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Chapter 166.

Domestic Relations. Marriage. Divorce.

Marriage.

Sec. 1. Marriages prohibited within certain degrees.—No man shall marry his mother, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister; and no woman shall marry her father, grandfather, son, grandson, stepfather, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother, brother's son, sister's son, father's brother or mother's brother. (R. S. c. 153, § 1.)

See § 51, re void marriages.

Sec. 2. Void marriages.—No insane or feeble-minded person or idiot is capable of contracting marriage. (R. S. c. 153, § 2.)

Cross references.—See § 9, re marriage outside state to evade law is void; § 51, re void marriages; c. 10, § 22, Rule VIII and note, re the words "insane person" may include an idiotic, non-compos, lunatic, or distracted person.

Sanity determined by sufficiency of mental capacity to contract marriage.—The question in determining the sanity or insanity of a party to a marriage contract is whether the alleged imbecile had mental capacity enough to make the contract of marriage. Had he mental soundness sufficient to make that kind of contract? St. George v. Biddeford, 76 Me. 593.

Party to marriage contract must understand nature of such contract.—A man is incapable of contracting marriage if, at the time it was contracted and solemnized, he had not sufficient mental capacity to understand the nature of the marriage contract, and that by it he would become a husband and assume all the duties, obligations and responsibilities which the marriage relation imposes upon him; he should have at the time sufficient mental capacity to enable him to understand that he assumes the duties, obligations and responsibilities which the law imposes upon him as a result of that contract, whatever they may be. St. George v. Biddeford, 76 Me. 593.

But the law applies different rules or tests of sanity under different circumstances. It tries to ascertain whether a person, alleged insane, is such in respect to the particular question which is being investigated. A man may be of unsound mind in one respect, and not in all respects. He may have mental competency to make one contract and not another. St. George v. Biddeford, 76 Me. 593.

Instruction as to contractual ability held unexceptionable. — It was held that exceptions did not lie to an instruction that the same degree of mind sufficient to enable a person to enter into a valid contract, or make a valid deed or will, would be sufficient to enable him to contract matrimony. Atkinson v. Medford, 46 Me. 510.

Intelligent consent of both parties required.—Marriage requires the intelligent consent of two persons to make the contract that it produces. St. George v. Biddeford, 76 Me. 593.

And if party is incapable of consent, marriage is nullity.—As no person can contract a valid marriage when incapable of giving an intelligent consent thereto,

the marriage of an insane person, though formally solemnized, is a nullity. Unity v. Belgrade, 76 Me. 419.

In a legal sense, unsoundness of mind is synonymous with insanity. St. George v. Biddeford, 76 Me. 593.

Insanity embraces many degrees of derangement.—There are many degrees and varieties of mental derangement which come under the generic head of insanity. That term, in a legal sense, embraces all the groups and conditions. St. George v. Biddeford, 76 Me. 593.

And it may be judged by entire conduct of individual. — Upon the question of the insanity of a person, the entire conduct of the individual through life may be taken into account, in order to judge how for it betokens mental deficiency. St. George v. Biddeford, 76 Me. 593.

Marriage may be collaterally attacked for insanity. — It may be proved in any collateral proceeding, where the question legitimately arises, that a marriage is void because of the insanity of one of the parties thereto. St. George v. Biddeford, 76 Me. 593.

Cited in Winslow v. Troy, 97 Me. 130, 53 A. 1008.

Sec. 3. Polygamy.—Marriages, contracted while either of the parties has a former wife or husband not divorced, living, are void. (R. S. c. 153, § 3.)

See § 51, re void marriages.

Sec. 4. Intentions of marriage recorded. — Residents of the state intending to be joined in marriage shall cause notice of their intentions to be recorded in the office of the clerk of the town in which each resides, at least 5 days before a certificate of such intentions is granted; and if one only of the parties resides in the state, they shall cause notice of their intentions to be recorded in the office of the clerk of the town in which such party resides, at least 5 days before such certificate is granted; and if there is no such clerk in the place of their residence, the like entry shall be made with the clerk of an adjoining town; and if both parties reside out of the state they shall cause notice of their intentions to be recorded in the office of the clerk of the town in which such parties propose to have the marriage solemnized, at least 5 days before such certificate is granted; and the book in which such record is made shall be labeled on the outside of its cover, "Record of Intentions of Marriage," and be kept open to public inspection in the office of the clerk.

Upon application by both of the parties to an intended marriage, when both parties are residents of this state or both parties are nonresidents, or upon application of the party residing within the state when one of the parties is a resident and the other a nonresident, a judge of probate or the judge of a municipal court or trial justice may, after hearing such evidence as is presented, grant a certificate stating that in his opinion it is expedient that the intended marriage be solemnized without delay. Upon the presentation of such a certificate or a copy thereof certified by the clerk of the court by which the certificate was issued, or in extraordinary or emergency cases when the death of either party is imminent, upon the authoritative request of a minister, clergyman, priest, rabbi or attending physician, the clerk or registrar of the city or town in which the intention to be joined in marriage has been filed shall at once issue the certificate as prescribed in this section.

The 5 days' notice required by the provisions of this section shall not apply to cases in which either of the parties to an intended marriage has arrived as an immigrant from a foreign country within 5 days. (R. S. c. 153, § 4.)

See c. 25, §§ 127-135, re premarital medical examination, etc.

Sec. 5. Certificate; consent for minors. — On and after the 5th day from the filing of notice of intentions of marriage, except as otherwise provided, the clerk shall deliver to the parties a certificate specifying the time when such intentions were entered with him; and it shall be delivered to the minister or magistrate before he begins to solemnize the marriage, which shall be performed in the presence of at least 2 witnesses besides the clergyman or magistrate officiat-

ing; but no such certificate shall be issued to a male under 21 or to a female under 18 years of age, without the written consent of their parents, guardians or persons to whom a court has given custody of such minors first presented, if they have any living; in the absence of persons qualified to give consent, the judge of probate in the county where such minors reside may, after notice and hearing, grant consent; when 2 licenses are required and when either or both applicants for a marriage license are under the ages specified in this section, the written consent shall be given for the issuance of both licenses and such written consent shall be given in the presence of the clerk issuing the license or by acknowledgment under seal filed with such clerk. No certificate shall be issued to a male or female under 16 years of age without the written consent of their parents, guardians or persons to whom a court has given custody of such minors first presented, if they have any living, and without said clerk having notified in writing the judge of probate in the county in which they reside of the filing of such intentions, who may in the interest of public welfare order that no such certificate shall be issued, nor to a state, city or town pauper, when the overseers of such town where the pauper resides deposit a list of their state, city or town paupers with the clerk. Such certificate is void if not used within 1 year after the date of issuance. Whoever contracts a marriage or makes false representations to procure the certificate provided for above or the solemnization of marriage contrary to the provisions of this chapter shall forfeit $100. The clerk of any town or his deputy who intentionally violates the provisions of this section or falsely states the residence of either party named in the certificate above mentioned shall forfeit $20 for each offense. (R. S. c. 153, § 5. 1949, c. 58, § 4.)

See c. 25, §§ 127-135, re premarital medical examination, etc.

Sec. 6. Certificate of record of intentions of marriage printed.—All such certificates shall have conspicuously printed thereon the following words: "The laws of Maine provide that a fine of not more than $1,000 or imprisonment for not more than 5 years shall be the punishment of any clergyman or other person who shall solemnize a marriage within this state unless authorized to solemnize marriages therein." Following the above words, said certificate shall contain the blank form for the return to the clerk with a space for the entry of the date of the commission or license issued to the person solemnizing such marriage. (R. S. c. 153, § 6.)

See § 14, re penalty.

Sec. 7. Certificate of marriage out of state filed. — When residents of this state go outside of the state for the purpose of marriage, and it is there solemnized, and they return to dwell here, they shall, on the blank prepared by the state registrar for that purpose, fill out and file a certificate of their marriage with the clerk of the town in which each of them lived, within 7 days after their return. The clerk shall then record such marriage and make a return of it to the state registrar of vital statistics. Any person who fails to make the report of his marriage as above provided shall forfeit $20, ½ to the prosecutor and ½ to the town where the forfeit is incurred. (R. S. c. 153, § 7. 1949, c. 58, § 5.)

Foreign records adopted by implication. —The provision of this section would seem to imply that if the steps specified are taken, the State of Maine then recognizes the certificate as prima facie evidence of marriage, and to that extent adopts the foreign records as its own. Reed v. Stevens, 120 Me. 290, 113 A. 712.

Sec. 8. Proceedings when marriage forbidden.—Any person, believing that parties are about to contract marriage when either of them cannot lawfully do so, may file a caution and the reasons therefor in the office of the clerk where notice of their intentions should be filed. Then, if either party applies to enter such notice, the clerk shall withhold the certificate until a decision is made by 2 justices of the peace, approving the marriage, after due notice to and hear-

ing all concerned; provided that the person filing the caution shall within 7 days thereafter procure the decision of such justices, unless they certify that further time is necessary for the purpose. In such case a certificate shall be withheld until the expiration of the certified time. He shall, finally, deliver or withhold the certificate in accordance with the final decision of said justices. If the decision is against the sufficiency, the justices shall enter judgment against the applicant for costs, and issue excution therefor. (R. S. c. 153, § 8.)

Cited in Gardiner v. Manchester, 88 Me. 249, 33 A. 990.

Sec. 9. Marriage in another state in evasion of law.—When residents of this state, with intent to evade the provisions of sections 1, 2 and 3 and to return and reside here, go into another state or country and there have their marriage solemnized and afterwards return and reside here, such marriage is void in this state. (R. S. c. 153, § 9.)

Sec. 10. Marriage among Quakers. — Marriages solemnized among Quakers or Friends, in the form heretofore practiced in their meeting, are valid and not affected by the foregoing provisions; and the clerk or the keeper of the records of the meeting in which they are solemnized shall make return thereof as provided in section 380 of chapter 25. Any person who willfully neglects or refuses to perform the duty imposed upon him by the provisions of this section shall be punished by a fine of not more than $100 for each offense, for the use of the town in which the offense occurred. (R. S. c. 153, § 10.)

Sec. 11. Persons authorized to solemnize marriages; license. — Every justice of the peace and every notary public residing in this state may solemnize marriages therein. Every ordained minister of the gospel, clergyman engaged in the service of the religious body to which he belongs or person licensed to preach by an association of ministers, religious seminary or ecclesiastical body, whether a resident or nonresident of this state, and of either sex, may solemnize marriages therein after being licensed for that purpose, upon application duly filed with the secretary of state, as herein provided. Such application shall be made upon blanks furnished by the secretary of state, which shall be signed by the applicant and set forth the necessary facts in the premises, which facts shall be certified to by the clerk, treasurer or any of the municipal officers of the town wherein the applicant resides or wherein the ceremony is to be performed. Upon receipt of such application, the secretary of state shall issue to the applicant a license under the seal of the state to the effect that he is authorized to solemnize marriages in this state. Such license or a certified copy thereof shall be received as evidence in all courts of his authority in the premises, and a copy of the record of any marriage solemnized by such licensee, duly made and kept, and attested or sworn to by the clerk of the town in which the marriage intention was recorded or in which the marriage was solemnized, shall be received in all courts as evidence of the fact of marriage. In the event the applicant shall cease to be an ordained minister of the gospel, a clergyman engaged in the service of the religious body to which he belongs or a person licensed to preach by an association of ministers, religious seminary or ecclesiastical body, or a resident of the state, such license shall thereupon terminate and within 10 days thereafter the applicant shall notify the secretary of state to this effect and thereupon the secretary of state shall revoke such license. Such license may also be revoked by the governor for cause, after notice and an opportunity to be heard thereon. If any person willfully neglects or refuses to perform any duty imposed upon him by the provisions of this section, he shall be punished by a fine of not more than $100 for each offense, for the use of the town in which the offense occurred, and the state registrar of vital statistics shall enforce the provisions of this section as far as it comes within his power and shall notify the county attorney of the county in which said penalty should be enforced of the facts that

have come to his knowledge, and upon receipt of such notice the county attorney shall prosecute the defaulting person or persons. (R. S. c. 153, § 11. 1945, c. 85.)

Certificate signed by justice held good upon question of capacity.—Where a certificate was signed by a person holding the office of justice of the peace and also of judge of a municipal court, and showed that a marriage was solemnized by him, and that he held both of those offices at the time, but did not state in which capacity he acted; it was held that he acted in the capacity in which he lawfully might perform the duty. Jones v. Jones, 18 Me. 308.

Evidence of authority to solemnize marriage held insufficient. — A certificate, under the hand of the governor and the seal of state, attested by the secretary, that a person had been appointed and qualified to solemnize marriages, and that he continues to hold the office, was held not to constitute legal evidence of the person's authority. State v. Hasty, 42 Me. 287.

Cited in Opinion of the Justices, 72 Me. 542.

Sec. 12. Copy of record, legal evidence.—A copy of a record of marriage duly made and kept, and attested or sworn to by a justice of the peace, commissioned minister or town clerk, shall be received in all courts as evidence of the fact of marriage. (R. S. c. 153, § 12.)

This section applies only to records of town clerks within this state. It has no extraterritorial force. It does not apply to records in another state. Reed v. Stevens, 120 Me. 290, 113 A. 712.

Sec. 13. Marriage valid, if consummated in good faith by either party. — No marriage, solemnized before any known inhabitant of the state professing to be a justice of the peace or an ordained or licensed minister of the gospel duly appointed and commissioned, is void, nor is its validity affected by any want of jurisdiction or authority in the justice or minister or by any omission or informality in entering the intention of marriage, if the marriage is in other respects lawful and consummated with a full belief, on the part of either of the persons married, that they are lawfully married. (R. S. c. 153, § 13.)

Evidence of marriage held insufficient in indictment for adultery.—Testimony of the particeps criminis that she was "married two years ago by C. L. at his house," it not appearing that C. L. professed to be "a justice of the peace or an ordained or licensed minister of the gospel," or that the marriage was "consummated with a full belief on the part of either of the persons married, that they were lawfully married," is not sufficient evidence of a marriage in an indictment for adultery. State v. Bowe, 61 Me. 171.

Applied in Pratt v. Pierce, 36 Me. 448.

Cited in Opinion of the Justices, 72 Me. 542; Camden v. Belgrade, 75 Me. 126.

Sec. 14. Penalties.—Whoever knowingly and willfully joins persons in marriage contrary to the provisions of this chapter shall be punished by a fine of $100; and such offender is forbidden to join any persons in marriage thereafter.

If any person thus forbidden, or any minister or other person not authorized to solemnize marriages, joins any person in marriage, he shall be punished by a fine of not more than $1,000 or shall be confined to hard labor in the state prison for not more than 5 years.

A town clerk who makes out and delivers to any person a false certificate of the entry of the intention of marriage, knowing it to be false in any particular, shall be punished by a fine of $100 or by imprisonment for 6 months. (R. S. c. 153, § 14.)

Sec. 15. Fees for solemnization of marriages. — For solemnizing a marriage and certifying the same, the fee shall be $1.25. (R. S. c. 153, § 15.)

See c. 112, § 91, re suits for breach of promise to marry.

Parents and Children.

Sec. 16. Father and mother joint natural guardians of children.—The father and mother are the joint natural guardians of their minor children and are jointly entitled to the care, custody, control, services and earnings of such children; and neither parent has any rights paramount to the rights of the other with reference to any matter affecting such children. (R. S. c. 153, § 16.)

Cross references. — See c. 41, § 233, re liability of parent for injury by minor to schoolhouse and school furnishings; note to c. 94, § 1, sub-§ II, re what constitutes emancipation of minor.

Law commits child to natural guardians. —To the natural guardians the law commits the child's care and custody, even if he has a guardian appointed by the probate court. Shaw v. Small, 124 Me. 36, 125 A. 496.

Father has right to provide for child under own roof. — It is necessary for the preservation of the parental authority, and for the welfare of the child, that the father, who is without fault in discharging the obligation which the law imposes upon him, should have the right to provide for the child under his own roof where he can exercise judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

And father's obligations cease if child abandons his home. — Irrespective of any statutory provision the father is bound by law to support his minor child. This however is a limited obligation; it does not attach to the father under all circumstances, or in favor of all persons. A minor who abandons his father's house without the father's fault carries with him no credit on the father's account, not even for necessaries. When the authority of the parent is abjured, without any necessity occasioned by the parent, all obligations to provide for such child cease. It would be no less true that where the child is induced by another person to leave the family of the father without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

But if father deserts child, he is liable for necessaries.—A father who deserts his infant child, and makes no provision for its support, is liable to one who furnishes it with necessary supplies. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

And obligations not affected by divorce without decree as to support.—A divorce without a decree as to the custody and support of the children does not affect the father's duties and obligations as to the support of his minor children. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

Enticing child from parents is infringement of joint right.—Enticing and persuading a child from the joint custody of its parents is an infringement of a joint right in the parents as declared by this section. Hare v. Dean, 90 Me. 308, 38 A. 227.

Though the right of a parent to the custody of a minor child is not an absolute right. Blue v. Boisvert, 143 Me. 173, 57 A. (2d) 498.

And emancipation in infancy severs parent-child relationship as fully as though the child were twenty-one years of age. Lowell v. Newport, 66 Me. 78; Trenton v. Brewer, 134 Me. 295, 186 A. 612.

Married woman does not act as to child by authority of husband. — The independence of married women under the laws of this state leaves no room for indulgence in the theory that a wife, in exercising her right to the care and custody of her child in her husband's absence and free from his control, acts under and by virtue of authority delegated by him, or that damages recovered by either parent for losses incident to injuries to their child belong beneficially to both. Husband and wife do not constitute in this state a legal community known to the laws of some jurisdictions. Illingworth v. Madden, 135 Me. 159, 192 A. 273.

Stated in Grover v. Grover, 143 Me. 34, 54 A. (2d) 637.

Cited in Cummings, Appellant, 126 Me. 111, 136 A. 662.

Sec. 17. Parents may maintain joint action for loss of services; either may sue when one refuses.—The parents of a minor child jointly may maintain an action for loss of the services or earnings of such child when such loss is caused by the negligent or wrongful act of another; but where one parent refuses to sue, the other may sue alone. Nothing contained herein shall be

deemed to limit, amend, supersede or affect the provisions of the workmen's compensation law or acts in amendment thereof. (R. S. c. 153, § 17.)

Sec. 18. When one parent dead or has abandoned child, rights devolve on other.—If one of the parents of a minor child is dead or has abandoned such child, all parental rights respecting such child shall devolve upon the other parent. (R. S. c. 153, § 18.)

Stated in Grover v. Grover, 143 Me. 34, 54 A. (2d) 637.

Sec. 19. Custody and support decreed when parents live apart. — If the father and mother of a minor child are living apart from each other, the judge of probate or the superior court justice in the county where either resides, on petition of either in term time or vacation and after such notice to the other as he may order, may decree which parent shall have the exclusive care and custody of the person of such minor or he may apportion the care and custody of the said minor between the parents, as the good of the child may require; and he may order the father of the minor child or children to contribute to the support of such minor child or children such sums payable weekly, monthly or quarterly as are deemed reasonable and just and may enforce obedience by appropriate decrees, execution issuing for said sums when payable and for costs; which decrees shall be in force until further order of the judge or justice. An appeal shall lie from such decree or decrees to the supreme court of probate, where originating in the court of probate, or to the supreme judicial court where originating in the superior court, but the original decrees shall be in force until reversed. (R. S. c. 153, § 19. 1945, c. 303.)

Cross reference. — See c. 158, § 3, re power of guardian over minor's person and property.

The paramount consideration for the court is the present and future welfare and well-being of the child. Grover v. Grover, 143 Me. 34, 54 A. (2d) 637; D'Aoust, Appellant, 146 Me. 443, 82 A. (2d) 409.

A decree of custody is never final. D'Aoust, Appellant, 146 Me. 443, 82 A. (2d) 409.

Right of visitation when decreed is integral part of care and custody. — In determining the best interests of a child the court often grants a right of visitation. Necessarily the details of such right will vary with the circumstances. The right forms an integral part of the plan decreed for the care and custody of the child. It must be honored faithfully by both mother and father. D'Aoust, Appellant, 146 Me. 443, 82 A. (2d) 409.

When findings as to suitability of parental custody disturbed by law court. — The findings of a justice of the supreme court of probate as to whether a mother is a suitable person to care for a child, and whether the best interests and welfare of the child will be promoted by her having custody, will not be disturbed by the law court on exceptions unless found without evidence or contrary to the only conclusion which may be drawn from the evidence. D'Aoust, Appellant, 146 Me. 443, 82 A. (2d) 409.

Sec. 20. Vested jurisdiction of courts not affected. — Nothing contained in the 4 preceding sections shall be deemed to abrogate any power or jurisdiction now vested in any court over the care and custody of minor children. (R. S. c. 153, § 20.)

Quoted in Blue v. Boisvert, 143 Me. 173, 57 A. (2d) 498.

Sec. 21. Funds paid to minor not having guardian.—Whenever, under any decree or order of the supreme judicial court or superior court of this state or of any justice of either of said courts, in term time or in vacation, or of any judge of any probate court in this state, any receiver, master, executor, administrator, trustee, guardian or other person acting under authority of either of said courts, or any justice or judge thereof shall have in his hands any funds not exceeding $200 to be distributed or paid to any person under the age of 21 years, not having a guardian legally appointed in this state, payment may be

made directly to such minor, if such minor be 10 years of age, and such minor's receipt therefor shall be a sufficient voucher for such payment in the settlement in court of any account by the party who makes such payment, and shall discharge and release him from any and all further liability on account of the same. When said minor is under 10 years of age, the payment may be made to either parent at the discretion of said person paying said money; provided, however, that where the money is paid directly to said minor the person paying the same may, in his discretion, require on such receipt the counter signature of one or both of the parents of such minor, and when the minor is under 10 years of age the person paying the same shall receive the receipt of either or both parents, or if neither parent is living may withhold payment until further order of court or until the appointment of a guardian. (R. S. c. 153, § 21.)

Sec. 22. Children to care for parents according to ability.—Children shall, in proportion to their respective abilities, contribute to the care of or shall care for their parent or parents who have not sufficient ability, income or property to support themselves jointly or individually.

When less than all children, residing within the state, shall comply with the obligation imposed upon them by the preceding paragraph, one or more may complain to the superior court in the county where such parent or parents reside; and the court may cause any defaulting child or children so alleged, to be summoned, and upon hearing or default may assess and apportion a reasonable sum upon all children residing within the state as are found to be of sufficient ability for the support of such parent or parents to the time of assessment; and may enforce payment thereof by warrant of distress.

Such assessment shall not be made to pay any expense of support afforded more than 6 months before the complaint was filed.

Such complaint may be filed with the clerk of court who shall issue a summons thereon, returnable and to be served as writs of summons are; and under such complaint, the court may assess and apportion for the future support of such parent or parents, a sufficient sum, to be paid quarterly or as the court may otherwise order and until further order of court; and may direct with whom of such children consenting thereto and for what time he or they may dwell, having regard to his and their comfort and their convenience.

On application of any person to whom payment was ordered, the clerk may issue or renew a warrant of distress returnable to the next term of court to collect what may be due for any preceding quarter, or for such period as the court may have made a prior order which has not been complied with in accordance with the terms thereof.

The court may, from time to time, make any further order on complaint of a party interested, and after notice given, alter or amend any assessment or apportionment.

On failure to sustain a complaint the respondents recover costs. (R. S. c. 153, § 22. 1953, c. 386.)

Bastard Children.

History of statute. — See Woodbury v. Yeaton, 135 Me. 147, 191 A. 278.

The statute is general and comprehensive. Roy v. Poulin, 105 Me. 411, 74 A. 923.

This statute must be construed as a whole. It introduces provisions differing most materially from the course of proceedings of the common law, and the rights of the parties depend upon their construction. The procedure in bastardy cases is sui generis, and it is hard to draw analogies from ordinary common law actions. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Purpose of statute. — The statute respecting the maintenance of children born out of wedlock was designed to relieve the towns from burden as well as to aid the mother in their support. Low v. Mitchell, 18 Me. 372.

The object of the statute relating to

bastard children and their maintenance is to compel the putative father to aid in supporting his illicit offspring. Smith v. Lint, 37 Me. 546; Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

The sole object of the statute before the amendment of 1909, which provided for lying-in expenses, was to compel the putative father to aid in supporting his illicit offspring. Woodbury v. Wilson, 133 Me. 329, 177 A. 708; Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The prosecution under the bastardy act was not designed to punish the accused for a crime, but to make him, if found guilty, contribute to the support of the child. It is in substance and effect a civil suit. Low v. Mitchell, 18 Me. 372; Mahoney v. Crowley, 36 Me. 486.

The statute converts an existing moral obligation of the father into a legal obligation, enforceable like any other legal obligation upon the obligor if within the jurisdiction. Roy v. Poulin, 105 Me. 411, 74 A. 923; Harding v. Skolfield, 125 Me. 438, 134 A. 567.

Bastardy action is essentially civil.—In this state bastardy proceedings have, by judicial construction, been held to fall within the provisions of statutes relating to civil suits. They have all the essential characteristics of such suits. Murray v. Joyce, 44 Me. 342.

That proceedings under the bastardy statute are civil actions is too firmly established to be questioned. Easton v. Eaton, 112 Me. 106, 90 A. 977.

It is criminal in form; but is not local.—A bastardy action is a civil action, criminal in form, but not local. It is to be brought in the county where the complainant resides, in accordance with § 25. Hodge v. Sawyer, 85 Me. 285, 27 A. 153.

The process under this statute is criminal in form, but it is well settled, that in substance it is a civil remedy, having all the incidents of civil process. Mahoney v. Crowley, 36 Me. 486.

Prosecutions under the bastardy act are not local. Dennett v. Kneeland, 6 Me. 460.

And it compels support of child upon pain of imprisonment; proceeding not adapted to survivorship. — The process in a bastardy proceeding, though held to be civil in character, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child or suffer imprisonment as a penalty for his neglect to do so. There is no fitness in the proceeding that would adapt itself to the principle of survivorship. McKenzie v. Lombard, 85 Me. 224, 27 A. 110.

Minor complainant should be represented by guardian or next friend, and minor respondent by guardian.—Proceedings under the bastardy act are civil actions and it may be that, although the proceedings may be instituted by a minor upon entry of the complaint in court, the complainant, if a minor, should be represented by a guardian or next friend; and a respondent, if a minor, must be represented by a guardian. Harding v. Skolfield, 125 Me. 438, 134 A. 567.

If infant sustaining adverse judgment has no guardian, it is error. — As the proceedings for the maintenance of bastard children under this statute are civil actions, they are within the rule requiring the appointment of a guardian ad litem to protect the rights of the infant before a judgment is entered against the infant. Violation of this rule is error in the original proceedings and exceptions thereto will be sustained. Easton v. Eaton, 112 Me. 106, 90 A. 977.

And in settlements minor complainant must be represented by next friend, and settlement approved.—The same care and supervision which the law exercises over a settlement of other civil actions in which minors are plaintiffs, should be exercised in bastardy proceedings. Before such settlement can be regarded as valid it must appear that the minor complainant was represented by a next friend, and that such settlement was approved by the court, or affirmed by an entry or judgment, as provided in c. 158, § 32. The incapacity of an unfortunate minor to put a just value on her right to receive from the putative father of her child suitable aid in its support is quite as apparent as her incapacity to properly appraise her damages in cases of personal injury. Harding v. Skolfield, 125 Me. 438, 134 A. 567.

Otherwise release will not bar action.—A release by a minor complainant, standing alone, is not a bar to an action to compel the father of the illegitimate child to contribute to its support and maintenance, unless it appears that the minor complainant was represented by a next friend, and that such settlement was approved by the court, or affirmed by an entry or judgment. Harding v. Skolfield, 125 Me. 438, 134 A. 567.

Bastardy act is exclusive.—The support of illegitimate children is provided for under the bastardy act which makes adequate and exclusive provision for the en-

forcement of that duty. State v. McCurdy, 116 Me. 359, 102 A. 72.

Where a defendant was arrested, convicted, and released, under the bastardy statute, it was held that he was exempt from further prosecution or arrest, except upon an execution procured in the same suit for noncompliance with the order of court therein. He is under no other act liable to prosecution or arrest for or on account of the non-support of the illegitimate child in question. State v. McCurdy, 116 Me. 359, 102 A. 72.

There was no action in bastardy at common law. The present action is entirely statutory. Woodbury v. Yeaton, 135 Me. 147, 191 A. 278; Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The act demands compliance in all essential requirements.—The relief sought in a bastardy proceeding is given solely by express provisions of the statute, which prescribe the mode of prosecution and to some extent, the nature of the evidence requisite to hold the accused answerable to the charge. To authorize an adjudication in her favor, the complainant must show a compliance on her part with all the essential requirements of the statute. Palmer v. McDonald, 92 Me. 125, 42 A. 315.

§§ 23-34 applied in Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209.

