EB
AGt
IFd

THE LAW

OF

DOMESTIC RELATIONS

OF THE

STATE OF NEW YORK

WITH FORMS

INCLUDING

MARRIAGE, DIVORCE, SEPARATION,

RIGHTS AND LIABILITIES OF MARRIED WOMEN, DOWER, ACTIONS FOR DOWER, GUARDIAN AND WARD, ADOPTION OF CHILDREN, APPRENTICES AND SERVANTS, ABANDONMENT OF WIVES AND CHILDREN, AND SUPPORT OF POOR PERSONS BY RELATIVES,

AS CONTAINED IN

THE DOMESTIC RELATIONS LAW (L. 1896, CH. 272), THE REAL PROPERTY LAW (L. 1896, CH. 547), THE CODE OF CIVIL PROCEDURE, AND THE CODE OF CRIMINAL PROCEDURE, AS AMENDED BY THE LEGISLATURE OF 1902.

BY FRANK B. GILBERT,
AUTHOR OF TOWN AND COUNTY OFFICERS' MANUAL, ETC.

SECOND EDITION.

BY F. W. BATTERSHALL,
INSTRUCTOR ON DOMESTIC RELATIONS IN THE ALBANY LAW SCHOOL.

ALBANY, N. Y.:
MATTHEW BENDER.
1902.

PREFACE TO SECOND EDITION.

Since the first edition of this work in 1898, there have been important amendments to the statutes, together with a large number of judicial decisions thereon, resulting in many changes in the law governing matrimonial actions and the domestic relations. A second edition bringing the work down to date has thus become necessary.

In this edition all amendments and additions to the statute up to and including the amendments by the Legislature of 1902 are incorporated. Among the more vital statutory changes of the law, attention may be called to the following: The "common-law marriage" provable by cohabitation and reputation has been abolished, and unless there be a solemnization of marriage by a clergyman or a magistrate duly authorized, the contract of marriage must be evidenced by a writing. In actions for divorce corespondents are now permitted to come in and defend with, it seems, substantially the same rights as parties. The wisdom of this addition to the statute is apparent, as the plaintiff can now only prefer charges of adultery against third persons at the peril of being charged with costs upon the failure of proof. The rights of action of married women carrying on separate business is enlarged. A large number of statutes have been amended in minor particulars, which are yet of vital importance to the practitioner.

All of the decisions, since the last edition, are, it is believed, embodied in the present work as they stand at

the time of going to press. The most important in its consequences is the decision of the United States Supreme Court in Atherton v. Atherton, whereby the validity of foreign divorce is affirmed, on the ground that due credit must be given to decisions of the courts of the several States. The holding overturns the rule which had previously obtained in this State. Many statutes whose exact scope was undetermined at the time of the first edition of this work have subsequently been considered and applied and their meaning declared with more certainty.

In spite of the changes, all decisions appearing in the first edition are here retained; but the modification brought about by the later cases is pointed out. This was necessary; as, for example, though the common-law marriage is abolished, the statute is not retroactive, and it is apparent that for many years to come the courts of this State will be called upon to adjudicate as to marriages resting upon cohabitations and reputation, not to speak of common-law marriages entered into in States where the common-law marriage has not been abolished.

The book has been made more serviceable by the addition of a complete set of forms, which were prepared by Frank B. Gilbert, the editor of the first edition.

F. W. B.

ALBANY, N. Y., *August* 11, 1902.

PREFACE TO FIRST EDITION.

The Domestic Relations Law (L. 1896, ch. 272) is a revision of all the statutes relating to marriage, rights and liabilities of husband and wife, the powers and duties of guardians, the custody and wages of children, the adoption of children and apprentices and servants, which did not relate to practice and were not contained in the Code of Civil Procedure.

The sections of this revision are contained in this work in full, with notes showing the former statutes from which they were derived. All the important court decisions involving the construction and application of the former statutes are cited in connection with the present law. Many of the principles of the common law relating to the subjects contained in this chapter of the revision, which have not yet been the subject of legislative enactment, are set forth and considered.

The statutory law of this State relating to annulment of marriage, divorce and separation, is contained in the Code of Civil Procedure. The sections of the Code relating thereto are included. The many important cases determining the causes for instituting marital actions, and relating to the procedure therein, are cited and discussed.

It is the aim of this work to collate all the statutes of this State relating to the subjects embraced therein, and cite all the important court decisions bearing upon such statutes. In treating of these statutes it has been sometimes considered expedient to set forth and discuss the principles of common law. But the law of Domestic Relations is now almost

exclusively the subject of legislative enactment. It has been deemed most important, therefore, to set forth in full all such enactments, and apply the cases arising thereunder to the several sections.

Many cases have been decided under the various enabling acts respecting the rights and liabilities of married women which are not now applicable, because of the changes made from time to time by those acts. These cases have been carefully considered and, if not now in force, are omitted.

Albany, May, 15, 1898.

FRANK B. GILBERT.

TABLE OF CONTENTS.

CHAPTER I.

MARRIAGE.

PAGE.

SECTION 1. Marriages at Common Law 1
2. Solemnization of Marriage 9
3. Certificates; Filing and entry; Fees 11
4. Effect of Marriage of Parents on Illegitimates 14
5. Written Contract now Requisite 16

CHAPTER II.

VALIDITY OF MARRIAGES.

SECTION 1. Validity of Marriage Governed by Lex Loci Contractus 17
2. Void Marriages 18
3. Voidable Marriages 23

CHAPTER III.

ANNULMENT OF MARRIAGES.

[*Code of Civil Procedure*, §§ 1742–1755.]

SECTION 1. When Action May be Brought 24
2. Who May Maintain Action for Annulment of Marriages 33
3. Trial and Judgment 37

CHAPTER IV.

DIVORCE.

[*Code of Civil Procedure*, §§ 1756–1761.]

SECTION 1. When Actions for Divorce May be Maintained 40
2. Pleadings 43
3. Trial 48
4. Proof of Adultery 53
5. Connivance, Collusion, Condonation and Recrimination 59
6. Effect of Judgment Granting Divorce 62

CHAPTER V.

SEPARATION.

[*Code of Civil Procedure*, §§ 1762–1767.]

PAGE.

SECTION 1. Separation Agreements 68
2. Action for Separation, When Maintainable..... 71
3. Pleadings 79
4. Judgment 81

CHAPTER VI.

PROVISIONS GENERALLY APPLICABLE TO MATRIMONIAL ACTIONS; ALIMONY AND COUNSEL FEES.

[*Code of Civil Procedure*, §§ 1768–1774.]

SECTION 1. Residence of Married Women 85
2. Alimony Pendente Lite; Allowances for Expenses and Counsel Fees 86
3. Permanent Alimony 97
4. Affirmative Relief 100
5. Custody and Maintenance of Children and Support of Wife 101
6. Practice in Divorce Cases Generally..... 112
7. Effect of Foreign Judgments in this State..... 119

CHAPTER VII.

RIGHTS AND LIABILITIES OF HUSBAND AND WIFE.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), §§ 20–29.]

SECTION 1. Property Rights of Married Women 125
2. Rights and Liabilities of Married Women as to Contracts. 129
3. Insurance on Husband's Life 140
4. Contracts in Contemplation of Marriage 146
5. Liability of Husband for Ante-Nuptial Debts..... 148
6. Contract of Married Woman Not to Bind Husband.. 149
7. Husband and Wife may Convey to Each Other or Make Partition 152
8. Right of Action by or Against Married Women for Torts 154
9. Pardon Not to Restore to Marital Rights 156
10. Compelling Transfer of Trust Property 156
11. Married Woman's Right of Action for Wages..... 157

CHAPTER VIII.

RIGHT OF DOWER.

[*Real Property Law* (*L.* 1896, *ch.* 547, *article V*).]

PAGE.

SECTION 1. Of What Lands Widow is Endowed..... 158
2. Dower in Lands Exchanged 159
3. Dower in Lands Mortgaged Before Marriage..... 160
4. Dower in Lands Mortgaged for Purchase Money... 161
5. Surplus Proceeds of Sale, Under Purchase-Money Mortgage 162
6. Widow of Mortgagee not Endowed 162
7. When Dower Barred 163
8. Election of Dower by Widow 165
9. When Provision in Lieu of Dower is Forfeited..... 169
10. Effect of Acts of Husband 169
11. Widow's Quarantine; Bequeath of Crops..... 171
12. Release of Dower 171

CHAPTER IX.

ACTIONS FOR DOWER.

[*Code of Civil Procedure*, §§ 1596–1625.]

SECTION 1. When Action Must be Brought 173
2. Parties 174
3. Damages for Withholding Dower 175
4. Assignment of Dower, Effect of; Collusive Recovery Against Infants 177
5. Complaint 178
6. Admeasurement of Dower by Referee or Commissioners 178
7. Powers and Duties of Referee or Commissioners; Reports; Fees and Expenses 179
8. Final Judgment; Its Enforcement and Modification; Effect of Junior Incumbrances; Appeal Not to Stay Execution 182
9. Payment of Gross Sum 184
10. Sale of Property to Satisfy Claim or Dower..... 186

CHAPTER X.

THE CUSTODY AND WAGES OF CHILDREN.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), *article IV*.]

SECTION 1. Habeas Corpus for Child Detained by Parent..... 190
2. Habeas Corpus for Child Detained by Shakers..... 195
3. Payment of Wages to Minor; When Valid 195

CHAPTER XI.

GUARDIAN AND WARD.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), §§ 50, 53, 54.]

PAGE.
SECTION 1. Guardians in Socage 198
2. Duties and Liabilities of General Guardians 200
3. Guardianship of Married Woman 205

CHAPTER XII.

GENERAL GUARDIANS APPOINTED BY THE COURT.

[*Code of Civil Procedure*, §§ 2821–2850.]

SECTION 1. Power of Surrogate's Court to Appoint Guardians.. 206
2. Petition for Appointment of Guardian..... 208
3. Proceedings Upon Return of Citations; Subpoena of Witnesses 211
4. Appointment of Temporary Guardian..... 212
5. Guardians of Property 214
6. Guardians of the Person 217
7. Revocation of Letters of Guardianship 217
8. Ancillary Letters to Foreign Guardian 221
9. Annual Inventory and Accounts 224
10. Examination of Guardian's Accounts 225
11. Maintenance of Infants 227
12. Judicial Settlement of Guardian's Accounts 228

CHAPTER XIII.

GUARDIANS APPOINTED BY WILL OR DEED.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), §§ 51, 52, *and Code of Civil Procedure*, §§ 2851–2860.]

SECTION 1. Appointment of Guardian by Parent 231
2. Powers and Duties of Such Guardian 232
3. Will or Deed to be Proved and Recorded..... 233
4. Qualifications and Letters of Testamentary Guardian, 234
5. Security of Testamentary Guardians 236
6. Inventory and Accounts 237
7. Judicial Settlement of Accounts 238
8. Removal and Resignation of Testamentary Guardian, 239

CHAPTER XIV.

ADOPTION OF CHILDREN.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), *article VI.*]

SECTION 1. Definitions; Effect of Article VI of Domestic Relations Law 241
2. Whose Consent Necessary 243
3. Requisites of Voluntary Adoption 344
4. Order Allowing or Affirming Adoption 245
5. Effect of Adoption 245
6. Adoption from Charitable Institutions 247
7. Abrogation of Voluntary Adoption 248
8. Application in Behalf of Child for Abrogation of an Adoption from a Charitable Institution 250
9. Application of the Foster Parent for the Abrogation of Such an Adoption 251

CHAPTER XV.

APPRENTICES AND SERVANTS.

[*Domestic Relations Law* (*L.* 1896, *ch.* 272), *article VII.*]

SECTION 1. Definitions; Effect of Article VII of Domestic Relations Law 253
2. Contents of Indenture 254
3. Indenture by Minor 255
4. Indenture by Poor Officers 256
5. Indenture by Charitable Corporation 257
6. Penalty for Failure of Master or Employer to Perform Provisions of Indenture 258
7. Assignment of Indenture on Death of Master or Employer 258
8. Contract with Apprentice in Restraint of Trade Void, 259

CHAPTER XVI.

ABANDONMENT OF WIVES AND CHILDREN.

[*Code of Criminal Procedure*, §§ 899–913.]

SECTION 1. Abandonment; Disorderly Conduct 260
2. On Complaint, Warrant to be Issued..... 263
3. On Confession or Proof that He is a Disorderly Person, Security to be Required 264
4. If Security Given, Defendant to be Discharged, if not, to be Convicted; Form of Certificate..... 265
5. Certificate to Constitute Record of Conviction; Commitment Thereon 266
6. Undertaking, Forfeiture of 266
7. County Court to Examine Disorderly Persons..... 268
8. Discharge or Binding Out of Disorderly Persons.. 268
9. Imprisonment of Disorderly Persons 269

CHAPTER XVII.

SUPPORT OF POOR PERSONS BY RELATIVES.

[*Code of Criminal Procedure*, §§ 914–926.]

PAGE.

SECTION 1. Who may be Compelled to Support Poor Relative.. 270
2. Order to Compel a Person to Support Poor Relative, 272
3. Support, When to be Apportioned 273
4. Effect and Modification of Order..... 274
5. Costs and Expenses; Enforcement of Order 275
6. Abandonment of Children 276
7. Seizure of Property of Absconding Parents; Transfer Thereof when Void 277
8. Confirmation or Discharge of Warrant 278
9. Sale of Property Seized, and Application of its Proceeds 279
10. Superintendents of Poor may Enforce Provisions of Title 279

CHAPTER XVIII.

Appendix 280

CHAPTER XIX.

Forms 283

THE

DOMESTIC RELATIONS LAW.

STATE OF NEW YORK.

CHAPTER I.

MARRIAGE.

SECTION 1. MARRIAGES AT COMMON LAW.
2. SOLEMNIZATION OF MARRIAGE.
3. CERTIFICATES; FILING AND ENTRY; FEES.
4. EFFECT OF MARRIAGE OF PARENTS ON ILLEGITIMATES.
5. WRITTEN CONTRACT NOW REQUISITE.

Section 1. Marriages at Common Law.

Marriage a civil contract; effect of this article [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. ch. 339, L. 1901), § 10].— Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of parties capable in law of making a contract is essential. A lawful marriage contracted in the manner and pursuant to the regulations of a religious society to which either party belongs, is as valid as if this article had not been enacted. (To take effect January 1, 1902.)

The amendment of 1901 is intended to conform this section to the requirements of section 11 as amended. A radical change is thereby made in the law of marriages in this state, and subsequent to the first day of January, 1902, the so-called common-law marriage is abolished. In proof of the contract of marriage a written contract, as specified

in subdivision 4, is now requisite to the validity of all marriages within this state, other than ceremonial marriages permitted by the section. Nevertheless, as the act takes effect only on January 1, 1902, there will unquestionably for some time to come be numerous questions of common-law marriages before the courts, not to speak of common-law marriages subsequent to that date which may occur in states not having a similar statute, and the validity of which will have to be determined by the laws of the place of contract. Therefore all the decisions in regard to common-law marriages are retained in this edition.

It will be noticed that by the above section marriage is declared to be a civil contract, "so far as its validity in law is concerned." But it is more than a civil contract. It is a personal relationship, based upon a civil contract.

In Field's Civil Code marriage was defined as a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is alone necessary. This definition makes consent alone sufficient and is in accordance with the views expressed in Starr v. Peck, 1 Hill, 270; Jackson v. Winne, 7 Wend. 47; Caujolle v. Ferrie, 23 N. Y. 106; Hayes v. People, 25 N. Y. 390.

While marriage is declared a civil contract for certain purposes, it is not thereby made synonymous with the word contract employed in the common law or statutes. It cannot be dissolved by the parties when consummated, nor released with or without consideration. The relation is always regulated by government. It requires certain acts of the parties to constitute marriage, independent of and beyond the contract. It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy for the benefit of the community. Wade v. Kalbfleisch, 58 N. Y. 282.

Justice Field, in the case of Maynard v. Hill, 125 U. S. 190, says: "Marriage is more than a mere contract. The consent of the parties is essential to its existence, but upon execution of the contract to marry by marriage, a relation is created between the parties which they cannot change. Other contracts may be modified or entirely released upon the consent of the parties. Not so with marriage. The relation once formed the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which, in its purity, the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."

Common law marriages and how proved. — In the case of Clayton v. Warwell, 4 N. Y. 230, it was held that all that is essential to the validity of a marriage contract is the deliberate consent of competent parties entering into a present agreement to take each other for husband and wife. Such agreement may be proved like any other fact, either by positive evidence thereof, or by evidence from which it may be inferred.

MARRIAGES AT COMMON LAW.

The law is well settled that a man and woman, without the presence of witnesses, without the intervention of minister or magistrate, by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves and to society as such. And if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other to friends and acquaintances and the public as such, and the general reputation thereof, will enable a court to presume that there was, in the beginning, an actual, *bona fide* and valid marriage. Brinkley v. Brinkley, 50 N. Y. 184, 198. See also Gall v. Gall, 114 N. Y. 109; O'Gara v. Eisenlohr, 38 Id. 296; Caujolle v. Ferrie, 23 Id. 90; Fenton v. Reed, 4 Johns. 52; Van Buskirk v. Claw, 18 Id. 346; Rose v. Clark, 8 Paige, 574; Betsinger v. Chapman, 88 N. Y. 487; Badger v. Badger, 88 Id. 546. To presume that there has been an actual marriage from the fact of cohabitation, it must be matrimonial and be so begun, and not illicit. It is not the fact alone that raises the presumption, but the character of the fact. The parties must not only live together as do man and wife, but to become man and wife, there must be a purpose in beginning so to live, and they must hold themselves out to the world as so related. Rose v. Clark, 8 Paige, 574.

The courts will not, by testimony that is not clear and explicit, that is not general and supported by other circumstances, nor by reputation for marriage that is divided, raise such a presumption. Clayton v. Wardell, 4 N. Y. 230.

No particular mode of declaring or substantiating consent is prescribed or required by law. The essence of the contract, as of all contracts, is the consent of the parties; and its validity does not depend upon any form of celebration or upon the fact of cohabitation. Hayes v. People, 25 N. Y. 390, 397. This case was a trial of an indictment for bigamy. It was held that to support the indictment it was immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character. It is no answer for the accused that, having a wife living and so incapable of a valid marriage, he did not intend or consent to a marriage in fact, but obtained the consent of the woman by fraudulently imposing upon her the form of marriage by a pretended clergyman. A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy.

In the case of Badger v. Badger, 88 N. Y. 546, no formal marriage or express agreement between the parties was proven. The evidence showed cohabitation for a long period of time, characterized by general repute and by conduct and conversation, as matrimonial instead of meretricious. The cohabitation was under an assumed name and in another locality. Under such circumstances it would seem that the marriage contract might be held to have been executed. It was held expressly in this

case that the fact that the alleged husband was known among very many of his friends and acquaintances as a bachelor was immaterial. The repute, proper to be shown in such a case, cannot go beyond the range of knowledge of cohabitation.

The case of Bissell v. Bissell, 55 Barb. 325, was where a man and woman being engaged to be married, the former stated to the latter that he did not believe in marriage ceremonies, and wished her to waive the ceremony, saying that a marriage without it would be perfectly valid. She finally consented to waive any ceremony, and fixed a day for the marriage. On that day, while they were riding together in a carriage, he placed a ring upon her finger, saying: "This is your wedding ring; we are married." She received the ring as a wedding ring. He then said: "We are married, just as much as Charles is to his wife (referring to his brother and sister-in-law). I will live with you and take care of you all the days of my life, as my wife." She assented to this, and they went to a house where he had previously engaged board for "himself and wife," where they lived together as man and wife for about five weeks; he treating her as his wife, and addressing and speaking of her as such. This was held to constitute a valid marriage.

In the case of Davis *v.* Davis, 7 Daly, 308, it appeared in an action for a divorce that the plaintiff, some time prior to her marriage with the defendant, went from her home in Texas in company with T., to the residence of an Indian preacher in the Indian Territory, and that he then performed a marriage ceremony, *per verba de præsenti* between them. It was held that the marriage was valid and barred the action for divorce, although the preacher was not regularly ordained as a minister; although they gave fictitious names to him; never cohabited as man and wife, and never were recognized as such among their friends and acquaintances, and although she intended that it should not be valid in certain contingencies.

Promise to marry in the future. — A contract to marry, *per verba in futuro*, though followed by cohabitation does not amount to a marriage in fact. Cheney v. Arnold, 15 N. Y. 345.

Marriage is a civil contract, and like other contracts, it may, in terms and intent, be executory or executed. If executed, that is, if the parties agree, *eo instanti*, to take each other for husband and wife, it is of itself a marriage. If executory in its terms it would not, by any analogy to common-law contracts, create the relation of husband and wife. It would bind the parties to enter into these relations in future, and, viewed as an agreement to marry, it confessedly furnishes the basis of an action for damages. The court, in the case above cited, says: "Mutual promises to marry in future are executory, and whatever indiscretions the parties may commit after making such promises, they do not become husband and wife until they have actually given themselves to each other in that relation. That this has been the sense of the legal profession and of the

courts is evident from the rules relating to several actions in common use. If a man seduce a woman under promise of marriage, an action for the seduction is allowed at the suit of the father, an action for the breach of the promise at the suit of the daughter. If a marriage existed by reason of a mutual engagement to be married at a future time, followed by intercourse, these actions would be absurdities, for the marriage being complete by the act complained of, there would be no seduction and no breach of promise."

The case of Cheney v. Arnold, *supra*, declared the child of parents born before the solemnization of marriage to be illegitimate; under the present law (Domestic Relations Law, § 18, *post*, p. 14), provides that the marriage of the parents of an illegitimate child legitimatizes the child. This statute can have no effect upon the principle stated by the court in such case, relating to the effect of a promise of marriage in the future, followed by intercourse.

Cohabitation as presumptive proof of marriage. — Cohabitation alone is insufficient to raise the presumption of marriage. Rose v. Clark, 8 Paige, 574; Clayton v. Wardell, 4 N. Y. 230. Concubinage cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage. Such a contract can only be proved by circumstances which exclude the inference or presumption that the former relation continued, and satisfactorily prove that it had been changed into that of an actual marriage by mutual consent. Foster v. Hawley, 8 Hun, 68.

The cohabitation must be matrimonial. The general definition of " matrimonial cohabitation " is the living together of a man and woman, ostensibly as husband and wife. Wilcox v. Wilcox, 46 Hun, 32, 37, citing Bishop on Mar. and Div., § 777; Pollock v. Pollock, 71 N. Y. 137. This does not necessarily require the announcement further than it is given by the appearances of the purpose of the parties. The relationship must be shown by the manner in which the parties are living together.

Matrimonial cohabitation raises the presumption of marriage which can only be repelled by the most cogent and satisfactory evidence. Hynes v. McDermott, 91 N. Y. 451. In the case of Gall v. Gall, 114 N. Y. 109, 117, the court says: " The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married. While such cohabitation does not constitute marriage, it tends to prove that a marriage contract has been entered into by the parties. Where, however, the cohabitation is illicit in its origin, the presumption is that it so continues until a change in its character is shown by acts and circumstances strongly indicating that the connection has become matrimonial. It is sufficient if the acts and declarations of the parties, their reputation as married people and the circumstances surrounding them in their daily lives, naturally lead to the conclusion that, although they began to live together as man and mis-

tress, they finally agreed to live together as husband and wife." Citing Caujolle v. Ferrie, 23 N. Y. 90; O'Gara *v.* Eisenlohr, 38 Id. 296; Badger *v.* Badger, 88 Id. 546, 554; Hynes v. McDermott, 91 Id. 451, 457.

In the case of Badger v. Badger, 88 N. Y. 547, the alleged husband appeared to live a double life. In one locality and among his friends and relations he seemed to be a bachelor possessing considerable wealth; at the head of a respectable business; occupying rooms with his sisters and with others during much of the period; and if not always at home, yet not so frequently absent as to arouse suspicion or remark. In another locality in the same city, he appears under a different name living with the plaintiff as his wife, introducing her as such, called uncle by her nephew deemed father by her daughter, paying her bills and expenses, furnishing her with the food and shelter which he shared, nursing her through severe and continuous sickness, seldom absent at night; the intercourse created no scandal, but was reputed to be virtuous and respectable, and that of husband and wife. Justice Finch says: "It is over this cohabitation and its true character and meaning that the controversy arises. So far as is known, the association began when the plaintiff was young and the decedent in middle life, and continued until he fell dead, an old man of seventy-six. It lasted without break or interruption. It survived the loss of youth and its attractions; it ran on through sickness, paralysis, and some degree of mental weakness; it showed no trace of the satisfied passion that tires of its victim and abandons her for new temptation; it did not change when the girl had grown into the matron and become deaf and lame; it stayed with the tenacity of love and duty, remaining patient and faithful until the end. It is argued with great force, that if this relation was that only of lover and mistress, it approached strangely near to matrimonial truth and devotion, and gave to unlawful lust an endurance and virtue not common or expected."

In this case the only fact which seemed to place in doubt the character of the cohabitation, and to raise a question as to the legitimate inferences to be drawn therefrom, is the assumption of a false name by the alleged husband and his persistent silence among his own relatives. It was also claimed that the connection was originally illicit and must be presumed to retain that character until proof is given of a change in its object and purpose. The court said: "The rule that a connection, confessedly illicit in its origin, or shown to have been such, will be presumed to retain that character until some change in established is both logical and just. Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin the subsequent intercourse is deemed matrimonial. (Citing Fenton v. Reed, 4 Johns. 52; Rose v. Clark, 8 Paige, 574; Starr v. Peck, 1 Hill, 270; Jackson v. Claw, 18 Johns. 346.) But a change may occur, and be satisfactorily established although the precise time or occasion cannot be clearly ascertained. If

the facts show that there was or must have been a change, that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say when or exactly why the change occurred."

Proof of matrimonial cohabitation, declaration of the parties and reputation that they are man and wife, is sufficient to found a presumption of marriage, and a prior marriage may thus be presumed, although there was a subsequent actual marriage between the parties. Betsinger v. Chapman, 88 N. Y. 487. But where there was neither a marriage ceremony, nor any contract of marriage between a man and woman, and no agreement to live together as husband and wife, but only an agreement to live together, the man never having held the woman out to the world as his wife, the general repute being to the contrary, the facts do not create a presumption, as a matter of law, that the marriage relation exists between the parties. Soper v. Halsey, 85 Hun, 464, 33 N. Y. Supp. 105.

Where the prior relation between the parties was a meretricious one, a marriage will not be presumed from cohabitation and reputation. Bates v. Bates, 7 Misc. 547, 57 N. Y. St. Rep. 725, 27 N. Y. Supp. 872. In this case a writing signed by the alleged husband to the following effect: " This is to certify that ' plaintiff ' is my true and beloved wife, whom I love, honor and cherish " was held insufficient to establish a common-law marriage, in view of testimony that showed it to be given as a cover for illicit intercourse, and the defendant himself denying the authenticity of the certificate.

The fact that a man and woman matrimonially cohabited for a number of years does not conclusively establish a marriage between them. It is but *prima facie* evidence and may be overcome by attendant circumstances which tend to show a purely meretricious relationship. If after the cohabitation the parties separate, and the man marries another woman, and no claim is ever made upon him by the woman from whom he separated, although the marriage was open and professed and knowledge of such marriage must have been brought to her attention, such cohabitation does not constitute a marriage. Chamberlain v. Chamberlain, 71 N. Y. 423. Judge Earl, in this case, states the facts as follows, and holds them ample to overcome the *prima facie* evidence of a matrimonial cohabitation between the parties: "Although she lived about fifty years after the separation, she never made any claims upon him as her husband. At the time of the separation she was still young, probably not more than thirty-five years old, and yet she did not obtain a divorce from him, although abundant grounds existed therefor, if she had been married to him. She was poor, became dependent upon her relations, and was a burthen upon them, yet no effort was made during her long life to compel him to contribute to her support. Although she survived him about eight years, she claimed no share in his property as his lawful widow. He was a pensioner, and after his death, if his

lawful widow, she was entitled to a pension, and yet she never claimed any."

Cohabitation and the declarations of the parties are *prima facie* evidence of marriage, but where, without any apparent rupture, the parties, after a cohabitation of two years, separated and continued separate, without any claims or pretensions on each other as husband and wife, the presumption of marriage arising from previous cohabitation will be rebutted. Jackson v. Claw, 18 Johns. 346.

Meretricious cohabitation not evidence of marriage. — Meretricious cohabitation of a man and woman will not produce a presumption of the marriage relation, however long such cohabitation may continue. In the case of Fagan v. Fagan, 32 N. Y. State Rep. 995, a cohabitation had continued for more than twenty years, which, in its origin, was undoubtedly meretricious. The court remarks: "Taking into consideration the manner in which the parties began to live together, the defendant's neglect to show her any of the attentions usual in married life, such as making calls or visits with her, and the separation of the plaintiff from the defendant's social surroundings and the occupations and interests of his daily life, I find it impossible to say that there was any time when the original adulterous connection changed into a matrimonial one."

If the cohabitation is meretricious in its origin, its continuance must be presumed until proof of a change and of marriage. In such a case marriage will not be presumed from cohabitation and reputation, but proof of a subsequent actual marriage is necessary. This may be shown by circumstances, but they must be such as to exclude the inference or presumption that the former relation continued, and to satisfactorily prove that it was changed into that of actual marriage by mutual consent. Bates v. Bates, 57 N. Y. St. Rep. 725, citing Foster v. Hawley, 8 Hun, 68; Gall v. Gall, 114 N. Y. 109; Williams v. Williams, 17 Abb. N. C. note p. 508.

Cohabitation and repute not conclusive. — Cohabitation and repute alone do not constitute a marriage. There must be an actual, provable agreement or contract to be husband and wife; mere living together as such is not sufficient; the agreement is an absolute and vital prerequisite to a valid marriage. This agreement can be proved by circumstantial evidence. The agreement may be established by the actions of the parties, their visible relations to each other and their representations to others. Matter of Hamilton, 76 Hun, 200.

Though a common-law marriage may be proved by cohabitation, reputation among friends and neighbors, and mutual recognition by the parties of that relation, yet such facts do not, of themselves, constitute marriage, but are simply evidence of it. Evidence of this character sufficient to warrant a finding of marriage considered, and also as to when such evidence is inadmissible under section 829 of the Code. Matter of Brush, 25 App. Div. 610.

In the case of Clayton v. Wardell, 4 N. Y. 230, 236, it is said that "mere reputation, when admissible at all, is always to be regarded as the weakest kind of evidence. It is never conclusive, except when it is general and supported by other evidence."

To establish a marriage from cohabitation and repute, the repute proper to be shown cannot go beyond the range of knowledge of the cohabitation; within that range, to contradict the repute of marriage, which to be effective must be general, a divided repute may be shown, that is, that among some friends and acquaintances the connection was reputed to be illicit, not matrimonial. Badger v. Badger, 88 N. Y. 546.

While an agreement to become husband and wife may, if not proven in express terms, by competent evidence, be established by proof of cohabitation, reputation among friends and neighbors, and mutual recognition by the parties of their occupying that relation, these facts do not, of themselves, constitute a marriage, but are simply evidence from which, if sufficiently strong, the courts may infer that the cohabitation was the result of a previous agreement to marry, and, from that fact, may infer that a marriage actually existed. Matter of Brush, 25 App. Div. 610.

Section 2. Solemnization of Marriage.

How a marriage must be solemnized [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. ch. 339, L. 1901, and ch. 522, L. 1902), § 11.]— A marriage must be solemnized by either:

1. A clergyman or minister of any religion, or the leader, or the assistant leader, of the Society for Ethical Culture in the city of New York;

2. A mayor, recorder, alderman, police justice or police magistrate of a city;

3. A justice or judge of a court of record, or of a municipal court, a justice of the peace; or

4. A written contract of marriage signed by both parties, and at least two witnesses who shall subscribe the same, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to

entitle the same to be recorded. Such contract shall be filed within six months after its execution in the office of the clerk of the town or city in which the marriage was solemnized. The word "clergyman" when used in the following sections of this article, includes any person referred to in the first subdivision of this section; the word "magistrate," when so used, includes any person referred to in the second or third subdivision. (To take effect January 1, 1902.)

See first note following § 10, *ante*.

Marriage, how solemnized [DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 12]. — No particular form or ceremony is required when a marriage is solemnized as herein provided, by a clergyman or magistrate, but the parties must solemnly declare in the presence of the clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness besides the clergyman or magistrate must be present at the ceremony.

This section is derived from R. S. Pt. II, ch. 8, tit. 1, § 9. The former law provided that when a marriage was "solemnized by a minister or priest, the ceremony of marriage shall be according to the forms and customs of the church or society to which he belongs." This is omitted in the revision. The Statutory Revision Commission, in their report (1896), state as a reason for the omission that the form of solemnization by a minister or priest "is a subject for ecclesiastical control." By the present section the parties must solemnly declare in the presence of the clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. Under the former law, this declaration was only expressly required when the ceremony was performed by a magistrate.

Duty of clergyman or magistrate [DOMESTIC RELATIONS LAW (L. 1896, ch. 272) § 13]. — A clergyman or magistrate requested to solemnize a marriage must, before solemnizing it, ascertain:

1. The name and residence of each party.

2. That each party is of sufficient age to be capable in law of contracting marriage.

3. The name and residence of the attending witness, or,

if more than one are present, of at least two attending witnesses.

Unless such facts are personally known to him, he must require them to be proved and for that purpose may administer an oath to and examine either or both of the parties or any other person. Each examination so taken must be reduced to writing, subscribed by the person examined, and entered in a book kept by the clergyman or magistrate for that purpose; in which he must also enter each fact required to be ascertained by this section which is within his knowledge, and the day on which the marriage is solemnized.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 1, § 10, as amended by L. 1830, ch. 320, § 25, and § 11, as amended by L. 1873, ch. 25. No material change is made, except that by the former law (§ 11), it was provided that "either of the respective parties making a false statement under oath shall be deemed guilty of wilful and corrupt perjury, and shall be liable therefor." This was omitted because section 96 of the Penal Code defines the crime of perjury, which would include a false statement made under oath during an examination conducted pursuant to this section.

Solemnizing of an unlawful marriage a misdemeanor. — By section 376 of the Penal Code, it is provided "A minister or magistrate who solemnizes a marriage when either of the parties is known to him to be under the age of legal consent, or to be an idiot or insane person, or a marriage to which within his knowledge a legal impediment exists, is guilty of a misdemeanor."

Section 8. Certificates; Filing and Entry; Fees.

Contents of certificate [DOMESTIC RELATIONS LAW [L. 1896, ch. 272), § 14]. — A clergyman or magistrate by whom a marriage is solemnized must furnish to either party, on request, a certificate, signed by him, stating:

1. The name and place of residence of each of the parties; that they were known to him, or had satisfactorily proved by their oaths or the oath of a person known to him, that they were the persons described in the certificate and that they had attained the age of legal consent.

2. The name and place of residence of the attending witness; or, if more than one is present, of at least two attending witnesses.

3. The time and place of the marriage.

4. That after due inquiry made, there appeared to be no legal impediment to the marriage.

This section is a re-enactment without change in substance of R. S. Pt. II, ch. 8, tit. 2, § 13, as amended by L. 1873, ch. 25.

Filing and entry of a certificate or contract [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. L. 1901, ch. 339), § 15.]—On the presentation of such certificate signed by such magistrate or clergyman, or of such contract, within six months after the marriage, to the clerk of the city or town in which the marriage was solemnized or in which either party resided at the time of the marriage or resides when the certificate or contract is presented, such clerk must file in his office and enter in a book kept by him for that purpose in the alphabetical order of the initial letter of the surname of each party and in the order of time in which the certificate is filed:

1. The names and places of residence of the persons married.

2. The time and place of marriage.

3. The name and official station of the person signing the certificate.

4. The date of filing the certificate or contract.

This section is a consolidation of R. S. Pt. II, ch. 8, tit. 2, §§ 14, 15 and 16, as amended by L. 1830, ch. 320. The only material change made in the revision is that under the present law the certificate is not required to be acknowledged if made by a clergyman. Under the last amendment the written contract of marriage may be filed.

Registration of marriages with boards of health.— By section 12 of the Public Health Law (L. 1893, ch. 661), as amended by L. 1897, ch. 138, it is provided that each local board of health shall supervise and make complete the registration of all marriages occurring within its municipality, in accordance with the methods and forms prescribed by the state board of health, and promptly forward the certificates of such marriages to the state bureau of vital statistics. The groom, or the officiating clergyman or magistrate, is required to cause a certificate of the marriage to be returned within thirty days thereafter

to the local board of health or the person designated by it to receive the same. Such certificate is to be attested by the officiating clergyman or magistrate. The person making such certificate is entitled to the sum of twenty-five cents therefor, which is a charge upon and to be paid by the municipality where the marriage occurred. Copies of the certificate are to be furnished upon request of any person, and when certified to be correct by the president or secretary of the local board of health, or the local registering board designated by it, are presumptive evidence in all courts and places of the facts therein stated.

Certificate, contract, entry and copies evidence [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. L. 1901, ch. 339), § 16].—Such certificate or contract or entry, or a copy of either certified by the officer with whom such certificate or contract is filed, is presumptive evidence of the marriage.

This section is a substantial re-enactment of R. S. Pt. II, ch. 8, tit. 1, § 17.

It is also provided by section 928, of the Code of Civil Procedure that: "An original certificate of a marriage, within the state, made by the minister or magistrate by whom it was solemnized, the original entry thereof, made, pursuant to law, in the office of a clerk of a city or town within the state; or a copy of the certificate, or of the entry, duly certified, is presumptive evidence of the marriage."

Evidence of ceremonial marriage in general. — Direct proof of a ceremonial marriage is only necessary in prosecutions for bigamy and actions for criminal conversation. In other cases it may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family and other circumstances. Rockwell v. Tunnicliff, 62 Barb. 408. And see Fenton v. Reed, 4 Johns. 52; O'Gara v. Eisenlohr, 38 N. Y. 296; Jackson v. Claw, 18 Johns. 346; Tummalty v. Tummalty, 3 Bradf. 369; Van Gelder v. Post, 2 Edw. 577; Rose v. Clark, 8 Paige 574.

Church registers of marriage are *prima facie* evidence of marriages entered therein and of the time when they occurred, without reference to any law declaring them to be evidence. It is no objection to the admission of such a register that it was the practice for each minister of the parish to keep an account of the marriages solemnized by him, in a book kept by himself, as the marriages occurred, or soon after, and to hand in a memorandum of them to the rector, on a slip of paper, from which they were entered in the register by the rector. In such a case the register only, and not the original book of entry, is admissible. Maxwell v. Chapman, 8 Barb. 579, citing 1 Greenleaf Evi., 483, 484, 493; Jackson v. King, 5 Cow. 237. In the case of Degnan v. Degnan, 43 St. Rep. 646, 17 N. Y. Supp. 883, it was held that proof by a foreign parish register, while competent, is not the best evidence, especially where it is not shown that the law required such registry.

EFFECT OF MARRIAGE OF PARENTS ON ILLEGITIMATES.

In actions for criminal conversation an actual marriage must be proved. Cohabitation of the parties as man and wife, their declarations and admissions, the reputation of an existing marriage, the plaintiff's acknowledgment of the woman as his wife, holding her out as such to his friends and acquaintances, and her reception in his family as such are not sufficient to maintain the suit. A certificate of a justice of the peace which does not conform to the statute, and contains the statements required thereby cannot be admitted as evidence of a marriage for the purpose of bringing such an action. Dann v. Kingdom, 1 Sup. Ct. Rep. (T. & C.) 492.

A memorandum purporting to be a record of marriage, but which is not signed and gives no names of witnesses to the ceremony, and does not state that the persons named therein as being married were known to the minister as the persons therein mentioned, cannot be admitted in evidence. Matter of Molter, 22 Week. Dig. 507. Although a marriage certificate is not made in conformity to the statute, in omitting particulars required to be stated, still if it is an original certificate given at the time of the marriage in the presence of the parties, it is competent at common law as part of the *res gestæ*. Wingate v. Haskins, 20 Week. Dig. 438.

Fees [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. L. 1901, ch. 339), § 17].— Fees for services rendered under this chapter may be collected as follows: For solemnizing a marriage, including the certificate thereof, one dollar. For administering an oath and taking an examination as prescribed in section thirteen, fifty cents for each person examined. For filing and entering a certificate or contract, twenty-five cents. For a certified copy of a certificate or contract, or entry, ten cents. Am 1907. ch 480.

This section is derived from R. S. Pt. II, ch. 8, tit. 1, § 18. The first two paragraphs, allowing a charge for solemnizing a marriage and for each witness examined, are new, as also charge for filing contract, etc.

Section 4. Effect of Marriage of Parents on Illegitimates.

Illegitimate children, how legitimatized [DOMESTIC RELATIONS LAW (L. 1896, ch. 272, as amd. L. 1899, ch. 725), § 18].— An illegitimate child whose parents have heretofore intermarried, or shall hereafter intermarry, shall

thereby become legitimatized and shall become legitimate for all purposes, entitled to all the rights and privileges of a legitimate child; but an estate or an interest vested or trust created before the marriage of the parents of such child shall not be divested or affected by reason of such child being legitimatized.

This section is a re-enactment of L. 1895, ch. 531. By section 289 of the Real Property Law (L. 1896, ch. 547), it is provided that "if a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relations shall not inherit."

Under the above section, the marriage of the parents of an illegitimate child, legitimatizes the child, and he would then become entitled to inherit, notwithstanding the above provision of the Real Property Law.

In construing § 19 of R. S. Pt. II, ch. 2, from which section 289 of the Real Property Law was, in part, derived, the court in the case of Miller v. Miller, 18 Hun, 507, said: "The word 'illegitimate,' when used in this connection, has by the common law and the law of this state, a well defined meaning, which is, 'begotten and born out of wedlock.' This has been the meaning of the word since the common law was reduced to writing. This statute, read in this light, means that children begotten and born out of wedlock shall not inherit lands in this state."

Judge Follett, in the case above cited, discusses at length the effect of a statute of the state where the illegitimate child was born and domiciled, legitimatizing the child by a marriage of the parents subsequent to the child's birth. The opinion was, of course, written when no statute of a similar nature existed in this state. It was held that the right of an illegitimate child to inherit lands in this state was to be determined, solely, by the laws of this state, and that a legitimatization by the laws of another state could not affect this right. In concluding his opinion, Judge Follett says: "Permitting the legitimatization of children long after their birth, by the marriage of their parents, would not tend to the establishment of families through that relation. Several states have adopted in whole, or in part, the rule of the civil law. But this state has not, and the legislature of another state cannot thrust it upon us. We think that until the rule is changed by the legislature, that the common-law meaning of the word 'illegitimate' must prevail." It is evident, under the present status of our laws, that this case cannot be applied to the right of illegitimate children whose parents have intermarried, to inherit lands in this state.

The statutes of 1895–1899, legitimatizing illegitimate children of parents who have subsequently married is not retroactive and does

not divest vested interests. Thus an illegitimate child born in 1874, whose parents married thereafter, and whose father died in 1875, is not the next of kin of his parental grandmother. Hence where the grandmother's estate had been divided among her legitimate children, the illegitimate grandson cannot compel them to file an inventory of the estate. Matter of Barringer, 29 Misc. 457.

Where a testator, knowing that his son had an illegitimate child, made a will creating a trust for his son during life, and at his death the capital to be paid to "his lawful issue, then living," the illegitimate child does not take, although the son married the mother of the child to his father's knowledge prior to the will. United States Trust Co. v. Maxwell, 26 Misc. 276.

The legitimation of an infant under the laws of a foreign country where the marriage took place, and which was the domicile of the parents, is effective in determining the rights of such infant to inherit property in this State as heir of its father. Bates v. Virolet, 33 App. Div. 436.

The above section of the Domestic Relations Law must be construed in connection with section 289 of the Real Property Law.

As to the legitimacy of children and their custody, where a subsequent marriage is annulled, see section 1745 of the Code of Civil Procedure (*post*, p. 34).

Section 5. Written Contract now Requisite.

No other marriages within this state valid after 1902 [Domestic Relations Law (new section added, L. 1901, ch. 339), § 19].— No marriage claimed to have been contracted on or after the first day of January, nineteen hundred and two, within this state, otherwise than in this article provided, shall be valid for any purpose whatever, provided, however, that no such marriage, shall be deemed or adjudged to be invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person solemnizing the same under subdivision one, two, three and four of section eleven of this article, if consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage, or on account of any mistake in the date or place of marriage or in the residence of either of the parties in case of a marriage solemnized under subdivision four of said section eleven.

CHAPTER II.

VALIDITY OF MARRIAGES.

SECTION 1. VALIDITY OF MARRIAGE GOVERNED BY LEX LOCI CONTRACTUS.
2. VOID MARRIAGES.
3. VOIDABLE MARRIAGES.

Section 1. Validity of Marriages Governed by Lex Loci Contractus.

As a general rule, it may be stated that the validity of a marriage is to be determined by the *lex loci contractus*. Smith v. Woodworth, 44 Barb. 198. In the case of Cropsey v. Ogden, 11 N. Y. 228, it is stated that by the universal practice of civilized nations the permission or prohibition of particular marriages, of right belongs to the country where the marriage is to be celebrated.

In Haviland v. Halstead, 34 N. Y. 643, a person divorced, for adultery committed by himself in this state, promised to marry the plaintiff in New Jersey. He married another, and an action for the breach of this promise was brought in this state and failed. The parties resided in this state and contemplated the performance of the contract here. The court carefully distinguished the case so presented from one where a marriage had taken place in a foreign state. They assume that the latter would be treated as valid, although the parties had gone there with intent to evade the laws of this state. The doctrine in favor of the validity of a marriage so contracted is founded on principles of policy to prevent the great inconvenience and cruelty of bastardizing the issue of such marriages, and to avoid the public mischief which would result from the loose state in which people so situated would live.

In the case of Van Voorhis v. Brintnall, 86 N. Y. 18, the rule is definitely stated that the validity of a marriage contract is to be determined by the law of the state where it was entered into. If valid there, it is to be recognized as such in the courts of this state, unless contrary to the prohibition of the natural law, or the express prohibitions of a statute. While every state can regulate the status of its own citizens, in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred; the intent must find clear and unmistakable expression in the statute.

Where an American girl, in school in France, eloped with a citizen of the Argentine Republic, and went through a so-called marriage ceremony at Paris, which was not according to the formalities re-

quired by the laws of France, it was held that assuming that the formality of the marriage law of France did not apply to foreigners temporarily in that country, yet the Paris marriage was not valid as a common-law marriage in the absence of proof that the common law was, under such conditions, applicable in France so as to render valid a common-law marriage. The court will take judicial notice that the common law is not and never was in force in France. Assuming that such marriage was contracted at the Consulate it would not be valid unless performed according to the laws of the domicile of the contracting parties, and the facts did not justify a finding that the marriage at Paris was contracted according to the laws of the Argentine Republic, the domicile of the husband. Matter of Hall, 61 App. Div. 267.

Where the laws of another state do not prohibit a re-marriage by a party divorced, its validity cannot be questioned in this state. Moore v. Hegeman, 92 N. Y. 521.

A marriage if valid under the laws of the state where it was contracted, is valid here, and every right and privilege growing out of the relation so established attaches to each party thereto. Thorp v. Thorp, 90 N. Y. 602.

Section 2. Void Marriages.

Incestuous and void marriages [DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 2].— A marriage is incestuous and void whether the relatives are legitimate or illegitimate between, either;

1. An ancestor and a descendant, or,
2. A brother and sister of either the whole or the half blood.
3. An uncle and niece or an aunt and nephew.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 1, § 3, as amended by L. 1893, ch. 601, without change in substance.

In the case of Wightman v. Wightman, 4 Johns. Ch. 343, marriage between persons in the direct lineal line of consanguinity was stated to be clearly unlawful by the law of the land, independent of any church canon or of any statutory prohibition. Chancellor Kent says, in this case: "That such a marriage is criminal and void by the law of nature, is a point universally conceded. And, by the law of nature, I understand those fit and just rules of conduct which the Creator has prescribed to man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they

may be more precisely known, and more explicity declared by divine revelation." It is also remarked in this case that marriages out of the lineal line, and in the collateral line beyond the degree of brothers and sisters, could not well be declared void as against the first principles of society.

In 1880 it was held that marriages between aunts and nephews were not void in this state. Campbell v. Crampton, 8 Abb. N. C. 363. Judge Wallace in this case remarked that: "The fact that marriages between persons so related are so commonly prohibited by legislation in those communities which are among the most advanced in moral and intellectual progress, must be deemed high evidence of the general prevailing public sentiment on the subject. Whether this sentiment finds its origin in the mandates of divine law, or the belief that such unions are a violation of the physical laws of nature, or in the conviction that to tolerate such alliances would impair the peace of families, and lead to domestic licentiousness, its existence must be acknowledged and traced to some or all of these sources."

Chapter 60 of the Laws of 1893 was the first legislative enactment making marriages between uncles and nieces and aunts and nephews incestuous and void.

Section 302 of the Penal Code provides that: "When persons, within the degree of consanguinity, within which marriages are declared to be incestuous and void, intermarry or commit adultery or fornication with each other, each of them is punishable by imprisonment for not more than ten years." It is no defense that the female with whom the defendant is charged with having committed the crime was his illegitimate daughter. People v. Lake, 110 N. Y. 61.

Void marriages [DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 3].— A marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless either:

1. Such former marriage has been annulled or has been dissolved for a cause other than the adultery of such person;

2. Such former husband or wife has been finally sentenced to imprisonment for life;

3. Such former husband or wife has absented himself or herself for five successive years then last past without being known to such person to be living during that time.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 1, §§ 5, 6.

When former marriage may be annulled or dissolved.—A marriage cannot be annulled on the complaint of a party thereto, on the ground that the parties being domiciled in this state, and knowing

that one of them was prohibited from marrying again by a judgment of a court of this state granting a divorce to a former spouse, contracted their marriage in another state, to which they went temporarily for the purpose of evading the prohibition while the former spouse was living. Even if such a marriage is void the plaintiff is equally in the wrong with the defendant and the court will not grant relief. Kerrison v. Kerrison, 8 Abb. N. C. 444.

In the case of The People v. Faber, 92 N. Y. 146, it is held that a person against whom a divorce has been obtained because of adultery is regarded as having a husband and wife living, so long as the party obtaining the divorce lives. It may, therefore, be stated that a marriage with a person who has been divorced because of his adultery is void, unless the marriage was contracted in a state where such marriage is valid, in which case the *lex loci contractus* must prevail.

In the case of Van Voorhis v. Brintnall, 86 N. Y. 18, in considering the section of the Revised Statutes from which subdivision one of the above section was derived, states that the statute is penal in its nature, since it invalidates a marriage with any person who has been divorced because of his own adultery while the wife obtaining the divorce is living, and therefore places a restraint or punishment upon the person convicted of adultery. This case established the principle that a marriage with a divorced person convicted of adultery, contracted in a state where such a marriage is valid, must be considered valid here, and not within the provisions of the above section.

After a divorce has been granted on the grounds of the adultery of the husband he cannot, in this state, make a valid promise of marriage during the lifetime of his wife who obtained the divorce. Haviland v. Halstead, 34 N. Y. 643.

In an action to annul a marriage on the ground that a divorce procured by the defendant from a former wife was void, it appeared that the decree of divorce was granted in Massachusetts where the former marriage was not contracted, that the defendant did not reside in that state, nor was he served with process there, nor did he appear. It was held that the decree based upon constructive service by publication, was void in New York, and that the second marriage should be annulled. Davis v. Davis, 2 Misc. 549, 51 N. Y. St. Rep. 509, 22 N. Y. Supp. 191.

Absence of husband or wife.— The marriage may be valid if the husband or wife "has absented himself or herself for five successive years then last past without being known to such person to be living during that time." Two leading facts must be found to bring a case within the terms of this statute: First, "That the husband or wife has absented himself or herself;" and, secondly, "That he or she has not been known to such person to be living during the space of five successive years." Jones v. Zoller, 29 Hun, 551. In this case it was stated that the words "absented himself" evidently refer to a withdrawal of his whereabouts from his wife, his relations. and from the ordinary and usual opportunities of identification. That with-

drawal from his wife and family which would, after the lapse of five successive years, lead naturally to the inference that death had ensued.

It will be observed that by R. S. Pt. II, ch. 8, tit. 1, § 6, from which subdivision 3 of the above section was derived, provides that a marriage contracted during the lifetime of an absent husband or wife "shall be void only from the time that its nullity shall be pronounced by a court of competent jurisdiction." By the revision a marriage is absolutely void, if contracted by a person whose husband or wife by a former marriage is living, unless such former husband or wife has absented himself or herself, etc. By section 1743 of the Code of Civil Procedure (*post*, p. 24), it is provided that a marriage may be annulled upon the ground: "That the former husband or wife of one of the parties was living, and that the marriage with the former husband or wife was then in force." This section of the Code should be construed with subdivision 3 of the above section of the Domestic Relations Law. By the change in the revision there is, therefore, no different result produced. Such a marriage is only void after its nullity has been pronounced by a court of competent jurisdiction.

In speaking of the former statute, Justice Clerke of the General Term of the Supreme Court, in the case of Griffin v. Banks, 24 How. Pr. 213, says: "The language of the statute is very general and positive, without any reservation or exception, express or implied; and yet it would apparently be at variance with the plainest principles of justice, that the first husband should be deprived of his marital rights, merely by her mistake, arising from an absence which, under many circumstances, he could not avoid, and, which, indeed, may have originated in an endeavor to promote the common benefit of both. If the second marriage is to be upheld the first ceases to have any validity; both certainly cannot co-exist. Under our law, and under that of all Christendom, for many centuries, if not from the very origin of Christianity, no man shall have more than one wife, and no woman more than one husband, at the same time. Does the law, then, provide no redress for the husband who has been thus injured by the act of his wife, committed under a mistake? I think it does. It places the first marriage only in abeyance. It only temporarily suspends the rights of the first husband unless, by his own neglect or acquiescence, he should waive or abandon them."

If the first husband omits or neglects to resort to the proper remedy to annul the second marriage, the latter marriage continues in force after the death of the first husband, and has the same force and effect as if, when it was solemnized, the first husband was not alive. Griffin v. Banks, 24 How. Pr. 213. See also Valleau v. Valleau, 6 Paige, 207.

A person desiring to re-marry upon the ground that the husband or wife has absented himself or herself from the State for five successive years without being known to such person to be alive during that time, must act in good faith, and use all such means to obtain such information with respect to the absent spouse as reasonable persons would make use of under such circumstances. She cannot shut her eyes and ears without making such inquiry, and then marry at the

end of the five years. Circus v. Independent Order of Awahas, 55 App. Div. 534.

A wife is not justified in re-marrying after six years from the time her husband has been imprisoned for assault, without making a subsequent inquiry as to his whereabouts, nor does the statute create any presumption that he is dead. Alexaman v. Alexaman, 28 Misc. 638.

The absence of the husband for a period of five successive years is not in itself a sufficient justification for the wife's re-marriage. The statute is based upon the probability that in such case the absentee is dead, and is designed to protect the person who, in good faith, acts upon the statute. The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. Gall v. Gall, 114 N. Y. 109.

The court in this case remarks: "The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void. A statute with such possibilities should be so construed as to promote good order, and the person availing himself of its privilege should be required to act in perfect good faith. (Citing Jones v. Zoller, 32 Hun, 280, 282; Cropsey v. McKinney, 30 Barb. 47; McCartee v. Camel, 1 Barb. Ch. 455, 464.) He decides the question as to his right to re-marry for himself, without application to any court or public authority. The whole responsibility rests upon him. He cannot shut his eyes and ears and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he honestly believe she was dead? Did he make inquiry? Were the circumstances such that a reasonable man, honestly desiring to learn the truth, would have made inquiry? Was he excused from inquiring by a false report of her death? Questions of this character are involved in the ultimate question of good faith, which is necessarily for the jury, as it depends upon the inferences to be drawn from a great many circumstances."

Assuming that a wife whose adultery causes her husband to leave her, can, after the expiration of five years, bring herself within the provisions of the statute protecting subsequent marriages, where the wife has been deserted by her husband, something more than the mere act of desertion by the husband must be shown; it must be shown where the husband went to reside, or that diligent inquiry in that respect had proved unavailing; that he had abandoned his former resorts or occupations, and, if his residence was discovered, that he had afterwards abandoned such residence without leaving any trace of where he had gone. Matter of Tyler, 80 Hun, 406.

A wife abandoned her husband on account of his intemperate habits, cruel treatment, and absence from home, and during five successive years resided in an adjoining county with a second husband, and it did not appear that she had knowledge of the death of her first husband, or that he was not generally well known to be living. It was

held not to be such a continuous absence of five successive years as to render valid the second marriage and authorize the issuing of letters to the woman as the widow of the second husband. Wyles v. Gibbs, 1 Redf. 382.

Section 8. Voidable Marriages.

Marriages void from time their nullity is declared [Domestic Relations Law (L. 1896, ch. 272), § 4].— A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is eighteen years,

2. Is incapable of consenting to a marriage for want of understanding,

3. Is incapable of entering into the married state from physical cause,

4. Consents to such marriage by reason of force, duress, or fraud; or,

5. Has a husband or a wife by a former marriage living, and such former husband or wife has absented himself or herself for five successive years then last past without being known to such party to be living during that time.

Actions to annul a void or voidable marriage may be brought only as provided in the code of civil procedure.

This section is derived from R. S. Pt. II, ch. 8, tit. 1, §§ 4, 6, and § 2, as amended by L. 1887, ch. 24. The word duress is inserted in the 4th subdivision in accordance with section 1743 of the Code of Civil Procedure. The age of legal consent of marriage is raised to eighteen years in the case of females, to conform to section 282 of the Penal Code as amended by L. 1895, ch. 460, which makes it abduction to marry a woman under eighteen years of age without the consent of her parents. (Report of Statutory Revision Commission, 1896.) Except as specified, no changes have been made in the revision.

In the preceding section we have cited cases showing the effect of a marriage by a person whose husband or wife has absented himself or herself.

It is provided by the above section that void or voidable marriages can only be annulled as provided in the Code of Civil Procedure.

CHAPTER III.

ANNULMENT OF MARRIAGES.

[*Code Civ. Pro.* §§ *1742–1755.*]

SECTION 1. WHEN ACTION MAY BE BROUGHT.
2. WHO MAY MAINTAIN ACTION FOR ANNULMENT OF MARRIAGES.
3. TRIAL AND JUDGMENT.

Section 1. When Action may be brought.

Action by woman married under sixteen [CODE CIV. PRO., § 1742]. — An action may be maintained by the woman to procure a judgment declaring a marriage contract void, and annulling the marriage, under the following circumstances:

I. Where the plaintiff had not attained the age of sixteen years, at the time of the marriage.

II. Where the marriage took place without the consent of her father, mother, guardian or other person having the legal charge of her person.

III. Where it was not followed by consummation or cohabitation, and was not ratified by any mutual assent of the parties after the plaintiff attained the age of sixteen years. [Thus amended by L. 1887, ch. 22].

This section was derived from L. 1841, ch. 257.

In what other cases marriage may be annulled [CODE CIV. PRO., § 1743]. — An action may also be maintained to procure a judgment, declaring a marriage contract void, and annulling the marriage, for either of the following causes, existing at the time of the marriage:

1. That one or both of the parties had not attained the age of legal consent.

2. That the former husband or wife of one of the parties was

living, and that the marriage with the former husband or wife was then in force.

3. That one of the parties was an idiot or lunatic.

4. That the consent of one of the parties was obtained by force, duress, or fraud.

5. That one of the parties was physically incapable of entering into the marriage state. But an action can be maintained, under this subdivision, only where the incapacity continues, and is incurable.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 20.

The Supreme Court has no inherent power to declare a marriage contract void. Neither has it inherent power to decree a limited or absolute divorce. The common-law courts, or a Court of Chancery in England, never possessed it. Whatever power, therefore, is possessed is given by statute. The court can exercise no power on the subject of divorce, except what is expressly specified in the statute. Peugnet v. Phelps, 48 Barb. 566. It therefore follows that no action can be maintained to procure a judgment annulling a marriage, except for the causes specified in these sections of the Code. See also Wightman v. Wightman, 4 Johns. Ch. 343; Ferlat v. Gojon, 1 Hopk. 478; Burtis v. Burtis, 1 Hopk. 557.

In the case of Palmer v. Palmer, 1 Paige, 276, it was held that the Chancery Court, to whose jurisdiction the Supreme Court has succeeded, had no power even with the consent of the parties to decree an absolute or partial dissolution of the marriage contract, except in the special cases provided for by statute. But, in the case of Perry v. Perry, 2 Paige, 501, it was held that that part of the common law of England, which rendered a marriage contract absolutely void in certain cases, formed a part of the law of this State, and may be enforced by the appropriate tribunals independent of any statutory provisions.

The Supreme Court has no inherent power to grant a divorce or separation, and can exercise such authority only as it is conferred by the legislature. But in actions to annul marriage it is otherwise, for in such actions the court has inherent jurisdiction. Wood v. Wood, 61 App. Div. 96.

Residence of parties.— The Supreme Court of New York has jurisdiction of an action to annul a marriage contracted within this State, though both parties are non-residents. The court may acquire jurisdiction of such non-resident defendant by service by publication. Becker v. Becker, 58 App. Div. 374.

Where the former husband or wife of one of the parties is living.— Where, in an action by a husband against his wife, to obtain a decree declaring void a marriage between them, for the reason that the defendant, at the time of such marriage, had a husband living and

from whom she had never been divorced, the facts alleged in the complaint are undisputed, the marriage between the parties is absolutely void, and no court can hesitate to decree the nullifying of the marriage.

The word "may" in the statute conferring power upon a court to annul such a marriage, means "must." Appleton v. Warner, 51 Barb. 270.

The mere fact that a wife has absented herself for five years, and that her husband has not heard from her in that time, does not justify him in marrying again; it must appear that he acted as a reasonable man desiring to act in good faith would have acted under the circumstances. Gall v. Gall, 114 N. Y. 109.

The provision for the voidance of a second marriage contracted by a person whose former spouse has been absent five years, applies only where the absentee has been discovered to be still alive. Nesbit v. Nesbit, 3 Dem. 329.

Where a woman marries a month previous to obtaining a divorce from her first husband, the second marriage will be annulled at the suit of the second husband having no knowledge of the first marriage and where there is no issue. McCarron v. McCarron, 26 Misc. 158.

Where a common-law marriage is followed by cohabitation, there is a legal marriage, and where the wife marries again in the lifetime of the husband, the second husband is entitled to have his marriage annulled. Herz v. Herz, 34 Misc. 125.

Where one of the parties was an idiot or lunatic. — In the case of Banker v. Banker, 63 N. Y. 409, it appeared in an action to annul a marriage upon the ground of the lunacy of the husband, that two days after the marriage an inquisition was found declaring the husband to be of unsound mind, and that he had been so for six months previous; the wife, at the time of the marriage, had notice that proceedings would be instituted to declare the husband a lunatic.

It was held that the inquisition was conclusive against subsequent acts and dealings, and presumptive only against prior ones. It was, therefore, only presumptive evidence of the husband's incapacity at the time of the marriage.

A man in his last illness, being of unsound mind, contracted marriage *per verba de praesenti* with the woman who was attending him as nurse, and died without a consummation. The marriage was held to be void upon the ground that a lunatic is incapable of making such a marriage contract, and it is competent for any court, where the validity of it is incidentally involved, to treat it as a nullity. Jaques v. Pub. Adm'r, 1 Bradf. 499.

Where plaintiff is not of age of consent. — An action to annul a marriage is made out under section 1743 where the plaintiff was not of the age of legal consent and has not cohabitated with her husband. Silveira v. Silveira, 34 Misc. 267.

Annulment because of fraud. — The fraud which will lead the court to annul a marriage must be such as shocks the sense of fairness

and is successful by its very audacity and baseness. Scott v. Shufelt, 5 Paige, 43; Ferlat v. Gojon, 1 Hopk. 478; Sloan v. Kane, 10 How. Pr. 66; Clarke v. Clarke, 11 Abb. Pr. 228; Klein v. Wolfsohn, 1 Abb. N. C. 134.

Where a shrewd, designing, lewd and unchaste woman in middle age, knowing that an old man, who is deaf, and living in seclusion, is a firm believer in spiritualism, takes advantage of such belief, seeks his acquaintance pretending to be a medium and receiving communications from spirits commanding that they marry, and that the old man convey to her valuable property, claims to be a clairvoyant physician, and to be able to cure his deafness, and by other frauds and devices induces the old man to marry her and to convey to her the property, the marriage and conveyance will be set aside, as procured by fraud and undue influence, when the court is satisfied from all of the evidence that they were so procured. Hides v. Hides, 65 How. Pr. 17.

A marriage will not be annulled for fraud where after the commencement of the action the parties voluntarily cohabited as husband and wife with knowledge of the fraud. Steimer v. Steimer, 37 Misc. 26.

In the case of Moot v. Moot, 37 Hun, 288, it appeared that a girl just beyond the statutory age of consent, while absent from home on a visit to relatives, was induced by the defendant, who was twenty-four years old, and had been employed for about four months upon the farm of the plaintiff's father, to enter the house of a clergyman, and have a marriage ceremony performed. The plaintiff at first refused to be married without the consent of her parents and because of her youth; the defendant falsely stated to her that her parents knew the object of his visit, and that they would not care or object, and assured her that she need not live with him for three or four years, and that the ceremony should be kept secret, and that she should continue to reside with her parents and attend school. The marriage was never consummated. It was held that as these representations related to the very essence of the contract, and were false, and made with intent to induce the plaintiff to consent, they furnished sufficient ground to uphold a judgment declaring the marriage contract void, as having been obtained by fraud.

If a party knowing that he cannot be the father of a bastard child, is induced to marry the mother to avoid prosecution, it is no ground for annulling the marriage contract on the ground of fraud, although he afterwards be able to establish the fact that the child was not his. Scott v. Schufeldt, 5 Paige, 43.

A man's ignorance of a woman's pregnancy at the time of marriage, without positive concealment by her, is not a ground for annulling a marriage. Barth v. Barth, 5 Monthly Law Bulletin, 87.

A marriage will not be annulled on the ground that the plaintiff was induced to contract it by reason of the false representations that the defendant was pregnant by him. Tait v. Tait, 3 Misc. 218.

The fact concealed from the husband that the wife, before marriage, had given birth to an illegitimate child, does not, in itself, constitute such fraud as will authorize an annulment of the marriage. Shrady v. Logan, 17 Misc. 329.

The fact that a wife induced her husband to marry her by falsely representing that she had borne him a child, and by palming off a child upon him, which was neither his nor hers; held, not to be fraud under subdivision 4 of section 1743 of the Code, unless it appears that the child was the essence of the marriage contract. DiLorenzo v. DiLorenzo, 71 App. Div. 509.

In a recent case, reported in 21 Misc. Rep. 765, it appears in an action brought by a mother to annul for fraud, the marriage of her minor daughter, that, during the engagement, and before the marriage ceremony, the defendant had stated to the daughter that he was in good health that, in reliance upon the statement, she entered into the marriage relation, that he then was afflicted with a local, chronic and contagious venereal disease, which she contracted from him, and from which she suffered severely and was still suffering at the time of the trial. This was held to be sufficient to justify an annulment of the marriage upon the ground that the husband was guilty of fraud in stating to the person who subsequently became his wife that he was physically sound and capable of exercising the marital functions when, in fact, the exercise of these functions was certain to afflict her with a loathsome disease.

Where a wife sues for the annulment of marriage upon the ground of fraud, which consisted in the husband's having represented himself to be in good health, when in fact he was affected with a physical disease, the court may, by its inherent power, compel a physical examination. But this extreme remedy will not be granted before trial, nor upon the trial, unless necessary to prevent failure of justice. The application for examination before trial does not rest upon statute, nor on the Code of Civil Procedure, section 872, nor need it comply with that section. Anonymous, 34 Misc. 109.

The fact that a husband concealed from his wife the fact that prior to their marriage he had unlawfully cohabited with another woman, and had had children by her, is not such fraud as will warrant an annulment of the marriage. The fraud contemplated by subdivision 4 of section 1743 of the Code is fraud relating to the essentials of the contract. Glean v. Glean, 70 App. Div. 576.

A husband cannot allege, as a ground for annulling a marriage, that his wife made false representations to him whereby he was induced to marry her, when he otherwise would not have done so, when, during cohabitation he discovered the falsity of such representations, yet continued to cohabit with her for two years after such discovery. Muller v. Muller, 21 Weekly Dig. 287.

A man's secret following of a criminal occupation, at the time of making the engagement of marriage, furnishes a ground to the woman for an annulment of her marriage with him for fraud, where she married him after a long acquaintance and due inquiry, under a mistaken belief in his representations that he was a law-abiding citizen of good moral character, and had not condoned his fraud by cohabitation after she had discovered the truth. King v. Brewer, 8 Misc. 587, 31 Abb. N. C. 325. It appeared in this case that the defendant enjoyed, at the time of the marriage, a good reputation in society as a young man who attended church, and acting the part of a law-abiding citizen, but had for some time previous to the marriage, unknown to the plaintiff, secretly run a pool room. The plaintiff was a young woman of twenty, in good standing in society, and had known the defendant for some years without learning anything to his detriment. She had also been assured as to his character by her brother, who made inquiries in her behalf (the father being dead), and also by her pastor. A few months after the marriage the defendant was arrested for obtaining money under false pretenses, and confined in prison. While there the plaintiff frequently visited him under the belief that it was his first offense, but on his release, shortly afterwards, having in the meanwhile discovered the truth, she refused to cohabit with him. It was held that the plaintiff's consent to the marriage had been obtained by fraud which she had not condoned by her subsequent conduct, and that she was entitled to have it annulled.

Where the defendant, by fraudulently representing himself as an honest, industrious man, induced the plaintiff, a young woman, to marry him, when he was in fact a notorious thief, and was afterwards committed to prison, the marriage should be annulled for fraud. Keyes v. Keyes, 6 Misc. 355.

In the case of Clarke v. Clarke, 11 Abb. Pr. 228, the facts appeared that the husband, before marriage to his present wife, had represented to her that his former wife was dead, whereas, in truth, she was living, he having been divorced from her. It was held that these representations, even if fraudulent, and though the plaintiff would not have married him, if she had known the truth, were not sufficient for granting her a decree nullifying the marriage. It was not a fraud in the material matter or thing, even the ordinary or legitimate purpose of marriage, and supposed intent of the parties in contracting the marriage.

The husband's fraud in inducing the marriage by false representations as to his character and property is not a ground for an annulment of the marriage. Klein v. Wolfsohn, 1 Abb. N. C. 134.

If a woman represents herself as a maiden, and it turns out she is a widow, or a divorced woman, having the legal capacity to re-marry; or a man represents himself as a bachelor, when he is a widower or a divorced man, having the legal capacity to re-marry, the misrepresentation would not go to the foundation of the marriage contract; it would be one of

those frauds for which the law affords no relief upon the ground that the most serious considerations of public policy and good morals affect the relation and demand that it should indisoluble, except for the gravest causes. Fisk v. Fisk, 12 Misc. 466. Judge McAdam, in this case, remarks: " Marriage is the corner-stone of the social fabric, and, unlike other contracts, that of marriage cannot be rescinded by the voluntary act of the parties. Indeed, the statute does not provide that fraud shall vitiate the contract of marriage, but only confers the authority on the court to decree an annulment for such cause, if the nature of the fraud, or the degree or amount of the deception practiced be deemed sufficient to warrant the court in declaring the contract void. It is a contract to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage.

The case of Fisk v. Fisk, was affirmed in the App. Div. and is reported in 6 App. Div. 432. Judge Rumsey, in writing the opinion of the court in this case, says: " While the jurisdiction to annul a marriage is based upon the ordinary equity jurisdiction of the court, the fraud which will induce the court to set aside the marriage is sometimes different from the fraud which will induce the court to set aside an ordinary contract which has been executed, or even a contract which is still executory. The contract of marriage is something more than a mere civil agreement between the parties, the existence of which affects only the parties themselves. It is the basis of the family. Its dissolution, as well as formation, is a matter of public policy in which the body of the community is deeply interested, and it is to be governed by other considerations than those which obtain with regard to an ordinary civil contract *inter partes*. Although recently the courts have been strict in laying down and maintaining rules as to the annullment of this contract, and in requiring a higher degree of proof before permitting it to be set aside for fraud, than is requisite for the annullment of ordinary contracts, and insisting also that the fraud which shall invalidate the contract must be something more than mere misrepresentation as to collateral matters. The rule is well settled that no fraud will void 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 from entering into the marriage relation, or, having entered into it, would preclude the performance of the duties which law and custom impose upon the husband or wife as a part of that contract. (Citing 1 Bishop on Marriage & Divorce, §§ 183, 184; Schouler on Husband & Wife, § 27; Reynolds v. Reynolds, 3 Allen, 605.) Within that rule it has been held that fraudulent representations of one party as to birth, social position, fortune, good health and temperament do not vitiate the contract; and so also, it seems to be a well established rule that no misconception of one party as to the character, or fortune, or temper of the other, however brought about, will support an allegation of

fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. If, when the relation is entered into, the party is competent to make that contract, is mentally competent to do the duties which the contract involves and physically able to meet its obligations, nothing more can be required; and, however, the other party may be disappointed as to physical or mental characteristics which he or she expects would exist, such disappointment is no ground for setting aside a contract which the public good requires should be rendered indissoluble, except for the gravest reasons. It is well settled that the mere fact that the woman, previous to her marriage, has, without the knowledge of her husband, been guilty of incontinence, affords no ground for setting aside the marriage contract, if she has reformed. If that be true, much more may it be said that where the only objection is that the party complained of has once been married, but is now free to enter into a new relation, it can afford no possible barrier to her entering into such relation; and if her previous condition was not disclosed, that is no such fraud as would warrant the court in setting aside the marriage contract."

The court, in this case, disapproves of the case of King v. Brewer, 8 Misc. 587, where a marriage was annulled because the defendant was engaged in a disreputable occupation of which the plaintiff was ignorant at the time of the marriage. The case of Clarke v. Clarke, 11 Abb. Pr. 228, was approved.

If a person procures a marriage by false representations between himself and a woman, when by law he is not competent to enter into a marriage contract, he is liable to her in damage. If the marriage is void under the statute, an action may be maintained against the fraudulent husband without first procuring a formal annulment of the contract. Blossom v. Barrett, 37 N. Y. 434.

Annulment for duress. — A marriage may be annulled on the ground of duress, where the duress was exercised by the defendant's relatives and friends, and not by the defendant personally. Anderson v. Anderson, 74 Hun, 56, affirmed 147 N. Y. 719.

Bishop on Marriage & Divorce, § 212, says: "Force, to constitute in law duress, must be unlawful. A contract, for example, to free the maker from lawful arrest or to avoid such threatened arrest is not, therefore, invalid, and a man lawfully arrested on a process for bastardy or seduction cannot, if he marries the woman to procure his discharge, have the marriage declared void as procured by duress. Nor is it otherwise though he have a good defense and enters into the marriage simply to avoid being imprisoned under the process, and he afterwards discovers that he might have made his defense successful. But, if the process of arrest is void, or otherwise the imprisonment is unlawful, and he marries the woman to regain his liberty, the marriage will, on his prayer, be set aside. Perhaps the same result will follow if the arrest, while not tech-

nically illegal, is both malicious and without probable cause. Citing State v. Davis, 79 N. C. 603; Johns v. Johns, 44 Tex. 40; Sickles v. Carson, 26 N. J. Eq. 440; Dies v. Winne, 7 Wend. 47; Williams v. State, 44 Ala. 27.

By section 562 of the Penal Code it is provided that: "A person who falsely personates another and in such assumed character marries, or pretends to marry, or sustains the married relation towards another, with or without the connivance of the latter, is punishable by imprisonment in a state prison for not more than ten years."

It is provided by section 563 that "An indictment cannot be found for such crime, except upon the complaint of the person injured, if there be any such person living, and within two years after the perpetration of the crime."

By section 281 of the Penal Code it is provided that: "A person who, by force, means or duress, compels a woman against her will to marry him, or to marry any other person, as to be defiled, is punishable by imprisonment for a term not exceeding ten years, or by a fine of not more than one thousand dollars, or by both."

Annulment because of physical incapacity. — To authorize a judgment nullifying a marriage because of the physical incapacity of the defendant, it must be shown that the incapacity existed at the time of the marriage and was incurable. Both these facts must be established by the most satisfactory evidence, although they are admitted by the defendant, such a judgment will not be allowed until a surgical examination has been had for the purpose of ascertaining whether the alleged incapacity is incurable, if such defendant is within the jurisdiction of the court. The court has the necessary power and will compel the parties to submit to such a surgical or other examination as may be necessary to ascertain the facts for the correct decision of the cause; but, in a suit brought against a female, the court will not compel her to submit to further examination, if it appears that she has been already sufficiently examined by competent surgeons, whose testimony can be obtained by the complainant, to show that her physical incapacity is incurable. Devenbagh v. Devenbagh, 5 Paige, 554.

In this case Chancellor Walworth says: " Impotence on the part of a female which cannot be cured by proper medical treatment or a surgical operation is a case of very rare occurrence. Dr. Beck, in the last edition of his very learned and most valuable work on the subject of medical jurisprudence, after an elaborate examination of various cases of absolute and temporary incapacity for sexual intercourse, in both sexes, which have been noted or referred to by medical writers and others, arrives at the conclusion, from a review of the causes of such incapacity, that the cases of absolute or incurable impotency are very few, and the number of such cases has been greatly reduced by the improvements in surgery.

