimony, taken by the stenographic reporter at the court where said witness testified, is evidence to prove the same.

69 Me. 402; 110 Me. 338; 127 Me. 236.

**Sec. 174. Stenographic reports may be taxed in bill of costs.** R. S. c. 87, § 172. Any amount legally chargeable by stenographic court reporters, for writing out their reports for use in law cases, 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.

#### Crier.

**Sec. 175. Sheriff, deputy or clerk may act as crier.** R. S. c. 87, § 173. The duties of the crier in the courts shall be performed by the sheriff, or any deputy, or by the clerk.