Sec. 23. Accusation by woman pregnant with bastard child, and her examination.—When a woman pregnant with a child which, if born alive, may be a bastard, or who has been delivered of a bastard child, accuses any man of being the father thereof before any justice of the peace and requests a prosecution against him, such justice shall take her accusation and examination on oath respecting the accused, and the time and place when and where the child was begotten, as correctly as they can be described, and such other circumstances as he deems useful in the discovery of the truth. (R. S. c. 153, § 23.)

The accusation.—The first step in a bastardy action is the accusation by "a woman pregnant with a child, which, if born alive, may be a bastard, or who has been delivered of a bastard child." One accusation is obviously sufficient when made during pregnancy. There is no reason why duplication of an accusation should be required against a respondent after the birth of twins. This view is supported by c. 10, § 22, subsection II, which provides "Words of the singular number may include the plural." Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

It need not contain allegation of accusation made during travail.—It is essential, to a prosecution under the bastardy act that the mother of an illegitimate child accuse the putative father during her travail, and before delivery. But it is not essential that this fact be alleged in her complaint, since this may be made before the event has happened. Dennett v. Kneeland, 6 Me. 460.

Proceedings before justice of the peace or trial justice.—A complaint may be made, and the other preliminary proceedings had, before either a justice of the peace or a trial justice; before a justice of the peace, because such is the express language of the statute, and before a trial justice, because a trial justice is ex officio a justice of the peace by provision of c. 111, § 10. McFadden v. Bubier, 66 Me. 270.

Proceedings before a trial justice are a sufficient compliance with the statute, which says they shall be before a justice of the peace. Sidelinger v. Bucklin, 64 Me. 371.

Depositions may be received.—The process authorized by this section is regarded as a civil remedy, and for that reason depositions, which can be used only in civil causes, are received in prosecutions of this sort. Mahoney v. Crowley, 36 Me. 486.

It is not necessary that the complaint and the examination should be separate instruments. Woodward v. Shaw, 18 Me. 304.

Who may institute action.—There has been no amendment to section 23 or to the other sections of the statute, which authorize the commencement and prosecution of the action. The right to institute action is confined to a woman who was, "pregnant with a child which if born alive might be a bastard," or after the birth of the child, is still confined to a woman who had, "been delivered of a bastard child," and the statutory requirement under § 27 that before proceeding to trial the complainant must file a declaration stating that she, "has been delivered of a bastard child," remains unchanged. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The statute in terms authorizes the prosecution to be commenced after the birth, and there is nothing in the other provisions so inconsistent as to authorize courts to deny the right. Keniston v. Rowe, 16 Me. 38.

Process not limited to complaints of

full age.—There is no reason to believe it to have been the intention of the legislature to limit process under this section to those cases, where the woman was of full age. It is competent for the legislature to authorize minors to prosecute, and to enable them to do all acts necessary for that purpose. Low v. Mitchell, 18 Me. 372.

Only the mother can bring the action, and it may be prosecuted by her representative if she dies.—It is the mother who is authorized to invoke the statute. Overseers of the poor cannot invoke it, except in her behalf. In case of her death pending the suit her executor or administrator is to prosecute it to final judgment. It is her suit, her remedy. Roy v. Poulin, 105 Me. 411, 74 A. 923.

And the statute does not limit the remedy to residents. It opens the door of the court to any unfortunate mother of a bastard child without exception. If the court has jurisdiction over the father, it should not turn away a mother willing to submit herself to it. It should enforce upon persons subject to its jurisdiction at the suit of any aggrieved persons resident, or nonresident, whatever the statutes of the state declare to be a legal duty. And it cannot matter where the child was begotten or born; the duty to contribute to its maintenance is the same. Roy v. Poulin, 105 Me. 411, 74 A. 923.

Suit by nonresident against resident is entered in county where defendant resides. —Where the defendant is a resident of this state, he is subject to our laws one of which is that the father of a bastard child shall contribute to its maintenance at the suit of the mother. In such case the suit is rightly entered in the county of the defendant's residence, the plaintiff not being a resident in any county in the state. Roy v. Poulin, 105 Me. 411, 74 A. 923.

Statute of limitations held not applicable. — The process is one of a peculiar character, and is not comprehended under any term used in the statutes of limitation, nor does it appear to have been designed to be limited by any of them. Keniston v. Rowe, 16 Me. 38.

The fact, that the bastard child needs no assistance cannot operate as a bar to the prosecution, for it is not the present maintenance only, which is to be secured; the party is required to give bond to secure the town against future liability. And it does not enter into the consideration of the case until after there has been a judgment respecting the reputed parentage, when it will become the proper subject of examination and of consideration. Keniston v. Rowe, 16 Me. 38.

Allegation of date of conception held sufficient. — Where the complainant in a bastardy process alleged that the child of which she was then pregnant was begotten on or about a certain day in April, without saying in what year, this was held to refer to the April next preceding, and was sufficient. Tillson v. Bowley, 8 Me. 163.

And description of place held sufficient.— It was held sufficient description of place, in a declaration in a bastardy complaint, to allege that the child was begotten "at (a named) shop in Waldoboro in the county of Lincoln." Kaler v. Tufts, 81 Me. 63, 16 A. 336.

Amendment of 1909 affected the remedy, not the right. — The amendment of 1909 was to § 29 respecting the remedy, and not to § 23 giving the right. The amendment was designed solely for the purpose of giving an additional remedy to "a woman . . . who has been delivered of a bastard child," and not to create a right where no right existed before. If the legislature had intended the accused to pay for lying-in expenses caused by pregnancy alone, it could have said so. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The bastardy statute contemplates a child born alive. The term, "delivered of a bastard child," means a living human being. A dead foetus cannot be substituted for the living organism and does not supply the requirements of the statute. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

And defective complaint, where child born dead, is reached by demurrer.—Where a woman has been delivered of a dead foetus, and in her complaint she states that if it had been born alive it would have been a bastard, this is a defect in substance in the complaint, and can properly be reached by a general demurrer to the complaint. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Applied in Beals v. Furbish, 39 Me. 469; Cooper v. Littlefield, 45 Me. 549; Luce v. Burbank, 56 Me. 414; Sidelinger v. Bucklin, 64 Me. 371; Priest v. Soule, 70 Me. 414; Mann v. Maxwell, 83 Me. 146, 21 A. 844.

Quoted in part in Totman v. Forsaith, 55 Me. 360.

Sec. 24. Warrant issued. — The justice may issue his warrant for the apprehension of the accused, directed to the sheriff of any county in which the

accused is supposed to reside or to either of his deputies or to a constable of any town in such county, accompanied by such accusation and examination. (R. S. c. 153, § 24. 1947, c. 369, § 4. 1951, c. 9, § 1.)

Cross reference. — See c. 89, § 199, re service of precepts by constables.

This section allows the issuing of a warrant either before or after the birth of the child. Luce v. Burbank, 56 Me. 414.

Warrant is returnable when order to arrest can be complied with.—Although a bastardy process is in substance a civil suit, the initiatory steps are criminal in form. Delay beyond the first term in effecting the arrest does not vitiate complaint and warrant. The warrant is not like a writ in civil cases, necessarily returnable at the next term of the court, which affords sufficient time for legal service. It is returnable before a magistrate when and so soon as the order to arrest can be complied with. Luce v. Burbank, 56 Me. 414.

Applied in Cooper v. Littlefield, 45 Me. 549.

Quoted in Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Sec. 25. Justice to take bond or commit; expense of support in jail.—When the accused is brought before such or any other justice, he may be required to give bond to the complainant, with sufficient sureties, in such reasonable sum as the justice orders, conditioned for his appearance at the next term of the superior court for the county in which she resides and for his abiding the order of the court thereon; and if he does not give it, he shall be committed to jail until he does. The cost of commitment and board of the accused while so in jail shall be paid by the county in which said jail is situated. If he gives the required bond after said commitment, he shall be liberated upon the payment of cost of commitment and board. (R. S. c. 153, § 25.)

Bond not necessary to confer jurisdiction if defendant appears.—In an action for the support and maintenance of bastard children, a bond is not necessary to give jurisdiction to the court, if the defendant appears either in person or by attorney. Mariner v. Dyer, 2 Me. 165.

Obligations of bond.—A bond given in a prosecution under the bastardy act, conditioned that the accused shall appear and abide the order of court, obliges him to the payment of such money as the court shall order for the maintenance of the child, as well as to the giving of a new bond for the performance of such order. Taylor v. Hughes, 3 Me. 433.

Imprisonment and release on poor debtor's oath do not discharge bond.—Where a bond was given under this section, and there was an order of commitment upon the failure of the defendant to comply with the order of court for the maintenance of the child, and to furnish further security, by virtue of which he was committed, and subsequently discharged by due course of law by taking the poor debtor's oath; it was held, that this was not a compliance with the condition of the bond, and that his sureties were not discharged. Corson v. Tuttle, 19 Me. 409.

And upon breach of bond, damages are due once for all.—There is no covenant or agreement outside of, or apart from, the bond itself. In such case the breach is once for all, and the damages are sustained once for all. There having been a breach, all the damages, past, present and future are due, and should be assessed at one time. Brett v. Murphy, 80 Me. 358, 14 A. 934.

Covenant of sureties is absolute unless relieved by surrendering respondent.—The covenant of the sureties is not conditioned upon the respondent's ability, but is absolute, unless they should relieve themselves by a surrender of the respondent before final judgment as provided in § 26. Brett v. Murphy, 80 Me. 358, 14 A. 934.

For an early case relating to this section, wherein a bond was held void upon failure of jurisdiction in the justice of the peace, see Robinson v. Swett, 26 Me. 378.

Action brought in county where complainant resides.—A bastardy action is to be brought in the county where the complainant resides, in accordance with this section. Hodge v. Sawyer, 85 Me. 285, 27 A. 153.

Applied in Luce v. Burbank, 56 Me. 414; McFadden v. Bubier, 66 Me. 270; Doyer v. Leavitt, 76 Me. 247.

Quoted in Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Cited in Mahoney v. Crowley, 36 Me. 486; Goding v. Beckwith, 116 Me. 396, 102 A. 105; Harding v. Skolfield, 125 Me. 438, 134 A. 567.

Sec. 26. Case continued, if complainant not yet delivered; surrender of principal.—If at such next or any subsequent term, the complainant is not delivered of her child, or is unable to attend court, or shows other good reason, the cause may be continued; and the bond shall remain in force until final judgment, unless the sureties of the accused surrender him in court at any time before final judgment, which they may do, and thereupon they shall be discharged; and he shall be committed until a new bond is given. (R. S. c. 153, § 26.)

Meaning of "final judgment"; surrender thereafter does not discharge sureties. — On a complaint under the bastardy statute, the adjudication and order of the presiding justice that the defendant is adjudged the father of the child, and that he stand charged with its maintenance and with assistance to the mother, constitute the "final judgment"; the time of the announcement and entry thereof in court, is the date of the judgment; and no surrender of the defendant on any day thereafter in court will discharge the sureties on his bond. Corson v. Dunlap, 80 Me. 354, 14 A. 933.

They cannot wait until judgment and then elect surrender.—The sureties on the bond have a statutory privilege of avoiding their bond by a surrender before judgment. They are not authorized to delay action until they learn what the judgment is, and then elect whether to satisfy it or surrender their principal. The statute says they must elect before judgment. If they wait until judgment is pronounced, they must see that it is satisfied, such being the obligation they voluntarily entered into. Brett v. Murphy, 80 Me. 358, 14 A. 934; Goding v. Beckwith, 116 Me. 396, 102 A. 105.

Bondsmen must strictly comply with statute.—If the bondsmen wish to avail themselves of the statutory mode of relief, without performing the conditions of the bond, they should seasonably and strictly comply with the statute. Doyen v. Leavitt, 76 Me. 247; Brett v. Murphy, 80 Me. 358, 14 A. 934.

Surrender must be "in court." — There is no provision in this statute for a surrender to an officer, or to the jail, nor for any surrender after judgment. The surrender must be "in court" while it is in session, and before final judgment in the case. Doyen v. Leavitt, 76 Me. 247.

And exoneration must be entered on docket.—To satisfy the provision for surrender of the defendant in court, there must be a formal surrender on the part of the sureties and an exoneration entered on the docket in discharging the bail. Some such formal step is necessary so that the complainant may have knowledge of the fact and protect her rights, and the accused may be committed until a new bond is given, as the statute provides. Goding v. Beckwith, 116 Me. 396, 102 A. 105.

Surrender held insufficient. — Where the accused gave himself up to an officer out of court, after final judgment and final adjournment, it was held that such surrender was not a surrender of him "in court" before final judgment. Doyen v. Leavitt, 76 Me. 247.

Quoted in Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Cited in Harding v. Skolfield, 125 Me. 438, 134 A. 567.

Sec. 27. Declaration filed before trial; form. — Before proceeding to trial, the complainant must file a declaration, stating that she has been delivered of a bastard child begotten by the accused, and the time and place when and where it was begotten, with as much precision as the case admits; and that being put on the discovery of the truth during the time of her travail, she accused the respondent of being the father of her child and that she has been constant in such accusation.

In the event that a Caesarian operation, so called, is performed for the delivery of such bastard child, such accusation of the respondent shall be sufficient, if made within 5 days next prior to the performance of such Caesarian operation upon her, to a duly registered physician, a duly registered osteopathic practitioner or to a duly qualified registered nurse, and the allegations in the declaration shall be varied to accord therewith. (R. S. c. 153, § 27.)

Allegations required in declaration.—In a prosecution under the bastardy act, it is necessary for the plaintiff to allege in her declaration, that, she being put upon the discovery of the truth, during the time of her travail, accused the defendant of being the father of the child whereof she was delivered. A compliance with this re-

quirement of the statute is essential to the success of the prosecution. Loring v. O'Donnell, 12 Me. 27.

The facts to be set forth in the declaration must be proved on the trial. They are all essential prerequisites, and the court can no more dispense with one than with all. Blake v. Junkins, 34 Me. 237; Smith v. Lint, 37 Me. 546.

The certainty in criminal proceedings is not necessary in drawing the declaration required by this section. Beals v. Furbish, 39 Me. 469.

Discrepancy as to time child begotten held not substantial.—It was held on demurrer, that it was not a substantial discrepancy in the pleadings in a bastardy complaint, to allege in the preliminary examination that the child was begotten "on or about the 20th of July, 1886," and aver in the declaration that it was begotten "between the first and twentieth days of July, 1886." Kaler v. Tufts, 81 Me. 63, 16 A. 336.

Presumption as to time of filing declaration.—When the declaration and adjudication appear by the docket to have been made on the same day, the presumption is that the declaration was filed before the adjudication was made. Priest v. Soule, 70 Me. 414.

A dead foetus is not a "bastard child," within the meaning of this section, and a woman delivered of a dead foetus would not be entitled to recover under the bastardy statute. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

For a consideration of the provision in this section requiring accusation during travail and constancy in such accusation, see note to § 28.

For a case relating to this section prior to the enactment of the provision pertaining to accusation in event of Caesarian operation, see Woodbury v. Yeaton, 135 Me. 147, 191 A. 278.

Section unchanged by amendment of 1909.—The requirement of this section that the complainant must file a declaration stating that she "has been delivered of a bastard child" remains unchanged by the amendment of 1909 now embodied in § 29. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Applied in Mann v. Maxwell, 83 Me. 146, 21 A. 844; Palmer v. McDonald, 92 Me. 125, 42 A. 315; Everett v. Allen, 125 Me. 55, 130 A. 858.

Cited in Payne v. Gray, 56 Me. 317.

Sec. 28. Prosecution maintained by complainant. — When the complainant has made said accusation; been examined on oath as aforesaid; been put upon the discovery of the truth of such accusation at the time of her travail and thereupon has accused the same man with being the father of the child of which she is about to be delivered; has continued constant in such accusation and prosecutes him as the father of such child before such court; he shall be held to answer to such complaint; and she may be a witness in the trial. (R. S. c. 153, § 28.)

Accusation at time of travail is condition precedent to prosecution.—The defendant in a bastardy suit cannot be held to answer, unless the complainant accused him of being the father of her child at the time of her travail. Such an accusation is a condition precedent to her right to prosecute him. And it was formerly a condition precedent to her right to be a witness in the case. Payne v. Gray, 56 Me. 317; Woodbury v. Yeaton, 135 Me. 147, 191 A. 278.

No prosecution can be sustained unless the party seeking to avail herself of the remedy which it affords, proves all the facts necessary to bring her case within the statute, among which is the fact that the mother accused the putative father, during the pains of parturition, of being the father of the child. If this is not done, the respondent must be acquitted, however strong may be the proof of his guilt. He is entitled to the testimony of the mother, who alone, in ordinary cases, can know with certainty the paternity of her child. Her testimony is, therefore, indispensable to the maintenance of the suit. Murray v. Joyce, 44 Me. 342.

The effect of the general enactment of 1864 allowing parties to be witnesses was to make the complainant in a bastardy case a competent witness without preliminary proof of an accusation by her at the time of her travail, but such proof was still essential to the success of her prosecution. Palmer v. McDonald, 92 Me. 125, 42 A. 315; Woodbury v. Yeaton, 135 Me. 147, 191 A. 278.

As is constancy in such accusation.—The accusation at the time of her travail is held to be a condition precedent, and constancy in such accusation must also be deemed a condition precedent to the maintenance of the suit. Palmer v. McDonald, 92 Me. 125, 42 A. 315.

But constancy in the accusation refers

only to the man accused.—The provision that the mother of the bastard child "has continued constant in such accusation," refers only to the man accused; and a variance as to the time, place, or circumstances stated in her accusation, goes to her credit, but not to her competency. Woodward v. Shaw, 18 Me. 304.

The constancy contemplated by the statute does not relate to accusations or declarations made by the complainant prior to the formal accusation against the defendant, made under oath before the magistrate. Palmer v. McDonald, 92 Me. 125, 42 A. 315.

Other accusations prior thereto go only to complainant's credibility.—Any accusation of any other person than the respondent, even in an examination under oath, made anterior to the complainant's accusation of the respondent, goes only to affect her credibility, not her competency as a witness. Burgess v. Bosworth, 23 Me. 573.

And they will not bar her suit.—Proof of an accusation against some other person prior to such accusation under oath against the defendant, might affect the complainant's credibility as a witness, but it would not be a bar to the maintenance of her suit. It would still be a question of fact for the jury to determine, upon all the evidence, whether the defendant was the father of her child. Palmer v. McDonald, 92 Me. 125, 42 A. 315.

Any intelligible accusation during travail is sufficient.—It is not necessary that the accusation should have been in answer to any inquiry by others, nor that she should expressly declare in the time of her travail that the respondent was the father of the child; if in any form she should intelligibly mention the fact, it is an accusation within the statute. Totman v. Forsaith, 55 Me. 360.

Whether by inquiry from without or by impulse from within.—It is immaterial how the complainant is "put upon the discovery of the truth during the time of her travail," whether by investigation from without, or by impulse from within. The accusation is what the statute regards as material. When that is made, inquiry becomes unnecessary. The object of the statute is accomplished. Wilson v. Woodside, 57 Me. 489.

And examination upon other matters during travail not required.—The complainant is not to be examined as to "the time and place when and where the child was begotten," during the pangs of childbirth, nor is she required to do more at that time than to accuse the respondent of being father of the child. Totman v. Forsaith, 55 Me. 360.

It is for the jury to determine whether the complainant has continued constant in her accusation. Everett v. Allen, 125 Me. 55, 130 A. 858.

And it is error to direct verdict on ground of constancy.—It is error for a presiding justice in a bastardy proceeding to direct a verdict for defendant on the specific ground that complainant had not shown "constancy in her accusation," the sufficiency of the evidence being a question of fact for the jury. Everett v. Allen, 125 Me. 55, 130 A. 858.

Accusation held sufficient.—Where the complainant said, in the time of her travail, "the child is P. T's. or not anyone's, "this was held a suffiicent accusation. Tillson v. Bowley, 8 Me. 163.

An accusation is too late, if not made until the child has been expelled from the body of the mother, though made before the connecting cord is severed and before the child has breathed. The time of such accusation is not within the meaning of the phrase "at the time of her travail." Blake v. Junkins, 35 Me. 433.

But accusation during travail will not be incompetent though made in painless interval.—Where the complainant's accusation of the father was made at the travail, after the pains of labor had commenced, and before the birth of the child, such accusation is none the less competent because it was made in a temporary interval of comparative freedom from pain; it is not easy to perceive at what other time it could have been made. Beals v. Furbish, 39 Me. 469.

Rationale of requirement of such accusation.—The facts necessary to establish paternity are in the more exclusive and certain knowledge of the mother. The statute has therefore required that the mother should make her accusation under oath, that during the time of her travail and while the pains and perils of child birth are upon her, she should accuse the respondent with being the father of the child about to be born, and should remain constant to the truth of such accusation. It was deemed that in the hour of her agony and under the danger of immediate death, there would be little fear of the utterance of falsehood or the concealment of truth on her part. Obligations equivalent to the sanctions of an oath, and securities for trustworthiness greater than any derivable from cross-examination, result from the critical nature of her

position. These statutory requirements already alluded to are specially defined and clearly prescribed and, if neglected, the prosecution must fail. Blake v. Junkins, 34 Me. 237.

Complainant is competent witness without showing accusation during travail.—Since 1864 a complainant in a bastardy suit has been a competent witness to testify to any fact within her knowledge, essential to her case, without first having shown that, being put on the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child. Payne v. Gray, 56 Me. 317.

Though such accusation remains indispensable to successful prosecution.—It has been settled law in this state, both before and since the enactment of 1854 allowing parties to be witnesses, that proof of the accusation by the complainant at the time of her travail was indispensable to the success of her prosecution. Prior to the enactment of 1864, it was a prerequisite to the admission of the complainant as a witness, as well as a condition precedent to her right of prosecution. The effect of that general enactment was to make the complainant in such a case a competent witness without preliminary proof of an accusation by her at the time of her travail, but such proof was still essential to the success of her prosecution. Palmer v. McDonald, 92 Me. 125, 42 A. 315.

It is indispensable that complainant testify.—To the success of a complaint under the bastardy act, it is indispensable that the complainant be admitted and testify as a witness. Blake v. Junkins, 34 Me. 237.

But declarations of complainant inadmissible by her to show constancy.—The declarations of a complainant in bastardy, whether made before or after her formal accusation upon oath, as to the paternity of her child, are inadmissible in evidence when offered by her, either to show constancy or to strengthen her credit, since they have no tendency to do either. They are no proof that entirely different statements may not have been made at other times, hence are no evidence of constancy in the accusation; and if her sworn statements are of doubtful credibility, those made without the sanction of an oath, or its equivalent, cannot corroborate them. Sidelinger v. Bucklin, 64 Me. 371.

And the complainant is not bound to answer the question whether she has had intercourse with another man who might have been the father of the child. Tillson v. Bowley, 8 Me. 163; Low v. Mitchell, 18 Me. 372.

Admissions of respondent admissible to corroborate complainant.—On the trial of a bastardy complaint, the admissions of the respondent that he was the father of the child, and his promise to marry the mother, although not of themselves sufficient to sustain the prosecution, may be given in evidence in corroboration of the testimony of the complainant. Woodward v. Shaw, 18 Me. 304.

But evidence of the character of a party is not admissible in bastardy proceedings. Low v. Mitchell, 18 Me. 372.

The general character of the accused in an action under this statute is not admissible in evidence, it being regarded as a civil suit. Mahoney v. Crowley, 36 Me. 486.

In bastardy proceedings the character of the complainant for chastity is not in issue, and evidence that she had sexual intercourse with another man at a time so long before that the child could not then have been begotten, would be irrelevant. Holbrook v. Knight, 67 Me. 244.

Proof that the complainant had the general reputation of being a prostitute is not admissible. Sidelinger v. Bucklin, 64 Me. 371.

Nor is resemblance of child to accused.—Testimony of the resemblance of the child to the alleged father or of the want of it, not being matter of fact, but merely of opinion, is not admissible. Keniston v. Rowe, 16 Me. 38.

Issue is whether respondent is father, and not when child conceived.—The gist of the matter before the jury in a bastardy case is whether the child of which the complainant had been delivered, was begotten by the defendant, and not on what particular day it was begotten. Beals v. Furbish, 39 Me. 469.

And the particulars of exact time and place of conception are only material as bearing upon the credit of the complainant as a witness. Holbrook v. Knight, 67 Me. 244.

Case for complainant held not made out.—Where the only evidence of the complainant is that respondent begot her with child on a specified day, and where the evidence of the respondent is a general denial accompanied with evidence that a normal child was born within seven months, that the complainant had symptoms of pregnancy before the time when the complainant claimed that the child was conceived, with evidence of admission by the complainant that she was herself

pregnant before that time, the complainant has failed to sustain the burden of proof that the respondent was responsible for her condition. Drake v. Lewis, 132 Me. 326, 170 A. 61.

For a case under an early form of this section, relating to the competency of the complainant as a witness, see Swett v. Stubbs, 33 Me. 481.

For cases under an early form of this section, holding that a complainant was not a competent witness unless she had fully complied with this section, see Loring v. O'Donnell, 12 Me. 27; Burgess v. Bosworth, 23 Me. 573; Blake v. Junkins, 34 Me. 237; Blake v. Junkins, 35 Me. 433; Jackson v. Jones, 38 Me. 185.

Respondent must answer complaint only after statutory requirements fulfilled.—Under this section it is only when the complainant has made the accusation before the justice of the peace as provided in § 23, and further statutory requirements are fulfilled, that the respondent has to answer to the complaint. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

To a complaint insufficient in law, the accused may answer by a general demurrer. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The fact that a woman was not delivered of a bastard child is one of substance and may be reached by general demurrer. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Cases involving demurrer distinguished.—In the case of Cooper v. Littlefield, 45 Me. 549, it was said that defects in the preliminary proceedings were not available upon demurrer, but there the demurrer was to the declaration and proceedings, the defendant had submitted to the jurisdiction, the record showed that the proceedings were authorized by law and exhibited sufficient matter to entitle the complainant to a judgment of filiation against the defendant, and it was held on the facts proved and admitted that the complainant was entitled to judgment thereon. In Inman v. Willinski, sustaining a demurrer, the demurrer was to the complaint alone and not to the declaration and proceedings. The complaint clearly showed that the complainant was not entitled to judgment, because the complaint itself was insufficient in law. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

After demurrer, defects in preliminary proceedings cannot be availed of.—In a prosecution under the bastardy act, the respondent, having submitted to the jurisdiction of the court, and filed a general demurrer, cannot, under his plea, avail himself of defects in the preliminary proceedings before the magistrate. Cooper v. Littlefield, 45 Me. 549.

Judgment for complainant upon demurrer where allegations make out case.—The facts alleged in the complaint and declaration of the complainant, being admitted by a demurrer, if the papers in the case show the allegations sufficient, if proved, to entitle the complainant to a judgment of filiation against the respondent, such judgment will be ordered. Cooper v. Littlefield, 45 Me. 549.

Papers received as evidence of regularity of proceedings.—Upon the trial of a bastardy process, a copy of the complaint and warrant, certified by the magistrate who took bond for the respondent's appearance, even though the complaint was made before, and the warrant issued by, another official, are properly received as evidence of the regularity of the original proceedings. Sidelinger v. Bucklin, 64 Me. 371.

Applied in Mann v. Maxwell, 83 Me. 146, 21 A. 844.

Cited in Holbrook v. Knight, 67 Me. 244.

Sec. 29. Proceedings after verdict.—If, on such issue, the jury finds the respondent not guilty, he shall be discharged; but if they find him guilty or the facts in the declaration filed are admitted by default or on demurrer, he shall be adjudged the father of said child; stand charged with its maintenance, with the assistance of the mother, as the court orders; and shall be ordered to pay the complainant her costs of suit and for the expense of her delivery and of her nursing, medicine and medical attendance during the period of her sickness and convalescence, and of the support of such child to the date of rendition of judgment; and shall give a bond, with sufficient sureties approved by the court, or by the clerk of said court in term time or in vacation, to the complainant to perform said order, and a bond, with sufficient sureties so approved, to the town liable for the maintenance of such child, and be committed until he gives them. The latter bond shall be deposited with the clerk of the court for the use of such town. If the respondent does not comply with that part of the order rela-

tive to payment of expenses and costs of suit, execution may issue therefor as in actions of tort. (R. S. c. 153, § 29.)

Filiation order made upon a sufficient complaint under § 23.—The complaint to the justice under § 23 is that on which the filiation final order is to be made, and is the basis on which the respondent is brought before the court. Its sufficiency and substance to comply with § 23 is one of the conditions precedent to requiring the respondent under § 28 to answer thereto. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Order may require weekly payments, and costs.—An order on the putative father to pay a sum weekly till the further order of court, is warranted by the statute. So also is a judgment for costs, such having been the uniform practice under the statute. Mariner v. Dyer, 2 Me. 165.

The court may render a judgment of filiation upon default, the provision for a trial by jury being for the defendant's benefit, which he may waive. Mariner v. Dyer, 2 Me. 165.