" In every case of this kind, therefore, it is necessary that the court

should proceed with the greatest vigilance and care, not only to prevent fraud and collusion by the parties, but also to guard against an honest mistake under which they may be acting, merely from the want of proper medical advice and assistance. From the very nature of the case, it appears to be impossible to ascertain the fact of incurable impotence, especially where the husband is the complaining party, except by a proper surgical examination by skilful and competent surgeons, in connection with other testimony.

In an action to annul a marriage on the grounds of sterility it was held that a woman who had her ovaries removed by an operation, and is incapable of conceiving, is not unable to enter into the marriage state so long as there is no impediment to physical commerce. Held, further, that where a woman before marriage had informed her intended husband that she had had an operation which made it doubtful as to whether she could bear children, that the marriage cannot be annulled upon the grounds of fraud, especially where the husband continued to cohabit with her after learning of her physical defects. Wendel v. Wendel, 30 App. Div. 447.

Where a wife married for two years produces evidences that she is still *virgo intacta*, and sues to annul marriage upon the ground of incapacity of her husband, the court by virtue of its equitable powers may direct a surgical examination to be made by a competent surgeon before a referee. Cahn v. Cahn, 21 Misc. 506.

Section 2. Who May Maintain Actions for Annulment of Marriage.

Who may maintain action when party was under age of consent [CODE CIV. PRO., § 1744.]—An action to annul a marriage, on the ground that one of the parties had not attained the age of legal consent, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or where it appears that the parties, for any time after they attained that age, freely cohabited as husband and wife.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 21.

Where an action is brought by a husband's mother to annul a marriage upon the ground that her son had not attained the age of legal

consent, the wife cannot interpose a counterclaim alleging adultery of the husband and demanding a divorce, because the son is not a party to the action, and it constitutes no defense where the action is brought by the mother. Such counterclaim is demurrable. Slocum v. Slocum, 37 Misc. 143.

As to infant as party in action for annulment brought by mother, see Fero v. Fero, 62 App. Div. 470, under § 1750, *post*.

Id.; when former husband or wife was living [CODE CIV. PRO., § 1745.]— An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties, during the lifetime of the other, or by the former husband or wife. Where it appears, and the judgment determines, that the subsequent marriage was contracted, by at least one of the parties thereto, in good faith, and with the full belief that the former husband or wife was dead, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes the legitimate children of the parent who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will. This section shall be construed to extend to all cases where the judgment or decree of nullity of such subsequent marriage is rendered after the passage of this act, whether such subsequent marriage was contracted before or after the passage hereof. [Thus amended by L. 1882, ch. 401.]

This section, as it stood before the amendment of 1882, was derived from R. S. Pt. II, ch. 8, tit. 2, §§ 22, 23.

A second marriage, where a wife marries after five years' absence of her former husband, believing him to be dead, can be adjudged void only at the instance of one of the parties to it during the life of the other. Cropsey v. McKinney, 30 Barb. 47; Griffin v. Banks, 24 How. Pr. 213, reversed on other grounds, 37 N. Y. 621; Anon. 15 Abb. N. S. 171.

In the case of In re Borrowdale, 28 Hun, 336, it was held that where a husband has procured a judgment divorcing him from his wife and forbidding her to marry again, a marriage contracted by her, even where her former husband has been absent for five years without being known to her to be living during that time, is void, and its invalidity may be asserted by the heirs-at-law and next-of-kin of the second husband after his death. See Gall v. Gall, 114 N. Y. 109.

Id.; where party was an idiot [CODE CIV. PRO., § 1746]. — An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained at any time during the lifetime of either party, by any relative of the idiot, who has an interest to avoid the marriage.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 24.

Id.; where party was a lunatic [CODE CIV. PRO., § 1747]. — An action to annul a marriage, on the ground that one of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic in that condition, and during the life of the other party to the marriage, by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after restoration to a sound mind; but, in that case, the marriage shall not be annulled, if it appears that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, §§ 25, 27.

Action by next friend of idiot or lunatic [CODE CIV. PRO., § 1748].— Where no relative of the idiot or lunatic brings an action to annul the marriage, as prescribed in either of the last two sections, the court may allow an action for that purpose to be maintained, at any time during the lifetime of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply, where the marriage might have been annulled, at the suit of the lunatic, as prescribed in the last section.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 26.

Issue, when entitled to succeed, etc. [CODE CIV. PRO., § 1749].— A child of a marriage, which is annulled on the ground of idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 28.

Who may maintain action on the ground of force, fraud, etc. [CODE CIV. PRO., § 1750].— An action to annul marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained. Such an action may also be maintained, during the lifetime of the other party, by the parent or the guardian of the person of the party, whose consent was so obtained, or by any relative of that party, who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress, if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, §§ 30, 31.

In an action by the mother of an infant to annul the infant's marriage, under section 1750 of the Code, upon the ground that the infant's consent was obtained by fraud, duress, etc., the infant is a necessary party to the action. Fero v. Fero, 62 App. Div. 470.

Where a decree of annulment was fraudulently obtained by collusion between an infant wife and her husband, it was held that the wife's mother as *amicus curiae* could attack the decree of annulment for fraud. Steimer v. Steimer, 37 Misc. 26.

Custody, maintenance, etc., of issue of such a marriage [CODE CIV. PRO., § 1751].— The court must, upon the application of the plaintiff, award the custody of the children of a marriage, which is annulled on the ground of force, duress, or fraud, to the innocent parent, unless it ap-

pears that the latter is unfit, for any reason, to have the custody of one or more of the children, in which case the court must give such directions relating thereto, as the interests of the child or children require. The judgment may make provision for the education and maintenance of the children, out of the property of the guilty parent.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 32.

Action on ground of physical incapacity [CODE CIV. PRO., § 1752].— An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage. [Thus amended by L. 1895, ch. 809.]

This section as it stood before the amendment of 1895, was derived from R. S. Pt. II, ch. 8, tit. 1, § 33.

It was held, in the case of Kaiser v. Kaiser, 16 Hun, 602, that the provision in this section that the action must be begun within two years, as the section then read, was in effect a statute of limitation, and that the action is not barred by the lapse of that time, unless that objection is set up in the answer.

Section 8. Trial and Judgment.

No judgment by default; evidence; trial by jury [CODE CIV. PRO., § 1753].— In an action brought as prescribed in this article, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the

facts, upon which the allegation of nullity is founded. And the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced. In such an action, except where it was founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may, of its own motion, make an order directing the trial by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled, as prescribed in section 970 of this act.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, §§ 35, 36, and R. S. Pt. III, ch. 1, tit. 2, § 45.

Where an action was brought by a husband to dissolve a marriage on the ground that he was induced to enter into it by the fraudulent concealment of a disease with which his wife was afflicted, and also on the ground that by reason of such disease she was physically incapable of entering into the marriage state, and there was no reason to suppose that her physical incapacity would be removed. It was held that a compulsory reference could not be ordered unless the plaintiff waived his right to a trial by jury. The exception in this section, authorizing a reference in an action to annul a marriage because of physical incapacity of one of the parties embraces only cases in which, from a physical incapacity, other than that which results from sickness, the marriage cannot be consummated. Morell v. Morell, 17 Hun, 324. See Supreme Court Rules, 1900, Nos. 72, 73, 74, 76 (*post*, pp. 45, 47, 51, 53, 111, 112, 113). See Code Civ. Pro., §§ 1012 (*post*, pp. 113, 114), 1229 (*post*, p. 115).

See Carrie v. Davis, 41 App. Div. 520, for a case where a bill of particulars was denied in an action to annul a marriage because of the fraud of the wife in contracting such marriage knowing she had another husband living.

In an action to annul a ceremonial marriage the Supreme Court has power to grant alimony and counsel fees *pendente lite*, although the provisions of the Code of Civil Procedure are silent as to alimony and counsel fees. Higgins v. Sharp, 164 N. Y. 4.

A marriage will not be annulled on confession of the defendant alone, and the fact that the plaintiff confirmed the confession does not corroborate it. Steimer v. Steimer, 37 Misc. 26.

Where a judgment of annulment of marriage is taken on default and contains erroneous provisions, the proper remedy is by motion to correct the judgment and not by appeal. Park v. Park, 24 Misc. 373.

Judgment annulling a marriage; how far conclusive [CODE CIV. PRO., § 1754].— A final judgment, annulling a marriage, rendered during the lifetime of both the parties, is conclusive evidence of the invalidity of the marriage, in every court, of record or not of record, in any action or special proceeding, civil or criminal. Such a judgment, rendered after the death of either party to the marriage, is conclusive only as against the parties to the action, and those claiming under them.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 37.

Attention is called to the new prohibition contained in section 1774, Code Civil Procedure, as amended 1902 (*post*, p. 110), which forbids the entry of a decree of annulment until the *expiration of three months* after filing decision of court or report of referee.

Where a judgment has been rendered in this state annulling a marriage, the courts of this state may entertain a suit to set it aside on the ground of fraud, and the summons therein may be served by publication upon a non-resident husband by whom the judgment was obtained. Everett v. Everett, *22* App. Div. 473.

How next friend of infant, lunatic and idiot, allowed to use [CODE CIV. PRO., § 1755].— An order, allowing a person to maintain an action, as the next friend of an infant, as prescribed in section 1744 of this act, or as the next friend of an idiot or lunatic, as prescribed in section 1748 of this act, may be granted by the court, in its discretion, without notice, or upon notice to such persons and in such a manner, as it deems proper. A motion to vacate such an order must be made at a term held by the judge who granted it, unless he is dead, out of office, or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge. But where such an order has been granted, the court, to which application for final judgment is made, may dismiss the complaint, if justice so requires, although in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

CHAPTER IV.

DIVORCE.

[*Code Civ. Pro.* §§ *1756–1761.*]

SECTION 1. WHEN ACTIONS FOR DIVORCE MAY BE MAINTAINED.
2. PLEADINGS.
3. TRIAL.
4. PROOF OF ADULTERY.
5. CONNIVANCE, COLLUSION, CONDONATION AND RECRIMINATION.
6. EFFECT OF JUDGMENT GRANTING DIVORCE.

Section 1. When Actions for Divorce may be Maintained.

Particular cases specified [CODE CIV. PRO., § 1756]. — In either of the following cases, a husband or a wife may maintain an action, against the other party to the marriage, to procure a judgment, divorcing the parties and dissolving the marriage, by reason of the defendant's adultery:

1. Where both parties were residents of the state, when the offence was committed.

2. Where the parties were married within the state.

3. Where the plaintiff was a resident of the state, when the offence was committed, and is a resident thereof, when the action is commenced.

4. Where the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State.

This section was derived from R. S. Pt. II, ch. 8, tit. 4, § 38.

Jurisdiction of courts in actions for divorce. — Prior to the year 1787, the courts of this state had no jurisdiction of the subject of divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the colonial governor and his council or to the legislature for relief. In that year an act was passed authorizing the Court of Chancery to entertain proceedings, and when the fact was made to

appear, to decree divorce for adultery. Erkenbrach v. Erkenbrach, 96 N. Y. 456, citing Burtis v. Burtis, 1 Hopk. 557; Griffin v. Griffin, 47 N. Y. 134, 138. In this case it is stated that the courts in this State have no common law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute.

Courts of chancery in this state, have, in some cases, entertained bills to declare the nullity of marriages, independently of any statutes conferring jurisdiction. But these were cases in which the marriage was sought to be declared void, for some cause for which chancery had power to cancel or avoid all contracts, such as lunacy or fraud, and it was held that the marriage contract was not excepted from the operation of this general jurisdiction. But, in all other cases, it must be conceded that the jurisdiction of the court of chancery of this state in actions for divorce, either on the ground of nullity or for cause arising subsequent to the marriage, is founded wholly upon the statutes. Griffin v. Griffin, 47 N. Y. 134, 138.

It is well settled that the courts of this state have no common-law jurisdiction over the subject of divorces, and that their authority is confined to the exercise of such express and incidental powers as are conferred by statute. Chamberlain v. Chamberlain, 63 Hun, 96. See also Peugnet v. Phelps, 48 Barb. 566; Blanc *v.* Blanc, 67 Hun, 384.

The qualifications of a husband or wife to bring an action for divorce in this state, and the grounds upon which a decree may be pronounced are matters of positive legislation. Dickinson v. Dickinson, 63 Hun, 516.

Origin of divorce laws in this state. — The colony of New York never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce or authorizing divorce in any case whatever was ever enacted by the legislature of the colony. Some special applications were made to the colonial legislature; but all such applications were refused. Chancellor Sandford, in the case of Burtis v. Burtis, 1 Hopk. Ch. 557, says: "According to all the information which I can obtain from records or otherwise, it appears that no divorce took place in the colony of New York during more than one hundred years preceding the time when the colony became a state, and that the only divorces which ever took place in the colony were the four granted by Governor Lovelace in 1670 and 1672. Thus it appears that the law of England concerning divorces and matrimonial causes was never adopted in the colony of New York. It was not adopted in fact or in practice and it was never the law of the colony."

In the case of Griffin v. Griffin, 47 N. Y. 134, it is stated: " Prior to 1787, there was no tribunal in this state authorized to grant a divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the legislature for relief. In 1787 an act was passed reciting that it was more advisable for the legislature to make general provi-

sions for such cases, than to afford relief to individuals without a proper trial, and therefore conferring jurisdiction upon the court of chancery to decree divorces in cases of adultery. This was the only cause of divorce until the year 1813, when divorces, on the application of the wife, on the ground of cruel treatment, was authorized, and in 1824 the husband was enabled to sue for a divorce on the same ground."

In the case of Jones v. Jones, 90 Hun, 414, it was contended, as in the case of Burtis v. Burtis, *supra*, that the ecclesiastical law of England, so far as it related to the subject of divorce, became a part of its common law, and was therefore, by the Constitution of 1777, made a part of the law of the state, subject, nevertheless, to such alterations as the legislature should make. The court followed the case of Burtis v. Burtis, and held that the ecclesiastical law of England relative to divorce was never adopted in this state, and that the statutes of this state are original regulations.

Residence of parties. — To maintain an action in the courts of this state it must appear that, where the marriage was solemnized without the state, that both parties were inhabitants of the state at the time of the adultery. Mix v. Mix, 1 Johns. Ch. 204.

If the marriage was solemnized without the state, it must appear that both parties were residents of the state when the offense was committed, or that the plaintiff was a resident of the state when the offense was committed and the action was commenced, or if the offense was committed within the state, that the plaintiff was a resident at the time of commencing the action. The residence must be actual and *bona fide*. Williamson v. Parisien, 1 Johns. Ch. 389.

The word "resident," as used in this section, is synonymous with inhabitancy or domicile as distinguished from temporary residence. It means permanent abode. De Meli v. De Meli, 120 N. Y. 485. The theoretical presumption that the residence of the wife follows that of the husband, is not sufficient to meet the jurisdictional requirements as to the residence of the parties, specified in this section. There must be an actual residency on the part of the wife. Hewes v. Hewes, 40 N. Y. St. Rep. 680, 16 N. Y. Supp. 119; Gray v. Gray, 143 N. Y. 354, 359.

Where the plaintiff is a resident of this state, was a resident when the offense charged was committed, and when the action was commenced, and the marriage was solemnized here, the courts of this state have jurisdiction of an action for a divorce, though the defendant be a non-resident, and service was made upon him by publication. Scragg v. Scragg, 44 N. Y. St. Rep. 845, 18 N. Y. Supp. 487.

By section 1768 of the Code (*post*, p. 85), it is provided that if a married woman dwells within the state, when she commences an action against her husband for a divorce, she is deemed a resident thereof, although her husband resides elsewhere.

The provisions of this section authorizing an action for divorce, where the parties were married within this state, does not change, nor was it

intended to change, the rule that the courts in this state have no power to adjudge the status of the parties residing beyond its jurisdiction. Gray v. Gray, 143 N. Y. 354–357.

In the case of Dickinson v. Dickinson, 63 Hun, 516, the allegations contained in the complaint, as to the residence of the plaintiff, were put in issue by the answer. The court held that it was improper to allow the plaintiff, by her own testimony, to prove her residence. Under section 831 of the Code of Civil Procedure, a husband or wife is not competent to testify against the other upon the trial of an action founded upon the allegations of adultery, except to prove the marriage, or disprove the adultery. In this case it was, therefore, improper for the plaintiff to testify as to jurisdictional facts which did not relate to the fact of the marriage, and did not tend to disprove a charge of adultery against herself.

Penalty for advertising to procure divorce [PENAL CODE, § 148a].—Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind offering to procure or to aid in procuring any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage, appear or act as attorney or counsel in any suit for alimony or divorce or the severance, dissolution or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. This act shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state. [Added, L. 1902, ch. 203, to take effect Sept. 1, 1902.]

Section 2. Pleadings.

Complaint.— In an action for a divorce on the ground of adultery, the complaint must allege the places at which the adultery was committed. This allegation must be definite and certain. A complaint which alleges that the defendant, from a certain date up to the time of the verification of the complaint, went to, visited, and at various houses or places of prostitution or assignation in the city of New York (which times and places the plaintiff cannot particularize), committed adultery, and had carnal connection with a person therein named, is too broad

and general and must be rendered definite and certain as to the places or be stricken from the complaint. Cardwell v. Cardwell, 12 Hun, 92.

In the case of Wood v. Wood, 2 Paige, 108, Chancellor Walworth says: "The only safe and prudent course is to require the charge, whether of crimination or recrimination, to be stated in the pleading and in the issues in such a manner that the adverse party may be prepared to meet it on the trial. If the persons with whom the adultery was committed are known, they must be named in the pleading, and the adultery must be charged with reasonable certainty as to the time and place. If they are unknown, that fact should be stated in the pleading and the time, place and circumstances under which the adultery was committed should be set forth. Neither party has a right to make such a charge against the other on mere suspicion relying upon being able to fish up testimony before the trial to support the allegation. When information sufficient to justify the charge is given, the party will be possessed of the requisite facts to put the charge in a distinct and tangible form on the record."

Where a pleading alleges that the parties with whom the adultery was committed are unknown, and does not state the times or places of such adultery, it has been held that the pleader was warranted in not giving the names of the persons with whom the adultery was committed because they were unknown, but he is not warranted in omitting to state the times or places at which the offenses were committed. Tim v. Tim, 47 How. Pr. 253.

In the case of Codd v. Codd, 2 Johns. Ch. 224, one of the earlier cases in chancery in this state, the bill charged the defendant with adultery in this state and elsewhere, without naming with whom or that the name of the person was unknown, and without making any statement that the charge could not be more specific, or why it was so vague and general, it was held that the adultery was not sufficiently specified to entitle the complainant to an award of a feigned issue to try it.

In the case of Germond v. Germond, 6 Johns. Ch. 347, the chancellor concedes and holds that it is not necessary to name the person with whom the defendant has committed the adultery where his name is unknown and no objection is made or suggested that the issues are improper or too broad in charging the commission of the offense to have been in the county of Rensselaer, or in the city of New York, without the specification of any particular place therein.

In the case of Mitchell v. Mitchell, 61 N. Y. 398, the cases above referred to, and in addition the cases of Bokel v. Bokel, 3 Edw. Ch. 376; Heyde v. Heyde, 3 Sandf. Ch. 692; Strong v. Strong, 3 Robt. 719; Pramagiori v. Pramagiori, 7 Robt. 302, are discussed at length, and the rule is stated to be, where the complaint, in an action for divorce on the ground of adultery, alleges the commission of the offense with a person whose name is unknown to the plaintiff, at a time between certain specified dates, and in a town or city named, with the further

allegation that the plaintiff is unable to state more particularly the times and places, it is sufficient to authorize evidence in proof of the offense so charged, and, if it be proved, to sustain the action, although no proof be given of the offenses particularly charged.

The complaint should allege that the discovery by the plaintiff of the defendant's criminality took place within a certain time before the commencement of the action. By section 1758 of the Code (*post*, p. 59), an action for divorce must be commenced within five years after the discovery by the plaintiff of the offense charged. Zorkowski v. Zorkowski, 27 How. Pr. 37.

Supreme Court Rules.— Rule 72, as amended in 1900, provides that "When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order the reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

"When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

"In an action for divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interest requires that the examination of the witnesses should not be public, exclude all persons from the courtroom except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court." (For practice under the second paragraph of Rule 72 see notes, p. 51.)

Where the plaintiff, in his complaint, alleged that five years had not elapsed " since he discovered the fact that such adultery had been committed by the defendant, without his consent, connivance or procurement " it was held not to be a compliance with the above rule.

If a complaint is verified and alleges the averments required to be set forth by Rule 72 of the Supreme Court Rules, it is, in view of the incompetency imposed by section 831 of the Civil Code, *prima facie* evidence of the facts set forth, and the burden of proof is thereby shifted upon the defendant, who is bound to controvert and disprove such allegations as a matter of affirmative defense. Farace v. Farace, 61 How. Pr. 61, 1 Civ. Pro. R. 419 (see notes, p. 51).

Where the wife alleges the communication to her by her husband, long after marriage, of a disease, the fruit of an illicit connection, she is not bound to allege when, where, or with whom, he had the adulterous connection. Clark v. Clark, 7 Robt. 276.

Questioning legitimacy of children in complaint. — On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time. (Supreme Court Rules, 1896, No. 75.)

Supplemental complaint alleging adultery after commencement of suit. — The plaintiff will not be allowed to serve a supplemental complaint alleging adulteries committed by the defendant since the beginning of the action. This rule was laid down in the case of Milner v. Milner, 3 Edw. Ch. 114, and followed in Morange v. Morange, 2 N. Y. Law Bull. 30; Day v. Day, 4 Misc. 235, 24 N. Y. Supp. 873; Halsted v. Halsted, 26 N. Y. Supp. 758. In the latter case, Judge Giegerich says: " While a complete determination of the rights of the parties is desirable, I fail to see how the application can be granted without disregarding the rule, as laid down by the adjudications, that a new substantive cause of action, upon which a judgment can be had without connecting it with the original complaint, cannot be set up by supplemental complaint." It was contended in this case that a different rule was laid down in Blanc v. Blanc, 67 Hun, 384. But a distinction exists between the latter case and the cases above cited. In the latter case the defendant was permitted to serve a supplemental answer, pleading, by way of counterclaim, acts of adultery committed by the plaintiff after the suit was brought. The reason for the application of a different rule in the latter case is that the defendant cannot discontinue and sue over again, while a plaintiff can.

In an action for divorce the plaintiff cannot serve a supplemental complaint setting up acts of adultery committed after the action was commenced, even though the defendant has interposed a counterclaim setting up acts of adultery committed by the plaintiff. It seems

that the plaintiff by supplemental complaint can only set up facts bearing on the original cause of action as it existed when the cause of action was commenced, or facts occurring after the action was commenced which will affect the relief to which the plaintiff would be entitled. Faas v. Faas, 57 App. Div. 611.

Bill of particulars. — In the case of Cardwell v. Cardwell, 12 Hun, 92, an order was granted requiring the plaintiff to amend his complaint by stating the time and place where the misconduct is supposed to have taken place.

But the defendant is not necessarily, and as a matter of course, entitled to a bill of particulars. Mitchell v. Mitchell, 61 N. Y. 398.

To entitle his application for the bill to success, his probable inability to meet the allegations as set forth in the complaint should be shown, for, notwithstanding the very general nature of the allegation, he may be fully aware of the individual intended to be referred to in making it; and if he has that knowledge or information, then he cannot be misled or prejudiced in his defense by the omission to state the name, or give the description of the person in the complaint, or to designate the place where the misconduct may have occurred. The affidavit showing the defendant's inability to meet the allegations must be made by the defendant himself. It will not be sufficient if made by his attorney. De Carrillo v. De Carrillo, 53 Hun, 359.

In an action brought to obtain a divorce by an alleged wife the defendant is entitled to know and to ascertain, through the medium of a bill of particulars, the time when and the place where the alleged marriage took place (if a ceremonial marriage is claimed), by whom it was celebrated, and if a marriage is claimed to have taken place without any witnesses present the time when and the place where such contract was entered into. Bullock v. Bullock, 85 Hun, 373.

Where the answer makes a countercharge of adultery, alleging a specific and certain act, and alleging also that "at various other times in the years 1897 and 1898, the plaintiff committed adultery," with the co-respondent "at certain other places in said city and borough, to the plaintiff unknown," it was held that a motion for a bill of particulars should be denied. The defendant showed by affidavit that he expected to prove but one specific instance of adultery, though intending to prove intimacy and conduct on the part of the parties; held, that the bill of particulars should not be ordered in such a form as to exclude evidence of general course of conduct. Ketchan v. Ketchan, 32 App. Div. 26.

Answer [Code Civ. Pro., § 1757, subd. 1, in part].— The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint.

The defendant in an answer may set up the adultery of the plaintiff, or any other matter which would be a bar to the divorce, separation,

or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause. Rule 74, Sup. Ct. Rules, 1900.

If adultery is set up in the answer, it should be alleged in the same manner as when contained in a complaint. Morell v. Morell, 3 Barb. 236.

The adultery of the plaintiff, to constitute a defense, must be alleged in the answer; when so alleged it is a ground for affirmative relief in the same action. Anon., 17 Abb. Pr. 48.

The answer setting up the plaintiff's adultery need not allege the inhabitancy of the parties, or either of them, at the time of the offense. Leseuer v. Leseuer, 31 Barb. 330.

A denial in the answer of an allegation in the complaint that the plaintiff was, at the time of exhibiting her complaint, an actual resident of this state, does not, of itself, take from the court the power of awarding temporary alimony and expenses. Brinkley v. Brinkley, 50 N. Y. 184.

An allegation in the answer that defendant has no knowledge or information sufficient to form a belief as to whether the first wife was living at the commencement of the action, is a denial of a material allegation. Anon., 15 Abb. Pr. N. S. 311.

An answer, which seeks to avoid the alleged marriage as invalid by reason of a prior marriage of the defendant, must allege that fact, as it is not provable under a denial of the allegation of the marriage. Vincent v. Vincent, 16 Daly, 534, 17 N. Y. Supp. 497.

If the answer alleges various acts of adultery by the plaintiff, at various times and places, the plaintiff may make a motion for a bill of particulars. Kelly v. Kelly, 12 Misc. 457, 68 St. Rep. 133, 34 N. Y. Supp. 255.

The defendant cannot interpose, as a defense, either as a bar to the action or as a counterclaim, cruel and inhuman treatment and abandonment by the plaintiff of the defendant. The action for divorce is not founded on contract, but for the breach of a legal duty; and the transaction out of which it arises is not the marriage, but the adultery. Griffin v. Griffin, 23 How. Pr. 183. And see McNamara v. McNamara, 2 Hilt. 547, 9 Abb. Pr. 18.

Section 3. Trial.

Mode of trial; framing issues [CODE CIV. PRO., § 1757, subd. 1, in part].— If the answer puts in issue the allegation of adultery, the court must, upon the application of

either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the question to be tried must be prepared and settled, as prescribed in section 970 of this act. If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff, before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint, and also, by his own testimony or otherwise, that there is no judgment or decree in any court of the state, of competent jurisdiction, against him in favor of the defendant, for a divorce upon the ground of adultery.

Trial by jury on the question of adultery in divorce cases is a matter of right. Conderman v. Conderman, 7 N. Y. St. Rep. 789.

Where an issue of fact is raised it must in all cases be tried by a jury, unless such trial is waived, and a reference therein can only be ordered when the consent of both parties has been secured. Deitz v. Deitz, 4 Sup. Ct. (T. & C.) 565.

A right to a trial by jury in an action for divorce is a constitutional right, and would exist independent of the above section of the Code. Batzel v. Batzel, 42 Super. Ct. (J. & S.) 561; McCrea v. McCrea, 58 How. Pr. 220; Whitney v. Whitney, 76 Hun, 585; Sigel v. Sigel, 28 Abb. N. C. 308.

Right of co-respondent to intervene and defend [CODE CIV. PRO., § 1757, subd. 2. New; added by L. 1899, ch. 661].— In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of the pleading on the co-respondent named therein. At any time within twenty days after such service on said co-respondent, he may appear to defend such action, so far as the issues affect such co-respondent. If no such service be made, then at any time before the entry of judgment any co-respondent named in any of the pleadings shall have the right, at any time before the entry of judgment, to appear either in person or by attorney, in said action, and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter,

and he may appear to defend such action, so far as the issues affect such co-respondent. In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and disbursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.

The intention of subdivision 2 of section 1757 of the Code is to give a co-respondent in an action for absolute divorce the rights of a party. Thus, where a husband sues for divorce, and the defendant denies the adultery, setting up a counterclaim charging adultery with an unmarried woman, and the husband does not reply, the co-respondent is entitled to intervene, answer and demand a trial by jury of the issues so far as they affect her. Rixa v. Rixa, 35 Misc. 227.

Speaking of the rights of a co-respondent the court says: "Thus as an incident of the right to defend the co-respondent would have the right to move for a bill of particulars of the charges; * * * I am of opinion that the co-respondent would have the right to receive copies of all papers affecting her rights in the action, as for example, notice of trial, for how otherwise could she be informed of the time of trial, and her default could not otherwise be taken. Rixa v. Rixa, 35 Misc. 227.

Framing issues [CODE CIV. PRO., § 970].— Where a party is entitled by the constitution, or by express provision of law, to a trial by jury, of one or more issues of fact, in an action not specified in section nine hundred and sixty-eight of this act, he may apply upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues to the trial of which, by a jury, the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated,

is conclusive in the action unless the verdict is set aside, or a new trial is granted.

In framing issues in an action for divorce, where the action is directed to be tried by a jury, care should be taken to add such certainty as to the charges of misconduct on the part of the defendant as would afford him a complete opportunity to meet such charges by proof upon the trial. De Carrillo v. De Carrillo, 53 Hun, 359.

Where the issue of adultery is sent to the jury upon the application of either party under section 1757 of the Code, the finding of the jury thereon is conclusive, by reason of section 970, unless the verdict is set aside or a new trial granted. Lowenthal v. Lowenthal, 157 N. Y. 236. See also notes, *post*, p. 113.

Where the issues are settled in an action for divorce, and the jury disagree except as to one of the charges, in regard to which charge they were directed to find for the defendant, there is a mistrial and no judgment can be entered. Smith v. Smith, 27 Misc. 252.

Where a part of the specific adulteries alleged are denied, the court, upon the application of either party, must direct trial by jury and a settlement of the issues raised by the denial, and the court may take evidence of the adulteries not denied. Galusha v. Galusha, 43 Hun, 181.

Where the issues are stated in pursuance of a stipulation of the attorneys for the parties, they respectively waive the right to have preliminary to the trial any more questions specifically stated and settled. Whitney v. Whitney, 76 Hun, 585. In this case it was stated that "while the plaintiff was not, as matter of course, entitled to a bill of particulars she, at the outset, had the right to have the issues express the charges of misconduct on her part with a fair degree of particularity so that she might be apprised of those she was required to meet."

The limitation of time for making the application for a trial by jury as contained in Rule 31 of the Supreme Court, cannot have the effect of qualifying the right to make the application and to have it granted in an action for divorce where the right to trial by jury exists and the framing of the issues is essential to enable the party to have a trial of the issues in that manner. Conderman v. Conderman, 44 Hun, 181.

The issues must be settled before notice of trial can be given or the suit placed upon the calendar. Leslie v. Leslie, 11 Abb. N. S. 311.

Allegations of adultery to be proved if the defendant makes default.— By Rule 72 of the Supreme Court, as amended in 1900, it is provided that: "In an action for divorce or for the annullment of a marriage, where defendant fails to answer, no reference shall be granted to take proofs of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interests require that the examination of the witnesses should not be public, ex-

clude all persons from the court room, except the parties to the action, and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up, and exhibited only to the parties to the action or some one specially interested, upon order of the court."

Under this rule, the plaintiff, before he is entitled to judgment, in case the defendant defaults, must prove in court the material allegations of his complaint, and must show that there is no judgment or decree in a court of competent jurisdiction in this state against him in favor of the defendant for a divorce upon the ground of adultery.

Proof must be made not only of the fact of adultery, but of all the other material facts alleged in the complaint. Arborgast v. Arborgast, 8 How. Pr. 297.

Under Rule 72 of the Supreme Court, it must be alleged in the complaint, or shown by the plaintiff's affidavit, that the adultery charged in the complaint was committed without the consent, connivance, privity, or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; proof of all these allegations must be made before the plaintiff will be entitled to a judgment of divorce. Myers v. Myers, 41 Barb. 114.

In relation to the proof of the facts enumerated under Rule 72, where there has been a default, the practice is thus stated by Gaynor, J., in Evans v. Evans, 27 Misc. 10: "The time of the court is so much wasted on hearing of these defaults in actions for absolute divorce, by the unnecessary introduction of evidence on certain points, that something needs to be said about the practice." After citing the provisions of Rule 72 the court continues: "Thus, under the rule, if these things be not alleged in a verified complaint, the way to do is to present an affidavit of them. In some way it has come about that attorneys persist in introducing oral testimony of them; and that even though the verified complaint alleges them. Some attorneys even insist on asking the formal question whether five years have elapsed since the plaintiff discovered the adultery, when the allegation and the proof are that it was committed on a named date within the five years, or even within a few weeks or months. There seems to be a general notion that the things mentioned in Rule 72 are for the plaintiff to allege and prove as part of the cause of action, whereas they are no part of the cause of action, but defenses to be pleaded by the defendant. Rule 72 was made for cases of default only; and it is in effect that in anticipation of a default the plaintiff may aver the said things in a verified complaint, in lieu of presenting a separate affidavit of their truth. There is no rule for oral proof of them, and if the bar would conform to the rule it would be appreciated by the court, for the profession is a learned one."

See, however, the dictum in Merril v. Merril, 41 App. Div. 343, as follows: Though the plaintiff in an action is bound to negative con-

donation and *must prove the fact should the defendant make default*, yet if defendant interposes an answer and relies upon condonation as a defense, he must allege the same and establish it by proof. See this case also for facts which were held to establish condonation.

Where the application is made for a judgment of divorce upon a default of the defendant, the court is required to scrutinize the testimony closely and not grant a judgment where it is doubtful, uncertain or unsatisfactory. Moore v. Moore, 14 Week. Dig. 255.

By Rule 76 of the Supreme Court Rules of 1896, it is provided that "no judgment granting a divorce shall be made of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause or by consent."

There can be no reference on default. See *post*, p. 111.

Section 4. Proof of Adultery.

Court of Appeals bound by finding of Appellate Division.— Where the General Term finds upon conflicting evidence that there is evidence to support a finding of adultery, the Court of Appeals is bound by the decision. Lowenthal v. Lowenthal, 157 N. Y. 236.

When husband and wife not competent witnesses.— A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. Code Civ. Pro., § 831.

Because of the incapacity imposed upon a husband and wife by this section, the allegations of a verified complaint in an action for divorce, are *prima facie* evidence of such facts, and the burden of proof is shifted upon the defendant, who is bound to controvert and disprove such allegations as a matter of affirmative defense. Farace v. Farace, 1 Civ. Pro. R. 419, 61 How. Pr. 61.

In an action for divorce on the ground of adultery, where jurisdictional facts are put in issue, the plaintiff cannot testify as to any of such facts except to prove her marriage and disprove a charge of adultery against herself. It would be improper for her to testify that she was a resident of the state where the offense was committed by her husband, and at the time of bringing the action, when either of these facts are put in issue by the defendant's answer. Dickinson v. Dickinson, 63 Hun, 516.

A husband cannot testify to material facts tending to establish the charge of adultery alleged in his complaint to have been committed by his wife. The rule in equity that where there is ample evidence before the court to sustain a finding, it will disregard incompetent evidence, is not to be applied to evidence which is incompetent because of this

section. Colwell v. Colwell, 14 App. Div. 80. See also Fanning v. Fanning, 20 N. Y. Supp. 849; Budd v. Budd, 55 App. Div. 113.

If the defendant in his answer denies the charge of adultery and sets up counter allegations of adultery on the part of the plaintiff, the reception of testimony of the plaintiff, incompetent under the Code, as to the issues presented upon the charges in the complaint, but which is competent upon the issues presented by the counter charges in the answer, is not error. McCarthy v. McCarthy, 143 N. Y. 235. And see Woodrick v. Woodrick, 141 N. Y. 457; De Meli v. De Meli, 120 N. Y. 485.

Presumption of innocence.— Evidence of adultery should be closely scrutinized, and unless clearly convincing and pointed, the presumption of innocence should prevail. Donnelly v. Donnelly, 63 How. Pr. 481.

Although presumptive evidence alone is sufficient to establish the fact of adulterous intercourse, the circumstances must lead to it, not only by fair inference but as a necessary conclusion; appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. Evidence simply showing full and frequent opportunity for illicit, carnal intercourse, is not alone sufficient to found an inference that the criminal act was committed. Pollock v. Pollock, 71 N. Y. 137.

Parties seeking a divorce must prove a full and complete case. Nothing is to be taken in favor of the applicant by intendment or presumption, even in case of a default in answering or at the hearing. Linden v. Linden, 36 Barb. 61. See also Steffens v. Steffens, 33 N. Y. St. Rep. 643, 19 Civ. Pro. R. 267.

The mere fact that a defendant wife in an action for divorce left her home on the same day as her alleged paramour left his does not prove they went together or substantiate the adultery. Isaacs v. Isaacs, 29 Misc. 557.

Confessions of defendant.— The confessions of the defendant as to his adultery are admissible in evidence, but to avoid the danger of collusion, the court, before granting the decree, will require such corroboration of the confession as to remove all just suspicion of collusion. When that is satisfactorily done, the confessions become a sufficient basis for a judgment for divorce. Madge v. Madge, 42 Hun, 524, citing Matchin v. Matchin, 6 Pa. St. 332; Billings v. Billings, 11 Pick. 461.

Where the confessions are perfectly free from taint of collusion, confirmed by circumstances and the conduct of the accused, the evidence is sufficient. Sigel v. Sigel, 20 N. Y. Supp. 377, 47 N. Y. St. Rep. 397.

Confessions are not alone sufficient to establish a charge of adultery. A sentence of divorce will not be given upon the sole confession of the parties. This is a general rule. But the foundation of the rule is the fear of collusion and imposition on the court. When, however, the reason of the rule fails, the rule itself ceases. Hence, whenever the confession is made under circumstances which entirely preclude suspicion of collusion or imposition, the confession will be received, and

a decree granted thereon, without other evidence. Lyon v. Lyon, 62 Barb. 138.

See Phillips v. Phillips, 24 Misc. 334, for a case where a divorce was refused on the alleged confession of defendant, where the only witness for plaintiff was her brother.

Circumstantial evidence.— In an action for a divorce, the fact of adultery need not be proved by direct evidence, but generally may be made out from circumstances, which involve the fact by fair inference and lead to it as a necessary conclusion. Mulock v. Mulock, 1 Edw. Ch. 14.

If resort is had to circumstantial evidence, such evidence must lead inevitably to that fact, exclusive of every other conclusion. Evidence of full and sufficient opportunity for illicit intercourse is not, of itself, sufficient. Pollock v. Pollock, 71 N. Y. 137. See also Conger v. Conger, 82 N. Y. 603.

On proof that a wife was found at midnight with a man not her husband, under circumstances which irresistibly required an inference of adultery, the court will find her guilty of that offense in preference to accepting her version, which though supported by the testimony of her paramour is not pleaded in her answer. Lutz v. Lutz, 28 Misc. 393.

In an action for absolute divorce brought by the husband evidence of indiscreet language by the wife when under the influence of liquor and in the presence of friends of the plaintiff invited by him to be present is inadmissible, upon the ground that such evidence had no bearing upon, nor does it tend to support the allegations of adultery. Franey v. Franey, 28 App. Div. 50.

A divorce will not be granted upon the mere impressions of the plaintiff's witnesses as to defendant's relations with the co-respondent. As for example, that the defendant had looked at the co-respondent in a manner that indicated that improper relations existed between them. Pettus v. Pettus, 37 Misc. 315.

Identification of the defendant by means of a photograph is criticised in Bigelow v. Bigelow, 34 Misc. 265, where it was held that the testimony of a witness to the adultery was not sufficient for a decree in an uncontested divorce, where it merely states that he was acquainted with her and identifies her from the photograph, which is identified by the husband. The witness should further state the circumstances under which he made the defendant's acquaintance and what knowledge he had of her identity. The identification of the photograph by the plaintiff alone is of no value unless corroborated.

While the consequences that follow a judgment of divorce are so serious that such a judgment should not be granted unless the evidence which furnishes the basis therefor is, after very careful scrutiny, satisfactory and such as can command the confidence of a careful, prudent and cautious judge, the courts must take such evidence as the nature of the case permits, circumstantial, direct or positive; and bring-

ing to bear upon it the experiences and observations of life, and thus weighing it with prudence and care, give effect to its just preponderance. Moller v. Moller, 115 N. Y. 466. See also Mott v. Mott, 3 App. Div. 532, and Warren v. Warren, 8 Misc. 189, 59 N. Y. St. Rep. 390.

The fact of adultery may be established by proof of such facts and circumstances as, under the rules of evidence, are competent to be proved, and which satisfy the mind of the tribunal, required to pass upon the question, of the truth of the charge. It is not necessary to satisfy the mind beyond a doubt, or to lead the judgment as a necessary conclusion to the determination that adultery has been actually committed. Alllen v. Allen, 101 N. Y. 658.

Visits to houses of ill-repute.— Proof of two or three visits to a brothel, by a husband, unaccompanied by a woman, is not sufficient evidence of adultery to authorize a divorce. Van Epps v. Van Epps, 6 Barb. 320. See also Zorkowski v. Zorkowski, 27 How. Pr. 37.

Evidence that the defendant was seen in a saloon, and that he went with the girl who tended bar into a hall, is insufficient to establish adultery, when there is no evidence that the saloon was a house of ill-fame. Hunn v. Hunn, 1 Sup. Ct. (T. & C.) 499.

So, also, where the defendant was seen at a house of ill-fame by two servants thereof, and that he had once been seen in the room of an inmate, it was held to be insufficient to establish adultery, since there was no evidence that he was ever shut up in a room alone with such inmate. Platt v. Platt, 5 Daly, 295; Fraser v. Fraser, 3 Month. Law Bull. 61.

But, if the evidence of frequenting houses known to be of ill-repute is unexplained, it is sufficient to justify an inference of guilt. Van Name v. Van Name, 49 Hun, 264, citing Allen v. Allen, 101 N. Y. 658. See, also, in this connection, Mott v. Mott, 3 App. Div. 532; Carpenter v. Carpenter, 9 N. Y. Supp. 583; Smith v. Smith, 13 N. Y. Supp. 817.

A wife going to a house of ill-repute with another man is evidence of adultery, since it is not to be conceived that a woman would go to such place but for a criminal purpose. Shelf. on Mar. & Div. 409.

Testimony of prostitutes.— The testimony of a prostitute, uncorroborated, is not sufficient to prove adultery. Turney v. Turney, 4 Edw. Ch. 566; Banta v. Banta, 3 Edw. Ch. 295. Proof of illicit intercourse with a notorious prostitute before marriage and a continuance of the intimacy afterwards, together with evidence of defendant's dissolute character and habits, is sufficient evidence of adultery. Van Epps v. Van Epps, 6 Barb. 320.

The rule as to corroboration of evidence by detectives and prostitutes is merely for the guidance of the judicial conscience, and is not a rule of evidence. Therefore if such evidence support the conclusions of the trial judge, and the judgment is affirmed by the Appellate Division, the controversy should be deemed closed in the Court of Appeals. Winston v. Winston, 165 N. Y. 553.

The uncorroborated testimony of a prostitute paid for testifying, and of the detective who employed her, is not enough. Bentley v. Bentley, 3 Month. Law Bull. 76.

Uncorroborated evidence of servants who have lived in houses of ill-repute is not sufficient. Platt v. Platt, 5 Daly, 295.

In Moller v. Moller, 115 N. Y. 466, Judge Earl said: "The courts have come to regard the uncorroborated evidence of prostitutes as insufficient to break the bonds of matrimony."

If the defendant fails to take the stand in his own behalf, slight corroboration of the charges of adultery made by dissolute women is sufficient. McCarthy v. McCarthy, 143 N. Y. 235.

Where the testimony of prostitutes is corroborated by proof of facts and circumstances harmonizing therewith, giving such weight and strength to the testimony as to induce belief in its truth, a judgment founded thereon is proper. Moller v. Moller, 115 N. Y. 466.

The testimony of prostitutes and private detectives in matrimonial causes requires corroboration, but where it is the only evidence obtainable, it must be taken for what it is worth, and where it is adduced on both sides, the preponderance must be weighed. Mott v. Mott, 3 App. Div. 532.

Testimony of paramours.— If a paramour admits the criminality, the evidence is to be received with caution and should be corroborated. This rule does not apply where the paramour denies his guilt. Pollock v. Pollock, 71 N. Y. 137.

In the case of Crary v. Crary, 46 N. Y. St. Rep. 307, 18 N. Y. Supp. 753, an absolute divorce was granted in a litigated action upon the uncorroborated testimony of the co-respondent when there was no fraud or collusion.

Proof of adultery by paramours should be received with great reluctance, and must be corroborated. Delling v. Delling, 34 Misc. 122.

The requirement of corroboration of a paramour's testimony was founded on the inability of a party charged with adultery to contradict the testimony in an action between the parties for a divorce on that ground, before the amendment of section 831 of the Code, permitting a husband or wife to be a witness to disprove adultery in such an action. Since that amendment the force of the reason requiring such corroboration has been weakened, and the sufficiency of such testimony must now depend mainly on the degree of the paramour's credibility. Steffens v. Steffens, 33 N. Y. St. Rep. 643, 19 Civ. Pro. Rep. 267.

In the case of Beadleston v. Beadleston, 2 N. Y. Supp. 809, the evidence of an alleged paramour was not accorded much credibility, since it appeared that he threatened exposure of the wife if she did not pay him money.

As to value and weight of testimony of co-respondents in refuting charges of adultery, see Uhland v. Uhland, 59 N. Y. St. Rep. 655, 27 N. Y. Supp. 647.

The unsupported evidence of defendant's paramour is subject to the same objection as the evidence of any other accomplice. Anon., 5 Robt. 611.

Opportunity as evidence of adultery. — Evidence of full and sufficient opportunity for illicit intercourse is not, of itself, sufficient. Pollock v. Pollock, 71 N. Y. 137.

Evidences of association, frequent interviews and intimacy between the defendant and the woman with whom he is charged with having adulterous intercourse, will not sustain the charge, in absence of credible evidence of improper conduct or familiarities, or of any criminal attachment between them, especially when the evidence shows that the meetings might have been for proper purposes. Conger v. Conger, 82 N. Y. 603.

Because a husband, who has separated from his wife, has an unmarried woman in his house, ostensibly as a housekeeper, it is not sufficient to establish his adulterous relation with her, where both testify that such a relation did not exist. Welke v. Welke, 17 N. Y. Supp. 298.

Every act of adultery implies three things: First, the opportunity; second, the disposition of the mind of the adulterer; and, third, the same in the mind of the *particeps criminis*. And the proposition is substantially true that, whenever these three are found to concur, the criminal act is committed. Bishop on Mar. & Div. (4th ed.), § 619.

If an opportunity be shown and with it a disposition to commit adultery, the commission of the adultery may be inferred. Jayne v. Jayne, 25 N. Y. Supp. 810. In this case it appeared that the wife fastened the door leading from her bedroom to that of her husband and left unlocked the door leading to the room of her alleged paramour. This was deemed a sufficient opportunity. The court held that other like offenses might be shown to corroborate the specific act complained of, not as independent testimony, but as tending to characterize the improper intercourse between the parties alleged in the bill. Citing 2 Greenleaf Evi., § 47; Bishop on Mar. & Div. (4th ed.), § 625.

This holding is different from that found in Germond v. Germond, 6 Johns. Ch. 347, where it is held that acts of adultery not charged cannot be proved for any purpose. In the case of Stevens v. Stevens, 54 Hun, 490, evidence of indiscretions with other men than those with whom the adultery was charged in the complaint was held to be inadmissible to show the lustful disposition on the part of the defendant. Citing Beadleston v. Beadleston, 2 N. Y. Supp. 809; McDermott v. State, 13 Ohio St. 334; Washburn v. Washburn, 5 N. H. 195.

Venereal disease as evidence. — The fact of a husband having a venereal disease long after marriage is *prima facie* evidence of adultery. Johnson v. Johnson, 14 Wend. 637.

In a suit by a wife, there was no evidence of adultery by the husband, but by implication from certain stains on his linen, supposed to result from venereal disease, it was held that this was insufficient to authorize a verdict of guilt. Ferguson v. Ferguson, 1 Barb. 604. In this case a record verdict against the defendant on the same evidence was again set aside. Ferguson v. Ferguson, 3 Sandf. 307. In this last case it was con-

sidered as unsafe to regard as sufficient evidence that the husband had the disease eighteen months after the marriage, because it could not be safely inferred that it was not existing before the marriage and had broken out afresh. See also, in this connection, Homberger v. Homberger, 46 How. Pr. 346; Auld v. Auld, 16 N. Y. Supp. 803; Clark v. Clark, 7 Robt. 276; Klein v. Klein, 42 How. Pr. 166, 11 Abb. Pr. N. S. 450.

Section 5. Connivance, Collusion, Condonation and Recrimination.

When divorce denied, although adultery proved [Code Civ. Pro., § 1758]. — In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offence was committed by the procurement or with the connivance of the plaintiff.

2. Where the offence charged has been forgiven by the plaintiff. The forgiveness may be proved either affirmatively, or by the voluntary cohabitation of the parties, with the knowledge of the fact.

3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery, by the plaintiff, of the offence charged.

4. Where the plaintiff has also been guilty of adultery, under such circumstances that the defendant would have been entitled, if innocent, to a divorce.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 42.

Connivance and collusion. — A divorce will be denied where it appears that the offense charged was committed by the procurement or with the connivance of the plaintiff. Bishop on Mar. & Div. says: "Connivance is a defense available in all divorce cases, though it will be found to arise most frequently in suits for adultery. It is defined to be a corrupt consent on the part of the married party to the conduct of the other of which he afterward complains." Connivance destroys all claims to remedy by way of divorce, being founded on the obvious principle that no man has a right to relief from a court for an injury which he was chiefly instrumental in effecting. Myers v. Myers, 41 Barb. 114.

Conduct which amounts to connivance must be actuated by corrupt intention, for where there is no corrupt intention proved on the part of the complainant the remedy is not barred. Hoar v. Hoar, 3 Hagg. Ecl. 137.

While the law very justly condemns any act on the part of the husband by which he voluntarily leads his wife into temptation or in any way connives at or procures her defilement, it does not prevent him from scrutinizing her conduct or detecting her in her voluntary violation of the sanctity of the married relation. Pettee v. Pettee, 77 Hun, 595.

Where a husband believes that his wife has already committed adultery and intends to persist in adulterous intercourse, he is not guilty of connivance in not actively interfering to prevent the commission of the offense, where he does so with the intention of obtaining evidence, if under the circumstances he desired to prevent the adultery and could not do it. Reiersen v. Reiersen, 32 App. Div. 62.

A decree of absolute divorce in favor of a husband was vacated on the ground of fraud and imposition upon the court and because of connivance, where the husband hired detectives to procure evidence, one of whom became acquainted with the wife, induced her to travel with him on the night boat, arranged so that they would be caught by a confederate, and where the detective on the trial as witnesses was given a false name, and where he succeeded in persuading the wife to withdraw her answer so that judgment was taken on default. Helmes v. Helmes, 24 Misc. 125.

The case of Karger v. Karger, 19 Misc. 236, was where the plaintiff knew that his wife was about to commit the offense of adultery and arranged by means of an agent for the discovery of the adultery and permitted it to be committed. The court held that from the testimony the inference was irresistible that the plaintiff was willing that the defendant should commit the act in order that he might obtain a divorce. After citing the leading text-book writers and several cases, he comes to the conclusion that connivance may be a passive permitting of adultery as well as an actual procuring of its commission. This would seem to differ from the rule laid down in the case of Pettee v. Pettee, *supra*. In the latter case it appears that while the husband's suspicions had been aroused, he did not take any affirmative steps to bring about the meeting between the defendant and her paramour, but merely left her to her own volition. He did nothing to prevent the adultery. The court holds that these acts do not amount to a procurement of, or connivance at his wife's wrongdoing.

In the case of Bunnell v. Greathead, 49 Barb. 106, it was said: "That it would be a dangerous principle to establish that a husband who is suspicious of his wife's infidelity shall be allowed to lay a train which might lead her to the commission of adultery in order that he may take advantage of it to obtain a divorce."

Bishop on Mar. & Div., § 21, states that: "If the husband receives a caution concerning the conduct of his wife, or if he sees what a

reasonable man could not see without alarm, he is called upon to exercise a peculiar vigilance and care over her; and if he sees what a reasonable man could not permit, and makes no effort to avert the danger, he must be supposed to see and mean the consequences."

In Schouler's Husband & Wife, § 540, it is stated that connivance will be presumed from passive as well as active encouragement of the offense." In this connection, see Huntley v. Huntley, 26 N. Y. Supp. 266.

Divorce was refused to the wife although her husband made default where it appeared that he committed the acts for the avowed purpose of furnishing grounds for divorce and by collusion with her son, who communicated the facts to her. Cowan v. Cowan, 23 Misc. 754.

Condonation. — If the offense of adultery has been forgiven by the plaintiff, no divorce will be granted. The voluntary cohabitation of the parties after a knowledge of the commission of the offense is proof of forgiveness. Condonation is conditional forgiveness of an injury and the repetition of the offense revives a condoned adultery. Smith v. Smith, 4 Paige, 432.

To revive a condoned adultery so as to entitle the injured party to a divorce, the subsequent misconduct of the defendant must appear to have been of the same character. Johnson v. Johnson, 4 Paige, 460.

Cohabitation, to bar the husband's remedy, should be with knowledge not only of the offense committed, but also of his ability to prove it. Quincy v. Quincy, 10 N. H. 272; Hoffmire v. Hoffmire, 7 Paige, 60.

Cohabitation by a wife with a guilty husband is not in all cases a strict bar against her, as she is, to a certain extent, under the control of her husband. The cohabitation must, in all cases, be voluntary with full knowledge of the act of adultery. Condonation to be effectual must be an act in which both husband and wife assent and participate. Betz v. Betz, 2 Robertson, 694, 19 Abb. Pr. 90.

To establish condonation as a defense to an action for divorce for the adultery of the wife, it is not only necessary that the husband should have full knowledge of the facts, but that he should be able to prove them. Hence a proof of confession to the wife by the husband would not suffice, as there would be no mode of proving the confession under the law as it stands. Uhlman v. Uhlman, 17 Abb. N. C. 236.

Condonation based on the husband's promise to treat his wife properly which he fails to do, is no bar to the action. Timerson v. Timerson, 2 How. N. S. 526.

Recrimination. — At common law divorces are only granted for the criminal acts of one of the parties to the marriage and in favor of the one who is innocent. If both parties are guilty, neither has any claim to relief. Wood v. Wood, 2 Paige, 108.

If a husband, who seeks to obtain a divorce on the ground of the criminal conduct of his wife, has himself been guilty of the same offense, either before or after the adultery of his wife, it is a conclusive bar to the suit. Smith v. Smith, 4 Paige, 432; Anonymous, 17 Abb. Pr. 48.

If both parties to an action brought by a husband to procure a divorce from his wife on account of her adultery, have been guilty of adultery, neither is entitled to a judgment of divorce. A recrimination charge made in such an action by the wife may be sustained on evidence not as strong as might be necessary to sustain the suit for adultery. Peck v. Peck, 44 Hun, 290.

When, in an action for divorce on the ground of adultery, the defendant alleges adultery on the part of the plaintiff and proves it, it is error on the part of the referee by whom the case is tried, to say nothing in his report in regard to the testimony on that question, and to direct judgment for the plaintiff upon findings establishing the guilt of the defendant. Griffin v. Griffin, 70 Hun, 73.

Section 6. Effect of Judgment Granting Divorce.

Regulations when action brought by wife [CODE CIV. PRO., § 1759].— Where the action is brought by the wife, the following regulations apply to the proceedings:

1. The legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.

2. The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

3. If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of any real property; or has, in her possession, or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property, by the decease of a relative intestate, the defendant shall not have any interest therein, absolute or contingent, before or after her death.

4. Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment. [Thus amended by L. 1895, ch. 891, and L. 1900, ch. 742.]

This section, as it stood before the amendment of 1895, was derived from R. S. Pt. II, ch. 8, tit. 1, §§ 43, 45, 47.

See section 1769 (*post*, p. 86), and cases cited thereunder.

Effect of judgment upon rights of the wife.— During the marriage the husband owes to the wife the duty of support and maintenance, although owing her no debt in a legal sense of the word. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree and compels him to perform it, but does not change its nature. The divorce and its consequent separation are the result of his own actions, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the debt are changed, but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had discretion and control has been changed into a specific duty over which not he, but the court, presides.

Under the second subdivision of this section the court may require the husband to provide for the support of his wife, but may not require him to furnish a fund for the payment of her debts. The court will not lend its aid to compel the appropriation of alimony to a wife in the decree of divorce to the payment of a debt contracted by her and actually subsisting prior to the date of the decree. Romaine v. Chauncey, 129 N. Y. 566.

The surplus income resulting from a trust fund, created for the benefit of a judgment debtor, which can be reached by her creditors, is that which is beyond what is necessary for the suitable support of the debtor and those dependent upon her, in the manner in which they have been accustomed to live. In an action for divorce the amount of alimony is fixed, having special reference to the manner in which they have been accustomed to live, and such a sum is determined upon as is suitable for the support of the wife, having regard to the

circumstances of the respective parties; and if, in a creditor's suit, the question as to what is a suitable sum for the maintenance of the wife can be considered at all, there must be kept in special view, in the consideration thereof, the manner in which the wife had been accustomed to live. Andrews v. Whitney, 82 Hun, 117.

The court has power in a decree of absolute divorce to forbid the use by the wife of the husband's name, and having done so, her continuing to use it may be punishable as a contempt. Blanc v. Blanc, 21 Misc. 268.

Before the amendment of subdivision 2 of this section, it was held, in the case of Chamberlain v. Chamberlain, 63 Hun, 96, that no judgment in an action for absolute divorce could either be modified or made so as to provide for the education and maintenance of children. Under the subdivision, as it now stands, the judgment may be modified on the application of either party. As to modification of decree awarding alimony, see note, p. 99.

Effect on rights of dower where divorce is secured by the wife.— Under the rule of the common law the wife's right of dower was not barred by a judgment dissolving the marriage contract for the husband's adultery. Wait v. Wait, 4 N. Y. 95; Forrest v. Forrest, 6 Duer, 102; Day v. West, 2 Edw. Ch. 592.

A wife who has obtained a divorce in her favor is entitled, notwithstanding her remarriage, upon her former husband's death, to dower in his real property and to one-third of his personal property. Van Voorhis v. Brintnall, 23 Hun, 260, *reversed*, on other grounds, in 86 N. Y. 18. The wife is not entitled to dower in lands of her husband of which he became seized after the divorce. Kade v. Lauber, 16 Abb. Pr. N. S. 288.

A wife who obtained a divorce against her husband in the state of Massachusetts, on the grounds of extreme cruelty is not deprived of her right of dower in property situated in the state of New York, acquired by the husband after the decree of divorce, notwithstanding that the husband acted in good faith upon the decree in contracting a second marriage in Pennsylvania. Starbuck v. Starbuck, 62 App. Div. 437.

For decisions as to alimony, see p. 86 *et seq.*

Regulations when action brought by husband [CODE CIV. PRO., § 1760].— Where the action is brought by the husband, the following regulations apply to the proceedings:

1. The legitimacy of a child, born or begotten before the commission of the offence charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed.

2. A judgment dissolving the marriage does not impair, or otherwise affect the plaintiff's rights and interests, in and to any real or personal property which the defendant owns or possesses, when the judgment is rendered.

3. Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property

This section was derived from R. S. Pt. II, ch. 8, tit. 1, §§ 44, 47, 48.

Rights of dower where judgment is secured by the husband.— The wife loses her right of dower only where, upon proof and a finding or verdict of adultery, the court has, in an action brought against her, given judgment of divorce against the wife and dissolved the marriage contract. The forfeiture is not a consequence of the offense, but of the judgment founded thereon. So, where, in an action for divorce brought by a husband against his wife, the referee found the wife guilty of the adultery charged, and also found the husband guilty of the same offense, and thereupon a judgment was entered dismissing the complaint, it was held that the wife had not lost her right of dower. Schiffer v. Pruden, 64 N. Y. 47.

In the case of Pitts v. Pitts, 52 N. Y. 593, the wife was proven guilty of adultery, but no judgment of divorce was rendered because there had been a condonation by the husband. It was held that the wife did not lose her right of dower.

Where a wife absents herself from her husband for five successive years, without being known by him to be living within that time, and he contracts a second marriage, which is annulled in an action between them because the first wife is living, the second wife is not entitled to dower in real estate owned by him at the date of the entry of judgment of nullification. Price v. Price, 124 N. Y. 589, 37 N. Y. St. Rep. 146.

A decree dissolving a marriage for a cause not regarded as adequate by the laws of this state, rendered in another state, by a court having jurisdiction of the subject and the parties in an action by the husband will not deprive the wife of her then existing rights in lands in this state. Section 48 of R. S. Pt. II, ch. 8, tit. 1, from which subdivision 3 was derived, declared that "A wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower." This section was repealed by ch. 245, Laws of 1880, but the provisions contained in the present law are not different. Van Cleaf v. Burns, 118 N. Y. 549.

Questioning legitimacy of children.— On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the com-

plaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time. Court Rules, 1900, Rule 75.

Where a husband's complaint in an action for divorce did not question the legitimacy of the issue, the wife cannot have that question determined as to a child born a year before the marriage. It seems that where the complaint tenders no issue as to the legitimacy of the children the parties cannot by consent or otherwise extend the issues beyond the scope and purpose of the pleadings. Tully v. Tully, 28 Misc. 54.

Marriage after divorce for adultery [CODE CIV. PRO., § 1761].— Where a marriage is dissolved, as prescribed in this article, the plaintiff may marry again, during the lifetime of the defendant; but a defendant, adjudged to be guilty of adultery, shall not marry again, until the death of the plaintiff. But this section does not prevent the remarriage of the parties to the action.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 49.

Section 49 was not repealed by the Repealing Act of 1880, ch. 245, and was amended by ch. 452 of the Laws of 1897, to read as follows: "Sec. 49. Whenever a marriage has been or shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the lifetime of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment, which modification shall only be made upon satisfactory proof that five years have elapsed since the decree of divorce was rendered and that the conduct of the defendant since the dissolution of such marriage has been uniformly good."

Where a divorced husband moves for permission to remarry under the statute, for uniform good conduct for five years, no notice need be given to the plaintiff wife, as she has no interest in the penalty for her husband's adultery, which is imposed solely in the interest of the public. Matter of Salmon, 34 Misc. 251.

Before the amendment of 1897 a judgment of divorce could be modified so as to permit the defendant to remarry upon satisfactory proof that the complainant is remarried, and that five years have elapsed since the decree of divorce was rendered. Under the present law permission to remarry may be given after five years have elapsed without regard to whether or not the complainant has remarried.

Effect of decree and statute where marriage is contracted in another state.— The statute and decree prohibiting the marriage of a guilty party can have no effect beyond the territorial limits of this

state. Where the laws of another state do not prohibit such marriage by a party divorced its validity cannot be questioned in this state. Moore v. Hegeman, 92 N. Y. 521.

In the case of Van Voorhis v. Brintnall, 86 N. Y. 18, it was held that the validity of the marriage contract is to be determined by the law of the state where it was entered into. If valid there it is to be recognized as such in the courts of this state, unless contrary to the prohibitions of natural law or the express prohibitions of the statute. In this case it appeared that a divorce had been granted to the wife on the ground of the husband's adultery, and it was decreed that it should not be lawful for him to marry again until after her death, and he afterwards and during her life married again in the state of Connecticut. By the laws of that state the marriage was valid and the decision in the case cited was that the marriage being valid by the laws of Connecticut, a child born from such marriage is legitimate and entitled to inherit. This case was followed in Throp v. Throp, 90 N. Y. 602.

CHAPTER V.

SEPARATION.

[*Code Civil Pro.*, § *1762–1767.*]

SECTION 1. SEPARATION AGREEMENTS.
2. ACTION FOR SEPARATION, WHEN MAINTAINABLE.
3. PLEADINGS.
4. JUDGMENT.

Section 1. Separation Agreements.

Such agreements against public policy. — In the case of Carson v. Carson, 3 Paige, 483, the chancellor says: "It may well be doubted whether public policy does not forbid any agreement for a separation between husband and wife except upon the sanction of a court of justice; as whether it does not also require that such agreements should be limited to those acts where by the previous misconduct of one of the parties the other is entitled to have the marriage contract dissolved, either wholly or partially by a decree of a competent tribunal." In this case it was also held that an agreement of separation cannot be supported, unless the separation has already taken place or is to take place immediately upon the execution of the agreement. Such an agreement will be rescinded, if the parties afterward cohabit or live together as husband and wife by mutual consent for ever so short a time. See also Rogers v. Rogers, 4 Paige, 516; Cropsey v. McKinney, 30 Barb. 47; Morgan v. Potter, 17 Hun, 403; Beach v. Beach, 2 Hill, 260.

Articles of separation between husband and wife, in which another joins with her as trustee, although valid when made, are rendered void by resumption by them of their conjugal relations. Zimmer v. Settle, 124 N. Y. 37.

An agreement between a husband and wife that the wife shall live separate from him, in consideration of a promise to pay her an annual sum for her support, is against public policy, and revocable by either at pleasure, and, therefore, where her offer to return to him is refused by him and he does not provide for her support, she is entitled to a separation with alimony on the ground of abandonment and non-support. Gilbert v. Gilbert, 26 N. Y. Supp. 30.

An agreement made in 1888 between husband and wife without the intervention of a trustee, and at a time when they lived together, by which he agreed to make certain payments for her support, is not

authorized by chapter 381 of the Laws of 1884, but is absolutely void. And this even though an action for divorce was then pending. Lawrence v. Lawrence, 32 Misc. 503.

A separation agreement executed by husband and wife without the intervention of a trustee at a time when they were living together, is void, and where it is an essential part of the agreement that they should thereafter live separate, and where neither of the parties appears to be entitled to a separation. It was further held that section 21 of the Domestic Relations Law, providing that a married woman may contract with any person, including her husband, does not enlarge the power of the husband and wife in respect to separation agreement. Poillon v. Poillon, 49 App. Div. 341, affg. 29 Misc. 666.

By section 21 of the Domestic Relations Law (*post*, p. 129), it is provided that "a husband and wife cannot contract to alter or dissolve the marriage or relieve the husband from his liability to support her." In the case of Whitney v. Whitney, 4 App. Div. 597, the question was considered as to how far the legislation of this state, removing the common-law restrictions which hampered a married woman in the enjoyment of her property and personal rights, would affect a contract providing for their separation and making provision for the support of the wife; the court held that such a contract very materially alters the marital relation of the parties and that no action would lie for its enforcement by the wife in the courts in this state.

A contract for support made directly between husband and wife living apart because of the husband's cruel treatment, and stipulating also for a gross sum to be paid to the wife in satisfaction of all her rights in his estate is valid, does not violate public policy, nor section 21 of the Domestic Relations Law. Dower v. Dower, 36 Misc. 559.

A bond given by a husband to his wife, reciting that they have just cause for living separately, and conditioned that the husband shall pay a certain sum weekly for the support, education and maintenance of herself and children for the term of her natural life, is not void or contrary to public policy as being a contract between husband and wife to live apart. Nor is it in violation of section 21 of chapter 272 of Laws of 1896, as being a contract to dissolve the marriage and relieve the husband from liability and support where it appears that the wife has just cause and did not live with her husband for some time prior to the execution of the bond. Lawson v. Lawson, 56 App. Div. 535.

Agreement may be made valid through intervention of trustee. — While a contract between husband and wife for future separation is void, after a separation has taken place, a contract for the separate support and maintenance of the wife, valid and binding upon all the parties, may be made through the intervention of a trustee. Such a contract is valid as far as it relates to the indemnity given to the husband by the trustee. Such covenants are mutual and dependent. Galusha v. Galusha, 116 N. Y. 635.

In this case it was also held that such a contract, being at its execution valid and binding, could not be invalidated by a subsequent vio-

lation of the marriage vow on the part of the wife. Nor do the considerations supporting it fall upon the granting of a decree of divorce. After making the contract it is not in the power of either party, acting alone, and against the will of the other, to destroy its effect.

In the case of Clark v. Fosdick, 118 N. Y. 7, a husband and wife agreed to live separately, and, to effectuate that agreement, entered into articles of separation through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee annually a sum named for the support of the wife during life, the sum to be in full satisfaction for such support and maintenance and of all alimony. The wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon the execution of the agreement the parties separated. In an action against the husband, to recover the payment under the agreement, it was held that, the trustee named was the trustee of an express trust, and that the action was properly brought in his name, and that the agreement was not abrogated by the subsequent divorce of the parties.

In the case of Lord v. Lord, 68 Hun, 537, the agreement of separation contained no express covenant to pay any sum to the wife, but did covenant to pay a certain annual sum to the trustee for the wife's support, and the trustee agreed to indemnify the husband for the wife's debts; it was held that the wife could not maintain an action against the husband to enforce his covenant to pay the money to the trustee, but that the trustee, as trustee of an express trust, within section 449 of the Code of Civil Procedure, is entitled to maintain such an action.

Where a separation agreement made through the intervention of a trustee provided for the payment of a certain sum annually to the trustee for the maintenance of the wife, to be secured either by bond or other sufficient surety, etc., it was held under the facts of the case that the covenant to give security was supported by ample consideration and could be enforced by a trustee against the husband. It was further held that the rules of law prohibiting a contract between husband and wife have been abrogated by statute (ch. 381, Laws of 1884, amd. by ch. 594, Laws of 1892), and that there is now no reason why an agreement between husband and wife, providing for the wife's future support, should not be specifically enforced. Greenleaf v. Blakeman, 40 App. Div. 371.

An instrument by which the husband promises to pay his wife one-fourth of his future income in lieu of alimony does not operate as an equitable assignment of the interest of the husband's future earnings, but is only a promise to pay a portion of such earnings as they may accrue. The court will not take the after-acquired property of the husband into possession by means of a receiver. Netling v. Netling, 60 App. Div. 409.

Where a separation agreement provided that the wife should have the custody of the children, but it was agreed on her part and that of the trustee named, who was a party of the third part to the agreement, that the husband should have the right to visit and associate with his

children in the manner specified therein, it was held, in an action to recover the payment stipulated by the contract, to be made by the husband to the trustee for the benefit of the wife, that the agreement permitting the husband to associate with his children was a material part of the contract, which could not be violated by the wife and a recovery sustained for her benefit for the sum stipulated to be paid by the husband. Duryea v. Bliven, 122 N. Y. 567.

The conveyance of property to a third person by a husband, who has separated from his wife, for the purpose of her support during her life, to be conveyed to the husband's heirs-at-law should he predecease her, creates an irrevocable power in trust. The power to be exercised in favor of the heirs is irrevocable, but it seems that the wife's rights under the trust deed are not affected by her subsequent cohabitation with her husband. Smith v. Terry, 38 App. Div. 394.

The Supreme Court has no jurisdiction without the consent of the husband or trustee to remove such trustee appointed under an agreement of separation between husband and wife. Hughes v. Cuming, 165 N. Y. 91.

Where a trustee sues a husband to recover the balance due on a separation agreement, and the husband answers, praying that the agreement be canceled because of the change in the circumstances of himself and his wife, the court may, upon motion of defendant, order that the wife be brought in as a party defendant unless she elects to appear as plaintiff. Chamberlain v. Cuming, 65 App. Div. 474.

The rule that contracts between husband and wife are only upheld in equity, when they are fair, applies to a separation agreement, which is found to afford an inadequate remedy for the support of the wife, and was executed by her unadvisedly and imprudently. She may rescind the agreement upon restoring to her husband so much of the consideration as she has not expended for her support. Hungerford v. Hungerford, 161 N. Y. 550.

Section 2. Action for Separation, when Maintainable.

For what causes action may be maintained [CODE CIV. PRO., § 1762].— In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

2. Such conduct, on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the latter.

3. The abandonment of the plaintiff by the defendant.

4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

This section was derived from portions of §§ 50 and 51 of R. S. Pt. II, ch. 8, tit. 1.

Nature of action for separation.—An action for a separation is really an appeal to a court of equity by one of the parties to a marriage contract for a modification of the marriage relations, duties and obligations. The court is virtually asked to change and readjust these relations and to prescribe such new duties and obligations to be observed by the litigants as justice may require. People ex rel. Comrs. of Charities v. Cullen, 153 N. Y. 629, 637.

By the terms of the statute a judgment separating the parties from bed and board may be forever or for a limited time.

The first statute in this state authorizing a divorce *a mensa et thoro* was passed on 13th of April, 1813. By this act such divorces were only granted on the application of the wife. Under this statute it was held that a decree of separation should be made perpetual with the proviso that the parties may, at any time, by their mutual and voluntary act, apply to the court for leave to be discharged from the decree. Barrere v. Barrere, 4 Johns. Ch. 187.

The right to grant a separation is based entirely upon the statute, and unless the plaintiff brings himself within it, a separation cannot be granted, however unpleasant the relations of the parties or however unhappy they are made, even though they cannot live together. De Meli v. De Meli, 67 How. Pr. 20.

There is no statutory provision as to delay in bringing a suit for a limited divorce, although in peculiar cases a long delay might lead to its dismissal. Burr v. Burr, 10 Paige, 20.

What constitutes cruel and inhuman treatment.—Cruelty is a wrongful act or omission, by one of the parties, inconsistent with the discharge of the duties of married life, and may be either: 1, An act causing or threatening personal injury to life, limb or health; 2, Words inflicting indignity and threatening pain, which does not include mere words of abuse, though it may mean opprobrious words by way of aggravation; 3, In general, a wrongful act or acts plainly subversive of the marriage relation, and making it impossible that the duties of married life be properly discharged. Uhlmann v. Uhlmann, 17 Abb. N. C. 236.

For a case where the allegations of cruel and inhuman treatment were held sufficient to support complaint in action for separation and

demand for alimony and counsel fees, see Itzkowitz v. Itzkowitz, 33 App. Div. 244.

Cruel and inhuman treatment does not necessarily imply such as places a wife in physical fear of her husband. Lutz v. Lutz, 31 N. Y. St. Rep. 718.

A husband who, in the presence of his wife, and in spite of her entreaties, unmercifully beats her child, inflicts an injury to her feelings which is cruel and inhuman within the meaning of the statute. Bihin v. Bihin, 17 Abb. Pr. 19.

Words of menace accompanied by a probability of bodily violence are sufficient to warrant a decree. Whispell v. Whispell, 4 Barb. 217.

For circumstances under which it was held to be cruel and inhuman treatment to compel a young wife, prior to the birth of her child, to do heavy housework, coupled with abuse, lack of clothing, and refusal to allow her to visit her parents, etc., see Gloster v. Gloster, 23 App. Div. 336.

Cruel and inhuman treatment does not necessarily imply such treatment as places a wife in physical fear of her husband. The conduct of the husband may produce such mental agony in the wife as to be even more cruel and inhuman than any mere physical pain which was inflicted, and where the conduct of the husband towards the wife is of such a character, it justifies a court in freeing her from the necessity of submission to such treatment. Atherton v. Atherton, 82 Hun, 179; affd., 155 N. Y. 130; reversed on other grounds, 181 U. S. 155.

Cruel and unsafe means the same thing as unkind treatment accompanied by words of menace creating a reasonable apprehension of bodily injury. Mason v. Mason, 1 Edw. Ch. 278.

The word unsafe in the statute has reference to bodily personal injury or violence to physical health, as distinguished from mental suffering or wounded sensibilities, and the proofs must show either bodily violence, or acts and conduct such as may render it unsafe for a wife to cohabit with her husband. Walton v. Walton, 32 Barb. 203, 20 How. Pr. 347; Davies v. Davies, 55 Barb. 130, 37 How. Pr. 45.

Words of menace are sufficient to warrant a decree if they be of such a character and accompanied by such circumstances as to justify a belief in their seriousness. That is, they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as importing action, and in that sense continuing the reality of a threat of bodily harm. Ruckman v. Ruckman, 58 How. Pr. 278.

False charges of adultery.— Charges of infidelity, made in bad faith, as auxiliary to and in aggravation of threatened violence are sufficient to constitute "cruel and inhuman treatment." Kennedy v. Kennedy, 73 N. Y. 369. Such charges would not authorize a separation, unless they were made in bad faith and without any ground for believing them to be true. De Meli v. De Meli, 67 How. Pr. 20.

In the case of Straus v. Straus, 67 Hun, 491, it appeared that the defendant, without reasonable cause, falsely and repeatedly accused the plaintiff of being an unchaste woman. The court said: "Such an accusation constitutes cruel and inhuman treatment, and is sufficient to justify a judgment of separation even if no other ground of complaint exists. Such a charge, if false, and made without sufficient cause, as found in this case, is more cruel than blows or any mere physical violence." Charges of unchaste conduct made in the presence of her children justify a limited divorce to the wife. Lutz v. Lutz, 31 N. Y. St. Rep. 718. See also Israel v. Israel, 54 App. Div. 408.