Bond secures whole order which includes the several elements.—As the statute uses the word "orders" with relation to the maintenance of the child and later the word "ordered" as to the payment of the costs of suit and the expenses of the complainant, it might be thought that the statute contemplates two separate orders, yet the fair and reasonable construction of it is that the court is commanded to make only one order for the benefit of the complainant to include its several elements. Therefore, when the statute says that the respondent "shall give a bond . . . to the complainant to perform said order," it means to secure the performance of all that the court is compelled to order. Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

The very fact that this section includes in the commanded order the costs of suit and support before judgment, as well as the mother's expenses, tends to show that it was intended that the bond should secure performance of the whole order. Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

The bond is the security of the mother for the partial maintenance of the child, and of the town to which the child may become chargeable as a pauper. If these bonds should be broken, and judgments be rendered in suits thereon, the obligors would be subject to arrest by their authority. McLaughlin v. Whitten, 32 Me. 21.

Judgment may be passed after declaration filed, respondent having previously submitted to default.—Where a defendant in a bastardy action, duly served with process and having given a valid bond for his appearance to abide the order of court upon the complaint, submits to a default before the declaration required of the complainant under § 27 has been filed, it is not error for the judge to proceed thereupon after the filing of such declaration to adjudge him the father of the child, and to charge him with its maintenance and require bonds accordingly in pursuance of the provisions of this section. Priest v. Soule, 70 Me. 414.

It has been held not error in bastardy proceedings to make the adjudication upon the default of a defendant who has been duly served with process and who has given a valid bond for his appearance to abide the order of court, upon the complaint and before the filing of the declaration provided for in § 27. Priest v. Soule, 70 Me. 414; Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

Defense after default.—The defendant in the bastardy process should present his defense at the court where his bond requires him to appear. It is open for him to move to take off the default and set up a defense, if he has any, after the filing of the declaration. If a default was inadvertently entered and he has a valid defense, his remedy after judgment entered against him is by petition for review. Priest v. Soule, 70 Me. 414.

Orders not complied with are foundations of actions of debt.—At the time of a judgment of filiation under the section for the maintenance of bastard children, orders are made by the court which, if not complied with, may be the foundations of actions of debt to be subsequently brought. McLaughlin v. Whitten, 32 Me. 21.

Commitment made at time of judgment.—The commitment of a party adjudged to be the putative father of an illegitimate child is made at the time of the judgment, as the means of enforcing the orders of the court, by obtaining the bonds provided by the statute. McLaughlin v. Whitten, 32 Me. 21.

But father cannot be imprisoned on order that may never become a charge against him.—The putative father cannot be arrested and imprisoned by virtue of an order which may never be a charge against him. The child may die before the expense for its maintenance provided for in an order, may be incurred. Neither can

his liberty be restrained on account of an installment which has not become payable, though the mother may have incurred a part of the expense, which the installment was intended to cover by the order. McLaughlin v. Whitten, 32 Me. 21.

Petition by town, after judgment, that bond be required is addressed to discretion of court.—A petition by the inhabitants of a town in which an illegitimate child has a legal settlement, that the adjudged father be required to give a bond to the mother and to the town, and averring that no such bonds were given at the time of the rendition of the judgment, is addressed to the discretion of the court, and exceptions do not lie to a denial of the petition. Madison v. Gray, 72 Me. 254.

Order may be made though child dead, and may require maintenance as exigencies require.—If the jury should find the respondent guilty, then by this section "He shall be adjudged the father of said child"; and "stand charged with its maintenance." All this may be done, whether at this time the child is living or not. The order of court may embrace the past and the future, or it may relate only to the past, as the exigencies of the case may require. Any other or different construction would limit and restrain the just and beneficial operation of this statute. Smith v. Lint, 37 Me. 546.

The expenses for the maintenance of an illegitimate child commence at its birth. They include what may be necessary for its support and comfort. The liability of the father is coextensive with that of the mother and relates to the past as well as the future. The order of court, charging him with maintenance, embraces expenses which have been, as well as those which may be, incurred. The death of the child relieves the father from future support, but furnishes no discharge as to the past. Smith v. Lint, 37 Me. 546.

Lying-in expenses provided for by amendment.—Under the bastardy statute as it existed prior to 1909 no provision was made for lying-in expenses. In that year this section was amended, making provision for such expenses. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The purpose of the amendment of 1909, embodied in this section, was to enlarge the order for the benefit of the mother, and thus compel the father to render additional help in paying costs of suit, the expenses of her delivery, nursing, medicine, and medical attendance during the period of her sickness and convalescence. Woodbury v. Wilson, 133 Me. 329, 177 A. 708; Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

The amendment of 1909 was to § 29 respecting the remedy, and not to § 23 giving the right. The amendment was designed solely for the purpose of giving an additional remedy to "a woman . . . who has been delivered of a bastard child," not to create a right where no right existed before. If the legislature had intended the accused to pay for lying-in expenses caused by pregnancy alone, it could have said so. Inman v. Willinski, 144 Me. 116, 65 A. (2d) 1.

A verdict that a defendant is the father of twins is indivisible, so that if the paternity of one child is excluded the verdict may not stand. Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

Mother not deprived of security for costs and expenses by last sentence of section.—The last sentence of this section does not deprive the mother of the right of security for payment of the costs and her expenses; the issue of the execution therefor is not intended to be in the place of their inclusion in the bond. This last sentence subtracts nothing from the effect of the previous language but simply gives to her a possible auxiliary remedy altogether consistent with the purpose and scope of the bastardy statute. Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

Neither last sentence nor § 32 relieves father of giving bond for performance of order.—The possible issue of execution as in tort under the provision of the last sentence of this section does not relieve the defendant from the necessity, would he keep out of jail, of giving a bond which shall secure the performance of the whole order, including the costs of suit and the mother's expenses. Nor does the provision in § 32 for an action of debt indicate that the issue of the execution, as provided for in § 29, is not a cumulative remedy. Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

Attorney has lien on bond for services.—An attorney, who prosecutes a bastardy process to final judgment and execution, has a lien for his services and disbursements upon the bond given by the respondent in that process; and he may maintain a suit thereon to recover his claim, notwithstanding the complainant in the original process has given a full discharge to the obligors. Bickford v. Ellis, 50 Me. 121.

Applied in Corson v. Dunlap, 80 Me. 354, 14 A. 933; Brett v. Murphy, 80 Me. 358, 14 A. 934.

Stated in Eames v. Gray, 61 Me. 405.
Cited in Scott's Case, 117 Me. 436, 104 A. 794; Cook v. Cook, 132 Me. 119, 167 A. 852.

Sec. 30. Complainant not to settle with father if town objects in writing. — No woman, whose accusation and examination on oath have been taken by a justice of the peace at her request, shall make a settlement with the father or give him any discharge to bar or affect such complaint, if objected to in writing by the overseers of the poor of the town interested in her support or the child's. (R. S. c. 153, § 30. 1947, c. 369, § 5. 1951, c. 9, § 2.)

Object of section is to save town harmless.—The object of this section, § 31, and the provision of § 29 requiring a bond to be given to the town, is to save the town, liable for the support of the child, harmless, as far as may be, by giving it a remedy against the putative father. The section should receive a construction in harmony with this purpose. Eames v. Gray, 61 Me. 405.

But town must comply with statute.—The rights of the town are limited and defined by statute. Until and unless it complies with the terms prescribed therein, it is not entitled to be heard. Cook v. Cook, 132 Me. 119, 167 A. 852.

Objection by town is seasonably made at trial.—The objection in writing to a settlement or discharge of a complaint in bastardy authorized by this section is seasonably made, if made at the trial of the respondent on the complaint. For the fact of settlement or discharge is one peculiarly within the knowledge of the parties to it; and therefore to hold that the objection to a discharge or settlement should be made in advance of the making thereof, or at any time before the trial of the complaint, would be to render this section a nullity in a large number of cases. Eames v. Gray, 61 Me. 405.

Until such objection is made, parties may make settlement.—Until and unless the written objection specified in this section is made, the parties have an absolute right to make a settlement on their own terms, but the town may file its objection at any time before final judgment. It may delay taking action until the time of trial; and a settlement agreed upon may be set aside on objection by the interested town if seasonably made. Cook v. Cook, 132 Me. 119, 167 A. 852. But see Harmon v. Merrill, 18 Me. 150, wherein it was held that neither the town where her settlement is, nor the mother of a bastard child, has power to settle a prosecution under the bastardy act, against the alleged father of the child, without the consent of the other.

Though objection will be entertained within the term even after judgment.—Even after final judgment has been entered, an objection by the town would be entertained and the case restored to the docket, provided the objection were filed at the term at which judgment was entered; but when a valid and final judgment has been entered and parties are out of court, it does not lie within the power of the presiding judge at a subsequent term to bring the action forward. Judicial authority has been then exhausted. Cook v. Cook, 132 Me. 119, 167 A. 852.

Other cases held not conflicting.—The rule laid down in Myers v. Levenseller, 117 Me. 80, 102 A. 776, and affirmed in Sawyer v. Calais Nat. Bank, 126 Me. 314, 138 A. 470, does not conflict with this statement of the law. These cases stand for no more than that a court may, at a subsequent term, correct mistakes and rectify false or fraudulent entries provided that final judgment has not been entered. Cook v. Cook, 132 Me. 119, 167 A. 852.

Sec. 31. Town, failing in suit, pays costs. — A town prosecuting in behalf of the complainant is liable to the respondent, if he prevails, for his costs of court, to be recovered in an action on the case; or the court may, on his motion, enter judgment against the town for such costs and issue execution thereon. (R. S. c. 153, § 31.)

Stated in Eames v. Gray, 61 Me. 405.

Sec. 32. Discharge of father from imprisonment after 6 months; action to recover sums due.—When the father of such bastard child has remained for 6 months in jail without being able to comply with the order of the court, he may be liberated by taking the poor debtor's oath, as persons committed on execution; but he shall give 15 days' notice of his intention to do so, to the mother if living, and to the clerk of the town where the child has its legal settlement if in the state. The mother and said town may, after such liberation, re-

cover of him by action of debt any sum of money which ought to have been paid pursuant to the order of the court. (R. S. c. 153, § 32.)

Section does not affect bond.—This section provides only for the enlargement of the accused from prison, when committed, but does not affect his bond. Corson v. Tuttle, 19 Me. 409.

Enforcement of judgments recovered after liberation of father is not limited by this section.—If the mother should recover judgment after the liberation of the father from the imprisonment caused by his neglect to provide the bonds according to the order, she is not limited by the statute, giving her the remedy, in the use of all the means to which resort may be made to enforce the payment of judgments in ordinary cases. McLaughlin v. Whitten, 32 Me. 21.

Cited in Madison v. Gray, 72 Me. 254; Woodbury v. Wilson, 133 Me. 329, 177 A. 708.

Sec. 33. Complainant dying before trial.—When the complainant dies before trial, her executor or administrator may prosecute her action to final judgment; and in case of judgment against the respondent, the bond for performance of the order of court, required by the provisions of section 29, shall run to such executor or administrator who, after payment of the costs of prosecution, shall appropriate to the support of the child the money recovered of the respondent. (R. S. c. 153, § 33.)

Action does not survive against representative of respondent.—A bastardy proceeding does not survive against the personal representatives of a respondent who has died during the pendency of the proceeding in court before a trial has been had. That it does survive finds no favor in the common law, and there is no statutory provision authorizing it. McKenzie v. Lombard, 85 Me. 224, 27 A. 110.

The process in a bastardy proceeding, though held to be civil in character, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child or suffer imprisonment as a penalty for his neglect to do so. There is no fitness in the proceeding that would adapt itself to the principle of survivorship. McKenzie v. Lombard, 85 Me. 224, 27 A. 110.

Sec. 34. Blood grouping tests. — After return day, the court, in term time or vacation on motion of the respondent, shall order the complainant, her child and the respondent to submit to one or more blood grouping tests to determine whether or not paternity of the respondent can be excluded, the specimens for the purpose to be collected and the tests to be made by duly qualified physicians and under such restrictions as the court shall direct, the expenses therefor to be audited by the court and borne by the respondent. The results of such tests shall be admissible in evidence, but only in cases where exclusion is established. The order for such tests may also direct that the testimony of the examining physicians may be taken by deposition. (R. S. c. 153, § 34.)

This section accepts the verdict of science that even though blood grouping tests cannot prove paternity, they may in certain instances disprove it. Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209.

The test affords scientific proof.—The blood grouping test statute was enacted to provide for the situation in which a respondent, as a matter of ordinary proof without the tests, can do no more than create a doubt about the paternity of a child. Exclusion of paternity by blood grouping tests under biological law is scientific proof that a respondent is not the father. Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

And is mandatory upon motion of respondent.—This provision makes it mandatory on the court on motion of the respondent in a bastardy case to order such a test and makes the result admissible in evidence where it shows non-paternity. Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209.

But is not conclusive.—The statute did not intend to make the result of a blood grouping test as reported in court conclusive on the issue of non-paternity. It says only that the result of such test "shall be admissible in evidence." In a case where testimony is conflicting, where access by others to the complainant may be shown, such test may be decisive, but in the fact to unrefuted evidence that the complainant and the respondent had sexual intercourse on a certain date, that a child was born within the normal period of gestation, and in the absence of any evi-

dence that anyone else could have been the father of that child, blood tests are not conclusive on the issue of non-paternity. Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209.

For jury may find that mistake occurred in the test.—In weighing the evidence for the complainant, outside of the blood tests, the jury has the right to decide that there may have been some error in the handling of blood or serums or some mistake in the conclusions of laboratory technicians as to what they found. Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209.

Though exclusion must follow if jury finds biological law properly applied.—The biological law relating to exclusion of paternity by blood grouping tests goes beyond the opinion of an expert. The jury has the duty to determine if the conditions existed which made the biological law operative. That is to say, were the tests properly made? If so made, the exclusion of the defendant as father of the child follows irresistibly. Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

Jordan v. Davis, 143 Me. 185, 57 A. (2d) 209, is not authority for the proposition that a jury may give such weight as it may desire to biological law. Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

And absence of evidence of other possible parentage is not disadvantageous to respondent.—The absence of evidence that anyone else could have been the father of the bastard child of the complainant should not react to the disadvantage of the defendant, who presents clear and precise tests which exclude paternity under biological law. Jordan v. Mace, 144 Me. 351, 69 A. (2d) 670.

"Child" under the blood grouping test statute means a living person. Burton v. Thompson, 147 Me. 299, 87 A. (2d) 114.

Rights of Married Persons.

Statutes strictly construed.—In enacting the statutes governing the rights of married persons the legislature was aware that they could not be extended by implication, but would be construed strictly as in derogation of the common law, and as modifying a long approved policy. Haggett v. Hurley, 91 Me. 542, 40 A. 561.

The statutes pertaining to the rights of married persons have wrought great modifications and radical changes in the relative property rights of husband and wife. In contemplation of law they are no longer one person, and their interests in property are no longer identical but separate and independent. Under these statutes the wife is invested with greater privileges and weighted with greater responsibilities and liabilities than before. Robinson, Appellant, 88 Me. 17, 33 A. 652.

Estates by entirety abolished.—The rule of the common law creating estates by entirety is irreconcilable with both the letter and the spirit of the statutes governing the rights of married persons. Robinson, Appellant, 88 Me. 17, 33 A. 652.

Sec. 35. Rights of married persons to hold and dispose of property.—A married person, widow or widower of any age may own in his or her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, mortgage, convey and devise the same by will without the joinder or assent of husband or wife; but such conveyance without the joinder or assent of the husband or wife shall not bar his or her right and interest by descent in the estate so conveyed. Real estate directly conveyed to a wife by her husband cannot be conveyed by her without the joinder of her husband, except real estate conveyed to her as security or in payment of a bona fide debt actually due to her from her husband. When payment was made for property conveyed to her from the property of her husband or it was conveyed by him to her without a valuable consideration, it may be taken as the property of her husband to pay his debts contracted before such purchase. (R. S. c. 153, § 35. 1951, c. 375, § 2. 1953, c. 43, § 4.)

I. Rights of Married Persons Generally.
II. Contracts and Conveyances between Husband and Wife.
III. Assent to Conveyance Required to Bar Right by Descent.
IV. Conveyance of Property Conveyed to Wife by Husband.
V. Rights of Husband's Creditors in Property Conveyed to Wife.

I. RIGHTS OF MARRIED PERSONS GENERALLY.

History of section.—See Springer v. Berry, 47 Me. 330; Call v. Perkins, 65 Me. 439; Fields v. Mitchell, 112 Me. 368, 92 A. 293.

Section alters common-law status of husband and wife.—This section gives to a married woman certain powers over her separate estate which cannot be reconciled with the common-law status of husband and wife. Perkins v. Blethen, 107 Me. 443, 78 A. 574.

The law gives the wife the entire control over her property in every respect, except the power of conveyance in fee; and even if it be a homestead, her husband can occupy it only by her consent. It is subject to be taken by her creditors. A married woman is not limited in the management of her property however obtained. She may control its income. She may lease it without her husband's assent, and her lessee may expel him from the possession. During her lifetime he has no interest, not even a right of occupancy. If he survives her, and her estate is solvent, he acquires by these events a new interest by way of descent only. Clark v. Dwelling-House Ins. Co., 81 Me. 373, 17 A. 303.

Management and possession of personal property.—The wife has the same power to employ her husband or other person, to manage her personal property that any other owner of property has, who is not under the disabilities of coverture. Whether such property consist of household furniture, kept in her husband's house, or of stock kept on his farm, the wife is deemed to be in possession of it, in the same manner that the husband is in possession of his property kept in the same way. Hanson v. Millett, 55 Me. 184.

Power to manage property includes power to contract respecting it.—To manage property is to conduct the concerns of it, and the power to manage it must of necessity include the power to make valid contracts respecting it, by means of which the wife could acquire rights against those dealing with her in relation to it. Duren v. Getchell, 55 Me. 241.

The power is given to the wife to enter into contracts in reference to her own estate as if unmarried. In fact, in relation to her separate estate she is as if sole. She may give notes for land conveyed to her for her own use and she will be liable therefor. She may bid at an auction for the sale of real estate and if the highest bidder will be held to complete her purchase. Her contracts for buildings to be erected or improvements to be made upon her own land are binding upon her. Indeed she has full and entire power over her own estate—to convey it, which is the exercise of the highest power—or to charge it with incumbrances to any extent. The wife may convey her real estate to her husband or receive from him a conveyance of his. So she may lease her estate to her husband. She may enter into a reference in relation to it. Her powers over it are unlimited, so far as regards her dealings with persons other than her husband. Blake v. Blake, 64 Me. 177.

And married woman may not repudiate her contracts.—There are no decisions since the revision of 1857 which countenance the repudiation of contracts made by a wife respecting the management of her separate property. Duren v. Getchell, 55 Me. 241.

"Of any age" includes ages under 21 years.—"A married woman of any age" means precisely what it says, "of any age," whether under twenty-one or over. Thus the sale of real estate by a married infant is not voidable on the ground of infancy. Fields v. Mitchell, 112 Me. 368, 92 A. 293.

The opinion in Cummings v. Everett, 82 Me. 260, 19 A. 456, holding that a married woman under the age of 21 years is not liable on her executory contracts must be modified so far as is necessary to be consistent with the principle announced in this case that the words "of any age," in this section, include ages under 21 years. Fields v. Mitchell, 112 Me. 368, 92 A. 293.

A married woman may hold an estate in trust, and where a portion of the estate is devised to her, and the remainder is held by her as trustee, with power to sell and convey the estate, she may maintain an action in her name alone, for a breach of contract by a purchaser in a sale thereof. Springer v. Berry, 47 Me. 330.

A married woman can make a valid submission to arbitration of claims growing out of her own separate property, by virtue of this section. There can be no doubt that the power to make such an arrangement as this is included in the general power given to her in this section. Duren v. Getchell, 55 Me. 241.

Submission of claim to referees.—See note to c. 121, § 1, re married woman can make valid submission to referees of claims growing out of her property.

Assignment of mortgage to wife of mortgagor does not discharge mortgage.—If the grantee of real estate mortgages it back to secure the purchase-money, and the mortgagee assigns bona fide the mortgage to the wife of the mortgagor, such assignment will not operate as a discharge of the mortgage. Bean v. Boothby, 57 Me. 295.

The "purchase" intended by this section is one made from the wife's own property,

or that of others by their consent for her use. Property would not become hers merely because she made the purchase on the credit or from the means of her husband. Merrill v. Smith, 37 Me. 394.

Contract of married woman to purchase jointly with husband.—See Davis v. Millett, 34 Me. 429, decided under an early form of this section.

The natural increase of a mare, owned and possessed by a married woman, belongs to the wife. Hanson v. Millett, 55 Me. 184.

Applied in Clark v. Viles, 32 Me. 32; Eldridge v. Preble, 34 Me. 148; Howe v. Wildes, 34 Me. 566; Bates v. Enright, 42 Me. 105; Tllexan v. Wilson, 43 Me. 186; Roach v. Randall, 45 Me. 438; Beale v. Knowles, 45 Me. 479; Eaton v. Nason, 47 Me. 132; Beals v. Cobb, 51 Me. 348; Stratton v. Bailey, 80 Me. 345, 14 A. 739; Robinson, Appellant, 88 Me. 17, 33 A. 652; Minott v. Johnson, 120 Me. 287, 113 A. 464.

Quoted in Deering v. Tucker, 55 Me. 284.

Cited in McLellan v. Nelson, 27 Me. 129; Doak v. Wiswell, 38 Me. 569; Hancock Bank v. Joy, 41 Me. 568; Wentworth v. Wentworth, 69 Me. 247.

II. CONTRACTS AND CONVEYANCES BETWEEN HUSBAND AND WIFE.

Wife may contract with her husband.—The wife having the general and unrestricted power of making any and all contracts in relation to her estate, its sale, lease, and improvement, with the further right to make contracts for any lawful purpose under § 38, she may contract with whomsoever she may choose. She may contract with her husband equally as with any one else. Blake v. Blake, 64 Me. 177; Peaks v. Hutchinson, 96 Me. 530, 53 A. 38.

True, the courts would carefully scrutinize the contracts made between husband and wife, but when fairly and honestly made, no reason can exist why they should not be enforced. Blake v. Blake, 64 Me. 177. As to enforcement of contracts, see notes to §§ 38, 39.

This section gives a married woman the power to contract with her husband as well as with strangers in reference to her separate estate. Perkins v. Blethen, 107 Me. 443, 78 A. 574.

She may employ her husband as agent to purchase property.—Under this section a married woman can purchase property during coverture, and there does not appear to be any legal objection to the employment of her husband, or any other person, in making the purchase. While acting as her agent, her husband could not acquire any title to himself in the property purchased. Southard v. Piper, 36 Me. 84.

She may become seized of property directly from her husband.—By providing what should be done in case the husband should convey directly to the wife "without valuable consideration" the sense of this section very clearly indicates that a married woman may become seized or possessed of property directly from her husband. Johnson v. Stillings, 35 Me. 427.

The property in a negotiable note may pass from the husband to the wife during coverture, by his indorsement and delivery of it to her. Motley v. Sawyer, 34 Me. 540.

She may lease or convey directly to him.—The wife can contract with any person as to her real estate, and under that general right she can lease or convey to her husband. Blake v. Blake, 64 Me. 177.

Under this section a married woman has the power to convey her land directly to her husband. Savage v. Savage, 80 Me. 472, 15 A. 43.

And she is bound by the covenants in her deed.—If the wife can convey to her husband, she may be bound by the covenants of her deed. If the husband is liable for the rent of his wife's estate to her, she is none the less bound to the faithful performance of the covenants contained in such lease. Blake v. Blake, 64 Me. 177; Peaks v. Hutchinson, 96 Me. 530, 53 A. 38.

But she may not relinquish her interest in his estate by contract with him.—Because the statutes empower a wife to convey her real estate to her husband, a matter of bargain and sale, or gift, it does not follow that she may divest herself of her dower right, or, as we now say, her right and interest by descent, by simply contracting mutual releases with her husband. The two matters are different. Pinkham v. Pinkham, 95 Me. 71, 49 A. 48.

Right of contract between husband and wife is limited and anomalous. — The limited statutory right of contract between husband and wife given by this section does not place them in the same position with reference to one another as other contracting parties, but it must

be considered as an anomalous right, inconsistent in theory with the marriage status and to be made effective only so far as may be done without abrogating the common-law doctrine of the oneness of husband and wife. Perkins v. Blethen, 107 Me. 443, 78 A. 574.

And such contracts may not be enforced by actions at law.—Under this section a married woman may contract with reference to her separate estate, including contracts with her husband. She may enforce her legal contract against a stranger to the same extent as though she were unmarried, with the necessary corollary of personal liability, but she may not enforce such a contract against her husband by an action at law, nor is she on the other hand liable to her husband in an action at law on account of such contract. Perkins v. Blethen, 107 Me. 443, 78 A. 574. See also notes to §§ 38, 39.

But divorced woman may maintain action against former husband.—A woman, after a divorce a vinculo, may maintain an action against her former husband, on a promissory note given by him to her during coverture, for money borrowed of and belonging to her. Webster v. Webster, 58 Me. 139.

Action by husband against wife.—See note to § 38.

III. ASSENT TO CONVEYANCE REQUIRED TO BAR RIGHT BY DESCENT.

Provision as to conveyance without joinder or assent is limited to real estate.—It is obvious that the provision that "such conveyance without the joinder or assent of the husband or wife shall not bar his or her right and interest by descent in the estate so conveyed" is to be limited to conveyances of real estate. Wright v. Holmes, 100 Me. 508, 62 A. 507.

Power of husband to dispose of personal property in his lifetime is not restricted.—The law places no restriction or limitation on the power of the husband to make such disposition, by gift, voluntary conveyance or otherwise, of his personal property during his lifetime, as he may wish, even though his wife is thereby deprived of the distributive share therein which would otherwise fall to her upon his death. Wright v. Holmes, 100 Me. 508, 62 A. 507.

If disposition is bona fide.—If the disposition of personal property by the husband is bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her. Wright v. Holmes, 100 Me. 508, 62 A. 507.

A husband may by gift dispose of his personal property absolutely, without the concurrence and against the will of his wife, exonerated from all claim by her, provided the transaction is not merely colorable, and is unattended by facts indicative of some other fraud upon her than that arising from his absolute transfer, to prevent her having an interest therein after his death. Wright v. Holmes, 100 Me. 508, 62 A. 507.

But if transfer is mere device or contrivance it is fraudulent and void.—Where the transfer is a mere device or contrivance by which the husband, retaining to himself the use and benefit of the property during his life, and not parting with the absolute dominion over it, seeks at his death to deprive his widow of her distributive share, it is to be regarded as fraudulent as to the wife, and void. Wright v. Holmes, 100 Me. 508, 62 A. 507.

Principles are equally applicable to transfers of personalty by wife.—The rules as to disposition of personal property by a husband apply with at least equal force in this state to gifts by a married woman. Wright v. Holmes, 100 Me. 508, 62 A. 507.

IV. CONVEYANCE OF PROPERTY CONVEYED TO WIFE BY HUSBAND.

The husband's only rights in real estate he conveys to his wife are a naked veto of a conveyance by her in fee, and a possibility of taking by descent from her at her decease, depending on his survivorship and her solvency. Her creditors have more right than he in such estate. She may manage the property without the joinder or assent of her husband. Clark v. Dwelling-House Ins. Co., 81 Me. 373, 17 A. 303.

Only real estate cannot be conveyed without husband's assent.—It is "real estate" that cannot be conveyed by the wife without the husband's assent. A lease is personal property. It bargains away a temporary possession; it does not dispose of any fee of title. There is no inhibition against a sale of personal property by the wife alone, although given to her by the husband. Perkins v. Morse, 78 Me. 17, 2 A. 130.

And word "convey" refers to alienation of estate.—The word "convey" must re-

fer to an alienation of the estate, a transference of the title. Perkins v. Morse, 78 Me. 17, 2 A. 130.

Thus wife may lease property though husband refuses assent.—This section does not prevent a wife from leasing the real estate in her name alone for a term of years, although her husband refuses to assent to the lease. Perkins v. Morse, 78 Me. 17, 2 A. 130.

Conveyance by mortgage stands in same category as conveyance by deed.—As to conveyance of real estate conveyed to a wife by her husband, a conveyance by mortgage stands in the same category as a conveyance by deed under this section. Otherwise that could be done indirectly by mortgage and foreclosure which could not be done directly by deed. Gato v. Christian, 112 Me. 427, 92 A. 489.

Section does not regulate rights of wife's creditors.—This section does not purport to act upon, or regulate the rights of the creditors of the wife. If it affects creditors at all, it is only those of the husband and for their protection. Virgie v. Stetson, 77 Me. 520, 1 A. 481.

And property is not exempt from attachment and levy for her debts.—In the second sentence of this section the legislature referred to such conveyances as were voluntary on the part of the wife, the result of contracts to which she should be a party, receiving their force and effect from her consent alone; it was not intended to go further and exempt such real estate from attachment and levy in satisfaction of her debts. Virgie v. Stetson, 77 Me. 520, 1 A. 481.

Wife is not prohibited from conveying land simply because husband once owned it.—A wife is not prohibited from conveying land without the joinder of her husband simply because he may have once owned it, but because it was conveyed by him to her. Bean v. Boothby, 57 Me. 295.

Provision is inapplicable where property was conveyed to wife before marriage.—Where real estate was conveyed to the wife before her marriage, and she afterwards married the grantor, there is in no sense a conveyance to her, either directly or indirectly, from her husband. She can subsequently convey it without the joinder of her husband. Reed v. Reed, 71 Me. 156.

Indirect conveyance.—See Bean v. Boothby, 57 Me. 295, decided under an early form of this section, which limited the wife's capacity to convey such real estate as had been "directly or indirectly conveyed to her, or paid for by her husband."

The word "joinder" implies that the assent is to be expressed in writing in the deed. Bray v. Clapp, 80 Me. 277, 13 A. 900.

But no more than written assent is required.—No more than written assent of the husband was really intended by this section. Bray v. Clapp, 80 Me. 277, 13 A. 900; Roberts v. McIntire, 84 Me. 362, 24 A. 867.

And husband joins in deed not as grantor but as assenter merely.—This section exacts the joinder of the husband not as a grantor, because he has nothing to grant, but as an assenter merely, for he has only the power to withhold or give his assent. Roberts v. McIntire, 84 Me. 362, 24 A. 867; Bray v. Clapp, 80 Me. 277, 13 A. 900.

It is sufficient if husband merely signs deed in token of assent.—It has been held to be sufficient for the husband to sign the deed in token of his assent to the conveyance. Roberts v. McIntire, 84 Me. 362, 24 A. 867.

Or if he signs deed "in witness" that wife executed it.—Where the husband signed and sealed the deed "in witness" that his wife had executed it, it was held to be a sufficient assent of the husband. Roberts v. McIntire, 84 Me. 362, 24 A. 867.

Or if he joins in testimonium clause.—It is a sufficient joinder of a husband in his wife's deed of real estate directly conveyed to her by him, where he gave his written assent thereto by joining in the testimonium clause under his hand and seal, and acknowledged the instrument to be his free act and deed. Roberts v. McIntire, 84 Me. 362, 24 A. 867.

And assent may appear in separate instrument.—The husband's assent to the conveyance evinced by his deed is the essential thing required, and that assent may as well appear in a separate instrument. If both convey the same premises by deed to the same party, though they do not join in the deed, they may be as truly said to join in the conveyance as though their names were subscribed and their seals affixed to the same paper. Strickland v. Bartlett, 51 Me. 355.

V. RIGHTS OF HUSBAND'S CREDITORS IN PROPERTY CONVEYED TO WIFE.

The provisions of this section are an

affirmance of well established doctrines in equity, in cases of fraudulent conveyances, so far as these provisions have relation to creditors who were so at the time of the fraudulent acts complained of. Dockray v. Mason, 48 Me. 178.

Conveyances of property from husband to wife are to be closely scanned when the rights of his creditors are involved, inasmuch as they have unusual facilities for the perpetration of fraud upon creditors. His conveyances of property to her without consideration are void, as against existing creditors, although no fraud be actually intended thereby. Robinson v. Clark, 76 Me. 493.

Property may be taken for husband's debts though parties are guilty of no fraud. —Real estate conveyed to the wife and paid for by the husband may be taken although the parties are guilty of no actual or intentional fraud. It is sufficient if the allegations sustained by proof meet the substantive requirements of this section, setting forth the conveyance, payment therefor in whole or in part from the property of the husband, and that the debt for the payment of which the land is sought to be taken accrued before the conveyance. Call v. Perkins, 65 Me. 439.

Interest of wife in contract for conveyance of land may be taken.—The interest which a wife has in a written contract for the conveyance of land to her by a third person, the payments therefor having been made by her husband out of his own money, may be taken in an equitable process against husband and wife, to be appropriated by a creditor on a debt of the husband incurred before the existence of the contract to convey. Merrill v. Jose, 81 Me. 22, 16 A. 254.

Property may be taken though purchased with husband's pension money.— It is no defense to a bill in equity, seeking payment of the husband's pre-existing debt from lands conveyed to the wife by him, that the purchase was made with his pension money. Berry v. Berry, 84 Me. 541, 24 A. 957.

Property need not be wholly paid for by husband.—Under the last provision of this section, property conveyed to a married woman, but paid for by her husband, may be taken as his to pay his prior contracted debts. Such property need not be wholly paid for by the husband; if paid for in part by him, his interest may be taken. Call v. Perkins, 65 Me. 439.

Conveyance in payment of note given wife for money loaned to husband. — Where a husband, although insolvent, conveyed real estate to his wife in payment of a note given her by him for money of hers loaned him, it was held that, if there was no intent to defraud or delay creditors, they could not take the property for the debts of the husband. Randall v. Lunt, 51 Me. 246.

Creditor may take property conveyed though husband has other property. — The fact that the husband has other property which may be reached, imposes no legal duty upon the creditor to pursue that course and take that property, in preference to property conveyed to the wife without consideration. It is the privilege of the creditor, and not of the debtor or those who hold his property, to elect which shall be taken. Call v. Perkins, 65 Me. 439. See Gray v. Chase, 57 Me. 558.

Conveyance passes title to wife except as against creditors. — A conveyance of land by a husband to his wife directly passes the title, except as against the creditors of the husband. Allen v. Hooper, 50 Me. 371.

The intention of the framers of this section, appears to have been, to allow a husband to pay for property conveyed to his wife with his own money or property, and to allow his wife to hold it, unless the creditors then existing of the husband should thereby be defrauded. Any other construction might render all such conveyances ineffectual, if the husband should afterward contract debts and become insolvent. Davis v. Herrick, 37 Me. 397; Hilton v. Morse, 75 Me. 258.

The gift from the husband to the wife is valid unless fraudulent as to existing creditors. French v. Holmes, 67 Me. 186.

And it is void only as to existing creditors.—It is only for the husband's debts contracted before the deed to the wife that the property is liable to be taken thereafter. The gift from the husband to the wife is valid unless fraudulent as to existing creditors, and then void only as to them. Hilton v. Morse, 75 Me. 258.

If a conveyance was made to defraud existing creditors, whose debts have been since paid, the property would not under the provisions of this section, while it would by the common law, be subject to be taken for the payment of debts subsequently contracted. Hilton v. Morse, 75 Me. 258.

Property may be taken only for prior contracted debts.—The property referred to in the last sentence of this section can

be taken only for prior contracted debts. Davis v. Herrick, 37 Me. 397.

But section relates only to voluntary, not actually fraudulent, conveyances. — This section relates only to voluntary conveyances from the husband to the wife, such as, being made without consideration, are constructively fraudulent, and not to such as are actually fraudulent, being made with an express intention to hinder and delay creditors or others. Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472.

And it does not apply to torts.—This section does not apply to torts at all. Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472.

With respect to actual frauds and torts the law remains the same as it was before this section was enacted. A mere voluntary conveyance from the husband to the wife is valid as against one who is injured by a subsequent tort of the husband. But such a conveyance, which is not only voluntary, but is made for the express purpose of defeating one who has a just and legal claim against the husband for a tort committed before the conveyance is made, is void. Tobie & Clark Mfg. Co. v. Waldron, 75 Me. 472.

And general principles of law and equity apply to case of actual fraud.—This section does not preclude the operation of the general principle of law and equity in a case in which actual fraud upon future creditors was directly intended by the conveyance, from husband to wife without valuable consideration, though such conveyance was made before the debts were incurred, the grantor being insolvent at the time of the conveyance and paying earlier debts only by contracting others of a later date and of an equal or greater amount, for the purpose of giving validity to his deed by merely changing the date of his indebtedness. Neither this section nor the decisions under it prevent the general rule of law from obtaining in this state, by which under such circumstances the subsequent creditors are to be subrogated to the rights of the creditors whose debts their means have been used to pay. Hilton v. Morse, 75 Me. 258.

Creditor must have recovered judgment. —To authorize the taking of the property conveyed to a wife and paid for from the property of her husband, or conveyed by him to her without a valuable consideration paid therefor, there must be a judgment recovered by the creditor against his debtor. Holmes v. Farris, 63 Me. 318.

Where judgment is based on prior and subsequent debts he is subsequent creditor.—If a creditor, having demands accruing partly before and partly after the conveyance which he would impeach, blends them all in one suit, and, having recovered judgment, extends his execution on the land, he can come in only in the character of a subsequent creditor. Holmes v. Farris, 63 Me. 318.

This section has prescribed no form of remedy for cases falling within its provisions; the process for obtaining the object intended to be secured is to be sought in analogous cases. When a creditor cannot effectually reach the real estate which is equitably that of the debtor, by reason of a fraud committed by the debtor, and others, who may hold the legal title, courts of equity will aid the creditor, to enable him to obtain payment, when the legal remedies have proved inadequate. Dockray v. Mason, 48 Me. 178.

Mode of taking is to be determined by existing law and practice.—This section is silent as to the mode by which the property of the husband is to be taken. The section simply declares, as a principle of law, that the property may be taken to pay the husband's debts by his creditor, leaving the mode and manner of taking to be determined by the existing law and practice. Low v. Marco, 53 Me. 45.

Where husband conveyed property to wife it may be levied upon by his creditors.—Where the title to property has once been in the husband, and he has conveyed it, directly or indirectly, to his wife, without a valuable consideration, in fraud of his creditors, and in similar cases, the title has never legally passed from the debtor who held it, as against creditors, and therefore it may be levied upon as still in the debtor. Low v. Marco, 53 Me. 45.

But where title was never vested in husband levy is not effectual. — Where the title to property never vested in the husband, a levy is not effectual, and a deed given to the wife by a third party upon payment made from the husband's property does not so vest the estate in the husband that it can be taken by levy, but the creditor must proceed by equity. Warner v. Moran, 60 Me. 227. See Low v. Marco, 53 Me. 45; Call v. Perkins, 65 Me. 439.

Notwithstanding the provisions of this section, property, the title to which is ac-

quired by the wife by a conveyance from a third person under the circumstances specified in the last sentence of this section, cannot be taken by levy of execution so as to transfer the legal title to the levying creditor. That is, in cases where the debtor has never had the legal estate, but has paid the purchase money, and caused the land to be conveyed by third person to his wife, he has never had any title that can be seized on execution. In such a case the creditor must resort to equity. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

And property may be reached only by process in equity. — When the husband never had the legal title to property paid for out of the property of the husband, it can be reached by the creditor only by means of a process in equity. Gray v. Chase, 57 Me. 558.

Where the debtor never had any legal title, no legal title can be acquired simply by a levy. The creditor, however, is not without remedy. After such levy, a court of equity will aid the creditor to obtain the title or the property. Low v. Marco, 53 Me. 45.

Creditor need not make levy before resorting to equity.—It has been held that, where the legal title never was in the debtor, the judgment creditor may reach and secure the property in equity, without any levy on the premises. Low v. Marco, 53 Me. 45.

The creditor need not make a levy, but a return of nulla bona will be a sufficient preliminary proceeding. But when he has levied, he has exhausted his legal remedy so far as that land is concerned and then may invoke equity to perfect his right under this section. Call v. Perkins, 65 Me. 439.

Though the plaintiff may have a remedy at law, it does not prevent his resort to equity to reach property conveyed to the wife. The complainant is not required to resort to a levy, where the title was never in the husband. Hamlen v. McGillicuddy, 62 Me. 268.

Sufficiency of allegations in bill.—It is enough if the allegations in the bill to reach property purchased by the husband and conveyed to the wife contain all the requirements of this section. It is sufficient that the property conveyed to the wife was paid for from the property of the husband, and that the debt was contracted before such purchase. It is not required that there should be the allegations of any fraudulent design or purpose on the part of the wife. It is sufficient that the wife has received a conveyance of property purchased with the means of the husband to authorize its being taken for antecedent debts, the wife having paid no valuable consideration therefor. Hamlen v. McGillicuddy, 62 Me. 268.

Burden of proof is on creditor.—When a party alleges the existence of facts authorizing the seizure of property the title to which is in the wife, wherewith to pay the debts of the husband, he must establish their existence by proof. The burden is on him. Winslow v. Gilbreth, 50 Me. 90.

Sec. 36. Property of woman not affected by marriage.—A woman having property is not deprived of any part of the same by her marriage; and a husband, by marriage, acquires no right to any property of his wife. A married woman may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may in writing revoke the same. (R. S. c. 153, § 36.)

History of section. — See Allen v. Hooper, 50 Me. 371.

Section gives wife entire and exclusive authority over her own estate.—The rights of the wife conferred by this section are utterly at variance with those she possesses at common law. She has entire and exclusive authority over her own estate, and her husband has none. As to her property she is as if sole. Webster v. Webster, 58 Me. 139.

It embraces property acquired before and after marriage.—Although property is acquired by the wife after coverture, she has the same control over it as she has over that which she possessed before the coverture. This section embraces property belonging to the wife at the time of the marriage, and that obtained by her afterwards. She has the control of it irrespective of the time when it is acquired. Southard v. Piper, 36 Me. 84.

The word "property," in the first clause of this section, includes choses in action as well as choses in possession. It includes money due as well as money possessed. It includes money due for personal services as well as money due for anything else. In its broadest sense it includes everything which goes to make up one's wealth or estate. Carlton v. Carlton, 72 Me. 115.

Wife is not deprived by marriage of money due her from husband.—A woman, by her marriage, can no more be deprived

of money due to her than she can of money actually possessed by her, of money due from the man she marries no more than of money due from any one else. It may be that while the marriage relation subsists no action of any kind can be maintained by her against her husband. But when this relation ceases, this impediment is removed, and no reason is perceived why she cannot then sue him as well as any one else. Carlton v. Carlton, 72 Me. 115.

And she may sue therefor after divorce.—A woman who is divorced can maintain an action against her former husband for personal services performed for him before their marriage. Carlton v. Carlton, 72 Me. 115.

Stock and crops on farm operated by husband.—The wife should be regarded as in possession of her own stock, kept upon her husband's farm, in the same manner that the husband is of his property kept in the same way. And where the wife owns a farm and allows her husband to carry on the place for their common support, the crops would belong to the wife. Norton v. Craig, 68 Me. 275.

The wife may make her husband her agent, or not, as she chooses. Clark v. Dwelling-House Ins. Co., 81 Me. 373, 17 A. 303.

Facts not showing release.—Where husband and wife lived upon the wife's farm together, he occupying and carrying on the farm permissively without any contract, this was not a release to the husband within the language of this section. Bradford v. Hanscom, 68 Me. 103.

Revocation of release.—As the wife may release to the husband the control of her property, so she may revoke the right thus conferred. Revoking those rights, it would seem a necessary inference that she might call him in some way to account for what he may have received during his agency. If not so, then he is an agent without responsibility. Webster v. Webster, 58 Me. 139.

Right of action for injury to property remains in wife after release.—The right of action for any injury to the property over which the husband was exercising control by the wife's consent would be in the wife equally after such release as before. The release in no way affects the right of action. Collen v. Kelsey, 39 Me. 298. See Bradford v. Hanscom, 68 Me. 103. See also note to § 39.

But husband may bring action in her name.—Where a wife, by an instrument under seal and in terms irrevocable, appoints her husband her attorney for her and in her name to collect and receive to his own use the rents and profits of her real estate already under lease, to make repairs, pay taxes, have the general oversight thereof during his life, without accounting to her, and represent her before any court, the husband is thereby authorized to commence an action for an injury to the real estate, but only in her name. Woodman v. Neal, 48 Me. 266.

Applied in Southard v. Plummer, 36 Me. 64; Hanson v. Millett, 55 Me. 184; Meserve v. Meserve, 63 Me. 518; Day v. Bishop, 71 Me. 132.

Quoted in Deering v. Tucker, 55 Me. 284; Blake v. Blake, 64 Me. 177.

Cited in McLellan v. Nelson, 27 Me. 129; Wentworth v. Wentworth, 69 Me. 247; Haggett v. Hurley, 91 Me. 542, 40 A. 561.

Sec. 37. Labor not done for married woman's family. — A married woman may receive the wages of her personal labor not performed for her own family, maintain an action therefor in her own name and hold them in her own right against her husband or any other person. (R. S. c. 153, § 37.)

Money earned by husband and wife from joint labor is not within section.—Money earned by husband and wife from joint labor in the operation of a farm, and in keeping a public house thereon, does not fall within the scope of this section. Sampson v. Alexander, 66 Me. 182.

Where a wife took boarders into her home and provided for them together with her family, independent of her husband, without any direction, aid or assistance from him, and to a great extent during his absence from home, it was held that this, as a matter of business, was outside of family duties, and the income would belong to the wife. Stratton v. Bailey, 80 Me. 345, 14 A. 739.

Applied in Pike v. Smith, 120 Me. 512, 115 A. 283; Gatherer v. West, 126 Me. 566, 140 A. 380; Marr v. Hicks, 136 Me. 33, 1 A. (2d) 271.

Quoted in Robinson, Appellant, 88 Me. 17, 33 A. 652.

Stated in Blake v. Blake, 64 Me. 177.

Cited in Laughlin v. Eaton, 54 Me. 156; Lane v. Lane, 76 Me. 521; Haggett v. Hurley, 91 Me. 542, 40 A. 561.

Sec. 38. Husband not liable for wife's debts or torts; her property, but not her body, liable as if sole.—A husband is not liable for the debts

of his wife contracted before marriage nor for those contracted in her own name for any lawful purpose; nor is he liable for her torts in which he takes no part; but she is liable in all such cases. A suit may be maintained against her therefor, and her property may be attached and taken on execution for such debts and for damages for such torts as if she were sole; but she cannot be arrested. (R. S. c. 153, § 38.)

I. General Consideration.

II. Exemption from Arrest.

Cross Reference.

See note to § 35, re contracts of married woman.

I. GENERAL CONSIDERATION.

History of section. — See Haggett v. Hurley, 91 Me. 542, 40 A. 561; Marcus v. Rovinsky, 95 Me. 106, 49 A. 420; Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

Section distinguishes between debts contracted before and after marriage.—This section makes a distinction between debts contracted before and those contracted after marriage. As to the former a married woman is made liable without restriction. As to the latter her liability is confined to those contracted "in her own name." Haggett v. Hurley, 91 Me. 542, 40 A. 561.

"All such cases."—The "all such cases" in which a married woman is by this section made liable are three: (1) her debts contracted before marriage, (2) her debts contracted in her own name, and (3) her torts in which her husband took no part. Haggett v. Hurley, 91 Me. 542, 40 A. 561.

The word "therefor" in the second sentence of this section plainly refers to all the different causes of action before enumerated in that section. Marcus v. Rovinsky, 95 Me. 106, 49 A. 420.

The contracts contemplated by this section are restricted to contracts in the wife's own name. This restriction clause would seem, by the strict letter of the statute, to exclude contracts made in the name of a partnership between the husband and wife or in any other name than her own. Haggett v. Hurley, 91 Me. 542, 40 A. 561.

The words "in her own name" seem to indicate that the wife's power to contract is not unlimited, that it is confined to her separate business or estate. Haggett v. Hurley, 91 Me. 542, 40 A. 561.

The wife can contract "for any lawful purpose." No limitation is imposed upon her general right to contract, save that the purpose be lawful. No restrictions are intimated as to the person or persons with whom contracts for lawful purposes may be made. Blake v. Blake, 64 Me. 177.

Wife may enter into contract with husband.—A contract entered into by a husband and wife to improve the wife's real estate, to pay taxes, and to remove incumbrances upon it, is for a "lawful purpose," and is binding upon the wife. Blake v. Blake, 64 Me. 177.

And husband may bring action against her thereon after divorce.—The objection to the maintenance of an action at common law arising from the marital relation no longer exists where the marriage has been dissolved. The binding obligation of the wife to pay for services rendered by her husband pursuant to contract with her remains in full force, and the disability to sue has ceased. Blake v. Blake, 64 Me. 177.

A man who had made valuable improvements upon the real estate of his wife, paid taxes assessed thereon, and removed incumbrances, at her request and upon her promise to pay for the same, was held entitled, after the dissolution of the marriage by divorce, to recover for such improvements and moneys paid. Blake v. Blake, 64 Me. 177.

Married woman may be surety.—A contract of suretyship is a lawful contract, and for a lawful purpose. It is valid and binding on a married woman. Mayo v. Hutchinson, 57 Me. 546. See Blake v. Blake, 64 Me. 177.

She may indorse note payable to her order.—Where a woman assigned by delivery a note payable to her order and afterwards marries the maker, her indorsement after such marriage was held to transfer the legal title. For if liable as indorser or surety upon any contract of indorsement or suretyship, as has been held, much more may she perform the merely clerical act of indorsement. Guptill v. Horne, 63 Me. 405.

Liability for "necessaries" purchased by married woman. — In order to take with her the credit of her husband even for "necessaries" the wife must be justified in leaving the home the husband provided for her. Brown v. Durepo, 121 Me. 226, 116 A. 451.

Upon obtaining credit, the wife must exercise that right. If it was her intent to obtain the goods on her own credit, it will

not render the husband liable. Brown v. Durepo, 121 Me. 226, 116 A. 451.

Where husband and wife are living apart through some fault of the husband, the presumption still is in the case of the purchase on credit of "necessaries," unless it be shown that the husband has otherwise made reasonable provisions for her support, that she has pledged the husband's credit and not her own, and even though the goods be charged to her, unless by her express direction, still the husband would be liable and she, not. Brown v. Durepo, 121 Me. 226, 116 A. 451, holding the evidence sufficient to overcome the presumption that necessaries were bought by a married woman on her husband's credit.

Under this section an action will lie against a married woman for medical attendance rendered at her request, and for which she expressly promises to pay. Yates v. Lurvey, 65 Me. 221.

Negligence of one spouse not imputed to other.—As between husband and wife not jointly and mutually assuming and exercising the responsibility of care in a particular situation, the doctrine of imputed negligence has not been accepted in this jurisdiction. In a long line of cases where husband or wife or both were suing a third person in negligence to recover for their own personal injuries or losses, the independent responsibility of each spouse has been recognized and the contributory negligence of the one held not to be imputable to the other. Illingworth v. Madden, 135 Me. 159, 192 A. 273.

Applied in Fuller v. Bartlett, 41 Me. 241; Bates v. Enright, 42 Me. 105; Bryant v. Merrill, 55 Me. 515; Bell v. Packard, 69 Me. 105.

Stated in Robinson, Appellant, 88 Me. 17, 33 A. 652.

Cited in Lee v. Lanahan, 59 Me. 478; Rollins v. Crocker, 61 Me. 244; Wentworth v. Wentworth, 69 Me. 247; Atwood v. Higgins, 76 Me. 423; Virgie v. Stetson, 77 Me. 520, 1 A. 481.

II. EXEMPTION FROM ARREST.

Purpose of exemption from arrest.—The exemption is from arrest rather than from suit. It is for the benefit of women, and it is for the benefit of organized society, on the concept and persuasion that, in the spirit or genius of our civilization, the protection of wives and mothers from harassment from arrest is essential to maintaining the home, the beginning and the end of all government, in integrity. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

Arrest of married woman may not be caused with impunity. — "Cannot" means that the arrest of a married woman, on mesne process, may not be caused with impunity. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

And she has right of action for violation of exemption.—This section is a legislative "Thou shall not." A witness may be exempted; the arresting of a married woman is forbidden. Once she is arrested, equitable estoppel aside, a right of action for interfering with her liberty has accrued. But such right of action may be relinquished voluntarily. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

Exemption is not conditional upon being claimed.—Under this section the married woman's exemption from arrest is not conditional upon being claimed. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

But right of action for violation may be waived.—A woman arrested on an original writ for tort or contract may waive the right of action which the violation of her exemption completes. Bragg v. Hatfield, 124 Me. 391, 130 A. 233.

Exemption may be lost either by waiver or by estoppel.—Exemption from arrest is a personal privilege and as such may be lost either by waiver or by estoppel. Kalloch v. Elward, 118 Me. 346, 108 A. 256.

Married woman held estopped from claiming exemption. — Where a married woman was arrested in an action to recover damages from the defendant because of her alleged alienation of the affections of the plaintiff's husband, she having held herself out as a single woman, and did not divulge her marriage until after verdict against her, and thereafter, but before judgment, she filed a motion asking that she and her sureties on the bail bond be exonerated and discharged because she was a married woman and under the statutes of this state was exempt from arrest, it was held that she was equitably estopped from claiming an exonere-tur. Kalloch v. Elward, 118 Me. 346, 108 A. 256.

Judgment creditor held not liable for refusing to release married woman from arrest.—A judgment creditor is not liable in trespass for refusing, on notice that his debtor is a married woman, to release her from arrest already made by an officer on an execution regularly issued on a judgment recovered against her as a single woman before a court having complete jurisdiction. Winchester v. Everett, 80 Me. 535, 15 A. 596.

Sec. 39. Capacity to prosecute or defend suits at law, with or without joinder of husband; neither liable to arrest.—She may prosecute and defend suits at law or in equity, either of tort or contract, in her own name without the joinder of her husband, for the preservation and protection of her property and personal rights or for the redress of her injuries, as if unmarried, or may prosecute such suits jointly with her husband; and the husband shall not settle or discharge any such action or cause of action without the written consent of the wife. Neither of them can be arrested on such writ or execution nor can he alone maintain an action respecting his wife's property. (R. S. c. 153, § 39.)

Object of section.—The plain object of this section is to enable the married woman to procure a final adjustment of claims growing out of her separate property, unembarrassed by the joinder or interference of her husband. Duren v. Getchell, 55 Me. 241.

The design of this section is to protect the wife from all marital interference in suits commenced by her alone or jointly with her husband, and to prevent his maintaining alone any action respecting his wife's property. Hobbs v. Hobbs, 70 Me. 381; Libby v. Berry, 74 Me. 286; Howard v. Howard, 120 Me. 479, 115 A. 259.

Strict construction.—This section, being in derogation of the common law, has been construed strictly. Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669.

This section manifestly refers to suits by the wife against third persons and empowers her to maintain an action in her own name or in the joint names of herself and husband, at her election. It does not contemplate a suit by the wife against the husband, nor that he should be arrested and imprisoned at her instance. Crowther v. Crowther, 55 Me. 358.

It does not authorize wife to maintain action at law against her husband.—This section was not intended to give a wife the right to maintain an action at common law against her husband during the existence of the marriage relation. It relates to cases when, by the very assumption, the husband may be a party with the wife, or not, at her election. Hobbs v. Hobbs, 70 Me. 381; Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669. See Perkins v. Blethen, 107 Me. 443, 78 A. 574.

It only authorizes the wife to maintain alone such actions as previously could be sustained when brought by the husband alone or by the husband and wife jointly. It enlarges not her right of action, but her sole right of action. It does not enable her to maintain suits which could not have been maintained before, but to bring in her own name those which before must have been brought in the husband's name, either alone or as a party plaintiff with her. Libby v. Berry, 74 Me. 286; Howard v. Howard, 120 Me. 479, 115 A. 259; Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669.

It relates only to cases where husband may be a party with wife at her election.—This section relates to cases where by the very assumption the husband may be a party with the wife or not, at her election. The design is to protect her from all marital interference in suits commenced by the wife alone or jointly with her husband, and to prevent his maintaining alone any action respecting his wife's property. Libby v. Berry, 74 Me. 286; Howard v. Howard, 120 Me. 479, 115 A. 259.

Wife cannot maintain assumpsit or replevin against husband during coverture.—This section authorizing a married woman to prosecute suits at law in her own name, as if unmarried, refers to those by the wife against third persons, and not to those against her husband. She cannot maintain assumpsit or replevin against her husband during coverture. Morrison v. Brown, 84 Me. 82, 24 A. 672.

A wife cannot maintain an action of assumpsit under this section against her husband while the marriage relation is still subsisting. Howard v. Howard, 120 Me. 479, 115 A. 259.

As to contracts and torts common-law immunity of husband remains.—This section does not empower the wife to sue her husband at law. As to actions on contracts with her husband, or for torts committed by him, the common-law immunity of the husband, and disability of the wife, remains, at least during coverture. Anthony v. Anthony, 135 Me. 54, 188 A. 724.

Not even an assignee of a claim of a wife against her husband can maintain an action against the husband, for the husband is immune from actions at law to enforce any contractual claim of the wife against him, at least during coverture. Mott v. Mott, 107 Me. 481, 78 A. 900.

Wife cannot maintain action for assault against husband or his agent.—This sec-

tion does not so far modify the common law as to authorize a civil action by the wife against the husband to recover damages for an assault, nor against those who act with the husband and under his direction in doing such a wrong. Libby v. Berry, 74 Me. 286; Howard v. Howard, 120 Me. 479, 115 A. 259.

It is clear, under this section, that the husband cannot be a party plaintiff with the wife in an action against a third party, where the husband was the principal and the defendant the agent in procuring an assault upon the wife. Hence the wife alone cannot maintain an action against such agent. Libby v. Berry, 74 Me. 286.

Nor can she maintain action against husband's principal for tort of husband as agent.—Where the plaintiff was injured in an automobile accident while riding as a passenger in the defendant's automobile, the plaintiff's husband being the driver thereof, since the plaintiff's husband could not mantain an action for his wife's injury, as he could neither sue himself nor his employer, then therefore this disability on his part was a bar to an action by his wife against the defendant owner. Sacknoff v. Sacknoff, 131 Me. 280, 161 A. 669.