Cruel and inhuman treatment may consist of continuous verbal outrage. Where the defendant denounced the plaintiff as a "cur," a "worm," a "devil," whom he consigned to "hell," and, under circumstances of peculiar atrocity, he maliciously and unjustifiably impugned her conjugal fidelity, it is sufficient to authorize a judgment in favor of the plaintiff. Fitzpatrick v. Fitzpatrick, 21 Misc. 378.

Frequent charges of infidelity of the wife with various men, naming them, and calling her opprobrious names, using her with violence and menacing her, are sufficient to justify a decree of separation. Waltermire v. Waltermire, 110 N. Y. 183.

But it is not cruel to charge a wife with infidelity if there is ground for suspicion. Kennedy v. Kennedy, 73 N. Y. 369.

What acts are not sufficient.— Occasional and even frequent intoxication is not of itself ground for a separation; nor do occasional sallies of passion, from whatever cause, amount to legal cruelty, so long as they do not threaten bodily harm. Mason v. Mason, 1 Edw. Ch. 278; Solomon v. Solomon, 3 Robt. 369.

Nor is the act of the husband in angrily expelling his wife from home, under suspicion of her unfaithfulness, a sufficient ground. Barlow v. Barlow, 2 Abb. Pr. N. S. 259. Nor is the husband's refusal to permit his wife to attend a church of which she is a member sufficient. Lawrence v. Lawrence, 3 Paige, 267.

A separation cannot be adjudged merely because there is no possibility of the parties living together in harmony. Davis v. Davis, 1 Hun, 444. See also Ruckman v. Ruckman, 58 How. Pr. 278. The causing of mere mental suffering, without bodily injury, will not sustain the action. Paisley v. Paisley, 2 Mon. Law Bull. 6; De Meli v. De Meli, 67 How. Pr. 20.

A threat, not giving rise to any apprehension of immediate personal injury, does not constitute legal cruelty. Anonymous, 17 Abb. N. C. 231.

A refusal to allow a wife to name a child is not cruel treatment. Appleby v. Appleby, 2 Civ. Pro. Rep. 422.

Where the evidence shows only one act of actual violence and only one occasion on which he used abusive language, and there was no evidence that the wife was in fear of her husband, a judgment of separation will not be granted.

ACTION FOR SEPARATION, WHEN MAINTAINABLE.

A separation on the ground of cruelty should be denied where it appears that the wife provoked her husband by persisting in associating with a man to whom he objected and by visiting him at his room. Taylor v. Taylor, 26 N. Y. Supp. 246.

Meanness or disagreeable conduct or vile language is not sufficient: McBride v. McBride, 31 N. Y. St. Rep. 631, also 9 N. Y. Supp. 827. Nor is demeanor provoking annoyance, discontent and disgust. Conklin v. Conklin, 17 Abb. Pr. 20.

In an action for limited divorce, on the ground of cruel and inhuman treatment, it has always been deemed important for the court to know what has been the conduct of the wife towards the husband as well as what his conduct has been towards her. Rose v. Rose, 52 Hun, 154, citing Hopper v. Hopper, 11 Paige, 46. In this case the court said: "This seems to be a self-evident proposition, because the question whether the treatment is cruel and inhuman, and is of such a character as to render it unsafe to even live with the husband, depends very largely upon the circumstances which gave rise to such ill-treatment. If it appears that, had the wife performed her duties towards her husband, she would have suffered no ill-treatment at his hands, it is difficult to understand upon what principle a court of equity could grant a relief." It is the policy of the law not to grant a separation or divorce for slight and trivial causes. When the parties have deliberately entered into such relations it is incumbent upon them to do everything in their power to make the union a happy one. Burke v. Burke, 75 Hun, 412.

Where a husband committed his wife to an insane asylum, she having been subject to delusions and suffering from insanity, etc., it was held that this was not cruel and inhuman treatment upon which to found an action for separation. Kuster v. Kuster, 37 Misc. 136.

Proof that a wife, eighteen years old, and weighing 103 pounds, was compelled by her husband to do not only the ordinary housework, but also to cook free lunches for his saloon, an operation involving the lifting of an iron pot, weighing fifty pounds, upon a stove three feet high, taken in connection with the fact that he swore at her, left her alone at night, in great fear, failed to provide her with proper clothing for out-door use, and refused to let her visit her parents who lived near by, justifies the granting of a separation, upon the ground of cruel and inhuman treatment, especially when it is shown that the wife was in delicate health and physically unable to do the work required of her. Gloster v. Gloster, 23 App. Div. 336.

Abandonment. — The term abandonment, used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification, with the intention of not returning. Williams v. Williams, 130 N. Y. 193; Simon v. Simon, 6 App. Div. 469.

There must be a final departure without sufficient reason therefor, and without the consent of the other party, and with the intention of not returning. Uhlmann v. Uhlmann, 17 Abb. N. C. 236.

ACTION FOR SEPARATION, WHEN MAINTAINABLE.

A determined purpose of a husband to withdraw from his wife permanently and withhold his support are both necessary to a judgment for abandonment. Ruckman v. Ruckman, 58 How. Pr. 278; Atwater v. Atwater, 53 Barb. 621.

Where the husband and wife separated pursuant to an agreement, void as against public policy, and the wife subsequently offered to return to the husband's bed and board, which offer he refused, and also refused to support her, it is sufficient to constitute an abandonment and neglect or refusal to support within the meaning of this section. Gilbert v. Gilbert, 5 Misc. 555.

Abandonment, in the sense in which it is used in the statute, means the actual and wilful desertion by the husband of the wife. It is the wilful act of actually leaving her, or separating from her, and the withdrawal of all aid and protection implied in the marriage relations. If the wife herself procures the separation, or consents to it, the case does not come within the statute. It cannot be the result of an agreement or affected by the judgment of a court, but must be what is known to the criminal law as wilful and voluntary desertion or abandonment. People ex rel. Comm'rs of Charities v. Cullen, 153 N. Y. 629, 638.

Where, after separation by agreement, followed by repeated negotiations for a return to each other which were continued by both parties down to the time of the commencement of the suit for a judicial separation, there is not such an abandonment as will support a decree of limited divorce. Simon v. Simon, 39 N. Y. Supp. 573, 6 App. Div. 469.

A cessation by a husband from living with his wife, with a fixed determination not to resume such relation, and the absence of her consent to such separate living, and no conduct on her part justifying her husband's withdrawal, amounts to an abandonment and justifies an action by the wife for a separation, although the husband had continued to provide for the support of the wife, and her infant children. Clearman v. Clearman, 15 Civ. Pro. Rep. 313, 18 N. Y. St. Rep. 272.

A husband's refusal to remain in the house of his wife's father, when she declines to live with him, except there, is not an abandonment. Appleby v. Appleby, 2 Civ. Pro. Rep. (McCarty) 422.

Where a woman remarried after the absence of her husband for five years, without being known to be alive, the marriage is voidable only, and thus she may maintain an action for separation against her second husband for abandonment, if after knowledge of the death of her first husband he continues to live with her for a term of years. Taylor v. Taylor, 25 Misc. 566.

If it appears that the abandonment of which the plaintiff complains was caused by continued personal violence and insulting language, she is entitled to a judgment for a separation and reasonable support. Waltermire v. Waltermire, 110 N. Y. 183.

A husband who drives his wife from his home merely because she will not promise not to go near her parents, is guilty of a legal abandonment. Gloster v. Gloster, 23 App. Div. 336.

Abandonment excludes the consent of the parties and involves a final and determinate renunciation of cohabitation. This must be shown by saitsfactory proof, and the burden of proof is upon the plaintiff. Dignan v. Dignan, 17 Misc. 268.

No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common-law life and home have been resumed. People ex rel. Comm'rs of Charities v. Cullen, 153 N. Y. 629, 638, citing Fitzgerald v. Fitzgerald (L. R. [1 P. & D.] 684).

Condonation. — Slighter misconduct than would constitute an original ground for separation will revive former injuries so as to authorize a separation. Whispell v. Whispell, 4 Barb. 217; Burr v. Burr, 10 Paige, 20.

The cruelty which constitutes a ground for a decree of separation is generally a course of conduct, not a single act; and subsequent sexual cohabitation is not a condonation of an act of cruelty in the sense that it is of an act of adultery. Even where there has been a forgiveness of previous acts of cruelty sufficient to bar an action, proof of such previous cruelty is competent on the trial of the action for separation for the purpose of giving character to subsequent acts, and showing that they arose from a settled purpose and not from impulse. Doe v. Doe, 52 Hun, 405; Cox v. Cox, 5 N. Y. Supp. 367, 23 N. Y. St. Rep. 691.

Condonation is a conditional forgiveness; a repetition of cruelty revives the injury. Smith v. Smith, 4 Paige, 432.

An offer by a wife to return to her husband and live with him, made pursuant to an order of court for her support in lieu of an allowance, or if not accepted or made upon conditions which the husband does not comply with, is not a condonation of the previous cruel treatment and abandonment of her. Condonation, to be effectual, must be an act in which both husband and wife assent and participate. Betz v. Betz, 2 Robt. 694, 19 Abb. Pr. 90.

Cruelty of the husband to his wife which has been condoned will be revived by subsequent acts of cruelty which of themselves would not be sufficient to justify a separation; the condonation of the prior offense is always subject to the condition that the husband shall thereafter treat the wife with conjugal kindness. Atherton v. Atherton, 82 Hun, 179; affd. 155 N. Y. 130; reversed on other grounds, 181 U. S. 155.

Residence, as affecting right to maintain action [CODE CIV. PRO., § 1763].— Such an action may be maintained, in either of the following cases:

1. Where both parties are residents of the state, when the action is commenced.

2. Where the parties were married within the state, and the plaintiff is a resident thereof, when the action is commenced.

3. Where the parties, having been married without the state, have become residents of the state, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.

This section was derived from R. S. Pt. I, ch. 8, tit. 1, part of §§ 50 and 51.

Both husband and wife must in fact be residents of the state, except as provided in subdivisions 2 and 3, and the theoretical residence of the wife, presumed to follow that of the husband, is not sufficient to enable him to bring the action, where she never has been actually such resident. Hewes v. Hewes, 40 N. Y. St. Rep. 680, 16 N. Y. Supp. 119.

The question whether one has ceased to be a resident of this country and has become a resident of a foreign country is dependent upon his intention, and his residence, for the purpose of this section, is a permanent abode rather than a temporary residence. De Meli v. De Meli, 120 N. Y. 485.

A married woman may have a domicile in a jurisdiction other than that of her husband when the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce. She may acquire a separate domicile whenever it is necessary for her to do so, but the right to do so springs from the necessity of its exercise. Atherton v. Atherton, 82 Hun, 179; affd. 155 N. Y. 130. See note under section 1756 (*ante*, p. 40) as to jurisdiction of courts as affected by the residence of parties to an action for divorce.

When both parties are residents of the state when the action is commenced for separation, it may be maintained without reference to the time during which either of them may have resided in the state. But it seems that where the marriage took place within the state and where the plaintiff is a resident when the action is commenced he may maintain the same against a non-resident defendant without reference to the length of time of the plaintiff's residence and without showing that the defendant ever resided within the state. It seems also that where the parties were married without the state, the plaintiff may maintain such action against a non-resident only when the parties have at some time been residents of the state for at

least one year, and the plaintiff must be a resident when the action is commenced. Code, § 1763, construed; Bierstadt v. Bierstadt, 29 App. Div. 210, distinguishing Ramsden v. Ramsden, 28 Hun, 285.

An action for separate maintenance cannot be maintained where the marriage took place within the state, and the wife has not resided in the state one year before bringing the action. Ramsden v. Ramsden, 28 Hun, 285.

Where the parties were married and lived in another state, and the husband moved to New York, the wife refusing to follow him, he cannot sue her for separation. Toosey v. Toosey, 14 Daly, 537.

Section 3. Pleadings.

Requisites of complaint [CODE CIV. PRO., § 1764].—The complaint in such an action must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty.

This section was derived in part from R. S. Pt. II, ch. 8, tit. 1, § 52.

Allegations of scandalous, indecent and licentious acts, unaccompanied by allegations that they gave her pain or led her to fear personal injury, are immaterial in an action for limited divorce because of cruelty. Klein v. Klein, 42 How. Pr. 166, 34 N. Y. Super. Ct. 481, 11 Abb. N. S. 450.

It is no answer to a demurrer under this section that there are provisions for making the complaint more definite. Walton v. Walton, 32 Barb. 203, 20 How. Pa. 347.

In an action by a wife against her husband for a limited divorce, an amendment to the complaint was allowed, by which the action was changed to a suit for an absolute divorce. The order allowing the amendment was made more than seven years after the commencement of the action, and without personal notice to the defendant, although the papers upon which the application was made showed that the plaintiff knew where the defendant might be found. It was held that the amendment was improperly allowed. Robertson v. Robertson, 9 Daly, 44.

Where a husband brought an action for absolute divorce and the wife a counterclaim for separation on the ground of cruel and inhuman treatment, it was held that after the issue had been decided in favor of the wife the husband would not be allowed to amend his pleadings so as to charge the wife with adultery with another person, when

it appeared that he possessed information tending to show the charge when the action was commenced. However the husband should be allowed to take testimony as to such misconduct with the person referred to in the proposed amendment, because such evidence was admissible under the pleadings as originally framed, being in justification of the cruel and inhuman treatment alleged by the wife. Israel v. Israel, 54 App. Div. 408.

Answer; defendant may set up plaintiff's misconduct [CODE CIV. PRO., § 1765].— The defendant may set up, in justification, the misconduct of the plaintiff; and if that defence is established to the satisfaction of the court, the defendant is entitled to judgment.

This section is derived from R. S. Pt. II, ch. 8, tit. 1, § 53.

What constitutes misconduct.— The enactment of this section is the adoption of the principle of compensation or recrimination. It is the principle that, in an action for a divorce, the plaintiff shall not have relief if he has himself violated the marriage contract. Doe v. Roe, 23 Hun, 19. In this case the defendant set up as a defense the adultery of the plaintiff. The court held that adultery was misconduct, which, if proved, would defeat the plaintiff's right to a judgment and refused to follow the cases of Terhune v. Terhune, 40 How. Pr. 258, and Henry v. Henry, 17 Abb. Pr. 411, 27 How. Pr. 5, where it was held that an allegation of adultery was not a good defense. Judge Learned remarked that the court in the latter cases must have overlooked section 53, from which the above section of the Code was derived. See Uhlmann v. Uhlmann, 17 Abb. N. C. 236.

Any misconduct which is calculated to irritate and provoke the defendant, or to excite his jealousy, or to alienate his affections from the plaintiff may be set up in his answer. Hopper v. Hopper, 11 Paige, 46; Crow v. Crow, 7 Civ. Pro. R. 423.

It is sufficient if the ill-conduct of the plaintiff causes the cruelty or abandonment on the part of the defendant, unless the acts of the defendant were so disproportionate to those on the part of the plaintiff as to render them wholly unjustifiable. Palmer v. Palmer, 29 How. Pr. 390. In this case it was also held that if the defendant establishes the plaintiff's misconduct, the court is precluded from awarding alimony to the plaintiff and disposing of the custody of the children.

Provocation which led to the cruelty is a defense; Devaismes v. Devaismes, 3 Civ. Pro. R. 124, and so is misconduct, not the cause of the cruelty complained of, as are acts of violence on the part of the plaintiff towards defendant's children. Crow v. Crow, 7 Civ. Pro. R. 423.

Sufficiency of answer.— The defendant is not entitled to show misconduct on the part of the plaintiff, unless the fact is affirmatively

alleged in the answer; a denial of an allegation in the complaint as to the plaintiff's good conduct is not sufficient. Roe v. Roe, 14 Hun, 612.

Without reference to the validity of a separation agreement, the fact that the wife voluntarily left her husband and continued to live apart from him for a consideration furnished by him and accepted by her is a complete answer to the charge of abandonment by the husband. Desbrough v. Desbrough, 29 Hun, 592.

An allegation in an answer to the effect that at the time of the plaintiff's alleged marriage to the defendant she was the wife of another man, then living, from whom she had never been divorced, but whose lawful wife she then was, is sufficient. Clark v. Clark, 5 Hun, 340. See § 1770 (*post*, p. 100) as to what is deemed a counterclaim.

Adultery of the wife is a defense in an action brought by her for separation on the ground of cruel and inhuman treatment. Israel v. Israel, 54 App. Div. 408.

The conduct of a wife in refusing to cohabit with her husband, and in persisting in seeing a former paramour, whose company she had promised to forego, is sufficient justification for the husband leaving her and in refusing to support her, and is an answer to her action for separation on such grounds. Deisler v. Deisler, 59 App. Div. 207.

Where an action is brought by a woman for separation from her second husband, the latter is not entitled to a decree annulling the second marriage on the ground that the plaintiff's first husband was living at the time of such marriage, where it appears that the defendant has lived with her for more than ten years after obtaining knowledge of the fact that her former husband was not dead at the time of the second marriage. As to whether such counterclaim is proper in an action for separation, *quære*. Taylor v. Taylor, 63 App. Div. 231.

Section 4. Judgment.

What final judgment may contain [CODE CIV. PRO., § 1766].— Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court may, in such an action,

render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

This section was derived from R. S. pt. II, ch. 8, tit. 1, §§ 54, 55.

The court, after it has denied the principal relief sought on the ground that the evidence failed to show facts to establish any of the causes for which a separtion can be adjudged, has no power to give judgment awarding the custody of the children of the marriage to the plaintiff, and making provision for their maintenance out of the property of the husband; upon failure of the plaintiff to make out a case for a divorce, the defendant is entitled to judgment dismissing the complaint. Davis v. Davis, 75 N. Y. 221.

A decree of maintenance is but an incident to one for separation, and the circumstances under which a decree for maintenance may be made must be of such a nature as would justify a decree of separation. Ruckman v. Ruckman, 58 How. Pr. 278.

Where the husband has judgment for a separation, the court cannot order an allowance to the wife for support. Waring v. Waring, 100 N. Y. 570; Perry v. Perry, 2 Barb. Ch. 311; Palmer v. Palmer, 1 Paige, 276. And if the husband establishes his defense of misconduct on the part of the wife, the court cannot award the custody or maintenance of the children. Palmer v. Palmer, 29 How. Pr. 390.

An allowance to the wife for counsel fees or expenses of the action cannot be awarded in a final judgment for divorce or separation. Straus v. Straus, 67 Hun, 491.

Decree for support and maintenance, without decree of separation. — The provisions of this section authorizing a decree for the support and maintenance of the wife, although a decree for separation be not made, only applies where cruel and inhuman treatment or other cause of divorce have been made to appear to the court. The equity powers of the court cannot be invoked to sustain a judgment awarding the custody of children to the wife; the action being a statutory one, the powers of the court are to be sought in the statute itself, and only such judgment can be rendered as is authorized thereby. Nor is such relief justified by the provisions of § 1771 of the Code (*post*, p. 101), authorizing, in an action by a married woman for divorce or separation, an order for the custody of the children " during the pendency of the cause, or at its final hearing or afterwards; " this simply provides for the provisional custody of the children, and for awarding their custody when a decree shall be granted. Davis v. Davis, 75 N. Y. 221.

In the case of Ramsden v. Ramsden, 91 N. Y. 281, the wife's complaint alleged facts sufficient to sustain an action for separation, but simply asked for support and maintenance, it was held that the court had no

power to grant an allowance for counsel fees or alimony *pendente lite*. The court said that " In Atwater v. Atwater, 36 How. Pr. 431, 53 Barb. 621, the General Term held that the statute did not authorize a complaint to be filed by a wife for her support and maintenance by her husband, as a distinctive substantial relief. This was, we think, the true construction of the statute then in question, and the one now before us must be dealt with in the same manner."

The circumstances, under which a decree for maintenance may be made, must be of such a nature as would, in themselves, justify a direction of separation. The husband's intemperance is not a cause of separation, and a decree will not issue for the maintenance of a wife because of such intemperance. Douglas v. Douglas, 5 Hun, 140. As to modification of judgment, see Code Civ. Pro., § 1771 (p. 101, *post*).

Effect of decree of separation. — When a judicial decree of separation from bed and board has once been pronounced, the common-law obligation to support the wife, if not entirely abrogated, is greatly modified. Alimony then becomes the regular measure of the husband's obligation. It is granted or withheld always in furtherance of justice, and the amount is regulated by the exercise of a sound discretion, according to the circumstances of the parties. When the marriage bond was modified by the decree of separation, the legal obligation to support the wife in the sense that it existed before ceased, and in its place was substituted the power of the court to appropriate some part of the property or earnings of the husband to that purpose as justice might require. People ex rel. Comm'rs of Charities v. Cullen, 153 N. Y. 629, 636, citing Kamp v. Kamp, 59 N. Y. 212; Romaine v. Chauncy, 129 N. Y. 566; Galusha v. Galusha, 116 N. Y. 635; Wetmore v. Wetmore, 149 N. Y. 520; Schouler on Husband & Wife, § 118; Parsons on Contracts, vol. 2, p. 85; Tyler on Infancy and Coverture, § 700, p. 924.

Judgment for separation may be revoked [Code Civ. Pro., § 1767]. — Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

This section is a re-enactment of the provisions of § 56 of R. S. Pt. II, ch. 8, tit. 1.

The original note to this section of the Revised Statutes made by the revisers is: " New, but conformable to the practice of the court of chancery. Barrere v. Barrere, 4 Johns. Ch. 187." In the case cited Chancellor Kent assumed that he had the power to grant a decree of separation until the parties might become reconciled, but said: " Such a decree

seems to be of too loose a texture, and to be destitute of the requisite sanction. It separates the parties until they are reconciled, and leaves that event open to dispute. I prefer that the sentence shall be binding and effectual until the parties shall have applied to the court, and received, upon just grounds, a judicial recognition of the certainty and sincerity of their reconciliation." It would seem then that before the adoption of section 56 of the Revised Statutes above referred to, from which this section was derived, that a judgment for separation could not be revoked by a reconciliation of the parties, without an application to the court granting the decree of separation.

The case of Barrere v. Barrere, above cited, is considered in the case of Jones v. Jones, 90 Hun, 414, where the court held that the only method by which a judgment for a separation forever, or for a limited period, can be revoked is that prescribed by the above section of the Code, and it can only be done by the court. The fact that after a decree of separation was granted the parties lived together as husband and wife, does not operate to revoke the decree.

If a wife voluntarily return to her husband before the trial of an action for separation the same is terminated, although no order of discontinuance is entered. The attorney for the wife may bring an action against the husband for the value of his services if any counsel fees or alimony has been awarded. Naumer v. Gray, 41 App. Div. 361.

The case of Hobby v. Hobby, 5 App. Div. 496, was an action brought by a wife to obtain a decree of separation from her husband, and the defendant answered that a similar action was brought by the plaintiff in 1868 in which a judgment of separation was recovered. The plaintiff admitted this, but in order to avoid its effect, alleged that the parties were reconciled and lived together from 1875 to 1880, when the defendant again abandoned her. It was held that the action could not be maintained and that the decree entered in 1868 was not vacated or in any manner revoked by the reconciliation or cohabitation of the parties. The only way in which such a decree can be revoked is in the manner prescribed by section 1767 Code Civ. Pro.

CHAPTER VI.

PROVISIONS GENERALLY APPLICABLE TO MATRIMONIAL ACTIONS; ALIMONY AND COUNSEL FEES.

[*Code Civil Procedure*, §§ *1768–1774.*]

SECTION 1. RESIDENCE OF MARRIED WOMEN.
2. ALIMONY PENDENTE LITE; ALLOWANCES FOR EXPENSES AND COUNSEL FEES.
3. PERMANENT ALIMONY.
4. AFFIRMATIVE RELIEF.
5. CUSTODY AND MAINTENANCE OF CHILDREN AND SUPPORT OF WIFE.
6. PRACTICE IN DIVORCE CASES GENERALLY.
7. EFFECT OF FOREIGN JUDGMENTS IN THIS STATE.

Section 1. Residence of Married Women.

Married women deemed a resident in certain cases [CODE CIV. PRO., § 1768]. — If a married woman dwells within the state, when she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 57.

The general rule to be derived from the principles universally applied, is that the courts of this state have no power to adjudge the status of parties residing beyond its jurisdiction. It is not likely that this rule was changed, or intended to be changed, by the provisions of the Code. Gray v. Gray, 143 N. Y. 354. In this case the complaint alleged that the parties were married in this state and that the plaintiff resided here. The summons was served in this state, and the defendant appeared and answered. The answer, after denying the commission of the offense charged in the complaint as a separate offense, alleged that both parties were, at all the times mentioned in the complaint, residents of the state of Pennsylvania, and that the courts in this state had no jurisdiction. To this the plaintiff demurred as being upon its face unnecessary. Upon

the pleadings and other proof which warranted a finding that the parties, before the commencement of the action, had separated, and that the plaintiff was then a resident of this state as defined in the above section, an order was granted directing the payment by the plaintiff of the sums specified for counsel fees and alimony. It was held that the court had the power to make the order.

A married woman may acquire a domicile in a jurisdiction other than that of her husband when necessary to enable her to maintain an action for a limited divorce on the ground of cruel treatment. Atherton v. Atherton, 82 Hun, 179; aff'd 155 N. Y. 131. The provisions of this section seem to recognize the exception to the rule that the domicile of the wife is that of the husband.

The case of Hunt v. Hunt, 72 N. Y. 242, states the exception in the following words: "When the conduct of the husband has been such as to entitle the wife to an absolute or limited divorce she may have a domicile in another jurisdiction than that of her husband. She may acquire a separate domicile whenever it is necessary for her to do so. The right to do so springs from the necessity for its exercise."

In the case of Gray v. Gray, 143 N. Y. 354, the court says: "It is no doubt true that *prima facie* the domicile of the husband is that of the wife, but it is equally true that in a case where a separation takes place by reason of the domestic difficulties, the wife may obtain a residence in this state which will enable her to maintain an action for a divorce. See also People v. Baker, 76 N. Y. 78; Mellen v. Mellen, 10 Abb. N. C. 329; Rundle v. Van Inwegan, 9 Civ. Pro. Rep. 328.

Section 2. Alimony Pendente Lite; Allowances for Expenses and Counsel Fees.

Orders for payment of expenses of action; payment of costs [CODE CIV. PRO., § 1769]. — Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money, necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs, in favor of or against either

party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 58.

Alimony pendente lite, when allowed.— In an action brought by a husband to have his marriage with the defendant declared void on the ground that she had a former husband living at the time it was celebrated, the court has power to make an order allowing a defendant a counsel fee *pendente lite*. O'Dea v. O'Dea, 31 Hun, 441. The Code has not changed the law as it existed under the Revised Statutes allowing counsel fees in a husband's action to annul a marriage. Lee v. Lee, 66 How. Pr. 207.

Where a marriage is sought to be annulled by the husband on the ground that the wife had another husband living, the wife is entitled to alimony and counsel fees *pendente lite*. Wabberson v. Wabberson, 27 Misc. 125.

The weight of authority is against the allowance of alimony and counsel fees in an action brought by a wife to annul her marriage on the ground that she had not arrived at the age of legal consent. Heron v. Heron, 28 Misc. 323, citing Meo v. Meo, 22 Abb. N. C. 58.

For cases holding the contrary doctrine see 2 Fiero on Special Actions, 959.

An allowance to the wife for her support and to carry on the suit, whether for divorce or separation, is not a matter of right, but discretionary with the court. Jones v. Jones, 2 Barb. Ch. 146; McDonough v. McDonough, 26 How. Pr. 193.

If the action is brought against the wife temporary alimony may be granted to her while the action is pending. Leslie v. Leslie, 10 Abb. Pr. N. S. 64; Ford v. Ford, 10 Abb. Pr. N. S. 74.

Temporary alimony will be refused if the conflict of evidence creates doubt of ultimate success, especially where the plaintiff has an income of her own sufficient for support. Counsel fees, however, will be granted where the plaintiff on her own statement makes out a *prima facie* case, and her income is not sufficient to support her and defray the expenses of the suit. Douglas v. Douglas, 13 Abb. Pr. 291.

There is an exception to the rule that alimony will be awarded to the defendant wife, for example where she does not interpose a meritorious defense, or where the defense is merely to deceive the court and obtain the benefit of an allowance. Stearns v. Stearns, 53 N. Y. Supp. 348.

Where a woman denies the charge of adultery upon oath, she will be allowed alimony *pendente lite* unless the evidences of her guilt so preponderate as to render it most improbable that she will succeed at the trial. Glaser v. Glaser, 36 Misc. 231.

ALIMONY PENDENTE LITE; ALLOWANCE FOR EXPENSES, ETC.

Alimony *pendente lite* should not be allowed, unless the existence of the marital relation is admitted or proven to the satisfaction of the court. Brinkley v. Brinkley, 50 N. Y. 184; Collins v. Collins, 71 N. Y. 269; Kinzey v. Kinzey, 7 Daly, 460; Collins v. Collins, 80 N. Y. 1; Humphries v. Humphries, 49 How. Pr. 140.

Where, in an action brought by a husband, the wife sets up a divorce from the plaintiff in another state, and admits her subsequent marriage to another, temporary alimony and expenses should not be denied on the ground that it does not appear that she is the plaintiff's wife, since that is one of the issues to be tried. Starkweather v. Starkweather, 29 Hun, 488.

Alimony should not be allowed where it appears reasonably certain that she is not destitute of means of livelihood nor property sufficient to carry on her action. Maxwell v. Maxwell, 28 Hun, 566.

In a husband's bill for divorce the court will not order an allowance for support or for expenses before answer disclosing the defense. Lewis v. Lewis, 3 Johns. Ch. 519.

If a wife, who is sued for divorce, in her answer denies her guilt, or sets up an affirmative defense, such as forgiveness or recrimination, counsel fees and alimony will be allowed her, unless the court is satisfied that she is altogether in the wrong or has no reasonable ground of defense. Strong v. Strong, 1 Abb. Pr. N. S. 358; Clark v. Clark, 7 Robt. 284; Pettee v. Pettee, 45 N. Y. St. Rep. 549, 19 N. Y. Supp. 311; Starkweather v. Starkweather, 29 Hun, 488.

Where the action is brought by the husband for a divorce on account of the adultery of the wife, and a gross case is clearly made out against the wife, alimony and counsel fees should not be granted. Kock v. Kock, 42 Barb. 515; Griffin v. Griffin, 23 How. Pr. 189.

In an action brought by the wife for a limited divorce because of cruel and inhuman treatment, she must make it appear that she has been injured and present a meritorious cause of action. A single instance of cruelty is not sufficient to authorize the court to interfere, although vague charges of cruel treatment be also made against the husband. Solomon v. Solomon, 3 Robt. 669, 28 How. Pr. 218; Bertschy v. Bertschy, 14 Week. Dig. 111.

Alimony and counsel fees will not be allowed a wife in an action for separation. The police courts furnish her remedies for compelling her husband to support her. Le Bowski v. Le Bowski, 27 Misc. 759.

Compare, however, the following:

Where a wife's application to the police court for support from her husband proved unavailing, and she is not living with him and cannot properly do so, alimony and counsel fees will be allowed in an action for separation. Wood v. Wood, 30 Misc. 50.

Where a wife's affidavit in an action for separation and for alimony showed that her husband's conduct justified her in leaving him, the rule that she should apply to the police court for support will not be applied, as she is entitled to alimony as distinct from mere support and for counsel fees. Miers v. Miers, 35 Misc. 476.

ALIMONY PENDENTE LITE; ALLOWANCE FOR EXPENSES, ETC.

A valid subsisting agreement of separation entered into with the intervention of a trustee who indemnifies the husband for the wife's support, is a bar to an allowance of alimony in a subsequent action by the wife for a divorce. Galusha v. Galusha, 116 N. Y. 635. See also Collins v. Collins, 80 N. Y. 1.

Alimony *pendente lite* will be refused in an action for absolute divorce where there is a valid subsisting separation agreement between the parties in which they covenant to live separately, and the husband transfers to his wife about one-half of his property. Grube v. Grube, 65 App. Div. 239.

Where husband and wife, through a trustee, have entered into articles of separation, and the husband has provided for her support and that of her child, counsel fees and alimony cannot be granted in an action for separation brought by the wife. Powers v. Powers, 33 App. Div. 126.

A wife will be refused counsel fees and alimony in an action for separation where the alleged abandonment took place under a separation agreement, and the cruel treatment complained of took place before such agreement. Curtis v. Curtis, 29 Misc. 257.

Good cause for granting alimony in an action for a limited divorce must be shown. It is not a matter of course. A mere allegation of abandonment generally and of neglect or refusal to support are not sufficient to warrant a granting of alimony, if they are denied. Boubon v. Boubon, 3 Robt. 715; Worden v. Worden, 3 Edw. Ch. 387; Hollerman v. Hollerman, 1 Barb. 64; Bissell v. Bissell, 1 Barb. 430, 3 How. Pr. 242.

An application for alimony may be denied if there is doubt of the plaintiff's ultimate success. Carpenter v. Carpenter, 19 How. Pr. 539.

If the petition for alimony does not deny on oath the adultery charged or show some valid defense the application will be denied. If the charges made by the plaintiff of the husband's adultery are founded on information and belief and the defendant positively denies them, and no affidavits are tendered in their support, the order for alimony should not be granted. Monk v. Monk, 7 Robt. 153.

Alimony and counsel fees were denied to the defendant wife in an action for divorce where she admitted the intercourse charged, but justified the same upon the ground that it was committed with her lawful husband, showing in support of such position a decree of a Dakota court, void by reason of the fact that the defendant was not served with process and did not appear. Bailie v. Bailie, 30 App. Div. 461.

In a wife's suit for separation where the answer on oath denies or explains the charges fully, the court cannot, upon the complaint and answer, merely, order an allowance. It must at least appear that she has good ground for bringing the suit. Bissell v. Bissell, 1 Barb. 430, 3 How. Pr. 242.

Where, in an action to annul a marriage, it clearly appears on the motion for an allowance for counsel fees and support that the defendant

asking the allowance had been married before, and her husband was living at the time of her second espousal, the motion will be denied since there was no second marriage, and such allowance is predicated upon the marriage relation. Hopper v. Hopper, 92 Hun, 415, 71 N. Y. St. Rep. 664, 36 N. Y. Supp. 610.

It is not an answer to a motion for alimony, support of a child, and for counsel fees, that the wife claims to have obtained the divorce in a foreign state. Baille v. Baille, 53 N. Y. Supp. 866.

Where the complaint and affidavits show a cause of action for a divorce within the jurisdiction of the courts of this state, and that the plaintiff is a resident and the defendant was served in this state and has appeared, the court has power to award alimony to the plaintiff, although she has demurred to the answer alleging that both parties were residing in another state at the commencement of the action, and that the court had no jurisdiction. Gray v. Gray, 143 N. Y. 354.

The fact that the husband has receovered a verdict against a person for adultery with his wife is no answer to her application for an allowance to enable her to defend a suit by the husband for a divorce where she swears the charge is unfounded. The fact that on a trial had by a jury on issues framed involving a denial, forgiveness and recrimination, the jury disagreed, it is enough to show that the wife has reasonable ground of defense without positive affidavits. Strong v. Strong, 1 Abb. Pr. N. S. 358.

When the wife is a defendant in a suit for divorce on the ground of adultery she is entitled to an allowance for her support pending the litigation, and to a further sum to enable her to defend the action, if she denies on oath the charge of adultery, although affidavits on the part of the husband are read showing that she is guilty. Wood v. Wood, 2 Paige, 108. See, also, Osgood v. Osgood, 2 Paige, 621; Clark v. Clark, 7 Robt. 284; Williams v. Williams, 3 Barb. Ch. 628.

Amount of alimony pendente lite.— The amount of alimony *pendente lite* is in the discretion of the court; and it should be fixed with reference to the husband's resources, including both property and income, the claims of his children and others upon him for sustenance and education, and his ability to provide for himself and family by his own exertions. Lawrence v. Lawrence, 3 Paige, 267; Leslie v. Leslie, 6 Abb. Pr. N. S. 193; Gilbert v. Gilbert, 15 N. Y. St. Rep. 822. Unless the allowance is gross or excessive, so as to show an abuse of judicial discretion, it is not reviewable. Llamosas v. Llamosas, 62 N. Y. 618. If there has been a palpable abuse of the discretion of the court, or if the court seems to have been controlled by improper considerations in making the allowance, there is no doubt of the power of the appellate court to review the action of the lower court on appeal. Patterson v. Patterson, 14 App. Div. 146, citing Lowenthal v. Lowenthal, 68 Hun, 366. The husband's estate is presumed to yield a reasonable income unless the contrary be shown. Forrest v. Forrest, 5 Bosw. 672.

ALIMONY PENDENTE LITE; ALLOWANCE FOR EXPENSES, ETC.

The amount of alimony allowed to a wife pending suit is usually less liberal than a permanent allowance. Leslie v. Leslie, 6 Abb. Pr. N. S. 193.

The power of the court to order the husband to provide for his wife during the suit is limited to an allowance of money. Simmons v. Simmons, 2 Robt. 712.

Only such sums should be allowed as the husband is able to pay, and sufficient to properly support the wife and enable her to try the cause. Gilbert v. Gilbert, 15 N. Y. St. Rep. 822.

The husband's poverty, though no reason for refusing to order an allowance, is to be considered in fixing the amount of alimony. Hallock v. Hallock, 4 How. Pr. 160; Rublinsky v. Rublinsky, 24 N. Y. Supp. 920.

The court is not limited to what is barely sufficient for the wife's support, but may consider the husband's ability to pay, and also his conduct in the controversy leading to the suit. Tearle v. Tearle, Daily Register, July 25, 1883.

The fact that a wife, suing for divorce, has some separate property, although a circumstance to be considered, does not bar her rights, or deprive the court of its discretion upon her application for temporary alimony, when it appears that the property did not come to her from her husband, and the income therefrom is not so great as to render all allowances unnecessary. Merritt v. Merritt, 99 N. Y. 643.

The husband may be required to pay temporary alimony, if he is earning enough and the wife is out of employment, where both are musicians dependent upon their earnings. Hoffman v. Hoffman, 7 Robt. 474.

In fixing the amount, the court should take into consideration the nature of the action, whether or not the wife has a good cause of action, the probable difficulty in proving her case, the strength of the case she is required to meet, the probable expense of carrying on the litigation and the means of the husband, including his expenditures and his apparent condition. Alimony or counsel fees should never be given to a wife merely to punish a husband because he refuses to consent to a reference of the action or because it is shown by the proceedings that he is an unworthy person. Patterson v. Patterson, 4 App. Div. 146.

Where it appears that the wife has not been entirely free from fault, such an allowance will not be made to her as will operate as an inducement to delay a speedy trial and disposition of the action. Hardy v. Hardy, 6 N. Y. Supp. 300.

In general, temporary alimony must be limited to the wife's actual wants. The expenses of her board and clothing should be estimated as of the place of residence of her relatives, if she has chosen to reside there. Germond v. Germond, 4 Paige, 643; Simmons v. Simmons, 2 Robt. 712.

Where it appears that, pending the suit, the wife's health requires her to travel for a season, the court may order an allowance in a gross

sum for that purpose, her regular allowance to be suspended meanwhile. Lynde v. Lynde, 4 Sandf. Ch. 373, affirmed 2 Barb. Ch. 72.

See Deisler v. Deisler, 65 App. Div. 208, for a case where, in an action for separation, brought upon the same grounds as a prior action in which the defendant succeeded on appeal, it was held that counsel fees and alimony should be denied to the plaintiff, and the alimony limited only to the support of the children.

Where as a condition of the discontinuance of an action for separation the husband executed an instrument agreeing to pay his wife a certain sum, she to recommence the action for separation if he fails to do so, it was held that in the second action an order for alimony and counsel fees at substantially the same rate which he had agreed to pay would not be disturbed. Van Gierson v. Van Gierson, 26 App. Div. 347.

An allowance of one-third of her husband's income as alimony was held to be excessive where such income was derived solely from his services as an opera singer. It seems that such an allowance when received from investments or from a certain salary not liable to be reduced, might not be excessive. Cowles v. Cowles, 29 App. Div. 476.

Allowance for expenses and counsel fees.— The power of the court, in an action brought by a wife to procure a separation, to make an allowance to the wife for counsel fees and expenses, is limited to such sums as may be necessary to enable her to carry on or defend the action; and if an application be made for counsel fees and other expenses after the trial of the action and its determination in favor of the plaintiff, without showing in the moving papers that the money is necessary to enable her further to defend the action or to maintain or prosecute her rights under the judgment, an allowance therefor is unauthorized. Atherton v. Atherton, 82 Hun, 179, citing Beadleston v. Beadleston, 103 N. Y. 402; McCarthy v. McCarthy, 137 N. Y. 500.

In the case of Beadleston v. Beadleston, 103 N. Y. 402, it was held that the purpose of section 1769 of the Code was to furnish the wife with means to thereafter carry on her action or defend the same during the pendency thereof. There can be no necessity for an allowance to make a defense which has already been made, or solely to pay expenses already incurred. A wife who has defended an action which has proceeded to a referee's report against her, cannot, before judgment and while the action is pending, have an order compelling her husband to pay her a sum for the expenses of such defense, when there is no proof that such sum is necessary to enable her further to carry on her defense in the action.

In an action brought by a husband for a divorce on the ground of adultery, the plaintiff's poverty is no defense to an application for an allowance for expenses and counsel fees to his wife. He must either furnish the wife with money to enable her to conduct her defense, or abandon his action. Great injustice might be done if the husband were not compelled to furnish to his wife the means of having so

important a question of fact as the wife's adultery decided in the usual manner. It is proper, however, to take into consideration the pecuniary ability of the husband and the circumstances in life of the parties, in fixing the amount of the allowance. Cohen v. Cohen, 32 N. Y. Supp. 1082, citing Hallock v. Hallock, 4 How. Pr. 160; Frickel v. Frickel, 4 Misc. 382, 24 N. Y. Supp. 483; Purcell v. Purcell, 3 Edw. Ch. 194.

If it is clear that the suit cannot be maintained, no allowance should be made to defray the expenses of the suit. Wood v. Wood, 8 Wend. 357. And if the complaint is multifarious, an allowance for costs cannot be ordered. Rose v. Rose, 11 Paige, 166.

Where all the facts upon which the plaintiff's right to a divorce is based, are denied by the defendant, and the preponderance of evidence seems to be with the latter, alimony should be denied; but if it appear that the plaintiff is poor and unable to pay the expenses of prosecuting her action, an allowance for counsel fees would be proper. Brennan v. Brennan, 19 Week. Dig. 342.

In an action for a separation the wife must make it appear that she has been injured, and present a meritorious cause of action before she is entitled to temporary alimony; but she should be granted an allowance for expenses and counsel fees when her own statement makes out a *prima facie* case, and her income is not sufficient to support her and pay the expenses of the suit. Browne v. Browne, 9 Civ. Pro. R. 180, citing Douglas v. Douglas, 13 Abb. Pr. N. S. 291.

An allowance for counsel fees to two counsel ought not to be made unless it is clearly shown that two counsel are necessary to protect the rights of the wife. Uhlman v. Uhlman, 51 Super. Ct. (J. & S.) 361.

An allowance may be granted to enable a wife to sue for divorce, although her husband has an action pending in another state to secure a divorce from her. Whitney v. Whitney, 22 How. Pr. 175.

Counsel fees may be awarded the wife in an action brought by the husband to annul the marriage on the ground of fraud and duress. Lee v. Lee, 66 How. Pr. 207; North v. North, 1 Barb. Ch. 241. Where the action is brought by the husband to nullify a marriage and the final decision is in favor of the wife, the court has power to award her extra expenses and counsel fees, beyond the taxable costs, independently of any statute. Griffin v. Griffin, 47 N. Y. 134.

A wife may have a counsel fee though the husband, on voluntary separation, made provision for her support, where she has answered alleging her husband's adultery. Miller v. Miller, 43 How. Pr. 125.

If the husband desires to prosecute further, after the wife has succeeded before the referee, it is proper to award counsel fees to her. Donnelly v. Donnelly, 63 How. Pr. 481; and pending an appeal by the husband from part of the judgment in favor of a wife, her counsel may be awarded an additional fee. Winton v. Winton, 12 Abb. N. C. 159. This case was reversed by the General Term as reported in 31 Hun, 290, where it was held that after judgment in favor of the wife has been entered in an action brought by her to procure a limited

divorce from her husband, the court has no power to make an order requiring the husband to pay any sum of money to the plaintiff's attorney for services which he has theretofore, or may thereafter, render to her in an action. The fact that the husband has appealed to the Court of Appeals from a judgment of the General Term affirming the judgment of the court below, does not authorize the court to make such an order.

In the case of McBride v. McBride, 119 N. Y. 519, the court questions the rule of the General Term in the case of Winton v. Winton, and holds that the power exists in case of an appeal from a judgment in an action for divorce to make an allowance for counsel fees during the pendency of the appeal until the final determination of the action.

In the case of McCarthy v. McCarthy, 137 N. Y. 500, the court suggests that after entry of judgment in the case of an appeal therefrom, it would be proper for the court to make an allowance for the costs of the appeal, and to include therein expenses already incurred. See also Halstead v. Halstead, 72 N. Y. St. Rep. 1080; Winkemlier v. Winkemlier, 42 N. Y. Supp. 586.

Allowance of additional alimony, pendente lite.— A wife who brings an action for a divorce and has received an allowance for counsel fees and expenses, is not entitled to a further allowance to cover expenses incurred previous to such second application, unless it appears that such allowance is necessary to enable her further to carry on the litigation. Stampfer v. Stampfer, 11 N. Y. Supp. 588. If unusual proceedings are taken by the husband, additional alimony may be allowed; while a court has power to increase alimony in an action for divorce the increase should not be granted, unless new facts are shown which did not exist or were not known to the applicant when the former order was made; otherwise such an application is in effect an appeal from the discretion of one justice to that of another. Strauss v. Strauss, 38 N. Y. St. Rep. 478.

Without showing a change of circumstances affecting the rights of the parties an additional allowance cannot be granted. Simonds v. Simonds, 57 Hun, 290; Kittle v. Kittle, 8 Daly, 72. See also Forrest v. Forrest, 5 Bosw. 672; Morrell v. Morrell, 2 Barb. 480.

Application for alimony, pendente lite.— The application for an allowance *pendente lite* should be made upon special application and cannot properly form a part of the final judgment. Straus v. Straus, 67 Hun, 491, citing Percival v. Percival, 14 N. Y. St. Rep. 255; Williams v. Williams, 25 N. Y. St. Rep. 183; Stampfer v. Stampfer, 33 N. Y. St. Rep. 807; Pountney v. Pountney, 32 N. Y. St. Rep. 335.

A motion by the attorney for his fee in the name of his client who has returned to her husband is improper; it should be in his own name. Chase v. Chase, 29 Hun, 527; Louden v. Louden, 65 How. Pr. 411.

A court should require the wife, when plaintiff, upon the application for alimony *pendente lite*, to show that the action is brought in good faith before compelling the husband to pay her money to enable her to prosecute the action, although the motion may be made upon affidavits and before a copy of the complaint has been served; yet in such case

the affidavits must allege in substance all the facts necessary to make a good complaint in the action. If the action is for adultery, the omission to show in the affidavits when or where the defendant committed adultery, precludes the court from granting the order. Whitney v. Whitney, 22 How. Pr. 175. But it was held in the case of Reese v. Reese, 2 How. Pr. 81, that the motion for an allowance, where the wife brings the action, should not be made until after the service of her complaint.

The objection that affidavits on a motion for alimony were not properly authenticated cannot be taken for the first time upon an appeal from the order granting the motion. Rogers v. Rogers, 54 App. Div. 195.

In Boesenberg v. Boesenberg, 50 App. Div. 622, it was held that the question of the defendant wife's adultery should not be determined by affidavits on a motion for alimony. "She should have an opportunity to cross-examine the witness whose sworn statements so strongly inculpate her." Stearns v. Stearns, 33 App. Div. 630, distinguished.

It is a general rule that courts will not try the merits upon affidavits in questions of alimony, but the rule is subject to the qualification that when it clearly appears that the success of the husband is inevitable, and undisputed, and independent facts show that the wife has no reasonable hope of success, alimony will be refused. The defendant in applying for temporary alimony must show that she has a meritorious defense. Stearns v. Stearns, 33 App. Div. 630.

An allowance for counsel fees and alimony pending appeal by wife of a judgment of divorce will not be granted as a matter of right, nor until the appellant has made her case on appeal and shown that the appeal is meritorious. Ganz v. Ganz, 59 N. Y. Supp. 955; 93 N. Y. St. Rep. 955.

Application for alimony will be denied in an action for separation brought by the wife upon the ground of cruel and inhuman treatment where the papers therein do not specify the particular nature and circumstances of the defendant's misconduct, as required by section 1764 of the Code, and where the answering affidavits not only disprove the charges of misconduct, but show without contradiction that the plaintiff is living in open adultery. Mackintosh v. Mackintosh, 44 App. Div. 118.

Where the charges in a wife's complaint in an action for divorce were made entirely upon information and belief, and were denied by the defendant's affidavits before answering, and the plaintiff offers no evidence of reasonable probability of success, alimony and counsel fees should not be granted. Downing v. Downing, 23 App. Div. 559.

The question of counsel fees and alimony cannot, except with the consent of counsel, be reserved for decision after the trial of an action, and thus where the complaint has been dismissed after trial the court has no power to award alimony at a specified rate from the time of the commencement of the action or award counsel fees. Lonsdale v. Lonsdale, 41 App. Div. 224.

The wife's affidavits upon motion for alimony must furnish material upon which to base a finding as to her husband's income. Miller v. Miller, 27 Misc. 758.

Marriage must be proved before alimony will be granted.— As the allowance for alimony is only authorized in favor of the wife, it must be admitted, or proof must be submitted sufficient to authorize the court to determine, that the applicant stands in the relation of wife to the opposite party, and if, in answer to her allegations of marriage facts are stated showing that the applicant was not competent to contract such a marriage and did not thereby become a wife, such facts must be denied or explained to the satisfaction of the court; if left uncontroverted the court is not justified in making an allowance. Collins v. Collins, 71 N. Y. 269.

The burden of proof is upon the applicant to establish the fact of marriage with a reasonable degree of certainty. Where, at the time of the alleged marriage the applicant believed herself competent to marry, but in fact was under a disability rendering the marriage void, but such disability subsequently ceasing, proof of cohabitation thereafter without any new marriage contract, and in reliance simply on the validity of the original marriage, is not at all proof of the validity of the marriage for the purpose of such application. Collins v. Collins, 80 N. Y. 1.

Where the marriage is denied by the answer, alimony will not be granted until it is proved, but a reasonably plain case will justify an allowance of temporary alimony as it need not be so conclusively established as for permanent alimony. Brinkley v. Brinkley, 50 N. Y. 184.

If the undisputed facts raise the presumption that the parties were married, so that the affirmative rests upon the husband to repel the presumption, the court may make temporary allowance although the party in opposition to the motion appears to repel the presumption. Kinzey v. Kinzey, 7 Daly, 460.

Where the cohabitation was originally illicit and the marriage in fact is not shown, no alimony or counsel fee will be allowed. Humphreys v. Humphreys, 49 How. Pr. 140.

Nor where the defendant admits facts showing that she is not the plaintiff's wife. Appleton v. Warner, 51 Barb. 270.

Husband is liable for legal services rendered in action brought by wife.— A husband is liable for legal services rendered to his wife in an action brought by her for separation. In such action the plaintiff must prove that the suit was for the protection and support of the wife and that the institution thereof was reasonable and proper. *Quære*, as to whether the same rule exists in an action for divorce. Naumer v. Gray, 28 App. Div. 529.

A husband is liable for the value of an attorney's services rendered to his wife in her defense of an action for separation, even though the parties are reconciled and the action discontinued. Hays v. Ledman, 28 Misc. 575.

Section 8. Permanent Alimony.

When allowed and how fixed.— When a woman is divorced from her husband by reason of his adultery, her right to such allowance as may be just, having regard to the circumstances of the parties respectively as they existed at the time the decree is pronounced, is perfect and absolute. Forrest v. Forrest, 3 Bosw. 661. And, in the case of Forrest v. Forrest, 25 N. Y. 501, the court held that on adjustment of the allowance, where there has been a divorce for adultery, the court may take into account imputations against the wife and of her moral delinquencies. After judgment has passed in her favor, the main subjects of inquiry are the proper measure of the wife's expenditures, the amount and income of the husband's estate and other duties or burdens chargeable upon him. The amount of alimony is largely in the discretion of the court, and while it is not a matter of division of portions of the property of the defendant, the question of suitable support to the extent of the husband's means is an important element.

In determining the income of the husband, where the value only of the estate is shown, and not his actual income, the court will take judicial notice of the fact that without the aid of well-guided business ability and available capital it could not produce a large rate of income. Galusha v. Galusha, 43 Hun, 181, modified in 116 N. Y. 635; Simmons v. Simmons, 2 Robt. 712; Germond v. Germond, 4 Paige, 643.

Articles of separation may be considered in fixing alimony and are not annulled by a decree of divorce. Galusha v. Galusha, 116 N. Y. 635.

Articles of separation providing alimony for the wife are bar to subsequent alimony in an action for divorce, as the executed agreement remains valid and constitutes a bar to further claim for support. Taylor v. Taylor, 32 Misc. 312.

The court should not in general allow the wife alimony to the extent of more than one-third of the husband's estate. See Collins v. Collins, 10 Hun, 272, reversed on other grounds, 71 N. Y. 269. See also Peckford v. Peckford, 1 Paige, 274; Miller v. Miller, 6 Johns. Ch. 91.

Where the defendant has settled property upon his wife, it must be surrendered before alimony can be allowed. Rose v. Rose, 11 Paige, 166.

Property of the husband, held by the wife, must be exhausted before he will be called upon to pay. Osgood v. Osgood, 2 Paige, 621.

It is proper to require that alimony may be secured by a lien on real estate. Forrest v. Forrest, 6 Duer, 102.

Alimony is not affected by subsequent marriage of the wife. Shepherd v. Shepherd, 1 Hun, 240.

Alimony ceases with the life of the defendant; but the order may require provision to be made in the defendant's lifetime for the payment of alimony during the joint lives of the parties. Field v. Field, 15 Abb. N. C. 434; Beach v. Beach, 29 Hun, 181; Galusha v. Galusha, 43 Hun, 181.

PERMANENT ALIMONY.

A decree directing the defendant to pay alimony during the wife's natural life, and requiring him to pay premiums upon certain policies of insurance for her benefit, ceases on the death of the husband, and there is no obligation upon his estate to pay the alimony. Where the decree does not especially impose such obligation upon the estate of the husband, making substantial provision for the wife upon his death, the decree will not be disturbed. The present provisions of the Code permitting a decree of divorce to be changed are not retroactive, and may not be invoked in aid of a judgment entered prior to the enactment of such provision. As to whether the court may, by express provision in a decree of divorce, direct the payment of alimony from husband's estate after his death, *quære*. Johns v. Johns, 44 App. Div. 533, but see notes, p. 99.

Where the final decree of the court has been made in an action for divorce on the ground of adultery, directing the payment of alimony to the defendant during the plaintiff's life, it was held that the obligation was personal and the decree must be construed to mean during the lives of both parties and upon the defendant's death the right to further alimony ceases. Field v. Field, 15 Abb. N. C. 434, 66 How. Pr. 346.

Where an action to annul a marriage is brought by a woman on the ground that there is a subsisting marriage between the defendant and another woman, the judgment cannot award alimony for the plaintiff and for the children, because the plaintiff never was the wife of the defendant. The judgment of annulment can only make provision for the children where the marriage is avoided for lack of legal consent. Park v. Park, 24 Misc. 372.

Alimony allowed by judgment.— If future alimony ought to be paid after judgment, a clause to that effect should be inserted in the judgment, or if reasons exist for its payment pending an appeal, a fresh application should be made therefor. Wood v. Wood, 7 Lans. 204.

In an action by a wife against her husband for divorce on the ground of adultery, a defendant, after a verdict against him, should be permitted to produce proof, and either on a reference or on a hearing before the court, should be allowed to show such facts as are proper to be considered in determining the amount of alimony, the time when it should commence, etc. Forest v. Forest, 6 Duer, 102, 3 Abb. Pr. 144.

The income of a trust fund created for the benefit of testator's son cannot be applied to the payment of alimony after an absolute divorce, where the plaintiff marries again and her husband's ability to support her is unquestioned. Wetmore v. Wetmore, 162 N. Y. 503.

In an action for divorce *a vinculo*, the jurisdiction of the court over the subject-matter of the action and over the parties, in respect to all matters involved in it, terminates with the entry of final judgment therein, save for the enforcement or correction of the judgment. Where the action is by the wife, her claim for alimony is to be determined by the situation of herself and husband at the time of making the decree. If no provision for her is made therein, it is to be presumed that the court decided adversely to her claim, and the decree

is equally as final as if such provision had been made. The court has no power in a subsequent application, showing circumstances thereafter arising, to award alimony. Kamp v. Kamp, 59 N. Y. 212.

Where the defendant in an action for divorce fails to appear although duly served, the court may decree alimony if it was demanded in the complaint, although the complaint itself was never served on the defendant. Park v. Park, 80 N. Y. 156.

Modification of allowance of alimony.— Note that the amendment to Code Civ. Pro., § 1759, made by L. 1900, ch. 742, allows the annulment or modification of a provision for permanent alimony "*whether heretofore or hereafter rendered.*" Therefore the holdings in the following cases would seem to be rendered inoperative unless there is no provisions for alimony in the decree, or the reservation of a right to such provision.

While going to press a decision of the Appellate Division, Livingston v. Livingston, is noticed in the daily papers (July 9, 1902), holding that the amendment to section 1759 of the Code of Civil Procedure allowing an amendment of a decree granting alimony "whether heretofore or hereafter rendered" is unconstitutional in so far as it applies to decrees entered before the amendment of 1895.

Under section 1759 of the Code, as it existed before the amendment of 1891, the courts had no power to change the amount of alimony allowed in a final judgment of divorce. But by the amendment to that section by chapter 728 of Laws of 1894, and chapter 891 of Laws 1895, the court may, after final judgment, vary the direction as to alimony. But such provision is not retroactive and does not confer authority on the court to change the amount of alimony allowed in a judgment entered prior to this amendment. Walker v. Walker, 155 N. Y. 77.

As to a judgment of divorce entered in 1882 it was held that where the decree contained no provision reserving to the court the right to alter or modify the judgment in respect to alimony, the court has no power to amend it by inserting such provision. Livingston v. Livingston, 46 App. Div. 18.

The amendment of 1895 to section 1759 of the Code is not retroactive, and the court cannot modify a judgment entered before its enactment; but where a judgment of divorce entered in 1885, while containing no direction as to alimony, adjudges "that the question of alimony and the amount to be paid, if any, by the defendant * * * be reserved for the future consideration of this court," the court has jurisdiction to make an order upon notice granting alimony to the plaintiff. Hauscheld v. Hauscheld, 33 App. Div. 296.

If the decree of separation contains no provision for the payment of alimony the court cannot subsequently order such payment, but may require an allowance to be made for the care and education of the children of the marriage. Erkenbrach v. Erkenbrach, 96 N. Y. 456.

An application to alter alimony after final judgment of the court, in divorce, is a proceeding at the foot of the decree, which should be tried in the usual manner in which issues of fact are tried in an action,

and should not be granted upon the affidavits and without a trial of the principal issues presented. Wetmore v. Wetmore, 29 App. Div. 507.

A reasonable allowance of alimony will not be modified on the ground that the husband lost his situation through the efforts of the wife. Kumze v. Kumze, 53 N. Y. Supp. (87 St. Rep.) 938.

Where the adultery of the wife is proven in an action between third parties, her husband by separating from her is freed from further contributing of her support, though he must continue to support their child. Nevertheless if he has been ordered in an action for support to pay a monthly sum for the support of the wife and child he is not excused from such payment because of the adultery, unless the order has been modified. Ronan v. Ronan, 32 Misc. 467.

A husband sued for separation interposed a counterclaim of adultery and the jury found the wife guilty thereof, the husband will not be compelled to continue paying alimony *pendente lite*, where he has been incarcerated upon a criminal charge and is without means of support. Lusk v. Lusk, 31 Misc. 312.

A reversal by the Appellate Division of an order of the Special Term, modifying a decree of alimony, is reviewable by the Court of Appeals. Wetmore v. Wetmore, 162 N. Y. 503.

In Kabatchnick v. Kabatchnick, 26 App. Div. 292, it was held that although a referee in a proceeding to reduce alimony, stated that the defendant was financially unable to pay, the Appellate Division will not interfere with a direction that he pay a certain sum per week where it appears that the fees paid his attorney and the costs of printing papers on appeal, etc., amount to enough to have paid the alimony directed to be paid from the granting of judgment to present time.

Bankruptcy no discharge.— A judgment of separation providing for alimony is not a debt provable in bankruptcy, nor is it affected by discharge, and this is true of installments of alimony accruing after adjudication and before the time of the motion. The same is true in regard to counsel fees and temporary alimony. Matter of Smith, 30 Civ. Pro. 95.

Arrears of alimony do not constitute a debt provable in bankruptcy proceeding of the husband, and are not covered by discharge in bankruptcy. Maisner v. Maisner, 62 App. Div. 286.

A discharge in bankruptcy does not discharge liability for alimony, whether accruing before the petition or accruing thereafter. Young v. Young, 35 Misc. 335.

Section 4. Affirmative Relief.

What is deemed a counter-claim [CODE CIV. PRO., § 1770].— Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action against the plaintiff, and in favor of the defendant, arising under either of said articles, may be interposed, in

connection with a denial of the material allegation of the complaint, as a counter-claim.

This section was not contained in the Revised Statutes, and was new in the Code.

The effect of this section is to authorize the defendant, in an action for a separation or absolute divorce, to interpose a cause of action against the plaintiff as a counter-claim, and if established in connection with the failure on the part of the plaintiff to prove his or her case, to have a judgment in his or her favor.

On the trial of an action by the wife to procure a divorce from her husband on the ground of adultery, it appeared that he had committed adultery with her connivance and consent, the defendant alleged in his answer, and proved upon the trial, that his wife had committed adultery once before and once after the time at which he had committed it; and that he had not connived at or consented to her so doing, nor had he condoned the offense; it was held that her connivance at his adultery prevented her using it as a defense and that he was entitled to an absolute divorce. Bleck v. Bleck, 27 Hun, 296.

In an action for separation on the ground of cruel and inhuman treatment, the defendant is at liberty to allege in his answer adulteries by way of counter-claims and seek affirmative relief against the plaintiff for a dissolution of his marriage with her. De Meli v. De Meli, 120 N. Y. 485; Van Benthuysen v. Van Benthuysen, 17 N. Y. St. Rep. 978, 15 Civ. Pro. Rep. 234; Fullmer v. Fullmer, 6 Week. Dig. 22.

A counter-claim of adultery is not demurrable for not stating that such adultery was without the connivance, privity or procurement of the defendant. Van Benthuysen v. Van Benthuysen, 17 N. Y. St. Rep. 978, 15 Civ. Pro. Rep. 234.

An action to annul a marriage cannot be set up as a counter-claim to an action for divorce or separation, because section 1770 of the Code of Civil Procedure does not give such right. Taylor v. Taylor, 25 Misc. 566.

Recriminating charges of adultery require the same evidence to establish them as original charges. Pollock v. Pollock, 71 N. Y. 137.

A supplemental answer setting up acts of adultery committed by the plaintiff subsequent to the commencement of the action may be permitted by the court. Blanc v. Blanc, 67 Hun, 384.

Section 5. Custody and Maintenance of Children and Support of Wife.

Final judgment to award custody of children and provide for their maintenance; modification of judgment [CODE CIV. PRO., § 1771].— Where an action is brought by either husband or wife, as prescribed in either of the last

two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions, as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

This section was derived from R. S. Pt. II, ch. 8, tit. I, § 59, which was amended by ch. 891 of the Laws of 1895. Before the amendment of 1895, final judgment was not to contain provision for the maintenance of the children or for the support of the wife. The effect of the amendment of 1895 was to authorize the judgment to provide for the maintenance of children and support of a wife in actions brought for limited divorce.

In the case of Tonjes v. Tonjes, 14 App. Div. 542, the final judgment was awarded in November, 1894, in an action brought to procure a separation which directed, among other things, that the plaintiff should have the right to move for an increase of her allowance and alimony in case her mother died. But, if a change occurred in the pecuniary circumstances of her husband, it was held that in such an action the alimony stood upon a different basis from what it does in an action to dissolve a marriage; as the marriage tie is not severed by separation, the provision for alimony is at all times the subject of equitable protection and control. The amendment made in 1895 to this section, authorizing either party to an action for a separation to move the court to amend, vary or modify the decree, constitutes remedial legislation and should be liberally construed. Since the obligation of support and maintenance in a case of separation is a continuing one, the amendment operates upon the subject as it finds it, and its provisions become immediately applicable to a decree of separation in the same manner and to the same extent as any other change in a law operative upon individual rights.

CUSTODY AND MAINTENANCE OF CHILDREN AND SUPPORT OF WIFE.

By section 1759 of the Code it was provided that judgment in an action for absolute divorce should provide for the support of the wife. Where a foreign judgment of divorce awards the custody of a child to the mother, but makes no allowance for its support and maintenance, although the court might have made such provision, such judgment is a bar to an action brought by a wife in this state to recover from the husband an allowance for the support and maintenance of their child. Since the right of the wife to an allowance for the maintenance of the child was one of the questions involved in the action in the foreign state, her claim for such allowance must be held to have been decided adversely to her. Rich v. Rich, 88 Hun, 566.

As the statute stood before 1895, a final decree of divorce was not susceptible of modification, and its directions as to the custody of children were unalterable. The change made by the amendment of 1895 involves a change in the policy of the law, implying that after a sentence of divorce, circumstances may require a different disposition of the offspring of the parties. Perry v. Perry, 17 Misc. 28.

The amendment authorizes the court to annul, modify or vary a direction in a final judgment. If the judgment contains no provision for the support of the wife, or the maintenance of her infant daughter, the court cannot insert such provisions therein after final judgment. Gould v. Gould, 18 Misc. 334.

In the case of Noble v. Noble, 20 App. Div. 395, the court says: "It is the settled law of this state that, unless alimony is provided for in the final judgment, it cannot be awarded by a subsequent order; but providing for alimony does not necessarily mean the allowance by specific mention of a fixed and definite sum."

In this case the final judgment contained a reservation of power to grant a further order of allowance in the following words: "The plaintiff may apply at the foot of the judgment, as she may be advised, for such other provision, touching an allowance or otherwise, as any change in the circumstances of the parties may require." This reservation was held to be sufficiently broad to allow an application to be made for provisions for the plaintiff's support.

Alimony *pendente lite* should not include allowance for support and maintenance of the plaintiff's stepson, a child by former marriage, nor has the court any authority to award the custody of such child to his grandfather, who is not a party to the proceeding. It seems that the court can only take infants from the custody of their parents and deliver them to strangers when invoked by petition or by application by *habeas corpus* and upon notice. Wood v. Wood, 61 App. Div. 96.

In Galusha v. Galusha, 138 N. Y. 272, it is said that alimony need not be determined when the judgment dissolving the marriage is entered, providing the right to have it subsequently determined is reserved in the judgment. And in Stahl v. Stahl, 12 N. Y. Supp. 855, it was held by the General Term of the Supreme Court "that the reservation of this right of supervision, being a part of the original decree, was designed to continue the subject to which it related, within the jurisdiction of the court, and was in effect a continuing of the

power of the court over the subject and the parties, and was not, as to alimony, a final judgment."

Custody of children. — It is settled law in this state that in determining the custody of infants between father and mother, their welfare, and not the supposed rights of the parents, is the controlling principle; nor in a competition does the father start with any superior title; for whatever was the notion in former times and other jurisdictions, at this day and in this country the claim of the mother to her offspring is at least of equal potency. Perry v. Perry, 17 Misc. 28.

By the law of nature, the father has no paramount right to the custody of his child; all other things being equal, the mother is the most proper person to be entrusted with the care of children of tender age. The law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree. Mercein v. People, 25 Wend. 103, 106.

But, where the husband obtains a divorce because of the wife's adultery, the husband is entitled to the custody of the children, unless their good clearly determines otherwise. Uhlman v. Uhlman, 17 Abb. N. C. 236.

The court has no power to modify a decree of absolute divorce which awarded the custody of a child to the plaintiff, entered before the amendment of section 1771 of the Code, in 1895, for such amendment was applicable only to judgments entered after the amendment went into effect. Matter of Haworth, 59 App. Div. 393.

Where judgment of divorce, entered in 1899, awarded the custody of the children to the plaintiff wife, such order, after its entry, cannot be re-settled by the presiding justice by inserting therein a provision allowing the defendant to see his children, unless leave to move for such modification had been previously obtained, as required by section 1771 of the Code. Mersereau v. Mersereau, 51 App. Div. 461.

A decree of divorce against the defendant wife may be modified so as to permit the mother to see a child four times a year in the presence of the referee, where the child is intentionally kept by its father from intercourse with its mother. McGown v. McGown, 22 Misc. 307.

On granting a divorce to plaintiff the Supreme Court in its discretion may award the custody of the children to the defendant, and where the authority of the court has not been exceeded, an affirmance of the discretion by the Appellate Division is not reviewable by the Court of Appeals. Osterhoudt v. Osterhoudt, 168 N. Y. 358.

The rights and custody of the children are to control, and not the merits of the controversy between the parents. People v. Brown, 35 Hun, 324. The court's power to award the custody of the children is discretionary and cannot be reviewed by the Court of Appeals. Price v. Price, 55 N. Y. 656.

Pending the proceedings for divorce, the custody of the child may be awarded to one party subject to the right of the other to visit it, with security not to remove it from the jurisdiction of the court. People v. Paulding, 15 How. Pr. 167.

In determining as to the custody of a child, where a judgment of

separation is awarded to the husband, the court will consult mainly the welfare of the child. It is open to the wife to satisfy the court, upon a subsequent application, that its welfare will be best promoted by placing it in her custody. Waring v. Waring, 100 N. Y. 570.

Attachment or proceedings to secure a writ of *habeas corpus* are the methods of enforcing the decree for the custody of children; an order cannot be directed to the sheriff directing him to deliver them. Nicholls v. Nicholls, 3 Duer, 642.

In the case of Monjo v. Monjo, 53 Hun, 145, the husband procured an absolute divorce from his wife and was awarded the custody of the children. One of such children was afterwards found by the husin the possession of the mother, who refused to give the child up. A policeman was called who arrested the mother upon direction of the husband, and conducted her to the station-house, where she remained all night. It was held that the husband was liable to the mother for damages resulting from her arrest and confinement in the station-house, and that he could have taken the child by force in a gentle manner, but he could not arrest the mother because she refused voluntarily to give up the child.

Security for support and maintenance; sequestration of property of husband [CODE CIV. PRO., § 1772].—Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section 1769 of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other profits, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

This section was derived from R. S. Pt. II, ch. 8, tit. 1, § 60.

Proceedings to compel sequestration.— The proceeding to compel the application of the rents and profits of the real estate of the husband whose property has been sequestrated in divorce proceedings pursuant to this section, should be brought by the wife. Foster v. Townshend, 68 N. Y. 203.

The property of the husband should not be sequestrated unless he neglects or refuses to give security for the payment of the alimony, or upon default of the husband and his surety after security is given. Davis v. Davis, 1 Hun, 444. But, in the case of Percival v. Percival, 14 N. Y. St. Rep. 255, it was held that the court may order a receiver of the husband's property, although the judgment did not require security for the payment of alimony, and the husband had not refused to give security therefor.

In the case of Forrest v. Forrest, 9 Bosw. 686, it was held that the court could not sequestrate a husband's property until it had asked him to give security to pay the allowance.

Where an allowance for alimony is made to the wife to be paid by her husband, a trustee, required by the will of his testator to pay over annually, to the husband the income of the trust estate, may be ordered by the court to pay to the wife the amount of such income equal to the alimony awarded to her. Thompson v. Thompson, 52 Hun, 456.

Where a wife is awarded alimony *pendente lite* in an action for separation and the husband removes beyond the jurisdiction of the court, leaving no property which may be taken upon execution or sequestration, the wife may maintain an equitable action against him and his father's executors to reach the surplus of the beneficial income given to him in his father's will. McGlynn v. McGlynn, 37 Misc. 12.

Where the property of a husband has been sequestered to pay alimony and a receiver appointed, the wife may maintain a separate action in aid of such proceeding to restrain the executors from paying her husband a legacy accruing after the sequestration, and to compel them to pay it to the receiver. Such receiver cannot sue without leave. Thus, where he joined with the wife in an action without leave the complaint is demurrable as to him. Garden v. Garden, 34 Misc. 97.

In the case of Foster v. Townshend, 68 N. Y. 203, it was held that the receiver, appointed under this section to sequestrate the personal property, and the rents and profits of the real estate of the husband, acquires no title to the real estate, but simply is entitled to possession as against the defendant, and all claiming under him and so long as his rights are not questioned, and there is no interference therewith either actual or threatened, he has no concern with the title, and cannot maintain an action to determine the validity of transfers thereof made by the defendant.

The case of Donnelly v. West, 17 Hun, 564, comments upon the case of Foster v. Townshend, and says that, "that action was brought to set aside a transfer made after the appointment of the sequestrator or receiver. In that case the right of the third person was subsequent and subordinate to the right of the receiver, and was never in fact

opposed to the possession and proceedings of the receiver. Upon that ground the Court of Appeals reversed the decision of the court below, but the right of the receiver to bring the action where the adverse right was obtained before the appointment of the receiver, and was set up to prevent the proceeding of the receiver in the execution of the mandate of the court, was fully recognized if not conceded." In the case of Donnelly v. West, the complaint alleged that the transfer was made previous to the appointment of the receiver, and that because of such transfer the receiver was unable to obtain any personal property or to collect any of the rents and profits of the real estate. Such a transfer may be set aside, if fraudulent, in an action brought by the receiver in his own name, but the wife cannot look to her husband to advance moneys to enable her to resort to the remedies given by this section, if he does not pay the money awarded her. McQuien v. McQuien, 61 How. Pr. 280.

An action may be maintained in this state to recover instalments of alimony awarded by a foreign judgment of divorce as they fall due, but there is no principle, or equity or comity, by which the defendant's property can be sequestrated, but he can be compelled to give security in this state for future alimony awarded by a foreign judgment. Wood v. Wood, 31 Abb. N. C. 235. As to foreign decrees for alimony, see notes, p. 123.

Punishment for contempt in case of default [CODE CIV. PRO., § 1773].— Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order, directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

This section was not contained in the Revised Statutes.

A husband can be imprisoned for non-payment of alimony, when, after the court determines that the sequestration or required security,

as provided in the preceding section, would not result in getting the money. In general, the husband should have notice of the application to commit him; but the court has power to commit him without notice if it is satisfied that the sequestration and security would be useless. Isaacs v. Isaacs, 61 How. Pr. 369.

Before the adoption of this section, under the old Revised Statutes, it was held that where the judgment had been obtained that the defendant pay alimony, and in default thereof that attachment issue as for a contempt, could not be enforced in case of disobedience in not giving security for not paying alimony by commitment for contempt. Gane v. Gane, 45 Super. Ct. 355.

But the case of Park v. Park, 80 N. Y. 156, was where, upon the return of the attachment against the defendant for an alleged contempt in disobeying the provisions contained in the judgment of divorce, which required him to pay alimony, and to give security for the payment thereof, and upon motion to vacate the attachment the court adjudged him to be in contempt, and ordered him to pay a fine, to give security for a specified amount for future alimony, and to stand committed until compliance with the order. It was held that the whole matter was before the court, and the court had jurisdiction to grant such relief.

Before a husband who, in an action for divorce, has been directed to pay alimony and counsel fees, can be punished for contempt in failing so to do, it must appear to the court that the payment cannot be forced by execution, sequestration or resorting to security, and where the security has not been ordered, and it does not appear that payment can be enforced by sequestration proceedings or execution, an order of commital should be reversed. Whitney v. Whitney, 19 Civ. Pro. Rep. 265.

Where the defendant refuses to comply with the order directing payment of alimony, the court may act directly by proceeding to punish for contempt, if it is shown affirmatively that payment cannot be enforced by requiring security or sequestrating the defendant's property, but in all cases it should be shown that the amount cannot be realized by sequestration or by a receiver before punishment by a fine or imprisonment can be inflicted. Brisbane v. Brisbane, 34 Hun, 339.

In Wetmore v. Wetmore, 34 Misc. 640, a husband who had persistently refused to pay alimony, and who had never given the bond required in sequestration proceedings, and had remained continuously without the jurisdiction of the court, was refused a motion that the judgment in divorce and sequestration be vacated and that he be purged of contempt upon showing a willingness to pay back alimony. The court said his conduct had been such that it would refuse him any relief as a favor, and that he was not entitled to any as a matter of right.

Where, in an action for separation, brought by a wife against her husband, the final judgment directed the defendant to pay to plaintiff's attorney a fixed sum for her costs and counsel fees, the failure of the

defendant to make such payment cannot be treated as a contempt, authorizing his commitment until he shall pay such amount. Jacquin v. Jacquin, 36 Hun, 378; Weill v. Weill, 18 Civ. Pro. Rep. 241, 10 N. Y. Supp. 627.