But she may have action against one claiming to hold her property under authority from husband. — Although the decisions are adverse to the maintenance of a suit by the wife directly against the husband for wrongful acts injurious to her property when the coverture is properly pleaded, there is nothing that militates against her right to maintain suits against third parties, wrongfully claiming to hold or appropriate her property under color of authority from her husband. Even where she brings suit against her husband and a co-trespasser jointly, though the husband is discharged by reason of the coverture, the co-trespasser, acting presumably under his directions, should be held liable. Meserve v. Meserve, 63 Me. 518.

And she may attach by trustee process property in hands of husband. — It has been held that a married woman in a suit for her personal labor against a third party could attach by trustee process property of the defendant in the possession of her husband. Mott v. Mott, 107 Me. 481, 78 A. 900.

After the connubial relation has terminated the wife may maintain assumpsit against her former husband on express or implied contracts made by them during the existence of the marriage relation, when the action is seasonably commenced. Morrison v. Brown, 84 Me. 82, 24 A. 672. See Webster v. Webster, 58 Me. 139.

But even after divorce she cannot maintain action for tort.—If a right of action by the wife for tort does not exist during coverture it does not arise upon divorce. From the competency of married women to make legal contracts, and from the full recognition of their separate right of property, certain special instances have arisen in which after divorce actions of assumpsit by them against their former husbands have been sustained in several cases. But nothing in those cases indicates such right of action in tort. Libby v. Berry, 74 Me. 286.

Even after the connubial relation has ceased by reason of divorce, a wife cannot maintain an action in the case against her husband or those acting under his direction, for an assault made upon her during the subsistence of that relation. Morrison v. Brown, 84 Me. 82, 24 A. 672.

It has been held under this section that a woman after divorce could not maintain an action of tort against her former husband for an assault committed during coverture. Howard v. Howard, 120 Me. 479, 115 A. 259.

When wife not authorized to defend tort action alone. — This section does not authorize the wife to defend alone an action against her for an alleged tort not relating to her property, her personal rights, or redress of her injuries, nor does it relieve the husband of liability for such a tort. Atwood v. Higgins, 76 Me. 423.

An action brought by a married woman to recover money lost by her husband in gambling is not a "suit for the preservation and protection of her property or personal rights, or the redress of her injuries." The legal disability of married women, existing at common law, to bring such an action was not removed by this section. Spiller v. Close, 110 Me. 302, 86 A. 173.

A husband cannot maintain an action in his own name alone for an injury to his wife's property, though he has the exclusive possession and full control of the property at the time of the injury, and the action is brought with the wife's consent. The law expressly forbids it. Green v. North Yarmouth, 58 Me. 54.

Although control of wife's property has been released to husband. — If the control to the wife's real estate is released to the husband, an action for an injury to the property must be in her name, and could

not be in his name alone. Norton v. Craig, 68 Me. 275. See also note to § 36.

Submission of claims to arbitration.— Perhaps a reasonable construction of this section would empower a married woman to submit property claims to arbitration. Duren v. Getchell, 55 Me. 241.

Applied in Ballard v. Russell, 33 Me. 196; Webb v. Hall, 35 Me. 336; Smith v. Gorman, 41 Me. 405; Hilton v. Lothrop, 46 Me. 297, overruled in Strout v. Lord, 103 Me. 410, 69 A. 694; Weston v. Palmer, 51 Me. 73; Laughlin v. Eaton, 54 Me. 156; Bradford v. Hanscom, 68 Me. 103; Winchester v. Everett, 80 Me. 535, 15 A. 596.

Quoted in Springer v. Berry, 47 Me. 330.

Stated in Deering v. Tucker, 55 Me. 284; Robinson, Appellant, 88 Me. 17, 33 A. 652.

Cited in Doak v. Wiswell, 38 Me. 569; Abbott v. Abbott, 67 Me. 304; Virgie v. Stetson, 77 Me. 520, 1 A. 481; Haggett v. Hurley, 91 Me. 542, 40 A. 561; Illingworth v. Madden, 135 Me. 159, 192 A. 273.

Sec. 40. Proceedings in equity between husband and wife.—A wife may bring a bill in equity against her husband for the recovery, conveyance, transfer, payment or delivery to her of any property, real or personal or both, exceeding $100 in value, standing in his name, or to which he has the legal title, or which is in his possession or under his control, which in equity and good conscience belongs to her and which he neglects or refuses to convey, transfer, pay over or deliver to her, and upon proper proof, may maintain such bill. And a husband shall have the same right to bring and maintain a bill in equity against his wife for the purposes aforesaid, subject to the limitations aforesaid. Marriage shall be no bar to the maintenance of a bill in equity by a wife against her husband or by a husband against his wife, brought for the purposes aforesaid. No costs shall be awarded against either party in any such proceedings. If it satisfactorily appears to the court on hearing that the party bringing the bill has conveyed or transferred any of her or of his property, real or personal, to the other party to the bill for the purpose of cheating, defrauding, hindering or delaying her or his creditors, the bill shall be dismissed. An appeal from any final decree may be taken as in other equity causes. There shall be no survival of the right to institute proceedings under the provisions of this section, and if a wife or husband dies after the commencement of proceedings hereunder and before the final determination and disposition of the same, such proceedings shall abate. (R. S. c. 153, § 40.)

Cross reference.—See c. 107, § 4, sub-§ IX, re equity powers to hear and determine property matters between wife and husband.

Extent of section.—Only when property is entrusted or advanced by one to the other under conditions where it is apparent that it was regarded not as a joint or common interest, or as a gift, but as separate property of the party advancing it, for which the recipient was expected, and ought in equity and good conscience, to account, may this remedy be invoked. Walbridge v. Walbridge, 118 Me. 337, 108 A. 105.

It is not intended to adjust all financial relations. — This section could not have been intended to provide for the adjustment of all the financial relations between husband and wife. No end of litigation would arise, and domestic infelicities would be increased tenfold. Walbridge v. Walbridge, 118 Me. 337, 108 A. 105.

And relief sought by a plaintiff with unclean hands may be refused. See Dunton v. Dunton, 123 Me. 243, 122 A. 629.

Section requires no findings upon facts — only a bare decree. — There is no obligation resting upon the justice who hears the case to make a finding upon the facts; a bare decree is all that this statute, or equity practice, requires. But the filing of a decree, sustaining the bill, is ipso facto a finding of fact in favor of the plaintiff upon some or all of the allegations in his bill. Tebbets v. Tebbets, 124 Me. 262, 127 A. 720.

Property conveyed under separation agreement recovered.—Where a husband conveyed a homestead to his wife pursuant to an agreement of separation, but no separation ever took place, it was held that the property could be recovered under this section, since to permit her to retain the property under these circumstances would be against equity and good conscience. Greenwood v. Greenwood, 113 Me. 226, 93 A. 360.

Where a wife received a conveyance by deed of homestead property which was not intended as a gift, and for which the only consideration was an agreement between herself and her husband as to their future method of living, which agreement was not carried out; it was held that to permit her to hold the property would be unfair, unreasonable and inequitable, that in equity and good conscience it belonged to the husband, and under this section he should be permitted to recover it. This holding is a fair indication of the attitude of the court as to this statute even when the defendant had a legal title to the property, acquired by a deed, sealed and executed, a most solemn instrument and carrying upon its face a presumption of consideration. Tebbetts v. Tebbetts, 124 Me. 262, 127 A. 720.

Property rights in U. S. war bonds determined.—Equity may determine rights under this section as between husband and wife as co-owners of United States war savings bonds where the wife had redeemed bonds after a bill in equity was served upon her. Thibeault v. Thibeault, 147 Me. 213, 85 A. (2d) 177.

And where defendant sold wife's property, proceeds recovered.—Where the defendant gave his wife joint half interest in the properties and these were sold without her consent and he appropriated the entire proceeds, she may recover her share of such proceeds under this section. Greenberg v. Greenberg, 141 Me. 320, 43 A. (2d) 841.

Applied in Vassar v. Vassar, 142 Me. 150, 48 A. (2d) 620.

Cited in Anthony v. Anthony, 135 Me. 54, 188 A. 724.

Sec. 41. Action by married woman for alienation of affections of husband.—Whoever, being a female person more than 18 years of age, debauches and carnally knows, carries on criminal conversation with, alienates the affections of the husband of any married woman or by any arts, enticements and inducements deprives any married woman of the aid, comfort and society of her husband, or whoever, being a male person, alienates the affections of the husband of any married woman or by any arts, enticements and inducements deprives any married woman of the aid, comfort and society of her husband, shall be liable in damages to said married woman in an action on the case brought by her within 3 years after the discovery of such offense. (R. S. c. 153, § 41.)

Cross reference. — See c. 112, § 91, re suits for breach of promise to marry.

Section strictly construed. — This section being in derogation of the common law must be strictly construed. Farrell v. Farrell, 118 Me. 441, 108 A. 648; McCollister v. McCollister, 126 Me. 318, 138 A. 472.

And remedy is subject to statutory limitations. — This section provides a special remedy upon particular facts and is subject to the conditions and limitations defined by the legislature. Pray v. Millett, 122 Me. 40, 118 A. 721; Kimball v. Cummings, 144 Me. 331, 68 A. (2d) 625.

Actions to be scrutinized for unscrupulous purposes. — Presumably there is a legitimate field for actions brought under this statute and for actions based on charges of alienation generally, but the nature of the claims so asserted is such that such suits furnish a most convenient weapon for extortion and the right to bring them is a constant temptation to the unscrupulous. Every such case should be subjected, therefore, to the most careful scrutiny not only by jurors but by the appellate court. Especially is this true in cases in which parents are defendants. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

Actions must be brought within 3 years. —For the reason that this section constitutes time an essential part of the cause, the plaintiff must allege and prove the alienation of the husband's affections as of a day within three years of the date of the writ; or, alleging the alienation as of a day before that time, then she additionally must allege and show that the discovery thereof by her was within three years of the bringing of the action. Pray v. Millett, 122 Me. 40, 118 A. 721.

It is question of fact as to time of alienation of affections and when discovered. —Alienation of affections alone usually does not consist of a single act but rather in a culmination of cumulative acts. It is ordinarily progressive in its nature and a question of fact as to when, if at all, the conduct of the defendant culminated in the alienation of affections of plaintiff's husband and also, if accomplished, when it was discovered by the plaintiff. Kimball v. Cummings, 144 Me. 331, 68 A. (2d) 625.

Distinction exists between permitted attitude of parents and that of strangers.— The law has always recognized a broad

distinction between the permitted attitude of parents toward their married children, in connection with their domestic difficulties and the attitude which may be taken under like circumstances by strangers. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

Proof required to hold parent liable.— It should require more proof to sustain an action against a father for alienation of a wife than against a stranger. It ought to appear either that he detained his daughter against her will or that he enticed her away from her husband from improper motives. But as unworthy motives are not to be presumed they ought to be positively proved or necessarily deduced from facts and circumstances. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

Parent may, in good faith and on reasonable grounds, advise child to leave its spouse. — Although a parent may not with hostile, wicked or malicious intent break up the relations between his daughter and her husband, yet he may advise his daughter, in good faith, and for her good, to leave her husband, if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or to destroy her peace of mind, so that she would be justified in leaving him; and if the parent acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband. Wilson v. Wilson, 115 Me. 341, 98 A. 938.

A parent may advise his daughter, in good faith and for her good, to leave her husband, if he believes that the further continuance of the marriage relation tends to injure her health or to destroy her peace of mind so that she would be justified in leaving him. A parent may in such case persuade his daughter. He may use proper and reasonable arguments drawn, it may be, from his greater knowledge and wider experience. McCollister v. McCollister, 126 Me. 318, 138 A. 472; Block v. Block, 132 Me. 202, 168 A. 873.

A wife may, for proper reasons, leave her husband. In such case she may seek advice from her parents. And such advice may be enforced by reasonable arguments. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

Even though such parent acts on mistaken premises. — Whether the motive of the parent in advising his daughter to leave her husband was proper or improper is always to be considered. It may turn out that the parent acted upon mistaken premises, or upon false information, or his advice and his interference may have been unfortunate; still, if he acts in good faith, for the daughter's good, upon reasonable grounds of belief, he is not liable to the husband. McCollister v. McCollister, 126 Me. 318, 138 A. 472; Block v. Block, 132 Me. 202, 168 A. 873.

The liability attaches to a parent only when the parent interferes with hostile, wicked or malicious intent or simply because he does not wish the marriage relation to continue longer. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

A parent is liable for any wrongful alienation of the affections of a married child, but only when the parent's conduct is malicious. It is incumbent on the plaintiff in such cases to prove malice on the part of the defendant. McCollister v. McCollister, 126 Me. 318, 138 A. 472.

And malice is not presumed. — Malice on the part of a parent in persuading a son to abandon his marriage is not presumed. It must be proved. And it may be conceded that there is abundant authority for the application, under special circumstances, of the same rule in actions against brothers and sisters. Block v. Block, 132 Me. 202, 168 A. 873.

That is for the jury to determine; and if proved, recovery must follow. — If in an action by a wife there is evidence, upon which the jury would have a right to find that a parent, or brothers and sisters who stand in "loco parentis," have actively interfered, to cause a son and brother to abandon the wife, and have deprived her of his affections and the comfort and solace of his society, through hatred or malice toward the wife and not for the purpose of affording a proper protection to the husband and furthering his true welfare, then the case is for the jury and, if the facts so in evidence are deemed proved, recovery must be granted. Block v. Block, 132 Me. 202, 168 A. 873.

Prior to the enactment of this section a wife could not maintain the action in this state, for alienation of the affections of her husband. Wilson v. Wilson, 115 Me. 341, 98 A. 938; Farrell v. Farrell, 118 Me. 441, 108 A. 648; McCollister v. McCollister, 126 Me. 318, 138 A. 472.

For a case prior to the enactment in 1913 of the provision permitting an action against a male defendant, such case holding that such action could not be maintained, see Howard v. Howard, 120 Me. 479, 115 A. 259.

Applied in Kalloch v. Elward, 118 Me. 346, 108 A. 256; Talla v. Merry, 130 Me. 414, 156 A. 892.

Sec. 42. Descent of property of married woman, dying intestate; husband and wife may dispose by antenuptial settlement.—When a married woman dies intestate, her property, real and personal, descends as provided in chapter 170, and administration and distribution may take place accordingly; but a husband and wife, by a marriage settlement executed in presence of 2 witnesses before marriage, may determine what rights each shall have in the other's estate during the marriage and after its dissolution by death, and may bar each other of all rights in their respective estates not so secured to them. (R. S. c. 153, § 42.)

Cross reference.—See c. 170, §§ 8-19, re rights of surviving husbands and wives.

This section is restricted to the rights which either party to the marriage settlement may have in the estate of the other, and it does not follow that the section covers the whole field of marriage relations other than "rights" in the estate of one or the other. Bright v. Chapman, 105 Me. 62, 72 A. 750.

Wife may waive jointure or pecuniary provision made during coverture and save interest by descent.—The law jealously regards the rights of a wife in the estate of her husband. If during coverture, jointure or pecuniary provision is made for her, even with her consent, and her dower or right and interest by descent would be thereby barred, she may waive the provision, and save her interest. Pinkham v. Pinkham, 95 Me. 71, 49 A. 48.

Marriage settlement may bar all rights in estate of spouse.—The right to "determine what rights each shall have in the other's estate," authorizes a determination that neither shall have any rights in the other's estate. Wentworth v. Wentworth, 69 Me. 247.

But does not bar petition of wife for allowance.—A settlement agreement barring all property rights of the wife in the husband's property is no defense in the supreme court of probate to a petition for an allowance, which is wholly within the court's discretion. Wentworth v. Wentworth, 69 Me. 247; Bright v. Chapman, 105 Me. 62, 72 A. 750.

Section is not exclusive, and agreement may be binding though not witnessed.—The provision of this section as to marriage settlements is not exclusive, and before marriage a husband and wife may enter into an antenuptial agreement that will be binding in equity upon the parties, though agreement is not executed in the presence of two witnesses according to statute. McAlpine v. McAlpine, 116 Me. 321, 101 A. 1021.

Antenuptial agreements are valid independent of section, and enforceable.—Antenuptial contracts between persons contemplating marriage, settling prospective rights of the husband and wife in each other's property when the marriage is terminated by death are valid contracts, independent of the statutes, and are enforceable in the courts of equity. McAlpine v. McAlpine, 116 Me. 321, 101 A. 1021; Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Such agreements being without fraud and not unconscionable.—An antenuptial contract, where it is made without fraud or imposition and is not unconscionable, will be enforced in equity although it does not conform to this section. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Requirements of marriage settlements as to fraud, imposition, etc.—Certain cardinal principles as to marriage settlements obtain, such as the principle that there shall be no fraud or imposition practiced, that full and complete disclosure shall be made and that adequacy in provision for the spouse shall result; that gross disproportion of such adequacy may invalidate such agreement; that the natural confidence of the relations of the parties shall not be violated; that where gross disproportion results fraud will be presumed, and that the burden is upon him who sets up an antenuptial agreement to prove fairness, notice, understanding and adequacy. Rolfe v. Rolfe, 125 Me. 82, 130 A. 877.

Disproportion determined on basis of property held at time contract executed.—Antenuptial agreements are to be considered, so far as disproportionate results may arise, by an examination of the property holdings at the time when the contract is executed, for if the rule were otherwise no antenuptial agreement could be safely made. Rolfe v. Rolfe, 125 Me. 82, 130 A. 877.

Almost any bona fide antenuptial agreement to secure wife is enforceable.—Almost any bona fide antenuptial contract made to secure the wife, either in the enjoyment of her own property or a portion of that of her husband, either during coverture or after his death, will be enforced in equity. Wentworth v. Wentworth, 69 Me. 247; Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Settlements enforced by equity during marriage; by law courts after dissolution by death. — Even under this section re-

course must be had to equity for the enforcement of the marriage settlement in so far as it concerns rights of one party in the estate of the other during marriage. After dissolution of the marriage by death the settlement provided for by our statute is cognizable in the courts of common law. Bright v. Chapman, 105 Me. 62, 72 A. 750

Last clause was held to include dower.—The sweeping language in the last clause of this section was held to include the right of dower, for "all rights" are not less than the whole. Wentworth v. Wentworth, 69 Me. 247.

Effect of statute of frauds.—The statute of frauds, c. 119, § 1, does not prevent specific performance of an oral antenuptial agreement where there is some subsequent memorandum or note thereof made in writing during coverture. Smith v. Farrington, 139 Me. 241, 29 A. (2d) 163.

Stated in Littlefield v. Paul, 69 Me. 527.

Cited in Mace v. Cushman, 45 Me. 250, overruled in Lord v. Bourne, 63 Me. 368; Chase v. Alley, 82 Me. 234, 19 A. 397; Haggett v. Hurley, 91 Me. 542, 40 A. 561; Peaks v. Hutchinson, 96 Me. 530, 53 A. 38.

Sec. 43. Husband and father compelled to contribute to support of wife or minor children.—Whenever a man, having a wife, a minor child or children, residing in this state and being of sufficient ability or being able to labor and provide for them, willfully and without reasonable cause, refuses or neglects to provide suitable maintenance for them, the superior court, the probate court and any municipal court, in term time, or any judge or justice of said courts in vacation, in the county where the wife or such minor child or children reside, on petition of the wife for herself and for such child or children, or of such child or children by their guardian, after such notice to the husband or father as it may order, and hearing, may order him to contribute to the support of his wife and such minor child or children or either of them such sums payable weekly, monthly or quarterly as are deemed reasonable and just, and may enforce obedience by appropriate decrees. Pending petition hereunder, the court may order the husband to pay to the court for the wife sufficient money for the prosecution thereof, upon default of which order execution may issue as in actions of tort. Execution may also issue for said sums when payable, and for costs, and when the husband is committed to jail on execution the county having jurisdiction of the process shall bear the expense of his support. Any party aggrieved by any order or decree authorized by the provisions of this section and made by a probate court or municipal court may appeal from said order or decree in the same manner as provided for appeals from such court in other causes, and appeal may be taken from the superior court to the law court. Pending the determination of such appeal, the order or decree appealed from shall remain in force and obedience thereto may be enforced as if no appeal had been taken. Said appeal shall be in order for hearing at the 1st term of the court appealed to, held after said appeal is taken, and no continuance thereof shall be had without the consent of the appellant or without legal cause shown therefor to the justice of said court to which appeal is had. (R. S. c. 153, § 43. 1949, c. 349, § 137.)

Cross reference.—See c. 138, §§ 1-4, 15, re criminal proceedings for desertion of families.

Father has right to provide for child in own home.—It is necessary for the preservation of the parental authority and for the welfare of the child, that the father, who is without fault in discharging the obligation which the law imposes upon him, should have the right to provide for the child under his own roof where he can exercise judgment and supervision as to the wants of the child, and the character, cost and necessity of the supplies furnished. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

And is not liable for support of child who abandons his home.—Irrespective of any statutory provision the father is bound by law to support his minor child. This however is a limited obligation; it does not attach to the father under all circumstances, or in favor of all persons. A minor who abandons his father's house without the father's fault carries with him no credit on the father's account, not even for necessaries. When the authority of the parent is abjured, without any necessity occasioned by the parent, all obligations to provide for such child cease. It would be no less true that where the child is in-

duced by another person to leave the family of the father without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

But deserting father is liable for necessaries furnished child.—A father who deserts his infant child, and makes no provision for its support, is liable to one who furnishes it with necessary supplies. Glynn v. Glynn, 94 Me. 465, 48 A. 405.

Divorce without decree as to the support does not affect father's duty to support child.—A divorce, without a decree as to the custody and support of the children, does not affect the father's duties and obligations as to the support of his minor children. Glynn v. Glynn, 94 Me. 465, 48 A. 405.

Section confers authority to grant prompt and summary relief.—The intent of the legislature in enacting this section was to give to the municipal and certain other courts jurisdiction and authority to grant prompt and summary relief. Orders thereupon issuing are ordinarily of a temporary character subject to revision by the court which makes them. Cotton v. Cotton, 103 Me. 210, 68 A. 824; Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

Proceeding to compel support is a summary process.—The proceeding under this section is a summary process without ad damnum, made returnable either in term time or vacation, and requiring speedy consideration by the court, whether supreme judicial, superior, probate or municipal. Head v. Fuller, 122 Me. 15, 118 A. 714.

It is not an action. — The proceeding brought to compel a father to contribute to the support of his wife and minor children does not come within the category of "actions." Head v. Fuller, 122 Me. 15, 118 A. 714.

Limitation upon right to support.—The support ordered in such sums "as are deemed reasonable and just" marks the limit of the wife's right to support and maintenance from her husband, until further order. Vienna v. Weymouth, 132 Me. 302, 170 A. 499; Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

Living apart not required.—A requirement that the husband or father be living apart from his wife or minor child found in the statute when first enacted in 1895 was stricken from the statute in 1905. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

And order does not create judicial separation.—The order under this section can be made while the parties live together. The order does not create a judicial separation. The marital status of the parties remains unchanged. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

Correction of alleged injustice by lower court is by appeal.—In complaining to an upper court, either the superior court or the law court, of injustice done by a subordinate court, procedure shall be an appeal. Appeals, as distinguished fom exceptions, bring up questions of fact as well as of law. Kelley, Appellant, 136 Me. 7, 1 A. (2d) 183.

For cases before the present provision for appeal was enacted, relating to an appeal under this section, see Cotton v. Cotton, 103 Me. 210, 68 A. 824; Head v. Fuller, 122 Me. 15, 118 A. 714.

Applied in Vienna v. Weymouth, 132 Me. 302, 170 A. 499.

Cited in Sprague v. Androscoggin County, 104 Me. 352, 71 A. 1090.

Judicial Separation.

Sec. 44. Protection of wife deserted by or living apart from her husband.—If a husband, without just cause, deserts his wife or if his wife, for just cause, is actually living apart from him, and if such desertion or living apart has continued for a period of at least 1 year next prior to the filing of the petition hereinafter referred to, the probate court may, upon her petition, or if she is insane, upon the petition of her guardian or next friend, enter a decree that such wife is so deserted or is so living apart and may prohibit the husband from imposing any restraint on her personal liberty during such time as such court shall by order direct; and upon the petition of either the husband or wife, or of the guardian or next friend of either who may be insane, may make further orders relative to the care, custody and maintenance of the minor children of the parties, may determine with which of their parents such children or any of them shall remain, may order the husband to pay to such court for the wife sufficient money for the prosecution of such petition, and may from time to time,

upon a similar petition, revise or alter any such order and make a new order in lieu thereof, as the circumstances of the parties or such minor children or any of them may require, and may enforce obedience by appropriate process. (R. S. c. 153, § 44.)

Cause for separation need not involve conduct entitling spouse to divorce.—Justifiable cause, which will excuse a wife for living apart from her husband, ordinarily involves, on the part of the husband with respect to the wife and to her knowledge, conduct inconsistent with the marital relation; not necessarily misconduct or ill treatment of such a character as might entitle her to a divorce from the bonds of matrimony, but such, for instance, as could be made, without turning on the same length of time, the foundation for a judicial separation. Albee's Case, 128 Me. 126, 145 A. 742.

A wife does not live apart from her husband for justifiable cause, if he is not recreant to marital duty. Albee's Case, 128 Me. 126, 145 A. 742.

The law approves reasonable delay rather than haste in seeking separation on the ground of impotence of the husband, especially where doubt exists in the libellant's own mind as to whether she herself might not be at fault. Lausier v. Lausier, 123 Me. 530, 124 A. 582.

Impotence is not such a fault as may be condoned. Condonation implies forgiveness for past offenses not continuing ones; an overlooking in consideration of promises of better behavior in the future. Lausier v. Lausier, 123 Me. 530, 124 A. 582.

Denial of divorce for impotence held res judicata in suit for separation on same ground.—Where the wife had applied for a divorce for impotence which was denied, the issue of impotence was held res judicata in a subsequent suit by the husband for separation under this section, he alleging that the wife had lived apart from him for more than a year without just cause, and she defending on the ground that she had just cause for living apart from her husband, based solely on her husband's impotence. Lausier v. Lausier, 123 Me. 530, 124 A. 582.

§§ 44-47 applied in Lausier v. Lausier, 123 Me. 530, 124 A. 582.

Sec. 45. Husband deserted by or living apart from wife; decree bars wife's rights in husband's property.—If a wife, without just cause, deserts her husband, or if he is living apart from her for just cause, and if such desertion or living apart has continued for the period set out in section 44, the probate court may upon petition of the husband, or if he is insane, upon the petition of his guardian or next friend, enter a decree that such husband is so deserted or is so living apart, and such husband may thereafter convey his real property in the same manner as if he were sole, and no portion of his estate shall descend to his said wife at his decease, neither shall she be entitled to receive any distributive share thereof or to waive any will made by him in her favor. (R. S. c. 153, § 45.)

Sec. 46. Deserted wife obtaining decree may convey her property as if sole; decree bars husband's rights.—If the probate court has entered a decree that a wife has been deserted by her husband without just cause, or has lived apart from him for just cause, for the period set out in section 44, she may convey her real property in the same manner and with the same effect as if she were sole, and no portion of her estate shall descend to her said husband at her decease, neither shall he be entitled to receive any distributive share thereof or to waive the provisions of any will made by her in his favor. (R. S. c. 153, § 46.)

Sec. 47. Petition; notice.—The petition under the provisions of the 3 preceding sections may be brought and determined in the county in which either of the parties lives, except that if the petitioner has left the county in which the parties lived together and the respondent still lives therein, the petition shall be brought in that county, and such notice shall be given thereon as the judge of said court shall direct. (R. S. c. 153, § 47.)

Sec. 48. Rights of issue, marriage settlement or contract not affected. —The provisions of the 4 preceding sections shall not bar the issue of

the marriage from inheriting or affect their rights, neither shall it invalidate any marriage settlement or contract between the parties. (R. S. c. 153, § 48.)

Sec. 49. Appeal.—Any party aggrieved by any order or decree provided for in sections 44 to 48, inclusive, may take an appeal in the same manner as provided for probate appeals. (R. S. c. 153, § 49.)

Sec. 50. Certified copy of any decree filed in office of register of deeds.—Whenever any decree provided for in sections 44 and 45 shall become effective either by reason of expiration of the time within which an appeal might have been taken or of final judgment on appeal, the register of probate shall forthwith file in the office of the register of deeds in the county or counties where real estate which may be affected by such decree is situated, under seal of the probate court, a certified copy thereof which the register of deeds shall record without fee. (R. S. c. 153, § 50.)

Illegal Marriages and Annulment.

Sec. 51. Certain marriages void, without process. — Marriages prohibited in sections 1, 2 and 3, if solemnized in this state, are absolutely void and the sentence of either party to imprisonment for life and confinement under it dissolves the bonds of matrimony; without legal process in either case. (R. S. c. 153, § 51.)

Cross reference.—See note to § 2, re meaning of "insane" person contracting marriage.

Marriage of insane person is nullity.—As no person can contract a valid marriage when incapable of giving an intelligent consent thereto, the marriage of an insane person, though formally solemnized, is a nullity. Unity v. Belgrade, 76 Me. 419.

And may be attacked collaterally.—As the law does not require so useless a ceremony as that of annulling by a special proceeding, a marriage which has no existence, but is absolutely void ab initio, as for instance, the marriage of an insane person, its invalidity may be shown in any proceeding in any court whenever the question arises collaterally. Unity v. Belgrade, 76 Me. 419; St. George v. Biddeford, 76 Me. 593; Winslow v. Troy, 97 Me. 130, 53 A. 1008.

Sec. 52. Illegal marriages annulled.—When the validity of a marriage is doubted, either party may file a libel as for divorce; and the court shall decree it annulled, or affirmed according to the proof; but no such decree affects the rights of the libelee, unless he was personally notified to answer or did answer to the libel. (R. S. c. 153, § 52.)

Cross references.—See note to § 2, re meaning of "insane" person contracting marriage; note to c. 107, § 26, re that section requiring findings of fact to be made in equity cases not applicable to proceedings under this section.

An answer to a libel under this section does not supersede the necessity of proofs, nor in any degree lighten the burden of the libellant in establishing his allegations. Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

A petition of the guardian of a husband to annul the marriage confers no jurisdiction upon the court and any decree made pursuant to such petition is void. Winslow v. Troy, 97 Me. 130, 53 A. 1008.

And no annulment can be granted without notice.—The court has no jurisdiction to decree the annulment of a marriage, without notice to the party against whom the proceeding is brought. Winslow v. Troy, 97 Me. 130, 53 A. 1008.

Court may enter such decree as disposes of suit.—The legislature did not intend to tie the hands of the court as to the form of the decree made under this section, but the court is free to enter such decree as, being in accordance with its usual practice, finally disposes of the suit. Sargent, Petitioner, 115 Me. 130, 98 A. 117.

Decree of "petition denied" after hearing on merits bars future suit.—The entry of the decree "petition denied" after a hearing on the merits must be regarded as a final decree barring a future action between the same parties on the same subject matter, despite the language of the statute to the effect that "the court shall decree it affirmed or annulled according to the proof." Sargent, Petitioner, 115 Me. 130, 98 A. 117.

And res judicata will apply in annulment proceedings although prior determination was by foreign court.—It is a general rule that parties are estopped from litigating issues which had been previously and finally decided between them on the merits of the controversy by a court of competent jurisdiction, although the court be a foreign one, and this rule applies to proceedings for annulment of marriage under this section. Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

Marriage is a status wherein public policy rises superior to mere sympathy for the parties. Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

In a proceeding to determine the validity of petitioner's second marriage, he must prove legal separation from the first spouse. Jones v. Jones, 136 Me. 238, 8 A. (2d) 141.

Fraud vitiating ordinary contracts not sufficient to annul marriage.—It is not true that every kind and degree of fraud which would be sufficient to annul an ordinary contract would also be sufficient to annul a marriage. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

Effect of fraud in contracting marriage, and affirmance or disaffirmance thereafter.—Undoubtedly a voluntary consummation is usually such a ratification as cures the defect of lack of consent in the original contract of marriage. When the effect of the fraud, error or duress has been removed from the mind enthralled, the party has the election to affirm the marriage or not. It is affirmed, for example, by a voluntary continuance of the cohabitation with full knowledge of the invalidating facts. Where the mind is overcome by fraud, by error, or by duress, so that in fact it does not consent to an apparent marriage, the law will deem it no marriage; though if, after the thrall is broken, it then fully consents, no repetition of the ceremony is required to make the marriage good. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

Marriages fraudulently procured may be good at the election of the injured party, who, on being set free from the influence of the fraud or duress, may then give a voluntary consent—may ratify and confirm the contract. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

If either party to a marriage contract were disqualified at the time of making the contract, then the contract would be void ab initio. So if the marriage were effected by fraud or duress, and was never afterwards ratified voluntarily, by a mind having the proper capacity, and also free at the time of ratification to act without fraud or force, then the same results might follow. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

Court has recourse to rules of equity in annulment proceedings.—In the absence of any statute on the effect of cohabitation after discovery of a practiced fraud, the court has recourse to the rules of equity, for annulment is a proceeding in equity on the theory that the marriage was void ab initio. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

But rules of practice in equity not required to be applied.—Undoubtedly equitable considerations prevail in hearing a libel as for divorce for annulment of marriage alleged to have been procured by fraud; but the application of equitable principles does not change the form of action into a suit in equity requiring the application of the rules of practice in equity cases. Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

Rules of practice in libels for divorce are followed.—Since, by legislative enactment, the validity of a marriage is to be tested and determined at a hearing on a libel as for divorce, it follows that in such a proceeding the rules of practice in libels for divorce are to be followed so far as they are applicable. Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

And rules of law applicable to actions of deceit apply to annulment proceedings for fraud.—A proceeding for annulment of a marriage under this section may be based upon alleged fraud and deceit, yet it is unlike an ordinary action of deceit. In an ordinary case of deceit, only the parties are interested, while in this proceeding for annulment of marriage, not only the parties themselves are concerned, but society as a whole and any child of the marriage whose status might thereby be affected have a very vital interest in the case; nevertheless the rules of law generally applicable to ordinary actions of deceit may be applied. Mitchell v. Lloyd, 126 Me. 503, 140 A. 182; Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

No fraud will avoid a marriage which does not go to the very essence of the contract, and which is not in its nature such a thing as would either prevent the party entering into the marriage relation, or, having entered into it, would preclude performance of the duties which the law and custom impose upon husband or wife as a party to the contract. Trask v. Trask, 114 Me. 60, 95 A. 352.

Annulment denied by reason of condonation.—The husband will not be entitled to an annulment of the marriage on grounds

of antenuptial pregnancy by another man, if after the discovery of this condition, he has condoned it by continuing to cohabit with her. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

And by reason of cohabitation, though marriage contracted under duress.—Where a man was constrained to marry because of fear of bodily harm, and consummated the marriage by cohabitation until the morning of the second day, there was found to be ratification of the marriage and annulment was refused. See Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

Or contracted by fraud.—A husband who was guilty of illicit sexual relations with a woman before marriage, cannot, after marriage and more than four months' cohabitation with her, in equity and good conscience put her from him by annulment, even if she induced the marriage through fraud. Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572.

But annulment allowed where marriage contracted upon misrepresentations as to antenuptial pregnancy.—If a man is induced to marry a woman who he knows is pregnant, believing and relying upon false and fraudulent statements made to him by her to the effect that he is the father of the child with which she is pregnant, when, unknown to him, her pregnancy was caused by another, the marriage may be annulled for fraud, provided it has not been ratified or confirmed. Jackson v. Ruby, 120 Me. 391, 115 A. 90; Mitchell v. Lloyd, 126 Me. 503, 140 A. 182; Whitehouse v. Whitehouse, 129 Me. 24, 149 A. 572; Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

And premarital intercourse between parties will not bar annulment.—The mere fact that the husband had had sexual intercourse with his wife before they were married will not bar him from seeking an annulment. Jackson v. Ruby, 120 Me. 391, 115 A. 90; Mitchell v. Mitchell, 136 Me. 406, 11 A. (2d) 898.

Marriage pursuant to a dare held valid.—Where a female 20 years old and a male 19½ years of age, without parental consent, married pursuant to a dare, and both parties understood their action, upon a libel under this section it was held that the marriage was valid. See Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

Marriage of minor without parental consent is not void.—Though statute forbids the issuance of a license to a male minor having no consenting parents in the state, yet no statute declares that the marriage shall be void. Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

Nor is a marriage invalid because not consummated. Consummation by coition is unnecessary in the case of a ceremonial marriage. Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

And secrecy does not necessarily negative marriage.—Secrecy, while on its face unfavorable to, does not necessarily negative marriage. Secrecy is an explainable circumstance, frequently existing from politic reasons and valid incentives. Brooks-Bischoffberger v. Bischoffberger, 129 Me. 52, 149 A. 606.

Applied in Coffin v. Coffin, 55 Me. 361.

Stated in Unity v. Belgrade, 76 Me. 419.

Cited in Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Sec. 53. Issue, when legitimate and when not.—When a marriage is annulled on account of the consanguinity or affinity of the parties, the issue is illegitimate; but when on account of nonage, insanity or idiocy, the issue is the legitimate issue of the parent capable of contracting marriage. (R. S. c. 153, § 53.)

Stated in Unity v. Belgrade, 76 Me. 419.

Sec. 54. Issue of second marriage legitimate.—When a marriage is annulled on account of a prior marriage, and the party who was capable of contracting the second marriage contracted the second marriage in good faith, believing that a prior husband or wife was dead, or that the former marriage was void, or that a divorce had been decreed leaving the party to the former marriage free to marry again, that fact shall be stated in the decree of nullity; and the issue of such second marriage, begotten before the commencement of the suit, is the legitimate issue of the parent capable of contracting. (R. S. c. 153, § 54. 1949, c. 132.)

Divorce.

The law of divorce in Maine is wholly statutory. Henderson v. Henderson, 64 Me. 419; Stratton v. Stratton, 77 Me. 373; McIntire v. McIntire, 130 Me. 326, 155 A.

731; Jones v. Jones, 136 Me. 238, 8 A. (2d) 141; Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

And jurisdiction of court is derived from statute provisions.—It may be conceded to be settled in this state that the jurisdiction and authority of the court in matters pertaining to divorce are derived from the provisions of the statute. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

The right of the court to divorce is wholly statutory. Jones v. Jones, 136 Me. 238, 8 A. (2d) 141.

The sole power of our court over divorce is derived from statute. Plummer v. Plummer, 137 Me. 39, 14 A. (2d) 705.

And limited and controlled by them.—The jurisdiction of the court, and its powers relating to divorce, are derived solely from the statutes, and limited and controlled by them. Stratton v. Stratton, 73 Me. 481.

The court, deriving its authority as to divorce actions solely from the statutes, must be governed by them. Henderson v. Henderson, 64 Me. 419; Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

The law of divorce is wholly statutory, and the courts cannot travel beyond the purpose and intent of the statutes in applying them. Poulson v. Poulson, 145 Me. 15, 70 A. (2d) 868.

Thus power to alter decree is limited by statute.—Apart from the inherent right to annul a decree because of fraud, the court, unless possibly when it reserves the right to revise an award of alimony, has no power except as given by statute to alter a decree of divorce in any particular after the adjournment of the term of court at which it was entered. Plummer v. Plummer, 137 Me. 39, 14 A. (2d) 705.

Petition for annulment of decree procured by fraud.—No specific provision is found in the divorce statute, §§ 55-70, as to the method of procedure to be used to annul or vacate a divorce decree. But the uniform usage and practice in this state, where a decree of divorce is procured by fraud, has been to petition the court which granted the divorce for an annulment thereof. Preston v. Reed, 141 Me. 386, 44 A. (2d) 685.

Sec. 55. Causes for divorce; jurisdiction.—A divorce from the bonds of matrimony may be decreed in the county where either party resides at the commencement of proceedings, for causes of adultery, impotence, extreme cruelty, utter desertion continued for 3 consecutive years next prior to the filing of the libel, gross and confirmed habits of intoxication from the use of intoxicating liquors, opium or other drugs, cruel and abusive treatment or, on the libel of the wife, where the husband being of sufficient ability or being able to labor and provide for her, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her; provided that the parties were married in this state or cohabited here after marriage, or if the libelant resided here when the cause of divorce accrued, or had resided here in good faith for 6 months prior to the commencement of proceedings, or if the libelee is a resident of this state. When both parties have been guilty of adultery, or there is collusion between them to procure a divorce, it shall not be granted. Either party may be a witness. The superior court, or any justice thereof in vacation, has jurisdiction of libels for divorce in all counties. (R. S. c. 153, § 55. 1949, c. 311, § 1. 1953, c. 188.)

I. General Consideration.

II. Jurisdiction and Venue.

III. Causes for Divorce.

- A. Impotence.
- B. Cruelty.
- C. Desertion.
- D. Habits of Intoxication.

IV. Defenses.

- A. In General.
- B. Condonation.

I. GENERAL CONSIDERATION.

History of section.—See McIntire v. McIntire, 130 Me. 326, 155 A. 731; Preston v. Reed, 142 Me. 275, 50 A. (2d) 95.

Requisites for decree of divorce.—Before decreeing a divorce, the court must be reasonably satisfied that the libellant has been faithful to the marriage vows, that

the libellee has been guilty of one or more of the grievous offenses against the marital relations specified in the statute, that there has been no condonation, and that there is no collusion. Berman v. Bradford, 127 Me. 201, 142 A. 751; Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

The causes of divorce may be changed by the legislature after marriage. They may be increased or diminished, and a divorce will be granted according to the law on that subject, when the libel is filed or the decree made, and not as it was when the ceremony of marriage was performed. New causes for divorce may be enacted, and the antecedent marriage will be dissolved for grounds subsequently deemed sufficient for its dissolution. Adams v. Palmer, 51 Me. 480.

Divorce may be granted on uncorroborated testimony of libelant.—The rule of not granting a divorce upon the uncorroborated testimony of the libelant is a rule of practice, and not an inflexible rule of law. The libelant wife is a competent witness, and there is no rule of law to prevent a finding of fact solely upon her testimony, if her credibility is established to the satisfaction of the presiding justice. Sweet v. Sweet, 119 Me. 81, 109 A. 379. See this note, analysis line III B, re cruelty found from uncorroborated testimony of libelant.

Section does not permit disclosure of confidential communications.—The removal of incompetency of husband and wife as witnesses in divorce cases does not permit either to disclose confidential communications induced by the marital relations. Bond v. Bond, 127 Me. 117, 141 A. 833. See this note, analysis line III B, re admissibility of abuse with tongue.

The provision of this section, permitting either party to the libel to testify, does not in terms reach the point whether it also removes the ban on what, in the law of evidence, are termed privileged communications, which has nothing to do with the competency of the husband or wife as witnesses. Bond v. Bond, 127 Me. 117, 141 A. 833.

Marital secrets induced by the relations thus existing, confessions and admissions confidential in their nature, and all communications that can be said to be induced by the confidence presumed to be inherent to the marital relations, are privileged and cannot be disclosed by either without the consent of the other; yet conversations may be had between husband and wife which are in no sense confidential or induced by the marital relations. Bond v. Bond, 127 Me. 117, 141 A. 833.

Divorce decrees may not be granted to both spouses. McIntire v. McIntire, 130 Me. 326, 155 A. 731; Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

Since and including the Revision of 1857, there has been no provision for granting a "like divorce" to the other party where one party "has been, or shall be, divorced from the bonds of matrimony," nor has there been any other law which could by any stretch of the imagination be regarded as so providing. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

And divorced spouse has no standing in court.—The case of Stilphen v. Stilphen, 58 Me. 508, which was followed by Stratton v. Stratton, 77 Me. 373, rests upon the opinion of the court that it had such statutory authority to entertain a suit for divorce brought by a party against whom a divorce had already been obtained. It is now held that apart from statutory authority, a husband or wife divorced on the libel of the one has no standing in court for the purpose of obtaining a decree in his or her favor against the other. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Factual findings not disturbed if supported by credible evidence.—In this state the general principle applicable to factual findings, i. e., that those made by the trier of fact will not be disturbed in appellate proceedings if supported by credible evidence, is controlling in divorce proceedings. Alpert v. Alpert, 142 Me. 260, 49 A. (2d) 911; Stewart v. Stewart, 143 Me. 406, 59 A. (2d) 706; Hadley v. Hadley, 144 Me. 127, 65 A. (2d) 8.

Court may vacate decree.—The court, after judgment on a libel for divorce, when convinced that the libelee has not had his day in court and that this was due to no negligence on his part, but to some oversight or mistake on the part of the court or of the attorney for the libelant, has the power, acting upon the motion of the libelee, or even upon its own initiative, to vacate the decree. It is a power inherent in the court during the term at which the decree is entered, to correct errors and right wrongs of this nature. Gato v. Christian, 112 Me. 427, 92 A. 489.

Divorce granted on proof of wrong doing.—Except for one cause, impotence, divorces are granted only upon proof of wrong doing by one spouse. Berman v. Bradford, 127 Me. 201, 142 A. 751; Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

And decree imports finding that libelee was answerable for his acts.—The granting

of the divorce imports a factual finding that the libelee was answerable for his conduct at the time of the acts found to constitute the grounds for divorce. Hadley v. Hadley, 144 Me. 127, 65 A. (2d) 8.

Thus, a divorce may not be grounded on an act committed by one insane when it was performed. Hadley v. Hadley, 144 Me. 127, 65 A. (2d) 8. See this note, analysis line III C, re insane person cannot have intent to desert.

For a case holding that divorce may be granted by the legislature, see Adams v. Palmer, 51 Me. 480.

Former provisions of section.—For cases relating to former provisions of this section authorizing divorce in the discretion of the judge when such divorce was "reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society, if the parties were married in this state, or cohabited here after marriage," see Motley v. Motley, 31 Me. 490; Elwell v. Elwell, 32 Me. 337; Goodwin v. Goodwin, 45 Me. 377; Slade v. Slade, 58 Me. 157; Stilphen v. Stilphen, 58 Me. 508.

Applied in Sherburne v. Sherburne, 6 Me. 210; Small v. Small, 31 Me. 493; White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Quoted in part in Lewis v. Meserve, 61 Me. 374; Jones v. Jones, 136 Me. 238, 8 A. (2d) 141.

Cited in Davis v. Davis, 61 Me. 395.

II. JURISDICTION AND VENUE.

Venue depends on residence.—Venue under this section depends on residence, for it is provided that a divorce "may be decreed in the county where either party resides at the commencement of proceedings". Stewart v. Stewart, 143 Me. 406, 59 A. (2d) 706.

Court will not assume jurisdiction if parties were never married.—Where parties have never been married, or the evidence is not sufficient to prove marriage, the court will not assume jurisdiction to decree a divorce. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Or have been previously divorced.—Where a previous divorce has been decreed to one party, the marriage status as such is as completely destroyed as if it had never existed, and there is no more or better reason, apart from statute, to take jurisdiction in that case than in cases where there has never been a marriage or where proof of marriage is not sufficient. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

And section does not confer jurisdiction over every traveler in the state.—The legislature did not intend by the use of the words, "cohabitated here after marriage," to confer jurisdiction over every traveler, who is journeying in the state, or on a mere visit to a friend. They intended the provision to apply to those who were living together in one house as their home —to those who were dwelling together in some place in the state, and not to foreigners, who were temporarily in the state on a visit of friendship or pleasure, and not residing and having no intention to reside in this state. Calef v. Calef, 54 Me. 365.

The primary meaning of the word "cohabit" is to dwell with some one—not merely to visit or see them. It includes more than that. Calef v. Calef, 54 Me. 365.

But court has jurisdiction if libelant resided in state for 6 months prior to proceedings.—The statute declares that this court has jurisdiction if the libelant has resided here in good faith for one year (now 6 months) prior to the commencement of proceedings, regardless of when or where the cause of divorce occurred. Walker v. Walker, 111 Me. 404, 89 A. 373.

Or at time cause of divorce accrued.—If the libelant resided in Maine when the cause of divorce accrued, the court has immediate jurisdiction. It matters not whether the guilty transgressed within or without the limits of the state. The statute makes no exception or restriction. Walker v. Walker, 111 Me. 404, 89 A. 373.

III. CAUSES FOR DIVORCE.

A. Impotence.

Divorce for impotence is in nature of annulment.—A divorce granted for impotence is in the nature of a decree annulling a marriage, resembling in its effects those cases where the marriage is declared void without any legal process, as provided in § 51. Chase v. Chase, 55 Me. 21.

Impotency is not such a fault as may be condoned. Condonation implies forgiveness for past offenses not continuing ones; an overlooking in consideration of promises of better behavior in the future. Lausier v. Lausier, 123 Me. 530, 124 A. 582. See this note, analysis line IV B, re condonation.

Law approves delay in seeking separation for impotence.—The law approves reasonable delay rather than haste in seeking separation on the ground of impotence of the husband, especially where doubt exists in the libelant's own mind as to whether she herself might not be at fault.

Lausier v. Lausier, 123 Me. 530, 124 A. 582.

B. Cruelty.

"Cruel and abusive treatment" covers wide range of conduct.—"Cruel and abusive treatment" are words of comprehensive meaning and the charge covers a wide range of conduct. Michels v. Michels, 120 Me. 395, 115 A. 161.

And each case must be judged by its own facts.—Temperament and character so widely differ, that conduct cruel to one, might scarcely annoy a more callous nature. Having in mind the sacred character of the marital relation, and its influence on the happiness and purity of society, as well as upon individuals, not overlooking considerations that may not be freely discussed, each particular case of alleged cruel and abusive treatment must be judged of by its own particular facts and circumstances. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827.

Cruel and abusive treatment does not necessarily imply physical violence.—Cruel and abusive treatment does not necessarily imply physical violence, though it may include it. Words and deportment may work injury as deplorable as violence to the person. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827.

But practices causing mental pain are not grounds for divorce if health not endangered.—Practices or habits that may annoy a wife or husband and even cause mental pain and suffering, but not to the extent of endangering health may have to be borne. The law does not ensure perfect marital bliss. Bond v. Bond, 127 Me. 117, 141 A. 833.

Divorce should not be a panacea for the infelicities of married life; if disappointment, suffering, and sorrow even be incident to that relation, they must be endured. Public policy requires that it should be so. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827.

But if health is endangered treatment is cruel and abusive.—Both a sound body and a sound mind are required to constitute health. Whatever treatment is proved in each particular case to seriously impair, or to seriously threaten to impair, the health of a spouse, will constitute cruel and abusive treatment. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827; Bond v. Bond, 127 Me. 117, 141 A. 833.

The legislature has directed the courts of this state to grant an absolute divorce when a continued course of treatment has so affected the other party that his or her health and perhaps eventually life is jeopardized. Bond v. Bond, 127 Me. 117, 141 A. 833.

Regardless of motive.—A course of treatment so brutal or bestial as to seriously endanger the health of a wife is none the less cruel, regardless of the motive with which it is done, if a husband knows the effect of his treatment upon his wife or should have known it. He must be presumed to have intended its consequences, if he continues it. Bond v. Bond, 127 Me. 117, 141 A. 833.

The purpose of the legislature in authorizing divorce is not to punish the guilty party for an offense in which his motive is essential but to relieve the other party from an intolerable position if it threatens his or her life or health. Bond v. Bond, 127 Me. 117, 141 A. 833.

Willful attempt to have wife committed to insane asylum constitutes cruel and abusive treatment.—If the husband without just cause, willfully attempts to have his wife committed to an insane asylum, such conduct seriously affecting her health, it would obviously constitute cruel and abusive treatment, within the meaning of the statute. It is not merely the act itself, but the motive which inspired the act that is to be rigidly inquired into and determined by the jury. Michels v. Michels, 120 Me. 395, 115 A. 161.

Unless made in good faith.—If the application of a husband to have his wife confined for alleged insanity, although unsuccessful, was made in good faith, in the honest and sincere belief that the wife was in such an unsettled mental condition that her own good and that of her family required confinement and treatment in such an institution, such an act would be regarded as lacking entirely the essential element of cruel and abusive treatment. Michels v. Michels, 120 Me. 395, 115 A. 161.

But charge of infidelity alone does not constitute cruelty.—A charge of infidelity, when falsely and maliciously made, has been often held to constitute cruelty, if accompanied by acts of violence, or reasonable apprehension thereof. But few cases have been found, that hold the false charge of infidelity alone to be legal cruelty, and these were mostly adjudged in western states. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827.

Abuse with tongue admissible.—Abuse with the tongue, whether in the course of conversation or otherwise, and whether in the presence of others or not, is not warranted or induced by the marital relations, is not ordinarily of confidential nature, and,

as an act of cruelty, is, therefore, admissible in support of an allegation of cruel and abusive treatment. Bond v. Bond, 127 Me. 117, 141 A. 833. See this note, analysis line I, re confidential communications not admissible.

And a finding of extreme cruelty may be grounded in the uncorroborated testimony of a libelant. Sweet v. Sweet, 119 Me. 81, 109 A. 379; Stewart v. Stewart, 143 Me. 406, 59 A. (2d) 706. See this note, analysis line I.

Libel held sufficient.—A libel of the husband has been held sufficient on demurrer, which charges cruel and abusive treatment in these words: that the libellee has for a long time refused her bed to the libellant, and has invaribly slept apart from him without cause; that she has continuously charged him with infidelity without cause, in the presence of their minor children, and in the presence of their servant; that she has sought to alienate the affections of their children from him; that she has studiously avoided his society; that she has lost all interest in his welfare, and ceased to perform any wifely act; that his home has thereby become so unhappy, that existence in it is insupportable, whereby his peace of mind has become so affected, as to endanger his health. Holyoke v. Holyoke, 78 Me. 404, 6 A. 827.

C. Desertion.

Utter desertion involves abnegation of all duties resulting from marriage.—The word "utter" is used in its ordinary acceptation, entire and complete, absolute, total; utter desertion involves an abnegation of all the duties and obligations resulting from the marriage contract. Moody v. Moody, 118 Me. 454, 108 A. 849. See note to c. 31, § 2, sub-§ VIII, re what constitutes desertion within the meaning of the Workmen's Compensation Act.

Desertion not inferred from fact that parties do not live together.—Desertion cannot be inferred from the mere fact that the parties do not live together. It may be that a wife may be passive and yet deserted. On the other hand, she may manifest consent avowedly, or even silently, to her husband's prolonged absence and neglect. Albee's Case, 128 Me. 126, 145 A. 742.

But to establish desertion three things must concur and must be proved; these are cessation from cohabitation continued for the statutory period, intention in the mind of the deserter not to resume cohabitation, and the absence of the other party's consent to the separation. Moody v. Moody, 118 Me. 454, 108 A. 849; Landry v. Landry, 121 Me. 104, 115 A. 769; Deering v. Deering, 123 Me. 448, 123 A. 634.

To constitute desertion, separation and intention to abandon the marital relation must concur. Landry v. Landry, 121 Me. 104, 115 A. 769.

To constitute "utter desertion" under the statute, there must be not only cessation from cohabitation continued for the required period and absence of consent to the separation on the part of the libelant, but also intention in the mind of the libelee not to resume cohabitation. Moody v. Moody, 118 Me. 454, 108 A. 849; Landry v. Landry, 121 Me. 104, 115 A. 769; Deering v. Deering, 123 Me. 448, 123 A. 634; Preston v. Reed, 142 Me. 275, 50 A. (2d) 95.

And insane person cannot form such intent.—A libelee, who is insane, does not have the mental capacity necessary to form the intent to desert. Preston v. Reed, 142 Me. 275, 50 A. (2d) 95. See this note, analysis line I.

Desertion cannot be predicated on a separation by mutual consent. Lourie v. Melnick, 128 Me. 148, 146 A. 84.

There may be separation, but there cannot be desertion by consent. The word itself negatives such a proposition. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

And an absence assented to does not constitute desertion. Albee's Case, 128 Me. 126, 145 A. 742.

If the deserted party at any time furnishes just cause for the one deserting to refuse to return, or by his or her acts consents to the separation, desertion, as a willful and unjustifiable abandonment of one party by the other and as a ground of divorce, ceases. Scott's Case, 117 Me. 436, 104 A. 794.

Until withdrawal of consent.—A separation begun by a husband, his wife acquiescing or consenting, does not amount to desertion, until some withdrawal of the acquiescence or consent, or the occurrence of some act, or the making of a declaration indicative of a change in attitude. Albee's Case, 128 Me. 126, 145 A. 742.

No matter how long separation is continued.—A separation with the consent or acquiescence of the parties does not constitute desertion, no matter how long continued. Although a wife is living elsewhere than under the husband's roof, yet, in the eye of the law, if the living separately is by consent, she is considered as still living with her husband as his wife. The rule is held to be the same when a wife lives apart from her husband, at his request, because of his inability to furnish

satisfactory support for herself and her children. Landry v. Landry, 121 Me. 104, 115 A. 769.

Consent can be expressed by conduct as well as by words. Moody v. Moody, 118 Me. 454, 108 A. 849.

But it must be manifested.—If the absence is assented to by the party claiming to be deserted, it does not constitute desertion within the meaning of the law; the word "desertion" imports that the absence is without the consent of the party deserted; a desertion consented to is not a desertion. But "without the consent" means without the manifested consent, and the undisclosed emotions of the deserted party do not affect his rights. Moody v. Moody, 118 Me. 454, 108 A. 849.

Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity of motives, design, or the interpretation of words. Moody v. Moody, 118 Me. 454, 108 A. 849.

Desertion must be for the 3 years next prior to filing the libel.—By the 1883 amendment, which added to the first sentence of this section the words "next prior to the filing of the libel", the legislature intended that, before authority would be granted by it to a court to grant a divorce for utter desertion, the desertion should not be for any 3 years prior to, but for the particular 3 years next prior to the filing of the libel. Preston v. Reed, 142 Me. 275, 50 A. (2d) 95.

And it must continue to the date of filing the libel. Moody v. Moody, 118 Me. 454, 108 A. 849.

Desertion as a ground for divorce must continue up to the time of filing the libel, and involves not only the willful abandonment without just cause, or the consent of the other party, but also the continued refusal to return without justification. Scott's Case, 117 Me. 436, 104 A. 794.