The inability of the defendant to pay is no defense to the application to commit him. Strobridge v. Strobridge, 21 Hun, 288; Ryckman v. Ryckman, 34 Hun, 235, but his poverty is ground for a motion for his discharge from imprisonment if he has not continued his adulterous relations. Ryckman v. Ryckman, 34 Hun, 235; In re Application of Ryckman v. Ryckman, 39 Hun, 646; Ryer v. Ryer, 33 Hun, 116. A defendant committed for a failure to pay alimony and counsel fees to the plaintiff is not entitled to the jail liberties. In re Clark, 20 Hun, 551; Strobridge v. Strobridge, 21 Hun, 288; Allen v. Allen, 58 How. Pr. 381.

Inability to pay alimony is no excuse for failure to pay in contempt proceedings. To procure relief the husband should move to be released from imprisonment. Young v. Young, 35 Misc. 335.

Practice in contempt proceedings.— The provisions of title 3, chapter 17 (§§ 2266–2292), of the Code of Civil Procedure, relating to proceedings to punish a contempt of court, other than a criminal contempt, apply to proceedings under this section to enforce payment of alimony. The affidavit upon which an order for the commitment of the defendant under this section can be made must state whether he has property or not, and that his conduct is calculated to and did impair the rights or remedies of the plaintiff. Sandford v. Sandford, 44 Hun, 563.

To warrant an order to show cause why a defendant should not be punished for contempt in not paying alimony, an affidavit on information and belief that he has no property, except his earnings, the disposition of which the deponent is ignorant of, that he cannot give security, and that an order for security or sequestration would be ineffectual, would be sufficient. Rahl v. Rahl, 14 Week. Dig. 560.

An application to punish a party for contempt in failing to obey an order directing him to pay alimony, cannot be made upon a mere notice of motion, but the party must be brought before the court either by an order to show cause or a warrant of attachment. Sanford v. Sanford, 9 Civ. Pro. Rep. 289.

An order committing a husband for contempt in refusing to pay alimony need not state whether he has any real or personal property, or that payment cannot be enforced by sequestration of such property. Distasio v. Distasio, 26 Misc. 491.

Section 111 of the Code, which limits the duration of imprisonment under civil process, does not preclude the court from committing a husband to prison for failure to pay permanent alimony awarded in a final judgment, although he has previously served three months under a judgment for contempt for failing to pay alimony *pendente lite*. Reese v. Reese, 46 App. Div. 156.

An order to show cause may be served upon the attorney of the defendant. Winton v. Livey, 16 Civ. Pro. Rep. 348; Mahon v. Mahon, 50 N. Y. Super. 92.

Regulations respecting judgment [CODE CIV. PRO., § 1774].— In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff, upon the defendant's default in appearing or pleading, unless the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "action for a divorce;" or "action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and a copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service, must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant. No final judgment annulling a marriage, or divorcing the parties and dissolving a marriage, shall be entered, in an action brought under either article first or article second of this title, until after the expiration of three months after the filing of the decision of the court or report of the referee. After the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a mar-

riage shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after the entry of interlocutory judgment unless otherwise ordered by the court. But on and after the entry of the interlocutory judgment the payment of alimony if allowed shall cease and the person against whom the interlocutory judgment is rendered shall have no lien upon the property of the party succeeding in said action. [Amended L. 1902, ch. 364, to take effect Sept. 1, 1902.]

This section was not contained in the Revised Statutes, but was inserted in the Code on its adoption in 1880.

The court rules relating to judgments by default.—When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order the reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

When the action is for divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

In an action for divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court, and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court may, however, in case the evidence is such that the public interests require that the examination of the witnesses should not be public, exclude all persons from the court room, except the parties to the action, and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or

some one specially interested, upon order of the court. Court Rules, 1900, Rule 72.

Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul a marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; and that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason. Supreme Court Rules, 1900, Rule 73.

No judgment annulling a marriage contract or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in the consequence of any neglect to appear at the hearing of the cause, or by consent. Every such case shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of this suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except upon the special direction of the court. Supreme Court Rules, 1900, Rule 76.

Section 6. Practice in Divorce Cases Generally.

Preference. — Section 791, Code of Civil Procedure, was amended by Laws 1902, chapter 357, by adding a new subdivision (subd. 13), by which a preference is given in "An action for absolute divorce in which an order has been made granting temporary alimony."

Trial by jury. — The trial of issues as to adultery raised in an action for divorce must be tried before a jury, unless a jury trial is waived. Batzel v. Batzel, 42 N. Y. Super. Ct. Rep. 561.

The right to a trial by jury in such cases is a constitutional one, and cannot be reduced to a discretionary right by the general rules of

practice. Conderman v. Conderman, 44 Hun, 181; Sigel v. Sigel, 28 Abb. N. C. 308; Whitney v. Whitney, 76 Hun, 585.

In an action for divorce on the ground of adultery, the issues as to adultery must be settled before notice of trial can be given or the cause placed on the calendar. Leslie v. Leslie, 11 Abb. N. S. 311.

In section 1757 of the Code (*ante*, p. 48), it is provided that "if the answer puts in issue the allegation of adultery the court must, upon the application of either party, or it may of its own motion, make an order directing the trial by a jury on that issue; for which purpose the issues or questions to be tried must be prepared and settled as prescribed in section 920 of this act." We have collated under section 1757 a number of decisions relating to the framing of issues (see *ante*, pp. 48, 51).

Where issues as to adultery are framed in an action for divorce, the verdict of the jury is not one to enlighten the conscience of the court, but is governed by the same rules as apply to a verdict in any action at law triable by a jury, and is conclusive unless set aside for some proper reason. Fries v. Fries, 34 Misc. 478.

Where, in an action for divorce, no affirmative defense is set up, and the defendant demands a jury trial, and the sole issue presented is that of adultery, which is found by the jury, it is proper for the court to order judgment for the relief demanded in the complaint without making findings or conclusions or filing a decision under section 1022 of the Code. Lowenthal v. Lowenthal, 157 N. Y. 236.

Where an answer in divorce is merely a general denial, and sets up no affirmative defense, so that no issue of connivance is raised and questions are framed for trial by jury, including question as to connivance, but no proof thereof is offered, and the jury finds affirmatively as to the adultery, the court may set aside and disregard an answer of the jury stating, by mistake, that there was connivance upon part of the plaintiff. Lowenthal v. Lowenthal, 157 N. Y. 236.

Though the judge presiding at a trial brought by the husband for absolute divorce has power to set aside the verdict exonerating him from charge of adultery, yet such power should not be exercised except where it is demonstrated that the verdict is the result of sympathy or other improper influence, or has been reached in disregard of clear and convincing proof by uncontradicted testimony of disinterested witnesses. Donnelly v. Donnelly, 50 App. Div. 453.

Trial by referee.— Rule 72 of the general rules of practice provides that "When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, the court shall in no case order a reference to a referee nominated by either party, nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof."

By section 1012 of the Code of Civil Procedure, as amended by L. 1898, ch. 317, it is provided that "a reference shall not be made, of course, upon consent of the parties in an action to annul a marriage

or for a divorce or for a separation; * * * in a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and where a reference is granted, the court must designate the referee. If the referee, thus designated, refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, upon the application of either party, appoint another referee."

An order of reference made in an action brought to obtain a divorce which designates as referee a person who is agreed upon by the counsel for the respective parties is irregular, and should, upon motion, be modified by designating another referee. The spirit and intention of section 1012 of the Code of Civil Procedure is that the court, when a reference in an action brought for divorce has been already consented to, must name a referee of its own motion, and without the consent or agreement as to the person to be named by the counsel or parties. So, in an action brought to secure a divorce where the parties consent in open court to a reference, not to any person, but simply that the case should be referred, the plaintiff agreeing to it as a condition that she should not at once proceed to trial, and where thereafter, by a stipulation entered into between the parties to which the court acceeded, a certain person was named as referee, it was held that the plaintiff was not entitled to have the whole order vacated because that portion of the order designating the person before whom the reference was to be tried was improperly made. Ives v. Ives, 80 Hun, 136.

In the case of Fullmer v. Fullmer, 6 Week. Dig. 42, the referee was named by the parties, and upon the coming in of the referee's report, and the application for a judgment thereon the question was raised as to the regularity of the referee's appointment. The court held that the reference was not void for a selection of the referee contrary to the rules. This was in recognition of the fact that such a reference was in violation of the rules, and simply decided that it was too late to raise such a question after the case had been tried by the referee agreed upon.

Title 2, of chapter 10 of the Code of Civil Procedure (§§ 1008–1026), relating to trials without a jury, are applicable to marital causes when tried without a jury.

Qualifications of the referee. — Section 1024 of the Code provides that "A referee, appointed by the court, must be free from all just objections; and no person shall be so appointed, to whom all parties object, except in an action to annul a marriage, or for a divorce or a separation. A judge cannot be appointed a referee, in an action brought in the court of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee.

Report of referee. — Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon

the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report. Code Civ. Pro., § 1228.

In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made as prescribed in section 1215 of this act. Where a reference is made in such an action, the testimony, and other proceedings upon the reference, must be certified to the court, by the referee with his report; and judgment must be entered by the court. Code Civ. Pro., § 1229.

Though the court may refuse to confirm referee's report in an action for divorce, it cannot direct judgment contrary to such report. Goldner v. Goldner, 49 App. Div. 395; Gorham v. Gorham, 40 App. Div. 564. The contrary was formerly held, see Schroeter v. Schroeter, 23 Hun, 230; Anonymous, 3 Abb. N. C. 161; Meyer v. Meyer, 7 Week. Dig. 535; Coe v. Coe, 37 Barb. 232.

After the determination of the issues in divorce by a referee in favor of the plaintiff, the court may, upon a hearing of exceptions to the report, withhold judgment upon the ground of insufficient proof, and also for the reason that there was sufficient evidence of condonation, but a dismissal of the complaint is improper, and a new trial should be ordered. Harding v. Harding, 43 Super. Ct. 27.

If it appears that the proceedings have been regular, free from fraud or collusion, and that the evidence is sufficient to uphold the finding, it is the duty of the court to enter judgment upon the report. Goodrich v. Goodrich, 21 Week. Dig. 264.

In the case of McCleary v. McCleary, 30 Hun, 154, the General Term agreed with the conclusion of Judge Follett of the Special Term, that when issues are joined in an action for divorce, and by the consent of the parties, the court, in its discretion, may grant a reference which is a reference to hear and decide the issues, and is not merely a reference to take evidence and report the same with his opinion. When the issues are joined they are to be tried, not merely reported upon. The court says "that the reason of the provisions contained in section 1229 of the Code is that, in matters of divorce the public have an interest. Married parties are not permitted by any collusion between themselves to obtain a judgment of divorce. It is the right and duty of the state, acting through its courts, to see that no divorce is granted, unless there be real and not collusive ground therefor. Hence it is required that after a trial of the issues before a referee, not merely his report, but the whole testimony shall be presented to the court for its action."

In a number of other cases it has been held that the Special Term cannot set aside the report of the referee on the ground that the evidence is insufficient, and direct judgment to be entered against the party in whose favor the referee had found, unless it appear that there was fraud and collusion in securing the report. Rice v. Rice, 22 Week. Dig. 258; Matthews v. Matthews, 6 N. Y. Supp. 589; Ross v. Ross, 31 Hun, 140.

PRACTICE IN DIVORCE CASES GENERALLY.

Application for judgment in divorce suits, unless *ex parte*, must be made at Special Term for the hearing of enumerated motions, and not at a Special Term for the hearing of non-enumerated motions. Johnson v. Johnson, 21 N. Y. St. Rep. 241.

Where in an action for divorce a motion for a new trial was made before the referee's report was confirmed, it was held that the sufficiency of the evidence should be decided upon a motion for the confirmation of the report, rather than upon the motion for a new trial. Reynolds v. Reynolds, 53 Supp. 135.

Where the decision of the referee is against the divorce, the court need not closely scrutinize the evidence, for in such case the marriage is protected and preserved. Where the issues have been filed and fairly tried before a referee to hear and determine, his decision should stand as a guide for the court in rendering judgment, unless some unjust, or inadvertent, or unwise ruling appears which tends to destroy the safeguards which the court throws around the indissolubility of the marriage tie, in such a case, and in such alone should the Special Term intervene. Smith v. Smith, 7 Misc. 305, 28 N. Y. Supp. 136.

In an action brought for divorce on the ground of adultery, a referee was appointed, under a stipulation of the parties, to hear and determine the action, who, after a trial, made a report in favor of the plaintiff. On application to the Special Term for the confirmation of his report, the motion was denied, and the issues in the action were sent to the circuit for trial. It was held, on appeal, that the report of the referee upon such a trial stands as the decision of the court, which will not review the finding upon the merits, but will only make such examination as may be necessary to ascertain whether the report is in support of the evidence, or whether there has been fraud or collusion or any evil practice in the case by either party. After such examination the application for the judgment will either be granted or denied, but the report will not be set aside; and where the parties have agreed to a reference, the court has no authority, in the absence of a reason sufficient in law to disregard the order of reference, and order a trial at the circuit. Ryerson v. Ryerson, 55 Hun, 191.

The special term has no power, after a trial before a referee, to examine the case upon the merits, or to reverse the report of the referee for errors or irregularities committed on the trial, and the only manner in which the trial before the referee can be reviewed is by an appeal to the General Term. Huntley v. Huntley, 73 Hun, 261.

No reference to be granted in case of defendant's default.—Attention is here called to Rule 72, as amended in 1900, forbidding a references in cases of default (*ante*, p. 111).

In cases where application is made for a divorce upon the default of the person proceeded against, the court is required to scrutinize the testimony closely, and not to direct a judgment for divorce where it may be doubtful, uncertain, or unsatisfactory in its character. Moore v. Moore, 14 Week. Dig. 255.

Failure to prove service.— In Pessolano v. Pessolano, 34 Misc. 16, a decree of divorce was refused in an uncontested action where the wife was attempted to be identified by a photograph of herself an her alleged paramour, while it was not shown by independent proof that the man represented in the photograph might not have been her husband, and it was not shown that the person served with the summons and complaint was in fact the defendant.

Where the brother of the plaintiff served a summons in an action for divorce upon the defendant wife, he should be called and examined as to his knowledge that the person served was the defendant in case of default, even though he states in the affidavit of service that he knew her very well. Fawcett v. Fawcett, 29 Misc. 673.

A divorce will not be granted unless there is clear proof that the person upon whom the summons was served was in fact the defendant. Affidavits of the plaintiff as to such service should be received with great caution, if admissible at all. Delling v. Delling, 34 Misc. 122.

Judgment in divorce cases.— Attention is called to the new prohibition contained in section 1774, Code Civil Procedure (*ante*, p. 110), as amended in 1902, which forbids the entry of *final decree* of divorce or annulment until the *expiration of three months* after filing decision of court, or report of referee.

A judgment of divorce will be reversed on appeal, if the referee's report on which it was entered does not find, upon the issues made by the pleadings, as to the guilt on the part of the successful party. Price v. Price, 9 Abb. Pr. N. S. 291.

A judgment, declaring void a marriage contract, entered *ex parte* by the plaintiff on the referee's report, without application to the court, is irregular. Blott v. Rider, 47 How. Pr. 90.

The application for judgment on the referee's report in a contested divorce case should be made at Special Term, and not at chambers. Smith v. Smith, 4 Month. Law Bull. 57.

Vacating judgment.— A judgment of divorce may be set aside on the ground that it was procured through fraud and imposition, upon motion. Megarge v. Megarge, 2 Week. Dig. 352.

A judgment will not be opened for irregularity where the defendant has been guilty of laches which are not excused. The motion should be made within a year. Schmidt v. Schmidt, 1 Week. Dig. 24.

When a court having jurisdiction of parties and subject-matter decrees an absolute divorce, with leave to the wife to marry again, and she does so marry, her second husband cannot maintain an action to have the judgment of divorce annulled, and his marriage declared void on the ground that the judgment of divorce was obtained fraudulently and by collusion. Ruger v. Heckel, 85 N. Y. 483.

Proof must be clear and satisfactory to induce the court to interfere with a regular judgment alleged to have been fraudulently obtained. It is not sufficient merely to raise a suspicion or to show constructive fraud, but there must be proof of actual fraud in hearing the motion for a vacation of the judgment. The Special Term has no power to

reverse or add to or subtract from the decision of the referee. To obtain such a result the remedy is by appeal where the decision of the referee could be reviewed. Jones v. Jones, 71 Hun, 519.

Upon a motion made to open a judgment of absolute divorce recovered by a wife against her husband the allegations contained in the moving affidavits, used upon such motion, showing that the husband had suspicion as to the fidelity of his wife, and charging that the wife had committed adultery, are entitled to no consideration, where, prior to the obtaining, by the wife, of the judgment sought to be opened, the husband had instituted an action for divorce against his wife which had been dismissed; and also an action against another for the alienation of the wife's affections which resulted in a verdict and judgment for the defendant therein. Weidner v. Weidner, 85 Hun, 432.

Insufficiency of testimony, upon which a divorce was granted, does not form a ground for setting aside the decree, after the lapse of several months, unless there was entire failure of evidence. Rice v. Rice, 22 Week. Dig. 258.

A decree of divorce will not be set aside on motion merely because the referee erred in admitting improper testimony, where there was other testimony sufficient to establish the fact in issue. Robertson v. Robertson, 9 Daly, 44.

The plaintiff, in an action for divorce, died after having recovered judgment, and the defendant sought to have the judgment set aside for fraud and irregularity. It was held that she could not obtain relief by motion on notice to plaintiff's administrator. Watson v. Watson, 1 Hun, 267.

Where a decree for divorce for adultery was regularly obtained by the wife while the husband was a convict in state prison, the court refused to open the decree to enable the husband to set up condonation. Hoffmire v. Hoffmire, 7 Paige, 60.

The rule that a default will not be opened to permit defenses not meritorious to be interposed is not applied in actions for absolute divorce; in which actions it has been the frequent practice to open default, except where there has been laches, or where it may be made to appear that injustice would result in permitting the opening of the default. Hamilton v. Hamilton, 29 App. Div. 331.

Where the plaintiff in an action for divorce dies after judgment in his favor, the defendant cannot move in the same action to vacate the judgment on the ground that it was improperly obtained. The remedy is to bring a separate action against all the heirs and other persons interested in the plaintiff's estate, grantees thereof subsequent to judgment and his personal representatives. Groh v. Groh, 35 Misc. 354.

Notice of motion to vacate a judgment of divorce upon the grounds of fraud may properly be served upon the wife's attorney of record. Gebhard v. Gebhard, 25 Misc. 1.

Vacating judgment after remarriage of parties.— A judgment of divorce may be vacated for irregularity and affecting the jurisdiction

of the person, even after the prevailing party has married again; but this should be done with hesitation, and only after the gravest and most careful consideration. Wortman v. Wortman, 17 Abb. Pr. 66. The judgment in such a case may also be vacated on the ground of collusion or fraud; but it must be made apparent that the moving party is acting from good motives, and not from any expectation of personal advantage, such as regaining a support. Singer v. Singer, 41 Barb. 139.

A judgment of divorce may be opened and the defendant allowed to come in and defend, even after the plaintiff has married again, where the plaintiff's second wife is shown to have combined with him fraudulently to procure the divorce. Denton v. Denton, 41 How. Pr. 221.

Where the plaintiff has married an innocent person, after a judgment by default, the court, on opening the decree, will allow the judgment to stand until the final determination of the action. Von Rhade v. Von Rhade, 2 Super. Ct. (T. & C.) 491.

Remarriage after judgment.— The plaintiff in an action for divorce upon being informed by the referee in the action that he had reported in her favor, and granted a divorce, remarried believing herself legally divorced, but the decree was not entered in fact until after such marriage. Upon a motion by the defendant to set aside the decree on the ground of the plaintiff's adultery, it was held that under the circumstances, it was not sufficient ground for refusing a decree if it had been known to the court when applied for, and was not sufficient ground for vacating such decree. Robertson v. Robertson, 9 Daly, 44.

A plaintiff in an action for divorce, who in good faith marries after judgment in his favor which is subject to reversal on appeal, is not guilty of adultery in so doing; but the defendant is estopped in a second action for divorce on ascertaining that the plaintiff committed adultery with the woman he married, in reliance upon the judgment. Bailey v. Bailey, 45 Hun, 278.

Where, after judgment had been rendered by a decision in favor of the plaintiff, in an action for an absolute divorce on the ground of adultery, the plaintiff, with knowledge that the application is about to be made to open such default, remarries, the effect of such remarriage is not a good reason for denying the motion for a new trial, if the circumstances connected with the default would otherwise justify the granting of such application. Scripture v. Scripture, 70 Hun, 432.

Section 7. Effect of Foreign Judgments in this State.

Validity of foreign divorces declared by the Supreme Court of the United States.— The rule holding foreign divorces invalid in the absence of personal service or appearance by defendant, which has long obtained in New York and some other states,

beginning with the decision in People v. Baker, 76 N. Y. 78, has been overruled by the important decision of the Supreme Court of the United States, Atherton v. Atherton, 181 U. S. 155. In this case the parties were married in the state of New York, but subsequently obtained a matrimonial domicile in Kentucky. Thereafter the wife left her husband and returned to her mother in this state. The husband filed a petition for absolute divorce from the bonds of matrimony in the courts of Kentucky, basing the action upon abandonment, which was there a cause for absolute divorce. The wife, resident in New York, was served without the state according to the practice laid down by the Kentucky statutes. Held, that the decree rendered in such action was binding, and was a bar to the wife's petition for a divorce in New York. Peckham, J., with whom the chief justice concurred, dissented. The contrary rule had been held by the Court of Appeals in the same case, Atherton v. Atherton, 155 N. Y. 129. The decision of the Supreme Court is founded upon the first section of the fourth article of the Constitution of the United States, providing "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." As will be seen the effect of this decision is radical and overturns the New York rule, though it will be noted that the opinion makes the following exception: "This case does not involve the validity of a divorce granted on constructive service by the courts of a state in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into." In Atherton v. Atherton, though the parties were married in New York, Kentucky was said to be the undoubted domicile of the husband and wife, though the wife subsequently acquired a domicile in this state under the New York statute.

We have, however, retained in this edition the cases which develop the New York doctrine, which must be considered as overruled or modified as above stated.

New York decisions prior to Atherton v. Atherton, 181 U. S. 155.— A divorce granted in another state dissolving a marriage contract in this state in favor of the husband, temporarily residing there, upon substituted service upon his wife, who resided in this state, and for an alleged cause which did not exist in fact, is invalid and inoperative as against the wife. Mellen v. Mellen, 10 Abb. N. C. 329.

In the case of The People v. Commissioners of Charities, etc., 13 Hun, 414, it appeared that the husband left the wife, stating to her that he was going into business in Cincinnati; but immediately thereafter he sued in Utah for a divorce, alleging that he intended to become a resident of that territory. No service was made on the wife other than by publication in Utah, and she had no knowledge of the proceedings. It was held that the proceedings were void, and that judgment for divorce was not valid as against the wife.

Where the statute in another state authorizing a service of the summons by publication requiring affidavits of certain facts, and it appears

that such affidavits in an action to procure a divorce in that state were false and fraudulent, the service of the summons therein will be treated as a nullity by the courts of the state, and a judgment obtained in such an action is invalid. Stanton v. Crosby, 9 Hun, 370.

Where it appeared that, in an action for divorce in Indiana, neither of the parties in fact resided, at the time of bringing the action, in that state, and there had been no personal service of process upon the defendant therein, nor any authorized appearance for her, the judgment obtained in such an action is invalid in this state, although the Indiana record recites the residence of the plaintiff in good faith for one year within the state of Indiana, and shows an appearance for the defendant by one purporting to be an attorney at law in that state. Kerr v. Kerr, 41 N. Y. 272.

The following cases may be cited as establishing the above principle: Jackson v. Jackson, 1 Johns. 424; Borden v. Fitch, 15 Johns. 121; Bradshaw v. Heath, 13 Wend. 407; Vischer v. Vischer, 12 Barb. 640; McGiffert v. McGiffert, 31 Barb. 69.

In the case of Hoffman v. Hoffman, 46 N. Y. 30, it was held that a divorce obtained in another state, without service of process upon the defendant, and where both parties at the commencement of the suit, and during its pendency, resided in this state, is invalid. The record of such a decree is not conclusive upon the courts of this state as to the question of jurisdiction, but the facts alleged therein may all be shown to be untrue.

Jurisdiction of courts of other states, when may be questioned. — In the case of Kinnier v. Kinnier, 45 N. Y. 535, it is held that, in questioning the validity in this state of the decree of a court of competent jurisdiction of a sister state, the status of the parties within that state, and the question whether they or any of them were residents of that state so as to give them a standing in court there for the purpose of such decree, are to be determined by that court, and their determination thereupon cannot be questioned collaterally in our own. In this case it appears that a former husband of the defendant, a resident of Massachusetts, went to Illinois expressly to procure his divorce from her, commenced an action there in the proper court for the purpose, and she having appeared and permitted by collusion with him, a decree of divorce to be granted against her, subsequently married the plaintiff here, it was held, that in an action brought in this state to annul the last marriage on the ground of the defendant's former marriage being still in force, that a complaint stating such facts was insufficient, and a demurrer thereto must stand.

In the case of Hunt v. Hunt, 72 N. Y. 217, it was held that the jurisdiction of the court of another state, in which a judgment has been rendered, is always open to inquiry in the courts of this state, and the judgment may be also questioned collaterally for fraud. To authorize a disregard of the judgment because of fraud there must be fraudulent allegations and representations, designed and intended to mislead, with knowledge of falsity resulting in damaging deception.

The court, in the above case, in discussing this question uses the following language: "There are numerous authorities, and the plaintiff has cited some of them, to the effect that a judgment of another state got against a resident of this state, who has never been a citizen of that, without personal service of process or voluntary appearance, is not a valid judgment, and may be inquired into in our courts, and on such facts appearing may be disregarded as having been rendered without jurisdiction. We have not seen a decision which so holds, where the defendant was a citizen of the other state, and the court thereof proceeded upon a substituted service, in accordance with the laws of that state. Borden v. Fitch, 15 Johns. Rep. 121, which is the leading case in this state, rests upon the fact that the defendant, in the judgment there impugned, had never been domiciled in the state where the judgment was rendered. It would be tedious to name and review all of the cases in this state. In the earlier of them, there was not harmony with those of the federal courts, and a disposition was manifested to treat the judgment of the court of another state as like those of the courts of a foreign country. I think that the result of the decisions in this state, at this time, is this: that when the courts of another state have jurisdiction of the subject-matter and of the person, they are to be credited collaterally; that jurisdiction of the subject-matter is to be tested by the power conferred by the constitution and the laws of the other state; and that as to the jurisdiction of the person they go no farther against it than that if the defendant is a domiciled citizen of this state, jurisdiction of him by the courts of another state is not acquired, save by person service of process or his voluntary appearance."

It would seem, then, that where divorce is secured in another state against one, who at the time it was rendered, and pending the action, was domiciled in this state, and who was not served with process, and did not appear, is inoperative and void as to the defendant. Cross v. Cross, 108 N. Y. 628; O'Dea v. O'Dea, 101 N. Y. 23; People v. Baker, 76 N. Y. 78; Williams v. Williams, 6 N. Y. Supp. 645; Atherton v. Atherton, 155 N. Y. 129; Kimball v. Kimball, 165 N. Y. 62.

The marriage relation is not a *res* within the state of the party invoking the jurisdiction of the court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another state, by the subsequent service, or actual notice given without the jurisdiction of the court where the action is pending. A judgment, therefore, of divorce rendered in another state against a resident of this state, where there has been no personal service within the state rendering it, and no personal appearance by the defendant in the action, is inoperative and void in this state. A state may adjudge the status of its citizens towards a non-resident, and so long as the operation of such a judgment is kept within its own confines, other states must acquiesce, but it has no effect beyond the limit of the state. Williams v. Williams, 130 N. Y. 193; De Meli v. De Meli, 120 N. Y. 485; Rigney v. Rigney, 127 N. Y. 408; Bell v. Bell, 4 App. Div. 527; Atherton v. Atherton, 82

Hun, 179, affirmed 155 N. Y. 130. In the later case it appears that a wife who resided in the state of Kentucky, left her husband because of his cruelty and resided in the state of New York, where she resided prior to her marriage; an action was subsequently commenced by the husband in the state of Kentucky, to procure a divorce under the statute of that state on the ground of abandonment, in which the wife was not personally served with process within the state of Kentucky, nor did she appear in the suit, nor in any way consent thereto, nor do any act which gave the judgment binding force upon her in the state of New York; it was held that the judgment was wholly inoperative within this state, was not binding upon the wife, nor did it constitute a bar to her right to maintain an action for a separation against her husband in the state of New York in case he personally appeared in the action brought therefor in that state. Overruled, 181 U. S. 155.

In an action brought to annul a marriage on the ground that the defendant had a husband living at the time of her marriage to the plaintiff, and it appeared that the defendant was married, and afterwards secured a divorce in another state; in order to invalidate a judgment of divorce so secured it must be shown that the defendant was not at that time a resident of the state in which the divorce was granted. The burden of proof in such a case is upon the plaintiff. Campbell v. Campbell, 90 Hun, 233.

It is well settled that where both of the parties to a marriage contract are *bona fide* citizens of and domiciled in any state, the courts of that state have power to divorce them. Such a divorce is valid not only in the state where it is granted, but in every other, and the jurisdiction of the person of the defendant in an action for a divorce may be acquired by a court of the state in which he is a domiciled citizen by such proceedings in the nature of service of process, as the law of the state was made equivalent to personal service within its jurisdiction. While a person maintains the relation of a citizen of the state he is subject to its laws, which he cannot avoid by a temporary or prolonged absence from the state. Therefore a judgment of divorce rendered by the courts of the state against such a citizen upon a substituted service of process, such as is authorized in the case of an absent defendant, is valid to effect the dissolution of the marriage contract, and is conclusive upon the defendant in every other state, although the husband was not within the territorial jurisdiction during the progress of the suit, and did not appear therein. Matter of Denick, 92 Hun, 161.

Where a wife had separated from her husband and had obtained an absolute divorce from him by a foreign judgment, not recognized in this state, it was held that she could not impeach the validity of the decree of divorce obtained by her, and claim the right to administer the estate of her former husband as his widow; having submitted to the jurisdiction of that court she could not thereafter be heard to question it. Matter of Swales, 60 App. Div. 599.

EFFECT OF FOREIGN JUDGMENTS IN THIS STATE.

Foreign decrees awarding alimony; amendment and enforcement thereof.— The court of another state having, by the law of that state, power to amend a decree of divorce previously rendered therein against a resident of this state by inserting provisions for alimony, acquires jurisdiction to render a decree for the payment of the alimony where he is served with notice of motion therefor in this state, makes an appearance and contests the motion, even though the decree of divorce was invalid for want of jurisdiction. Further, the provisions of the Federal Constitution requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state, requires the courts of this state to give such decree full credit and effect as a judicial debt of record against the defendant for the amount fixed at the time the decree was rendered. But this state will not permit the plaintiff to invoke equitable remedies in aid of a judgment recovered on such decree, for they are available only in aid of decrees of divorce rendered in this state. It was further held that a provision in such foreign decree for future alimony, subject to the discretion of the foreign court, lacks that conclusiveness which requires courts of this state to enforce it. Held, further, that the provision of such foreign decree allowing the enforcement of payment by equitable remedies of receivership and injunction cannot be enforced in this state; being in the nature of an execution they operate only upon the defendant as he or his property may be found within the jurisdiction of the foreign court. Lynde v. Lynde, 162 N. Y. 405.

For other decisions on this subject, see *ante*, p. 107.

CHAPTER VII.

RIGHTS AND LIABILITIES OF HUSBAND AND WIFE.

[*Domestic Relations Law* (*L. 1896, ch. 272*), §§ *20–29.*]

SECTION 1. PROPERTY RIGHTS OF MARRIED WOMEN.
2. RIGHTS AND LIABILITIES OF MARRIED WOMEN AS TO CONTRACTS.
3. INSURANCE ON HUSBAND'S LIFE.
4. CONTRACTS IN CONTEMPLATION OF MARRIAGE.
5. LIABILITY OF HUSBAND FOR ANTE NUPTIAL DEBTS.
6. CONTRACT OF MARRIED WOMAN NOT TO BIND HUSBAND.
7. HUSBAND AND WIFE MAY CONVEY TO EACH OTHER OR MAKE PARTITION.
8. RIGHT OF ACTION BY OR AGAINST MARRIED WOMEN FOR TORTS.
9. PARDON NOT TO RESTORE TO MARITAL RIGHTS.
10. COMPELLING TRANSFER OF TRUST PROPERTY.
11. MARRIED WOMAN'S RIGHT OF ACTION FOR WAGES.

Section 1. Property Rights of Married Women.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 20]. — Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, continues to be her sole and separate property as if she were unmarried, and is not subject to her husband's control or disposal nor liable for his debts.

This section was derived from L. 1848, ch. 200, §§ 1 and 2, and L. 1860, ch. 90, § 1.

Section 1 of the Act of 1860 provided that the property of a married woman should not be liable for the debts of her husband "except such debts as may have been contracted for the support of herself or her children by her as his agent." These words were omitted in the revision.

Note of Statutory Revision Commission stating reason for omission. — The statutory Revision Commission, in its report to the legislature of 1896, gave the following as a reason for omitting the clause above referred to: "Laws of 1848, chapter 200 provided that the prop-

erty of a married woman at the time of her marriage, or thereafter acquired, 'shall not be subject to the disposal of her husband or be liable for his debts.' The act of 1860, chapter 90, went as far as the act of 1848, in allowing a married woman to hold property as her separate estate, and provided that it should not be liable for the debts of her husband, 'except such debts as may have been contracted for the support of herself or her children, by her as his agent.' This exception has been frequently before the courts for construction. That a wife's property could be held liable for her husband's debts merely because they happened to be contracted by her as his agent has appeared to the courts to be inconsistent with the general tendency of modern legislation. In the case of Demott v. McMullen (N. Y. Sup. Ct. 1869), 8 Abb. Pr. N. S. 335, the court argued that the legislature had not said what it intended to say; that it intended to say, 'by her husband as her agent,' but the court was forced to admit that if the plaintiff had brought his case within the strict letter of the law he might have recovered. In Covert v. Hughes, 8 Hun, 305, Judge Learned says: 'I suppose that the legislature thought it would be unjust when a married woman should actually purchase food and clothing for herself and her children, that the creditor should not be allowed to collect the debt out of her property, because the purchase had been made as the agent of the husband.' In 85 N. Y. 516 (Tiemeyer v. Turnquist), although the recovery of the plaintiff was based upon the fact that the separate estate of the wife was charged with the debt, Judge Finch discusses this exception, declaring that it did not render the wife personally liable for the debt contracted by her as her husband's agent, but that 'The sole effect of the provision is not to make her personally liable for her husband's debt, * * * but merely that the shield and protection thrown over her property against the debts of her husband shall be withdrawn in a case where his debt has been contracted * * * through her acting as his agent, and for the purpose of providing for her own support and that of her children.' This case was followed in Strong v. Moul (General Term, 1889), 4 N. Y. Supp. 299, where an action was brought directly against the wife for a debt of this nature, the court holding that she was not personally liable, or, in other words, that the action must first be brought against the husband, and execution returned unsatisfied, before the action can be brought against her for the debt. In Edwards v. Woods (1892), 131 N. Y. 350, it was held that an execution cannot issue against the wife upon a judgment for such a debt rendered against her husband, but the debt must be enforced against her in proceedings instituted for that purpose, and that the liability must first be adjudged in an action to which she is a party, and in which she has had an opportunity to be heard.

It will thus be seen that in no case, unless it be that of Covert v. Hughes, has the exception been squarely before a court for adjudication. In every case the court has been able to decide the action upon other

grounds. The debt is the debt of the husband, although contracted by the wife as his agent. It is difficult to see why the fact that it was contracted for the support of herself or her children should render her liable merely because she happened to act as her husband's agent. If the debt had been contracted by him personally her property would not be liable. Judge Andrews said, in the case of Edwards v. Woods: 'In view of the custom of families, when the husband leaves the management of the household to his wife, and commits to her the discretion to make purchases for the house and to supply her wants and those of her children, the broad construction claimed for this section of the Act of 1860 opens a wide door of departure from the policy of the acts for protecting the property of married women.'

It seems to the commissioners that the provision should no longer be retained in the statutes; that if the wife is to be held liable for necessaries supplied to her it should be only when they are purchased by her upon her own account; that if the credit is extended to the husband, she acting merely as his agent, his estate, and his estate only, shall be liable for the debt. If the provision should, however, be retained, the commissioners recommend that the clause should be added, in accordance with the decisions of the courts, that only in the case of the insolvency of the husband, appearing from an execution returned unsatisfied, shall the wife's estate be liable. But the commission recommend that the exception be repealed without re-enactment." The recommendation of the commission was followed by the legislature.

Object and effect of enabling statutes. — Chapter 200 of the Laws of 1848; ch. 375 of the Laws of 1849; and ch. 90 of the Laws of 1860, have been denominated enabling acts.

In referring to the acts of 1848 and 1849 the Court of Appeals held that the effect of these acts was to divest the husband's marital title during coverture; and they enabled a wife to purchase property whether she had a separate estate before or not, and her purchase on credit vests no title in her husband during coverture, but only in her. Knapp v. Smith, 27 N. Y. 277.

The court, in the case of McIlvaine v. Kadel, 3 Robt. 429, says: "The act for the protection of the property of a married woman has worked a complete radical change in the marital rights of the husband. Their old common-law right to the personal estate of the wife, and the use of her real estate, has gone; they have no estate, or interest or right whatever, absolute or contingent, except that, upon the death of the wife, after issue born, without exercising the *jus disponendi*, a husband has the estate for his life as tenant by the curtesy. A married woman may hold her estate during life discharged of all control over or power of disposal by her husband, and may convey it in his lifetime or devise it by will to take effect on her death to whomsoever she pleases."

The court, in Blood v. Humphrey, 17 Barb. 662, uses this emphatic

language: "The legislature intended to remove the entire disability which the common law and the statute had thrown around a married woman, not only as regards their right to take and hold free and independent of their husbands, but also to remove the obstacles which the law had interposed against their conveying both by grant and devise, and to place them, so far as the lands which they held in their own right was concerned, on the same basis, precisely, as unmarried females." Judge Denio, in White v. Wager, 25 N. Y. 333, said: "By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she was not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law."

A husband's common-law right as tenant by the courtesy is not affected by these statutes. Hatfield v. Sneden, 54 N. Y. 280.

It was held in the case of Vanneman v. Powers, 56 N. Y. 39, that the married woman's statutes have only affected her liability in matters relating to her separate estate or effects; in other respects the common-law rule of liability still prevails.

The legislation of this state upon the subject of the rights of married women has only changed their common-law status to the extent set forth in the various statutes; they have not deprived the husband of his common-law right to avail himself of a profit or benefit from the services of his wife. Porter v. Dunn, 131 N. Y. 314.

Where an attorney employs a woman as a clerk for so long a time as he practices law, payment not to be made until he retires from practice, and the parties are subsequently married, the contract was merged. A husband, after that event, is entitled to her services, and she cannot recover for such as are rendered during the period of the married relation. Such a contract is not properly within the meaning of the Act of 1848, which continues the woman's separate property after marriage. This act does not save from extinguishment by a marriage of the parties, the contract relating solely to personal services to be rendered by the woman for the man for a consideration named. Matter of Callister, 153 N. Y. 294.

In the case of Power v. Lester, 23 N. Y. 527, it was held that where a female who was the mortgagee married the mortgagor, that she could still foreclose the mortgage, and that by the enabling acts the common-law rule, that where a female marries her debtor the debt is extinguished, is virtually repealed. In speaking of this case, in the Matter of Callister, *supra*, the court said: "It is undoubtedly true that a contract made between a man and a woman who were married, relating solely to property, and not to services springing from the marital relation, would not be extinguished by their marriage after the passage of such enabling acts." See also Dygert v. Remerschnider, 32 N. Y. 629.

The wife is not enabled by these acts to make a binding contract with her husband for services having no connection with her separate business and estate, although the same are to be rendered outside of her household duties. While he cannot require her to perform services to him outside of the household, such services as she does render, whether within or without the strict line of her duty, belong to him, and a promise to pay therefor is simply a promise to make her a gift and so is not enforcible. Blaechinska v. Howard Mission and Home, 130 N. Y. 497, citing Reynolds v. Robinson, 64 N. Y. 589; Coleman v. Burr, 93 N. Y. 17; Whitaker v. Whitaker, 52 N. Y. 368.

Effect of enabling act upon the rights of husband to the rents of lands held by him and his wife in entirety. — The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant, or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife, and his right to rents and profits in her lands, *jure uxoris*, during their joint lives was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. While, therefore, the acts relating to the rights of married women have not abrogated the common-law doctrine of tenancy by the entirety, and under a conveyance to a husband and wife they take, not as tenants in common or joint tenants, but by entirety, and upon the death of either the survivor takes the whole estate. As the right of the husband to the rents and profits in the wife's lands during their joint lives, has been completely swept away by such statutes, he is not exclusively entitled to the usufruct of the lands so held by them in entirety, but they are tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits so long as the question of survivorship is in abeyance. Hiles v. Fisher, 144 N. Y. 306; Bartles v. Nunan, 92 N. Y. 152; Zorntlein v. Bram, 100 N. Y. 12.

The common-law rule that husband & wife to whom land is conveyed take as tenants by the entirety, and not as tenants in common, or as joint tenants, is not abrogated by section 56 of the Real Property Law, which provides that every estate granted or devised to two or more persons in their own right shall be considered a tenancy in common, unless expressly declared to be a joint tenancy. Price v. Pestka, 54 App. Div. 59.

Section 2. Rights and Liabilities of Married Woman as to Contracts.

[Domestic Relations Law (L. 1896, ch. 272), § 21].— A married woman has all the rights in respect to property,

real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife.

The following acts are revised and contained in this section of the revision: L. 1835, ch. 275; L. 1848, ch. 200, § 3, as amended by L. 1849, ch. 375; L. 1851, ch. 321; L. 1860, ch. 90, §§ 1, 2, and 3, as amended by L. 1862, ch. 172; L. 1878, ch. 300; L. 1884, ch. 381, and L. 1892, ch. 594. It is believed that no substantial change is effected by the consolidation of these acts in this section.

Liabilities of married women for carrying on separate business, trade or occupation.— By this section of the revision, the wife is given all the powers that single women possess in carrying on a business, trade or occupation, and she may exercise all the powers and enjoy all the rights in respect thereto, and in respect to her contracts, and is liable on such contracts as if she were unmarried.

The effect of this provision is to authorize a married woman to carry on business and enter into engagements in the course thereof, which shall be binding on her and her property generally. Young v. Gori, 13 Abb. Pr. 13; Barton v. Beer, 35 Barb. 78, 21 How. Pr. 309; Klen v. Gibney, 24 How. Pr. 31.

To create a charge upon the property of a married woman on account of a debt created in the course of her separate business, it is not necessary that any written instrument should be executed. Cohen v. O'Connor, 5 Daly, 28, affirmed 56 N. Y. 613.

If such separate business is carried on through an agent, she is liable for the acts of the agent as if she were unmarried. Bodine v. Killeen, 53 N. Y. 93. She is also liable for checks issued by her agent, who is authorized to issue checks in the course of her business. Lewis v. Woods, 4 Daly, 241.

A husband and wife may enter into copartnership, and the wife is liable on the obligation entered into in the copartnership name. Graff v. Kinney, 37 Hun, 405. The contrary was held in the case of Kaufman v. Schoeffel, 37 Hun, 140. The law, as contained in the above section of the revision, would seem to settle this question in favor of authorizing a partnership agreement by a wife with her husband.

A married woman who embarks in business with a member of a firm is liable upon the firm notes given for money to use in the firm's business. Williams v. Burton, 19 Week. Dig. 299.

RIGHTS AND LIABILITIES OF MARRIED WOMEN AS TO CONTRACTS.

A woman suing a person not her husband for conversion of property is not obliged as part of her case to prove the source of her title or that she had a separate estate. Under the present statute a married woman now sues in respect to such property as if she were single. Lumley v. Torsiello, 69 App. Div. 76.

In the case of Suau v. Caffe, 122 N. Y. 308, it was held that the common-law disability of a married woman to engage in business as a copartner or jointly with her husband was removed by the provisions of the act of 1860, authorizing a married woman to carry on any trade or business on her sole and separate account, and that, therefore, when a husband and wife assume to carry on a business as copartners and contract debts in course of it, the wife cannot escape liability on the ground of coverture.

Liability of a married woman upon contracts generally under the enabling acts of 1848, 1849 and 1860.— Under these statutes it was held that the liability of a married woman upon contracts may be enforced: (1) When created in or about carrying on trade or business. (2) When the contract relates to or is made for the benefit of her separate estate. (3) When the intention to charge her separate estate is expressed in the instrument or contract by which the liability is created. Manhattan Manufacturing Co. v. Thompson, 58 N. Y. 80; Frecking v. Rolland, 53 N. Y. 422; Phillips v. Wicks, 14 Abb. N. S. 380; Saratoga County Bank v. Pruyn, 90 N. Y. 250.

If the contract does not make an express charge upon her separate estate, it must be shown to have been made in or about the trade or business carried on by her or for the benefit of her separate estate. Nash v. Mitchell, 71 N. Y. 199.

It must be shown that the obligation was made negotiable in respect to her business or estate. Bogert v. Gulick, 65 Barb. 322.

Where a married woman who owned a house and twenty acres of land, which she managed herself, made her note for money obtained from the plaintiff to be used for the business purposes of her place, and which the plaintiff advanced to the credit of her separate estate, it was held that the plaintiff could recover the amount against her separate estate, although an intention to charge it did not appear on the face of the instrument. Quassaic National Bank v. Waddell, 1 Hun, 125.

Prior to the passage of the Enabling Act of 1884, a married woman who had no separate estate, and was not engaged in any separate business, was incapable, by reason of her coverture, of making a contract. Even where she had a separate estate, a promissory note made by her was open to the defense of want of consideration, although in the hands of a *bona fide* holder for value. Linderman v. Farquharson, 101 N. Y. 434.

Though the husband was absolutely entitled to reduce his wife's personal property to possession before the Married Woman's Act of 1848, he could waive such right, and permit his wife to hold the

same as her separate estate, and yet receive it from her upon trust for the benefit of their son. Dorland v. Dorland, 59 App. Div. 37.

Liability of a married woman under her contracts is now unlimited.— The rule laid down in the case of Saratoga County Bank v. Pruyn, 90 N. Y. 250, and earlier in the cases of Manhattan Manufacturing Co. v. Thompson, 58 N. Y. 80, and Frecking v. Rolland, 53 N. Y. 422, was materially changed by chapter 381 of the Laws of 1884, and by the above section of the revision, in which is re-enacted the substance of the Act of 1884. As the statute now stands the power of a married woman to contract is practically unlimited. She may bind her separate estate without regard to the purpose, intention or subject-matter of the contract. A great number of cases arising under the enabling acts prior to the Act of 1884, relating to the liability of a married woman under her contracts, and limiting, qualifying, and distinguishing such liability, are no longer applicable, and need not be referred to under the above section of the revision. It seems sufficient to note that her liability under her contracts is the same as that of an unmarried woman.

Agency of husband.— No authority in the husband as agent of his wife can be inferred from the relationship. If anything, greater care in ascertaining the precise limits of his authority is required. Smith v. Fellows, 41 Super. Ct. (J. & S.) 36; Allen v. Williamsburg Bk., 2 Abb. N. C. 342; Hoffman v. Treadwell, 2 Sup. Ct. (T. & C.) 57; Valentine v. Applebee, 87 Hun, 1. If a husband makes a contract in his own name for the erection of a building upon a piece of land owned by his wife, and the price be paid from moneys raised by her by means of an incumbrance upon the land, and before completion the wife leases the property, agreeing to finish the building substantially as described in the building contract, the contract may be regarded as being made by the husband as the wife's agent, and she would be liable to the husband for the amount due upon the contract. Fowler v. Seaman, 40 N. Y. 592.

Marriage does not create a husband an agent for his wife. Proof of his appointment as agent or ratification is necessary to bind her. Aarons v. Klein, 29 Misc. 639.

A married woman may be held liable for the services of an attorney employed by her husband if he was generally authorized to collect demands arising from her separate estate. Owen v. Cawley, 36 N. Y. 600.

A wife does not, by employing her husband to carry on a farm, which is her separate property, render its profits, or chattels purchased by her to be used by her in connection with it, liable for his debts. Vrooman v. Griffiths, 4 Abb. Ct. of App. Dec. 505, 1 Keyes, 53. See also Abbey v. Deyo, 44 N. Y. 343; Buckley v. Wells, 33 N. Y. 518.

RIGHTS AND LIABILITIES OF MARRIED WOMEN AS TO CONTRACTS.

A married woman who receives and retains the fruits of a contract made by her husband, as her agent, in reference to her separate property, is liable in an action for damages for his deceit in making the contract. Graves v. Spier, 58 Barb. 349.

A married woman is not chargeable either in law or in equity for improvements made on her separate estate, under contracts made by her husband therefor, where no fraud imputable to her has induced the person contracting with her husband, to make them. Ainsley v. Mead, 3 Lans. 116. But see Colvin v. Currier, 22 Barb. 371.

Where a husband, with fraudulent intent, obtained a power of attorney from his wife to carry on business in her name, and in that business bought goods on credit, sold them at less than cost, and finally induced the wife to make an assignment, she having no knowledge of the fraud; it was held that the wife was legally responsible for the frauds committed by her husband as her agent, and the assignment was void. Warner v. Warren, 46 N. Y. 228.

The wife is liable for a debt contracted by her husband in making repairs upon a house owned by her, if she knowingly permitted them to be made. Miller v. Hunt, 1 Hun, 491, 3 Sup. Ct. (T. & C.) 762.

If a husband employs another to work on his own houses and those of his wife, without disclosing his agency, the person employed having no knowledge of the separate ownership, the wife's liability is not thereby enlarged. She is liable only for work performed on her own houses. Newell v. Roberts, 54 N. Y. 677.

A husband who takes general care and management of his wife's property may charge her with the payment of bills for repairs thereon without special authority. Armstrong v. Jones, 10 Week. Dig. 144.

Notice to the husband as the wife's agent is notice to the wife. Brumfield v. Boutall, 24 Hun, 451; Hensler v. Sefrin, 19 Hun, 564, citing Adams v. Mills, 60 N. Y. 533, 539.

Authority of the husband to make a contract for his wife does not confer authority to cancel or surrender it. Stilwell v. Mutual Life Ins. Co., 72 N. Y. 385.

Where the wife, having a separate estate, is represented by her husband, his knowledge and fraud becomes hers by imputation. Du Flon v. Powers, 14 Abb. Pr. N. S. 391; Baum v. Mullen, 47 N. Y. 577.

Although a married woman is liable for fraud committed by her husband while acting as her agent, yet, where he is not so acting, and she does not participate as an actor and is not profited by the act, she is not liable simply by reason of prior assent, advice, or authorization on her part. Vanneman v. Powers, 56 N. Y. 39.

It is not within the authority of a husband acting as his wife's agent in the construction of houses, to adjust the amount due to persons who have furnished materials therefor, solely for the purpose of allowing such persons to assign their claims to a third person, and the wife is not estopped by such adjustment from questioning the actual amount due as against the assignee of the claims. Parker v. Collins, 127 N. Y. 185, citing Bickford v. Menier, 107 N. Y. 490.

The possession by a husband of authority to buy land in his wife's name, and with her money, does not include power to bind her personally to assume payment of the mortgage debt. Blass v. Terry, 156 N. Y. 122.

Where a wife joined with her husband in a power of attorney authorizing the attorney to sell and convey certain real property owned by the husband, and "grant in our names good and sufficient deeds," etc., the attorney may execute a conveyance sufficient to convey the wife's inchoate right of dower, although the power of attorney does not specifically name such interest. Platt v. Finck, 60 App. Div. 312.

The question of the husband's agency is a question for the jury. Cutter v. Morris, 116 N. Y. 310; Farnilo v. Stiles, 52 Hun, 450.

A declaration by a husband that he was agent for his wife is not sufficient evidence of his authority to charge her. Wolfe v. Benedict, 48 N. Y. St. Rep. 195; O'Callaghan v. Barrett, 50 N. Y. St. Rep. 166. But the question of agency may be determined by the declaration of the husband and the wife, and by their acts and conduct in respect to the transaction. Matter of Zinke, 90 Hun, 127. In this case it was held that the husband could maintain an action to establish a claim against his wife's estate for services performed by him as her agent in respect to her separate estate.

The implied agency of a husband to act for and bind his wife, which is inferred from his possession of her mortgage of her property, must have respect to and be limited by the terms of that instrument. Bank of Albion v. Burns, 46 N. Y. 170.

Rights of wife to compensation for services rendered by her.— The law in relation to right of married woman to sue for wages earned by her is radically modified, and that right given her by a new section (30) of the Domestic Relations Law, added by L. 1902, ch. 289 (see p. 157). The following decisions must be read in the light of the new section.

Where a wife is engaged in no separate business or services on her own account and renders services to another person in her husband's household by a contract with such person, the services rendered belong to her husband. Reynolds v. Robinson, 64 N. Y. 589.

The common-law right of a husband to the services and earnings of his wife, when not received or rendered upon her sole and separate account, is not affected by chapter 381 of the Laws of 1884, and where such services were rendered by a married woman, while living with her husband, under a contract made by him, an action to recover thereon may be brought in his name. Holcomb v. Harris, 166 N. Y. 257.

But if such services are rendered on her own account outside of her houshold duties, compensation therefor belongs to her. Brooks v. Schwerin, 54 N. Y. 343. In the case of Coleman v. Burr, 93 N. Y. 17, 25, the court remarks: "Whatever services a wife renders in her home for her husband cannot be on her sole and separate account.

They are rendered on her husband's account in the discharge of a duty which she owes him or his family, or in the discharge of a duty which he owes to the members of his household. See also Filer v. N. Y. Cent. R. R. Co., 49 N. Y. 47; Whitaker v. Whitaker, 52 N. Y. 368; Birkbeck v. Ackroyd, 74 N. Y. 356.

Though section 21 of chapter 272, Laws of 1896, does not destroy the common-law unity of husband and wife, and the former is still entitled to the services of the wife, yet if the wife render services for another with the consent of the husband, and payment is made to her therefor, the compensation belongs to her absolutely. The husband can forego his right to his wife's earnings, and unless done in fraud of creditors the property she acquires with his knowledge and consent, whether within the household or without, vests in her. Carver v. Wagoner, 51 App. Div. 47.

In the case of Blaechinski v. Howard Mission, 130 N. Y. 497, the court says: "The enabling statutes do not relieve a wife of the duty of rendering services to her husband. While they give her the benefit of what she earns, under her own contracts, by labor performed for any one except her husband, her common-law duty to him remains. * * * Such services as she does render him, whether within or without the strict line of her duty, belong to him. If he pays her for them, it is a gift. If he promises to pay her a certain sum for them, it is a promise to make her a gift of that sum. She cannot enforce such a promise by a suit against him."

Under the enabling statutes, if a married woman, with the knowledge of the husband, renders services to a third person, pursuant to a contract, for compensation, she may maintain an action to recover the price agreed or the value of the services. Stokes v. Pease, 79 Hun, 304, citing Adams v. Curtis, 4 Lans. 164; Sheldon v. Button, 5 Hun, 110; Snow v. Cable, 19 Hun, 280; Rowe v. Comley, 11 Daly, 317; Matter of Kinmer & Gray, 14 N. Y. St. Rep. 618. See also Robinson v. Raynor, 28 N. Y. 494.

A married woman cannot recover damages against a railroad company for injuries received by her, unless it appears that she was carrying on business or performing services on her separate account. Filer v. N. Y. Cent. R. R. Co., 49 N. Y. 47. See also Sloan v. N. Y. Cent. R. R. Co., 1 Hun, 540; Cregin v. Brooklyn Crosstown R. R. Co., 18 Hun, 368; Brooks v. Schwerin, 54 N. Y. 343; Hartel v. Holland, 19 N. Y. Week. Dig. 312; Dawson v. City of Troy, 49 Hun, 322; Mellwitz v. Manhattan Ry. Co., 43 N. Y. St. Rep. 354.

But where it appeared that the wife's husband had left her, and that she was supporting her family by her own exertions, she may maintain an action for personal injuries in her own name. Griffith v. Utica & Mohawk R. R. Co., 43 N. Y. St. Rep. 835.

Services rendered by a wife as a member of the family of her husband's father, if the subject of compensation, are the property of her husband, unless he transferred to her his right thereto or consented

that she might receive the compensation. Roblee v. Gallentine, 19 Week. Dig. 153.

Where the wife works with her husband for an employer under a contract made by the husband, and there is no arrangement that she is to receive separately the avails of her labor, he may sue for them. Graf v. Feist, 9 Misc. 479, 61 N. Y. St. Rep. 100.

The legislation in this state upon the subject of the rights of married women has only resulted in abrogating their common-law status to the extent set forth in the various statutes. They have not by express provision nor by implication deprived the husband of his common-law right to avail himself of a profit or benefit from the services of his wife. Porter v. Dunn, 131 N. Y. 314. In this case it appeared that the defendant's testator in his lifetime hired a room in the plaintiff's house, took his meals in the plaintiff's restaurant, and was nursed in his illness by plaintiff's wife in connection with her houshold duties, she having no separate business, and procuring the money expended for the testator's benefit from her husband; it was held that the husband was entitled to recover for the wife's services to the testator.

Earnings of wife in furnishing board.— The right to recover for board furnished to a person in a husband's household belongs to the husband and not to the wife, where the expenses of the household are borne by him. Stamp v. Franklin, 144 N. Y. 607; Birkbeck v. Ackroyd, 74 N. Y. 356; Farrell v. Harrison, 14 Misc. 462.

But where a wife renders services and furnishes meals to a stranger under an agreement made between herself and her husband that in case she renders such services and furnishes such meals she alone shall receive the compensation therefor, and that it shall become her separate property, the common-law rights of the husband to his wife's services are abrogated and she may enforce the claim in her own name and right. Lashaw v. Croissant, 88 Hun, 206.

While, ordinarily, where the wife lives with her husband and has no separate business, a claim for board in the family would belong to the husband, yet it has been determined that a contract between the husband and wife, by which he allows her to board a party and receive compensation therefor, is valid. Sands v. Sparling, 82 Hun, 401, citing In re Kirimer, 14 N. Y. St. Rep. 618; Burley v. Barnhard, 9 N. Y. St. Rep. 587; Bowers v. Smith, 8 N. Y. Supp. 226.

Where a wife supports her husband, as in a case where she keeps a boarding-house upon her own account, an acknowledgment of indebtedness for the support by husband creates a valid obligation against his estate Matter of Hamilton, 70 App. Div. 73.

Contracts with her husband.— Under the above section of the Domestic Relations Law a married woman may make contracts with

respect to her property with any person "including her husband" and her liabilities under such contracts are the same as if she were unmarried. Prior to ch. 594 of the Laws of 1892, amending § 1 of ch. 381 of the Laws of 1884, a married woman could not make contracts with her husband, except in relation to her separate estate. Blaechinski v. Howard Mission and Home, etc., 130 N. Y. 497.

A contract by a husband to pay his wife for household services is void, as against his creditors, and property transferred to the wife in pursuance thereof, and purchased by the wife with the avails of such contract, may be reached by creditors. Conger v. Corey, 39 App. Div. 241.

The rule that an executory contract between husband and wife in order to be enforced must be shown by the husband to have an adequate consideration, and utmost good faith in obtaining the same, only applies where the marital relations have not been disturbed and the parties are living upon terms of intimacy. Such rule does not apply to a contract between husband and wife where they have been living apart for a period of five years, when by such contract the wife agrees to pay a trustee a certain sum weekly for the support and maintenance of her husband. Minor v. Parker, 65 App. Div. 120.

The agreement of a wife with her husband to employ him in the management of her separate business and to pay him a stipulated sum as compensation for his services, the wife also agreeing to pay the family expenses, is an agreement which she had a right to make, if she was solvent at the time, without committing a fraud as to her subsequent creditors. Third Nat. Bank v. Guenther, 123 N. Y. 568.

Although a wife's express agreement to pay her husband wages in aid of her separate business may be enforced, she cannot be required to pay his creditors for services voluntarily rendered by him. Maxwell v. Lowther, 35 N. Y. St. Rep. 767, 13 N. Y. Supp. 169.

In an action by the wife against the personal representatives of her deceased husband to recover money received by her husband in the care and management of her property, items of credit for sums paid by the husband to the wife are not avoided by the fact that the wife used the moneys, when received, for support, clothing and household expenses. Such use will not create a liability on the part of the husband for the amount so expended without circumstances out of which may arise a promise to repay it to her. Nostrand v. Ditmis, 127 N. Y. 355.

A written contract delivered by a husband to his wife agreeing to pay her a certain sum semi-annually, in pursuance of an agreement by which he undertook to furnish her with proof of adultery on his part, in order that she might divorce him and marry another man, is void as against public policy. Train v. Davidson, 20 App. Div. 577.

RIGHTS AND LIABILITIES OF MARRIED WOMEN AS TO CONTRACTS.

Rights and liabilities of wife under contracts made for her support.— While, in the absence of any contract with the wife, the common-law liability of the husband for her suitable support still exists, if she avails herself of her power to contract, by making an express contract in her own name, even for her necessary support, she will not be deemed as acting as agent for her husband, nor will there be any implied agreement on his part to pay such services. Byrnes v. Rayner, 84 Hun, 199. See also Von Mallen v. Fuhrman, 56 Hun, 402.

Where a married woman purchased jewelry which was charged to her on plaintiff's books, and accounts were rendered to her from time to time upon which she made payments, and the evidence showed that she had ordered the jewelry to be charged to her, it was held sufficient to bind her personally for the price thereof. Dickinson v. Ensign, 31 N. Y. St. Rep. 651, 120 N. Y. 650.

A parol agreement to provide for a wife by will in consideration of the abatement of an action for separation and her returning to live with her husband, which agreement is executed upon her part, constitutes a valid executed contract which she may enforce in equity against her husband's legatees and devisees under a subsequent will in contravention of the contract. Nor is the statute of frauds a defense to such an action, as the wife has made a full performance. Goldstein v. Goldstein, 35 Misc. 251.

The common-law unity of husband and wife survives for the purpose of aiding the wife to enforce a covenant for her benefit, made with her husband by a third party, and which equity and common sense approve. The authorities as to the relation of husband and wife as consideration for a covenant by third parties with the husband for the benefit of the wife, collated and approved. Buchanan v. Tilden, 158 N. Y. 109.

It seems that since the passage of section 21 of the Domestic Relations Law an action may be brought against a married woman for articles of clothing in the nature of necessaries, although she has not expressly promised to pay therefor. Mayer v. Lithauer, 28 Misc. 171.

In an action against a married woman for plaintiff's services as a physician, her declaration to him at the time of employing him that she had personal property and was worth enough to pay him, was held sufficient to show that she had a separate estate and to sustain a verdict against her for such services. Ellison v. Sessions, 44 N. Y. St. Rep. 644, 18 N. Y. Supp. 108. But in the absence of a special agreement the husband would be liable for such services. Estate of Shipman, 22 Abb. N. C. 289. Where a married woman, who has a husband and children, purchases groceries for family use, the presumption is that the purchases were made by the wife as the agent of her husband, and that he alone is liable

for their amount; although a wife may, by an agreement to that effect, make herself personally liable for such necessaries. Lindholm v. Kane, 92 Hun, 369, citing Winkler v. Schlager, 64 Hun, 83; Kegney v. Ovens, 18 N. Y. St. Rep. 482; Tiemeyer v. Turnquist, 85 N. Y. 516; Hallock v. Bacon. 45 N. Y. St. Rep. 484.

A married woman is liable for musical instructions given to her daughters and sheet music furnished at her request. Muller v. Platt, 31 Hun, 121.

A hotel-keeper may maintain a claim of lien on the property of the wife, for the board of husband and wife, by showing that she was the head of the family, the one trusted, and had money and credit, and her husband had none. Birney v. Wheaton, 2 How. Pr. N. S. 519.

Liability of wife when husband and wife both live upon land.—The produce and proceeds of the wife's separate estate upon which the husband and wife both live, and which he cultivates, are not liable to the husband's creditors, except where the transaction between the husband and wife are shown to be a colorable device to cheat his creditors. Gage v. Dauchy, 34 N. Y. 293.

Where a married woman owns a farm and her husband has no property, carries on the farm by her permission, he is her agent none theless because she gives him unlimited authority to do as he pleases, she is engaged in the business of farming, and her estate is subject to the debts contracted by him in pursuing her business. Smith v. Kennedy, 13 Hun, 9.

There must be a surrender by a wife to her husband of some interest or dominion over her real property by some act or agreement on her part, express or implied, which will take from her at least some right or incident ordinarily pertaining to the absolute ownership of the real estate in order to give him a legal possession of her premises on which they live together. Mygatt v. Coe, 147 N. Y. 456.

A married woman, as a necessary incident to her right to acquire property and possess it, independent of the control or interference of her husband, is competent, although living with her husband, to secure and maintain legal possession of property acquired by her, free and independent of the rights of persons claiming an interest therein through or under her husband. Stanley v. National Bank, 115 N. Y. 122.

A married woman is liable for the price of farm implements bought on her credit for use on her farm. Purdy v. Bean, 17 Week. Dig. 143.

Since the acts relating to the property of married women, there is no presumption that the husband is in possession of lands belonging to the wife, and upon which they both live, and on an ejectment against the husband to recover possession of such lands it is a question of fact whether the wife is occupying the lands, or has given possession thereof to her husband. Martin v. Rector, 101 N. Y. 77.

Under the statutes of this state a married woman has such freedom

and control over her own real property that her husband cannot, without her consent, and against her will, maintain a vicious domestic animal thereon, and she is liable for injuries committed by such animal, although it is owned by the husband. Quilty v. Battle, 135 N. Y. 201.

The primary purpose of the married woman's act was to enable her, *feme covert*, to hold property in her own right without the intervention of trusts or marriage settlements. Matter of Mitchell, 61 Hun, 372.

Where a woman who owned a farm was lame, and was assisted by her husband in its management, and in negotiating for the purchase of the farm stock referred the seller to her husband, who afterwards closed the bargain, it was held that the jury was warranted in finding that the husband acted under her authority. McLouth v. Myers, 40 N. Y. St. Rep. 853.

Since a married woman may hold real estate in her own right and may convey the same as if she were unmarried, there attaches to her title all the usual incidents and marks of ownership. She holds possession of her lands as completely as if she were *feme sole*, and delivered such possession to the purchaser by some act or instrument as would have been effectual for that purpose before her marriage. If the real estate be a dwelling-house in which she resides, the person of her husband there as the head of the family cannot in the least detract from her full possession and ownership. Her title and possession are consistent with all the rights and duties that arise out of the marital relation. The fact that the husband occupies a house owned by his wife and pays the taxes on it, and keeps it in repair cannot in the least impair her title to the possession of the property. Mygatt v. Coe, 152 N. Y. 457.

Proof of the fact of the use of fertilizer bought by a husband to be used on the wife's farm is not sufficient to charge the separate estate of the wife. Helmer v. Brockert, 21 Misc. 431, citing Jones v. Walker, 63 N. Y. 612.

Where goods are furnished for the benefit of the separate estate of a married woman, the presumption is that they were furnished at her request, and the fact that the goods were charged to her husband does not necessarily overcome the presumption, where the seller did not know of her ownership. Boynton v. Squires, 85 Hun, 128, citing Cutter v. Morris, 116 N. Y. 310. See also Fairbanks v. Mothersell, 60 Barb. 406.

Section 3. Insurance on Husband's Life.

[Domestic Relations Law (L. 1896, ch. 272), § 22]. — A married woman may, in her own name, or in the name of a third person, with his consent, as her trustee, cause the life of

her husband to be insured for a definite period, or for the term of his natural life. Where a married woman survives such period or term she is entitled to receive the insurance money, payable by the terms of the policy, as her separate property, and free from any claim of a creditor or representative of her husband, except, that where the premium actually paid annually out of the husband's property exceeds five hundred dollars, that portion of the insurance money which is purchased by excess of premium above five hundred dollars, is primarily liable for the husband's debts. The policy may provide that the insurance, if the married woman dies before it becomes due and without disposing of it, shall be paid to her husband or to his, her or their children, or to or for the use of one or more of those persons; and it may designate one or more trustees for a child or children to receive and manage such money until such child or children attain full age. The married woman may dispose of such policy by will or written acknowledged assignment to take effect on her death, if she dies thereafter leaving no descendant surviving. After the will or the assignment takes effect, the legatee or assignee takes such policy absolutely.

A policy of insurance on the life of any person for the benefit of a married woman, is also assignable and may be surrendered to the company issuing the same, by her, or her legal representative, with the written consent of the assured.

This section was derived from L. 1858, ch. 187, as amended by L. 1870, ch. 277, § 1, and L. 1866, ch. 656, superseding L. 1840, ch. 80; L. 1870, ch. 277, § 2, and L. 1879, ch. 248.

By the previous act (L. 1858, ch. 187, § 1, as amended by L. 1870, ch. 277), it was provided: "But when the premium paid in any year out of the property or funds of the husband shall exceed five hundred dollars, such exception from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors." As it now reads the amount of insurance which could be purchased by the excess of premiums annually paid, more than five hundred dollars, will inure to the benefit of creditors.

Under the former law (L. 1879, ch. 248), only policies held by married

women on the lives of their husbands could be assigned. Under the above section such policies on the lives of any person may be assigned.

The intent of the statute of 1840, and also of the present statute, was to make policies of insurance upon the life of a husband in favor of his wife, a security to the family of a married man and a provision for their use and benefit. Eadie v. Slimmon, 26 N. Y. 9, 15.

To bring an insurance by a wife upon the life of her husband within the provisions of the statute, it need not appear, either by the terms of the policy or by extrinsic evidence, that it was the intention of the assured to avail himself of the provisions of that act; the intention is to be presumed from the beneficial nature of the policy. Brummer v. Cohn, 86 N. Y. 11; Brick v. Campbell, 122 N. Y. 337.

The common-law right of survivorship in the husband in case of an insurance on his life in favor of his wife was not affected by these statutes. Olmstead v. Keyes, 85 N. Y. 593.

When the policy is made payable to the wife upon the husband's death it cannot be reached by the husband's creditors or representatives, although not issued in the wife's name, nor in that of any third person as trustee. Bloomingdale v. Lisberger, 24 Hun, 355.

Insurance for a definite period. — Where the insurance on a husband's life is for a definite period, the wife is entitled to receive the insurance money at the expiration of the period, if she survives, as her separate property, under the provisions of the above section.

But where an endowment policy upon the life of a husband provided that in case the husband survived the term of fifteen years, the sum insured should be paid to him, and the husband survived the policy period, the interest of the wife in the policy ceased upon the expiration of that period, and the whole interest vested in the husband. Miller v. Campbell, 140 N. Y. 457.

Where an endowment policy on a husband's life is made payable, in case of his death before a specified time to his wife, and if he survives the period, to him, neither the husband or wife during the period have an exclusive interest in the contract, and cannot demand payment of its value, or receipt for or discharge such value. Newcomb v. Almy, 96 N. Y. 308.

A direction by the husband for the payment of an endowment policy upon his life, to his wife, in the event of his death before its maturity, vests the latter with an interest which the husband cannot divest without her consent. Fowler v. Butterly, 78 N. Y. 68.

A policy payable to the insured at the end of a certain number of years, or in case of his earlier death to his wife, gives her a direct interest which is not defeated by an assignment made by her husband, nor by an assignment to which her signature is obtained by compulsion. Geraty v. Reid, 78 N. Y. 64.

Rights of creditors of wife. — Insurance policies taken out on the

life of the husband, and payable to the wife and children after his death, are not subjert to the claims of the creditors of the wife. Leonard v. Clinton, 26 Hun, 288.

The provisions of chapter 80, Laws of 1840, which exempted insurance upon the life of the husband for the benefit of his wife from the claims of the representatives of the husband, or of his creditors, operates to prevent a creditor of the wife from reaching by attachment or judgment her interest in such policy issued by the ordinary life insurance company after the policy has matured and before payment of the proceeds to her by the company. It seems, however, that the exemption ceases when the proceeds have actually been paid to the wife, unless it was paid by a fraternal benefit society. Amberg v. Manhattan Life Ins. Co,. 56 App. Div. 343.

Assignability of policies by wife.— Prior to the Enabling Act of 1879, ch. 248, a married woman who had a child, or any issue of a child, living, had no power to assign a policy of insurance upon the life of her husband, for her benefit, during the life of her husband. Brick v. Campbell, 122 N. Y. 337. But the Act of 1879 authorized such an assignment with the written consent of her husband. This act is re-enacted in the above section.

Where an assignment of a policy was made prior to the passage of ch. 248 of L. 1879, it is invalid, notwithstanding the passage of such act. Brick v. Campbell, 122 N. Y. 337; Miller v. Campbell, 140 N. Y. 457.

The question of the validity of such an assignment is not affected by the fact that the policy was issued by an insurance company of another state, although the laws of that state might authorize such an assignment. Miller v. Campbell, 140 N. Y. 457.

The statute authorizes an assignment to be executed when accompanied by a written assent on the part of the husband. Anderson v. Goldsmidt, 103 N. Y. 617.

In the case of Spencer v. Myers, 73 Hun, 274, 26 N. Y. Supp. 371, it is held that the statute of 1879, which was repealed and re-enacted by ch. 272 of the Laws of 1896, applied not only to policies actually made and delivered within the state, but also to policies made outside of the state. Affirmed 150 N. Y. 269.

An assignment of a policy in which the wife is the beneficiary is valid where the assignment is made by the wife with the written consent of her husband, although the assignee has no interest in the life of the husband and merely takes the assignment upon an agreement that he shall have a two-thirds interest in the policy, provided he pays the premium upon it and prevents it from lapsing. Fuller v. Kent, 13 App. Div. 529.

Where a policy of insurance payable to the wife of the insured, if alive at his death, or in case she is dead then to their children, which policy contained an option that after certain premiums are paid it may be converted into cash, at the option of the holder, it was held that

the contingent interests of the wife and children in the policy was subject to the insured's right to convert the policy into cash, and that therefore the provisions of chapter 248, Laws of 1879, providing that insurance on lives of husbands for the benefit or use of wives shall be assignable by the wife with the written consent of the husband, did not apply or require a written consent of the wife to the transfer by the husband of his interest, and that an assignment by the husband was valid. Travellers Insurance Co. v. Healey, 25 App. Div. 53, affirmed on opinion below 164 N. Y. 607.

The ratification and recognition of an assignment of such a policy made prior to the passage of the Act of 1879, after the passage of such act, is equivalent to a prior authority and sufficient to confirm the title of the assignee to the extent of payments made for the purpose of keeping the policy alive. Conn. Mut. Life Ins. Co. v. Van Campen, 32 N. Y. St. Rep. 1125.

Only the wife or her personal representatives can avoid the assignment of a policy made contrary to the provisions of this section. Smillie v. Quinn, 90 N. Y. 492.

An assignment of such a policy made prior to the passage of the Enabling Acts of 1873 and 1879, is voidable by the wife at her option although the premiums on the policy were paid by her out of her separate estate. Frank v. Mutual Life Ins. Co., 102 N. Y. 266.

An endowment policy is non-assignable during its term, but when the term expires and the policy becomes payable to the husband, a formal assignment executed by husband and wife will become operative and vest the right to the insurance moneys in the assignee. Miller v. Campbell, 140 N. Y. 457, citing Brunner v. Cohn, 86 N. Y. 11.

Nothing short of the written consent of a husband to an assignment by his wife of an insurance policy upon his life for her benefit will amount to a compliance with chapter 248 of the Laws of 1879. But a policy payable to the legal representatives of the insured cannot be regarded as one for the benfit and use of the wife within the meaning of the statute. Therefore, such policy may be assigned by the wife without the written consent of the husband, as well as a paid-up policy taken by her in lieu of the original policy payable to the husband's representatives, the latter being merely a continuation of the original. Dannhauser v. Wallenstein, 169 N. Y. 199, reversing 52 App. Div. 312.

Where a husband having an insurance policy payable to his representatives, assigned the same to his wife and her administrator subsequently surrendered the policy and received a paid-up policy therefor, the assignment of such paid-up policy by the administrator does not require the consent of the husband under Laws 1879, chapter 248, because the original policy was not issued for the benefit of the wife. Morschauser v. Pierce, 64 App. Div. 558.

Surrender of policy by husband.— Where a husband procures a life policy, payable to his wife, and afterwards exchanges it for a paid-up policy, which he subsequently surrenders to the insurance company, upon receiving a certificate for its value, and the wife knows nothing of these transactions until after his death, she may, upon learning the facts, ratify his acts in procuring the first policy and repudiate his surrender of the latter, and compel the company to pay the same to her, notwithstanding payment of the certificate to a person to whom the husband had assigned it. People v. Globe Mutual Life Ins. Co., 15 Abb. N. C. 75.

A wife, in whose favor a policy of insurance has been written upon the life of her husband, but without her knowledge, cannot claim the benefit thereof, without at the same time assuming all the responsibilities for a failure to perform all its essential conditions, and she is bound by a failure to pay a premium thereon, notice of which was duly given, although, before the time when payment became due, a surrender of the policy was accepted by the company, and its cash value paid the husband upon the presentation of a forged consent of the wife, the company acting in good faith and without fault or negligence. Schneider v. U. S. Life Ins. Co., 123 N. Y. 109.