Deserted husband may visit and cohabit with wife. — Where a wife has deserted the husband and abandoned his home, it is not illegal or improper for the husband to visit and cohabit with her. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. Danforth v. Danforth, 88 Me. 120, 33 A. 781.

And such conduct will not defeat right to divorce.—If a wife deserts her husband and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and for two or three nights occupied the same bed with her. Danforth v. Danforth, 88 Me. 120, 33 A. 781.

But if reconciliation is effected the desertion is interrupted. — If the husband succeeds in effecting a reconciliation, and his wife returns to her home and to her duties as his wife, undoubtedly her prior desertion will be interrupted, or regarded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. Danforth v. Danforth, 88 Me. 120, 33 A. 781.

Continuity of desertion interrupted by libel.—Where the wife, being in desertion of the husband, is libelled by the husband for a divorce, the continuity of the desertion is thereby interrupted. Landry v. Landry, 121 Me. 104, 115 A. 769.

Which may be shown as proof of consent.—The overt act of the libelant husband in making and filing a libel for divorce on the ground of desertion may be shown, in another suit by the libelant on the same grounds and brought within three years, as proof of his consent to her absence from his home; and such proof will defeat the suit. Deering v. Deering, 123 Me. 448, 123 A. 634.

Although dismissed.—Where a husband filed a libel for divorce alleging extreme cruelty, cruel and abusive treatment, and utter desertion continued for three consecutive years next prior to the filing of the libel, which came to hearing and was dismissed without prejudice; his act necessarily and conclusively imported an intention not to live with his wife; and her absence, if previous to the filing of the libel it had been without his consent, was so no longer. He, in effect said to her, that in the past he had overlooked her acts of cruelty and abusive treatment, and wished her to come back, but that now he was unwilling for her to return, and claimed his right to a decree of divorce. And the dismissal of the former libel without prejudice does not change the situation; the continuity of the desertion which had been broken, was not thereby restored. Moody v. Moody, 118 Me. 454, 108 A. 849.

Husband refusing to accept wife after her desertion may be guilty of desertion. —Where a wife deserted her husband without cause for a few months, then went and requested admission again into his family and he then refused to receive her, and for 3 years neglected to make any

provision for her support, such refusal and neglect constituted a desertion on his part, for which she may maintain a libel for divorce. Fellows v. Fellows, 31 Me. 342.

D. Habits of Intoxication.

Habits of intoxication must continue to time of filing libel.—Where a divorce is sought on the ground of gross and confirmed habits of intoxication, from the use of intoxicating liquors, opium, or other drugs, the habits must continue up to the time of filing the libel. Fish v. Fish, 126 Me. 342, 138 A. 477.

But continuance may be inferred.—If a gross and confirmed habit is once shown to exist, the reasonable probability that it will continue to exist, furnishes some ground for an inference which the court may consider in dealing with a litigated matter. Fish v. Fish, 126 Me. 342, 138 A. 477.

And need not be proved by affirmative evidence.—Justice does not require that a divorce should be denied because of the utter inability of the libelant to prove, by affirmative evidence, that habits of intoxication on the part of the spouse continued until the time of filing the libel. Fish v. Fish, 126 Me. 342, 138 A. 477.

IV. DEFENSES.

A. In General.

A libelant who is guilty of misconduct which, in itself, would be a ground for divorce is barred from obtaining a divorce. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

Under the doctrine of recrimination, the defendant to an action for divorce may set up as a defense in bar that the plaintiff was guilty of misconduct which in itself would be a ground for divorce. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

Whether libelee raises the issue or not.—If it is disclosed at the hearing that the libelee has grounds for divorce, the court may not grant a divorce to the libelant, and whether the libelee chooses to raise the issue is not material. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

But support order under § 43 in favor of wife does not bar husband. — A separate support order, obtained under § 43, in favor of a wife, does not of itself bar a husband from a divorce. Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

As nonsupport under that section differs from that which constitutes cause for divorce.—The nonsupport contemplated in § 43 differs markedly from nonsupport as a cause for divorce under this section. Under § 43 the nonsupport is accomplished "willfully and without reasonable cause" and not, as in this section, "grossly or wantonly and cruelly." Russell v. Russell, 145 Me. 113, 72 A. (2d) 640.

No divorce granted if both parties guilty of adultery.—This statute, being plain and unambiguous, must be construed as it reads and even if the husband's guilt has been condoned by the wife, where both parties have been guilty of adultery, no divorce can be granted. Littlefield v. Littlefield, 125 Me. 506, 131 A. 137.

It is the policy of the law that, where husband and wife are equally guilty of adultery, neither shall be permitted to go into court and accuse the other, and thereby affect their rights to property; and the same policy requires that neither their heirs, devisees nor grantees should be permitted to do so. Littlefield v. Paul, 69 Me. 527.

And denial on this ground not disturbed if supported by evidence.—Denial of divorce on a finding that both parties are guilty of adultery will not be disturbed if it is based upon any evidence in the case which would justify the court in making such finding. See Hayes v. Hayes, 129 Me. 487, 150 A. 496.

B. Condonation.

What constitutes condonation.—Condonation means the blotting out of the offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed. Christensen v. Christensen, 125 Me. 397, 134 A. 373. See this note, analysis line III A, re impotence cannot be condoned.

All marital rights of offending party must be restored.—To be effectual, condonation must include a restoration of the offending party to, or a continuance of, all marital rights, after the offense becomes known. While condonation imports forgiveness, the converse is not necessarily true. The offended party may forgive, in that he does not bear any ill will, yet withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation and full marital rights. Christensen v. Christensen, 125 Me. 397, 134 A. 373.

The preliminary steps toward reconciliation and ultimate condonation, such as receiving the offending spouse back into the home, does not alone constitute condonation, so long as full marital rights are intentionally withheld. Christensen v. Christensen, 125 Me. 397, 134 A. 373.

Burden on defendant to prove condonation.—While evidence of condonation in

this state may be introduced without a special plea, the burden is on the party setting up the defense to prove it. Christensen v. Christensen, 125 Me. 397, 134 A. 373.

Condonation is a fact to be found to which no exception will lie, unless it is found without evidence to support it. Christensen v. Christensen, 125 Me. 397, 134 A. 373.

Sec. 56. Commencement of proceedings; service.—The libelant may file in the clerk's office a libel, signed by him, or insert it in a writ of attachment with power to attach real and personal property, to respond to the decrees of the court as in other suits; and service thereon shall be made by summons and copy, 14 days before it is returnable; the court in any county or a justice thereof in vacation, may order notice as in other suits; provided, however, notice may be ordered upon writs of attachment with a libel inserted therein notwithstanding the fact that no attachment either real or nominal has been made on said writ; and no service of a writ of attachment with a libel for divorce inserted therein shall be held to be insufficient solely because no attachment either actual or nominal was made thereon, provided the same be personally served on the libelee by summons and copy as aforesaid, or if notice be given in the manner and by such means as the court or any justice thereof may order under the provisions of this or the following section. (R. S. c. 153, § 56. 1947, c. 368, § 1.)

Cross references.—See note to c. 114, § 1, re libel may be inserted in trustee process; c. 114, § 5, re where action brought when libel inserted in trustee writ.

Meaning of "writ of attachment."—The phrase "writ of attachment" is used in a generic sense, and means any mesne civil process in the nature of a writ on which property may be attached. Smith v. Smith, 120 Me. 379, 115 A. 87.

Section gives both parties right to attach. — The purpose of the authorization of the mode of service provided in this section was to give to both parties the right to attach both real and personal property to secure the enforcement of any decree the court might make in such proceedings. Smith v. Smith, 120 Me. 379, 115 A. 87.

Libel and writ are merged into single instrument.—It might be said that the legislature, by this provision, intended that the libel and the writ should be merged into a single legal instrument to be known as the libel. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Libel is pending after service on libelee. —A libel for divorce, inserted in a writ, is to be regarded as pending after service on the libelee. Russell v. Russell, 69 Me. 336.

Cited in Pouliot v. Bernier, 123 Me. 148, 122 A. 183.

Sec. 57. Residence of libelee; notice.—When the residence of the libelee can be ascertained, it shall be named in the libel and actual notice shall be obtained; if the libelee is out of the state, notice shall be given in such manner and by such means as the court may order. When a libel is inserted in a writ of attachment, as provided in the preceding section, the residence of the libelee shall be regarded as named in the libel if such residence is named in the writ, and for this purpose the libel and the writ together shall be regarded as constituting the libel. When the residence of the libelee is not known to the libelant and cannot be ascertained by reasonable diligence, the libelant shall so allege under oath in the libel. Where notice by publication is ordered upon any libel which sets out adultery as a ground for divorce the name of any alleged paramour of the libelee, if set out in the libel, shall be omitted from the published notice and a copy of such libel wherein are inserted, in place of such names, the words, "a certain man named in the libel" or "a certain woman named in the libel," as the case may be, shall, if otherwise correct, be considered and held to be for all purposes a true copy of such libel. (R. S. c. 153, § 57.)

History of section. — See McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Residence named in writ is sufficient.— The courts of this state, since the enactment of the provision requiring the residence of the libelee to be named in the libel, have granted many divorces on libels inserted in writs of attachment where the only naming of the residence was in the writ itself, and by their decrees they have placed a judicial construction upon the meaning of the phrase "it shall be named

in the libel"; the libel and the writ are merged. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Since the purpose of the provision requiring the naming of the libelee is accomplished by having the residence stated in the writ, such naming of the residence constitutes full compliance with the statutory requirements relating thereto. To place any other construction on the statute would be subversive of its real purpose and might well result in infinite difficulty and evil. McIntire v. McIntire, 130 Me. 326, 155 A. 731.

Personal notice must be obtained if libelee has known residence in state.—The purpose of this statute is to render impossible a notice by newspaper when the libelee has a known residence in this state, and is only temporarily absent from it. In such case, an actual personal service of the libel must be obtained; a constructive newspaper notice is not a sufficient service of the libel. Spinney v. Spinney, 87 Me. 484, 32 A. 1019. See McIntire v. McIntire, 130 Me. 326, 155 A. 731.

"When the residence of the libelee is not known to the libelant and cannot be ascertained by reasonable diligence, the libelant shall so allege under oath in the libel." It is only in this case that the court has jurisdiction to order constructive notice to the libelee by publication. And unless it is proved at the hearing that the sworn allegations in the libel as to the residence of the libelee are true, the court has no jurisdiction, for want of proper notice, to decree a divorce. Leathers v. Stewart, 108 Me. 96, 79 A. 16.

"Residence," in this section, means actual residence, in its usual sense. Spinney v. Spinney, 87 Me. 484, 32 A. 1019.

Libelant cannot swear that residence is unknown simply because whereabouts is unknown.—When a wife knows where her husband's residence is, and that it is in this state, she is not justified in swearing to her libel alleging that she does not know where her husband's residence is, simply because she does not know in what town he is, or where he is staying, at the moment when the oath is administered to her. Service of the libel in such case by newspaper notice is illegal and insufficient to confer jurisdiction upon the court. The apparent jurisdiction is colorable only, and not real. Spinney v. Spinney, 87 Me. 484, 32 A. 1019.

Decree vacated when notice is given by publication on false allegation of libelant. —When a libelant in a libel for divorce falsely alleges that the residence of the libelee is unknown to him and cannot be ascertained by reasonable diligence, and thereupon constructive notice to the libelee by publication is ordered and given, the court may, and in proper cases should, vacate the decree of divorce on the petition of the defrauded spouse. Leathers v. Stewart, 108 Me. 96, 79 A. 16.

Although the libelant has contracted a new marriage. Leathers v. Stewart, 108 Me. 96, 79 A. 16.

Or since died and property rights are involved. Leathers v. Stewart, 108 Me. 96, 79 A. 16.

Libelant held not to have exercised due diligence to ascertain residence of libelee. —See Spinney v. Spinney, 87 Me. 484, 32 A. 1019.

Sec. 58. Perjury penalty. — Whoever falsely and corruptly swears or affirms to any facts required as aforesaid is guilty of perjury and shall be punished by imprisonment for not less than 2 years nor more than 10 years. (R. S. c. 153, § 58.)

See c. 135, § 1, re definition of perjury.

Sec. 59. Pending libel, wife's expenses paid by husband.—Pending a libel, the court, or any justice thereof in vacation, may order the husband to pay to the wife, or to her attorney for the wife, sufficient money for her defense or prosecution thereof, and to make reasonable provision for her separate support, on petition for which costs and counsel fees may be ordered; enter such decree for the care, custody and support of the minor children as the court deems proper; and in all cases enforce obedience by appropriate processes on which costs and counsel fees shall be taxed as in other actions. (R. S. c. 153, § 59. 1947, c. 256.)

Wife has no power to pledge husband's credit for expenses of suit.—This statute guarantees the wife full and complete relief, and provides the avenue through which her prosecution or defense of a libel may be maintained and the services of an attorney may be secured. It follows that, in this state, the wife is under no necessity of pledging her husband's credit for the expenses of prosecuting or defend-

ing a libel for divorce, and therefore she has no implied power to do so, and the husband is not liable in an independent action. Meaher v. Mitchell, 112 Me. 416, 92 A. 492.

Alimony pendente lite not allowable if wife has means.—Means for prosecution or defense should be granted the wife, if she is otherwise entitled, and has not sufficient means of her own. When the wife has such means, temporary alimony is, as a settled principle of equity, not allowable. White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Exceptions do not lie to order under this section.—Exceptions to an order made pursuant to the authority conferred by this section do not lie. Obviously, the object of this provision is to provide for the immediate wants of the wife. The allowance of exceptions to such an order, and the delay that would be thereby occasioned, would in many cases leave the wife to starve, or force her to become a public charge, or to accept support at the hand of charity. Such could never have been the intention of the legislature. Call v. Call, 65 Me. 407.

And an adjudication that husband is able to pay sum ordered is final.—An adjudication that the husband is of sufficient ability to comply with an order to pay a certain sum to his wife pending a libel is conclusive and binding upon the parties. Russell v. Russell, 69 Me. 336.

Alimony pendente lite commences from return of citation. — A libel having been served on the libelee, there is a suit pending for divorce. The parties can no longer live properly or legally in matrimonial cohabitation. The wife must be supported. The duty to support her devolves on the husband. By the fact of marriage, she is entitled to alimony pendente lite. By the terms of the order it usually commences from the return of the citation. Russell v. Russell, 69 Me. 336.

Husband failing to pay as ordered may be proceeded against as for contempt.— The proper course, in the event that the husband does not pay as ordered under this section, is to proceed against the libelee as for contempt, before the court where the divorce was tried. Dwelly v. Dwelly, 46 Me. 377.

And committed. — Where a husband is adjudged in contempt for refusing to comply with an order issued under this section, he may be ordered committed until he shall comply with the order of court. This has been held to be the proper course in such case. It is an appropriate remedy to enforce a decree of the court. Russell v. Russell, 69 Me. 336.

Or execution may issue against him.— Undoubtedly, execution may issue in the usual form against the husband for alimony decreed the wife (see note to § 63). No reason is perceived why it may not issue upon failure by the libelee to make the payments ordered to be made pendente lite, the amount to be paid being a matter of record. Attachments for contempt for nonpayment of the amount ordered, and executions for such amount, when unpaid, are both appropriate remedies for the enforcement of the decrees of the court. Russell v. Russell, 69 Me. 336.

If the husband refuses to comply with an order of the court to furnish money for his wife for the prosecution or defense of a libel, he can be adjudged in contempt and ordered to be committed until he does comply, or execution may issue. Meaher v. Mitchell, 112 Me. 416, 92 A. 492.

Sec. 60. Court may free wife from restraint pending libel.—Pending a libel, the court, or any justice thereof in vacation, on petition of the wife, may prohibit the husband from imposing any restraint on her personal liberty; and enforce obedience by appropriate processes. (R. S. c. 153, § 60.)

Sec. 61. Issues for jury in divorce libels.—Whenever, in a hearing on a libel for divorce, any question of fact arises which may properly be submitted to a jury, issues may be framed for that purpose under the direction of the presiding justice, and the findings of a jury thereon shall have the same force and effect as similar findings in probate appeals. All libels for divorce shall be in order for hearing at the first or return term, provided service of said libel has been made in accordance with the provisions of this chapter not less than 60 days before said return term, and may be heard by any justice thereof in vacation. (R. S. c. 153, § 61. 1949, c. 311, § 2.)

Cross reference. — See c. 153, § 32, et seq., re supreme court of probate.

Former provision of section.—For a case relating to a former provision of this section providing for a jury trial "if either party requests," see Slade v. Slade, 58 Me. 157.

Applied in Simpson v. Simpson, 119 Me. 14, 109 A. 254.

Sec. 62. Certain divorces validated.—All divorces heretofore granted in this state on libels inserted in a writ of attachment, and otherwise valid except for want of attachment nominal or otherwise upon the writ, are validated. (1947, c. 67. 1949, c. 349, § 138.)

Sec. 63. Alimony and other provisions for wife in case of divorce for husband's fault. — When a divorce is decreed for impotence, the wife's real estate shall be restored to her, and the court may enter judgment for her against her husband for so much of her personal property as came to him by the marriage, or its value in money, as it thinks reasonable; and may compel him to disclose, on oath, what personal estate he so received, how it has been disposed of, and what then remains. When a divorce is decreed to the wife for the fault of the husband for any other cause, she shall be entitled to 1/3 in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead; and the same right to a restoration of her real and personal estate, as in case of divorce for impotence.

The court may also decree to her reasonable alimony out of his estate, having regard to his ability, and sufficient money for her defense or prosecution of hearings affecting alimony; and, to effect the purposes aforesaid, may order so much of his real estate, or the rents and profits thereof, as is necessary, to be assigned and set out to her for life; or, instead of alimony, may decree a specific sum to be paid by him to her or payable in such manner and at such times as the court may direct; and the court or any justice in vacation may at any time alter, amend or suspend a decree for alimony or specific sum when it appears that justice requires; and use all necessary legal processes to carry its decrees into effect. (R. S. c. 153, § 62. 1945, c. 232.)

Cross references.—See note to § 64, re notice required before issuance of execution for unpaid installments of support money; c. 170, § 1, re rules of descent.

History of section.—See Chase v. Chase, 55 Me. 21; Stratton v. Stratton, 73 Me. 481.

Alimony is strictly an allowance to a wife for her maintenance, while living apart from her husband. Chase v. Chase, 55 Me. 21.

And the claim for alimony can only arise after a decree of divorce. Alimony is or may be an incident to a decree. It is, necessarily, subsequent thereto. Prescott v. Prescott, 59 Me. 146.

And it may be allowed at a subsequent term.—To the allowance of alimony at a term subsequent to that in which the divorce was decreed, there can be no valid objection. The motion for permanent alimony is not to be made until after a decree of judicial separation. Prescott v. Prescott, 59 Me. 146.

But question of alimony cannot be raised after decree if it was in issue at the hearing.—The general rule is that, apart from statute, the question of alimony cannot be raised after a decree of divorce is granted, if it was in issue at the hearing, and was omitted from the decree without fraud or mistake. Plummer v. Plummer, 137 Me. 39, 14 A. (2d) 705.

And provision as to modification does not apply if alimony not granted in decree.—Statutes, such as this section, which authorize modifications of decrees as to alimony or support, do not apply where no alimony is granted in the decree. Plummer v. Plummer, 137 Me. 39, 14 A. (2d) 705.

Decree for alimony may be made in accordance with agreement of the parties.—The court, being invested with jurisdiction in reference to alimony, there is nothing whereby parties are prohibited from entering into a proper agreement in reference thereto, or the court from rendering judgment in accordance with the agreement of the parties, which they have seen fit to make, as in other cases. Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

And notes given in settlement of claim for alimony are valid.—Notes given by a husband to a wife during the pendency of proceedings for divorce, in settlement of the claim for alimony, deposited before, though to be delivered after a decree of divorce, should one be granted, are valid, if there is no collusion to procure the divorce. Burnett v. Paine, 62 Me. 122.

Claim for alimony may be presented on motion or petition during pendency of libel.—It has been, in our practice, usual to insert the claim for alimony in the libel, and this is the better course; but if this is

not done, the libelant, by motion or petition, may, during the pendency of the libel, set forth her claim for alimony. The language of the statute implies that the question of alimony is to be presented for adjudication after the decree of divorce. Prescott v. Prescott, 59 Me. 146.

Alimony and support money included in one sum.—Allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum. Hall v. Green, 87 Me. 122, 32 A. 796; White v. Shalit, 136 Me. 65, 1 A. 765.

Gross sum may be awarded in lieu of alimony.—This section is the source, limited to divorce for the fault of the husband, for awarding permanent alimony. In lieu thereof, the award may be in a gross sum. White v. Shalit, 136 Me. 65, 1 A. 765.

Although claim not specifically set out in libel.—After a decree of divorce a vinculo on a libel in behalf of the wife, the court may, on motion or petition, decree to her a specific sum instead of alimony, although such claim is not specifically set out in the libel. And such a decree may be made during the pendency of the libel or at any term subsequent to the decree of divorce. Prescott v. Prescott, 59 Me. 146.

Decree allowing alimony is subject to alteration or suspension.—The decree ordering alimony is, in the sound discretion of the court, subject to alteration, amendment, or suspension if by reason of changed conditions, justice so requires. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

Even though entered in accordance with agreement of the parties.—Even though a decree of the court with respect to the payment to the wife may have been entered in accordance with an agreement of the parties, it may still be a decree for alimony and subject to modification as provided by this section. Remick v. Rollins, 142 Me. 206, 49 A. (2d) 172.

And alimony ceases when wife remarries.—The award of alimony is a continuance under the order of the court of the husband's obligation to support the wife. There is no reason why that obligation should remain when another husband has assumed it. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

It is against public policy in the ordinary case for one man to be supporting the wife of another who has himself assumed the legal obligation for her support and a court of equity should not tolerate it. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

In absence of extraordinary circumstances.—The remarriage of a divorced wife does not of itself terminate her right to alimony, but it does make out a prima facie case which requires the court to end it, in the absence of proof of some extraordinary circumstance justifying its continuance. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

Although without it the wife would not be able to live in customary manner.—Upon a petition by a former husband for termination of alimony where the wife has again married, it is not a valid reason for continuance of alimony that she would not be able, without it, to live with her second husband in the way in which she lived prior to her marriage to him. The first husband is under no obligation to support her as another man's wife in the same status as she lived as a single woman. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

Financial situation of husband at time of separation is immaterial on petition for modification.—The financial situation of the husband at the time the parties separated prior to the divorce is immaterial on a petition to modify a decree of alimony. Remick v. Rollins, 142 Me. 206, 49 A. (2d) 172.

Husband obtaining divorce for wife's fault cannot be compelled to pay alimony.—Under the divorce statute of this state, a husband cannot be compelled, without his consent, to provide alimony or support for a wife against whom he has obtained a divorce for her fault. Stratton v. Stratton, 77 Me. 373; Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

The divorce statute contains no authority to grant alimony to a wife from whom the husband obtains a divorce. Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

Unless he previously agreed to do so.—It is a general rule, independent of statute, that permanent alimony will not be awarded to a wife from whom her husband obtains a divorce for her marital fault or misconduct, except when particular circumstances may be deemed to justify it. It is a compelling particular circumstance justifying the employment of the exception to the general rule when, with the parties before the court, there is a noncollusive, court-approved agreement as to alimony. The court should not shield the husband, who breaks his word, and deny the wife the agreed-upon subsistence, because he obtained his divorce for her fault. Wilson v. Wilson, 140 Me. 250, 36 A. (2d) 774.

In which case decree cannot be modified against his will.—Under the divorce statute of this state, a husband cannot be com-

pelled without his consent to provide alimony or support for a wife against whom he has obtained a divorce for her fault; and a decree for her future support, based on his consent, cannot be modified against his will. Luques v. Luques, 127 Me. 356, 143 A. 263.

Provisions for wife are same as for widow.—This section discloses a legislative intent to make the provision for a divorced wife in her husband's real estate, when the divorce is for his fault, similar to the provisions for a widow, so that she will be entitled to the same share in the same real estate, except wild lands, as she would be entitled to "if he were dead." Leavitt v. Tasker, 107 Me. 33, 76 A. 953.

The legislature did not intend by the amendment of 1895 which provided that the widow take, instead of dower, an undivided portion of her husband's real estate in fee, to diminish but to enlarge the right which the then existing statute provided for a divorced wife in her husband's real estate. Leavitt v. Tasker, 107 Me. 33, 76 A. 953.

And the provisions for the innocent party on divorce are to be construed in connection with the rules of descent. Poulson v. Poulson, 145 Me. 15, 70 A. (2d) 868. See c. 170, § 1.

But settlement agreement adopted in decree bars wife's claim to realty under this section.—Where the wife and her husband have entered into an agreement for property settlement and the court adopts such agreement in its divorce decree, this section is inoperative and confers no rights on the wife in her husband's realty. And any claims which she makes under the section may be removed as a cloud on title. See Strater v. Strater, 147 Me. 33, 83 A. (2d) 130.

"Wild lands" do not include land used with farm.—The words "wild lands," as used in this section, do not include a wood lot or other land used with a farm or dwellinghouse, though not cleared. Leavitt v. Tasker, 107 Me. 33, 76 A. 953.

Wife's property restored even if divorce granted for her own impotence.—It is to be observed that the law gives the right of restoration of property to the wife, even when the divorce is decreed for her own impotence. The language of this section is general, "when a divorce is decreed for impotence"; not as in the following sentence: when decreed "for the fault of the husband." This is but carrying out the idea of a voidable marriage, and that impotence is not a crime or wrong in itself, which gives either party special rights on account of the conduct of the other. Chase v. Chase, 55 Me. 21.

But alimony cannot be decreed when divorce granted for impotence.—On a divorce a vinculo, for impotence, alimony cannot be decreed under the statutes of this state. The reasons for this are in the nature and operation of a divorce granted for impotence. Chase v. Chase, 55 Me. 21.

No exceptions lie to decision of judge under this section.—The power granted in this section is addressed to the sound discretion of the presiding judge, and exceptions to his decision do not lie. Call v. Call, 65 Me. 407.

In allowing alimony or in subsequently altering the decree.—The discretion of the court in awarding alimony is not subject to exceptions; and the same rule would of course apply to any subsequent action of the court in altering the decree. An abuse of such discretion raises an issue of law. Bubar v. Plant, 141 Me. 407, 44 A. (2d) 732.

Execution may issue to enforce court's orders.—The issuing of execution for the amount allowed as alimony is an appropriate process to enforce obedience to the court's order, as authorized by this section. Prescott v. Prescott, 59 Me. 146.

Former provisions of section.—For cases relating to a former provision of this section giving the wife dower in all lands of which the husband was seized during the marriage, see Given v. Marr, 27 Me. 212; Stilphen v. Houdlette, 60 Me. 447; Lewis v. Meserve, 61 Me. 374; Davis v. Davis, 61 Me. 395; McAllister v. Dexter & P. R. R., 106 Me. 371, 76 A. 891.

For a case relating to this section, before the enactment of the provision providing for amendment of alimony decrees, such case holding that when the original decree gives an annuity for life, without reservation, it cannot thereafter be modified on motion or petition, see Stratton v. Stratton, 73 Me. 481.

Applied in Curtis v. Hobart, 41 Me. 230; Smith v. Libby, 122 Me. 156, 119 A. 195; Crockett v. Borgerson, 129 Me. 395, 152 A. 407.

Cited in Jones v. Jones, 18 Me. 308; Littlefield v. Paul, 69 Me. 527; Kelsea v. Cleaves, 117 Me. 236, 103 A. 527.

Sec. 64. Payment of alimony; attorney's fees; support of minor children; capias execution.—Pending a petition to enforce a decree of alimony, or a decree for payment of money instead thereof, or for the support of

minor children, or a decree for support pending libel or for payment of counsel fees, or for the alteration of an existing decree for the custody or support of minor children, the court may order the husband or father to pay to the wife or mother, or to counsel for the wife or mother, sufficient money for the prosecution or defense thereof, upon default of which order execution may issue as in actions of tort. Petition for such execution may be signed by the person seeking same or his attorney of record in such divorce action. At the time of making a final decree in any divorce action, the court may order that execution and such reasonable attorney's fee as the court shall order shall issue against the body of any party to the action charged with the payment of support of minor children or payments of alimony or a specific sum in lieu thereof, upon default of any payment, and the court shall order that the clerk of said court shall issue such execution upon the filing with the clerk an affidavit signed by the party to whom such payments are to be made, setting forth the amount in arrears under said decree. When the husband or father is committed to jail on execution issued upon decree of alimony, or for payment of money instead thereof, or for the support of his minor children, or for support pending libel, or for payment of counsel fees, the county having jurisdiction of the process shall bear the expense of his support and he may be discharged from imprisonment by payment of the execution and all costs and expenses of his commitment and support, and he shall not be entitled to relief therefrom under the provisions of chapter 120; provided, however, that he may petition the court issuing such execution for relief, whereupon a judge of such court after due notice to the wife or mother, and hearing thereon, may order his discharge from imprisonment on such terms and conditions as justice may require.