Rights of beneficiaries.— A policy of life insurance must be regarded as a contract made between the insurer and the insured for the benefit of a person named as beneficiary therein, and the rights of the beneficiaries do not depend upon any privity between them and the assured, but rest in contract, and are capable of being enforced as other contracts and stand where at the maturity of the policy the contract leaves them. Where a policy is made payable in case of the death of the insured to his wife or, if she be not then living, to his children, the assignment of the policy by the wife of the insured prior to the death of the insured would in no way affect the rights of his children. The authority contained in the statute for a wife to assign a policy of life insurance with the written consent of her husband does not authorize her to assign the interest which by the express terms of the policy, is reserved to her children. Travellers Ins. Co. v. Healey, 86 Hun, 524.

But the mere fact that the wife has children at the time of assignment does not make such assignment void, even though they have a contingent interest which may become vested by her death before policy matures. If she survives the maturity the contingent interest of the children is ended. Anderson v. Goldsmidt, 103 N. Y. 617.

Where a husband procures a policy of insurance upon his life for the benefit of his wife, or in case of her death before his, of their children, he acts simply as their agent in procuring it and in doing whatever is necessary to perfect and continue the rights of the assured. They ac-

quire a vested interest in the policy at the moment of its delivery, and the fact that they did not know of its existence until after his death is immaterial. The beneficiaries acquire their ownership irrespective of the question as to whether the policy has been actually delivered to them. Whitehead v. N. Y. Life Ins. Co., 102 N. Y. 143.

Section 4. Contracts in Contemplation of Marriage.

[Domestic Relations Law (L. 1896, ch. 272), § 23]. — A contract made between persons in contemplation of marriage remains in full force after the marriage takes place.

This section was derived from L. 1848, ch. 200, § 4, and L. 1849, ch. 375, § 3. There was no change made by the revision.

Under section 3 of the Act of 1849, it was held that parties could avoid the effect of marriage upon their property relations by an ante-nuptial contract, although at common law such a contract was invalid. Matter of the Estate of Young v. Hicks, 92 N. Y. 235.

An ante-nuptial contract by which the future wife releases all her claims against the estate of her husband upon his decease will be sustained when fairly made, but it is subject to rigid scrutiny. Pierce v. Pierce, 71 N. Y. 154.

The relation of parties betrothed is one of confidence especially on the part of the woman, and if she agrees before marriage to release all claims upon his estate in consideration of a grossly inadequate sum without consulting others and in igonorance of the circumstances of the intended husband, the burden of proof is upon the legal representatives of the husband in an action brought by the wife to secure her dower interest. Warner v. Warner, 18 Abb. N. C. 151.

The courts will regard with rigid scrutiny an ante-nuptial contract which deprives a wife of any prospective interest in the estate of her husband, especially where no provision is made therein for her support in case she survives him. Where it appears that the husband is possessed of real estate to the value of $100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the contract; that the husband then stated that he wanted it arranged so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that the wife acted without the aid of counsel, the ante-nuptial contract should be set aside. Graham v. Graham, 143 N. Y. 573.

But where it appeared that the contract was entered into without fraud on the part of the husband; that the parties were married to settle an action which was pending against the husband for seduction, the contract was held to be valid, since the marriage was an ample consideration to support the contract. Davis v. Wood, 31 N. Y. St. Rep. 604, 10 N. Y. Supp. 460.

A note given in consideration of a promise to marry is valid in the hands of the wife after marriage and an action may be maintained thereon by her against her husband. Wright v. Wright, 54 N. Y. 437.

The above provision of the statute comprehends ante-nuptial contracts made by infants in respect to either their real or personal property, and an ante-nuptial settlement by a female infant of all her real and personal property in trust is valid, and not impeachable on the mere ground that she was an infant at the time of its execution. Wetmore v. Kissam, 3 Bosw. 321. See also McElvaine v. Cadel, 3 Robt. 429.

Such a contract is voidable only at the option of the infant on arriving at age. Beardsley v. Hotchkiss, 96 N. Y. 201.

If the infant does not, within a reasonable time, seek to avoid it, she will be deemed to have ratified it. The trustee under the settlement cannot raise such objection against a claim for an accounting. Jones v. Butler, 30 Barb. 641, 20 How. Pr. 189.

Ante-nuptial contracts by which it is attempted to regulate and control the interests which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts, and will be enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises. Johnston v. Spicer, 107 N. Y. 185.

An ante-nuptial contract executed in the state of Connecticut, by the terms of which a husband agrees that he "will not claim to have or pretend to have any right or interest in or to any part of her estate, or of the income thereof, but will permit the same to pass by her will to her devisees, or by descent to her heirs-at-law, as the same would pass if she had remained single and unmarried," is valid, and constitutes a bar to any tenancy by curtesy on the part of the husband in the lands of the wife in the state of New York. The rule that legal privity must exist between the promisee and a third party in order to enable the latter to sue upon a promise alleged to have been made for his benefit, does not apply to ante-nuptial contracts or to agreements of a similar nature. Such an ante-nuptial contract must be regarded as made for the benefit of any person to whom the wife's property passes by devise or descent. White v. White, 20 App. Div. 560.

A marriage settlement made in Germany, in contemplation of the parties living in Maryland, may be enforced in New York, and the plaintiff may have a trustee appointed and an accounting between the parties holding the trust property and the trustee so appointed. Gleitsmann v. Gleitsmann, 60 App. Div. 371.

A wife may have an action to enforce an ante-nuptial agreement in which the husband agreed to convey certain real property to the wife, and to pay her a sum of money. Specific performance may be had of an agreement to convey, and damages for the breach of contract to pay the money. This relief may be obtained in one action, but the defendant is entitled to a jury trial of the action for damages. Van Deventer v. Van Deventer, 32 App. Div. 578.

Where an ante-nuptial agreement provided that if the husband survived the wife he should have absolute title to all her personal property, the agreement merely operates to give the husband, in the event of survival, title to the residuum of personal property after the wife's estate has been duly administered. Foehner v. Huber, 42 App. Div. 439.

As to when ante-nuptial agreement, executed in view of marriage, and which provided that in event of the death of one party the survivor should take the estate of the deceased party, was held not to create a presumption that it was procured by fraud or undue influence, on part of the husband, see Green v. Benham, 57 App. Div. 9.

As to when an oral ante-nuptial agreement is not sufficient consideration for a debt from husband to wife as against the husband's creditors. See Whyte v. Denike, 53 App. Div. 320.

Ante-nuptial settlements were considered in Boiland v. Welsh, 162 N. Y. 104; Brown v. Wadsworth, 168 N. Y. 225.

Section 5. Liability of Husband for Ante-Nuptial Debts.

[Domestic Relations Law (L. 1896, ch. 272), § 24].—A husband who acquires property of his wife by ante-nuptial contract or otherwise, is liable for her debts contracted before marriage, but only to the extent of the property so acquired.

This section is a re-enactment of § 2 of ch. 576 of L. 1853, without material changes.

The Enabling Act of 1848 did not abrogate the common-law rule making the husband liable for all debts contracted by his wife before marriage and the Act of 1853 does not affect a right of action against her husband which was vested before that act took effect. Berley v. Rampacher, 5 Duer, 183.

Section 6. Contract of Married Woman Not to Bind Husband.

[Domestic Relations Law (L. 1896, ch. 272), § 25].— A contract made by a married woman does not bind her husband or his property.

This section was derived from § 8 of ch. 90 of L. 1860, as amended by L. 1862, ch. 172.

This section has modified the language used in the prior statute. It was formerly provided that "No bargain or contract made by any married woman in respect to her sole and separate property, or any property which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person (except her husband), and no bargain or contract entered into by any married woman, in or about the carrying on of any trade or business, under any statute of this state shall be binding upon her husband or render him or his property in any way liable therefor." It is not thought that any substantial change has been made by the revision. As the law existed prior to the revision, married women could contract in the same manner and be liable to the same extent as unmarried women. It would thus seem that under such prior statute, married women would be liable upon their contracts and their husbands would be relieved from all liability. At the time of the passage of the Act of 1862, the rights of married women to contract was limited to contracts relating to her separate property and to the carrying on of her separate business; but by the Act of 1884, ch. 381, all restrictions upon the right of a married woman to contract were removed.

Liability of husband for necessaries.— Where a married woman who has a husband and children purchases groceries for family use, the presumption is, that the purchases were made by the wife, as the agent for the husband, and that he alone is liable for their amount; although a wife may, by an agreement to that effect, make herself per-

sonally liable for such necessaries. Lindholm v. Kane, 92 Hun, 369, citing Winkler v. Schlager, 64 Hun, 83; Tiemeyer v. Turnquist, 85 N. Y. 516.

A husband is legally bound to supply necessaries to his wife so long as she does not violate her duty as his wife. Cromwell v. Benjamin, 41 Barb. 558; Johnstone v. Allen, 6 Abb. Pr. N. S. 306.

If a husband and wife part by consent, and the husband secure to her a separate maintenance, suitable to his condition in life, and pay it according to agreement, he is not liable for articles furnished to his wife, and the general reputation of the separation will be sufficient to relieve him. Baker v. Barney, 8 Johns. 72; Fenner v. Lewis, 10 Johns. 38; De Long v. Baker, 9 Week. Dig. 315.

But, if no separate maintenance is provided for her, he is liable for her contracts for necessaries furnished to her. Lockwood v. Thomas, 12 Johns. 248.

The adultery of the husband justifies the wife in leaving him, and he is liable for necessaries, although he offered to provide for her in a separate apartment of his residence. Sykes v. Halstead, 1 Sandf. 483.

Where a wife leaves her husband against his will and without justifiable cause, and goes to live with her parent, with whom she resides, although her husband is willing to maintain her in his own house, and does not promise to pay for her maintenance at her father's house, the father has no cause of action against the husband for his wife's board or for other necessaries furnished to her. Catlin v. Martin, 69 N. Y. 393.

In an action for necessaries furnished to a wife living separate from her husband, the burden of proof is on the plaintiff to show that the separation was brought about by improper conduct on the part of the husband. Blowers v. Sturtevant, 4 Den. 46.

Persons who sell goods to a wife upon the husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show his subsequent promise to pay, or that the goods were necessary for the maintenance of the wife, and that she was not otherwise provided for by her husband. Theriott v. Bagioli, 9 Bosw. 578; Mott v. Comstock, 8 Wend. 544; Kimball v. Keyes, 11 Wend. 33.

The husband's liability for necessaries furnished to the wife for her support rests entirely upon the ground of his neglect or default. Supervisors, etc. v. Budlong, 51 Barb. 493; McCutcheon v. McGahey, 11 Johns. 281.

The presumption of the wife's authority to pledge the husband's credit is negatived by their living apart, and in such case a person who supplied articles to the wife must not only show that they were necessaries, but that, in consequence of the inadequacy of the husband's provision, they were actually required for the wife's proper support, commensurate with his means, her wonted living as his spouse and her station in the community. Bloomingdale v. Brinckerhoff, 2 Misc. 49.

CONTRACT OF MARRIED WOMAN NOT TO BIND HUSBAND.

A husband cannot be held liable for money loaned to his wife, even though it be shown that the money was used for her support. Schwarting v. Bisland, 4 Misc. 534.

Where a husband abandons his wife and neglects to support her, he is liable for moneys loaned to her upon his credit for necessaries. Kenny v. Meislahn, 69 App. Div. 572.

It must be shown in an action to recover for necessaries furnished to defendant's wife that they were supplied on his credit. Errick v. Bucki, 7 Misc. 118.

The husband living in voluntary separation from his wife may either trust her with a sufficient allowance to spend for herself, in which case he is not liable for her debts, or he must trust her to pledge his credit for what is necessary for her support, in which case he is liable. Raymond v. Cowdrey, 19 Misc. 34.

While, in the absence of any contract with the wife, the common-law liability of the husband for her suitable support still exists, if she avails herself of the powers conferred by the statute, by making an express contract in her own name even for her necessary support, she will not be deemed as acting as agent for her husband, nor will there be any implied agreement on his part to pay for such necessaries. Byrnes v. Rayner, 84 Hun, 199.

Where the defense of a husband sued for the value of a physician's services in attending his wife was that she had deserted him without cause and was living apart from him, and the evidence tended to show that she left him because of his ill-treatment and with his consent, it was held that a dismissal of the complaint was error. Comstock v. Green, 88 Hun, 64.

A husband is liable to a physician, employed by him to attend his wife, for services to his wife continued after separation, if the employment is not revoked and there was no wrongful abandonment by her. Potter v. Virgil, 67 Barb. 578.

The reasonable value of the services of an attorney rendered in preparing papers in a suit for separation by a wife against her husband, necessary to be brought for her protection while she was living with him, but which papers were never served, the parties having become reconciled, may be recovered from the husband upon the ground of his wife's implied agency to bind him for necessaries. Langbien v. Schneider, 27 Abb. N. C. 228.

As to the form of complaint in an action to recover for necessaries furnished to a wife, see Hatch v. Leonard, 165 N. Y. 435.

One who furnishes necessaries to a wife after her husband has abandoned her is not obliged to show in an action against the husband a demand that he support his wife and that he refused to do so. Nor

is judgment in favor of the husband in a former action brought by the wife for abandonment conclusive evidence that he did not abandon her. Hardy v. Eagle, 25 Misc. 471.

Mere inattention and negligence upon the part of a husband in providing for his wife, unaccompanied by physical violence or specific misconduct, does not justify her in abandoning him, or render him liable to third persons for necessaries. There is no presumption of a continuing agency on the part of the wife for such necessaries on her husband's credit after such abandonment, where the vendor never rendered any bills for necessaries to the husband or received payment therefor. Bostwick v. Brower, 22 Misc. 709.

Where a husband abandons and fails to support his wife and children, the wife has a right to bind his credit for all necessaries for her own use and theirs. Hardy v. Eagle, 23 Misc. 441.

The right of a wife to charge her husband for necessaries is not revoked by separation without notice to the sellers who have previously dealt with the wife upon the husband's authority. Anon., 21 Misc. 656.

The statute enabling a married woman to contract as if sole does not absolve her husband from liability for her necessaries. Graham v. Schleimer, 28 Misc. 535.

Where a husband has been judicially declared incompetent and his wife appointed a committee, with a provision for her support during incompetency, she cannot pledge his credit for necessaries so as to bind him after incompetency is removed. Thedford v. Reade, 25 Misc. 490.

Section 7. Husband and Wife May Convey to Each Other or Make Partition.

[Domestic Relations Law (L. 1896, ch. 272), § 26].—Husband and wife may convey or transfer real or personal property directly, the one to the other, without the intervention of a third person; and may make partition or division of any real property held by them as tenants in common, joint tenants or tenants by the entireties. If so ex-

pressed in the instrument of partition or division such instrument bars the wife's right to dower in such property, and also, if so expressed, the husband's tenancy by curtesy.

The first sentence of this section is a re-enactment of § 1 of ch. 537 of the Laws of 1887. The last sentence was derived from ch. 472 of the Laws of 1880.

Prior to the Act of 1887, a married woman could not take and hold property by conveyance from her husband nor could a wife convey real estate to her husband. Johnson v. Rogers, 35 Hun, 267; Winans v. Peebles, 32 N. Y. 423; White v. Wager, 25 N. Y. 328.

Where the wife had advanced the purchase money from her own earnings, a conveyance of the real property to her by her husband is valid in equity as against his creditors, although made prior to the Act of 1887. Fitzpatrick v. Burchill, 7 Misc. 463.

And where, in 1871, a married woman executed and delivered to her husband a quit-claim deed of land conveyed to her in 1864, the consideration for which was paid by him from his earnings, it was held that if it appeared that she took as trustee equity would support the conveyance made by her, but in the absence of evidence to support that conclusion her deed to her husband was void. Scott v. Calladine, 79 Hun, 79.

A deed by a married woman to her husband dated before the enactment of the Act of 1887, but delivered after it became a law, is a valid conveyance, since the delivery completes the conveyance. Reynolds v. City National Bank, 71 Hun, 386.

Prior to the Act of 1887 a mortgage given by a wife to her husband was invalid at law, and did not operate to transfer any right except such as equity would enforce as founded upon a valuable or meritorious consideration. Cheney v. Thornton, 43 N. Y. St. Rep. 510, 17 N. Y. Supp. 545.

Under the Act of 1887, a conveyance by a husband to a wife without valuable consideration is good both at law and in equity. Talcott v. Levy, 29 Abb. N. C. 3; but such a conveyance must be with an honest intent and not for the purpose of hindering, delaying or defrauding creditors. Spaulding v. Keyes, 125 N. Y. 113.

Where a wife having only an inchoate dower in real property joins with her husband in the conveyance to a third party, and the husband takes back a joint mortgage payable to himself and his wife, there is a presumption that he intends to give the bond and mortgage to his wife if she survives him. Wilcox v. Murtha, 41 App. Div. 408.

Undue influence will not be presumed where the husband transfers his property to a faithful wife when in failing health. Nor will such transfer be set aside at the instance of relatives upon the mere proof of vagaries and eccentricities. Hoey v. Hoey, 28 Misc. 396.

Section 8. Right of Action by or Against Married Woman for Torts.

[Domestic Relations Law (L. 1896, ch. 272), § 27]. — A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed but must be proved. This section does not affect any right, cause of action or defense existing before the eighteenth day of March, 1890.

This section is a re-enactment of ch. 51 of the Laws of 1890, without material change.

Right of action for personal injuries. — Prior to the enactment of the Act of 1890, a married woman in an action brought to recover damages for personal injuries caused by the wrongful act of another could only recover for the direct injury. She was not entitled to recover consequential damages resulting from her inability to labor, unless she carried on a trade or business or performed labor or services on her sole and separate account. Her services and earnings belonged to her husband, and for the loss of such service he could recover. Filer v. N. Y. Cent. R. R. Co., 49 N. Y. 47; Brooks v. Schwerin, 54 N. Y. 343; Clark v. Dillon, 6 Daly, 526.

In an action for personal injuries prior to the passage of the Act of 1890, it was held that a married woman might recover for inability to labor on her own account occasioned by the injury; but not for loss of earnings unless she was actually engaged in business or performing services on her sole and separate account. Becker v. Janinski, 27 Abb. N. C. 45.

In speaking on this subject, Judge Vann, in the case of Blaechinski v. Howard Mission and Home, 130 N. Y. 497, 503, says: "Applying the law, as we gather it from the statute and the manifold decisions, to the facts of this case as now laid before us, we think that the plaintiff is entitled to recover actual damages only and that the consequential damages for the loss of her services, both in the house and in the shop, should be recovered by her husband in a separate action brought in his own name. The damages for the injury to her person belong to her, because the statute has given them to her, but the damages for the loss of her services belong to him, because the common law gave them to him and the statute has not taken them away."

The cause of action in this case arose prior to the passage of the Act of

1890, but there was nothing in that act, nor in the above section, which would change the rule as here laid down. The case of Thuringer v. N. Y. C. & H. R. R. Co., 71 Hun, 526, was an action brought by a married woman for an injury which occurred subsequent to the Act of 1890. In this case the court held that the services of a wife in the household still belonged to her husband, and so far as an injury to her disables her from performing such services, the loss is his, and he alone can recover therefor. In arriving at this conclusion the court cites Filer v. N. Y. C. & H. R. R. Co., 49 N. Y. 49, 56; Brooks v. Schwerin, 54 N. Y. 343, 348; Coleman v. Burr, 93 N. Y. 17, and the case of Blaechinski v. Howard Mission and Home, above cited.

Liability for torts. — Prior to the passage of the Act of 1890, the husband was held liable for the strictly personal torts of the wife. Rowe v. Smith, 45 N. Y. 230. The court in this case says: "The statute declares that the real and personal property of a wife shall remain her sole and separate property, and shall not be subject to the interference or control of her husband. If, therefore, the husband is liable solely or jointly with his wife for the injuries of which the plaintiff complains, the ground of that liability must be found in the general principle that the husband is liable for the torts of his wife. The theory upon which this liability proceeds is, that the marriage subjects the person of the wife to the dominion and control of her husband, so that the commission of a tort by her is, in a degree at least, the result of his fault or omission. The recent statutes leave unaffected this liability of the husband for the strictly personal torts of the wife."

In the case of Baum v. Mullen, 47 N. Y. 577, it was held that the enabling act did not alter the common-law liability of the husband for the personal torts of his wife, but when such torts were committed in the management and control of her separate property, the rule was changed and she only was liable.

Under the enabling acts a married woman has such freedom of control over her own real property that a husband cannot, without her consent and against her will, establish and maintain a nuisance upon it, and if she permits him so to do she is liable for the damages occasioned thereby. In an action against a husband and wife to recover damages for injuries occasioned by the bite of a dog, it appeared that the husband was the owner of the dog, but kept it upon premises owned and controlled by the wife, that she knew of the vicious propensities of the dog, but permitted it to be cared for upon the premises. There was no evidence that the husband had other property upon the premises; that he had any control of his wife's property or that he knew of the vicious propensities of the dog. He was sought to be held liable solely on the ground of his marital liability for the torts of his wife. It was held, that the wife was liable, but that a judgment against the husband was error. Quilty v. Battie, 135 N. Y. 201. See also Vallantine v. Cole, 1 N. Y. St. Rep. 719.

At common law the husband was liable to be sued jointly with his wife for all torts committed by her prior to or during coverture, and therefore where she wrongfully took and converted personal property belonging to another, the action was properly against both husband and wife, though he was in fact innocent of any wrong and never received any part of the property. Kowing v. Manly, 49 N. Y. 192.

The Act of 1890 changed the common-law rule of the liability of the husband and also the rule as stated under the provisions of the enabling act. As the law now stands, the husband is not liable for the wrongful or tortious acts of the wife, whether personal in their nature or committed in respect to the wife's sole and separate property, unless occasioned by the actual coercion or instigation of the husband. Kujek v. Goldman, 9 Misc. 34, 31 Abb. N. C. 314.

Wife cannot sue husband in tort.— A wife cannot maintain an action against her husband for damages for assault and battery, as in law the husband and wife are one. Nor do the provisions of section 27 of the Domestic Relations Law giving a right of action to her for an injury to her person confer a right to maintain an action for assault and battery against her husband. Nor is such action one "for an injury arising out of the marital relation. Nor can a wife defeated in such action be charged with costs. Abbe v. Abbe, 22 App. Div. 483.

Section 9. Pardon Not to Restore Marital Rights.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 28].— A pardon granted to a person sentenced to imprisonment for life within this state, does not restore that person to the rights of a previous marriage or to the guardianship of a child, the issue of such a marriage.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 1, § 7, without change in substance.

Section 10. Compelling Transfer of Trust Property.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 29].— A person who holds property as trustee of a married woman, under a deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certifi-

cate of a justice of the Supreme Court, that he has examined the condition and situation of the property, and made inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman all or any portion of such property, or the rents, issues or profits thereof.

This section is a re-enactment of L. 1849, ch. 375, without change in substance.

Section 11. Married Woman's Right of Action for Wages.

[Domestic Relations Law (L. 1902, ch. 289), § 30, new]. — A married woman shall have a cause of action in her own sole and separate right for all wages, salary, profits, compensation or other remuneration for which she may render work, labor or services, or which may be derived from any trade, business or occupation carried on by her, and her husband shall have no right of action therefor, unless she, or he, with her knowledge or consent, has otherwise expressly agreed with the person obligated to pay such wages, salary, profits, compensation or other remuneration. In any action or proceeding in which a married woman or her husband shall seek to recover wages, salary, profits, compensation or other remuneration for which such married woman has rendered work, labor, or services, or which was derived from any trade, business or occupation carried on by her or in which the loss of such wages, salary, profits, compensation or other remuneration shall be an item of damage claimed by a married woman or her husband, the presumption of law in all such cases shall be that such married woman is alone entitled thereto, unless the contrary expressly appears.

The foregoing section shall not affect any right, cause of action or defense existing before the date when this act shall take effect.

CHAPTER VIII.

RIGHT OF DOWER.

[*Real Property Law* (*L. 1896, ch. 547, article* V.)]

SECTION 1. OF WHAT LANDS WIDOW IS ENDOWED.
2. DOWER IN LANDS EXCHANGED.
3. DOWER IN LANDS MORTGAGED BEFORE MARRIAGE.
4. DOWER IN LANDS MORTGAGED FOR PURCHASE MONEY.
5. SURPLUS PROCEEDS OF SALE, UNDER PURCHASE MONEY MORTGAGES.
6. WIDOW OF MORTGAGEE NOT ENDOWED.
7. WHEN DOWER BARRED.
8. ELECTION OF DOWER BY WIDOW.
9. WHEN PROVISION IN LIEU OF DOWER IS FORFEITED.
10. EFFECT OF ACTS OF HUSBAND.
11. WIDOW'S QUARANTINE; BEQUEATH OF CROPS.
12. RELEASE OF DOWER.

Section 1. Of what Lands Widow is Endowed.

[REAL PROPERTY LAW (L. 1896, ch. 547), § 170]. — A widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance, at any time during the marriage.

This section is derived from R. S. Pt. II, ch. 1, tit. 3, § 1.

A widow cannot be endowed of a reversionary interest or vested remainder expectant upon an estate for life. Durando v. Durando, 23 N. Y. 331; Green v. Putnam, 1 Barb. 500. But see House v. Jackson, 50 N. Y. 161, where it is held that where a husband is seized of a vested remainder expectant upon a life estate, subject to be defeated by his own death, prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower, subject to be defeated, as above.

A widow has no dower in lands held by her husband as trustee, or as equitable mortgagee. Terrett v. Crombie, 6 Lans. 82. See also Clark v. Clark, 147 N. Y. 639; Cooper v. Whitney, 3 Hill, 95; Germond v. Jones, 2 Hill, 569. Nor in an estate held by her husband during the life of another. Gillis v. Brown, 5 Cow. 388.

So long as the affairs of a copartnership remain unsettled, the widow of a partner is not entitled to dower in the partnership realty. Riddell v. Riddell, 85 Hun, 482, citing Sage v. Sherman, 2 N. Y. 417.

An interest in a pier for which ejectment could be maintained by the husband, is a legal estate which descends to his heirs, and of which dower is predicable.. Bedlow v. Stilwell, 91 Hun, 384

The creditor of a widow may attach her dower interest, although unadmeasured. Latourette v. Latourette, 52 App. Div. 192.

What constitutes seizin.— To entitle the wife to dower, the husband must be seized, either in fact or in law, of a present freehold in the premises, as well as an estate of inheritance. Such a seizin cannot be predicated with respect to land purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him. Phelps v. Phelps, 143 N. Y. 197.

The widow of a remainderman dying before the termination of the life estate is not entitled to dower. Stewart v. Crysler, 52 App. Div. 597.

It is not necessary to show that the husband actually took possession of the land, and where no adverse possession is shown, a title vested in him will constitute such seizin as the statute requires. McIntyre v. Costello, 47 Hun, 289.

A grandson of a decedent whose parent is living so that he has no immediate interest in decedent's estate, has not an estate in possession, to which the right of dower of his wife will attach, and an agreement entered into by him not to contest the will, which is fully carried out and executed, will prevent the wife from acquiring any dower interest therein. Jones v. Duff, 47 Hun, 170.

The wife of an heir, who takes as tenant in common, has an inchoate right of dower in the share of her husband, because he is seized of an estate of inheritance. Jourdan v. Haran, 56 Super. Ct. Rep. 185.

A testator's will directed that his wife have the use of his farm during her widowhood, and by subsequent provisions devised the fee. It was held that she took an interest during her widowhood and while that continued, the devisee of a portion had no seizin which would entitle his widow to dower therein on his death. Beekman v. Hudson, 20 Wend. 53; Adams v. Beekman, 1 Paige, 631; Dunham v. Osborne, 1 Paige, 634. See also Beardslee v. Beardslee, 5 Barb. 324.

Where the husband holds land by adverse possession, but, before the lapse of the period necessary to ripen into presumption of a grant, he conveys the land to the holders of the superior title, his seizin fails and his widow is not entitled to dower against them. Poor v. Horton, 15 Barb. 485.

Section 2. Dower in Lands Exchanged.

[Real Property Law (L. 1896, ch. 547), § 171].— If a husband seized of an estate of inheritance in lands, exchanges them for other lands, his widow shall not have dower of both,

but she must make her election, to be endowed of the lands given, or of those taken, in exchange; and if her election be not evinced by the commencement of an action to recover her dower of the lands given in exchange, within one year after the death of her husband, she is deemed to have elected to take her dower of the lands received in exchange.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 3.

The word "exchange" as used in this section means a mutual grant of equal interests, the one in consideration of the other. Wilcox v. Randall, 7 Barb. 633. It was held in this case that a transfer of an equitable interest in lands in consideration of a conveyance of a fee of lands and a transfer of personal property was not an exchange within the meaning of the statute.

Nor is a sale of lands and a conveyance of other lands in part payment, under peculiar circumstances. Runyan v. Stuart, 12 Barb. 537.

Section 8. Dower in Lands Mortgaged Before Marriage.

[Real Property Law (L. 1896, ch. 547), § 172]. — Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 4.

Where the husband has executed a mortgage for the purchase money before marriage, the widow cannot claim dower as against the mortgagee or those claiming under him, while she may as to all other parties. Smith v. Gardner, 42 Barb. 356, 365.

This section is not applicable to the case of a mortgage for the purchase money. Cunningham v. Knight, 1 Barb. 399.

A widow is entitled to dower in an equity of redemption, as well when the mortgage was executed before marriage, as when it is executed by the husband and wife during coverture. Denton v. Nanny, 8 Barb. 618.

Conveyances in contemplation of marriage. — In contemplation of marriage a person conveyed real property by way of advancement to his son, with intent to defeat the right of dower of his intended wife, and she married him not knowing of the conveyance. It was held that she could not enforce a claim for dower. Baker v. Chase, 6 Hill, 482.

A deed was given by a husband just before his marriage to his daugh-

ter without any consideration and kept concealed till after the marriage. It had been held fraudulent as against a subsequent mortgagee. It was held that it was to be adjudged equally fraudulent as against the widow's claim for dower. Swaine v. Perrine, 5 Johns. Ch. 482. See also Youngs v. Carter, 1 Abb. N. C. 136; Pomeroy v. Pomeroy, 54 How. Pr. 228; Babcock v. Babcock, 53 How. Pr. 97.

Section 4. Dower in Lands Mortgaged for Purchase Money.

[Real Property Law (L. 1896, ch. 547), § 173]. — Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 5, without change in substance.

At the common law, where land was conveyed to the husband during coverture, who at the same time executed a mortgage to the grantor to secure the payment of the consideration money, the seizin of the land is but for an instant in the grantee, and is immediately revested in the grantor, and it was therefore held that the widow of the grantee cannot claim dower in the premises. Stow v. Tifft, 15 Johns. 458.

The provisions of this section do not affect the wife's right of dower in the equity of redemption. Mills v. Van Vorhees, 20 N. Y. 412; Blydenburgh v. Northrop, 13 How. Pr. 289.

The wife takes dower in the mortgaged premises subordinate to the power of sale as well as in the lien of a purchase-money mortgage in which she did not join. Brackett v. Baum, 50 N. Y. 8.

A mortgage executed for the purchase money of land pursuant to an oral agreement by which it was to have been taken at the time of a conveyance, although in fact executed some time subsequently, is superior to the dower interest of a wife of a mortgagor to whom he is married in the intervening period. Ulrich v. Ulrich, 17 N. Y. St. Rep. 414.

Although a purchase-money mortgage is superior to the dower right of the wife of the mortgagor, yet where she has never been made a part to any action to foreclose her right of dower in the premises, she is entitled to equity of redemption as against the mortgagee. Sheldon v. Hoffnagle, 51 Hun, 478.

Section 5. Surplus Proceeds of Sale, under Purchase-Money Mortgages.

[Real Property Law (L. 1896, ch. 547), § 174].—Where, in a case specified in the last section, the mortgagee, or a person claiming under him, causes the land mortgaged to be sold, after the death of the husband, either under a power of sale contained in the mortgage, or by virtue of a judgment in an action to foreclose the mortgage, and any surplus remains, after payment of the money due on the mortgage and the costs and charges of the sale, the widow is nevertheless entitled to the interest or income of one-third part of the surplus for her life, as her dower.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 6, without change in substance.

The wife's inchoate right of dower in the husband's lands follows the surplus moneys raised by a sale under a power contained in a mortgage, and should be protected against the claims of the husband's creditors by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors, during the joint lives of husband and wife. Denton v. Nanny, 8 Barb. 618; Vartie v. Underwood, 18 Barb. 561. But see Titus v. Neilson, 5 Johns. Ch. 452; Bell v. Mayor, etc., of N. Y., 10 Paige, 49; Frost v. Peacock, 4 Edw. Ch. 678.

The widow of the owner of the equity of redemption is not barred of her right to dower in surplus moneys, arising on a foreclosure, by her failure to assert her claim in proceedings to obtain the surplus, where the person to whom such surplus has been paid has not been induced to take any action or part with anything, and has sustained no injury by the widow's neglect. Matthews v. Duryee, 45 Barb. 69.

Where a wife had obtained a separation from her husband without alimony it was held that where one-third of the surplus on foreclosure was deposited in court to secure the wife's inchoate right of dower, that the court should not direct the payment of the money so deposited to the husband upon his executing a bond conditioned to pay the same to the wife should she survive her husband. Emigrant Industrial Bank v. Regan, 41 App. Div. 523.

Section 6. Widow of Mortgagee not Endowed.

[Real Property Law (L. 1896, ch. 547), § 175].—A widow shall not be endowed of the lands conveyed to her husband by way of mortgage, unless he acquires an absolute estate therein, during the marriage.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 7, without change in substance.

Section 7. When Dower Barred.

By misconduct [REAL PROPERTY LAW (L. 1896, ch. 547), § 176]. — In case of a divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 8, without change in substance.

This section, as contained in the Revised Statutes, re-established the rule of the common law, that adultery is not enough to bar the claim of dower, but it must be followed by a divorce dissolving the marriage contract. Cooper v. Whitney, 3 Hill, 95; Reynolds v. Reynolds, 24 Wend. 193.

Where an absolute divorce is granted to the wife for the adultery of her husband, the alimony is not in lieu of dower. The court cannot require the release of her dower right either peremptorily or as a condition of granting a judgment of divorce. Forrest v. Forrest, 6 Duer, 102. It was so held also in the case of a limited divorce. Crain v. Cavana, 36 Barb. 410.

The statute of another state which declares that a wife who leaves her husband and dwells with her adulterer is barred of dower can have no force or effect in this state. Rundle v. Van Inwegan, 9 Civ. Pro. Rep. 328.

Where it was found in an action for divorce that the wife had been guilty of adultery, but that her husband had condoned it, it was held that her dower was not thereby barred. Pitts v. Pitts, 14 Abb. Pr. N. S. 97, 64 Barb. 482.

A finding or verdict that she has been guilty of adultery is insufficient to bar her dower right unless followed by a decree of divorce. Schiffer v. Pruden, 64 N. Y. 47. See also Schiffer v. Dietz, 83 N. Y. 300, 310.

Wilful desertion and absence of a wife from her husband, for which he has procured an absolute divorce in another state, which is valid and effectual against the wife, is not such misconduct as will deprive her of dower in the husband's estate, under the provisions of this section. To deprive her of dower under such a judgment in this state, the misconduct must be adultery. Van Cleaf v. Burns, 133 N. Y. 540. See also s. c. 118 N. Y. 549.

By jointure [REAL PROPERTY LAW (L. 1896, ch. 547), § 177]. — Where an estate in real property is conveyed to a person and his intended wife, or to the intended wife alone, or to a person in trust for them or for the intended wife alone, for the purpose of creating a jointure for her, and with her assent,

the jointure bars her right or claim of dower in all the lands of the husband. The assent of the wife to such a jointure is evidenced, if she be of full age, by her becoming a party to the conveyance by which it is settled; if she be a minor, by her joining with her father or guardian in that conveyance.

This section is derived from R. S. Pt. II, ch. 1, tit. 3, §§ 9, 10, without material change.

Before the Revised Statutes, from which this section is taken, a jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the father or the guardian of the infant, before marriage, was, in the absence of fraud, an equitable bar. But such a jointure must be certain and beneficial. It must be a provision to take effect immediately upon the husband's death, and to continue during the widow's life, and be a reasonable and competent livelihood for her. McCartee v. Teller, 2 Paige, 511; Hawley v. James, 5 Paige, 318.

By pecuniary provisions [REAL PROPERTY LAW (L. 1896, ch. 547), § 178]. — Any pecuniary provision, made for the benefit of an intended wife and in lieu of dower, if assented to by her as prescribed in the last section, bars her right or claim of dower in all the lands of her husband.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 11, without change in substance.

A pecuniary provision to bar dower must be a provision which the wife can take and enjoy after the husband's death. A provision which she has enjoyed and consumed in his lifetime is not within the statute. Crain v. Cavana, 36 Barb. 410.

The committee of a lunatic agreed with the lunatic's wife to pay the wife a certain sum, which she received, and in consideration thereof released all her right, title and interest, including her inchoate right of dower in her husband's real property. In an action to recover dower, brought by the wife after the husband's death, it was held that the money paid her was a pecuniary provision in lieu of dower and would bar her right to recover. Jones v. Fleming, 104 N. Y. 418.

Dower cannot be barred by a release thereof made to a stranger, although the instrument runs to the children of the husband. Armstrong v. Armstrong, 1 N. Y. St. Rep. 529; Merchants' Bank v. Thomson, 55 N. Y. 7.

Section 8. Election of Dower by Widow.

Election between jointure and dower [REAL PROPERTY LAW (L. 1896, ch. 547), § 179]. — If, before the marriage, but without her assent, or, if after the marriage, real property is given or assured for the jointure of a wife, or a pecuniary provision is made for her, in lieu of dower, she must make her election whether she will take the jointure or pecuniary provision, or be endowed of the lands of her husband; but she is not entitled to both.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 12, without change in substance.

To constitute a case for an election, the jointure or other provision in lieu of dower, must be one in which she is to have some beneficial interest. A mere power in trust for the sole benefit of others is not sufficient. Hawley v. James, 5 Paige, 318.

The receipt of one-third of the rent of a husband's lands by the widow will not bar her action for dower. Aikman v. Harsell, 98 N. Y. 186.

Election between devise and dower [REAL PROPERTY LAW (L. 1896, ch. 547), § 180]. — If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provision so made, or be endowed of the lands of her husband; but she is not entitled to both.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 13, without change in substance.

This section was amended by ch. 171 of the Laws of 1895, but restored by ch. 1022 of the Laws of the same year.

To put the wife to an election, the will must contain provisions inconsistent with her claim of dower in the particular part of the estate, as to which it is made. Fuller v. Yates, 8 Paige, 325; Adsit v. Adsit, 2 Johns. Ch. 448; Smith v. Kniskern, 4 Johns. Ch. 9; Jackson v. Churchill, 7 Cow. 287; Irving v. De Kay, 9 Paige, 521; Sandford v. Jackson, 10 Paige, 266; Lewis v. Smith, 9 N. Y. 502; Ferris v. Ferris, 10 Misc. 317; Wetmore v. Peck, 66 How. Pr. 54; Konoalinka v. Schegel, 104 N. Y. 125.

The widow's claim for dower, as well as her right to other provisions in a will, is not barred by accepting the latter, unless they are declared to be in lieu of dower; or permit her to enjoy both would interfere with the other dispositions, and the manifest intentions of the will. Matter of

Smith, 1 Misc. 269; Ferris v. Ferris, 10 Misc. 317; White v. Kane, 51 Super. Ct. 295.

Where the will does not in express terms provide that bequests made to the widow are in lieu of dower, and they are not inconsistent therewith, that effect will not be implied unless the intent is clearly manifested. Kimbel v. Kimbel, 14 App. Div. 570; Gray v. Gray, 5 App. Div. 132.

Where a testator in terms declares a provision in his will in favor of his wife to be in lieu of dower, if she accepts it, she cannot have her dower in the testator's estate. To deprive her of her dower, or compel her to elect, the terms of the will must be such as to show an intention on the testator's part to exclude the claim of dower. Sandford v. Jackson, 10 Paige, 266; Lewis v. Smith, 9 N. Y. 502; Mills v. Mills, 28 Barb. 454.

Testator directed all his estate, real and personal, to be sold, and one-third the proceeds invested for the use of his wife during her widowhood; it was held insufficient to show that he intended this provision to be in lieu of dower so as to put her to her election. Wood v. Wood, 5 Paige, 596. But if he makes a specific disposition of the income and remainder of the remaining two-thirds, it is inconsistent with the widow's claim of dower, and she will be put to an election. Starr v. Starr, 54 Hun, 300. See also Jurgens v. Rogge, 16 Misc. 100.

The fact that the devise exceeds the dower interest of the wife, does not, of itself, imply that the testator intended to bar the dower in the residue. Havens v. Havens, 1 Sandf. Ch. 324; Mills v. Mills, 28 Barb. 454. The claim of dower is to be favored, and the presumption is that a provision in the will not expressed to be in lieu, was intended as a bounty. Lasher v. Lasher, 13 Barb. 106; Leonard v. Steele, 4 Barb. 20; Konvalinka v. Schegel, 104 N. Y. 125; Gray v. Gray, 5 App. Div. 132; Stimson v. Vroman, 99 N. Y. 74, 80.

Where testator gave all his estate, real and personal, to his wife for life, or during widowhood, with remainder to his children, and the widow entered and held the land until her second marriage, she was entitled to dower after her second marriage. Church v. Bull, 2 Den. 430.

A provision in a will giving the widow "the rents, income, interest, use, occupancy, of all my real and personal estate" upon the condition that she insure the buildings, pay taxes, keep in repair, etc., "for and during the term of her natural life," is inconsistent with dower, and sufficient to compel an election. Matter of Zahrt, 94 N. Y. 605.

A provision in a will giving testator's widow the income of all his real estate during life, "to be enjoyed, accepted and received by her in lieu of dower, and in addition to what interest she would have had as dowress, if this devise was not so made to her," is in lieu of dower, so that her acceptance of the provision precluded her from claiming dower as against the title acquired by foreclosure of a mortgage executed by the husband in his lifetime. Nelson v. Brown, 144 N. Y. 384; Konvalinka v. Schegel, 104 N. Y. 125.

ELECTION OF DOWER BY WIDOW.

A devise of a life estate in all of the husband's property does not put a widow to an election between the devise and dower. But where she consents that the premises be sold in an action of partition, in which she is a defendant, and she is allowed and paid the value of such life estate out of the proceeds, she cannot afterwards maintain an action against the purchaser for admeasurement of dower. Hopkins v. Cameron, 34 Misc. 688.

A will which gives the wife a house to live in, to rent, and keep in repair during her life, entitles her to occupy a flat therein rent free, and to the use for life of the income thereof, and the provision is inconsistent with dower where she continues to live in the house after her husband's death. Koezly v. Koezly, 31 Misc. 397.

For a case where the refusal of a widow to transfer property standing in her name, as requested to do by will, making provision for her in lieu of dower, was held not to be an election. See Shanley v. Shanley, 34 App. Div. 172.

The mere request of a testator that a wife release her dower in the residuum does not put her to an election, as mere precatory words are insufficient. In order to compel an election there must be testamentary provision intended to be in lieu of dower. Miller v. Miller, 22 Misc. 582.

An election by a widow to accept a provision in her husband's will in lieu of dower will be set aside on her application to the court, if it appear that she was not at the time of her election fully aware of the extent and nature of her dower right. Hindley v. Hindley, 29 Hun, 318. But the widow will not be relieved from her election, because the provision made by the will proves to be worthless, especially against a grantee of her husband during his lifetime. Aken v. Kellogg, 48 Hun, 459; affirmed, 119 N. Y. 441.

Where a widow has accepted the provisions of a will in her favor expressed to be in lieu and satisfaction of her dower, the fact that a portion of the provisions in her favor is ineffectual as attempting to create a perpetuity, will not entitle her to dower in the lands embraced in the invalid provision, she retaining the other benefits conferred by the will, and not seeking to avoid her election. Lee v. Tower, 124 N. Y. 370.

When deemed to have elected [REAL PROPERTY LAW (L. 1896, ch. 547), § 181].— Where a woman is entitled to an election, as prescribed in either of the last two sections, she is deemed to have elected to take the jointure, devise or pecuniary provision, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for her dower. But, during such period of one year after the death of her said husband, her time to make such election may be enlarged

by the order of any court competent to pass on the accounts of executors, administrators or testamentary trustees, or to admeasure dower, on an affidavit showing the pendency of a proceeding to contest the probate of the will containing such jointure, devise or pecuniary provision, or of an action to construe or set aside such will, or that the amount of claims against the estate of the testator cannot be ascertained within the period so limited, or other reasonable cause, and on notice given to such persons, and in such manner, as such court may direct. Such order shall be indexed and recorded in the same manner as a notice of pendency of action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 14, as amended by L. 1890, ch. 61, without change in substance.

A wife is deemed to have accepted a devise made by her husband, unless she takes proceedings to recover her dower within one year from her husband's death, even though she did not know of the provisions of the will, except in case of fraudulent concealment. The devisees and grantees under the will are not bound to give her notice. Palmer v. Voorhis, 35 Barb. 479.

A suit brought by a widow to set aside an instrument by which she elected to accept certain provisions of the will in lieu of dower, is not a proceeding for the recovery of dower, compelling her to take such proceedings within a year from the time of her husband's death. Chamberlain v. Chamberlain, 43 N. Y. 424.

The provisions of this section are not so conclusive against the wife as to prevent her being relieved therefrom when she has been induced to omit such action by fraudulent representations. Akin v. Kellogg, 39 Hun, 252, citing Hindley v. Hindley, 29 Hun, 318; Manice v. Manice, 1 Lans. 348, reversed on other point in 43 N. Y. 303; Hone v. Van Schaick, 7 Paige, 221, 233.

The provisions of this section are in the nature of a statute of limitations. She is at once chargeable with the duty of informing herself as to the nature of the estate, and where the statutory period has elapsed, a court of equity cannot relieve against its provisions. Akin v. Kellogg, 119 N. Y. 441.

It is not necessary that the widow enter on or commence proceedings for assignment of her dower in all the lands to which her claim attaches within the year. If she begins proceedings for dower in any one parcel, it is sufficient. Hawley v. James, 5 Paige, 318, reversed on other grounds in 16 Wend. 61.

Under the provisions of this section permitting an extension of time for a widow to make an election of dower, there should be reasonable grounds for granting such an order. Bradhurst v. Field, 32 N. Y. St. Rep. 430.

Section 9. When Provision in Lieu of Dower is Forfeited.

[Real Property Law (L. 1896, ch. 547), § 182].— Every jointure, devise and pecuniary provision in lieu of dower is forfeited by the woman for whose benefit it is made in a case in which she would forfeit her dower; and on such forfeiture, an estate so conveyed for jointure, or devised, or a pecuniary provision so made, immediately vests in the person or legal representatives of the person in whom they would have vested on the determination of her interest therein, by her death.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 15, without change in substance.

Section 10. Effect of Acts of Husband.

[Real Property Law (L. 1896, ch. 547), § 183].— An act, deed, or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the contingent right of dower of a married woman, or a judgment or decree confessed by or recovered against him, or any laches, default, covin, or crime of a husband, does not prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 16, without change in substance.

Dower is subject to the lien upon the lands of a judgment against the husband recovered before the marriage. Scott v. Howard, 3 Barb. 319; Sandford v. McLean, 3 Paige, 117.

An inchoate right of dower is not an estate in lands and cannot be extinguished by merger or in any other way except by the death or conveyance of the wife. The fact that the husband deeded property during coverture, and his grantee re-conveyed it to the wife does not necessarily show that the husband intended to make her a jointure or provision in lieu of dower. Her acceptance of the deed does not estop her from subsequently claiming dower in the premises. Huff v. Wheeler, 27 Misc. 763.

A sale in partition will bar the widow's right of dower, if she was a party to the action. Jackson v. Edwards, 7 Paige, 386; Jordan v. Van Epps, 85 N. Y. 427; but otherwise if she was not a party. Van Gelder v. Post, 2 Edw. 577.

A foreclosure, though effectual during the lifetime of the mortgagor, is not effectual to bar his wife's inchoate right of dower, unless she is made a party. Mills v. Van Voorhis, 20 N. Y. 412; Wheeler v. Morris, 2 Bosw. 524.

The wife cannot execute a valid release of her dower in any other way than by joining with her husband in a conveyance to a third party; and a release of dower contained in a deed of separation, by which a provision is made for her, does not bar her legal right. Carson v. Murray, 3 Paige, 483, 503; Guidet v. Brown, 3 Abb. N. C. 295.

The release of dower which a married woman makes by joining with her husband in a conveyance of his land, operates against her only by estoppel, and can be taken advantage of only by those who claim under that conveyance. Malloney v. Horan, 49 N. Y. 111, 12 Abb. Pr. N. S. 289; Elmendorf v. Lockwood, 4 Lans. 393; affirmed, 57 N. Y. 322.

Where a deed is declared void, the release by the grantor's wife of her contingent right of dower fails as being a release to a stranger to the title. Hammond v. Pennock, 61 N. Y. 145. See also Lowry v. Smith, 9 Hun, 514.

A contract entered into between husband and wife during coverture, by which it was agreed that, in consideration of her being permitted to control and enjoy the property which she had at the marriage, she should relinquish her claim to dower, cannot be enforced against her as a bar to her dower. Townsend v. Townsend, 2 Sandf. 711.

A wife may, subsequently to the execution and delivery of a deed by the husband, convey and release by a separate instrument, her interest, dower, etc., in the premises; and such act is to be regarded as an adoption of and joining in her husband's conveyance. Irving v. Campbell, 56 N. Y. Super. Ct. 224, 18 N. Y. St. Rep. 966, 4 N. Y. Supp. 103.

If a wife joins her husband in a deed absolute in form, but which is in fact a mortgage, and it is afterwards canceled or superseded by giving a subsequent mortgage, in which she does not sign, her right of dower remains free and clear of incumbrance. Taylor v. Post, 30 Hun, 446.

The wife's joinder with her husband in a conveyance of land precludes her from afterwards claiming dower in the premises, as against the grantee or mortgagee, so long as there remains a subsisting title or interest created by his conveyance; but when the husband's deed is avoided or ceases to operate, as when it is defeated by a sale on execution under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. Hinchliffe v. Shea, 103 N. Y. 153.

An infant wife does not by her joining in her husband's deed bar her inchoate right of dower. McIntyre v. Costello, 47 Hun, 289.

RELEASE OF DOWER.

A deed which "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" the land, and "all the estate, right, title and interest, etc., of the grantors to the land," is sufficient to release the wife's right of dower in the land. Gillilan v. Swift, 14 Hun, 574.

Section. 11. Widow's Quarantine; Bequeath of Crops.

Widow's quarantine [REAL PROPERTY LAW (L. 1896, ch. 547), § 184].—A widow may remain in the chief house of her husband forty days after his death, whether her dower is sooner assigned to her or not, without being liable to any rent for the same; and in the meantime she may have her reasonable sustenance out of the estate of her husband.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 17, without change in substance.

This section only relates to lands to which she has a right of dower, and does not apply to leasehold property. Volckner v. Hudson, 1 Sandf. 215, 218.

At the expiration of the forty days, the heirs can eject the widow and compel her to bring suit for dower. Siglar v. Van Riper, 10 Wend. 414, 419.

Bequeath of corps [REAL PROPERTY LAW (L. 1896, ch. 547), § 185].—A woman may bequeath a crop in the ground of land held by her in dower.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 25, without change in substance.

The widow is entitled to the crop growing at the time of her husband's death on the land set apart to her for dower. Clark v. Battorf, 1 N. Y. Sup. Ct. (T. & C.) 58; Kain v. Fisher, 6 N. Y. 597.

Section 12. Release of Dower.

Divorced woman may release dower [REAL PROPERTY LAW (L. 1896, ch. 547), § 186].—A woman who is divorced from her husband, whether such divorce be absolute or

limited, or granted in his or her favor, by any court of competent jurisdiction, may release to him, by an instrument in writing, sufficient to pass title to real estate, her inchoate right of dower in any specific real property heretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire.

This section is derived from L. 1892, ch. 616.

The provision in the former law, that the release shall take effect upon the execution, delivery and recording of the release, together with the filing or recording in the proper office of a certified copy of the judgment or decree granting the divorce, has been omitted.

Release of dower by attorney [REAL PROPERTY LAW (L. 1896, ch. 547), § 187].—A married woman of full age may release her inchoate right of dower in real property by attorney in fact in any case where she can personally release the same.

This section is a re-enactment of L. 1893, ch. 599, without change in substance.

Such an attorney in fact may be the woman's husband. Wronkow v. Oakley, 133 N. Y. 505.

CHAPTER IX.

ACTIONS FOR DOWER.

[*Code of Civil Procedure*, §§ 1596–1625.]

SECTION 1. WHEN ACTION MUST BE BROUGHT.
2. PARTIES.
3. DAMAGES FOR WITHHOLDING DOWER.
4. ASSIGNMENT OF DOWER, EFFECT OF; COLLUSIVE RECOVERY AGAINST INFANTS.
5. COMPLAINT.
6. ADMEASUREMENT OF DOWER BY REFEREE OR COMMISSIONERS.
7. POWERS AND DUTIES OF REFEREE OR COMMISSIONERS; REPORTS; FEES AND EXPENSES.
8. FINAL JUDGMENT; ITS ENFORCEMENT AND MODIFICATION; EFFECT OF JUNIOR INCUMBRANCES; APPEAL NOT TO STAY EXECUTION.
9. PAYMENT OF GROSS SUM.
10. SALE OF PROPERTY TO SATISFY CLAIM OF DOWER.

Section 1. When Action Must be Brought.

Limitation of action for dower [CODE CIV. PRO., § 1596]. — An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited by this section. And if at any time, before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate

to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section.

Re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 18. Last paragraph added by L. 1882, ch. 277.

Statute of limitations barring dower cannot be interposed where widow has been in possession and subsequently ousted. Sayre v. Wisner, 8 Wend. 661.

Section 2. Parties.

Against whom action to be brought [Code Civ. Pro., § 1597]. — Where the property, in which dower is claimed, is actually occupied, the occupant thereof must be made defendant in the action. Where it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

This section was not in the Revised Statutes.

All persons occupying different parcels of the property must be made defendants. Peart v. Peart, 50 Hun, 600, 18 N. Y. St. Rep. 455. Only such parties as have present interests in the property are necessary parties to the action. O'Conner v. Garrigan, 17 Week. Dig. 302.

Ejectment for dower must be brought against the actual occupant, if any, and, if none, against the persons exercising acts of ownership as to the property. Sherwood v. Vandenburgh, 2 Hill, 303.

The effect of the section is to prevent such an action being brought except against a person who is either an occupant, or one exercising acts of ownership or claiming title to the premises. Connolly v. Newton, 85 Hun, 552, 33 N. Y. Supp. 102, 66 N. Y. St. Rep. 704.

Who may be joined as defendants [Code Civ. Pro., § 1598]. — In either of the cases specified in the last section, any other person, claiming title to, or the right to the posses-

sion of, the real property in which dower is claimed, may be joined as defendant in the action.

This section is new to the Code.

All the heirs of the deceased husband are proper parties to an action for dower. Van Name v. Van Name, 23 How. Pr. 247.

Who may be joined where defendants claim in severalty [CODE CIV. PRO., § 1599]. — In an action to recover dower, in a distinct parcel of real property of which the plaintiff's husband died seized, or in all the real property which he aliened by one conveyance, all the persons in possession of, or claiming title to, the property, or any part thereof, may be made defendants, although they possess or claim title to different portions thereof in severalty.

This section is new to the Code.

The action may be maintained against the occupant of a single floor of a store on the premises, who has hired it only for a year. Ellicott v. Mosier, 7 N. Y. 201.

Section 3. Damages for Withholding Dower.

Damages may be recovered; how estimated [CODE CIV. PRO., § 1600]. — Where a widow recovers, in an action therefor, dower in property of which her husband died seized, she may also recover in the same action, damages for withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed where the action is against the heir, from her husband's death, or where it is against any other person, from the time when she demanded her dower of the defendant; and, in each case to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include anything for the use of permanent improvements, made after the death of the husband.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, §§ 19, 20, and 21.

The heir-at-law is liable from the death of the husband. A grantee

becomes liable, only after a demand, after which his liability continues, not exceeding six years in all, until judgment admeasuring the dower is entered, although prior to that time he may have conveyed the land. Price v. Price, 54 Hun, 349.

Under the Revised Statutes it was held that the provisions contained in this section, were intended to prescribe the sole rule of damages, and the widow can recover in law and equity by and under the statute alone. Kyle v. Kyle, 67 N. Y. 400.

The amount of the dower is one-third of the value of the property at the time of alienation. Marble v. Lewis, 53 Barb. 432, 36 How. Pr. 337. See Walker v. Schuyler, 10 Wend. 480.

Rule in action against alienee of husband [CODE CIV. PRO., § 1601]. — Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include anything for the use of permanent improvements, made since the property was aliened by her husband. In all other respects, the same must be computed as prescribed in the last section.

This section is new to the Code.

Rule against non-occupants [CODE CIV. PRO., § 1602].— The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him.

This section is new to the Code.

Rule where action is against heirs, etc., aliening land [CODE CIV. PRO., § 1603]. — Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum, which she would otherwise be entitled to recover from the grantee; and any sum recovered as damages

from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 22.

Section 4. Assignment of Dower, Effect of; Collusive Recovery against Infant.

Action barred by assignment of dower [CODE CIV. PRO., § 1604]. — The acceptance, by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 23.

The right of dower may be assigned by the heir to the widow voluntarily. The admeasurement fixes only its location and extent. Rutherford v. Graham, 4 Hun, 796. But where the rent of real property has been assigned to the widow with her consent and accepted by her, to bar her action it must appear that the rent will endure for life. Ellicott v. Mosier, 7 N. Y. 201.

The receipt by the widow of one-third of the rent of real property, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, or bar her action therefor. To constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention. Aikman v. Harsell, 98 N. Y. 186.

Collusive recovery not to prejudice infant [CODE CIV. PRO., § 1605]. — Where a widow not having a right to dower, recovers dower against an infant, by the default or collusion of his guardian, the infant shall not be prejudiced thereby; but when he comes of full age, he may bring an action of ejectment against the widow, to recover the property so wrongfully awarded for dower, with damages from the time when she entered into possession, although that is more than six years before the commencement of the action.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 3, § 24.

Section 5. Complaint.

Complaint [CODE CIV. PRO., § 1606].— The complaint in an action for dower must describe the property, as prescribed in section 1511 of this act; and must set forth the name of the plaintiff's husband.

In an action to admeasure dower, where the question is whether the plaintiff was the widow of one who died seized of the realty in question, it was held that in the absence of proof that the decedent did not know that the first wife was living when he married the second, the fact will not be presumed. Palmer v. Palmer, 162 N. Y. 130.

Property claimed in action; how described in complaint [CODE CIV. PRO., § 1511].— The complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner; so that, from the description, possession of the property claimed may be delivered, where the plaintiff is entitled thereto.

Where the description of the premises is imperfect, it is not a ground for demurrer; the remedy is by motion to make more definite and certain. Rank v. Levinus, 5 Civ. Pro. Rep. 368.

An allegation in the complaint that deceased was plaintiff's husband is equivalent to an allegation of marriage. Draper v. Draper, 11 Hun, 616.

Where there are two distinct parcels occupied by different parties, the right of action for dower in each was separate, and the causes of action should be separately stated in the complaint and separately numbered. Peart v. Peart, 18 N. Y. St. Rep. 455, 50 Hun, 600.

Section 6. Admeasurement of Dower by Referee or Commissioners.

Interlocutory judgment for admeasurement [CODE CIV. PRO., § 1607].— If the defendant makes default in appearing or pleading; or if the right of the plaintiff to dower is not disputed by the answer; or if it appears, by the verdict, report, or decision upon a trial, that the plaintiff is entitled to dower in the real property described in the complaint, an interlocutory judgment must be rendered; which, except as otherwise prescribed in this article, must direct that the

plaintiff's dower in the property, particularly describing it, be admeasured by a referee, designated in the judgment, or by three reputable and disinterested freeholders, designated therein, as commissioners for that purpose.

This section is new in the Code. But see R. S. Pt. III, ch. 5, tit. 1, § 55, and ch. 8, tit. VII, §§ 9, 10.

The statute does not dispense with proof of the material allegations of the complaint in case of default. Dwyer v. Dwyer, 13 Abb. N. S. 269.

Oath of commissioners, etc., removal; filling vacancy [Code Civ. Pro., § 1608]. — Each of the commissioners, or the referee, as the case requires, must, before entering upon the execution of his duties, subscribe and take an oath, before an officer specified in section 842 of this act, to the effect that he will faithfully, honestly and impartially discharge the trust reposed in him. The oath must be filed with the clerk, before a commissioner or a referee enters upon the execution of his duties. The court may, at any time, remove the referee, or either of the commissioners. If either of them dies, resigns, or neglects or refuses to serve, or is removed, the court may, from time to time, appoint another person in his place.

This section is a re-enactment of R. S. Pt. III, ch. 8, tit. 7, §§ 11, 12.

Section 7. Powers and Duties of Referee or Commissioners; Reports; Fees and Expenses.

Dower, how admeasured [Code Civ. Pro., § 1609]. — The referee or the commissioners must execute their duties in the following manner:

1. They must, if it is practicable, and, in their opinion, for the best interests of all the parties concerned, admeasure and lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting the one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.

2. In making the admeasurement, they must take into con-

sideration any permanent improvements, made upon the real property after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, those improvements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which she will derive from so much of those improvements, as is included in the part laid off to her.

3. If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivisions of this section, they must report that fact to the court.

4. They may employ a surveyor, with the necessary assistants, to aid in the admeasurement.

This section is a re-enactment of R. S. Pt. III, ch. 8, tit. 7, § 13, subds. 1, 2, 4, and § 16, as amended by L. 1869, ch. 433.

Under this section the referee may, when in his opinion it is for the best interests of all the parties, lay off and admeasure the dower of the widow. But a widow is not entitled to have her dower assigned to her, in each separate and distinct parcel, when to do so would injuriously affect the equitable rights and interests of other parties. Price v. Price, 41 Hun, 486, 4 N. Y. St. Rep. 25.

The question as to improvements is to be determined by the commissioners. Marble v. Lewis, 53 Barb. 432; Brown v. Brown, 4 Robt. 688.

In all cases a reference must be had to ascertain whether actual admeasurement or partition can be made, after a decision of the referee as to the rights of the parties under the issue, and before the judgment declaring such rights is entered. O'Dougherty v. Remington Paper Co., 42 Hun, 192.

Dower should be assigned by metes and bounds if practicable, if not, a proportion of the profits or the separate alternate enjoyment of the whole for short proportionate periods may be assigned for dower. Coates v. Cheever, 1 Cow. 460.

Particular rooms of a house may be assigned. White v. Story, 2 Hill, 543.

No deduction can be made in consequence of any conveyance of land made by the husband to the wife during marriage. Hyde v. Hyde, 4

Wend. 630. Taxes and assessments are not to be deducted. Taylor v. Bentley, 3 Redf. 34; Graham v. Dunigan, 2 Bosw. 516; Williams v. Cox, 3 Edw. 178; Harrison v. Peck, 56 Barb. 251.

Although the statute does not require a notice to be given of the meetings of the commissioners, yet such notice is customary and proper. Smith v. Smith, 6 Lans. 813.

Report of referee or commissioners [CODE CIV. PRO., § 1610]. — All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. The referee, or the commissioners, or a majority of them, must make a full report of their proceedings, specifying therein the manner in which they have discharged their trust, with the items of their charges, and a particular description of the portion admeasured and laid off to the plaintiff; or, if they report that it is not practicable, or, in their opinion, it is not for the best interests of all the parties concerned, to admeasure and lay off a distinct parcel of the property, of which dower is to be admeasured, they must state the reasons for that opinion, and all the facts relating thereto. The report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

This section is a re-enactment of R. S. Pt. III, ch. 8, tit. 7, § 13, subd. 3, as amended by L. 1869, ch. 433.

Setting aside report [CODE CIV. PRO., § 1611]. — Upon the application of any party to the action, and upon good cause shown, the court may set aside the report, and, if necessary, may appoint new commissioners, or a new referee, who must proceed, as prescribed in this title, with respect to those first appointed.

This section is a substitute for R. S. Pt. III, ch. 8, tit. 7, §§ 16 and 17, in part.

Fees and expenses [CODE CIV. PRO., § 1612]. — The fees and expenses of the commissioners, or of the referee, including the expense of a survey, when it is made, must be taxed under

the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed to her, upon the taxation of her costs.

This section is a re-enactment of R. S. Pt. III, ch. 8, tit. 7, §§ 13, 25.

Section 8. Final Judgment; Its Enforcement and Modification; Effect on Junior Incumbrances; Appeal Not to Stay Execution.

What judgment must direct [CODE CIV. PRO., § 1613].—Upon the report being confirmed by the court, final judgment must be rendered. If the referee or commissioners have admeasured and laid off to the plaintiff a distinct parcel of the property, the judgment must award to her, during her natural life, the possession of that parcel, describing it, subject to the payment of all taxes, assessments, and other charges, accruing thereupon after she takes possession. If the referee or the commissioners report that it is not practicable, or that, in his or their opinion, it is not for the best interests of all the parties concerned so to admeasure and lay off a distinct parcel of the property, the final judgment must direct that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sum so to be paid, be and remain a charge upon the property, during her natural life. The final judgment may also award damages for the withholding of dower.

A provision similar to this was contained in R. S. Pt. III, ch. 8, tit. 7, § 18, and part of L. 1869, ch. 433, § 3.

The sum having been ascertained and fixed by the final judgment, the court has no power to alter such final judgment by providing that a party entitled to dower should receive one-third of the net rents which should be actually received from the party and no more. McIntyre v. Clark, 6 N. Y. St. Rep. 531, 43 Hun, 352.

A judgment in favor of the plaintiff in an action for admeasurement of

dower may be amended by setting off, against the costs awarded to her, the costs of a reference in which her claim for damages was disallowed. Swift v. Swift, 88 Hun, 551, 34 N. Y. Supp. 852, 68 N. Y. St. Rep. 749.

Plaintiff may recover sum awarded; court may modify judgment [CODE CIV. PRO., § 1614]. — The plaintiff may, from time to time, maintain an action against the owner, or a person who was the owner of the property, to recover any instalment of the sum, so awarded to her for her dower, which became due during his ownership, and remains unpaid. Or, if an instalment remains due and unpaid, she may maintain an action to procure a sale of the property, and enforce the payment of the instalments, due and to become due, out of the proceeds of the sale. Such an action must be conducted as if the charge upon the real property was a mortgage to the same effect. If, at any time, it is made to appear to the court, that the rental value of the real property, has materially increased or diminished, the court may, by an order, to be made upon notice to all the persons interested, modify the final judgment, by increasing or diminishing the sum to be paid to the plaintiff.

This section is a re-enactment of L. 1869, ch. 433, § 3, in part.

Junior incumbrancers; not affected by admeasurement [CODE CIV. PRO., § 1615]. — Where a portion of the property is admeasured and laid off to the plaintiff as her dower, a lien, which is inferior to the plaintiff's right of dower, attaches, during the life of the plaintiff, to the residue, or to the portion or share of the residue which was subject to it, as if the portion laid off to the plaintiff had not been a part of the property.

See L. 1870, ch. 717, § 2, as amended by L. 1874, ch. 258.

Appeal not to stay execution if undertaking is given [CODE CIV. PRO., § 1616]. — An appeal from a final judgment, awarding to the plaintiff possession of the part admeasured and laid off to her, does not stay the execution thereof, unless the court, or a judge thereof, grants an order directing such a stay. Such an order shall not be granted, if

an undertaking is given on the part of the respondent, with one or more sureties, approved by the court, or a judge thereof, to the effect that, if the judgment appealed from is reversed or modified, and restitution is awarded, she will pay to the person entitled thereto, the value of the use and occupation of the part so admeasured and laid off to her, or of the portion, restitution of which is awarded, during the time she holds possession thereof, by virtue of the judgment.

This section is a re-enactment of L. 1869, ch. 433, § 4.

Section 9. Payment of Gross Sum.

Plaintiff may consent to receive a gross sum [CODE CIV. PRO., § 1617]. — In an action for dower, the plaintiff may, at any time, before an interlocutory judgment is rendered, by reason of the defendant's default in appearing or pleading, or, where an issue of fact is joined, at any time before the commencement of the trial, file with the clerk, a consent to accept a gross sum, in full satisfaction and discharge of her right of dower in the real property described in the complaint. Such a consent must be in writing, and acknowledged or proved, and certified, in like manner as a deed to be recorded. A copy thereof, with notice of the filing, must be served upon each adverse party who has appeared, or who appears after the filing.

This section is a re-enactment of L. 1870, ch. 717, part of § 1.

The consent of the widow filed by her during the progress of the proceedings for dower before a referee to accept a gross sum in satisfaction of dower, did not give her such a vested right in such ascertained sum, that the suit could be carried on after her death, by her personal representatives. McKeen v. Fish, 33 Hun, 28, 30.

When the plaintiff has consented to accept a gross sum in lieu of dower, the defendant moved for leave to pay such sum; the referee appointed by the court had made and filed a report that plaintiff was entitled to a certain sum and the court decided to confirm the report, but before the entry of a formal order embodying such decision, the plaintiff died; it was held that the plaintiff's right was fixed and passed to her executor, who might enforce it. Robinson v. Grover, 138 N. Y. 425.

PAYMENT OF GROSS SUM.

The failure of a widow to file her consent to accept a gross sum in lieu of dower before interlocutory judgment in an action to admeasure dower is cured by the filing of such consent prior to the entry of judgment confirming the referee's report, when it does not appear that the defendants have been prejudiced. Freeman v. Ahearn, 64 App. Div. 509.

A testator's direction to executors to set apart and apply a fixed sum annually for the support of his wife does not, on its face, bar dower. Where such fixed sum exceeds the entire income of the estate and the widow was an incompetent person, the court refused the application of the committee to be permitted to take a gross sum in lieu of dower, as it was not for the best interests of the widow. Matter of Grotrain, 35 Misc. 257.

A woman having only an inchoate dower in surplus moneys is not entitled to a gross sum. She can have only one-third of the moneys invested during the joint lives of herself and husband and for her own life should she survive him. Citizens' Savings Bank v. Mooney, 26 Misc. 67.

Defendant may consent to pay it; proceedings thereupon [CODE CIV. PRO., § 1618].— At any time after a consent is filed, as prescribed in the last section, and before an interlocutory judgment is rendered, any defendant may apply to the court, upon notice, for an order granting him leave to pay such a gross sum. Thereupon the court may, in its discretion, and upon such terms as justice requires, ascertain the value of the plaintiff's right of dower in the property, by a reference or otherwise, and make an order, directing payment, by the applicant, of the sum so ascertained, within a time fixed by the order, not exceeding sixty days after service of a copy thereof; and directing the execution by the plaintiff of a release of her right of dower, upon receipt of the money. Obedience to the order may be enforced, either by punishment for contempt, or by striking out the pleading of the offending party, and rendering judgment against him or her or in both modes.

This section is new to the Code.

Value of right of dower, how ascertained.— Rule 70 of the General Rules of Practice, 1900, relating to the method of computing the value of dower interests, is as follows: Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in perma-

nent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton tables.

Section 10. Sale of Property to Satisfy Claim of Dower.

Interlocutory judgment for sale [CODE CIV. PRO., § 1619].— Where the plaintiff's consent has been filed, as prescribed in the last section but one, and she is entitled to an interlocutory judgment in the action, the court must, upon the application of either party, ascertain, by a reference or otherwise, whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties. If it appear to the court, that a distinct parcel cannot be so admeasured and laid off, the interlocutory judgment must, except in the case specified in the next section, direct that the property be sold by the sheriff, or by a referee designated therein; and that, upon the confirmation of the sale, each party to the action, and every person deriving title from, through, or under a party, after the filing of the judgment-roll, or a notice of the pendency of the action, as prescribed in article ninth of this title, be barred of and from any right, title, or interest in or to the property sold.

This section is a substitute for L. 1870, ch. 717, part of § 1 and § 3.

Interlocutory judgment, directing a part to be laid off [CODE CIV. PRO., § 1620].— In a case specified in section 1617 of this act, where the property, or a part thereof, consists of one or more vacant or unimproved lots, the plaintiff's consent may contain a stipulation to take a distinct parcel out of those lots, in lieu of a gross sum. In that case, the inter-

locutory judgment, instead of directing a sale, may direct if it appears to be just so to do, that commissioners be appointed to admeasure and lay off to the plaintiff a distinct parcel, out of the vacant or unimproved lots; and, if there is any other property, that it be sold, and a gross sum to be paid to her out of the proceeds thereof, as prescribed in the next three sections. The plaintiff's title to each distinct parcel, admeasured and laid off to her, as prescribed in this section, is that of an estate of inheritance in fee simple. In admeasuring and laying off the same, the commissioners must consider quantity and quality relatively, according to the value of the plaintiff's right of dower in the vacant or unimproved lots, out of which the admeasurement is to be made; which must be ascertained, in proportion to the value of those lots, as prescribed, in the next three sections, for fixing a gross sum to be paid to her out of the proceeds of a sale.

This section is a re-enactment of L. 1870, ch. 717, § 6.

Where a widow claims dower in lands of which her husband was seized as tenant in common, the court can only direct the sale of the undivided interest of the husband. Card v. Pudney, 42 App. Div. 405.

Liens to be ascertained [CODE CIV. PRO., § 1621].— Before an interlocutory judgment is rendered for the sale of the property, the court must direct a reference to ascertain whether any person, not a party, has a lien upon the property, or any part thereof. Except as otherwise expressly prescribed in this article, the proceedings upon and subsequent to the reference must be the same, as prescribed in article second of this title, where a reference is made as prescribed in section 1561 of this act.

This section is a re-enactment of L. 1870, ch. 717, § 2, as amended by L. 1874, ch. 258.

Liens, payment of; or sale subject to [CODE CIV. PRO., § 1622].— Where the interlocutory judgment directs a sale, if the right of dower of the plaintiff is inferior to any other lien upon the property, the judgment may, in the discretion

of the court, direct that the property be sold either subject to the lien, or discharged from the lien; and, in the latter case, that the officer making the sale pay the amount of the lien out of the proceeds of the sale.

This section is a re-enactment of L. 1870, ch. 717, § 4.

Report of sale [CODE CIV. PRO., § 1623].—Immediately after completing the sale, and executing the proper conveyance to the purchaser, the officer making the sale must make and file with the clerk a report thereof, showing the name of the purchaser, and the purchase-price paid by him, or, if the property was sold in parcels, the name of each purchaser, and the price and a description of the parcel sold to him; the sums which the officer has paid out of the proceeds of the sale, pursuant to the interlocutory judgment; the purpose for which each payment was made; the amount and items of his fees and expenses; and the net amount of the proceeds, after deducting the payments.

This section is a re-enactment of L. 1870, ch. 717, § 5, in part.

Final judgment thereon [CODE CIV. PRO., § 1624].—Upon confirming the sale, the court must ascertain by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities. The court must thereupon render final judgment, confirming the sale, and directing that the gross sum so ascertained be paid to the plaintiff, in full satisfaction of her right of dower; and that the remainder of the proceeds of the sale be distributed among the persons entitled thereto.

This section is a re-enactment of L. 1870, ch. 717, § 5, in part.

Where a widow dies before judgment in an action for dower, and an order has been made dismissing the complaint and granting an extra allowance to defendant, the personal representative of the widow

may continue the action for the purpose of reviewing the right to extra allowance. Armstrong v. Union College, 55 App. Div. 302.

Certain provisions of article second made applicable [CODE CIV. PRO., § 1625].— The provisions of article second of this title, relating to a sale made as prescribed in that article, and to the distribution, investment, and care of the proceeds, apply, as far as they are applicable, to a sale made as prescribed in this article, and to the distribution of the proceeds of a sale, as prescribed in the last section.

This section is new in the Code.
The article of the Code referred to relates to actions in partition.

CHAPTER X.

THE CUSTODY AND WAGES OF CHILDREN.

[*Domestic Relations Law* (*L. 1896, ch. 272*), *article IV.*]

SECTION 1. HABEAS CORPUS FOR CHILD DETAINED BY PARENT.
2. HABEAS CORPUS FOR CHILD DETAINED BY SHAKERS.
3. PAYMENT OF WAGES TO MINOR; WHEN VALID.

Section 1. Habeas Corpus for Child Detained by Parent.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 40]. — A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child, may apply to the Supreme Court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order.

This section is derived from R. S. Pt. II, ch. 8, tit. 2, §§ 1, 2 and 3. Under the former law the wife was permitted to apply for the writ.

The sections of the Domestic Relations Law, 40 and 41, permitting *habeas corpus* to determine the right to custody of a child detained by parents or detained by Shakers, are merely provisions in addition to the special proceeding of *habeas corpus* to inquire into the cause of detention. The proceeding of *habeas corpus* to inquire into the cause of detention will be found in the Code of Civil Procedure, §§ 1991–2064. Under these section any person having a right to the custody of a child may have the writ to obtain possession, as for example, a grandfather. In re Reim, 10 Supp. 516, 31 N. Y. St. Rep. 13. Such writ is of frequent use where children are detained from their parents or guardians upon the ground that absence from legal custody

is equivalent to illegal restraint and imprisonment. It is thus seen that the above two sections of the Domestic Relations Law must be merely considered as widening the scope of the common-law writ, and allowing the right as to custody to be determined as between parents. For the common-law writ, as now governed by the Code, see 1 Fiero on Special Proceedings (2d ed.), 56.

The father is entitled to the custody of his infant children, and where differences exist between the parents the right of the father is preferred to that of the mother; but he may forfeit it by misconduct, may be controlled in the exercise of his parental power and under certain circumstances, the care and custody of the children may be committed to the mother. People v. Chegaray, 18 Wend. 637; People v. ———, 19 Wend. 16; People v. Mercein, 3 Hill, 399; Ahrenfeldt v. Ahrenfeldt, Hoffm. Ch. 477; People v. Olmstead, 27 Barb. 9; People v. Humphrey, 24 Barb. 521.

Considerations affecting the health and welfare of the child may justify a court in withholding the custody of it temporarily, even from its legal guardians; and they are so purely matters of discretion with the court of original jurisdiction that the appellate court will not review the conclusions thereon unless some manifest error or abuse of discretion is made to appear. Matter of Welch, 74 N. Y. 299; People v. Manly, 2 How. Pr. 61; Matter of Watson, 10 Abb. N. C. 215; People ex rel. Wehle v. Weissenbach, 60 N. Y. 385; Matter of Rieman, 31 N. Y. St. Rep. 13.

Where a *habeas corpus* is directed to a private person to bring up an infant, the court is bound to set the infant free from improper restraint; but whether they shall direct the infant to be delivered over to any particular person, even to the father, rests in their discretion. Matter of McDowle, 8 Johns. 328; Matter of Waldron, 13 Johns. 418; People v. Mercein, 8 Paige, 47; People v. Olmstead, 27 Barb. 9.

A petition in *habeas corpus* for the possession of children must allege that the petitioner is an inhabitant of the state or the court does not gain jurisdiction. Allegation that the petitioner is living in a certain house in Rochester, N. Y., is not sufficient. A wife having obtained a residence in a foreign state, where she procured a divorce, that domicile is presumed to continue. Matter of Colbrook, 26 Misc. 139.

This section does not confer upon a county judge any authority to entertain proceedings by habeas corpus in behalf of a wife living in a state of separation from her husband, respecting the custody of a minor child. The Supreme Court alone, not a justice of that court, is invested with the power given by this section. People v. Humphrey, 24 Barb. 521; People ex rel. Ward v. Ward, 59 How. Pr. 174; People ex rel.

Hoyle v. Osborne, 6 Civ. Pro. Rep. 299; People ex rel. Parr v. Parr, 49 Hun, 473; affirmed, 121 N. Y. 679.

The power conferred upon the court by this section will only be exercised in cases of separation of husband and wife by judicial decree or by mutual consent, and not where the wife, of her own accord, without justifiable cause, withdraws herself from the protection of her husband. People v. ———, 19 Wend. 16.

Where the wife has separated from her husband without any sufficient cause, she ought not to have the custody of her child, unless the health and present condition of the child imperatively demand it. People v. Humphreys, 24 Barb. 521.

Where a father forces daughter into a distasteful marriage at the age of sixteen, and where such marriage was annulled, and of her own will she took up residence with a stranger, it was held that she would not be compelled upon *habeas corpus* proceedings to abandon her home of adoption and return to her father. There was no evidence that her reputation had suffered or was affected by the change of residence. People ex rel Oprandy v. Ciarcia, 49 App. Div. 90.

Where a *habeas corpus* is sued out on the application of a mother, on the coming in of the return, denials of material facts set forth in the return, and new allegations in support of the application will be received, provided the same be made under oath; but in such case the father will be allowed to give further evidence on his part. People v. Chegary, 18 Wend. 637.

The decision of a judge on *habeas corpus*, refusing to transfer the custody of an infant child from its mother to its father, is at most only conclusive in respect to facts and circumstances then existing, and not as to such as arise afterwards. People v. Mercein, 3 Hill, 399.

When a child is brought into court in obedience to a writ of *habeas corpus*, sued out by the mother, against the father, and the suit is dismissed by the consent of the parties, it is proper for the court, in its order directing a dismissal, to remand the child to the custody of the father. Matter of Viele, 44 How. Pr. 14.

On an inquiry as to the proper custody of a child, with reference to his own welfare, evidence of the father's violence to the mother is relevant. Matter of Pray, 60 How. Pr. 194.

Where an infant has been committed to a house of industry, the court cannot review such commitment when made by a competent tribunal upon returns to writ of *habeas corpus* and *certiorari*, the remedy being by appeal taken under section 749 of the Code of Criminal Procedure. People ex rel. Stern v. New York Society, etc., 27 Misc. 457.

A proceeding for the commitment of destitute children, under section 291 of Penal Code, is not a criminal proceeding. The child com-

mitted under such section may be restored to its parents by virtue of the general chancery jurisdiction where the parents have reformed and are able to care for the child, even without the consent of the institution. The chancery powers of the court in this respect seem only to be limited by the necessities of the case, having due regard for the welfare of the child. The same rules exist as to the discharge of children from custody under the Poor Law. Matter of Knowack, 158 N. Y. 482.

Costs.— Proceedings on *habeas corpus* are special proceedings and costs are allowable in the discretion of the court. Matter of Barnett, 11 Hun, 468.

A non-resident relator suing out a writ of *habeas corpus* for the custody of his child, cannot be required to give security for the costs. People ex rel. James v. Soc. for Prevention of Cruelty to Children, 19 Misc. 677, 44 N. Y. Supp. 1100.

When writ should be granted.— In order to warrant the court in exercising the purely discretionary power conferred by the provisions of this section it must be shown that the wife had good and substantial grounds for leaving her husband, but it is not necessary that such grounds be sufficient to enable her to obtain a decree of divorce from him. Where it appears that the wife was morally justified in leaving her husband, that she is a woman of refinement and education, is personally and pecuniarily competent to take charge of her children who are of tender years, a case is presented which justifies the court in awarding to the wife the custody of the children. People ex rel. Sternberger v. Sternberger, 12 App. Div. 398.

The statute does not declare on what grounds a court shall proceed, but confides the whole matter to its discretion, and hence the occasion, cause and circumstances of the separation and the relative merits and demerits of the parties may be taken into account. People v. Brooks, 35 Barb. 85, 89.

The real question in a controversy between a husband and wife who have separated, over the care and custody of an infant child, is not what are the legal rights of the father or of the mother to the custody of the child, or whether the right of one is superior to that of the other, but what are the rights of the child, and what is required in respect to its custody by its own best interests. Matter of Hartman, 23 Week. Dig. 128.

In determining as to the custody of children, the interest of the child is the chief consideration, even where the mother is solely in fault, the age, sex or health of the child may make it the duty of the court to leave it in her custody. Matter of Maurer, 18 Week. Dig. 568.

Where a husband and wife separated and by mutual consent the husband's mother took the child home and cared for her well up to the time of beginning the *habeas corpus* proceedings, when the child was

nearly seven years old, it was held that, as the welfare of the child was the most important consideration, she would not be removed from her grandmother, her mother being destitute and having previously neglected the child. Matter of Reynolds, 28 N. Y. St. Rep. 538.

The jurisdiction of the court upon *habeas corpus* to secure the custody of an infant child is equitable in its character, and the welfare of the child is the chief object to be attained and must be the guide for the judgment of the court. People ex rel. Pruyne v. Walts, 122 N. Y. 238.

When child is without the jurisdiction.— The Supreme Court has jurisdiction to issue *habeas corpus* to inquire into the cause of a person's detention, notwithstanding that it appears in the petition that such person is not within the state, if it be shown that the respondent may have the power to produce such person. But if it appears affirmatively that it is physically impossible for the respondent to obey the writ, it will be vacated and the petitioner left to his remedy in another state, or to the criminal law. People ex rel. Billotti v. New York Asylum, 57 App. Div. 383, reversing 100 St. Rep. 157.

Where the return to a writ of *habeas corpus* sued by a husband to obtain possession of his child from his wife, alleges that the child is in New Jersey, and no traverse is interposed to such allegation, the mother cannot be adjudged guilty of contempt for failing to produce the child as commanded by the writ. People ex rel. Winston v. Winston, 31 App. Div. 121.

It seems that until the child is actually produced before the court on *habeas corpus* and is within its jurisdiction, there can be no adjudication as to the custody of the child. People ex rel. Winston v. Winston, 31 App. Div. 121.

Where a mother, unable to support her infant child, had it committed to an asylum for a period of two years, and upon the expiration of that time sues out a writ of *habeas corpus* to obtain custody of the child, and the corporation makes return stating that the child has been indentured to a person in Illinois and is without the state and without the custody or control of defendant, which latter fact is denied in the traverse, it is error for the court to make an order requiring the corporation to deliver the child to the custody of the relator without taking proof as to whether the corporation will be able to comply with the order. People ex rel. Dunlap v. New York Asylum, 58 App. Div. 133.

Where a mother, being the actual custodian of her child, after a divorce for abandonment, which made no disposition of the child, establishes a domicile in this state and maintains the same for four years, her civil status establishes that of the child and a foreign court has no power while she and the child are temporarily in that state to regulate the relations between them upon *habeas corpus*. People ex rel. v. Dewey, 23 Misc. 267.

Effect of former application.— In an action for a separation, each

party claiming abandonment by the other, the court having decided that there was no abandonment on the part of either, it appeared that in a previous proceeding by habeas corpus, the custody of the children had been awarded to the wife. It was held that this question could only be passed upon in another proceeding of the same character in which it should be shown that the conditions had altered since the prior decision. Simon v. Simon, 6 App. Div. 469.

The only proceeding at common law to inquire into the custody of children is by habeas corpus. Upon the issue of a new writ in another proceeding for the custody of children the relator is always at liberty to show that a new condition of things has arisen and is not bound by a former adjudication. People ex rel. Keater v. Moss, 6 App. Div. 414.

Section 2. Habeas Corpus for Child Detained by Shakers.

[Domestic Relations Law (L. 1896, ch. 272), § 41]. — If it shall appear on such application, or the return of the writ, that the husband or wife of the applicant has become attached to the society of Shakers, and detains a child of the marriage among them, and that such child is secreted or concealed among them, the court may issue a warrant in aid of such writ of habeas corpus, directed to the sheriff of the county where the child is suspected to be, commanding such sheriff, in the day-time, to search the dwelling-houses and other buildings of such society, or of any members thereof, or any other building specified in the warrant, for such child, and to bring him before the court, and the sheriff must forthwith execute such warrant.

Section 3. Payment of Wages to Minor; When Valid.

Domestic Relations Law (L. 1896, ch. 272), § 42]. — Where a minor is in the employment of a person other than his parent or guardian, payment to such minor of his wages is valid, unless such parent or guardian notify the employer in writing, within thirty days after the commencement of such service, that such wages are claimed by such parent or guardian, but whenever such notice is given at any time payments to the minor shall not be valid for services rendered thereafter.

PAYMENT OF WAGES TO MINOR; WHEN VALID.

This section was derived from ch. 266 of the Laws of 1850, which provided that "It shall be necessary for the parents or guardian of such minor children, as may be in service, to notify the party employing such minor, within thirty days after the commencement of such service, that said parent or guardian claim the wages of such minor, and in default of such notice payment to such minor shall be valid."

It will be observed that the requirement that the notice be in writing, and that whenever such notice is given at any time, payments to the minor shall not be valid for services rendered thereafter, was not contained in the former law.

Under the former law it was held that the provision requiring notification by the parent or guardian to persons employing minor children, within thirty days after the commencement of the service, only protects the employer if, without notice, he pays the minor after the expiration of thirty days, but does not prevent the parent from collecting any wages due to the infant although the parent may fail to give notice within thirty days, nor does it affect his right to collect the infant's future earnings, after giving notice at any time. McClurg v. McKercher, 56 Hun, 305. It would thus seem that no change was made in the revision by inserting the clause authorizing the notice to be given at any time.

One who having a demand against a minor, received from him an order upon his employer for money earned as wages and collects the money thereon, is not liable in an action therefor to the father of the minor unless it appears that the parent gave the required notice to the employer. Herrick v. Fritcher, 47 Barb. 589.

Where a minor makes a contract for his services on his own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings. Armstrong v. McDonald, 10 Barb. 300.

Emancipation. — A parent may emancipate an infant child and confer upon him a right to labor for himself and receive the earnings. Stanley v. National Union Bank, 115 N. Y. 122.

The law implies an emancipation from parental authority and control when the father compels or consents that his minor child shall go abroad and earn his own livelihood, or neglects to support him. Lind v. Sullestadt, 21 Hun, 364.

Where, by the father's consent, an infant served another under the promise of the latter to do well by the infant, it is to be inferred that the infant and not the father is entitled to the compensation. Burlingame v. Burlingame, 7 Cow. 92.

The continued absence of the father without supporting or controlling his son is evidence of his consent that the son might labor for his own benefit. Canovar v. Cooper, 3 Barb. 115. In this connection see also McCoy v. Huffman 8 Cow. 84; Shute v. Dorr, 5 Wend. 204.

PAYMENT OF WAGES TO MINOR; WHEN VALID.

Where the father of an infant has consented that he have his own wages, he may recover for loss thereof by reason of negligence. If he is not emancipated he cannot recover for loss of wages. Lieberman v. Third Ave. R. R. Co., 25 Misc. 704.

Where the father of a minor, residing with his parents, neglects to serve upon the child's employer a notice that he claims the child's wages, the title to the wages vests in the child, and if the child pays the same to his mother without objection upon the part of his father, the mother's title thereto is valid. Watson v. Kemp, 42 App. Div. 372.

CHAPTER XI.

GUARDIAN AND WARD.

[*Domestic Relations Law* (*L. 1896, ch. 272*), §§ *50, 53, 54.*]

SECTION 1. GUARDIANS IN SOCAGE.
2. DUTIES AND LIABILITIES OF GENERAL GUARDIANS.
3. GUARDIANSHIP OF MARRIED WOMAN.

Section 1. Guardians in Socage.

DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 50].— Where a minor for whom a general guardian of the property has not been appointed shall acquire real property, the guardianship of his property, with the rights, powers and duties of a guardian in socage, belongs:

1. To the father;
2. If there be no father, to the mother;
3. If there be no father or mother, to the nearest and eldest relative of full age, not under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred.

The rights and authority of every such guardian shall be superseded by a testamentary or other guardian appointed in pursuance of this article.

This section is a re-enactment of R. S. Pt. II, ch. 1, tit. 1, §§ 5, 6, 7, without change in substance. The words " for whom a general guardian of the property has not been appointed " were inserted by the revision. Reference is made to the appointment of a general guardian, as provided by the Code of Civil Procedure. See §§ 2821–2841, Code Civ. Pro.

Guardian in socage under the common law. — At common law, he only could be guardian in socage, to whom the ward's lands could not possibly descend. This species of guardianship continued until the ward was fourteen years of age and then ended. Byrne v. Van Hoesen, 5 Johns. 66.

Guardianship in socage may be considered as gone into disuse, and it

can hardly be said to exist in this country, for the guardian must be some relative by blood, who cannot possibly inherit, and such a case can rarely exist. 3 Wait's Actions and Defenses, 533. Whenever it has been recognized, as in the above section, it has been in a form materially differing from its character at common law. In the case of Fonda v. Van Horne, 15 Wend. 631, it was said that the Revised Statutes modified the rule that a father could not be guardian in socage to his child as the inheritance may descend to him.

Powers of guardians in socage.— A guardian in socage may lease the lands of his ward for a term as long as he continued guardian. Emerson v. Spicer, 55 Barb. 428, affirmed 46 N. Y. 594; Gallagher v. David Stevenson Brewing Co., 13 Misc. 40, 68 St. Rep. 164. He can maintain actions for injuries to the real and personal estate of his ward. Torry v. Black, 58 N. Y. 185; Jackson v. De Walts, 7 Johns. 157. He may maintain an action in ejectment respecting the real property of the minor. Holmes v. Seeley, 17 Wend. 75.

Where an owner of land dies leaving a widow and infant heirs, the widow is authorized to take the rents and profits of the land for the benefit of the heirs; and any action for use and occupation, or injury to the possession must be brought by her as guardian in socage. Sylvester v. Ralston, 31 Barb. 286; Seaton v. Davis, 1 N. Y. Sup. Ct. (T. & C.) 91; Koke v. Balken, 73 Hun, 145.

A savings bank is not protected in paying money to the father of an infant who is not her general or testamentary guardian, even though he produces the bank-book at the time of payment. Ficken v. Emigrants Industrial Savings Bank, 33 Misc. 92.

The mother of infants, who is their guardian in socage, may, for the protection of their common interests, or for her own protection alone, purchase upon foreclosure real estate in which they have interests, and in which she has dower rights, and may take a deed therefor in her own name, and convey a good title to subsequent grantee. Boyer v. East, 161 N. Y. 580.

The duties of a guardian in socage relate solely to the care, custody and protection of real property. Foley v. Mutual Life Ins. Co., 64 Hun, 63.

Actions in name of infant.— The better practice in bringing an action, designed for the protection of the property of an infant, or for its recovery, is to bring the action in the name of the infant, represented by a guardian appointed for the purposes of the particular action. Carr v. Huff, 57 Hun, 18. In this case, it was stated: "By the Revised Statutes the guardian is required to take the custody and management of the personal estate of the minor, together with the profits of the real estate, and is authorized to bring such action in relation thereto, as a guardian in socage might by law. We perceive in the provisions of the Code no language which works a repeal of this statute, and, consequently, the same must be deemed in force, although as above stated, under the general scope and purpose of the Code of Civil Procedure, an infant should be represented by a person

specially designated by the court or judge to take care of his interests in each particular action." And see also Perkins v. Stimmel, 114 N. Y. 359; Coakley v. Mahar, 36 Hun, 157; Bayer v. Phillips, 17 Abb. N. C. 425; Weiler v. Nembach, 114 N. Y. 36.

Section 2. Duties and Liabilities of all General Guardians.

[Domestic Relations Law (L. 1896, ch. 272), § 53].— A general guardian or guardian in socage shall safely keep the property of his ward that shall come into his custody, and shall not make or suffer any waste, sale or destruction of such property or inheritance, but shall keep in repair and maintain the houses, gardens and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward as shall be in his possession; and shall deliver the same to his ward, when he comes to full age, in at least as good condition as such guardian received the same, inevitable decay and injury only excepted; and shall answer to his ward for the issues and profits of the real estate, received by him, by a lawful account.

If any guardian shall make or suffer any waste, sale or destruction of the inheritance of his ward, he shall lose the custody of the same, and of such ward, and shall forfeit to the ward treble damages.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 3, §§ 20, 51, without material change.

Commission of waste.— A general guardian or guardian in socage has no power to commit waste by cutting and removing timber from the land, except for necessary repairs of buildings. Torry v. Black, 58 N. Y. 185.

A guardian who has cut timber from the lands of his ward may, in an action for damages, set up that the avails were applied to the support of the ward. Holbrook v. Wells, 8 Week. Dig. 391.

A guardian guilty of *devastavit* is not entitled to commissions. Martin v. Hann, 32 App. Div. 602.

Actions by and against guardians.— A general guardian may sue in his own name to recover a debt due his ward. Code Civ. Pro.,

§ 469, relates only to actions brought in the name of the infant, and does not conflict with the right of a general guardian to maintain an action in his own name. Harnett v. Morris, 10 Civ. Pro. R. 223. See also Hauenstein v. Kull, 59 How. Pr. 24; Thomas v. Bennett, 56 Barb. 197; Segelken v. Meyer, 14 Hun, 593; Davis v. Carpenter, 12 How. Pr. 287. Such guardian may also sue to recover money received by the defendant by collecting the rents and profits of the land of the ward. Coakley v. Mahar, 36 Hun, 157, citing Field v. Schiefflein, 7 Johns. Ch. 150, 154; Thacker v. Hendrickson, 63 Barb. 271; Pond v. Curtiss, 7 Wend. 45; White v. Parker, 8 Barb. 48, 52; Chapman v. Tibbits, 33 N. Y. 289.

It is not proper for the court to deplete a small fund belonging to infants by the costs and allowances of an equity action which was needless. Sands v. Sands, 30 Misc. 338.

In Graham v. Wallace, 50 App. Div. 101, a female ward upon reaching majority was permitted to maintain an action against her general guardian to recover damages for her seduction while under the age of consent.

A general guardian has no power to submit a cause of action either on behalf of or against an infant, so as to give the court jurisdiction to adjudicate upon the rights of the infant. Coughlin v. Fay, 68 Hun, 521.

A general guardian may sue on an administrator's bond, where, on the settlement of the administrator's accounts, a payment is ordered to be made to him, and execution on the judgment therefor is returned unsatisfied. Prentiss v. Weatherly, 68 Hun, 114, citing Code Civ. Pro., § 2607.

Support of ward. — In general, it is the duty of the guardian to see that infants support themselves, wholly or partially, and he must show clear and satisfactory reasons for advances made to or payments made on account of the infants from the trust fund. Kelaher v. McCahill, 26 Hun, 148, citing Clark v. Montgomery, 23 Barb. 464; Matter of Ryder, 11 Paige, 185; Van Valkenburgh v. Watson, 13 Johns. 480; Clark v. Clark, 8 Paige, 152.

In the last case the chancellor held that it is a palpable breach of duty for a guardian to suffer a ward to live in idleness when he is able to earn his own support, unless he is preparing himself for future usefulness by obtaining an education, and that he could not, in the absence of all evidence on the subject, presume that the ward did not earn his own living during the time that he remained with the guardian.

By the terms of a will, the guardian and executor were to apply the rents, and if necessary, the proceeds of the realty, to the support of an infant; the guardian, in the discharge of this duty, contracted with another for the infant's support, the executor consenting thereto, it was held that such person must look to the guardian only for payment. Nethercott v. Kelly, 5 N. Y. Supp. 259.

It is not the guardian's duty to contribute to the support of the ward out of his own funds. Voessing v. Voessing, 4 Redf. 360. A guardian may be allowed, in the settlement of his accounts, the value of board

and necessaries furnished the ward, whom, without leave of the court, he took into his family. Le Prohon v. Becker, 9 Week. Dig. 482.

Advances made by a guardian to his ward to furnish a house will be allowed to the guardian upon accounting, where the ward affirms the transaction upon her majority. Matter of Plumb, 24 Misc. 249.

A father who is appointed guardian of his infant daughter, having an income of at least $7,000 a year, will not be allowed an unauthorized expenditure for his daughter's education. Matter of Wilber, 27 Misc. 53.

Where a mother is general guardian of an infant, the mother should on the final accounting be allowed such sum as she would be allowed for the support of the child if she had made an application to the surrogate at the earliest possible date for an order fixing a sum for such purpose. Matter of Klunck, 33 Misc. 267.

A mother who secured the custody of her child on *habeas corpus* proceedings is not entitled to charge the expenses thereof to the infant's estate upon being appointed his general guardian. Matter of Grant, 56 App. Div. 176.

Where a mother is appointed general guardian and the child lives with its mother and stepfather in the latter's house, and the mother pays nothing for his board, she is not entitled to an allowance out of the child's estate for the board thus furnished to the child. *Quære*, as to the stepfather's right to enforce such a claim. Matter of Grant, 56 App. Div. 176.

Where by decree a former guardian was directed to pay the entire net income of a trust estate to his ward's father, to be used by him for support, and where the father was subsequently appointed guardian, he is entitled to the protection of the former decree upon his accounting and should not be held to the same strictness in furnishing vouchers for his payments as is ordinarily required of guardians. Matter of Plumb, 24 Misc. 249.

The rule that where parties sustain the relation of parent and child, either by nature or adoption, the former, in the absence of an express promise, cannot be required to pay for services rendered by the child, nor the latter be obliged to pay for maintenance, is applicable to the relationship of guardian and ward, and a guardian's claim for support of a ward whom he had adopted into his family should not be allowed. Although a surrogate might grant a guardian relief from a strict application of the rule, in a case presenting equities in his favor, such equities do not exist where the guardian took the child with the avowed intent of supporting his gratuitously, and the evidence would warrant the finding that the child's services were worth the cost of his support. Otis v. Hall, 117 N. Y. 131, citing Hyland v. Baxter, 98 N. Y. 610.

A man is under no legal obligation to maintain his stepdaughter, an infant, but the general guardian of the latter may contract with him for her support, and on settlement of his accounts is entitled to be allowed such reasonable sum as he has, in good faith, paid for that purpose. Matter of Ackerman, 116 N. Y. 654.

Where a ward boards in the family of her guardian, and in fact renders services of value, those services should be allowed as a claim to reduce the charges for board. Matter of Clark, 36 Hun, 301.

Disposition of ward's legacy or distributive share.— See Code Civ. Pro., § 2746, for provisions as to payment of ward's legacy or distributive share to guardian or parent, for the ward's support, etc.

See Personal Property Law, § 9 (amended L. 1902, ch. 295), as to investment of trust funds by guardian.

Drawing on principal.— Expenses incurred by a guardian in the education and support of his ward, in excess of the funds in his hands and applicable thereto, though necessary and proper, cannot be charged against or ordered to be paid out of an estate which the ward may have in the hands of an executor, of which the income alone is applicable to education and support, and of which the principal is to be paid to the ward at majority, as that would require a violation of the provisions of the will; and in such case the guardian can only be allowed the amount of the fund in his hands, together with the income which has accrued upon the ward's share of the estate. Smith v. Bixby, 5 Redf. 196.

Where the ward's funds are small and more means are necessary to the due maintenance of the ward than can be derived from the income, the capital may be broken in upon, only to the extent necessary to answer the proper demands of the ward. The burden of showing the necessity of the encroachment rests upon the guardian. The court will not allow expenditures which were not warranted by the circumstances. Matter of Wandell, 32 Hun, 545; Oakley v. Oakley, 3 Dem. 140.

Residence of ward.— The right of a parent or guardian to change the residence of an infant from one state to another, is subject to the power of the court to restrain an improper removal, even by a parent. Wood v. Wood, 5 Paige, 596; Wilcox v. Wilcox, 14 N. Y. 575. The guardian has power to change the domicile of the ward from one county to another in the state, for such change still keeps the ward within the protection of the same general law. In re Bartlett, 4 Bradf. 221.

Contracts of guardians.— Contracts of guardians touching the property of their wards will not be enforced unless they are strictly equitable and for the interests of the infants. Sherman v. Wright, 49 N. Y. 227.

A contract by a general guardian for the exchange of the ward's lands cannot be enforced, although the other party has gone into possession. Bellinger v. Roatstone, 6 Week. Dig. 69.

The purchase by a testamentary guardian of his ward's land at partition sale is merely voidable and not void. Munsell v. Munsell, 33 Misc. 185.

The relation between a general guardian and an infant ward is that of trustee and *cestui que trust*. The general guardian has no authority to carry on business under the name of his ward, or to em-

ploy therein the capital or credit of the latter. If he embarks the property of his ward in business, without express or sufficient authority, he is guilty of a breach of trust and *devastavit* of the trust property. If he invests trust funds in the hands of a third person, who has knowledge of their character, they still remain impressed with the obligations of the trust in the hands of the holder, and are subject to be reclaimed. It is beyond the power of a trustee to bind his ward's estate by any contract with third parties who have knowledge of the character of the property transferred, except in the ordinary and usual course of administration of the trust. See this case as to fraudulent mortgaging of infant's real property by his guardian, and for the form of complaint for relief from the fraud. Warren v. Union Bank of Rochester, 157 N. Y. 259.

The restriction of section 1679 of the Code, which prohibits the guardian of an infant party from purchasing or being interested in the purchase of any property sold, etc., applies only to guardians *ad litem* and not to guardians in socage. Boyer v. East, 161 N. Y. 580.

A general guardian cannot invest his ward's personal property in real estate without obtaining authority from the Supreme Court, nor can he invest it in bank stock or bonds of a foreign corporation. Nor can he have commissions on annual rents, nor commissions upon the principal reinvested, nor can he charge the ward's estate with legal expenses incurred in attempting to get himself discharged as guardian before the ward's majority. Matter of Decker, 37 Misc. 527.

A guardian who, instead of selling partly paid contracts for the purchase of land, under circumstances that make it his duty to do so, assumes to compromise with the vendor, and surrender the contracts on receiving a deed in his own name for a part of the land, transcends his powers, and the ward, when of full age, may repudiate or affirm the transaction. White v. Parker, 8 Barb. 48. The infant alone can disavow the guardian's act in excess of authority. Burdick v. Jackson, 7 Hun, 488.

A guardian should not purchase the dower interest in the lands of his ward, or remove a cloud upon the title of such lands, without proper application to the court, and obtaining an order therefor. Rickard's Case, 15 Abb. Pr. N. S. 6.

Mortgages of guardian to himself.— Where a guardian executed individually to himself, as guardian, a mortgage for moneys of his ward in his hands, and afterwards sold the land subject to the mortgage, and thereafter brought an action to foreclose the mortgage, it was held that the parties were estopped by the judgment of foreclosure from questioning the validity of the mortgage, and so long as the money was realized, the ward could not complain, and the mortgage would not prevent conferring a good title. Lyon v. Lyon, 67 N. Y. 250.

A purchase at foreclosure for her own benefit, by one who was guardian in socage of infant defendants, is valid, when authorized by the judgment and necessary for the protection of personal rights. Lucky v. Odell, 46 Super. Ct. (J. & S.) 547.

A guardian cannot invest his wards' funds in a mortgage upon his own property, which he conveys to the wards' father after the receipt of such funds, and which mortgage proves to be insufficient security. The wards may disaffirm the transaction and recover the funds. The court charged the guardian with only 3 per cent. interest. Matter of Terry, 31 Misc. 477.

Section 3. Guardianship of Married Women.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 54].—The lawful marriage of a woman before she attains her majority terminates a general guardianship with respect to her person, but not with respect to her property.

This section is new.

CHAPTER XII.

GENERAL GUARDIAN APPOINTED BY THE COURT.

[*Code of Civil Procedure*, §§ *2821–2850.*]

SECTION 1. POWER OF SURROGATE'S COURT TO APPOINT GUARDIANS.
2. PETITION FOR APPOINTMENT OF GUARDIAN.
3. PROCEEDINGS UPON RETURN OF CITATIONS; SUBPŒNA OF WITNESSES.
4. APPOINTMENT OF TEMPORARY GUARDIAN.
5. GUARDIANS OF PROPERTY.
6. GUARDIAN OF THE PERSON.
7. REVOCATION OF LETTERS OF GUARDIANSHIP.
8. ANCILLARY LETTERS TO FOREIGN GUARDIAN.
9. ANNUAL INVENTORY AND ACCOUNTS.
10. EXAMINATION OF GUARDIAN'S ACCOUNTS.
11. MAINTENANCE OF INFANT.
12. JUDICIAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.

Section 1. Power of Surrogate's Court to Appoint Guardians.

[CODE CIV. PRO. § 2821]. — The surrogate's court has the like power and authority to appoint a general guardian, of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundered and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act. The same person may be appointed guardian of an infant in both capacities; or the guardianship of the person and of the property may be committed to different persons.

This section was derived from R. S. Pt. II, ch. 8, tit. 3, first clause of § 6, and see L. 1870, ch. 341, and L. 1871, ch. 708.

The Surrogate's Court has only such authority over infants and their property, and over the conduct of their guardians, as is specially conferred by statute. It has no authority, therefore, to direct the conversion of an infant's property from personalty into realty so as to bind an infant upon his attaining majority. Matter of Bolton, 159 N. Y. 129.

The jurisdiction of the Supreme Court over infants and their estates is not limited by the Code, which confers jurisdiction upon the Surrogate's Court, nor by Court Rule 52, which designates the persons who may present a petition for the appointment of a general guardian. Therefore, the Supreme Court has power to reappoint a former temporary guardian of the estate of an infant, although the father of the infant has already been appointed general guardian, and although the infant, being over fourteen years of age, asserts that he will not consent to the appointment of any other person than his father. Matter of White, 40 App. Div. 165.

The Supreme Court has general jurisdiction over guardians. Strubbe v. Kings County Trust Co., 60 App. Div. 548.

The power of appointment of a guardian of an infant whose parents are living should not be exercised, except in cases where the parents appear to be unfit for the control of, or have interests which are adverse to, the infant. In re Barre, 5 Redf. 64.

A surrogate may, as a condition of awarding the custody of a child to a person, require such person to permit access to his ward by such persons as the court may designate. Derickson v. Derickson, 4 Dem. 295. The court may also attach the condition that the child be allowed to reside with the parents. Smith v. Smith, 2 Dem. 43.

The powers of a guardian appointed by the court are not restricted by locality. He is recognized as the lawful guardian throughout the state. Ex parte Dawson, 3 Bradf. 130.

A surrogate has no general jurisdiction over a guardian, but simply such as have been especially conferred by statute, together with the incidental powers necessary to carry out that jurisdiction. Matter of Camp, 126 N. Y. 377.

Section 2. Petition for Appointment of Guardian.

When infant is over fourteen [CODE CIV. PRO., § 2822].— In either of the following cases, an infant, of the age of fourteen years or upwards, may present, to the surrogate's court of the county in which he resides; or, if he is not a resident of the state, to the surrogate's court of the county in which any of his property, real or personal, is situated; a written petition, duly verified, setting forth the facts upon which the jurisdiction of the court depends, and praying for a decree appointing a general guardian, either of his person, or of his property, or both, as the case requires; and, if necessary, that the persons, entitled by law to be cited upon such an application, may be cited to show cause why such a decree should not be made:

1. Where such a general guardian has not been duly appointed, either by a court of competent jurisdiction of the state, or by the will or deed of his father or mother, admitted to probate or authenticated, and recorded, as prescribed in section 2851 of this act.

2. Where a general guardian so appointed, has died, become incompetent or disqualified; or refuses to act; or has been removed; or where his term of office has expired.

Where the petitioner is a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence.

This section is derived in part from R. S. Pt. II, ch. 8, tit. 3, § 4. See also L. 1870, ch. 59, and L. 1871, ch. 32.

Court rules relating to appointment of guardian.— Except in cases otherwise provided by law, for the purpose of having a general

guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which said person bears to the infant, and the nature, situation and value of the infant's estate. Supreme Court Rules, 1900, No. 52.

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian. Supreme Court Rules, 1900, No. 53.

A surrogate of a county wherein property of an infant of the requisite age is situated, may entertain an application for the appointment of a guardian, irrespective of proceedings instituted under the laws of another state. Johnson v. Borden, 4 Dem. 36.

Contents of petition; citation [CODE CIV. PRO., § 2823]. — A petition, presented as prescribed in the last section, must also state whether or not the father and mother of the petitioner are known to be living. If either of them is known to be living, and the petition does not pray that the father, or, if he is dead, that the mothehr, may be appointed the general guardian, it must set forth the circumstances which render the appointment of another person expedient; and must pray that the father, or, if he is dead, that the mother, of the petitioner may be cited to show cause, why the decree should not be made. A citation, issued to the father of the petitioner, must be served at least ten days before it is returnable. Where the case is within subdivision second of the last section, the petition must pray that the person formerly appointed general guardian may be cited, unless it is shown

that he is dead. The surrogate must inquire, and ascertain as far as practicable, what relatives of the infant reside in his county; and he may, in his discretion, cite any relative or class of relatives of the infant, residing in that county or elsewhere, to show cause why the prayer of the petition should not be granted.

New in form to the Code. But see L. 1871, ch. 708, and L. 1870, ch. 341.

Petition must show which of the relatives reside in the county. Matter of Feeley, 4 Redf. 306. It should mention the amount of the property to which the infant is entitled within the state so as to enable the court to fix the penalty of the bond. Johnson v. Borden, 4 Dem. 36.

If a person other than a living mother or father is sought to be appointed, the petition must show the expediency of appointing another person. Ledwith v. Ledwith, 1 Dem. 154.

As to contents of petition, see also Matter of Van Vranken, 20 N. Y. St. Rep. 387, 50 Hun, 607.

The citation of relatives is to give the surrogate information as to the proper person to be appointed guardian. Kellinger v. Roe, 7 Paige, 362; Cozine v. Horn, 1 Bradf. 143; Ex parte Dawson, 3 Bradf. 130. See also People v. Wilcox, 22 Barb. 178; Matter of Feeley, 4 Redf. 306.

As to appointment of trust companies, etc., as guardians, see p. 212, *post*.

Citation where petitioner is a married woman [CODE CIV. PRO., § 2824].— The last section applies, where the petitioner is a married woman; except that her husband must also be cited, and that the surrogate may, in his discretion, make a decree, appointing a guardian of her property, without citing her father or her mother.

This section is new to the Code.

Section 8. Proceedings upon Return of Citations; Subpœna of Witnesses.

[Code Civ. Pro., § 2825]. — Upon the return of the citation, the surrogate must make such a decree in the premises, as justice requires. He may, in his discretion, hear allegations and proofs from a person not a party. Where a citation is not issued, the surrogate must, upon the presentation of the petition, inquire into the circumstances. For the purpose of such an inquiry, or of an inquiry into the amount of security to be required of the guardian, he may issue a subpœna, requiring any person to attend before him, to testify respecting any matter involved therein. If he is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person or of his property, he must make a decree accordingly, except that a guardian of the person of a married woman shall not be appointed. In a proper case, he may appoint a general guardian in one capacity, without a citation; and issue a citation, to show cause against the appointment of a general guardian, in the other capacity.

This section is new to the Code. But see R. S. Pt. II, ch. 8, tit. 3, § 6, last clause.

Guardian to be nominated by infant [Code Civ. Pro., § 2826]. — A guardian, appointed upon the application of an infant of the age of fourteen years, or upwards, as prescribed in this article, must be nominated by the infant, subject to the approval of the surrogate.

This section was formerly R. S. Pt. II, ch. 8, tit. 3, § 4, in part.

This section does not authorize an infant of over fourteen to emancipate himself from parental control. The infant has no absolute right to the appointment of a guardian upon his own nomination. The surrogate has a discretion to determine whether the interests of the infant will be promoted by the appointment of any guardian. Ledwith v. Ledwith, 1 Dem. 154.

Section 4. Appointment of Temporary Guardian.

For infant under fourteen [CODE CIV. PRO., § 2827].— A relative of an infant under fourteen years of age, or any other person in behalf of such an infant, may present, to the surrogate's court of the county in which the infant resides; or, if he is not a resident of the state, to the surrogate's court of the county in which any of the infant's property, real or personal, is situated, a written petition, duly verified, setting forth the facts, upon which the jurisdiction of the court depends, and praying for a decree appointing a guardian of the person, or of the property, or both, of the infant, to serve until the infant attains the age of fourteen years, and a successor to the guardian is appointed. The case in which such a guardian may be appointed, the contents of the petition, and the proceedings thereupon, are the same, as prescribed in the foregoing sections of this article, with respect to the appointment of a general guardian, upon the petition of an infant of the age of fourteen years or upwards; except that the surrogate must nominate, as well as appoint, the temporary guardian.

This section was derived from R. S. Pt. II, ch. 8, tit. 3, § 5, in part.

Residence.— Temporary residence is deemed sufficient. Matter of Pierce, 12 How. Pr. 532. If the petition contains allegations sufficient to give the surrogate jurisdiction, and the surrogate proceeds regularly and appoints a guardian, the appointment will be valid until vacated, although the infant never resided in the county. Dutton v. Dutton, 8 How. Pr. 99.

Who should be appointed.— By Laws 1901, ch. 443; Laws 1902, ch. 360, trust companies having qualification of residence, capital, etc., in said law prescribed, may be appointed guardian, trustee or administrator with or without the will annexed on the application or consent of any person acting as such or entitled to such appointment and in the place and stead of such person; or such trust company may be joined with any person so acting or entitled to such appointment; but such appointments shall be made upon notice, as is required by law, to the persons interested in the estate or fund, and on the consent of such of the principal legatees or other persons interested in the estate or fund as the court, surrogate or judge making the appointment shall deem proper. No ap-

pointment hereunder shall be deemed to increase the number of persons entitled to full compensation beyond the number so entitled under the terms of the will or deed creating a trust or appointing a guardian or authorized by law. Whenever a person is joined with such trust company in any appointment as guardian, trustee or administrator * * * his appointment may be under such limitation of powers and upon such terms and conditions as to deposit of assets by such person with such trust company or otherwise, and upon such reduced bond or security to be given by him as the court, surrogate or judge making the appointment shall prescribe.

The Banking Law, as amended by Laws 1900, chapter 552, amending section 157 of such law, provides among other things as follows: "Any court or officer having authority to grant letters of guardianship of any infant may, upon the same application as is required by law for the appointment of a guardian of such infant, appoint any such corporation as guardian of the estates of such infant," etc.

By chapter 67 of the Laws of 1902 the Hebrew Sheltering Guardian Society, of New York, is empowered to act as general guardian of the person and property of infants under its care and control.

Sole executor of the estate of deceased father should not be appointed guardian. Rickard's Case, 15 Abb. Pr. N. S. 6. A stranger could not be appointed without notice to relatives. Id. The home and surroundings of the parties seeking the custody of the infant should be considered. Underhill v. Dennis, 9 Paige, 202.

The interests of the infant, rather than the wishes of those desiring the appointment, should control. Smith v. Smith, 2 Dem. 43; Foster v. Mott, 3 Bradf. 409.

Consent of relatives is not necessary. Ex parte Danson, 3 Bradf. 130. Nor need a relative be appointed in preference to all others. Holley v. Chamberlain, 1 Redf. 333. The mother may be deprived of the custody of the children, where it is for their best interests. Petition of Schroeder, 17 Week. Dig. 71; Burmeister v. Orth, 5 Redf. 259; Matter of Meech, 7 N. Y. Supp. 257, 25 N. Y. St. Rep. 167.

The mother should be given the preference if the children are young, and in need of her care, she being a suitable person. Matter of Pray, 60 How. Pr. 194.

Dying requests of parents should be considered. Underhill v. Dennis, 9 Paige, 202; Matter of Pierce, 12 How. Pr. 532; Bennett v. Byrne, 2 Barb. Ch. 216; Matter of De Marcellin, 24 Hun, 207. Such wishes may be overruled in the discretion of the court. Cozine v. Horn, 1 Bradf. 143. Considerations affecting the health and welfare of the infants may justify the court in withholding their custody, temporarily, even from their legal guardians; being discretionary, appellate courts should not interfere, unless some manifest error or abuse of discretion is made to appear. Matter of Welch, 74 N. Y. 299; Matter of Vandewater, 115 N. Y. 669.

Term of office of temporary guardian [CODE CIV. PRO., § 2828].— The term of office of a guardian, appointed as prescribed in the last section, expires when the infant attains the age of fourteen years. But after the infant attains that age, the person so appointed continues to retain all the powers and authority and is subject to all the duties and liabilities, of a guardian of the person, or of the property, or both, pursuant to his letters; until his successor is appointed and has qualified, or until his letters are revoked, for some other cause, by the decree of the surrogate's court; and his sureties are responsible accordingly.

This section was formerly R. S. Pt. II, ch. 8, tit. 3, § 10.

Section 5. Guardian of Property; Bonds.

Inquiry as to value of property [CODE CIV. PRO., § 2829].— Where a general guardian of the property of an infant is appointed, as prescribed in this article, the surrogate must inquire into the infant's circumstances, and must ascertain, as nearly as practicable, the value of his personal property, and of the rents and profits of his real property.

This section was formerly contained in R. S. Pt. II, ch. 8, tit. 3, § 6.

Qualification of guardian of property; bonds [CODE CIV. PRO., § 2830].— Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must, besides taking an official oath, as prescribed by law, execute to the infant, and file with the surrogate, his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the per-

sonal property, and of the rents and profits of the real property; conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust; and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property and of the rents and profits of the real property for the term of three years. But in case where it appears to be impracticable to give a bond sufficient to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, to be approved by the surrogate, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant until the further order of the surrogate on additional further satisfactory security.

This section was derived from R. S. Pt. II, ch. 8, tit. 3, § 8. The last sentence was added by L. 1892, ch. 559.

The security to be given by the general guardian of an infant shall be a bond, in a penalty of double the amount of the personal estate of his ward, and of the gross amount or value of the rents and profits of the real estate during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond, over and above all debts; or, instead of personal security, the guardian may give security by way of mortgage on improved and unincumbered real property, of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security, where, from special circumstances, it may be found for the interest of the infant, and may direct the principal of the estate, or

any part thereof, to be invested in the stocks of the state of New York, or of the United States, or with any trust company which shall have been designated as a depository for such moneys or on bond and mortgage upon unincumbered improved property of at least double the value of the amount invested, to be shown to the satisfaction of the court, for the benefit of the infant, and that the interest or income thereof, only, be received by the guardian. Court Rule, 1900, No. 54.

Although a general guardian has given the bond required by section 2830 of the Code, he must, before receiving the legacy for his ward, execute a further bond as required by section 2746. Matter of Miller, 29 Misc. 272.

Liability of sureties.— Sureties are not liable for payment of costs in proceedings to remove guardian, nor for counsel fees and costs in an action instituted by the ward against the guardian because of his fraudulent acts in proceedings instituted for the sale of the ward's property. Clark v. Montgomery, 23 Barb. 464.

Where a bond of a guardian has been assigned to a subsequent guardian, the latter may bring an action in his own name thereon. Beams v. Gould, 8 Daly, 384. An accounting is not a prerequisite to an action upon the bond, where the liability may be determined as definitely in another manner. A demand is not necessary where the guardian has wrongfully converted to his own use the money of the ward. Girvin v. Hickman, 21 Hun, 316. But see Perkins v. Stimmell, 114 N. Y. 359.

The sureties on the bond of a general guardian are liable for the proceeds of an infant's real estate sold by order of the court, although the guardian did not give additional security. This is because the court had the right in its discretion to order payment to the guardian without requiring security. Allen v. Kelly, 171 N. Y. 1, reversing 66 App. Div. 623.

The sureties on the bond of a general guardian, whose executrix has been adjudged to pay a certain sum to the ward, are concluded by such decree in the absence of fraud. Martin v. Hann, 32 App. Div. 602.

Where a guardian has removed to another state, and died intestate without leaving property in either state, a final settlement of the guardian's accounts is not a condition precedent to a suit in equity against the sureties on his bond. Otto v. Van Riper, 164 N. Y. 536.

Insolvency of guardian or surety.— Where the guardian's responsibility becomes precarious, the court may order the money in the guardian's hands to be brought into court, or that further security be given. Monell v. Monell, 5 Johns. Ch. 284. Where one of the sureties has become insolvent, further security must be given, before the court will order money to be paid to guardian. Genet v. Tallmadge, 1 Johns. Ch. 561.

Section 6. Guardian of the Person.

Qualifications of guardian of person. [CODE CIV. PRO., § 2831].— Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned, that the guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

This section is new to the Code.

Section 7. Revocation of Letters of Guardianship.

When letters may be revoked for misconduct, etc. [CODE CIV. PRO., § 2832].— In either of the following cases, the ward, or any relative or other person in his behalf, or the surety of a guardian, may, at any time, present to the surrogate's court, a written petition, duly verified, setting forth the facts, and praying for a decree, revoking letters of guardianship, either of the person, or of the property, or both; and that the guardian complained of may be cited to show cause, why such a decree should not be made:

1. Where the guardian is disqualified by law, or is, for any reason, incompetent to fulfill his trust.

2. Where by reason of his having wasted or improperly applied the money or other property in his charge, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the real or personal property of the ward, or by reason of other misconduct in the execution of his office, or his dishonesty, drunkenness, im-

providence, or want of understanding, he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate, contained in a decree or an order; or any provision of law, relating to the discharge of his duty.

4. Where the grant of letters to him was obtained, by a false suggestion of a material fact.

5. Where he has removed, or is about to remove, from the state.

6. In the case of the guardian of the person, where the infant's welfare will be promoted by the appointment of another guardian.

This section was derived from R. S. Pt. II, ch. 8, tit. 3, § 14, and L. 1837, ch. 460, §§ 34, 45.

Where a mother, guardian of the person of her child, moves to another state, re-marries and dies, and the stepfather is thereafter in that state appointed guardian, the child's domicile will be deemed to have been changed to the foreign state, and application for guardianship in this state will be denied, and especially unless the stepfather is shown to be an improper person, and even in such a case the application for removal should be to the foreign court. Matter of Wilderberger, 25 Misc. 582.

Citation; hearing; decree [CODE CIV. PRO., § 2833].—Upon the presentation of a petition, as prescribed in the last section, the surrogate must inquire into the matter; and, for that purpose, he may issue a subpœna to any person requiring him to attend and testify in the premises. If the surrogate is satisfied that there is probable cause to believe, that the allegations of the petition are true, he must issue a citation to the guardian complained of; and, upon the return thereof, if the material allegations of the petition are established, he must make a decree, revoking the guardian's letters accordingly; except that, where the case is within subdivision third or fourth of the last section, he must dismiss the proceedings,

under the like circumstances and upon the like terms, as prescribed in sections 2686 and 2687 of this act, where a similar complaint is made against an executor or administrator.

This section was derived from R. S. Pt. II, ch. 8, tit. 3, §§ 14, 16.

A party by answering a petition waives his right to object to the sufficiency of the petition. Matter of Plumb, 21 N. Y. St. Rep .107. The extent of the inquiry is entirely in the discretion of the surrogate. Idem.

Suspension of guardian; effect thereof [CODE CIV. PRO., § 2834]. — Upon issuing a citation as prescribed in the last section, the surrogate may, in his discretion, make an order suspending the guardian, wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the guardian and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2603 and 2604 of this act, with respect to a decree revoking letters.

This section was derived from L. 1837, ch. 460, § 61.

Application by guardian for revocation of letters [CODE CIV. PRO., § 2835]. — A guardian, appointed as prescribed in this title, may, at any time present to the surrogate's court a written petition, duly verified, setting forth the facts upon which the application is founded, and praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters, and discharging him accordingly; and that the ward may be cited to show cause, why such a decree should not be made. The surrogate may, in his discretion, entertain, or decline to entertain, the application.

This section was derived from L. 1837, ch. 460, parts of §§ 51 and 52.

Proceedings when application is made by guardian [CODE CIV. PRO., § 2836] — If the surrogate entertains an application, made as prescribed in the last section, he must

issue a citation, as prayed for in the petition; and he may also require notice of the application to be given to such other persons, and in such a manner, as he deems proper. Upon the return of the citation, a guardian ad litem for the ward must be appointed; and the surrogate may also, in his discretion, allow any person to appear and contest the application, in the interest of the ward. Upon the hearing, the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. If he determines that they exist, and that the interests of the ward will not be prejudiced by the resignation of the guardian, the surrogate must make an order accordingly, and allowing the petitioner to account, for the purpose of being discharged. Upon his fully accounting, and paying all money which is found to be due from him to the ward, and delivering all books, papers and other property of the ward in his hands, either in the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, and discharging him accordingly.

This section was formerly contained in L. 1837, ch. 460, §§ 53, 54 and 55, and parts of §§ 52 and 56.

Ward or new guardian may require accounting [CODE CIV. PRO., § 2837]. — Notwithstanding the discharge of a guardian, as prescribed in the last section, his successor or the ward may compel a judicial settlement of his account, as prescribed in article second of this title, in the same manner and with like effect, as if the decree discharging him had not been made. With respect to all matters connected with his trust, his sureties continue to be liable, until his account is judicially settled accordingly.

This section was formerly contained in L. 1837, ch. 460, part of § 56.

Section 8. Ancillary Letters to Foreign Guardian.

Application for ancillary letters to foreign guardian [Code Civ. Pro., § 2838]. — Where an infant, who resides without the state and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a general guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security in at least twice the value of the personal property, and of the rents and profits of the real property of the ward, may present, to the surrogate's court having jurisdiction, a written petition duly verified, setting forth the facts and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed, and has given the security required in this section, which must be authenticated in the mode prescribed in article seventh of title third of this chapter, for the authentication of records and papers upon an application for ancillary letters testamentary, or ancillary letters of administration.

2. Where an infant, who resides without the state and within a foreign country, is entitled to personal property within the state, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a general guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant, and the person so authorized must present to the surrogate's court having jurisdiction a written petition, duly verified, setting forth the facts and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or

where such foreign guardian has not been appointed by any court with other proof of his authority to act as such guardian within such foreign country, and also with proof that, pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, of the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs or the department of justice of such country, attested by the signature or seal of a United States consul. [Amended by L. 1897, ch. 492, taking effect September 1, 1897].

Subdivision 1 was formerly L. 1870, ch. 59, part of § 1. Subdivision 2 was added by L. 1889, ch. 263, and amended by L. 1892, ch. 576.

Proceedings thereupon [Code Civ. Pro., § 2839]. — Where surrogate is satisfied, upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest, that ancillary letters of guardianship should be issued to the petitioner, he may make a decree, granting ancillary letters accordingly. Such a decree may be made without a citation; or the surrogate may cite such persons as he thinks proper, to show cause, why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire whether any debts are due from the ward's estate to residents of the state; and if so, he must require payment thereof.

This section was formerly § 1 of L. 1870, ch. 59, as amended by L. 1875, ch. 442.

Effect of ancillary letters [Code of Civ. Pro., § 2840]. — Ancillary letters of guardianship are issued as prescribed in

the last section, without security and without an oath of office. If issued in a case provided for in subdivision one,* of section twenty-eight hundred and thirty-eight, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a guardian of the property appointed as prescribed in this article; to remove them from the state, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two, of section twenty-eight hundred and thirty-eight, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal estate of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceeding respecting such personal estate in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident, guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the state, upon an allegation that the infant was a resident of that county, except by the special direction, made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.

This section was formerly a part of § 1, of L. 1870, ch. 59.

Application of the last section to former guardians [Code Civ. Pro., § 2841]. — The last section applies to letters granted, before this chapter takes effect, by a surrogate's court of the state, to a guardian appointed by a court of another state, or a territory of the United States, upon presentation of an exemplified transcript of the record of his appointment.

This section is new to the Code.

* So in the original.

Section 9. Annual Inventory and Account.

Guardian to file annual inventory and account [CODE CIV. PRO., § 2842]. — A general guardian of an infant's property, appointed by a surrogate's court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the surrogate's court the following papers:

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items, remaining in his hands; a statement of the manner, in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and nature of each investment of money, made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.

This section was substituted for L. 1837, ch. 460, part of § 57.

The provisions of this section are for the purpose of informing the court of the manner in which the guardian is performing his duties, but do not authorize the judicial settlement of such accounts or the allowance of commissions thereon. Matter of Accounting of Hawley, 104 N. Y. 250. The proceedings are *ex parte* and are not based upon petition. They are not properly the basis of a creditor's application to secure payment of his debt. Welch v. Gallagher, 2 Dem. 40. Neglect to file is not, of itself, sufficient cause for removal of the guardian. Ledwith v. Union Trust Co., 2 Dem. 439.

Affidavit to be annexed thereto [CODE CIV. PRO., § 2843. — With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by

the guardian, unless, for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and acount, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward. The surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an infant issued from his court.

A provision similar to this was contained in L. 1837, ch. 460, § 57, and part of § 58.

Section 10. Examination of Guardian's Accounts.

Accounts to be examined annually [CODE CIV. PRO., § 2844]. — In the month of February of each year, and thereafter until completed, the surrogate must, for the purposes specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to

make it, who must, before he enters upon the examination, subscribe and take, before the surrogate, and file, with the clerk of the surrogate's court, an oath faithfully to execute his duties, and to make a true report to the surrogate. Where the surrogate seasonably certifies in writing to the board of supervisors, or, in the county of New York, to the board of aldermen, that the examination required by this section cannot be made by him, or by the clerk of the surrogate's court, or by any clerk, employed in his office and paid by the county, the board must provide for the compensation of a suitable person to make the examination.

Formerly contained in L. 1837, ch. 460, § 58.

Rule in county of New York as to guardian's accounts. — The surrogate, on the written certificate of the person appointed under section 2844 of the Code, to examine the inventory and accounts of guardians filed in said surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interests of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian. Surrogate's Rules, N. Y. County, No. 21.

Proceedings when account defective, etc. [CODE CIV. PRO., § 2845]. — If it appears to the surrogate, upon an examination made as prescribed in the last section, that a general guardian of an infant's property, appointed by letters issued from his court, has omitted to file his annual inventory or account, or the affidavit relating thereto, as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full and satisfactory inventory or account; the surrogate must make an order, requiring the guardian to supply the deficiency, and also, in his discretion, requiring

the gnardian personally to pay the expense of serving the order upon him. Where the guardian fails to comply with such an order, within three months after it is made; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose.

Formerly contained in L. 1837, ch. 460, § 60.

Section 11. Maintenance of Infant.

Surrogate may direct as to infant's maintenance [CODE CIV. PRO., § 2846]. — Upon the petition of the general guardian of an infant's person or property; or of the infant, or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

This section is new to the Code.

A natural guardian may petition for an order directing the general guardian to apply the infant's property to the infant's support and education. Quin v. Hill, 6 Dem. 39.

This section does not provide for the payment of a debt already incurred. Welch v. Gallagher, 2 Dem. 40.

The petition should show the amount of net income of the estate; and, in case of a testamentary provision by a mother, the station in life and accustomed manner of living of the decedent's family, and the inability of the father to furnish the necessary means for the purposes mentioned. Norton v. Sillcocks, 4 Dem. 145.

The surrogate cannot authorize the support of an infant out of the principal of the estate, while interest remains uncollected and the debtors are solvent. Matter of Plumb, 22 N. Y. St. Rep. 547, 54 Hun, 637. The

infant cannot be authorized to expend her own estate. The expenditure must be made through her guardian. Idem.

The guardian should expend no more than the income of the ward for his support and education, without obtaining an order of the court for that purpose. If he expend any part of the principal without such order, he takes the chance of losing it, if not approved by the court. Matter of Bushnell, 17 N. Y. St. Rep. 813.

This section does not authorize the surrogate to compel a general guardian to pay a claim of a guardian ad litem, where the validity of the claim has not been established. Matter of Hampton, 23 N. Y. Supp. 280. The surrogate may require a guardian to contribute to the support of his ward, notwithstanding the ward refuses to abandon the people with whom he had been living for years and reside with the guardian. Matter of Wentz, 9 Misc. 240.

Section 12. Judicial Settlement of Guardian's Accounts.

When judicial settlement of guardian's accounts compelled [CODE CIV. PRO., § 2847]. — A written petition, duly verified, praying for the judicial settlement of the account of a general guardian of an infant's property, and that he may be cited to attend the settlement thereof, may be presented to the surrogate's court, in either of the following cases:

1. By the ward, after he has attained his majority.

2. By the executor or administrator of a ward, who has died.

3. By the guardian's successor, including a guardian appointed after the reversal of a decree, appointing the person so required to account.

4. By a surety in the official bond of a guardian whose letters have been revoked; or by the legal representative of such surety. Citation under this subdivision must be directed to both the guardian and the ward.

The first three subdivisions were formerly contained in R. S. Pt. II, ch. 8, tit. 3, § 11.

This section is the only authority for compelling a guardian to account. Welch v. Gallagher, 2 Dem. 40.

An infant's petition is good though signed by his guardian, without adding his official designation. Matter of Hurlburt, 43 Hun, 311.

JUDICIAL SETTLEMENT OF GUARDIAN'S ACCOUNTS.

Where a general guardian failed to account to his ward for moneys realized from the sale of real property of the ward under statutory proceedings for that purpose, it was held that the guardian's sureties were liable therefor on their bond, even though the guardian did not give additional security as required by section 2361 of the Code and Court Rule 59. Allen v. Kelly, 55 App. Div. 454.

A proceeding by a ward against the executor of his guardian for an accounting for moneys received by such guardian is barred by the lapse of ten years after the time the ward became of age and had a right to compel an accounting. It was further held that, under the facts, there was a presumption of payment to the ward. Matter of Lewis, 36 Misc. 741.

Settlement of accounts of guardian of person [CODE CIV. PRO., § 2848].— A petition, for the judicial settlement of the account of a general guardian of an infant's person, may be presented, as prescribed in the last section, or by the general guardian of the infant's property; but upon the presentation thereof, proof must be made, to the surrogate's satisfaction, that the guardian so required to account has received money or property of the ward, for which he has not accounted; or which he has not paid or delivered to the general guardian of the infant's property; and a guardian of the estate only of a minor shall be, for the purpose of this chapter, deemed a general guardian.

This section is new to the Code.

When guardian may compel judicial settlement [CODE CIV. PRO., § 2849].— A guardian may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case, where a petition for a judicial settlement of his account may be presented by any other person, as prescribed in either of the last two sections. The petition must pray that the person, who might have so presented a petition, and also the sureties in his official bond of such guardian or the legal representatives of such surety may be cited to attend the settlement.

This section was formerly contained in R. S. Pt. II, ch. 8, tit. 3, § 12. The words "and also the sureties in his official bond of such

guardian, or the legal representatives of such surety" were inserted in 1893.

Citation; proceedings thereupon; compensation [CODE CIV. PRO., § 2850].— Upon the presentation of a petition, as prescribed in either of the last three sections, the surrogate must issue a citation accordingly. Section two thousand seven hundred and twenty-seven, sections two thousand seven hundred and thirty-three to two thousand seven hundred and thirty-seven, both inclusive, and sections two thousand seven hundred and forty-one and two thousand seven hundred and forty-four of this act, apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. The accounting party must annex to every account produced and filed by him an affidavit, in the form prescribed in this article for the affidavit to be annexed by him to his annual inventory and account. A guardian designated in this title is entitled to the same compensation as an executor or administrator.

This section was new to the Code.

The proper form of an order directing the executor of a deceased guardian to pay over funds of the ward on his attaining majority is discussed in Matter of Hicks, 54 App. Div. 582.

A guardian's sureties need not be cited on an accounting instituted by a ward, but they are, nevertheless, bound by the decree fixing the guardian's liability. Where a guardian does not pay, the ward may prove the decree in a subsequent action against the sureties. Eberle v. Schilling, 32 Misc. 195.

CHAPTER XIII.

GUARDIAN APPOINTED BY WILL OR DEED.

[*Domestic Relations Law* (*L. 1896, ch 272*), §§ *51, 52. and Code of Civil Procedure*, §§ *2851–2860.*]

SECTION 1. APPOINTMENT OF GUARDIAN BY PARENT.
2. POWERS AND DUTIES OF SUCH GUARDIAN.
3. WILL OR DEED TO BE PROVED AND RECORDED.
4. QUALIFICATIONS AND LETTERS OF TESTAMENTARY GUARDIAN.
5. SECURITY OF TESTAMENTARY GUARDIANS.
6. INVENTORY AND ACCOUNTS.
7. JUDICIAL SETTLEMENT OF ACCOUNTS.
8. REMOVAL AND RESIGNATION OF TESTAMENTARY GUARDIAN.

Section 1. Appointment of Guardian by Parent.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272, amd. L. 1899, ch. 159), § 51].— A married woman is the joint guardian of her children with her husband, with equal powers, rights and duties in regard to them. Upon the death of either father or mother, the surviving parent, whether of full age or a minor, of a child likely to be born, or of any living child, under the age of twenty-one years and unmarried, may, by deed or last will, duly executed, dispose of the custody and tuition of such child during its minority or for any less time, to any person or persons. Either the father or mother may in the life-time of them both, by last will duly executed, appoint the other the guardian of the person and property of such child, during its minority.

A person appointed guardian in pursuance to this section shall not exercise the power or authority thereof unless such will is admitted to probate, or such deed executed and recorded as provided by section twenty-eight hundred and fifty-one of the code of civil procedure.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 3, § 1, as amended by L. 1893, ch. 175, and L. 1871, ch. 32, as amended by L. 1888, ch. 454.

The act of a father in disposing of the custody and tuition of his

minor children, by deed or will, is not defeated by a surrogate's appointment. People ex rel. Brooklyn Industrial School v. Kearney, 31 Barb. 430, 19 How. Pr. 493.

An appointment by will, without words indicating the duration of the guardianship, is not void for uncertainty, but the guardianship will continue during the minority. Such an appointment prevents another appointment on the infant's petition after attaining the age of fourteen. Matter of Reynolds, 11 Hun, 41.

The power to appoint a guardian by will or deed is statutory. Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580.

Under the Act of 1893, the father has no power to appoint the mother as testamentary guardian of his children. Matter of Alexandre, 70 N. Y. St. Rep. 431, 35 N. Y. Supp. 658. Under this section only the surviving parent is authorized to appoint such a guardian. The father, having no power under the statute to make the appointment, his void act in attempting to do so cannot be validated by the subsequent assent of the mother. Matter of Schmidt, 77 Hun, 201, citing People v. Boice, 39 Barb. 307. The right of testamentary appointment is not vested jointly in both parents, but in the survivor. Matter of Howard, 5 Misc. 293.

The power of disposing of the custody and tuition, includes guardianship of the infant's estate. Matter of Zwickert, 5 Misc. 272.

Section 2. Powers and Duties of such Guardian.

[Domestic Relations Law (L. 1896, ch. 272), § 52]. — Every such disposition from the time it takes effect, shall vest in the person to whom made, if he accepts the appointment, all the rights and powers, and subject him to all the duties and obligations of a guardian of such minor, and shall be valid and effectual against every other person claiming the custody and tuition of such minor, as guardian in socage or otherwise. He may take the custody and charge of the tuition of such minor, and may maintain all proper actions for the wrongful taking or detention of the minor, and shall recover damages in such actions for the benefit of his ward. He shall also take the custody and management of the personal estate of such minor and the profits of his real estate, during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law.

WILL OR DEED TO BE PROVED AND RECORDED.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. 3, §§ 2, 3, without change, except that the words " if he accepts the appointment " are inserted.

This section, as re-enacted, would seem to warrant an action in the name of the guardian, in relation to the custody and management of the personal property and the profits of the real estate of the ward, without regard to the provisions of the Code of Civil Procedure.

In the case of Carr v. Huff, 57 Hun, 18, cited under section 1, it was held that the proper practice was to begin such an action in the name of a special guardian *ad litem*. It is not probable that this section, as here re-enacted, would supersede this practice. But there can now be no question but that such actions may be brought in the name of the testamentary guardian.

Custody of ward. — The right of a testamentary guardian to the custody of a ward is not greater than that of the father who appointed him, and where the court is satisfied that the best interests of the child will be promoted by continuing it, for the time being, in the custody of the person to whom it was committed by its mother, the consideration of the child's welfare will prevail, and the custody of the child will not be interfered with upon *habeas corpus*. People ex rel. Pruyne v. Walts, 122 N. Y. 238. See also Matter of Wentz, 9 Misc. 240, 61 N. Y. St. Rep. 303, 30 N. Y. Supp. 211.

The testator's will appointed his wife as guardian of the persons of their children; it was held that she was the testamentary guardian, and, as such, entitled to the custody of their persons, and to the custody and management of their personal estate, and to receive the rents and profits of their real estate. Gelston v. Shields, 16 Hun, 143.

Section 3, Will or Deed to be Proved and Recorded.

[Code Civ. Pro., § 2851]. — A person shall not exercise, within the State, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the State, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the State, executed after this chapter takes

effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterwards duly appointed by a surrogate's court, the presumption is conclusive.

This section was derived from L. 1877, ch. 206, §§ 4-7, which formerly applied to the city and county of New York.

This section relates to practice alone and does not affect, in any way, the statute authorizing the appointment of a testamentary guardian. Griffin v. Sarsfield, 2 Dem. 5.

Section 4. Qualification and Letters of Testamentary Guardians.

[Code of Civ. Pro., § 2852]. — Where a will, containing the appointment of a guardian, is admitted to probate, the person appointed guardian must, within thirty days thereafter, qualify as prescribed in section 2594 of this act; otherwise he is deemed to have renounced the appointment. But the surrogate may extend the time so to qualify, upon good cause shown, for not more than three months. And any person interested in the estate may, before letters of guardianship are issued, file an affidavit, setting forth, with respect to the guardian so appointed, any fact which is made by law an objection to the issuing of letters testamentary to an executor. Sections 2636 to 2638 of this act, both inclusive, apply to such an affidavit, and to the proceedings thereupon. A person appointed guardian by will may, at any time before he qualifies, renounce the appointment by a written instrument, under his hand, filed in the surrogate's office.

See L. 1877, ch. 206, §§ 4, 5, 6, 7.

QUALIFICATION AND LETTERS OF TESTAMENTARY GUARDIAN.

If the appointment of a testamentary guardian is, by the terms of the will, to take effect upon the happening of any contingency, he must qualify within the time prescribed by the section, or he will lose all right under the will to letters of testamentary guardianship. Estate of Constantine, 22 N. Y. St. Rep. 883, 16 Civ. Pro. R. 262.

The following are the sections of the Code referred to in the above section:

§ 2594. **Official oaths of executors, etc.** — The official oath or affirmation of an executor, administrator, or guardian, to the effect that he will well, faithfully, and honestly discharge the duties of his office, describing it, must be filed with the surrogate, before letters are issued to him. The oath may be taken before any officer, within or without the state, who is authorized to take an affidavit, to be used in the supreme court. Where it is taken without the state, it must be certified as required by law, with respect to an affidavit to be used in the supreme court.

§ 2636. **When letters testamentary may be issued.** — Where a will, which is admitted to probate, names one or more persons to be executor or executors thereof, upon a contingency, the surrogate must inquire into the fact, and, if the contingency has happened, that fact must be recited in the decree. Immediately after a will has been admitted to probate, the person or persons named therein as executors, who are competent by law to serve, and who appear and qualify, are entitled to letters testamentary thereupon; unless before the letters are granted, a creditor of the decedent, or a person interested in the estate, files an affidavit specifying his demand, or how he is interested, and either setting forth specifically one or more legal objections to granting the letters to one or more of the executors, or stating that he is advised and believes that there are such objections, and that he intends to file a specific statement of the same. Where such an affidavit is filed, the surrogate must stay the granting of letters, at least thirty days, or until the matter is sooner disposed of. A specification or statement of an objection, made as prescribed in this section, must be verified by the oath of the objector, or his attorney, to the effect that he believes it to be true.

§ 2637. **Surrogate to inquire into objections.** — The surrogate must inquire into an objection, filed as prescribed in the last section; and, for that purpose, he may receive proof, by affidavit or otherwise, in his discretion. If it appears that there is a legal and sufficient objection to any person, named as executor in the will, letters shall not be issued to him, except as prescribed in the next section.

§ 2638. **Bond; when required.** — In either of the following cases, a person named as executor in a will, may entitle himself to letters testamentary thereupon, by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:

1. Where the objection is, that his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate, for the due administration of the estate.

2. Where the objection is that he is not a resident of the state; and he is a citizen of the United States.

But a person against whom there is no objection, except that of non-residence, is entitled to letters testamentary, without giving a bond, if he has an office within the state, for the regular transaction of business in person; and the will contains an express provision, to the effect that he may act without giving security.

Where the will of a surviving parent nominates as guardian of minor children persons who are not residents of the state, and who have no office for the transaction of business therein, and who are alleged to be unable to furnish adequate security, the surrogate is not authorized to refuse letters of guardianship. If the bond tendered by the guardian is too small the surrogate should prescribe the amount and kind of bond to be given. Matter of Welsh, 50 App. Div. 189.

A non-resident alien cannot have letters as testamentary guardian. Matter of Zeller, 25 Misc. 137.

Section 5. Security of Testamentary Guardians.

When security required from guardian appointed by will or deed [CODE CIV. PRO., § 2853].— Where a guardian of an infant's person or property has been appointed by will or by deed, the infant, or any relative or other person in his behalf, may present, to the surrogate's court in which the will was admitted to probate; or to the surrogate's court of the county in which the deed was recorded; a written petition, duly verified, setting forth, either upon his knowledge, or upon his information and belief, any fact, respecting the guardian, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such a person to give a bond, in order to entitle himself to letters; and praying for a decree, requiring the guardian to give security for the performance of his trust; and that he may be cited to show cause why such a decree should not be made. Upon the presentation of such a petition, and proof of the facts

therein alleged, to the satisfaction of the surrogate, he must issue a citation accordingly. Upon the return of the citation, a decree requiring the guardian to give security may be made, in the discretion of the surrogate, in a case where a person so named as executor, can entitle himself to letters testamentary only by giving a bond; but not otherwise.

This section is new to the Code.

What security to be given [CODE CIV. PRO., § 2854].— The security to be given, as prescribed in the last two sections, must be a bond to the same effect, and in the same form, as the bond of a general guardian, appointed by the surrogate's court. Each provision of this chapter, applicable to the bond of such a guardian, and to the rights, duties and liabilities of the parties thereto, or any of them, including the release of the sureties, and the giving of a new bond, applies to the bond so given, and the parties thereto.

This section is new to the Code.

Section 6. Inventory and Account.

Inventory and intermediate account may be required [CODE CIV. PRO., § 2855.].— Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court having jurisdiction to require security, as prescribed in the last three sections, may, at any time, in the discretion of the surrogate, make an order, requiring a guardian, appointed by will or by deed, to render and file an inventory and account, in the same form, and verified in the same manner as the inventory and account, required to be filed annually by a guardian appointed by a surrogate's court, as prescribed in article second of this title. The order may also require such an inventory and account to be filed, in the month of January of each year there-

after. Sections twenty-eight hundred and forty-two to twenty-eight hundred and forty-five of this act, both inclusive, apply to such an inventory and account, and to the filing thereof, as if the guardian had been appointed by the surrogate's court. The provisions of section twenty-eight hundred and forty-six of this act shall apply to a guardian appointed by will or deed with the same effect as if such guardian had been mentioned in said section, and the proceedings therein prescribed may be had in the case of any such guardian in the same manner as if he were a general guardian.

This section is new to the Code. The last sentence was added by ch. 61 of the Laws of 1896.

For sections 2842–2845 of the Code, see *ante*, p. 224, and for section 2846, see *ante*, p. 227.

Section 7. Judicial Settlement of Accounts.

When surrogate may compel judicial settlement of accounts [CODE CIV. PRO., § 2856].— The surrogate's court, having jurisdiction to require security may compel a judicial settlement of the account of a guardian appointed by will or by deed, in any case where it may compel a judicial settlement of the account of a general guardian; and the proceedings to procure such a settlement are the same as if the guardian so appointed by will or deed had been a general guardian. A guardian appointed by will or by deed may present to the surrogate's court a written petition, duly verified, praying for a judicial settlement of his account, and a discharge from his duties and liabilities, in any case where a petition for a judicial settlement of his account may be presented by any other person as prescribed in this article. The petition must pray that the person who might have so presented a petition may be cited to attend the settlement. Upon the presentation of such petition the surrogate must issue a citation accordingly. Sec-

tions twenty-seven hundred and thirty-three to twenty-seven hundred and thirty-seven, both inclusive, and sections twenty-seven hundred and forty-one and twenty-seven hundred and forty-four of this act apply to a guardian accounting as prescribed in this article, and regulate the proceedings upon such an accounting. A guardian designated in this title is entitled to the same compensation as a general guardian.

This section is new to the Code.

Where a testator provided that should his wife die before him certain persons should be guardians of his children, and receive for such services the sum of $500, to be paid by the executors, and where no such services were rendered, it was held that they were not entitled to the money; that the provision was intended as compensation for services and not as a legacy. Matter of Brigg, 39 App. Div. 485.

Effect of decree [CODE CIV. PRO., § 2857].— A decree made upon a judicial settlement of the account of a guardian appointed by will or by deed, as prescribed in this article, or the judgment rendered upon appeal from such decree, has the same force, as a judgment of the Supreme Court to the same effect.

This section is new to the Code.

Section 8. Removal and Resignation of Testamentary Guardian.

Removal of guardian appointed by will or deed [CODE CIV. PRO., § 2858].— Upon the petition of the ward, or of any relative or other person in his behalf, the surrogate's court, having jurisdiction to require security from a guardian appointed by will or by deed, may remove such a guardian, in any case where a testamentary trustee may be removed, as prescribed in title sixth of this chapter; and the proceedings upon such a petition are the same, as prescribed in that title for the removal of a testamentary trustee. Where a citation is issued, upon a petition for the

removal of such a guardian, he may be suspended from the exercise of his powers and authority, as if he had been appointed by the surrogate's court.

Substituted for L. 1874, ch. 469.

A testamentary guardian cannot be removed except upon grounds which would justify the removal of a testamentary trustee. Markay v. Fullerton, 4 Dem. 153.

A testamentary guardian who has had attacks of insanity and is otherwise an unsuitable person, will be removed. Damarell v. Walker, 2 Redf. 198.

As to procedure in proceedings for the removal of a testamentary guardian, see Matter of King, 42 Hun, 607. The question of instituting such proceedings by petition was discussed in this case. Under this section such practice seems recognized, and there can be no doubt of its regularity.

Resignation of such a guardian [CODE CIV. PRO., § 2859].— A guardian appointed by will or by deed, may be allowed to resign his trust, by the surrogate's court, having jurisdiction to require security from him. The proceedings for that purpose, and the effect of a decree made thereupon, are the same, as where a guardian appointed by the surrogate's court presents a petition, praying that his letters may be revoked, as prescribed in article first of this title.

This section is new to the Code.

Appointment of successor [CODE CIV. PRO., § 2860].— Where a sole guardian, appointed by will or by deed, has been, by the decree of the surrogate's court, removed or allowed to resign, a successor may be appointed by the same court, with the effect prescribed in section 2605 of this act; unless such an appointment would contravene the express terms of the will or deed.

This section is new to the Code.

CHAPTER XIV.

ADOPTION OF CHILDREN.