Any person who knowingly files a false affidavit alleging default of payments of support of minor children or payments of alimony or specific sum in lieu thereof, for the purpose of obtaining a capias execution as provided in this section, shall be deemed to have committed the crime of perjury and shall be subject to prosecution and imprisonment, upon conviction, in the same manner as provided in the statutes relating to the crime of perjury. (R. S. c. 153, § 63. 1947, c. 321.)

Allowances for wife and children included in one sum.—Allowances to the wife for herself and allowances to her for the support of her children are usually included in one sum. Hall v. Green, 87 Me. 122, 32 A. 796; White v. Shalit, 136 Me. 65, 1 A. 765.

Money ordered paid for support of minor children is not property of mother.—Minor children are in a sense wards of the court which has dissolved the marriage relationship, and a payment ordered to be made to the mother for their support is not to be regarded by her as her property. She is rather the instrument selected by the court in its effort to provide for them; and it is her duty to use the money which she receives for their benefit during their minority. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

The mother has no absolute property right in unpaid installments. Such is undoubtedly the intent of § 70 which says that the court "may also alter its decree from time to time as circumstances require". Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Even after they become of age.—Money remaining unpaid when a minor child becomes of age on a decree for the payment of money to the mother for the support of such child, is not the property of the mother, and an action of debt on judgment brought by the mother is not the proper remedy to recover the amount due. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Decree for support may be amended.—The court issuing a decree for support of a minor child has the right to amend it as to payments which are to be made in the future as well as to those which have already accrued but remain unpaid. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

And orders may be made retroactive.—If there are unpaid installments due for the support of children which have not been applied by the mother for such support, the court unquestionably has the power to direct what disposition shall be made of these. It may divert them directly to the child's support, or if the father has made adequate provision for support in other ways, such action on his

part may be allowed to discharge his obligation under the decree. The court has a wide power in such cases. It may increase or decrease the amount and it may make its orders retroactive. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Execution to issue only after proper notice.—The third sentence of this section, if read literally, is unconstitutional. It authorizes the issuance of an execution without giving to the debtor any notice and without affording him an opportunity to come before the court and set up the defense of payment or any of the other defenses which he may be entitled to make. At the time it was enacted, the decision in Griffin v. Griffin, 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, which holds that notice is necessary, had been on file for over a year. Since the intent to ignore the requirement so clearly there set out cannot be imputed to the legislature, this enactment must therefore be interpreted to provide for the issuance of execution only after proper notice shall have been given. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Unless the time is so short after the entry of the original decree of divorce that the issuance of an execution by the clerk can be regarded as a purely ministerial act, no execution for unpaid installments of alimony or support should be issued without notice to the libelee. Such execution should be issued as a continuation of the original divorce proceeding on a petition by the libelant accompanied by an affidavit, and notice should be given as in other cases. This entails no undue hardship on the libelant; for, in case of a failure of the libelee to appear and contest, a default may be entered as in other cases. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

In view of the case of Griffin v. Griffin, 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, no valid judgment either in personam or in rem for unpaid installments of alimony, or for unpaid installments for maintenance of children, which can form the basis for the issuance of a summary execution, may be entered without some form of notice by personal or substituted service, sufficient to give to the debtor the opportunity to raise the defense of payment or such other defenses as may be open to him under the law of the forum. To permit a contrary procedure would violate the due process requirement of the federal constitution. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Cited in Palow v. Kitchin, 149 Me. 113, 99 A. (2d) 305.

Sec. 65. Provisions for husband in case of divorce for fault of wife.—When a divorce is decreed to the husband for the fault of the wife, he shall be entitled to 1/3 in common and undivided of all her real estate, except wild lands, which shall descend to him as if she were dead; and the court may allow him so much of her personal estate as seems reasonable. In all cases the right, title and interest of the libelee in the real estate of the libelant shall be barred by the decree. (R. S. c. 153, § 64.)

Cross reference.—See c. 170, § 1, re rules of descent.

Section not applicable to joint tenancy.—A joint tenancy as distinguished from a tenancy of entirety is unaffected by the marital relation of the tenants, or by a divorce in and of itself. A surviving joint tenant holds the entire estate, not by acquisition of an interest from the deceased, but by right of the instrument creating the joint tenancy. The estate of the deceased joint tenant is extinguished and he leaves no inheritable estate. There is no interest in a joint tenancy in the wife upon which this section may operate, and a joint tenancy remains unchanged by the divorce and by this section. Poulson v. Poulson, 145 Me. 15, 70 A. (2d) 868.

The provisions for the innocent party on divorce are to be construed in connection with the rules of descent. Poulson v. Poulson, 145 Me. 15, 70 A. (2d) 868.

But provisions as to existence or nonexistence of issue or kindred are not applicable.—The relationship of husband and wife upon divorce, in so far as the source of the interest in real estate acquired under this section is concerned, is that of widower and deceased wife. The extent of such interest, however, is measured by this section and is limited to one-third share. The provisions of the rules of descent for differing interests dependent upon the existence or nonexistence of issue or kindred are not applicable. Poulson v. Poulson, 145 Me. 15, 70 A. (2d) 868.

Settlement agreement bars husband's claim under this section.—Where the husband and wife, prior to obtaining a divorce, made a property settlement agreement, such settlement was held to be a good defense against the husband's claim under

this section after securing the divorce for the fault of the wife. See McIntire v. McIntire, 130 Me. 521, 156 A. 138.

Applied in Bryant v. Bryant, 149 Me. 276, 100 A. (2d) 663.

Cited in Littlefield v. Paul, 69 Me. 527.

Sec. 66. New trial within 3 years granted. — Within 3 years after judgment on a libel for divorce, a new trial may be granted as to the divorce when the parties have not cohabited nor either contracted a new marriage since the former trial. (R. S. c. 153, § 65.)

Cross reference. — See c. 103, § 15, and note, re taking divorce case to law court on exceptions.

History of section.—See Tarbox v. Tarbox, 120 Me. 407, 115 A. 164.

This section has been employed to seek a change of alimony, to amend a decree fraudulently obtained, to alter a decree as to alimony and to annul a decree of divorce fraudulently obtained. Simpson v. Simpson, 119 Me. 14, 109 A. 254. But see Holmes v. Holmes, 63 Me. 420, wherein it was said that a petition to have a decree of divorce set aside for fraud is not a petition for a new trial, and does not fall within the scope of this section.

But wife can have no review as to alimony of proceedings on husband's libel. —Where a husband obtained a divorce upon his own libel, which contained no mention of his wife's dower or alimony, and no decree was made on that subject, it was held that the wife could not review the proceedings so far as alimony and dower were concerned. If any decree can be made as to either, while the decree obtained by the husband stands unreversed, it must be upon an independent libel praying for it, filed by the wife. Henderson v. Henderson, 64 Me. 419.

And new trial not granted if divorce decreed on verdict of jury.—Where, in a libel for divorce for desertion, a jury trial was had under § 61, and the jury found the allegation of desertion to be true and that a divorce should be granted, and the presiding justice thereupon signed a decree of divorce, the law court has no authority to entertain a motion asking that the verdict be set aside and a new trial granted. The only remedy under the existing facts is by bill of exceptions. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

Petition must name witnesses to prove new evidence.—Chapter 123, § 4, requires that, when a discovery of new evidence is alleged in the petition for a new trial, the names of the witnesses to prove it, and what each is expected to testify, must be stated under oath. Merrill v. Shattuck, 55 Me. 374.

Evidence of collusion is admissible though it might have been introduced on original hearing. — When a divorce is decreed for desertion and it is alleged in a petition for rehearing that the decree was obtained by the fraud of the libelant, evidence that the separation was by mutual arrangement between the libelant and libelee is entitled to consideration and may not be disregarded on the ground that such evidence might have been introduced at the original hearing. Lourie v. Melnick, 128 Me. 148, 146 A. 84.

As is evidence of libelee's mental incapacity. — When a petition under this section is based upon an allegation that final judgment was rendered against a libelee during a period of mental incapacity, evidence as to the mental condition of the libelee, both before and after the period directly in issue, is admissible. Louris v. Melnick, 128 Me. 148, 146 A. 84.

Petition is in nature of petition for review.—A petition for rehearing under this section is somewhat in the nature of a petition for review. Lourie v. Melnick, 128 Me. 148, 146 A. 84.

Application must be made within three year limit. — It is the application that is to be sustained or rejected, and to the making of that the three year limit is to apply. Judgment in the divorce case marks the beginning of the period; making application for its reversal marks the end. Tarbox v. Tarbox, 120 Me. 407, 115 A. 164.

But judgment thereon need not be entered within three years. — A petition for new trial filed within the three year period, even though final judgment thereon is not entered until after the expiration of that time, is not barred by this limitation. Tarbox v. Tarbox, 120 Me. 407, 115 A. 164.

Section contemplates distinct proceeding on new petition entered at subsequent term.—This section has no application to a motion filed in a pending libel at the term when the divorce is granted. It contemplates a subsequent and distinct proceeding brought on a new petition, served on the other party, entered at a subsequent term, and heard by the court at nisi prius, whence it may be taken to the law court on exceptions. It partakes somewhat of the nature of a review of

the prior proceedings, enacted perhaps because the ordinary petition for review cannot be invoked. Simpson v. Simpson, 119 Me. 14, 109 A. 254.

Former provision of section. — For a case applying a former provision of this section providing for new trial as to alimony "when it appears that justice has not been done through fraud, accident, mistake, or misfortune," see Plummer v. Plummer, 137 Me. 39, 14 A. (2d) 705.

Cited in Stratton v. Stratton, 73 Me. 481; White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Sec. 67. Divorces decreed out of state.—When residents of the state go out of it for the purpose of obtaining a divorce for causes which occurred here while the parties lived here or which do not authorize a divorce here, and a divorce is thus obtained, it shall be void in this state; but in all other cases, a divorce decreed out of the state according to the law of the place, by a court having jurisdiction of the cause and of both parties, shall be valid here. (R. S. c. 153, § 66.)

Courts of other states have no authority to decree a divorce between citizens of this state. Gregory v. Gregory, 78 Me. 187, 3 A. 280; Usen v. Usen, 136 Me. 480, 13 A. (2d) 738.

Domicil of party is test of jurisdiction.— The statute is but an affirmation of the general principle of law which makes the domicil of one of the parties at least the test of jurisdiction. Gregory v. Gregory, 76 Me. 535.

And mere presence in state does not give it authority over marital status.—The mere presence within a state's territory of the inhabitants of other states gives it no authority to fix or change their marital status. The state of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere. Gregory v. Gregory, 78 Me. 187, 3 A. 280.

But section not applicable if party acquires domicil in foreign state.—The statute is predicated upon the assumption that the party leaving the state for the purpose of getting a divorce has not acquired a domicil in the other state; but if he does acquire a domicil in the other state, the statute does not apply to him. Gregory v. Gregory, 76 Me. 535.

Even if his purpose is to obtain a divorce. — A resident of any state has the undoubted right to change his domicil at will when he acts in good faith. And if his purpose is to seek the jurisdiction of his new domicil in order that he may obtain a divorce according to the laws thereof, no principle of law is apparent to prevent it. Gregory v. Gregory, 76 Me. 535.

There is nothing in this section to prevent a man from leaving his wife in the state of their matrimonial domicil for justificable cause, and, after establishing a bona fide domicil in another state, from maintaining divorce proceedings there in accordance with the laws of that state. Roberts v. Roberts, 137 Me. 194, 17 A. (2d) 149.

But divorce so obtained will not be recognized to detriment of innocent party.— The courts of the state of matrimonial domicil may recognize judgments of divorce granted in a sister state, as a matter of comity. But before such divorce is recognized as a matter of comity, something more than the mere domicil of the spouse who procured it must be considered. The rights of the wife who continues to dwell in the state of matrimonial domicil must also be considered and safeguarded. And if it should appear that she is an innocent party, and that the recognition of such foreign divorce would work an injustice to her, it should not be recognized as a matter of comity. Roberts v. Roberts, 137 Me. 194, 17 A. (2d) 149.

And foreign divorce not binding on party with no knowledge of proceeding.— If the husband obtains a divorce in a sister state only on constructive notice to the wife, who continues to reside in the state of matrimonial domicil without any actual knowledge whatsoever of the proceeding, that would not be conclusive and binding upon the courts in the state of matrimonial domicil under the full faith and credit clause of the federal constitution, and may be collaterally attacked by her. Roberts v. Roberts, 137 Me. 194, 17 A. (2d) 149.

Courts not bound by foreign court finding on question of residence. — The courts of this state are not bound by the findings of courts of other states upon the jurisdictional question of residence of the parties. Gregory v. Gregory, 78 Me. 187, 3 A. 280.

And question of jurisdiction is open regardless of recitals in judgment. — The

question in cases under this section is one of jurisdiction, and jurisdiction depends upon domicil. Jurisdiction of a foreign court is open whatever may be the recitals relating thereto in the judgment. Gregory v. Gregory, 76 Me. 535.

Sec. 68. Issue inherit.—A divorce does not bar the issue of the marriage from inheriting nor affect their rights. (R. S. c. 153, § 67.)

Sec. 69. Investigation of cases in which custody of children involved.—Whenever in any divorce action the custody of a minor child is involved, and the court determines that the proper disposition of the case requires an investigation of the conditions and antecedents of the child and its parents for the purpose of determining the fitness of either parent to have custody of such child, the court may notify the bureau of social welfare. It shall then be the duty of the bureau to make such an investigation and submit to the court a full report in writing with a recommendation as to the disposition of such child and any other information regarding the case which the court may require; provided that within the discretion of the court the action may be continued to the succeeding term for the completion of such report. Such report shall be available for examination by counsel before a decree is made, and upon request of any interested party the court shall require the person making the report to testify subject to cross-examination and to rebuttal. (R. S. c. 153, § 68.)

Sec. 70. Disposal of minor children; change name of wife; employ compulsory process deemed proper; expense of maintenance and education.—The court making a decree of nullity or of divorce, or any justice thereof in vacation, may also decree concerning the care, custody and support of the minor children of the parties and with which parents any of them shall live, or grant the care and custody of said children to a third person or to some suitable society or institution for the care and protection of children or to the department of health and welfare, and may also alter its decree from time to time as circumstances require; change the name of the wife, at her request; and in execution of the powers given it under the provisions of this chapter may employ any compulsory process which it deems proper, by execution, attachment or other effectual form, on which costs shall be taxed as in other actions. In all proceedings under the provisions of this chapter where the husband is committed to jail on any execution issued upon decree for alimony, or for payment of money instead thereof, or for the support of the minor children of the parties, the county having jurisdiction of the proceedings shall bear the expense of his support in jail.

The expense of maintenance and education of children committed to care and custody of the department of health and welfare under the provisions of this section shall be borne in accordance with the provisions of section 251 of chapter 25.

An original decree made pursuant to this section granting the care and custody of a minor child to the department of health and welfare shall not extend beyond the time when the child shall reach the age of 18 years. But upon application by the department, the court, for sufficient cause, may extend such decree to the time when the child shall reach the age of 21 years. (R. S. c. 153, § 69. 1953, c. 155.)

Section gives authority to determine care and custody of children. — This section invests authority where, after hearing, conclusion is that there should be a divorce, to determine, incidentally, as to the care, custody and support of the minor children of the parties. White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Which authority is not qualified. — There is no qualification or restraint of the power given under this section, except such as may be imposed by the sound discretion of the justice presiding. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

And to the exercise of which exceptions do not lie. — The authority given by the statute is to be exercised with such discretion as may be required under the circumstances of each case, and when exercised, exceptions do not lie to the man-

ner of its exercise. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

Welfare of children governs court in its decree. — In all divorce proceedings, the welfare of the children is held to be superior to the wishes of the parent, and governs the court in its decrees as to custody and maintenance. Greenwood v. Greenwood, 113 Me. 226, 93 A. 360.

The law looks only to the child's welfare; and the father, mother, and other blood relatives, as such, have no rights in or to the child. A child is not "owned" by anyone. The state has, and for its own future well-being should have, the right and duty to award custody and control of children as it shall judge best for their welfare. Grover v. Grover, 143 Me. 34, 54 A. (2d) 637.

The court making a decree of divorce has wide powers to provide for custody and support of minor children. Their interests are paramount. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

And not common-law liability of parents.—The legislative consideration in this section for the vesting in the courts the authority to decree concerning the care and support of a minor child was the welfare of the child, and not the common-law liability of either parent. Luques v. Luques, 127 Me. 356, 143 A. 263, holding that whether the expense of musical training for a minor child, demanded by the libelee, can be deemed a necessity at common law is not determinative of the power of the court under this section to order a parent to contribute to the care and support of a minor child, a divorce having been decreed.

Upon a decree of divorce being granted, the amount which a father may be ordered to contribute to the care and support of minor children, where with his consent the child is allowed to remain with the mother, even though no decree for custody is made, is determined, not by his common-law liability, but in the sound discretion of the court, taking into consideration his financial ability, or his ability to earn, and the standard of living to which they have been accustomed. Luques v. Luques, 127 Me. 356, 143 A. 263.

And wishes of child should have great weight. — The wishes of a child of 12 years as to her custody should have great weight. Merchant v. Brussell, 139 Me. 118, 27 A. (2d) 816; Grover v. Grover, 143 Me. 34, 54 A. (2d) 637.

Kind and degree of care and support is not specified.—The kind and degree of care and support of the minor children of the parties which the court may decree is not specified in or limited by the statute. It is rather a question of the construction of the terms "care" and "support." Luques v. Luques, 127 Me. 356, 143 A. 263.

But it should be such as to properly train child to become self-supporting.—The purpose of this provision of the divorce statute is to provide for minor children, who are deprived of the care and training that naturally flow from a united home, sufficient means, within the ability of the parents, to furnish them not only with support but with proper training to ensure their finally becoming self-supporting and useful members of society. Luques v. Luques, 127 Me. 356, 143 A. 263.

And it may include suitable training for a vocation.—"Care" and "support" under our divorce statute, must be held not only to include food, shelter, and clothing, but, whenever a parent is able, suitable training to fit the child for a vocation in life to which his or her natural or special talents may be especially adapted. Luques v. Luques, 127 Me. 356, 143 A. 263.

Divorce without decree as to custody and support does not affect father's obligations. — A divorce without a decree as to the custody and support of the children does not affect the father's duties and obligations as to the support of his minor children. Glynn v. Glynn, 94 Me. 465, 48 A. 105.

And decree of custody and support may be made subsequent to divorce decree.—If there was no decree as to the custody or support made at the time of divorce, the court may make one later. This power is not limited to the judge who may chance to preside when the divorce is granted, nor to the term when judgment is entered. In this respect this section is unlimited. The authority to enter the decree in the first instance, and to alter it from time to time, is given in the same terms, and it may be exercised at any time when the circumstances may require. Harvey v. Lane, 66 Me. 536.

If the condition of the parties, at the time of the divorce, does not require any decree as to the care, custody and support of the children, the statute is broad enough to authorize such a one by the same court, at any subsequent time within their minority, when the circumstances may require it. Harvey v. Lane, 66 Me. 536.

Which decree substitutes a statutory liability.—While upon a decree of divorce without any order for the custody or sup-

port of minor children, the father's common-law liability still remains; if, by virtue of the statute, an order for custody, or care and support is made, a statutory liability is substituted for the common-law liability. Luques v. Luques, 127 Me. 356, 143 A. 263.

Mother may be ordered to contribute to children's support.—Under conceivable circumstances, a mother, under this section, might be ordered to contribute to the support of minor children when the care and custody are given to the father, if he is without means. Luques v. Luques, 127 Me. 356, 143 A. 263.

Court can make such decree as circumstances require. — This section conferring jurisdiction in such cases is very comprehensive. It authorizes the court to make such a decree as the circumstances require. Miller v. Miller, 64 Me. 484.

And decree for support may be made to continue after decease of father. — If, from hostility to the mother, or other cause, there is danger that the father will disinherit his children, and thus leave them to be supported by their mother without any aid from his estate, a decree may very properly be made for their support that shall continue in force after his decease, or until they are of sufficient age to provide for themselves; or at least until the further order of the court. Miller v. Miller, 64 Me. 484.

And father may be forced to give security for children's support. — When, through the fault of the father, his family is broken up, and his children become in one sense the wards of the court, he may be compelled, if there is danger that the father will squander his property, or convey it away, so that none will be left for the decree to operate upon, to give security if he is of sufficient ability, for the support of his children, and such security shall be binding upon his estate. Miller v. Miller, 64 Me. 484.

Or to pay a specific lump sum.—In the exercise of the power conferred by this section, the presiding judge may decree a specific sum to be paid by the husband to the wife for the support of a child, the care and custody of which are decreed to her. It is not essential to the validity of such a decree that the payment should be by installments, as the support is furnished, though perhaps, in most cases, it would be better to make it so. The amount, as in other cases of allowance in divorce suits, must be determined by the presiding judge, and to his decision exceptions do not lie. Call v. Call, 65 Me. 407.

Sustenance allowances may be fixed in installments, or for a specific amount. White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

And father's plea of emancipation is of no avail.—Contention that the emancipation of the child is effected, is not of moment in determining custody and support of a child of divorced parents. Divorce is not an act of the parties; it is an act of the law. A decree awarding custody of children to the mother may require the father to assist her in supporting his offspring. Hall v. Green, 87 Me. 122, 32 A. 796; White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

But money remaining unpaid when child becomes of age is not property of mother. — Money remaining unpaid when a minor child becomes of age on a decree for the payment of money to the mother for the support of such child, is not the property of the mother, and an action of debt on judgment brought by the mother is not the proper remedy to recover the amount due. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Custody may be granted to parent residing without the state.—The care and custody of a child of divorced parents may be given to a parent who resides without the state. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

And decree may cause child's removal from state.—That the result of the decree may cause the removal of the child beyond the limits of the state, is not of itself an objection to the exercise of discretion by the justice. This may be the effect in any case. Though the parent receiving the custody may at the time be a resident within the state, there is no authority, except in cases of crime, to prevent an immediate removal from the state. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

Or court may restrain such removal.—The great governing principle for the guidance of the court is the good of the child. It may often be for the best interests of the child that it should be removed from the state for the purposes of education, business or support. If there is any occasion for imposing restraint in this, it is competent for the justice presiding to impose it. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

And court does not lose jurisdiction by removal.—Though a child, whose custody has been decreed by the court, is removed from the state, yet the child is not removed from the jurisdiction of the court.

That has already attached. Stetson v. Stetson, 80 Me. 483, 15 A. 60. See White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Court can amend support decree.—The court issuing a decree for support of a minor child has the right to amend it as to payments which are to be made in the future as well as to those which have already accrued but remain unpaid. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Notwithstanding agreement of the parties.—A decree for the support of a minor child, or altering such part of a prior decree as provides for such support, does not require the consent of the father nor can the parties by any agreement oust the court of jurisdiction to alter or amend its decrees in this respect, or to make future provision for the care and support of minor children, if none is contained in the decree of divorce. Luques v. Luques, 127 Me. 356, 143 A. 263.

And it may change custody and control of children. — The court in divorce proceedings always retains the power on proper petition to change the custody and control of the minor children of divorced parents. White v. Shalit, 136 Me. 65, 1 A. (2d) 765; Blue v. Boisvert, 143 Me. 173, 57 A. (2d) 498.

And its decree is binding on parent without the state.—The decree granting custody is a conditional one, subject to modification and change. The mother takes the child subject to that condition. On any proper process for a change she is bound, wherever she may be, to take notice, and though she may not personally be within the jurisdiction of the court, the subject matter is, so that the judgment of the court will be valid and binding upon her, and, by the provisions of the Constitution of the United States, may be enforced against her, though in another state. Stetson v. Stetson, 80 Me. 483, 15 A. 60.

But change cannot be ordered in absence of circumstances requiring it.—If there is no evidence of circumstances which require a change of custody, the court should not order a change, and if it does, under such circumstances, the order will not be sustained. Grover v. Grover, 143 Me. 34, 54 A. (2d) 637.

Welfare of child governs action on petition to modify decree.—Although the issues on a petition to alter a custody and support decree are joined by the parties to the original libel, finding and judgment will primarily be directed to the best interests and essential good of the incapacitated parties, that is to say, the minor children. Stetson v. Stetson, 80 Me. 483, 15 A. 60; White v. Shalit, 136 Me. 65, 1 A. (2d) 765.

Execution should not issue without notice.—Unless the time is so short after the entry of the original decree of divorce that the issuance of an execution by the clerk can be regarded as a purely ministerial act, no execution for unpaid installments of alimony or support should be issued without notice to the libelee. Such execution should be issued as a continuation of the original divorce proceeding on a petition by the libelant accompanied by an affidavit, and notice should be given as in other cases. This entails no undue hardship on the libelant; for, in case of a failure of the libelee to appear and contest, a default may be entered as in other cases. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Nor should mandatory injunction issue against party not served within jurisdiction. — The provisions of this section authorizing the court to employ any compulsory process which it deems proper to enforce decrees relating to the support of minor children, do not authorize the issuance of a mandatory injunction against a party not served within the jurisdiction. Wilson v. Wilson, 143 Me. 113, 56 A. (2d) 453.

Applied in Kelley, Appellant, 136 Me. 7, 1 A. (2d) 183; Lovelett v. Michael, 149 Me. 73, 98 A. (2d) 546.

Quoted in part in Stratton v. Stratton, 73 Me. 481.

Support of Children.

Sec. 71. Failure to comply with court order relative to support of children, when felony.—Whoever without lawful excuse, being able by means of his property or capacity for labor, willfully neglects or refuses to comply with any order of court made pursuant to the laws of this chapter pertaining to the support of a minor child or minor children and such neglect or refusal results in said child or children being in destitute or necessitous circumstances, when such offense is of a high and aggravated nature, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more

than $500 or by imprisonment at hard labor for not more than 2 years, or by both such fine and imprisonment; and if a fine is imposed, the court may direct that it be paid in whole or in part to the mother or to the guardian or custodian of said minor child or children; provided that before the trial, with consent of the defendant, or after the conviction, instead of imposing the punishment whenever provided, or in addition thereto, the court in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, may make an order which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly until such child or children reach the age of 16 years or the age of 18 years if regularly attending schools to the mother or to the guardian or to the custodian of said minor child or children, or to any organization or individual approved by the court, as trustee, or to the department of health and welfare of the state for the use of such child or children, and to release the defendant from custody on probation for the period during which the aforesaid payments are ordered, and may in its discretion order said defendant to enter into a recognizance with sureties, in such sum as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so within said period, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise in full force and effect.

The furnishing of aid by any town or city within the state or by the department of health and welfare of the state to any such child or children shall be prima facie evidence that such child or children are in destitute or necessitous circumstances. (1947, c. 369, § 6.)

Sec. 72. Failure to comply with court order relative to support of children, when misdemeanor. — Whoever without lawful excuse, being able by means of his property or capacity for labor, willfully neglects or refuses to comply with any order of court made pursuant to the laws of this chapter pertaining to the support of a minor child or minor children and such neglect or refusal results in said child or children being in destitute or necessitous circumstances, when such offense is not of a high or aggravated nature, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not more than $300 or by imprisonment with or without hard labor for not more than 11 months, or by both such fine and imprisonment; and if a fine is imposed, the court may direct that it be paid in whole or in part to the mother or to the guardian or custodian of said minor child or children; provided that before the trial, with consent of the defendant, or after the conviction, instead of imposing the punishment whenever provided, or in addition thereto, the court in its discretion, having regard to the circumstances and to the financial ability or earning capacity of the defendant, may make an order which shall be subject to change by it from time to time as circumstances may require, directing the defendant to pay a certain sum weekly until such child or children reach the age of 16 years or the age of 18 years if regularly attending schools to the mother or to the guardian or to the custodian of said minor child or children, or to any organization or individual approved by the court, as trustee, or to the department of health and welfare of the state for the use of such child or children, and to release the defendant from custody on probation for the period during which the aforesaid payments are ordered, and may in its discretion order said defendant to enter into a recognizance with sureties, in such sum as the court may direct. The condition of the recognizance shall be such that if the defendant shall make his personal appearance in court whenever ordered to do so within said period, and shall further comply with the terms of the order and of any subsequent modification thereof, then the recognizance shall be void, otherwise in full force and effect.

The furnishing of aid by any town or city within the state or by the depart-

ment of health and welfare of the state to any such child or children shall be prima facie evidence that such child or children are in destitute or necessitous circumstances. (1947, c. 369, § 6.)

Sec. 73. On proof of violation of order, court may proceed under original indictment; amount recovered paid over.—If the court shall be satisfied by information or evidence under oath, that at any time during the period in which the payments were ordered pursuant to sections 71 and 72 the defendant has violated the terms of such order, it may forthwith proceed with the trial of the defendant under the original complaint or indictment, or sentence him under the original conviction, or enforce the original sentence, as the case may be. In case of forfeiture of recognizance and enforcement thereof by execution, the sum recovered may, in the discretion of the court, be paid in whole or in part to the mother or to the guardian or custodian of the minor child or children or to the state department of health and welfare when said department has furnished aid for said minor child or children. (1947, c. 369, § 6.)