[*Domestic Relations Law* (*L. 1896, ch. 272*), *article VI.*]

SECTION 1. DEFINITIONS; EFFECT OF ARTICLE VI OF DOMESTIC RELATIONS LAW.
2. WHOSE CONSENT NECESSARY.
3. REQUISITES OF VOLUNTARY ADOPTION.
4. ORDER ALLOWING OR AFFIRMING ADOPTION.
5. EFFECT OF ADOPTION.
6. ADOPTION FROM CHARITABLE INSTITUTIONS.
7. ABROGATION OF VOLUNTARY ADOPTION.
8. APPLICATION IN BEHALF OF CHILD FOR ABROGATION OF AN ADOPTION FROM A CHARITABLE INSTITUTION.
9. APPLICATION OF THE FOSTER PARENT FOR THE ABROGATION OF SUCH AN ADOPTION.

Section 1. Definitions; Effect of Article VI of Domestic Relations Law.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 60]. — Adoption is the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the "foster parent." A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his adult wife together, may adopt a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an

adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent, applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts, or devises in wills so made or created.

This section is a re-enactment of L. 1873, ch. 830, §§ 1, 2 and 13.

The adoption of children was unknown to the common law of England, and exists in the states of the Union solely by virtue of statute. Carroll v. Collins, 6 App. Div. 106.

The adoption of children was unknown to the common law, and exists in this country only by virtue of statute. The saving clause in the statute of this state providing that nothing therein contained shall prevent the adoption of any child heretofore made according to a method practiced in this state from having the effect of an adoption, refers only to those forms of adoption heretofore existing by special statutory enactment contained in the charters of charitable societies and was not intended to sanction private agreements, executed without authority of law and containing no safeguards as to transmission of property. Matter of Thorne, 155 N. Y. 140.

An adoption, within the saving clause of chapter 830 of the Laws of 1873, as amended by chapter 703, Laws of 1887, is not made out where it appears that the only written evidence of the adoption was an entry in the book kept by a charitable society to the effect that the child was adopted by the testator, even though the testator took her from the society, kept her in his home until her marriage, and treated her in every respect as his daughter, and referred to her in his will as his adopted daughter. Smith v. Allen, 161 N. Y. 478.

In the case of Hill v. Nye, 17 Hun, 457, it was held that the Act of 1873 had no retrospective effect. In construing section 13 of such act which provides "that nothing herein contained shall prevent proof of the adoption of any child heretofore made, according to any method practiced in this state, from being received in evidence, nor such adoption having the effect of an adoption hereunder," the court held that this section did not provide that an adoption theretofore made shall have the like effect as one made thereunder.

In the case of Carroll v. Collins, 6 App. Div. 106, it was held that section 13 of the Act of 1873 only applied to prior adoptions which were authorized by some special statute at the time when they were made,

and have no application to a method of adoption not authorized by any statute.

The provisions of the Act of 1873 are not applicable to the right of a charitable organization to indenture a child for adoption, without the consent of the mother, when it appears that the mother had abandoned the child, within the meaning of a special act giving such organization that right. Matter of Larson, 31 Hun, 539.

Section 2. Whose Consent Necessary.

[Domestic Relations Law (L. 1896, ch. 272), § 61].—Consent to adoption is necessary as follows:

1. Of the minor, if over twelve years of age;

2. Of the foster parent's, husband or wife, unless lawfully separated, or unless they jointly adopt such minor;

3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary.

4. Of a person of full age having lawful custody of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.

This section is a re-enactment of L. 1873, ch. 830, §§ 3–7, 11 and L. 1889, ch. 58, without change in substance.

Section 3. Requisites of Voluntary Adoption.

[Domestic Relations Law (L. 1896, ch. 272, amd. L. 1899, ch. 498), § 62].— In adoption the following requirements must be followed:

1. The foster parent or parents, the minor and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents reside, and be examined by such judge or surrogate, except as provided by the next subdivision.

2. They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parent or parents to adopt and treat the minor as his, her, or their own lawful child, and a statement of the age of the child, as nearly as the same can be ascertained; which statement shall be taken *prima facie* as true. The instrument must be signed by the foster parent or parents and by each person whose consent is necessary to the adoption, and severally acknowledged by said persons before such judge or surrogate; but where a parent or person or institution having the legal custody of the minor resides in some other country, state or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this state, is equivalent to his or their appearance and execution of such instrument.

This section is a re-enactment of L. 1873, ch. 830, §§ 2, 8 and 9, as amended by L. 1888, ch. 485, without change, except that the surrogate is given the same jurisdiction over adoption proceedings as a county judge.

Parol evidence is admissible to show the true agreement between the mother and the adopting parents of a child where the written instrument of adoption does not purport to state such agreement, and the mother of the child testifies that the agreement was entirely oral and that the written agreement was executed merely to transfer the custody of the child. Brantingham v. Huff, 43 App. Div. 414.

Section 4. Order Allowing or Affirming Adoption.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 63].— If satisfied that the moral and temporal interests of the child will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefor, and directing that the minor shall thenceforth be regarded and treated in all respects as the child of the foster parent or parents. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such county.

This section is a re-enactment of L. 1873, ch. 830, § 9, in part. The last sentence is new.

Where the order recites necessary facts and is signed by the county judge, the omission to sign the consent as a witness and to sign the certificate of the adopting parent, the natural parents having given their consent, is immaterial. People ex rel. Burns v. Bloedel, 42 N. Y. St. Rep. 453, 16 N. Y. Supp. 837.

The objection that the necessary instruments were executed in the presence of persons other than the judge before whom the adoption proceedings were had, is immaterial, if the judge certified in the order of adoption that the adopted child and the adopting parents appeared before him and that the necessary consents and agreement had been executed as provided by the statute. Von Beck v. Thomsen, 44 App. Div. 373.

Section 5. Effect of Adoption.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 64].— Thereafter the parents of the minor are relieved from all parental duties towards, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully

marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the stepfather or the stepmother of such child, may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. The child takes the name of the foster parent. His rights of inheritance and succession from his natural parents remain unaffected by such adoption.

The foster parent or parents and the minor sustain towards each other the legal relation of parent and child and have all the rights, and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a stepfather or stepmother, and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting; but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remainderman. [Thus amended by L. 1897, ch. 408.]

This section was derived from L. 1873, ch. 830, §§ 10, 12, and L. 1884, ch. 438, §§ 8, 9, 11.

The provision expressly denying to the natural parent the right to take by descent or succession from the adopted child, and giving to the adopted child the right to take by descent or succession from the natural parent, is new. In the case of Hill v. Nye, 17 Hun, 457, it was held that the consent of the parents of a child to his adoption, the adoption not being under any statute, does not deprive the natural parents of the right to inherit.

As to the heritable capacity of a child under this section, see Dodin v. Dodin, 40 N. Y. Supp. 748.

See note on the law of succession as affected by the adoption of children, in 29 Abb. N. C. 49.

A contract to leave property upon death to an adopted child in consideration of the surrender of the child for adoption, may be enforced, although the contract was made before the enactment of the statute authorizing adoption and conferring heritable qualities upon an adopted child. Godine v. Kidd, 64 Hun, 585, 29 Abb. N. C. 36.

A child adopted under the statute by husband and wife, after policies of insurance have been issued upon the life of the husband, payable to the wife, and in case of her death to her children, is entitled, upon the wife's failure to survive, to share in the proceeds of the policies with the natural children. Von Beck v. Thomsen, 44 App. Div. 373.

Where a woman made a written agreement with plaintiff's mother to maintain plaintiff, who was an infant, as her own child, and at her death give him all her property, if the mother would surrender the custody and control of the child, and where the plaintiff and his mother fulfilled their part of the agreement, it was held that the contract was binding upon the heirs and next of kin of the decedent and that the plaintiff was entitled to a specific performance thereof. Winnie v. Winnie, 166 N. Y. 263.

A child who has been adopted by husband and wife who, in consideration of the adoption, agree upon their death to give the child all their property, may maintain an action against the devisees and grantees of the husband to compel the specific performance. Nor is a decree of the Surrogate's Court denying the right of such child to intervene on the probate of the husband's will on the ground that there was no valid adoption a bar to the maintenance of such action. Brantingham v. Huff, 43 App. Div. 414.

Section 6. Adoption from Charitable Institutions.

[Domestic Relations Law (L. 1896, ch. 272), § 65].—Where an orphan asylum or charitable institution is authorized to place children for adoption, the adoption of every such child shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument

provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child, if over twelve years of age, all of whom shall appear before the county judge or surrogate of the county where such foster parents reside and be examined, except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where the foster parent resides and the adoption shall take effect from the time of such filing and recording.

This section is a re-enactment of L. 1884, ch. 438, §§ 7, 10, without change in substance.

Section 7. Abrogation of Voluntary Adoption.

[Domestic Relations Law (L. 1896, ch. 272), § 66].—A minor may be deprived of the rights of a voluntary adoption by the following proceedings only:

The foster parent, the minor and the persons whose consent would be necessary to an original adoption, must appear before the county judge or surrogate of the county where the foster parent resides, who shall conduct an examination as for an original adoption. If he is satisfied that the abrogation of the adoption is desired by all parties concerned, and will be for the best interests of the minor, the foster parent, the minor, and the persons whose consent would have been neces-

sary to an original adoption shall execute an agreement, whereby the foster parent and the minor agree to relinquish the relation of parent and child and all rights acquired by such adoption, and the parents or guardian of the child or the institution having the custody thereof, agree to reassume such relation. The judge or surrogate shall indorse, upon such agreement, his consent to the abrogation of the adoption. The agreement and consent shall be filed and recorded in the office of the county clerk of the county where the foster parent resides, and a copy thereof filed and recorded in the office of the county clerk of the county where the parents or guardian reside, or such institution is located, if they reside, or such institution is located, within this state. From the time of the filing and recording thereof, the adoption shall be abrogated, and the child shall reassume its original name and the parents or guardians of the child shall reassume such relation. Such child, however, may be adopted directly from such foster parents by another person in the same manner as from parents, and as if such foster parents were the parents of such child.

This section is a re-enactment of L. 1873, ch. 830, § 13.

The revision amplifies the former law, but does not materially change the substance, except that a surrogate is given the same jurisdiction as a county judge, and the provision allowing an application to a justice of the Supreme Court is omitted. The provisions requiring a copy of the agreement to be filed in the office of the clerk of the county where the parent or guardian of the child resides, and authorizing an adoption from a foster parent are new.

Although a County Court and Surrogate's Court have concurrent jurisdiction in adoption under the statute, the power to abrogate the adoption rests solely with that court which granted the order. Held, further, that where the surrogate decided that the foster parents are unfit parents and abrogates the adoption, and no appeal is taken from such order, the County Court has no power subsequently to make an order adopting the child to the same foster parents. Matter of Trimm, 30 Misc. 493.

Section 8. Application in Behalf of the Child for Abrogation of an Adoption from a Charitable Institution.

[Domestic Relations Law (L. 1896, ch. 272), § 67].—A minor who shall have been adopted in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, or any corporation which shall have been a party to the agreement by which such child was adopted, or any person on the behalf of such child, may make an application to the county judge or the surrogate's court of the county in which the foster parent then resides, for the abrogation of such adoption, on the ground of cruelty, misusage, refusal of necessary provisions or clothing, or inability to support, maintain or educate such child, or of any violation of duty on the part of such foster parent toward such child; which application shall be by a petition setting forth the grounds thereof, and verified by the person or by some officer of the corporation making the same. A citation shall thereon be issued by such judge or surrogate in or out of such court, requiring such foster parent to show cause why the application should not be granted. The provisions of the Code of Civil Procedure relating to the issuing, contents, time and manner of service or citations issue out of a surrogate's court, and to the hearing on the return thereof, and to enforcing the attendance of witnesses, and to all proceedings thereon, and to appeals from decrees of surrogate's courts, not inconsistent with this chapter, shall apply to such citation, and to all proceedings thereon. Such judge or court shall have power to order or compel the production of the person of such minor. If on the proofs made before him, on the hearing on such citation, the judge or surrogate shall determine that either of the

grounds for such application exists, and that the interests of such child will be promoted by granting the application, and that such foster parent has justly forfeited his right to the custody and services of such minor, an order shall be made and entered abrogating the adoption, and thereon the status of such child shall be the same as if no proceedings had been had for the adoption thereof.

After one such petition against a foster parent has been denied, a citation on a subsequent petition against the same foster parent may be issued or refused in the discretion of the judge or surrogate to whom such subsequent petition shall be made.

This section is a re-enactment of L. 1884, ch. 438, § 12, without change, except that the original act only conferred jurisdiction on the surrogate's court; by the present section a like jurisdiction is conferred upon the county court.

Section 9. Application of the Foster Parent for the Abrogation of such an Adoption.

Domestic Relations Law (L. 1896, ch. 272), § 68]. — A foster parent who shall have adopted a minor in pursuance of this chapter or of any act repealed thereby, from an orphan asylum or charitable institution, may apply to the county judge or surrogate's court of the county in which such foster parent resides, for the abrogation of such adoption on the ground of the wilful desertion of such child from such foster parent, or of any misdemeanor or ill-behavior of such child, which application shall be by petition, stating the grounds thereof, and the substance of the agreement of adoption, and shall be verified by the petitioner; and thereon a citation shall be issued by such judge or surrogate in or out of such court, directed to such child, and to the corporation which was a party to such adoption, or, if such corporation does not then exist, to the superintendent of the poor of such county, requiring them to show cause why such petition should not be granted. Unless

such corporation shall appear on the return of such citation, before the hearing thereon shall proceed, a special guardian shall be appointed by such judge or court to protect the interests of such child in such proceeding, and the foster parent shall pay to such special guardian such sum as the court shall direct for the purpose of paying the fees and the necessary disbursement in preparing for and contesting such application on behalf of the child. If such judge or surrogate shall determine, on the proofs made before him, on the hearing of such citation, that the child has violated his duty toward such foster parent, and that due regard to the interests of both require that such adoption be abrogated, an order shall be made and entered accordingly; and such judge or court may make any disposition of the child, which any court or officer shall then be authorized to make of vagrant, truant or disorderly children. If such judge or surrogate shall otherwise determine, an order shall be made and entered denying the petition.

This section is a re-enactment of L. 1884, ch. 438, § 13, without change, except that the county judge is given the same jurisdiction as the surrogate possessed under the former law.

CHAPTER XV.

APPRENTICES AND SERVANTS.

[*Domestic Relation Law* (*L. 1896, ch. 272*), *article VII.*]

SECTION 1. DEFINITIONS; EFFECT OF ARTICLE VII OF DOMESTIC RELATIONS LAW.
2. CONTENTS OF INDENTURE.
3. INDENTURE BY MINOR.
4. INDENTURE BY POOR OFFICERS.
5. INDENTURE BY CHARITABLE CORPORATION.
6. PENALTY FOR FAILURE OF MASTER OR EMPLOYER TO PERFORM PROVISIONS OF INDENTURE.
7. ASSIGNMENT OF INDENTURE ON DEATH OF MASTER OR EMPLOYER.
8. CONTRACT WITH APPRENTICE IN RESTRAINT OF TRADE VOID.

Section I. Definitions; Effect of Article VII of Domestic Relations Law.

[DOMESTIC RELATIONS LAW (L. 1896, ch. 272), § 70]. — The instrument whereby a minor is bound out to serve as a clerk or servant in any trade, profession or employment, or is apprenticed to learn the art or mystery of any trade or craft, is an indenture.

Every indenture made in pursuance of the laws repealed by this chapter shall be valid hereunder, but hereafter a minor shall not be bound out or apprenticed except in pursuance of this article.

This section is new.

To entitle a master to recover from a stranger the value of work and services performed for and rendered to him by one alleged to be an apprentice, a valid contract of apprenticeship must be established by the plaintiff. Barton v. Ford, 35 Hun, 32.

Section 2. Contents of Indenture.

[Domestic Relations Law (L. 1896, ch. 272, amd. L. 1899, ch. 488),] § 71.— Every indenture must contain:

1. The names of the parties;

2. The age of the minor as nearly as can be ascertained, which age, on the filing of the indenture, shall be taken *prima facie* to be the true age;

3. A statement of the nature of the service or employment to which the minor is bound or apprenticed;

4. The term of service or apprenticeship, stating the beginning and end thereof;

5. An agreement that the minor will not leave his master or employer during the term for which he is indentured;

6. An agreement that suitable and proper board, lodging and medical attendance for the minor during the continuance of the term shall be provided, either by the master or employer, or by the parent or guardian of the apprentice.

7. A statement of every sum of money paid or agreed to be paid in relation to the service;

8. If such minor is bound as an apprentice to learn the art or mystery of any trade or craft, an agreement on the part of the employer to teach, or cause to be carefully and skillfully taught, to such apprentice, every branch of the business to which such apprentice is indentured, and that at the expiration of such apprenticeship he will give to such apprentice a certificate, in writing, that such apprentice has served at such trade or craft a full term of apprenticeship specified in such indenture;

9. If a minor is indentured by the poor officers of a county, city or town, or by the authorities of an orphan asylum, penal or charitable institution, an agreement that the master or employer will cause such child to be instructed in reading, writing, and the general rules of arithmetic, and that at the

expiration of the term of service he will give to such minor a new Bible.

Every such indenture shall be filed in the office of the county clerk of the county where the master or employer resides.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. IV, §§ 8–11; L. 1871, ch. 934, § 1, subs. 2, 3, as amended by L. 1893, ch. 284; L. 1884, ch. 438, § 5. The terms of the indenture are amplified, but there are no changes in substance.

If the indenture does not contain a provision that the minor will not leave his master during the time of his indenture, it is invalid. Barton v. Ford, 35 Hun, 32.

Section 3. Indenture by Minor; by Whom Signed.

[Domestic Relations Law (L. 1896, ch. 272), § 72]. — Any minor may, by the execution of the indenture provided by this article, bind himself or herself:

1. As an apprentice to learn the art or mystery of any trade or craft for a term of not less than three nor more than five years; or,

2. As a servant or clerk in any profession, trade or employment for a term of service not longer than the minority of such minor, unless such indenture be made by a minor coming from a foreign country, for the purpose of paying his passage, when such indenture may be made for a term of one year although such term may extend beyond the time when such person will be of full age.

An indenture made in pursuance of this section must be signed,

1. By the minor;

2. By the father of the minor unless he is legally incapable of giving consent or has abandoned his family;

3. By the mother of the minor unless she is legally incapable of giving consent;

4. By the guardian of the person of the minor, if any;

5. If there be neither parents or guardian of the minor

legally capable of giving consent, by the county judge of the county or a justice of the Supreme Court of the district in which the minor resides; whose consent shall be necessary to the binding out or apprenticing in pursuance of this section of a minor coming from a foreign country or of the child of an Indian woman, in addition to the other consents herein provided;

6. By the master or employer.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. IV, §§ 1–4, 7, 12, 13, and L. 1871, ch. 934, §§ 1 and 2, sub. 1. The provision requiring the consent of a county judge or justice of the Supreme Court is new. Under the Revised Statutes a woman could only bind herself until she became eighteen.

The indenture must be signed by the master. People ex rel. Heilbronner v. Hoster, 14 Abb. Pr. N. S. 414.

The failure of the minor to sign cannot be availed of by the parent, where he has given his consent. People ex rel. Wehle v. Weissenbach, 60 N. Y. 385. The father is liable for the son leaving his master before the expiration of the period. Mead v. Billings, 10 Johns. 99; Bull v. Follett, 5 Cow. 170. But see Ackley v. Hoskins, 14 Johns. 374.

Section 4. Indenture by Poor Officers; by Whom Signed.

[Domestic Relations Law (L. 1896, ch. 272), § 73]. — The poor officers of a municipal corporation may, by an execution of the indenture provided by this article, bind out or apprentice any minor whose support shall become chargeable to such municipal corporation.

In such case the indenture shall be signed,

1. By the officer or officers binding out or apprenticing the minor;

2. By the master or employer;

3. By the county judge of the county, if the support of such child was chargeable to the county, by two justices of the peace, if chargeable to the town, or by the mayor and aldermen or any two of them, if chargeable to the city.

The poor officers by whom a child is indentured and their successors in office, shall be guardian of every such child and shall inquire into the treatment thereof, and redress any grievance as provided by law.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. IV, §§ 5, 6, 27. The provision requiring consent of county judge is new.

A mother having received temporary relief from the poor officers is not sufficient to warrant binding out her child under this section. People ex rel. Heilbronner v. Hoster, 14 Abb. Pr. N. S. 414. Where a child is placed in the custody of poor officers by a father, as a boarder, one month's board being paid, and he afterwards leaves the state, it is sufficient to authorize such officers to bind out the child. People ex rel. Wehle v. Weissenbach, 60 N. Y. 385. A child may be bound out where the father has asked and received alms from the poor authorities. Schermerhorn v. Hull, 13 Johns. 270. This case was decided under the Act of 1813; the Revised Statutes modified the language by striking out the words, "or who shall beg for alms," and is therefore not now applicable.

Section 5. Indenture by a Charitable Corporation; by Whom Signed.

[Domestic Relations Law (L. 1896, ch. 272), § 74]. — Where an orphan asylum or charitable institution is authorized to bind out or apprentice dependent or indigent children committed to its charge, every such child shall, when practicable, be bound out or apprenticed to persons of the same religious faith as the parents of such child, and the indenture shall in such case be signed,

1. In the corporate name of such institution by the officer or officers thereof authorized by the directors to sign the corporate name to such instrument, and shall be sealed with the corporate seal;

2. By the master or employer; and

3. May be signed by the child, if over twelve years of age.

This section is a re-enactment of L. 1884, ch. 438, §§ 5, 10, without change in substance.

Section 6. Penalty for Failure of Master or Employer to Perform Provisions of Indenture.

[Domestic Relations Law (L. 1896, ch. 272), § 75]. — If a master or employer to whom a minor has been indentured shall fail, during the term of service, to perform any provision of such indenture, on his part, such minor or any person in his behalf may bring an action against the master or employer to recover damages for such failure; and if satisfied that there is sufficient cause, the court shall direct such indenture to be canceled, and may render judgment against such master or employer for not to exceed one thousand nor less than one hundred dollars, to be collected and paid over for the use and benefit of such minor to the corporation or officers indenturing such minor, if so indentured, and otherwise, to the parents or guardian of the child.

This section is a re-enactment of L. 1871, ch. 934, § 5, and L. 1884, ch. 438, § 6, without change in substance.

Section 7. Assignment of Indenture on Death of Master or Employer.

[Domestic Relations Law (L. 1896, ch. 272), § 76]. — On the death of a master or employer to whom a person is indentured by the poor officers of a municipal corporation, the personal representatives of the master or employer may, with the written and acknowledged consent of such person, assign such indenture and the assignee shall become vested with all the rights and subject to all the liabilities of his assignor; or if such consent be refused, the assignment may be made with like effect by the county judge of the county, on proof that fourteen days' notice of the application therefor has been given to the person indentured, to the officers by whom indentured, and to his parent or guardian, if in the country.

This section is a re-enactment of L. 1884, ch. 438, § 12, without change of substance, except that the former act conferred jurisdiction upon the surrogate instead of the county judge.

Section 8. Contracts with Apprentices in Restraint of Trade Void.

[Domestic Relations Law (L. 1896, ch. 272), § 77]. — No person shall accept from any apprentice any agreement or cause him to be bound by oath, that after his term of service expires, he will not exercise his trade, profession or employment in any particular place; nor shall any person exact from any apprentice, after his term of service expires, any money or other thing, for exercising his trade, profession or employment in any place. Any security given in violation of this section shall be void; and any money paid, or valuable thing delivered, for the consideration, in whole or in part, of any such agreement or exaction, may be recovered back by the person paying the same, with interest; and every person accepting such agreement, causing such obligation to be entered into, or exacting money or other thing, is also liable to the apprentice in the penalty of one hundred dollars, which may be recovered in a civil suit.

This section is a re-enactment of R. S. Pt. II, ch. 8, tit. IV, §§ 39, 40, without change in substance.

CHAPTER XVI.

ABANDONMENT OF WIVES AND CHILDREN.

[*Code of Criminal Procedure*, §§ *899–913*.]

SECTION 1. ABANDONMENT, DISORDERLY CONDUCT.
2. ON COMPLAINT, WARRANT TO BE ISSUED.
3. ON CONFESSION OR PROOF THAT HE IS A DISORDERLY PERSON, SECURITY TO BE REQUIRED.
4. IF SECURITY GIVEN, DEFENDANT TO BE DISCHARGED, IF NOT, TO BE CONVICTED; FORM OF CERTIFICATE.
5. CERTIFICATE TO CONSTITUTE RECORD OF CONVICTION: COMMITMENT THEREON.
6. UNDERTAKING, FORFEITURE OF.
7. COUNTY COURT TO EXAMINE DISORDERLY PERSONS.
8. DISCHARGE OR BINDING OUT OF DISORDERLY PERSONS.
9. IMPRISONMENT OF DISORDERLY PERSONS.

Section 1. Abandonment, Disorderly Conduct.

[CODE CRIM. PRO., § 899]. — The following are disorderly persons:

1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means;

2. Persons who threaten to run away and leave their wives or children a burden upon the public.

[Subdivisions 3–9 are omitted.]

The first two subdivisions of this section are the only ones applicable to the subject of this work.

These sections of the Code of Criminal Procedure provide for compelling husbands to support their children and wives when they are liable to become a burden upon the public.

Sections 914–926 of the Code of Criminal Procedure [Chapter XVII], provide a remedy for compelling the support of poor persons by their relatives legally liable therefor. This remedy is applied by means of an order directing the payment of a certain amount of money per week for

such support. The order is enforced by a warrant against the property of the person liable.

But the remedy against a husband or father is more stringent. An abandonment makes him a disorderly person, and he can be punished as such by imprisonment.

Object of statute. — The statute is designed to protect the public against a burden of supporting a wife and children when the husband, without just cause, neglects or refuses to perform his legal obligation in that regard. It is not intended to give the wife any new remedy, either directly or indirectly. Interpreted literally, it might seem to warrant the conviction when the husband, possessed of proper means, for any cause refuses to support his wife. We do not think, however, such could have been the legislative intent. It authorizes a criminal proceeding and declares that to be a crime which was not theretofore punishable as an offense. It must, therefore, be strictly construed with reference to the object in view and the general policy of the law existing at the time it was passed.

We do not think it imposes any new duty upon a husband towards his wife. It simply declares that unreasonable neglect or refusal to perform certain existing obligations, in cases where such conduct will result in imposing a burden upon the public, shall be punishable as a crime. Any other view would result in a most serious disturbance of the reciprocal rights and duties which are founded upon the marital relation. The wife is entitled to reasonable support by the husband. But it is her duty, as well as right, to live with him in such proper place as he provides. He is entitled to determine not only the place, but their style of living, and it is her plain duty to follow him wherever his interests, necessity or reasonable wish may lead. It is only when he neglects or refuses to properly provide for, or maltreats her, or is guilty of infidelity to her, that she is justified in refusing her submission to his reasonable requirements in this respect. People ex rel. Douglas v. Naehr, 30 Hun, 461. This case arose under ch. 395 of L. 1871, as amended by ch. 171 of L. 1882, relating to the punishment of persons abandoning their wives and children, in the county of Kings. It is a similar statute in all respects to these sections of the Code of Criminal Procedure, and the decision of the court in this case is applicable thereto.

The statute providing for proceedings against a person as disorderly for abandoning his wife without support is summary and penal and should be strictly construed. It is of a criminal nature and it is incumbent upon the People to prove the charge. The abandonment contemplated by the statute means a willful and voluntary separation by the husband from the wife without justification. There is no abandonment within the meaning of the statute where the husband lives apart from the wife in obedience to a judgment of separation from bed and board obtained upon her suit. The common-law obligation to support is modified by such separation so that it cannot be enforced by proceedings for attachment under the statute, even if the

decree makes no provision for support. People ex rel. Commissioners v. Cullen, 153 N. Y. 629.

Though husband and wife have each been adjudged guilty of adultery, in an action for divorce, the husband is still bound to support the wife, and may be convicted as a disorderly person for refusing to support her. People ex rel. Kellar v. Schrady, 24 Misc. 532.

What constitutes support.— A husband cannot be made a vagrant and a disorderly person and held amenable to this statute by not complying with any condition in respect to support which the wife may see fit to impose, and the reasonableness of the condition cannot be referred to the decision of a jury. The husband has a right to select his own residence, and the support the statute was intended to secure is the necessaries of life, or such as the party had been accustomed to and the husband is able to provide. This summary statute was designed to enforce actual physical support only, not to interfere with the marital relation, and when such support is tendered the husband cannot be made liable under it, although he has been guilty of acts entitling the wife to an absolute divorce. People v. Pettit, 74 N. Y. 320.

The duty is upon the husband to provide suitable support for his wife. If he has been and continues ready, and in due time offers in good faith to do so, he has a defense against the charge of breach of the condition of the undertaking. The matter of association, other than that it be respectable, is not a controlling element to be considered upon a question of this character. With the husband is the right to select, as well as the duty to provide, a home for his wife; and in that respect his judgment, fairly exercised, must govern, in so far as to relieve him from the charge of being a disorderly person. Lutes v. Shelley, 40 Hun, 197.

In defining the words "adequate support" and the words "according to their means," found in subdivision 1 of this section, reference may be had to the rules of law existing before the statutes. Such rule is laid down as follows: The husband was bound to furnish a wife's necessaries or support suitable to her station and his condition in life. Bulkley v. Boyce, 48 Hun, 259.

In the prosecution of defendant as a disorderly person for failing to support his wife, evidence which would justify a finding that he had actually abandoned his wife without adequate support will not justify the magistrate in finding him guilty as a disorderly person in that "he did leave his wife in danger of becoming a burden upon the public." People v. Miller, 30 Misc. 355.

Section 2. On Complaint, Warrant to be Issued.

[Code Crim. Pro., § 900].— Upon complaint on oath, to a justice of the peace or police justice of a city, village or town,

or to the mayor, recorder, city judge or judge of the general sessions of the city, against a person, as being disorderly, the magistrate must issue a warrant, signed by him, with his name of office, requiring a peace officer to arrest the defendant, and bring him before the magistrate for examination.

Action may be brought by societies for prevention of cruelty to children.— The fact that a child has voluntarily left his home does not absolve the father from his obligation to support and maintain him, nor relieve the father from liability under this section for a failure to do so. Under L. 1875, ch. 130, providing that societies for the prevention of cruelty to children may prefer a complaint before any court or magistrate having jurisdiction for the violation of any law relating to or affecting children, a society organized for such purpose may prosecute cases arising under this section, and the president of such a society may prosecute such an action, although no formal action has been taken by the society, since such prosecution is an incident to the execution of the trust reposed in him as the head of the corporate body. People ex rel. Balch v. Strickland, 13 Abb. N. C. 473.

Evidence. — In a proceeding instituted by a wife against a husband for abandonment, it is competent for her to show that she was compelled to leave her husband because she was in imminent danger of suffering personal violence at his hands, and because it was unsafe for her to remain in the house with him. People ex rel. Scherer v. Walsh, 33 Hun, 345.

The charge of a wife against her husband as a disorderly person in failing to support her is not sustained by evidence that he failed to support their child. Such evidence is incompetent in such a proceeding. Therefore a conviction by a magistrate on both charges is erroneous, in so far as it convicts him of a distinct offense in having failed to support the child. People ex rel. Keller v. Powers, 35 Misc. 775.

In an action against her husband, a disorderly person, for abandoning his wife, and the question as to whether they are husband and wife being in issue, it was held that hearsay evidence as to the death of the wife's first husband was not admissible. People v. Miller, 30 Misc. 355.

In a proceeding instituted on behalf of the people to compel a husband to support his wife, it was held that as a defense the husband must show that he had obtained a decree dissolving the marriage or prove by independent evidence such infidelity of his wife as would entitle him to such relief. It was further held that a certified copy of the findings of a jury in an action for divorce to the effect that both husband and wife had been guilty of adultery does not constitute a defense. People ex rel. Keller v. Shrady, 40 App. Div. 460.

Section 8. On Confession or Proof that He is a Disorderly Person, Security to be Required.

[Code Crim. Pro., § 901].— If the magistrate be satisfied, from the confession of the defendant or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, by one or more sureties approved by the magistrate, to the following effect:

1. If he be a person described in the first or second subdivision of section 899, that he will support his wife and children, and will indemnify the county, city, village or town, against their becoming, within one year, chargeable upon the public;

2. In all other cases, that he will be of good behavior for the space of one year;

Or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrate.

Meaning of confession.— The confession of the defendant spoken of in this section upon which the magistrate can convict him as a disorderly person means a plea of guilty or what is tantamount to it. It would be dangerous to allow a magistrate to deduce an admission of guilt by a process of argument. Bennac v. The People, 4 Barb. 164.

Bond to comply with terms of order.— The bond given by a person convicted of being a disorderly person for refusing to support his wife must comply strictly with the terms and conditions of the order made under the statute providing for the same, otherwise it will be void. The fact that the instrument signed is unsealed is of no importance. Commissioners of Charities of Kings County v. Hammil, 33 Hun, 348.

Terms of bond not prescribed by statute.— The character of the undertaking is provided for, but its form, except as to the terms of the obligation to be assumed by it, is not prescribed by the statute. It was properly made in the name of the people for the benefit of the municipality concerned, and prosecution upon it for breach could be had in the name of the officer authorized by the statute to take the place of plaintiff in the action for that purpose. Lutes v. Shelley, 40 Hun, 197.

Amount of bond in nature of penalty.— The law imposes upon the husband the duty of providing for the support of his family, and the neglect to do so is a violation of law and renders him liable to be

treated as a disorderly person. It is wholly immaterial who furnishes them with support so long as he does not. It is his omission to perform his moral as well as legal duty that constitutes the violation of the statute. Instead of treating the recognizance as of the nature of a bond of indemnity to the town or county to repay such sums as either may have advanced for the support of the family, the amount named in it should be held to be a penalty imposed for the neglect to support. The object of the statute is to compel the husband to support his family or pay the penalty incurred by his neglect, or doing neither to be imprisoned until he shall consent to obey the law. People v. Pettit, 3 Hun, 416. This case was reversed in 74 N. Y. 320, but upon grounds which did not include the question as to the object of the bond.

Appeal. — Where a person has been convicted as a disorderly person for abandoning his wife without support, and has given an undertaking to obey an order requiring the payment of a weekly allowance, he is precluded, by section 861 of the Code of Criminal Procedure, from subsequently appealing from any other part of the order of the magistrate than that which fixes the amount of the allowance. People ex rel. Commissioner v. Benson, 63 App. Div. 142.

Section 4. If Security Given, Defendant to be Discharged, if not, to be Convicted; Form of Certificate.

[Code Crim. Pro., § 902].— If undertaking be given, the defendant must be discharged. But if not, the magistrate, must convict him as a disorderly person, and must make and sign with his name of office, a certificate in substantially the following form:

"I certify that A. B., having been brought before me, charged with being a disorderly person, I have duly examined the charge, and that upon his own confession in my presence [or 'upon the testimony of C. D.,' etc., naming the witnesses], by which it appears that he is a [pursuing the description contained in the subdivision of section eight hundred and ninety-nine, which is appropriate to the case], I have adjudged that he is a disorderly person.

"Dated at the town [or 'city'] of ....., the .... day of ....., 18..

"E. F.

"Justice of the peace of the town of .....

"[Or as the case may be.]"

Section 5. Certificate to Constitute Record of Conviction; Commitment Thereon.

[Code Crim. Pro., § 903].— The magistrate must immediately cause the certificate, which constitutes the record of conviction, to be filed in the office of the clerk of the county, and must, by a warrant signed by him with his name of office, commit the defendant to the county jail, or in the city of New York, to the city prison or penitentiary of that city, or in the county of Kings, to the penitentiary of that county, for not exceeding six months at hard labor, or until he give the security prescribed in section nine hundred and one.

Defendant committed to Albany penitentiary.— This section does not repeal the provisions of ch. 152 of L. 1844, establishing the Albany penitentiary, and ch. 183 of L. 1847, amendatory thereto, requiring a person convicted before one of the justices of the peace of the city of Albany of being a disorderly person and sentenced to hard labor to be sent to such penitentiary. Therefore, a person convicted before one of the police justices of such city of being a disorderly person may be sentenced to imprisonment in the Albany penitentiary instead of being committed to the Albany county jail. The principle involved is, that a special local statute is not repealed by a general statute, unless the intent to repeal is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter. Matter of Wacher, 62 How. Pr. 352.

Section 6. Undertaking, Forfeiture of.

[Code Crim. Pro., § 904].— The undertaking mentioned in section nine hundred and one is forfeited by the commission of any of the acts which constitute the person by whom it was given a disorderly person, and in the case of a person described in the seventh and eighth subdivisions of section eight hundred and ninety-nine, by his playing or betting, at one time or sitting, for money or property exceeding the value of two dollars and fifty cents.

UNDERTAKING, FORFEITURE OF.

Undertaking forfeited when husband neglects to support.— Under a proper construction of this section it is evident that the undertaking to be given is forfeited when the husband fails or neglects to provide for the wife according to his means. Such an undertaking ought not to be avoided and held invalid because it contains the words "according to his means." Such an undertaking is in accordance with the requirements of the statute under which it was given. Bulkley v. Boyce, 48 Hun, 259.

How prosecuted, and proceeds how applied [CODE CRIM. PRO., § 905, amended L. 1901, ch. 165].— When an undertaking is forfeited, it may be prosecuted in the name of the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, in the name of the corporation of that city, and the sum collected in the action must be paid into the county or city treasury, as the case may be, for the benefit of the poor. In case the defendant is an Indian, it must be prosecuted in the name of the people of the state of New York by the attorney-general, or at his request by the district attorney of the county, and the sum collected in the action, must be paid into the state treasury, for the benefit of the Indian poor.

Where an action is brought upon a bond for the support of a wife and children, given by the husband convicted as a disorderly person, the adultery of the wife during the term of the bond is no defense to the action. Keller v. Foleron, 36 Misc. 534.

When new security may be required, or defendant committed after recovery on undertaking [CODE CRIM. PRO., § 906].— Upon a recovery on the undertaking, the court in which it is had, may require from the defendant new security in the manner provided in section nine hundred and one, or if he fail to give it, may commit him in the manner provided in section nine hundred and three.

Defendant committed for not giving security; how discharged [CODE CRIM. PRO., § 907].— A person committed as a disorderly person, on failure to give security, may be dis-

charged by any two justices of the peace or police justices, or the county judge of the county, upon giving security as originally required pursuant to section nine hundred and one.

Section 7. County Court to Examine Disorderly Persons.

Keeper of prison to return list of disorderly persons, et cetera [CODE CRIM. PRO., § 908]. — The keeper of every prison to which disorderly persons may be committed, must return to the county court of the county, on the first day of each term, a list of the persons so committed and then in his custody, with the nature of the offense of each, the name of the magistrate by whom he was committed and the term of his imprisonment.

Examination of the case by the court [CODE CRIM. PRO., § 909]. — The county court must thereupon inquire into the circumstances of each case, and hear any proof that may be offered, and must examine the record of conviction, which is evidence of the facts contained in it, until disproved.

Section 8. Discharge or Binding Out of Disorderly Persons.

Court may discharge, or authorize the binding out of disorderly persons [CODE CRIM. PRO., § 910.] — The court may discharge a person so committed from imprisonment, either absolutely or upon his giving security as provided in section nine hundred and one, or if he be a minor, may authorize the county superintendents of the poor, or the overseers of the poor of the town, or in the city of New York, commissioners of charities and corrections, to bind him out in some lawful calling as a servant, apprentice, mariner or otherwise, until he be of age; or if he be of age, to contract for his service with any person, as a laborer, servant, apprentice, mariner or otherwise, for not exceeding one year. The binding out or contract, pursuant to this section, has the same

WHO MAY BE COMPELLED TO SUPPORT POOR RELATIVES.

General. — " The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during our minority, and honor and reverence ever after; they who protected the weakness of our infancy are entitled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring in case they stand in need of assistance." 1 Bl. Com. 453.

Liability created by statute. — The liability of a child to support his parents, who are infirm, destitute or aged, is wholly created by statute, and, therefore, the law does not imply a promise from the child to pay for necessaries furnished, without his request, to an indigent parent. Edwards v. Davis, 16 Johns. 281.

At common law no legal duty rests upon a child to support his indigent parent, and until proceedings to charge him with such support are taken as provided by statute he is not liable therefor. Herendeen v. Dewitt, 49 Hun, 53. And a son, who requests the superintendents of the poor to take proceedings to have his father committed to an asylum, and promises to pay a certain sum towards his future support, is liable therefor. Id.

Who are liable. — The statute requiring a grandchild to support his indigent grandparents extends to the case of his indigent maternal grandparents. Ex parte Hunt, 5 Cow. 284.

A husband is not bound to maintain his wife's children, especially her illegitimate children, born before his marriage. Overseers of the Poor v. Cox, 7 Cow. 235.

The wife of a man who is bound by law to support her, and who is abundantly able to do so, cannot be regarded as a pauper. Norton v. Rhodes, 18 Barb. 100.

Actions against third persons interfering with support. — The case of Stevens v. Cheney, 36 Hun, 1, was under the Civil Damage Act brought by a father who was dependent upon his son for support and who was deprived of that support by the sale of intoxicating liquors to the son by the defendant. The court said: " Under this statute (§ 914) the child is bound to aid in the support of a parent if he is a poor person and unable to defend himself, and, if he fails to do so, the court of sessions may compel him. If the child recognizes the duty laid upon him by statute to care for his indigent parent and voluntarily assumes it without waiting to be compelled by the court of sessions, what right have third persons or wrongdoers to interfere and prevent? The law affords the same protection to those who perform their duty voluntarily as it does to those who reluctantly act under compulsion, and we are of opinion that if the parent is a poor person within the provisions of the statute, it was the duty of the son to aid in his support, and if he voluntarily did that and the plaintiff has been deprived of his means of support by reason of the intoxication, that then he may recover, even though his child

is over the age of twenty-one years." See also De Puy v. Cook, 90 Hun, 43.

Where more than one are liable. — If there are two or more persons equally liable to support an indigent person, contribution may be ordered and all may be made to pay in accordance with their means. Stone v. Burgess, 47 N. Y. 521.

Does not extend to husband and wife. — The common law affords no means of compelling a husband to support his wife otherwise than by making him liable to third persons who have supplied her with necessaries after he has improperly refused so to do, and the statute providing for the compulsory support of indigent relatives does not apply to husband and wife. People ex rel. Kehlbeck v. Walsh, 11 Hun, 292.

It is the duty of superintendents of the poor to care for paupers. The wife of a man who is abundantly able to provide for her cannot be deemed a poor person. Superintendents of the poor cannot, therefore, maintain an action in their official capacities against a husband for boarding, clothing, and medical aid furnished to his wife as a pauper. Norton *v.* Rhodes, 18 Barb. 100.

Section 2. Order to Compel a Person to Support Poor Relative.

Application for Order [CODE CRIM. PRO., § 915]. — If a relative of a poor person fail to relieve and maintain him, as provided in the last section, the overseers of the poor of the town where he is, or in the city of New York, the commissioner of public charities may apply to any court of record or to a judge thereof where the relative dwells, for an order to compel such relief, upon at least ten days' written notice, served personally, or by leaving it at the last place of residence of the person to whom it is directed, in case of his absence, with a person of suitable age and discretion. If such poor person be insane and legally committed to and confined in an institution supported in whole or in part by the state, and his relatives refuse or neglect to pay for his support and maintenance therein, application may be made by the treasurer of such institution in the manner provided in this section for an order directing the relatives liable therefor to make such payment. [Thus amended by L. 1898, ch. 399, taking effect April 22, 1898].

Who to maintain action. — The overseers of the poor of the town of Cazenovia were the proper parties to begin proceedings to compel a father to support his poor and infirm son. Tillotson v. Smith, 12 N. Y. St. Rep. 331.

The superintendent of the poor cannot maintain an action against a husband for the maintenance of his wife as a pauper. Norton v. Rhodes, 18 Barb. 100, and see note to preceding section.

Court to hear the case, and make order of support [Code Crim. Pro., § 916]. — At the time appointed in the notice, the court or a judge thereof must proceed summarily to hear the allegations and proofs of the parties, and must order such of the relatives of the poor person, mentioned in section nine hundred and fourteen, as were served with the notice and are of sufficient ability, to relieve and maintain him, specifying in the order the sum to be paid weekly for her support, and requiring it to be paid by the father, or if there be none, or if he be not of sufficient ability, then by the children, or if there be none, or if they be not of sufficient ability, then by the mother. If the application be made to secure an order compelling relatives to pay for the maintenance of insane poor persons committed to and confined in an institution supported in whole or in part by the state such order shall specify the sum to be paid for his maintenance by his relatives liable therefor, from the time of his reception in such institution to the time of making such order, and also the sum to be paid weekly for his future maintenance in such institution. The relatives served with such notice shall be deemed to be of sufficient ability, unless the contrary shall affirmatively appear to the satisfaction of the court or a judge thereof. [Thus amended by L. 1898, ch. 399, taking effect April 22, 1898.]

Section 3. Support, When to be Apportioned.

[Code Crim. Pro., § 917]. — If it appear that any such relative is unable to wholly maintain the poor person, or to pay for his maintenance if confined in a state institution for the

insane, but is able to contribute towards his support, the court, or a judge thereof, may direct two or more relatives, of different degrees, to maintain him, or to pay for his maintenance in such an institution, if insane, prescribing the proportion which each must contribute for that purpose; and if it appear that the relatives are not of sufficient ability wholly to maintain him, or to pay for his maintenance in such an institution, if insane, but are able to contribute something, the court, or a judge thereof, must direct the sum in proportion to their ability, which they shall pay weekly for that purpose. If it appears that the relatives who are liable for the maintenance of an insane poor person confined in a state institution for the insane are not able to pay the whole amount due for such maintenance from the time of such poor person's admission to such institution, the court or a judge thereof, must direct the sum to be paid for such maintenance in proportion to the ability of the relatives liable therefor. [Thus amended by L. 1898, ch. 399, taking effect April 22, 1898.]

Contribution, effect of. — This section authorizes the court to require persons equally liable for the support of an indigent parent to contribute toward such support according to their ability, and where one of two persons is unable to contribute his entire proportion of such support, the court is authorized to require him to contribute according to his ability, and to require the other to pay the residue. Stone v. Burgess, 47 N. Y. 521, 2 Lans. 439. And an order reciting that the two are of sufficient ability, and directing the proportion each one is to pay, if the proportion is unequal, is, in effect, a determination that the one required to pay the less sum is unable to pay his full proportion, but is able to pay the sum fixed, and such order is valid. Id.

Section 4. Effect and Modification of Order.

[Code Crim. Pro., § 918]. — The order may specify the time during which the relatives must maintain the poor person, or during which any of the sums directed by the court, or a judge thereof, are to be paid, or it may be indefinite, or until the further order of the court, or a judge thereof. If the

order be for payment of a weekly sum for the maintenance of an insane poor person in a state institution, the order shall specify that such sum shall be paid as long as such insane poor person is maintained in such institution. The court, or a judge thereof, may from time to time vary the order, as circumstances may require, on the application either of any relative affected by it, or of an officer on whose application the order was made, upon ten days' written notice. [Thus amended by L. 1898, ch. 399, taking effect April 22, 1898.]

Order, in effect a judgment. — So long as an order, made by a court of sessions, directing the relative of a poor person to pay a specified sum periodically to the superintendent of the poor for the support of such poor person, remains unchanged, such relative is liable to pay the sum therein prescribed. If he or she desires to be relieved therefrom application should be made under the above section of the Code for an amendment of the order. Aldridge v. Walker, 73 Hun, 281, 57 N. Y. St. Rep. 273, 26 N. Y. Supp. 296.

Such an order is not void because it gives no option to such person either to support her daughter or to pay the amount provided, and if it is irregular the remedy is by appeal, and the question of its irregularity cannot be properly raised in an action brought to collect the amount directed to be paid by such person. Id.

While the determination provided for by this title is denominated an order, it was a final determination of the matter, and in effect a judgment. Id.

Notice. — The notice required by this section should be served upon the officer making application for the order compelling the relative to support the poor person.

Section 5. Costs and Expenses; Enforcement of Order.

Costs, by whom to be paid, and how enforced [CODE CRIM. PRO., § 919]. — The costs and expenses of the application must be ascertained by the court, and paid by the relatives against whom the order is made; and the payment thereof, and obedience to the order of maintenance, and to any order for the payment of money, may be enforced by attachment.

The amount of the costs is in the discretion of the court.

Action on failure to comply with order [CODE CRIM. PRO., § 920]. — If a relative, required by an order of the court, or a judge thereof, to relieve or maintain a poor person, neglect to do so in the manner provided by the officers mentioned in section nine hundred and fourteen, and neglect to pay to them weekly the sum prescribed by the court, or a judge thereof, the officers may maintain an action against the relative, and recover therein the sum prescribed by the court, or a judge thereof, for every week the order has been disobeyed, to the time of the recovery, with costs, for the use of the poor. If the order directs a relative to pay for the maintenance of an insane poor person in a state institution, and such relative refuses or neglects to pay the amount specified therein, an action may be brought by the treasurer of such institution in its corporate name to recover the amount due to such institution by virtue of such order. [Thus amended by L. 1898, ch. 399, taking effect April 22, 1898.]

When action will lie. — Defendant is not in default of an order of the court requiring him to support his mother at his own house when he has to support her for about a year, and she leaves without any just cause and does not return, he being willing to receive and support her in his family. Converse v. McArthur, 17 Barb. 410.

When an order is made requiring the relative of a person to support him, and fixing a sum to be paid weekly, the relative may provide for the support of the pauper, at such place and in such manner as he shall deem proper, provided the place and manner are approved by the overseer, and it is not until he has neglected or refused to do this that he is liable for the sum directed to be paid. Duel v. Lamb, 1 N. Y. Sup. Ct. (T. & C.) 66.

Section 6. Abandonment of Children.

[CODE CRIM. PRO., § 921]. — When the father, or the mother being a widow or living separate from her husband, absconds from the children, or a husband from his wife, leaving any of them chargeable or likely to become chargeable upon the public, the officers mentioned in section nine hundred and fourteen may apply to any two justices of the

peace or police justices in the county in which any real or personal property of the father, mother or husband is situated, for a warrant to seize the same. Upon due proof of the facts, the magistrate must issue his warrant, authorizing the officers so applying to take and seize the property of the person so absconding. Whenever any child shall be committed to an institution, pursuant to any provision of the Penal Code, any magistrate may issue a warrant for the arrest of the father of the child, and examine into his ability to maintain such child in whole or in part; and if satisfied that such father is able to contribute toward the support of the child, then the magistrate shall, by order, require the weekly payment by such father of such sum, and in such manner as such magistrate shall, in said order, direct, toward the maintenance of such child in such institution, which amount when paid shall be credited by the institution to the city, town or county against any sums due to it therefrom on account of the maintenance of the child.

Who may maintain proceedings. — One of two overseers of the poor is authorized to institute and carry on proceedings for the seizure of property of one who has absconded, leaving his wife or child chargeable to the town. When only one overseer acts the consent of the other will be presumed. Downing v. Rugar, 21 Wend. 178.

Evidence. — It is the duty of the court, before confirming the warrant and seizure and directing the sale of property, to require the overseers to produce some evidence to establish the case charged in the warrant, against the party whose property is seized, and the case may be contested by such party. People v. Overseers of Triangle, 23 Barb. 236.

Sums paid to institution to be credited to town, etc.— In cases of a commitment of a child to an institution, the above section authorizes a magistrate to order the father to pay a sum for the child's support which is to be credited by the institution to the city, town or county against any sum due for maintenance. People v. Dickson, 57 Hun, 312, 315.

Section 7. Seizure of Property of Absconding Parents; Transfer Thereof, when Void.

[Code Crim. Pro., § 922]. — The officers so applying may seize and take the property, wherever it may be found in the

same county; and are vested with all the right and title thereto, which the person absconding then had. The sale or transfer of any personal property, left in the county from which he absconded, made after issuing the warrant, whether in payment of an antecedent debt or for a new consideration, is absolutely void. The officers must immediately make an inventory of the property seized by them, and return it, together with their proceedings, to the next county court of the county where they reside, there to be filed.

Section 8. Confirmation or Discharge of Warrant.

When confirmed or discharged [CODE CRIM. PRO., § 923]. — The court, upon inquiring into the circumstances of the case, may confirm or discharge, the warrant and seizure; and if it be confirmed, must, from time to time, direct what part of the personal property must be sold, and how much of the proceeds of the sale, and of the rents and profits of the real property, if any, are to be applied toward the maintenance of the children or wife of the person absconding.

Inquiry must be as to merits. — It is not sufficient that the court is satisfied that a warrant has been issued by two justices, and that the overseers have seized the property and made an inventory thereof, and returned it to the court. An inquiry into the merits of the case was intended by the legislature. People v. Overseers of Triangle, 23 Barb. 236.

In what cases to be discharged [CODE CRIM. PRO., § 924]. — If the party against whom the warrant issued, return and support the wife and children so abandoned, or give security satisfactory to any two justices of the peace or police justices in the city, village or town, to the overseers of the poor of the town, or in the city of New York, to the commissioners of charities and corrections, that the wife or children so abandoned shall not be chargeable to the town or county, then the warrant must be discharged by an order of the magistrates, and the property taken by virtue thereof restored to the party.

Section 9. Sale of the Property Seized, and Application of its Proceeds.

[Code Crim. Pro., § 925]. — The officers must sell at public auction the property ordered to be sold, and receive the rents and profits of the real property of the person absconding, and in those cities, villages or towns which are required to support their own poor, the officers charged therewith must apply the same to the support of the wife or children so abandoned; and for that purpose must draw on the county treasurer, or in the city of New York, upon the comptroller, for the proceeds as directed by special statutes. They must also account to the county court of the county, for all money so received by them, and for the application thereof, from time to time, and may be compelled by that court to render that account at any time.

Section 10. Superintendents of Poor may Enforce Provisions of Title.

[Code Crim. Pro., § 926]. — In those counties where all the poor are a charge upon the county, the superintendents of the poor are vested with the same powers, as are given by this title to the overseers of the poor of the town, in respect to compelling relatives to maintain poor persons, and in respect to the seizure of the property of a parent absconding and abandoning his family; and are entitled to the same remedies in their names, and must perform the duties required by this title, of overseers, and are subject to the same obligations and control.

Powers as to maintaining actions. — An action cannot be maintained by superintendents of poor against a husband for boarding, clothing and medical aid furnished to his wife as a pauper; notwithstanding he has maltreated her and expelled her from his house without just cause, and refuses to provide for her though of sufficient ability to do so. Norton v. Rhodes, 18 Barb. 100.

It was proper for the overseers of the poor of the town of Cazenovia to begin proceedings against a father to compel him to support his poor and infirm son. Tillotson v. Smith, 12 N. Y. St. Rep. 331.

CHAPTER XVIII.

APPENDIX.

Showing Laws Repealed by the Domestic Relations Law. (L. 1896, ch. 272.)

Code of Criminal Procedure, §§ 939 and 940.
Revised Statutes, pt. 2, ch. 1, tit. I, art. 1, §§ 5, 6, 7.
Revised Statutes, pt. 2, ch. 8. All, except § 49 of tit. I.

LAWS OF—	Chapter.	Section.
1830.....	320.....	25 to 29 inclusive.
1840.....	80.....	All.
1845.....	11.....	All.
1848.....	200.....	All.
1849.....	375.....	All.
1850.....	266.....	All.
1851.....	321.....	All.
1853.....	576.....	All.
1858.....	187.....	All.
1860.....	90.....	All.
1862.....	172.....	All.
1866.....	656.....	All.
1870.....	277.....	All.
1871.....	32.....	All.
1871.....	934.....	All, except last sentence of § 3, as am. by L. 1888, ch. 437.
1873.....	25.....	All.
1873.....	821.....	All.
1873.....	830.....	All.
1877.....	430	All.
1878.....	300.....	All.
1879.....	248.....	All.
1880.....	472.....	All.

LAWS REPEALED BY THE DOMESTIC RELATION LAW.

LAWS OF—	Chapter.	Section.
1884.....	381.....	All.
1884.....	438.....	All, except 1, 2, 3, 4, 5, down to and including the word "servant" first occurring, and 7 down to and including the word "adoption" first occurring.
1887.....	24.....	All.
1887.....	77.....	All.
1887.....	537.....	All.
1887.....	703.....	All.
1888.....	78.....	All.
1888.....	437.....	All, except last sentence.
1888.....	454.....	All.
1888.....	485.....	All.
1889.....	58	All.
1889.....	415.....	All.
1890.....	51.....	All.
1892.....	594.....	All.
1893.....	175.....	All.
1893.....	242.....	All.
1893.....	284.....	All.
1893.....	601.....	All.
1895.....	531.....	All.

LIST OF FORMS.

PAGE.

No. 1. Civil contract of marriage 285
2. Examination of parties to a marriage 286
3. Certificate of marriage 286
4. Summons in matrimonial actions 287
5. Affidavit of personal service of summons..... 288
6. Complaint in action to annul marriage because one of parties had not attained age of consent 289
7. Complaint in action to annul marriage on ground that former husband or wife is living 290
8. Complaint in action to annul marriage on ground of lunacy 292
9. Complaint in action to annul marriage for force or duress. 292
10. Complaint in action for divorce 293
11. Answer in action for divorce on ground of adultery..... 295
12. Application for order directing trial of issues..... 296
13. Notice of motion for order directing trial by jury..... 297
14. Proposed issues of fact to be tried by jury..... 298
15. Proposed amendments to issues 298
16. Order directing the trial of issues by jury..... 299
17. Judgment in action for divorce 299
18. Order of reference in matrimonial action 300
19. Report of referee to hear and determine issues in divorce proceedings 301
20. Judgment for divorce upon report of referee..... 302
21. Notice of appearance by corespondent 303
22. Answer of corespondent 304
23. Complaint in action for separation on ground of cruelty.. 304
24. Complaint in action for separation on ground of abandonment 306
25. Judgment in action for separation 306
26. Petition for alimony 308
27. Order of reference to determine alimony..... 309
28. Report of referee as to alimony 310
29. Order granting alimony and counsel fees during pendency of action 311
30. Application of defendant for leave to remarry..... 312
31. Order granting leave to defendant to remarry..... 313
32. Complaint in action for dower 314
33. Interlocutory judgment in action for dower 315
34. Oath of referee or commissioners 316
35. Report of referee for the admeasurement of dower..... 317

LIST OF FORMS.

PAGE.

No. 36. Release of dower 318
37. Final judgment admeasuring dower 318
38. Petition for writ of *habeas corpus* for detention of child... 320
39. Writ of *habeas corpus* 321
40. Return to writ of *habeas corpus* 322
41. Petition for appointment of general guardian of an infant upwards of fourteen years of age 323
42. Decree appointing guardian 325
43. Application for order allowing and confirming adoption.. 326
44. Consent of parents to adoption 327
45. Statement as to age of child 328
46. Agreement for adoption of child 328
47. Order confirming adoption 329

FORMS.

No. 1.

Civil Contract of Marriage.

(Domestic Relations Law, § 11, *ante*, p. 9.)

This agreement, made this ..... day of ....., 19.., by and between A. B., residing at ....., county of ....., State of ....., and C. D., residing at ....., county of ....., State of .....;

Witnesseth, That the said parties have this day mutually and each for him and herself willingly agreed to become lawfully united in marriage, in accordance with the provisions of subdivision 4 of section 11 of the Domestic Relations Law, and that on and after the date hereof, each for him and herself, undertakes to assume all the obligations attendant upon the relationship of husband and wife, and to be controlled in all respects by law, in the same manner and to the same extent as if the marriage of such parties had been officially solemnized by a clergyman, minister, priest or magistrate.

That this contract of marriage has been executed on the above-named day at ..... [*state place where contract is executed*], in the city [*or village*] of ....., county of ....., State of .....

That the witnesses to such marriage are E. F., residing at ....., county of ....., State of ....., and G. H., residing at ....., county of ....., State of .....

(Signed) A. B.
C. D.

Witnesses:
E. F.
G. H.

STATE OF NEW YORK, }
COUNTY OF ....., } *ss.:*

On this ..... day of ....., 19.., before me personally appeared A. B. and C. D., to me personally known, and known to be the persons described in the foregoing instrument, and severally acknowledged that they executed the same, for the uses and purposes therein mentioned.

L. M.,
Notary Public [*or other official title*].

FORMS.

No. 2.

Examination of Parties to a Marriage.

(Domestic Relations Law, § 13, *ante*, p. 10.)

STATE OF NEW YORK, } *ss.:*
COUNTY OF ....., }

A. W. and L. F., being duly sworn, stated, each for him and herself, as follows:

A. W. states that his name is [*giving full name, including Christian and surname*]; that he resides at ..... street, in the city [*or village*] of ....., county of ....., State of .....; that he was born on the ..... day of ....., 18.., and is therefore of the age of ..... years [*or more than eighteen years of age*].

And L. F. states that her name is [*giving full name, including Christian and surname*]; that she resides at ..... street, in the city [*or village*] of ....., county of ....., State of .....; that she was born on the ..... day of ....., 18.., and is, therefore, of the age of ..... years [*or more than eighteen years of age*].

The names of the witnesses who attended at the marriage of the above-named parties are A. B., residing at ....., county of ....., State of ....., and C. D., residing at ....., county of ....., State of .....

(Signed) A. W.
L. F.

Subscribed and sworn to before me, }
this ..... day of ....., 19... }

E. F.,
[*Magistrate or officiating clergyman.*]

No. 3.

Certificate of Marriage.

(Domestic Relations Law, § 14, *ante*, p. 11.)

STATE OF NEW YORK, } *ss.:*
COUNTY OF ....., }

I hereby certify that A. W., residing at the city [*or village*] of ....., county of ....., State of ....., and L. F.,

residing at the city [*or village*] of ....., county of ....., State of ....., appeared before me at [*state place*] in the city [*or village*] of ....., county of ....., State of....., on the ..... day of ....., 19.., and were by me, at such place and time, lawfully united in marriage; that such persons were known by me [*or were satisfactorily proved by their oaths, or by the oath of a person known to me*] to be the persons above described, and that they had attained the age of legal consent.

The witnesses who attended at such marriage were A. B., residing at ....., county of ....., State of ....., and C. D., residing at ....., county of ....., State of .....

That after due inquiry by me, there appeared to be no legal impediment to the marriage of the above-described parties.

(Signed) L. F.,
[*Magistrate or officiating clergyman.*]

Dated at .....,
this .....day of ....., 19...

Witnesses:
A. B.
C. D.

No. 4.

Summons in Matrimonial Actions.

(Code Civ. Pro., §§ 417, 1774, *ante*, p. 110.)

SUPREME COURT — COUNTY OF .....

A. B., Plaintiff,

against

C. B., Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day

of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Action to annul a marriage [*or "for a divorce," or "for a separation," as the case may be*].

DAVID BENNETT,
Attorney for Plaintiff,
Office and Post-Office Address, 61 *State Street, Albany, N. Y.*

No. 5.

Affidavit of Personal Service of Summons.

(Code Civ. Pro., § 1774, *ante*, p. 110.)

[*Title of action as in Form No.* 4.]

STATE OF NEW YORK, }
COUNTY OF ....., } *ss.:*
[*City of* .....] }

R. S., being duly sworn, deposes and says; that he is a resident of the city [*or village*] of ....., county of ....., State of New York, and is [*a clerk in the office of the attorney for the plaintiff in the above-entitled action*], and that on the ..... day of ....., he personally served the annexed summons on C. B., the above-named defendant, at [*stating place where service was made, describing it with some particularity*], by delivering to and leaving with him a copy of said summons; that at the time of such service deponent was of the age of ..... years [*no service can be made by a person who is less than eighteen years of age*].

That there was written [*or printed*] upon the face of the copy of the summons so delivered to the above-named defendant an inscription "Action to annul a marriage" [*or "Action for a divorce" or "Action for a separation," as the case may be*].

That he knew the person so served to be the person mentioned and described in such summons as the defendant herein; that his knowledge that the person so served was the defendant and the proper person to be served is derived from his personal acquaintance with the said defendant for a period of ..... years, and from the fact that he has known that the plaintiff and the defendant herein resided together as husband and wife for a period of .....years, at

..... street, in the city [*or village*] of ....., N. Y.; [*or state such other facts known to deponent as will show beyond question that the deponent knew personally the defendant served by him; where deponent did not know personally the defendant so served, he must state in detail the method used by him in ascertaining the identity of the defendant*].

R. S.

Subscribed and sworn to before me, this ..... day of ....., 19...

No. 6.

Complaint in Action to Annul Marriage because One of Parties had not Attained Age of Consent.

(Code Civ. Pro., § 1742, and subd. 1 of § 1743, *ante*, p. 24.)

SUPREME COURT — COUNTY OF .....

A. B., through C. D., her Guardian *ad litem*, Plaintiff,

against

C. B., Defendant.

The plaintiff for a cause of action herein alleges:

I. That the plaintiff herein is an infant of less than the age of twenty-one years, having been born on the ..... day of....., 18..; and that on the ..... day of ....., 19.., upon application duly made as provided by law, C. D. was appointed by the Hon. James Brant, a justice of the Supreme Court [*or by Hon. James Brant, county judge of ..... county*], by an order which has been duly entered, as guardian *ad litem* for such plaintiff for the purposes of this action.

II. That the plaintiff and the defendant were married on the ..... day of ....., 19.., at ....., county of ....., State of New York; and that at such times, and at all times since that time, such parties were and have been residents of such State.

III. That at the time the plaintiff and the defendant were so married, the plaintiff was not of the age of eighteen years, having been born on the ..... day of ....., 18..

IV. That such plaintiff at the time of her marriage with the defendant was residing with her father [*or mother, or guardian*], who had the legal charge of her person; and that such marriage took place without the consent of her father [*or mother, or guardian*].

V. That such marriage has not been ratified by any mutual assent of the parties after the plaintiff herein attained the age of eighteen years, nor since such time have such parties at any time freely cohabited as husband and wife.

Wherefore, the plaintiff herein prays that a judgment be had declaring such marriage contract void, and annulling such marriage, and for such other and further relief as may be just, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff,
Office and Post-Office Address, 61 *State Street, Albany, N. Y.*

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
[*City of* .....] }

C. D., the above-named guardian *ad litem* for A. B., the above-named plaintiff, being duly sworn, deposes and says; that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

C. D.

Subscribed and sworn to before me,
this ..... day of ....., 19.. }

.....

No. 7.

Complaint in Action to Annul Marriage on Ground that Former Husband or Wife is Living.

(Code Civ. Pro., § 1743, subd. 2, *ante*, p. 24.)

[*Title of action.*]

The plaintiff for a cause of action herein alleges:

I. That the above-named plaintiff and defendant were married at the city [*or village*] of ....., county of ....., State of New York, on the ..... day of ....., 19..; and that at such time the said plaintiff and defendant were residents of the State

of New York, and that the plaintiff is now a resident of ....., county of ....., State of New York.

II. That the said plaintiff and defendant lived together as husband and wife from the time of said marriage until on or about the ..... day of ....., 19..

III. That at the time of said marriage the said defendant was the husband [*or wife*] of one L. M., who was then living; that the said defendant and the said L. M. were married at ....., county of ....., State of ....., on the ..... day of ....., 18.., and at the time of the marriage of the above-named plaintiff and defendant the said marriage of the said defendant with the said L. M. was in full force and effect.

IV. That when the marriage of the said plaintiff and defendant herein was contracted, plaintiff believed that L. M., the former husband [*or wife*] of the said defendant was dead [*or that the marriage between the said L. M. and the defendant had been dissolved; or if the former marriage of the defendant was unknown to the plaintiff, such fact should be stated; or if for any other reason the plaintiff supposed that the defendant was qualified to enter into the contract of marriage, it should be so stated in detail*].

V. That, as the issue [*if any*] of the marriage between the plaintiff and the defendant herein, one child, L. B., a boy [*or girl*] was born, on the ..... day of ....., 19.., and that such child is now living.

Wherefore, the plaintiff prays that the marriage between the plaintiff and the defendant herein be annulled and declared void, and that it be adjudged that the said L. B., the issue of the marriage between the said plaintiff and the defendant be for all purposes the legitimate child of the plaintiff and be entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of the said plaintiff, and that the said plaintiff be awarded the care and custody of said child, and for such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,

Attorney for Plaintiff,

Office and Post-Office Address, 61 *State Street, Albany, N. Y.*

[*Verification.*]

No. 8.

Complaint in Action to Annul Marriage on Ground of Lunacy.

(Code Civ. Pro., § 1743, subd. 2, and § 1747, *ante*, p. 35.)

[*Title of action.*]

The plaintiff for a cause of action herein alleges:

I. [*State allegation of marriage as in preceding form.*]

II. That at the time such marriage was contracted the plaintiff was a lunatic, and as such lunatic was incapable of contracting such marriage.

III. That the plaintiff remained a lunatic until about the ..... day of ....., 19.., when he was restored to a sound mind, and has since that time ever been of a sound mind.

IV. That the said plaintiff and the defendant herein have not freely cohabited as husband and wife since the said plaintiff was so restored to sound mind.

V. [*Allege as to whether or not children have been born as the issue of such marriage.*]

Wherefore, the plaintiff prays that a judgment be had annulling such marriage and declaring such marriage contract void; [*in case of children having been born of such marriage, judgment should be prayed in the same manner prescribed in the preceding form*] and such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff,
Office and Post-Office Address, 61 State Street, Albany, N. Y.

[*Verification.*]

No. 9.

Complaint in Action to Annul Marriage for Force or Duress.

(Code Civ. Pro., § 1743, subd. 4, and § 1750, *ante*, p. 36.)

[*Title of action.*]

The plaintiff for a cause of action herein alleges:

I. [*Allege marriage as in Form No. 7.*]

II. That the consent of the plaintiff to said marriage was obtained by force and duress, and that the plaintiff was made to believe that

if he did not marry the said defendant the brother of said defendant would shoot and kill him, the said plaintiff, and that serious violence would be committed upon him by defendant's father, and the said defendant's brother threatnened to kill said plaintiff if he did not marry the defendant, which threats were made with the knowledge and concurrence of the defendant; that in the fear that said threats would be carried out and that plaintiff would be killed or grievously wounded and hurt if he did not, the said plaintiff married the defendant to avoid such hurt or death.

III. That the said plaintiff and defendant have never since such marriage cohabited together as husband and wife.

Wherefore, the plaintiff demands judgment that the aforesaid marriage be annulled and declared void, and that each of the parties be freed from the obligations thereof, and for such other relief as may be necessary, with the costs of this action.

CHARLES J. PATTERSON,
Attorney for Plaintiff.

[*Verification.*]

[NOTE.— The form of the above complaint is taken from that used in the case of Anderson v. Anderson, 147 N. Y. 719.]

No. 10.

Complaint in Action for Divorce.

(Code Civ. Pro., §§ 1756, 1758, and General Rules of Practice, Rule No. 72, *ante*, pp. 40, 45.)

[*Title of action.*]

The plaintiff for a cause of action herein alleges:

I. That the plaintiff and the defendant were married on the ..... day of ....., 18.., at the city [*or village*] of ....., county of ....., State of New York.

II. [*Allege in case parties were not married within the State.*] That the above-named plaintiff and defendant are now and have been since such marriage residents of the city [*or village*] of ....., county of ....., State of New York, [*or state such other jurisdictional matters as are required by section 1758 of the Code of Civil Procedure*].

III. That upon information and belief, since the date of said marriage and on or about the ..... day of ....., 19.., at ..... in the city [*or village*] of ....., county of ....., State of ....., [*here definitely state time and place of alleged adultery*] the defendant committed adultery with ..... [*stating name of person with whom adultery was committed*].

[*If the name of the person with whom the adultery was committed is unknown, the allegation may be as follows:* *That on or about the ..... day of ....., 19.., at ....., in the city* (or village) *of ....., county of ....., State of ....., the defendant committed adultery with a woman whose name is unknown to the plaintiff.*]

IV. That at divers places within the city [*or village*] of ....., county of ....., State of ....., and at various times between the ..... day of ....., 18.., and the time of bringing this action, at what particular times and places plaintiff is unable to state, the defendant has committed adultery with one A. B. [*or with divers persons to the plaintiff unknown*].

V. That such adultery was committed without the consent, connivance, privity or procurement of the plaintiff.

VI. That five years have not elapsed since the plaintiff herein discovered the facts relating to the commission of such adulteries, and that the plaintiff has not voluntarily cohabited with said defendant since the commission of any of the offenses above set forth, and the discovery thereof by the plaintiff, or at any time, since the ..... day of ....., 19...

VII. That the plaintiff is not possessed of any real or personal property in her own name, and that she has no means of livelihood except such as are afforded her by the above-named defendant; that the defendant is seized and possessed of real and personal property to the value of ..... dollars; that he is engaged in the business of [*state nature of business or employment*] and that his annual income is at least the sum of ..... dollars.

VIII. That the following children have been born of the marriage between the above-named plaintiff and defendant: [*State names of children, and dates of birth.*]

IX. That no action for a divorce has been brought by the defendant against this plaintiff, nor has a judgment therein been obtained in any court of this State, or in any of the courts of any other State or country.

Wherefore the plaintiff prays judgment divorcing the said plaintiff and defendant, and that their marriage be dissolved; that the plaintiff

be awarded the care and custody of the above-named children; that the defendant be required to make suitable provisions for the support, maintenance, and education of such children, and for the support of this plaintiff; and that the plaintiff have temporary alimony; and for such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff,
Office and Post-Office Address, 61 *State Street, Albany, N. Y.*

[*Verification.*]

No. 11.

Answer in Action for Divorce on Ground of Adultery.

(Code Civ. Pro., §§ 1757, 1758, *ante*, pp. 49, 59.)

[*Title of action.*]

The defendant, for an answer to the complaint of the plaintiff herein, respectfully shows to this court:

I. He admits that he was married to the plaintiff at [*use language of complaint in paragraph I of preceding form*], as alleged in the complaint.

II. He denies each and every allegation contained in the complaint that the defendant herein had committed adultery with the persons named therein, or either of them, [*or with any other person*].

[*Or if adultery is not denied, it may be stated as a defense: That the acts of adultery charged against the said defendant in the complaint herein were committed by the procurement, or with the consent and connivance of the plaintiff.*]

[*Or it may be stated as a defense: That the offenses alleged in the said complaint to have been committed by the defendant have been forgiven by the plaintiff.*]

III. The defendant specifically denies that five years have not elapsed since the plaintiff discovered the fact of the adultery alleged in the complaint to have been committed by the defendant, and alleges that more than five years have elapsed since the discovery by the plaintiff of the adulteries so alleged to have been committed.

IV. And for a further defense, and as a counterclaim herein, the defendant alleges that the plaintiff has also been guilty of adultery at various times and places between the ..... day of .....,

19.., and the present time; and especially that on the ..... day of ....., 19.., at the city [*town or village*] of ....., county of ....., State of ....., with one ..... [*allege in this connection specifically the commission of acts of adultery charged against the plaintiff in the manner prescribed in Form No.* 10]; that the said acts of adultery were committed without the consent, connivance, privity or procurement of the defendant; that five years have not elapsed since the defendant discovered the fact of such adultery, so charged, and that the defendant has not voluntarily cohabited with the plaintiff since the commission of such acts of adultery, or since the year .....

Wherefore, the defendant prays judgment that the complaint of the plaintiff herein be dismissed with costs, and that the marriage between said plaintiff and defendant be dissolved, and that a judgment of divorce be granted in favor of this defendant, and for such other and further relief as to the court may seem just and proper.

D. F.
Attorney for defendant.

[*Verification.*]

No. 12.

Application for Order Directing Trial of Issues.

(Code Civ. Pro., § 1757, *ante*, p. 49.)

[*Title of action.*]

STATE OF NEW YORK, }
COUNTY OF ....., } *ss.:*
[*City of* .....] }

L. M., being duly sworn, deposes and says:

I. That he is the attorney for the plaintiff in the above-entitled action;

II. That such action is brought to procure a divorce upon the ground of the adultery of the defendant, as charged in the complaint herein, and that the answer of the defendant puts in issue the allegations of adultery as contained in such complaint;

III. That such action was commenced by the service of a summons and complaint upon the defendant on the ..... day of ....., 19..; and that the defendant served his answer herein on the ..... day of ....., 19..; and copies of such summons and com-

plaint, and the affidavit of service thereof is annexed hereto, and marked Exhibit A; a copy of the answer to such complaint is annexed hereto, and marked Exhibit B;

IV. That the plaintiff herein desires that the issues of fact pertaining to the adultery should be tried by a jury, and that an order be granted by this court directing that such issues be so tried. A statement of such issues of fact desired to be tried is hereto annexed.

L. M.,
Attorney for Plaintiff.

Subscribed and sworn to before me, this ..... day of ....., 19...

No. 13.

Notice of Motion for Order Directing Trial by Jury.

(Code Civ. Pro., § 1757, *ante*, p. 49.)

[*Title of action.*]

Take notice, That upon the affidavit of L. M., attorney for the plaintiff in the above-entitled action, and upon the complaint, affidavit of service thereof and the answer of the defendant herein, copies of which are served herewith upon you, the said L. M., attorney for the plaintiff herein, will move this court at a Special Term thereof to be held at [*county courthouse, city hall or chambers, as the case may be*], in the city [*or village*] of ....., on the ..... day of ....., 19.., at ten o'clock in the forenoon [*or at the opening of court*], or as soon thereafter as counsel can be heard, for an order settling the issues of fact in this action relating to allegations of adultery for trial by jury, or for such other relief as to the court may seem just and proper.

A copy of such issues of fact, which it is desired should be submitted to a jury, is hereto annexed and served upon you.

L. M.,
Attorney for Plaintiff.

Dated .....

To J. F., *attorney for defendant.*

No. 14.

Proposed Issues of Fact to be Tried by Jury.

(Code Civ. Pro., § 1757, *ante*, p. 49.)

[*Title of action.*]

STATEMENT OF PROPOSED ISSUES OF FACT TO BE SUBMITTED TO JURY.

The following questions of fact are desired by the plaintiff to be submitted to the jury for trial:

I. Did the defendant, on the ..... day of ....., 19.., at ....., in the city [*or village*] of ....., county of ....., State of ....., commit adultery with .....?

[*Each of the questions of fact should be distinctly stated and with sufficient certainty as to the charges of misconduct on the part of the defendant, so that complete opportunity may be given to meet such charges by proof upon the trial. See* Decarrillo v. Decarrillo, 53 Hun, 359.]

No. 15.

Proposed Amendments to Issues.

[*Title of action.*]

The following amendments are proposed by the defendant to the issues of fact proposed to be submitted by the plaintiff to a jury in this action:

I. Strike out question No. I, and insert in its place the following: [*State definitely the proposed substitute for such question.*]

J. F.,
Attorney for the Defendant.

Take notice, That the defendant herein proposes the foregoing amendments to the issues of facts proposed by the plaintiff for trial by a jury in the above-entitled action.

J. F.,
Attorney for the Defendant.

Dated .....

To L. M., *attorney for the plaintiff.*

No. 16.

Order Directing the Trial of Issues by Jury.

(Code Civ. Pro., § 1757, *ante*, p. 49.)

At a Special Term of the Supreme Court, held in and for the county of ....., at ....., in ....., in the said county, on the ..... day of ....., 19..

Present: Honorable A. B., *Justice.*

[*Title of action.*]

On the pleadings in this action, on the affidavit of L. M., attorney for the plaintiff, and on the statement of issues of fact arising thereon, proposed by the above-named plaintiff to be submitted to a jury for trial, and on the amendments proposed by the defendant to such issues, and on hearing the said L. M., of counsel for the plaintiff, and N. O., of counsel for the defendant, in opposition, on motion of L. M., attorney for the plaintiff, it is hereby

Ordered, That the following questions of fact, involved in the issues arising upon the pleadings herein, be tried by a jury; it is hereby further

Ordered, That such trial be had at a Trial Term of this court to be held at ....., in the city of ....., on the ..... day of ....., 19.., or as soon thereafter as the same may be heard.

The following are the questions of fact to be submitted hereunder:

First. [*State questions of fact as settled.*]

Enter.

A. B.,
J. S. C.

No. 17.

Judgment in Action for Divorce.

[*Title of action.*]

This action having come on for trial at the Monroe Special Term for the trial of equity causes, and the court having made an order directing fourteen questions to be stated herein for trial by jury, and those questions having been tried by the court and a jury at the court-rooms in the city of Rochester, N. Y., in and for the county of Monroe, on the 11th day of February, 1895, before the Hon. William Runney, and the jury having rendered a special verdict, and having answered the first of said questions in the affirmative and the remaining ques-

tions in the negative, and the said verdict having been entered on the minutes of this court, and the plaintiff having moved that the jury's answer to the thirteenth question be set aside, and that the plaintiff have judgment for the relief demanded in the complaint, and an order having been made herein directing that the jury's answer to the said thirteenth question be set aside, and that judgment be entered herein in favor of the plaintiff for the relief demanded in the complaint, and the defendant having made a motion before said justice on a case for a new trial on exceptions, and on the ground that the verdict was contrary to the evidence, and contrary to law, and said motion having been denied;

Now, on motion of David Hays, attorney for the plaintiff, it is hereby

Ordered and adjudged, That the marriage between the plaintiff, George Lowenthal, and the defendant, Maria Elizabeth Lowenthal, be dissolved, and the same is hereby dissolved, and the said parties are, and each of them is, freed from the obligations thereof; and it is hereby further

Ordered and adjudged, That the custody of the children of said marriage [*naming them*] is hereby awarded to said plaintiff, George Lowenthal; and it is hereby further

Ordered and adjudged, That it shall be lawful for the said George Lowenthal, the plaintiff, to marry again, in the same manner as if the said Maria Elizabeth Lowenthal, the defendant, were actually dead; but it shall not be lawful for the said Maria Elizabeth Lowenthal, the defendant, to marry any other person until the said George Lowenthal, the plaintiff, shall be actually dead.

No. 18.

Order of Reference in Matrimonial Action.

At a Special Term, etc. [*see Form No.* 16].

[*Title of action.*]

The summons, with a copy of the complaint in this action, having been personally served upon the defendant on the ..... day of ....., 19.., at ....., in the city of ....., county of ....., State of ....., and the defendant having duly appeared and answered, and a consent having been entered into between the parties hereto that the issues in this action be referred to a referee to be appointed by the court to hear and determine the same, and on motion of ....., attorney for the plaintiff, it is hereby

Ordered, That such issues be referred to ....., attorney-at-law, of the city [*or village*] of ....., county of ....., to hear and determine the same, and to take proof of all material facts alleged in the complaint, and report such proof to this court, and that the plaintiff be examined on oath, upon such reference, as to whether the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff, and as to whether five years have not elapsed since the discovery of the fact that such adultery was committed, and as to whether the plaintiff has or has not voluntarily cohabited with the defendant since such discovery, and if it shall appear that, at the time of the offense charged, the defendant was living in adulterous intercourse with a person with whom the offense is alleged to have been committed, that plaintiff be further examined on oath as to whether five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff; and that the said referee also inquire and report whether there is any judgment or decree in any court of this State, of competent jurisdiction, against the plaintiff in favor of the defendant for a divorce upon the ground of adultery.

Enter.

M. L. S.,
J. S. C.

[NOTE.— As to sufficiency of order of reference in a matrimonial action, see McCleary v. McCleary, 30 Hun, 154.]

No. 19.

Report of Referee to Hear and Determine Issues in Divorce Proceedings.

[*Title of action.*]

To the Supreme Court:

In pursuance of an order of this court, made and entered in the above-entitled action, on the ..... day of ....., 19.., by which such action and the issues arising therein were referred to me to hear and determine, and to take proof thereof, and report the same to this court with all convenient speed, I do respectfully report:

That I have been attended by the parties and their counsel, and have heard their proofs and allegations, and, after due deliberation thereon, I find as matters of fact:

1. That, on the ..... day of ....., 18.., the plaintiff intermarried with the defendant, in the city of ....., in the State of .....

2. That, since such marriage and until about the ..... day of ....., 18.., the said plaintiff and defendant cohabited as husband and wife.

3. That during said time the following children were born to them [*state names of children and ages, and whether living or not*].

4. That, at the time of such marriage, the plaintiff and defendant were, and now are, and at the time of the commission of the adultery hereinafter mentioned were, inhabitants of this State.

[*State findings as to other jurisdictional matters required by § 1763 of the Code.*]

5. That, on the ..... day of ....., 19.., the defendant committed adultery with one ....., at ....., in the city of ....., State of ....., as alleged by the plaintiff in the complaint herein; that said adultery was committed without the consent, connivance, privity or procurement of the plaintiff; that the plaintiff has not cohabited with the defendant since the discovery by her of such adulterous intercourse; that there is no judgment or decree rendered in any court of this State, of competent jurisdiction, against the plaintiff, and in favor of the defendant, for a divorce on the ground of adultery. [*If the order appointing the referee directed him to investigate as to the financial ability of the defendant for the purpose of determining the amount of alimony which should be paid by the defendant to the plaintiff, there should be added findings as to such matters.*]

I find as conclusions of law:

1. That a divorce should be decreed and in favor of the plaintiff against the defendant on the ground of his said adultery.

2. That the custody of said children should be awarded to the plaintiff.

3. That the plaintiff should have judgment for the costs of this action against the defendant.

The oral proofs upon which the foregoing report is based are annexed hereto.

Dated .....

A. B.,
Referee.

No. 20.

Judgment for Divorce upon Report of Referee.

At a Special Term, etc. [*as in Form No.* 16].

[*Title of action.*]

This action having been brought for an absolute divorce, and the summons and complaint herein having been personally served upon

the defendant, ..., in the city of ....., on the ..... day of ....., 19.., and the defendant having duly appeared, on the ..... day of ....., 19.., by her attorney, ..., and the defendant having served on the ..... day of ....., 19.., on the plaintiff's attorney, ..., her answer to the complaint herein, and an order having been made and entered in this action, bearing date the ..... day of ....., 19.., whereby it was ordered that the above-entitled action and all issues therein be referred to ....., attorney-at-law, as referee, to hear and determine the same, and report the proof thereof; and the trial of the issues so referred having hertofore been had before the said referee, at his office, ..., in the city of .....; and the said referee's report, together with his opinion, a transcript of the minutes of the testimony, proof and proceedings, had before him on such trial, and the exhibits offered in evidence upon the said trial having been filed in the office of the clerk of the county of ....., on the ..... day of ....., 19.., and within eight days thereafter the plaintiff and defendant having filed exceptions to the said referee's report in the office of the clerk of the county of ....., and having served the same upon the attorneys for the respective parties hereto; and such attorneys having brought on to a hearing before Mr. Justice ....., one of the justices of this court, on the ..... day of ....., 19.., their respective applications for the judgment to which each claims to be entitled, and satisfactory evidence having been produced to the court on the part of the plaintiff proving that the defendant has been guilty of adultery, and that the said plaintiff is entitled to a judgment as prayed for in his complaint;

Now, therefore, etc. [*proceed as in form No.* 17].

No. 21.

Notice of Appearance by Corespondent.

(Code Civ. Pro., § 1757, subd. 2, *ante*, p. 49.)

[*Title of action.*]

Take notice, that X. Y., the person named in the complaint in the above-entitled action for a divorce as corespondent, appears in such action, and that I am retained by and appear as attorney for him

therein, and demand that a copy of the summons and complaint and other papers and notices in this action be served on me.

Dated .....

L. M.,
Attorney for Corespondent.

To DAVID BENNETT, *Attorney for Plaintiff.*

No. 22.

Answer of Corespondent.

[*Title of action.*]

The answer of the corespondent named in the complaint in the above-entitled action respectfully shows to this court:

I. That he has been named in the complaint of the plaintiff in the above-entitled action as corespondent [*state the language of the complaint alleging acts of adultery by corespondent with defendant*].

II. That he did not, at the times and places mentioned in the ..... paragraph of the said plaintiff's complaint, commit adultery with the above-named defendant, as therein stated [*nor has he ever at any time or at any place committed an act of adultery with the said above-named defendant*].

Wherefore, he prays judgment against such plaintiff for his costs herein as provided by law.

L. M.,
Attorney for Corespondent.

[*Verification.*]

No. 23.

Complaint in Action for Separation on Ground of Cruelty.

(Code Civ. Pro., §§ 1762–1764, *ante*, pp. 71–79.)

[*Title of action.*]

The complaint of the plaintiff herein respectfully shows to this court:

I. That on the ..... day of ....., 18.., at ....., in the county of ..... and State of New York, the said plaintiff was married to the defendant.

II. That, at the time this action was commenced, the said plaintiff and defendant were and still are residents of this State. [*State such other jurisdictional facts as are required by § 1763 of the Code.*]

III. That, since the said marriage, the defendant has treated the plaintiff in a cruel and inhuman manner, and his conduct has been such as to render it improper and unsafe for her to cohabit with him, and, since the year ...., he has repeatedly committed acts of violence upon the plaintiff and her children, in particular as follows:

1. On or about the ..... day of ....., 18.., at ....., and also at her place of residence in the said city of ....., the defendant, without cause or provocation, falsely accused the plaintiff of soliciting the attention of men in an improper, lascivious and unchaste manner.

2. That, on or about the ..... day of ....., 18.., the defendant, without cause or provocation, falsely accused the plaintiff of carnal intimacy with one ....., who is a relative of the plaintiff.

3. That, on or about the ..... day of ....., 18.., at the city of ....., aforesaid, the defendant, without cause or provocation, violently assaulted the plaintiff and threatened to kill her.

4. [*Specify particularly in successive paragraphs the nature and circumstances of the defendant's misconduct, and set forth the time and place of each act complained of with reasonable certainty.*]

IV. That, since the marriage of the parties hereto, the plaintiff has given birth to the following children, who are now living with the plaintiff, and who are the issue of said marriage, viz.: Julia B., a daughter, born on the ..... day of ....., 18..; Clarence B., a son, born on the ..... day of ....., 18.., and Benjamin H. B., a son, born on the ..... day of ....., 18... That the defendant herein is an unfit and improper person to have the care, custody, training and education of such children.

V. That, as the plaintiff is informed and believes, the defendant is seized and possessed of real estate in the city of ....., county of ....., State of ....., of the value of ..... dollars, and that he is possessed and is the owner of personal property at said city of the value of ..... dollars.

Wherefore, the plaintiff demands judgment for a separation from the bed and board of the defendant, and that the custody of said children be awarded to the plaintiff, and that a reasonable provision for the support of the plaintiff and her children, and for the training and education of said children, be made out of the property of the said defendant, and for the costs of this action, and such other and further relief as to the court may seem just and proper.

DAVID BENNETT,
Attorney for the Plaintiff.

[*Verification.*]

No. 24.

Complaint in Action for Separation on Ground of Abandonment.

(Code Civ. Pro., §§ 1762–1764, *ante*, pp. 71–79.)

[*Title of action.*]

The complaint of the plaintiff herein respectfully shows to this court:

I. [*Allegation as to marriage as in preceding form.*]

II. [*Allegation as to residence of parties, as required by section 1763 of the Code, as in preceding form.*]

III. That, although the said plaintiff has always conducted himself toward the defendant as a faithful and loving husband, the said defendant disregarded her duties as a wife and on the ..... day of ....., 18.., at which time the said plaintiff was seventy years old and in feeble condition of health and entirely alone, and without just cause or provocation, left and has been ever since wilfully absent from the said plaintiff's bed and board, although the said plaintiff has repeatedly requested the said defendant to return. [*An allegation similar to this was contained in the case of* Waltermeyer v. Waltermeyer, 110 N. Y. 183.]

IV. That the issue of said marriage of the plaintiff and defendant are [*state names and dates of birth of children, and also allege as to the unfitness of defendant to have the care and custody of such children, if they are minors*].

Wherefore, the plaintiff demands judgment that a decree of separation may be made by this court, ordering, directing and decreeing that said plaintiff and defendant live separate and apart forever [*and where the children are minors, ask judgment for their care and custody as in preceding form*], besides the costs of this action, and such other and further relief as to this court may seem just and proper.

DAVID BENNETT,
Attorney for Plaintiff.

[*Verification.*]

No. 25.

Judgment in Action for Separation.

[*Title of action.*]

This action having been commenced by the due and personal service of the summons and complaint herein on the defendant, within the State of New York, on the ..... day of ....., 19.., and the

defendant having appeared and answered herein by her attorney, Mr. ....; and this cause having duly come on for trial before this court, and this court having heard all the evidence adduced by the plaintiff and defendant herein; and having duly made and filed its decision herein, wherein and whereby it finds that all the material allegations of the complaint herein have been established, and that the plaintiff herein is entitled to judgment as prayed for in the complaint.

After hearing ....., attorney for the defendant in opposition thereto, on motion of ....., attorney for the plaintiff, it is hereby

Ordered and adjudged, That the said plaintiff and defendant be and hereby are separated from bed and board forever; it is hereby further

Ordered and adjudged, That the plaintiff have the care, custody and control of the children born of the marriage of such plaintiff and defendant, to-wit: [*state names and ages of children*]; and that the defendant be permitted to visit and see such children at [*state times, places and under what conditions the children may be seen and visited by the defendant*]; it is hereby further

Ordered and adjudged, That the defendant herein be, and he hereby is enjoined and restrained from in any wise interfering with, molesting or hindering the plaintiff herein, or the custody and control of such children as hereby awarded; it is hereby further

Ordered and adjudged, That during the joint lives of the plaintiff and defendant herein, the said defendant pay to the plaintiff herein the sum of ..... dollars, weekly [*or monthly*], for her support and maintenance, which sum is to be paid [*state time and place of payment*]; it is hereby further

Ordered and adjudged, That on any change of circumstances of the parties hereto, or of either of them, leave and permission is hereby granted to either of them to apply to this court to vary, change or modify the provisions of this decree, pursuant to the statute in such case made and provided, and in the manner prescribed by such statute; and it is hereby further

Ordered and adjudged, That the plaintiff herein have and recover from the defendant herein, her costs and disbursements in this action, to be taxed in the manner provided by law, and that when said costs and disbursements are so taxed, a separate decree therefor may be entered by the clerk at the foot hereof.

M. L. S.,
Justice Supreme Court.

[NOTE.—Taken from Deisler v. Deisler, 59 App. Div. 207.]

No. 26.

Petition for Alimony.

(Code Civ. Pro., § 1769, *ante*, p. 86.)

[*Title of action.*]

To the Supreme Court:

The petition of Anna P. B., the above-named plaintiff respectfully shows:

I. That she has brought this action against the defendant, her husband, for a limited divorce or judgment of separation between them, upon the ground of cruel and inhuman treatment, and of such conduct, on the part of the defendant, toward the plaintiff, as renders it unsafe and improper for her to cohabit with him, as more fully appears by the complaint hereto annexed.

II. That the action has been actually commenced by the service upon the defendant on the ..... day of ....., 19.., of a summons and complaint; that she will be able to substantiate all the allegations of the complaint by proof on the trial, and that she has a good cause of action thereon, as she is advised by her counsel, L. M., who resides and has his office at ....., county of ....., State of New York, and as she verily believes.

III. That since said marriage, the defendant has treated the plaintiff in a cruel and inhuman manner, and since the year ..... he has repeatedly committed acts of cruelty and violence upon her and upon her children, as will more fully appear by the allegations contained in the verified complaint, a copy of which was served upon the defendant on the ..... day of ....., 19.., and a copy of which is hereto annexed.

IV. That your petitioner is wholly destitute of the means of supporting herself or her children pending this action or of carrying on the same and defraying the costs and expenses thereof.

V. That the defendant herein is seized and possessed of real estate of the value of ..... dollars, and personal property of the value of ..... dollars, as deponent is informed and believes, which is sufficient to enable him to advance therefrom to your petitioner such sums as may be necessary for the above-mentioned purposes; that your petitioner is informed and believes that the defendant herein is engaged in the mercantile business, at ....., as a dry goods merchant, and that he has or claims to have a large trade or business in connection therewith, and that he has a large annual income therefrom.

VI. That the issue of the marriage of the parties hereto, now living with the plaintiff, is three children, as follows: [*state names and dates*

of birth of children]; and the plaintiff alleges that the defendant is an unfit and improper person to have the care, custody, training and education of such children.

Wherefore, your petitioner prays that the said defendant may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance, and for the support and maintenance of her children during the pendency of this action, and such sums as may be necessary to enable your petitioner to carry on this action, and to defray the necessary costs and expenses thereof, and for such other and further order as may be just.

ANNA P. B.

[*Verification.*]

No. 27.

Order of Reference to Determine Alimony.

(Code Civ. Pro., § 1769, *ante*, p. 86.)

[*Title of action.*]

On reading and filing the petition of the plaintiff herein, verified the ..... day of ....., 19.., and upon the affidavits accompanying the same, with due proof of the service thereof, and upon reading the affidavits of X. Y. and Y. Z., in opposition thereto, and on motion of L. M., of counsel for the petitioner, and after hearing M. N., of counsel for the defendant in opposition thereto, it is hereby

Ordered, That the petition of the plaintiff herein be referred to D. F., attorney at law, of the city of ....., to inquire into the facts relating to the same and to report to this court what would be a reasonable sum to be allowed to the said plaintiff for her support and maintenance, and for the support, maintenance and education of the children of such marriage, mentioned in said petition. And it is hereby further

Ordered, That such referee make inquiry and report what would be a reasonable sum to be allowed the said plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof; and that such referee report also the time and place and under what conditions the payment of such sums should be made.

Enter.

A. B.,
J. S. C.

No. 28.

Report of Referee as to Alimony.

[*Title of action.*]

To the Supreme Court:

In pursuance of the order of this court, made and entered in the above-entitled action on the ..... day of ....., 19.., by which the petition of the above-named plaintiff herein for alimony and for an allowance for the purpose of enabling her to prosecute such action, was referred to me, to inquire into the facts relating to the same and to report to this court, with my opinion in regard thereto, I do respectfully report:

That I have been attended by the parties and their counsel, and have heard their proofs and allegations, and after due deliberation thereon I find as matters of fact:

1. That the defendant is seized and possessed of the following real property, to-wit: An apartment-house, situated on ..... street, in the city of ....., county of ....., State of ..... [*giving brief description of same*], which is of the value of ..... dollars, and the annual rents and profits of which are ..... dollars.

2. That he is also possessed of ..... shares of stock in the ..... company, of the par value of ..... dollars each, the actual value of which is ..... dollars, and the annual dividends from which for the past ten years have averaged each year the sum of ..... dollars.

[*State and briefly describe as above other property possessed by the defendant.*]

3. That such defendant is engaged in the mercantile business, owning and conducting a store for the sale of dry goods, at ..... street, in the city of ....., State of ....., the profits of which business during the preceding year were ..... dollars.

4. That the following children were born of the marriage of the plaintiff and the defendant in this action [*state names and dates of birth of children*], and that of such children, the following reside with the plaintiff and are in her care, custody and control.

I also further report that in my opinion the defendant herein should be required to pay to the plaintiff for her support and maintenance, and for the support, maintenance and education of the children residing with her, a sum of ..... dollars per month, during the pendency of this action; and that such sum should be paid to her on the first day of each month from the date of the order directing such payment.

And I also further report that in my opinion the sum of ..... dollars would be a proper sum to be allowed the plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof.

All of which is respectfully submitted.

Dated, ...

D. F.,
Referee.

No. 29.

Order Granting Alimony and Counsel Fees during Pendency of Action.

At a Special Term of the Supreme Court, etc. [*following as in Form No.* 16.]

[*Title of action.*]

On reading the summons, complaint and answer in the above-entitled action, and on reading and filing the notice of motion for this order, with proof of the due service thereof on ....., attorneys for the defendant, and the petition of the plaintiff, for alimony and counsel fees, verified on the ..... day of ....., 19.., and the affidavit of L. Y., thereto annexed, and the answer of the defendant to said petition, verified on the ..... day of ....., 19.., and the affidavits thereto annexed of [*state names of persons making affidavits in opposition to the petition*], and the papers thereto annexed, and after hearing L. M., of counsel for the plaintiff in support of the motion, and C. B., of counsel for the defendant in opposition thereto,

On motion of L. M., attorney for the plaintiff, it is hereby

Ordered, That the defendant pay to L. M., attorney for the plaintiff, the sum of ....., counsel fees, within ten days after the service of a certified copy of this order on the attorneys for the defendant; and it is hereby further

Ordered, That the defendant pay to the plaintiff the sum of ..... dollars per month, for her support and the education and support of the children of the marriage, during the pendency of this action, from the commencement thereof, to-wit: the ..... day of ....., 19..; and make such payments, as follows, to-wit: For the two months ending on the ..... day of ....., 19.., within five days after the service of a certified copy of this order on the attorneys for the defendant, and thereafter on the ..... day of each and every month, beginning on the ..... day of ....., 19..; and it is hereby further

Ordered, That the defendant make each and all payments above ordered at the office of ....., attorney for the plaintiff, at ..... street, city of ....., State of New York, between the hours of ten in the morning and three in the afternoon, and if any of the days so above fixed for payment shall fall on a Sunday or other holiday, then said payment shall be made on the next succeeding secular day.

Enter.

E. M. C.,
J. S. C.

No. 30.

Application of Defendant for Leave to Remarry.

(R. S., Part II, ch. 8, tit. 1, § 49, as amended by L. 1897, ch. 452, *ante*, p. 66.)

SUPREME COURT — COUNTY OF .....

In the Matter of the Application of A. B. for an Order Modifying the judgment in the Action of A. B. v. C. B., and Permitting the Defendant to Remarry.

To the Supreme Court:

The petition of C. B., respectfully shows to this court:

I. That he was married to A. B., the plaintiff in the action above named, on the ..... day of ....., 18..; and that said action was brought on the ..... day of ....., 19.., for a divorce on the ground of the adultery of the said C. B., the defendant therein.

II. That a judgment was rendered in such action on the ..... day of ....., 19.., dissolving the said marriage of A. B. and C. B., which judgment was entered in the County Clerk's office in the county of ....., on the ..... day of ....., 19.., a certified copy of which judgment is hereto annexed, and made a part of this petition; that by such judgment, the plaintiff in the said action was permitted to marry again during the lifetime of the defendant therein, but that such defendant was thereby forbidden to marry again during the lifetime of the said plaintiff.

III. That as appears from the date of the said judgment of divorce hereto annexed a period of five years has elapsed since the said judgment was entered.

IV. That since the entry of such judgment dissolving the said marriage the conduct of the defendant, your petitioner herein, has been uniformly good, as appears from the affidavits of C. D., E. F. and G. H., which are annexed hereto.

V. That no previous application for an order modifying such judgment in the manner herein asked for has been made by this petitioner.

Wherefore, your petitioner prays that an order be granted by this court modifying the said judgment of divorce, so that it shall be lawful for your petitioner, against whom such judgment was rendered, to marry again, as though the said A. B., the plaintiff in such action of divorce, were actually dead.

C. B.

[*Verification.*]

No. 31.

Order Granting Leave to Defendant to Remarry.

At a Special Term of the Supreme Court, etc. [*follow as in Form No.* 16].

[*Title of action as in preceding form.*]

On reading and filing the petition of C. B., verified on the ..... day of ....., 19.., and the affidavits of C. D., E. F. and G. H., and the court being satisfied thereby that five years have elapsed since the judgment of divorce in the action of A. B. against the said C. B., was granted, and that the conduct of the defendant since the entry of such judgment dissolving the marriage of such parties has been uniformly good; and after hearing L. M., of counsel for the petitioner, in favor of such petition, and due deliberation being had.

On motion of the said L. M., as attorney for such petitioner, it is hereby

Ordered, That the judgment of divorce entered in the action brought by the said A. B. against the said C. B., the petitioner herein, entered on the ..... day of ....., 18.., be and the same is hereby modified so that it shall be lawful for the said C. B., the petitioner herein, to marry again as though the said A. B., the plaintiff in such action, were actually dead.

Enter.

E. M. C.,
J. S. C.

FORMS.

No. 32.

Complaint in Action for Dower.

(Code Civ. Pro., §§ 1597–1606, *ante*, p. 174.)

SUPREME COURT — COUNTY OF .....

A. D.,

against

L. D., E. D., and C. D., as Administrator of the Estate of D. D., Deceased [*or, as Executor, etc.*].

The complaint of the above-named plaintiff respectfully shows:

I. That the plaintiff A. D. was married to D. D., deceased, late of the city of ....., county of ....., State of New York, on the ..... day of ....., 18.., and lived and cohabited with him as his wife until he died on the ..... day of ....., 19...

II. That the said D. D. died intestate [*or, leaving a last will and testament, which was duly proved and admitted to probate on the .....day of ....., 19.., by the surrogate of the county of ....., State of New York, a copy of which last will and testament is hereto annexed, and made a part hereof*]; that on the ..... day of ....., 19.., letters of administration were issued to C. D., by the surrogate of the county of ....., State of New York [*or, in case of letters testamentary, state to whom granted*].

III. That the said D. D., was seized and possessed at the time of his death of the following described real estate [*describe property with common certainty by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner; so that from the description, possession of the property claimed may be delivered.* Code Civ. Pro., §§ 1606, 1511.]

IV. That the defendants L. D. and E. D., upon the death of the said D. D., are in actual possession and occupation of the real estate above described and claim to be the owners thereof as the heirs-at-law of the said D. D. [*If premises are not actually occupied by the defendants named, but such defendants are exercising certain acts of ownership thereon, or claiming title thereto, or interest therein, at the time of the commencement of the action, it should be so stated, with a de-*

scription of the acts of ownership so exercised. See Code Civ. Pro., § 1597.]

V. [*If damages are claimed for withholding dower, an allegation should be inserted to the following effect: That the mesne profits of the above-described premises, since the death of the said D. D., is the sum of .....dollars; that no part of the one-third portion thereof, of which this plaintiff is entitled, has been paid to her by the said defendants L. D. and E. D.*]

[*If the action is against any other person than an heir-at-law, the amount of the profits should be alleged from the date when the plaintiff demanded her dower of the defendant in possession of the premises.* See Code Civ. Pro., § 1600.]

Wherefore, the plaintiff demands judgment, that as widow of the said D. D., deceased, she is entitled to her dower in all the real estate above described; that her said dower in said described premises may be set off and admeasured to her by a referee to be appointed for that purpose, or in such other manner as this court may direct, in accordance with the provisions of the Code of Civil Procedure of this State; and that she may recover from the above-named defendants, as damages for withholding her said dower, the sum of ..... dollars, together with the costs of this action, and for such other and further relief as to the court may seem just and proper.

L. M.,
Attorney for the Plaintiff.

[*Verification.*]

No. 33.

Interlocutory Judgment in Action for Dower.

(Code Civ. Pro., § 1607, *ante*, p. 178.)

[*Title of action.*]

The above-entitled action having been duly brought to trial at a Trial Term of this court, held in and for the county of ....., at ....., in the city of ....., commencing on the ..... day of ....., 19.., and this action having been reached for trial on the ..... day of ....., 19.., and the action having been by stipulation, duly made in open court, waiving a jury trial, tried

before the court without a jury, and said court having filed its decision [*or, where the action was referred to a referee for trial, or tried before a jury, the recitals should be made in accordance therewith*].

Now, therefore, in accordance with said decision, it is

Adjudged (1). That the plaintiff is entitled to dower in the premises hereinafter described.

(2). That D. F. be appointed by this court as a referee to admeasure dower and to ascertain with what and how it should be charged, and to determine its value in accordance with the statute in such case made and provided, and report to the court, with all convenient speed, that the court may take final action therein.

(3). That either party have liberty to apply to this court for such further order or judgment of the court as may be advised.

(4). The property above mentioned is bounded and described as follows: [*Insert herein description of premises as contained in complaint.*]

[*Signature of, and authentication by Clerk.*]

No. 34.

Oath of Referee or Commissioners.

(Code Civ. Pro., §§ 1609, 1610, *ante*, p. 179.)

[*Title of action.*]

STATE OF NEW YORK, }
COUNTY OF ....., } *ss.:*
[*City of* .....] }

D. F., the referee, appointed in the above-entitled action, to admeasure dower, by an interlocutory judgment, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of ..... county, on the ..... day of ....., 19.., being duly sworn, deposes and says:

That he will faithfully and fairly try the issues, and determine the questions referred to him and make a just and true report, according to the best of his understanding.

Subscribed and sworn to before me, }
this ..... day of ....., 19... }

D. F.,
Referee.

No. 35.

Report of Referee for the Admeasurement of Dower.

(Code Civ. Pro., §§ 1609, 1610, *ante*, p. 179.)

[*Title of action.*]

To the Supreme Court:

I, the undersigned, D. F., the referee appointed by an interlocutory judgment herein, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of the county of ....., on the ..... day of ....., 19.., to admeasure the plaintiff's dower in the premises therein described, and to ascertain the value of such dower and to report to this court the respective amounts so ascertained, with all due and convenient speed, do hereby report:

I. That before proceeding with the hearing of the matter so referred to me, I took the oath prescribed by the Code of Civil Procedure.

II. On the ..... day of ....., 19.., I attended at the premises described in such judgment, and the plaintiff, A. D., by her attorney, L. M., and the defendants L. D., E. D., and C. D., by their attorney C. P., appeared before me at the time and place aforesaid and pointed out to me the boundaries of the said property and the permanent improvements made thereupon after the death of the said plaintiff's husband.

III. And I further report that in my opinion it is not for the best interests of all the parties concerned to admeasure and lay off to the said A. D., the plaintiff herein, a distinct part of said property, for the following reasons: [*Here state with certainty why it is not practicable for the best interests of the parties to lay off a distinct parcel as the dower of the plaintiff.*]

IV. And I further report that under a stipulation of the respective parties herein, I attended at ....., in the city of ....., State of New York, on the ..... day of ....., 19.., and took testimony of certain witnesses to ascertain the rental value of said property, which said stipulation and testimony, signed by the said witnesses is hereto annexed.

V. And I further report that after hearing the testimony of the witnesses as aforesaid, to ascertain the rental value of the said property, and after hearing L. M., of counsel for the said plaintiff, and C. P., of counsel for the said defendants, and after due consideration of all the evidence before me in this matter, I find that the annual rental value of said property, independent of the improvements made thereupon by the said defendants, since the death of D. D., the deceased

husband of the said plaintiff, was the sum of ..... dollars for the year ....., and that the annual rental value of said property since such time has been and still is the sum of ..... dollars.

VI. The items of my charges herein are:

1. For one day attending at said property to see if admeasurement could be made	$10
2. For three days' services in taking testimony to ascertain the annual rental value of said property.....	30
3. For one day's services in preparing this report.....	10
4. For traveling expenses	7
	$57

In witness whereof, I have hereunto set my hand this ..... day of ....., 19...

D. F.,
Referee.

[*Acknowledgment as in Form No. 34.*]

No. 36.

Release of Dower.

[*Title of action.*]

The undersigned, A. D., the plaintiff in the above-entitled action, hereby consents to accept a gross sum in full satisfaction of her right of dower in the real property described in the complaint herein, the amount thereof to be ascertained pursuant to law.

Dated, ... A. D.

No. 37.

Final Judgment Admeasuring Dower.

At a Special Term of the Supreme Court, etc. [*as in Form No. 16.*]

[*Title of action.*]

The above-entitled action having heretofore been duly brought to trial at a Trial Term of this court, held in and for the county of ....., at ....., in the city of ....., commencing on the ..... day of ....., 19.., and trial by jury having been waived in open court, and trial having been had and the decision

of the court made and filed, and an interlocutory judgment having been rendered and entered in the office of the County Clerk of ..... county, on the ..... day of ....., 19.., by which judgment D. F. was appointed a referee to admeasure the plaintiff's dower in the premises described in such judgment, and who pursuant to stipulation took testimony to ascertain the rental value of said premises, and the report of said referee having been duly filed in the office of the County Clerk of ..... county, on the ..... day of ....., 19.., and said report having been confirmed by an order of this court, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of ..... county, on the ..... day of ....., 19..,

Now, after hearing L. M., of counsel for the plaintiff, and C. P., of counsel for the defendants in opposition thereto, and on motion of L. M., attorney for the plaintiff, it is

Adjudged (1). That the report of the said D. F., as referee, be and the same is hereby in all respects confirmed.

(2). That the plaintiff herein is entitled to dower in the premises described in the complaint as follows: [*Insert description.*]

(3). That upon the evidence taken by the said referee, D. F., in relation to the rental value of said premises, the rental value thereof for the year ....., was the sum of ..... dollars, and that the annual rental value of such premises since such time has been and still is the sum of ..... dollars, independent of taxes or other charges.

(4). That the defendants L. D. and E. D., pay to the plaintiff the sum of ..... dollars per year, on the first day of January of each year during her life, as and for her dower in the said premises.

(5). That one-third of the annual value of the *mesne* profits of such premises is ..... dollars.

(6). That the plaintiff, A. D., recover of the defendants L. D. and E. D., the sum of ..... dollars, as damages for withholding said plaintiff's dower from the ..... day of ....., 19.., to the date hereof, with the additional sum of ..... dollars as and for her costs in this action, and her disbursements herein, to be hereafter taxed by the clerk.

A. B. P.,
J. S. C.

[NOTE.— The foregoing form is substantially the same as that used in the case of Everson v. McMullen, 113 N. Y. 263.]

FORMS.

No. 38.

Petition for Writ of Habeas Corpus for Detention of Child.

(Domestic Relations Law, § 40, *ante*, p. 190.)

SUPREME COURT — COUNTY OF .....

THE PEOPLE OF THE STATE OF NEW YORK ex rel. A. B.,

against

J. B., E. B., and P. B.

To the Supreme Court of the State of New York, or to any justice thereof:

The petition of A. B. respectfully shows to the court:

I. That the petitioner is a resident and inhabitant of the State of New York, residing at ....., in the city of ....., in said State; and that he is engaged in the business of ....., in such city.

II. That on the ..... day of ....., 18.., the above-named petitioner was married to the said J. B., at ....., in the city of ....., State of .....; and that two children were born as the issue of such marriage, to-wit: Anna B., on the ..... day of ....., 18.., and John B., on the ..... day of ....., 18...

III. That the said children, Anna B. and John B., being infants of tender years, are imprisoned and restrained in their liberty by the above-named defendants, J. B., E. B., and P. B., at ....., in the city of .....

IV. That the said infants have not been committed, nor are they detained by virtue of any process or mandate issued by any court of the United States, or of any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree, or final order, according to the best knowledge and belief of your petitioner.

V. That the said petitioner and his wife, the said J. B., are living in a state of separation without being divorced; and the said E. B. and P. B. [*state relationship of parties, etc.*].

VI. That your petitioner is entitled by law to the absolute and exclusive control of the said children, and that the imprisonment and restraint of such children by the said J. B., E. B., and P. B., is illegal, and that the said children are thereby subjected to unfit, improper, and harmful influences.

VII. [*State particular reasons, in detail, why the children should not remain in the custody and control of the defendants.*]

VIII. That your petitioner is abundantly able to provide for the support, maintenance, and education of such children. [*State with some certainty the financial condition of the petitioner.*] But that the said J. B. and the defendants E. B. and P. B., are financially unable to properly provide for the support, maintenance and education of such children.

IX. That no previous application has been made by me for a writ of *habeas corpus* to secure the custody of such children.

Wherefore, your petitioner prays that a writ of *habeas corpus* issue, directed to J. B., E. B., and P. B., hereinbefore referred to, commanding them to produce my said children, Anna B. and John B., before this court, together with the cause of their imprisonment and detention by them, and that this court make an order herein awarding to me the custody of my said children, and for such other and further relief as to the court may seem just and proper.

And your petitioner will ever pray.

A. B.

[*Verification.*]

No. 39.

Writ of Habeas Corpus.

The People of the State of New York:

To J. B., E. B., and P. B., residing at ....., in the city of ....., N. Y.

Greeting:

We command you, that you have the body of Anna B. and John B., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name they shall be called or charged, before the Supreme Court, at a Special Term thereof, at ....., in the city [*or village*] of ....., on the ..... day of ....., 19.., at ten o'clock in the fore-

noon, to do and receive what shall then and there be considered concerning them, and have you then there this writ.

Witness: Hon. Roger A. Pryor, the ..... day of ....., 19..

HENRY D. PURROY,
Clerk.

DAVID BENNETT,
Attorney for Plaintiff,
61 *State Street, Albany, N. Y.*

Indorsement.
The within writ is hereby allowed.

Dated, New York, ... day of ....., 19..

ROGER A. PRYOR,
J. S. C.

No. 40.

Return to Writ of Habeas Corpus.

[*Title as in Form No. 37.*]

To the Supreme Court of the State of New York:

I, J. B., to whom the writ of *habeas corpus* issued herein is directed, do hereby make return thereto, as follows:

I. I was, as stated in the petition of the above-named A. B., married to the said A. B. on the ..... day of ....., 18..; and the children of such marriage, Anna B. and John B., infants of tender years, to-wit; of the age of five and seven years, respectively, are residing with me at the home of my parents, the above-named E. B. and P. B., at ....., in the city of ....., State of New York.

II. I deny that the petitioner is entitled by law to the absolute and exclusive control of such children, and that they are in any way illegally restrained or imprisoned, or that because of the custody and control of such children by me, that they are subjected to unfit, improper, and harmful influences.

III. Such children are of tender years, and are at an age when they must especially need the care and control of a mother, [*and state other reasons in detail, why the children should remain under the control of their mother and their grandparents*].

IV. [*State as to financial ability to provide for the support and education of such children.*]

V. [*State reasons why it is not safe or proper for the children to be placed in the custody of the father, and any other matter which can be shown in favor of the retention of the children.*]

Your respondent, therefore, prays that the said writ of *habeas corpus* may be dismissed.

Dated, ...

J. B.

[*Verification.*]

No. 41.

Petition for Appointment of General Guardian of an Infant Upwards of Fourteen Years of Age.

(Code Civ. Pro., § 2822, *ante*, p. 208.)

SURROGATE'S COURT — COUNTY OF .....

In the Matter of the Application for the Appointment of a General Guardian of A. B., an Infant.

To the Surrogate's Court, County of .....:

The petition of A. B., of the city [*town or village*] of ....., county of ....., State of New York, respectfully shows to the court:

I. That the said A. B. is an infant of over the age of fourteen years, having been born on the ..... day of ....., 19..; that he resides with [*state with whom*], at ....., in the city [*village or town*] of ....., county of ....., State of New York.

II. That the father or mother of your petitioner are both dead, the former having died on the .....day of ....., 18.., and the latter on the ..... day of ....., 18... [*If either of them is known to be living, and the petition does not pray that the father, or if he is dead, that the mother may be appointed the general guardian, the petition should state the place of residence of the living parent and must set forth the circumstances which render the appointment of another person expedient.* See Code Civ. Pro., § 2823.]

III. That your petitioner as a devisee of ....., is seized of and entitled to an estate in fee in [*describe real property*], of the value of ..... dollars, the annual rental value of which is ..... dollars; that he is the owner of and entitled to the following personal property [*describe property, giving its value and the income derived therefrom, if any*]; and on information and belief your petitioner further shows that he has no real or personal property, nor any right or interest therein, other than that above specified.

IV. That your petitioner has no general guardian; nor has any guardian of his person or of his property been appointed, either by a court of competent jurisdiction of this State, or by the will of his said father or mother duly admitted to probate as provided by law, nor by the deed duly authenticated, of his said father or mother. [*If a guardian has been appointed in either of the ways above specified, state reasons of incapacity to act, etc.*]

V. That the only relatives of your petitioner residing in the said county of ....., are [*give names and residences*].

VI. That for the proper care and protection of the person and property of your petitioner, it is necessary and expedient that some fit and proper person should be appointed as his general guardian; that A. F., residing at ....., in the city [*or village*] of ....., county of ....., who is your petitioner's uncle, is a fit and proper person to be so appointed as his general guardian.

Wherefore, your petitioner prays that a decree may be made appointing the said A. F., as the general guardian of the person [*and property*] of the said petitioner, and that the said ..... [*mother or father, if living, or relatives, if petition falls within Code, § 2822, subd. 2*] be cited to show cause why such a decree should not be made, and for such other and further relief as to the court may seem just and proper.

Dated, ... A. B.

[*Verification.*]

Consent of Guardian.

I, the above-named A. F., hereby consent to be appointed as the general guardian of the person [*and property*] of the petitioner above named, and I hereby offer as my sureties the following persons [*naming them, with their places of residence*].

Dated, ...

A. F.

No. 42.

Decree Appointing Guardian.

(Code Civ. Pro., § 2825, *ante*, p. 211.)

At a Surrogate's Court, held in and for the county of ....., at the surrogate's office, in the city [*or village*] of ....., on the ..... day of ....., 19..

Present — Hon. O. S., Surrogate.

In the Matter, etc. [*as in Form No.*].

On reading and filing the petition of A. B., an infant of the age of ..... years, residing at ....., in the city [*or village*] of ....., county of ....., duly verified on the ..... day of ....., 19.., praying for the appointment of A. F., residing at ....., in the city [*or village*] of ....., county of ....., as guardian of the person [*and property*] of the said A. B., and a citation having duly issued to [*naming persons cited*], the persons entitled by law to be cited to show cause why a decree should not be made as prayed for in said petition, and having duly appeared pursuant thereto [*or otherwise, as the case may be*]; and the surrogate having heard the allegations and proofs and duly inquired into the circumstances, and being satisfied that the allegations of the said petition are true in fact, and that the interests of the said infant will be promoted by the appointment of a general guardian of his person [*and property*]; and the said surrogate being satisfied that the said A. F. is a fit and proper person to be appointed as such guardian;

Now, on motion of L. M., attorney for the said infant, it is hereby

Ordered and decreed, That the said A. F. be and he is hereby appointed the general guardian of the person [*and property*] of the said infant A. B., upon his taking an official oath, as prescribed by law, for the faithful discharge of his duties as such guardian, and upon his executing his bond to the said infant, with at least two sureties, in a penalty of ..... dollars, conditioned as prescribed by law, and to be approved by the surrogate; and that letters of guardianship issue to him accordingly.

O. S.,
Surrogate.

No. 43.

Application for Order Allowing and Confirming Adoption.

(Domestic Relations Law, §§ 61, 62, *ante*, p. 243.)

COUNTY [OR SURROGATE'S] COURT — COUNTY OF .....

In the Matter of the Application of C. D. for an Order Allowing or Confirming the Adoption of A. B.

To the County Court [or Surrogate's Court] *of the County of .....*, *State of New York:*

Your petitioner, C. D., by his petition, respectfully shows to the court as follows:

I. That your petitioner, C. D., is a resident of the county of ....., residing with his wife at ....., in the city [*or village*] of ....., in said county.

II. That the above-named A. B. is a minor of the age of more than twelve years, having been born on the ..... day of ....., 18..

III. That the said A. B. is the legitimate child of D. B. and L. B., who now reside at ....., in the city [*or village*] of ....., county of ....., State of New York [*or state if but one be surviving; or if A. B. be the illegitimate child of L. B., so state, and also whether his mother be surviving and where she resides. If it appears that the parent has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, it should be so stated. If no parent be living, and no person can be found who has the lawful custody of the child, it should be so stated.*]

IV. That the said C. D., your petitioner herein, is a married man; that the said C. D. desires to adopt the said child, pursuant to the provisions of the Domestic Relations Law, and to treat such child as his own lawful child, and to extend to such child all the benefits, privileges and rights contemplated by such law; that his wife, A. D., consents to the adoption of the said child, A. B., as appears from her consent hereto annexed.

V. [*State circumstances showing that the moral and temporal interests of the child will be promoted by the adoption.*]

VI. That the said D. B. and L. B., the parents of the above-named child A. B., consent to such adoption, as appears from their consents attached hereto. [*See Domestic Relations Law,* § 61, *as to the consents required; which should be specified herein.*]

VI. That the consent and agreement of your petitioner, in the form and containing the matters required by law, are hereto annexed.

Wherefore, your petitioner prays that an order issue from this court allowing and confirming the adoption of the said child, A. B., by your said petitioner, and directing that the said child shall thenceforth be regarded and treated in all respects as the child of your petitioner, the foster parent.

[*Verification.*] C. D.

No. 44.

Consent of Parents to Adoption.

(Domestic Relations Law, § 61, *ante*, p. 243.)

COUNTY [OR SURROGATE'S] COURT — COUNTY OF .....

In the Matter of the Adoption of A. B., a Minor, by C. D., Foster Parent.

The undersigned, D. B. and L. B., the parents of the above-named child, A. B., do hereby consent to the adoption of such child by the said C. D., residing at ....., in the city [*or village*] of ....., county of ....., and State of New York.

Dated, ...

D. B.
L. B.

STATE OF NEW YORK, }
COUNTY OF ....., } *ss.:*
[*City of* .....] }

On the ..... day of ....., 19.., personally came before me the above-named D. B. and L. B., to me personally known to be the persons described in and who executed the foregoing consent, and duly acknowledged to me that they executed the same.

[*Signature of county judge or surrogate.*]

[NOTE.— This form should be adapted to all persons required by section 61 of the Domestic Relations Law to give consent to the adoption of a child.]

No. 45.

Statement as to Age of Child.

(Domestic Relations Law, § 62, *ante*, p. 244.)

[*Title as in preceding form.*]

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
[*City of* .....] }

L. M., being duly sworn, deposes and says that he is well acquainted with the above-named minor child [*state relationship, if any, or other reasons why deponent is qualified to certify as to age of child*], and that, on information and belief, said child was born on the ..... day of ....., 18.., and is now of the age of ..... years [*or state, "that he has made diligent inquiry to ascertain the age of the said minor child, and as nearly as the same can be ascertained such age is ..... years, and ..... months." And also state source of information.*]

L. M.

Sworn to before me, this .....
day of ....., 19.. }

.....

No. 46.

Agreement for Adoption of Child.

(Domestic Relations Law, § 62, *ante*, p. 244.)

[*Title as in Form No.* 43.]

THIS AGREEMENT, made on the ..... day of ....., 19.., between C. D., residing at ....., in the city [*or village*] of ....., county of ....., State of New York, party of the first part, and hereinafter also called the foster parent, and D. B. and L. B., residing at ....., in the city [*or village*] of ....., county of ....., State of ....., the parents of A. B., the child hereinafter mentioned, parties of the second part.

WITNESSETH, That, whereas the said party of the first part is desirous of adopting, pursuant to the provisions of the Domestic Relations Law, A. B., a minor male child, of ..... years of age, and to treat such child as his own lawful child, and to extend to such child all the benefits, privileges and rights contemplated by such law; and,

WHEREAS, the parents of such child, the said parties of the second part, approve of and consent to the adoption of the said child;

NOW, THEREFORE, in consideration of the premises herein, it is mutually agreed by and between the parties hereto, and the said parties, do hereby covenant and consent:

First. That the said C. D., party of the first part, will adopt and treat the above-mentioned minor child, A. B., as his own lawful child, hereby extending and assuring to such minor child all rights, benefits and privileges incident to such relation; and hereby assuming and engaging to fulfil all the responsibilities and duties of parents in respect to such minor child.

Second. And the said parties of the second part hereby consent (and each for himself and herself hereby consents) to such adoption, and covenants and agrees to acquiesce therein, and to refrain from doing or causing to be done any act or thing whatsoever inconsistent or in any way interfering with the rights, privileges or duties of such child when adopted.

In witness whereof, the said parties hereto have severally set their hands and seals, on this ..... day of ....., 19...

C. D. [*Foster Parent*].
D. B. [*Father*].
L. B. [*Mother*].
A. B.
[*Minor, if over 12 years of age.*]

In presence of: .....,
[*Surrogate or county judge.*]

No. 47.

Order Confirming Adoption.

(Domestic Relations Law, § 63, *ante*, p. 245.)

[*Title as in Form No.* 43.]

The above-named C. D., the foster parent, and A. B., the minor, and D. B. and L. B. [*or such other persons whose consents are required by section* 61 *of the Domestic Relations Law*], having appeared before me and been examined as required by the Domestic Relations Law; and upon reading and filing the application of C. D., duly verified on the ..... day of ....., 19..; and an instrument containing substantially the consents required by the said law, an agreement of the said C. D., as foster parent, to adopt and treat the said minor child as his own child, and a statement of the age of the child, as nearly as the same can be ascertained, having been presented to me; and the

said instrument having been signed by the foster parent and by each person whose consent is necessary to the adoption, which was severally acknowledged by the said persons before me.

And it also appearing, from the examination of the persons appearing before me, and from other information obtained by me in the premises, that the moral and temporal interests of the child will be promoted by allowing and confirming the adoption of such minor child [*state reasons as required by § 63 of the Domestic Relations Law*], it is hereby

Ordered and adjudged, That the said adoption of the said minor child, A. B., by the said foster parent, C. D., be and the same is hereby in all respects allowed and confirmed; and it is hereby further

Ordered and adjudged, That the said minor child shall hereafter be regarded and treated in all respects as the child of the said C. D., foster parent, with all the rights and privileges conferred by law.

[*Signature of county judge or surrogate.*]

GENERAL INDEX.

Abandonment: PAGE.
a ground for action for separation 75
what constitutes 76
of wives and children, disorderly conduct 260
warrant for arrest of husband 262
security, when to be required 264
defendant convicted, if security is not given 265
imprisonment of husband or father 269
of children by parents, seizure of property on account of..... 276
warrant and seizure, when confirmed or discharged 278
sale of property seized 279

Abrogation:
of adoption of children 248, 250
application of foster parent for 251

Absence.
of former husband or wife for five successive years..... 19, 20
annulment of marriage for 26, 34

Accounts:
by guardian, upon appointment of new guardian 220
annual, by general guardian appointed by court..... 224
affidavit to be attached to 224
of general guardian, to be examined annually..... 225
rule in New York county, as to..... 226
proceedings when defective, or not filed..... 226
judicial settlement of, petition for, when presented..... 228
of testamentary guardian, order requiring 237

Actions: *See* DIVORCE; SEPARATION; ANNULMENT OF MARRIAGE; DOWER.

Admeasurement of Dower:
interlocutory judgment in actions for dower, must direct..... 178
appointment of referee or commissioners for..... 179
commissioners or referee for, oath of 179
removal and vacancy of 179
powers and duties of 179
how made 179
report of referee or commissioners as to 181
may be set aside upon the application of any parties to the action 181
upon confirmation of, final judgment to be rendered 182
fees and expenses of commissioners or referee 181
junior encumbrances not affected by 182

GENERAL INDEX.

Adoption of Children: PAGE.
what constitutes 241
what is voluntary 241
whose consent necessary 243
proceedings in court relative to 244
order of court allowing or affirming 245
effect of, upon property rights 245
upon rights of inheritance 245
from charitable institutions 247
abrogation of voluntary, proceedings for 248
agreement of parties, endorsement 248
application of foster parent for 251

Adultery:
must be proved, in actions for divorce 46, 48, 51, 53
when husband or wife not competent witnesses as to 53
presumption of innocence should prevail 54
confessions of defendant, when admissible 54
proved by circumstantial evidence 55
visits to houses of ill-repute 56
uncorroborated testimony of prostitutes not sufficient..... 56
testimony of paramours 57
opportunities, evidence of 58
when divorce denied, although proved 59

Agency:
of husband, liability of wife on account of 132

Age of Legal Consent:
marriage voidable, if either party is under 23
action by woman under, to annul marriage 24
who may maintain 33

Agreements, Separation:
against public policy 68
may be made through intervention of trustees..... 69

Alimony:
pendente lite, when allowed 86, 87
amount of 90
when additional will be allowed 94
application for, how made 94
marriage must be proved, before granted 96
permanent, when allowed, and how fixed..... 97
should be specified in judgment 98
modification of allowance of 99

Ancillary Letters of Guardianship: *See* LETTERS OF GUARDIANSHIP.

Annulment of Marriage:
action for, by woman under sixteen 24
where a former husband or wife is living..... 25
where one of parties is idiot or lunatic..... 26

GENERAL INDEX.

Annulment of Marriage — (Continued):
action for — (Continued): PAGE.
where consent was obtained by force, duress, or fraud, 26, 27
where one of parties was physically incapable.... 24, 25, 32
trial by jury in 32
who may maintain, when party was under age 33
when former husband or wife is living..... 34
when party was an idiot or lunatic..... 35
on account of force, fraud or duress..... 36
children of marriage, custody, etc..... 36
on account of physical incapacity 37
no reference in case of defendant's default..... 116
evidence sufficient for 38
judgment, not to be rendered by default 37
how far conclusive 39
action by next friend of idiot or lunatic 39

Answer:
in actions for divorce 47
in actions for separation, defendant may set up plaintiff's misconduct 80
sufficiency of 80

Ante-Nuptial:
contracts in full force after marriage 146
debts, liability of husband for 148

Apprentice:
indenture binding out minor as, what is 253
contents of 254
how made by minor 255
by whom signed when made by minor 255
when made by poor officers 256
when made by charitable corporation 257
contracts with, in restraint of trade 259

Assignment:
of dower, bars widow's action 177

Bill of Particulars:
applications for, in actions for divorce 47

Board:
earnings of wife in furnishing 136, 157

Board of Health:
registration of marriage with 12

Bond:
of guardian of property of infant 214
liabilities of sureties on 216
insolvency of surety, effect of 216
of guardian of the person of infant 217

GENERAL INDEX.

Bond— (Continued): PAGE.
of testamentary guardian 236
when required, for abandonment of wife or children 264
forfeiture of, in abandonment proceedings 266

Business:
separate, liabilities of married women for carrying on..... 130

Certificate of Marriage:
contents of 11
must be filed and entered 12
when presumptive evidence 13
written contract now necessary..... 16

Charitable Institutions:
adoption of children from 247
application for abrogation of, on behalf of children..... 250
may bind out minor as apprentice 257
indenture, by whom signed 257

Children:
custody and maintenance of, where marriage is annulled because of fraud, force, or duress 36
judgments in marital actions to award custody of 101
who entitled to custody of 102, 104
support and maintenance of, bond to secure, in divorce actions 105
custody of, writ of habeas corpus to secure 190
adoption of, what constitutes 241
who may adopt 241
adoption of, proof of may be received in evidence..... 241
whose consent necessary 243
voluntary, proceedings relative to 244
order of court allowing or affirming..... 245
effect of 245
rights of inheritance affected by 246
from charitable institutions 247
abrogation of, application for 250
abrogation of voluntary, proceedings for 249
agreement of parties for 249
endorsement of court 249
agreement to be filed and recorded 249
voluntary adoption of, application of foster parent for abrogation of 251
abandonment of, disorderly conduct 260
warrant for arrest on account of 262
bond, when required 264
certificate of conviction, on account of 265
bond, forfeiture of 266
imprisonment of father, on account of 267
may be compelled to support parents 270
seizure of property of parents on account of abandonment... 277
warrant, when confirmed 278
when discharged 278

GENERAL INDEX.

Citation: PAGE.
to appear on application for appointment of general guardian, 208
must be served on father of petitioner 209
may be served on relatives 209
when petitioner is a married woman 210
to appear on application for revocation of letters of guardianship 217, 218
in proceedings for judicial settlement of guardian's accounts.. 228
to testamentary guardian, for giving bond 236
in application of testamentary guardian for judicial settlement, 238
in proceedings for the removal of testamentary guardian.... 239
in proceedings for the abrogation of adoption of children from charitable institutions 250

Clergyman:
definition 9
how to solemnize marriage 10
duty of, as to marriage 10
must furnish certificate of marriage 11

Cohabitation:
as proof of marriage 1, 8
as presumptive proof of marriage 5
must be matrimonial 5
meretricious, not evidence of marriage 7

Collusion:
a defense in actions for divorce 59

Commissioners:
for admeasurement of dower 178
See ADMEASUREMENT OF DOWER.

Common law:
marriages 1

Complaint:
in actions for divorce, what to allege 43
Supreme Court rules, as to 45
application for bill of particulars 47
in actions for divorce, questioning legitimacy of children in.. 46
supplemental, alleging adultery after commencement of suit 46
in action for separation, requisites of 79
in action for dower, must describe property..... 151

Condonation:
a defense in actions for divorce 59
in actions for separation 77

Connivance:
a defense in actions for divorce..... 59

GENERAL INDEX.

Consent: PAGE.
of parties entering into a marriage contract..... 2

Contempt:
punishment of husband for, in case of failure to pay..... 107
practice in proceedings for 109

Contracts:
written contract of marriage now necessary..... 16
rights and liabilities of married women as to..... 129, 157
liabilities of married women for, now unlimited..... 132
of married women with husband 136
in contemplation of marriage 146
of guardians, respecting property of wards..... 203

Co-respondents:
are entitled to come in and defend 49

Counsel Fees:
when allowed in marital actions 86, 92

Counter-claim:
may be interposed in marital actions..... 100

Crops:
bequest of, by widow 171

Cruel and Inhuman Treatment:
a ground for action for separation 71
what constitutes 72

Damages:
in actions for dower, how estimated..... 175
against alienee of husband 176
against non-occupants 176
against heirs aliening land 176

Decree: *See* JUDGMENT.

Deed:
appointing testamentary guardian to be recorded..... 233

Devise:
election of widow between dower and..... 165
when forfeited by widow..... 169

Divorce:
penalty for advertising to procure divorce..... 43
when action may be maintained 40
jurisdiction of courts in actions for..... 40
laws of, origin of 41
actions for, residence of parties 43
complaint in, what to allege 43

GENERAL INDEX.

Divorce — (Continued):
actions for — (Continued): PAGE.
Supreme Court rules relating to 45
applications for bill of particulars in 47
answer in 47
corespondents may come in and defend 49
mode of trial of, in 48
when defendant defaults or does not put in issue, adultery, 51
framing of issues in 48, 50
proof of adultery in 53
connivance, collusion, condonation and recrimination, defense in 59
effect of judgment in, when brought by wife 62
when brought by husband 64
counter-claim may be interposed by defendant..... 100
final judgment in, may award custody of children and provide maintenance 101
when judgment by default will not be rendered in..... 110
practice in, generally 112
trial of, by jury 112
qualification of referee 113
report of referee 114
no reference in case of defendant's default..... 116
judgment in, when may be vacated 117
effect of foreign judgment 119
jurisdiction of courts of other state, when may be questioned 121
marriage after, when granted for adultery..... 66
for misconduct of wife to bar dower 162

Divorce, Limited: *See* SEPARATION.

Dower:
plaintiff's right of, in actions for divorce, not affected..... 62
when judgment is secured by husband 64
to what lands right of, attaches..... 158
seizin necessary to entitle wife to right of 159
in lands exchanged 159
mortgaged before marriage 160
conveyances of land to defeat 160
right of, in lands mortgaged for purchase money..... 161
in proceeds of sale under purchase-money mortgage.... 162
barred by misconduct, in case of divorce 163
jointure 163
pecuniary provisions in lieu of 164
election between jointure and 165
election between devise and 165
time allowed for making 167
order extending time 167
when provision in lieu of, is forfeited 169
not affected by fraudulent acts of husband 169
inchoate right of, may be released by divorced woman..... 171
may be released by attorney 172

GENERAL INDEX.

Dower — (Continued): PAGE.
action for, must be brought within twenty years 173
against whom must be brought 174
who may be joined as defendants 174
where defendants claim in severalty 175
damages may be recovered in 175
how to be computed 175
barred by assignment of dower 177
collusive recovery in, not to prejudice infant 177
complaint in, must describe property 178
interlocutory judgment in, must direct admeasurement of dower 178
plaintiff may recover sum awarded to her..... 183
appeal from final judgment in, when not to stay execution, 183
plaintiff may consent to receive gross sum in lieu of dower. 184
defendant may apply for leave to pay gross sum..... 185
plaintiff may consent to take distinct parcel 186
liens to be ascertained before interlocutory judgment... 187
interlocutory judgment may direct sale of property subject to lien 187
report of sale under interlocutory judgment 188
final judgment confirming sale under 188
admeasurement of 178
See ADMEASUREMENT OF DOWER.
one-third part of real property to be set off as..... 179

Duress:
annulment of marriage because of 25, 31

Election:
of dower, by widow..... 165
between jointure and dower 165
devise and dower 165
when deemed to have been made..... 167
time allowed widow for making 167

Emancipation:
of minor children, what constitutes 196

Entirety:
effect of enabling acts upon husband's rights to rents of lands held by husband and wife in..... 129

Evidence:
certificate, entry and copies of 13
sufficient for annulment of marriage 37
as to adultery in divorce actions 53

Father:
may be compelled to support children 260, 270
See SUPPORT.

Fees:
marriage 14

GENERAL INDEX.

Foreign Judgment: PAGE.
of divorce, effect of in this State..... 119

Forms:
marriage, civil contract 285
examination of parties 286
certificate 286
matrimonial actions, summons 287
affidavit of personal service 288
complaint in action to annul marriage because of age of party 289
in action to annul on ground that former husband or wife is living 290
on ground of lunacy..... 292
for force or fraud 292
in action for divorce 293
answer in action for divorce 295
application for order directing trial of issues..... 296
notice of motion 297
proposed issues to be tried by jury 298
amendments proposed 298
order directing trial 299
judgment in action for divorce 299
order of reference 300
report of referee to hear and determine issues..... 301
judgment upon 302
notice of appearance by corespondent 303
answer of corespondent 304
separation, complaint in action 304
on ground of cruelty 304
complaint on ground of abandonment 306
judgment 306
alimony, petition 308
order of reference to determine 309
report of referee 310
order granting, and counsel fees 311
application of defendant for leave to remarry..... 312
order granting application 313
dower, complaint in action for..... 314
interlocutory judgment 315
oath of referee or commissioners 316
report of referee for admeasurement..... 317
release 318
final judgment admeasuring 318
writ of habeas corpus for detention of child 320
petition for 320
return to 322
general guardian, petition for appointment..... 323
decree appointing 325
adoption, application for order allowing or affirming..... 326
consent of parents 327
statement as to age of child 328
agreement for 328
order confirming 329

GENERAL INDEX.

Fraud: PAGE.
annulment of marriage because of 25
what constitutes 26

Guardian:
in socage, under the common law 198
powers of 199
general, when not appointed, guardianship to belong to whom, 198
duties and liabilities of 200
commission of waste by 200
actions by 200
support of ward 201
drawing on principal for 203
may change residence of ward 203
contracts of, respecting property of ward 203
mortgage of property of ward, to himself..... 204
appointment of, by Surrogate's Court..... 206
petition for, contents of 208
citations upon application for 209
Supreme Court rules relating to 208
proceedings upon return of citations 211
subpoena of witnesses 211
decree for 211
infant to nominate 211
temporary, appointment of, for infant under fourteen years... 212
petition for, may be made by relative or other person.... 212
contents of petition 212
who should be appointed 212
term of office of 214
surrogate to inquire into infant's circumstances..... 214
of property, must give bond 214
of the person, appointed by court, oath and bond of..... 217
letters of guardianship, revocation of for misconduct..... 217
petition for revocation of 217
citation for guardian to appear 218
decree revoking 218
See LETTERS OF GUARDIANSHIP.
ward or new guardian may require accounting of..... 220
general, appointed by the court, to file annual inventory and account 224
affidavit to be attached to inventory and account..... 224
order of court, directing maintenance of infant from principal in hands of 227
judicial settlement of accounts of 228
of infant's person, judicial settlement of accounts of..... 229
when may compel judicial settlement 229
compensation same as executor or administrator..... 230
testamentary, how appointed 231
not to exercise powers until will is probated or deed recorded 231
powers and duties of 232
has custody of ward 233

GENERAL INDEX.

Guardian — (Continued):
testamentary — (Continued): PAGE.
will or deed to be proved and recorded 233
qualifications of 234
objection to appointment of 235
affidavits stating 235
renunciation of appointment of 234
bond of, application by person interested 236
to be similar to general guardian's bond 237
inventory and intermediate account of 237
judicial settlement of accounts of 238
removal of, petition for 239
resignation of 240
appointment of successor of 240

Habeas Corpus, Writ of:
to secure custody of children 190
when should be granted 193
effect of former application for 194
to secure child detained by Shakers 195

Husband:
sequestration of property of, in matrimonial actions 105
proceedings to compel 106
punishment for contempt, in case of failure to pay 107
rights of, to rents of lands held by him and his wife, in entirety 129
agency of, liabilities of wife on account of 132
contracts of wife with 136
working land of wife, liability of wife 139
insurance on life of 140
for a definite period 142
rights of creditors to 142
assignability of policies of, by wife 143
surrender of policy by husband 145
rights of beneficiaries 145
liability of, for ante-nuptial debts of wife 148
for necessaries furnished to wife 149
may convey to wife 152
deed or conveyance of, without assent of wife, not to preclude right of dower 169
abandonment of wife and children by, disorderly conduct ... 260
action for, may be brought by societies for prevention of cruelty to children 263
complaint in proceedings for 262
warrants for arrest of, on account of 264
security, when to be required 265
convicted, if security is not given 265
certificate of conviction 265
bond, forfeiture of 266
imprisonment of, on account of 269

GENERAL INDEX.

Idiot or Lunatic: PAGE.
annulment of marriage where one of parties is 25, 26
who may maintain action for 33
child of, entitled to succeed 36
action to annul a marriage by next friend 39

Illegitimates:
effect of marriage of parents upon 14

Incestuous Marriages:
are void 18

Indenture:
of apprenticeship, what is 253
contents of 254
to be filed 254
made by minor 255
by whom signed when made by minor 255
made by poor officers, how signed 256
by charitable corporation 257
penalty for failure of master to perform terms of 258
assignment of, on death of master 258

Infant:
rights of, not to be prejudiced by widow's recovery of dower. 177
over fourteen years of age, may petition for appointment of guardian 208
to nominate guardian 211
under fourteen, appointment of temporary guardian for 212
See GUARDIAN; MINOR; WARD.

Inheritance:
rights of, not affected by adoption 245

Insane Persons:
relatives may be compelled to support 270

Insurance:
on husband's life for benefit of wife 140
for a definite period 142
rights of creditors to 142
assignability of policies by wife 143
surrender of policy by husband 145
rights of beneficiaries 145

Inventory:
annual, of general guardian 224
affidavit to be attached thereto 224
examination of, by surrogate 225
proceedings when defective or not filed 226
of testamentary guardian, order requiring 237

Issues:
framing of, in actions for divorce 48, 50

GENERAL INDEX.

Jointure: PAGE.
dower barred by 163
election between dower and 165
when forfeited by widow 169
not forfeited by fraudulent acts of husband 169

Judicial Settlement:
of accounts of general guardian, when may be petitioned for. 228
of guardian of person 229
citation upon 230
when guardian may compel 229
proceedings upon 230
of testamentary guardian, order requiring 238
testamentary guardian may petition for 238

Judgment:
in action for annulment of marriage not to be rendered by default 37
how far conclusive 39
in actions for divorce, effect of when brought by wife 62
application for modifications of 62, 63, 85
effect of, upon rights of wife 62
when brought by husband 64
vacating, after remarriage of parties 118
remarriage of parties, after 119
effect of foreign 119
in actions for separation, contents of 81
when to decree support and maintenance 82
effect of 83
revocation of 83
in actions for divorce and separation, to award custody of children, etc. 83
modification of 101
when not to be rendered upon defendant's default 110
Supreme Court rules relating to judgments by default... 111
in actions for dower, what to contain 182
may direct payment of fixed sum 182
may be modified by order of court 183
appeal from, when does not stay execution 183

Judgment, Interlocutory:
in action for dower, to direct admeasurement of dower..... 178
may direct sale of property when plaintiff consents to receive gross sum 186
may direct the setting off of distinct parcel if plaintiff consents 186
may direct sale of property subject to lien 187
report of sale under 188
final judgment confirming sale under 188

Jurisdiction:
of courts of other States, when may be questioned in matrimonial actions 121

GENERAL INDEX.

Jury: *See* TRIAL; DIVORCE; SEPARATION.

Letters of Guardianship. *See* GUARDIAN. PAGE.
revocation of, for misconduct, etc. 217
petition for, what to contain 217
citation for guardian to appear 218
guardian to be suspended during pendency of proceeding. 219
application for, by guardian 219
proceeding when application is made by guardian 219
ancillary, to foreign guardian, petition for 221
petition to be accompanied with records, etc..... 222
proceedings upon application for 222
effect of 222

Marriage:
a civil contract 1
defined 1
when proved by cohabitation 2, 8
promise to marry in future does not constitute 4
cohabitation, when presumptive proof of 5
presumption of, from reputation and declarations of the parties 5, 6
meretricious cohabitation, not evidence of 7
solemnization or contract now essential 1, 16
who may solemnize 9
how solemnized 10, 16
particular ceremony or contract required 10, 16
solemnizing unlawful, a misdemeanor 11
certificate of, contents of 11
must be filed and entered 12
registration of, with boards of health 12
evidence of ceremonial 13
written contract now requisite 16
fees 14
effect of, on illegitimates 14
validity of, governed by *lex loci contractus*..... 17
incestuous, void 18
contracted by person whose former husband or wife is living, absolutely void 19
valid, if former husband or wife had been absent for five successive years 19, 20
when voidable 23
annulment of, actions for 24
See ANNULMENT.
children of, when annulled because one of parties is idiot or lunatic 36
annulled on account of force, fraud or duress 37
contracts in contemplation of 146

Married Women. *See* WIFE.
property rights of 125
rights of, under enabling act 127
as to contracts 129, 157

GENERAL INDEX.

Married Women — (Continued): PAGE.
liabilities of, for contracts 129
for carrying on separate business, trade or occupation.. 130
under enabling acts 131
under contracts, now unlimited 132
right of compensation for services rendered by 134, 157
contracts of, with husband 136
liability when husband works land 139
right of action for personal injuries 154
right of action for wages 157
liability for torts 155
compelling transfer of trust property of 156
guardianship of, with respect to person, terminated by marriage 205
is joint guardian of children with husband 231

Master:
to give apprentice certificate at expiration of apprenticeship .. 254
penalty for failure to perform provisions of indenture 258
on death of, indenture to be assigned 258

Minor. *See* WARD.
how bound out as apprentice 253
when bound out by poor officers, what indenture shall contain 254
may bind himself as apprentice 255
apprenticed by poor officers 256

Mortgage:
purchase-money, right of dower in lands covered by 161
surplus proceeds of sale under, right of dower in 162

Mother:
may be compelled to support children 270
See SUPPORT.

Pardon:
not to restore to marital rights 156

Parents:
when entitled to wages of children 195

Parties:
corespondents may defend in divorce 49

Personal Injuries:
right of action for, by married woman 154

Petition:
for appointment of guardian by court 208
what to contain 209
contents of, in application for appointment of temporary guardian 212

GENERAL INDEX.

Petition — (Continued): PAGE.
for granting ancillary letters of guardianship to foreign guardian 221
for maintenance of infant out of principal in hands of guardian 227
for judicial settlement of guardian's accounts 228
for bond of testamentary guardian 236
of testamentary guardian for judicial settlement 238
for removal of testamentary guardian 239
for abrogation of adoption of children by foster parent..... 248

Physical Incapacity:
annulment of marriage because of 25, 32

Pleadings:
in actions for divorce 43
Supreme Court rules as to 45
in actions for separation 79

Preference:
in actions for divorce 112

Quarantine:
widow's right of 171

Recrimination:
a defense in actions for divorce 59, 61

Referee. *See* TRIAL; DIVORCE; SEPARATION, etc.
trial of matrimonial actions by 113
qualifications of 114
report of 114
for the admeasurement of dower 178
See ADMEASUREMENT OF DOWER.

Reference:
none in case of default in matrimonial actions 116

Relatives:
support of poor persons by 270
order compelling 272
application for 272
court to hear cause and make 273
support of poor persons, when to be apportioned among ... 273
order, effect and modification of 274
enforcement of 275
action on failure to comply with 276

Release:
of inchoate right of dower by divorced woman 171

Re-marriage:
of parties after judgment of divorce 119

GENERAL INDEX.

Report: PAGE.
of referee or commissioners for admeasurement of dower.. 179, 181
when may be set aside 181
final judgment rendered upon confirmation of 182

Residence:
of parties in actions for divorce 40, 42
in actions for separation 78
of married woman, what constitutes 85

Seizin:
in husband of land, to entitle wife to dower 159

Separation:
agreements for, against public policy 68
may be made valid through intervention of trustee 69
actions for, when maintainable 71
nature of 72
cruel and inhuman treatment grounds for action for.... 72
what constitutes 72
false charges of adultery constitute 73
what acts do not constitute 74
abandonment as a ground of 75
condonation as a defense in 77
residence of parties as affecting right to maintain 78
complaint in 79
defendant may set up plaintiff's misconduct in 80
judgment in, contents of 81
effect of 83
revocation of 83
counterclaim may be interposed by defendant in 80, 100
final judgment in, may award custody of children and provide maintenance 81, 101
when judgment by default will not be rendered in... 110, 116
practice in generally 112
trial of, by jury 112
by referee 113
qualification of referee 114
actions for, report of referee 114
judgment in, when may be vacated 117
effect of foreign judgment 119
jurisdiction of courts of other States, when may be questioned 121
See ALIMONY.

Sequestration:
of property of husband for support and maintenance of children and wife in matrimonial actions 105
proceedings to compel 106

Services:
right of wife to compensation for 134, 157

GENERAL INDEX.

Shakers: PAGE.
securing child detained by 195

Statutes:
enabling, effect of 131
liabilities of married women under ..... 131 *et seq.*

Summons:
in matrimonial actions 110

Support:
of poor persons, by relatives 270
order compelling, application for 272
court to hear application 273
effect and modification of 274
enforcement of 275
action on failure to comply with 276

Supreme Court Rules:
as to pleadings in divorce actions 45
as to contents of answer 47
as to proving allegations of adultery 45, 51, 111
as to judgments by default in matrimonial actions 111
relating to appointment of guardian by court 208

Torts:
right of action by or against married woman for 154
liability of married woman for 155

Trial:
in action for annulment of marriage 37
of actions for divorce by jury 48
of matrimonial actions by jury 112
preference in 112
by referee 113
qualifications of referee 114
report of referee 114

Trust property:
compelling transfer of, by trustee of married woman 156

Validity:
of marriage, governed by *lex loci contractus* 17

Void Marriages:
what is 19
where former husband or wife is living 19

Wages:
payment of, to minor, when valid 195

Ward:
when general guardian not appointed, who entitled to guardianship of 198
actions in name of 199

GENERAL INDEX.

Ward — (Continued): PAGE.
support of, by guardian 200, 201
drawing on principal for 203
change of residence of, by guardian 203
maintenance of, order directing, from principal in hands of guardian 227
may petition for judicial settlement of accounts of guardian.. 228
for accounts and inventory of testamentary guardian.... 237

Widow:
of what lands endowed 158
dower in lands exchanged 159
mortgaged before marriage 160
conveyance of land to defeat right of dower of 160
purchase-money mortgage, right of dower in lands covered by. 161
proceeds of sale under, right of dower in 162
not endowed unless lands conveyed absolutely to husband... 162
dower of, barred by jointure 163
by pecuniary provisions 164
election between dower and jointure 165
between dower and devise 165
quarantine of 171

Wife. *See* MARRIED WOMEN.
support of, judgment to decree, in action for divorce or separation 101
bond of husband to secure 105
liabilities of, on account of agency of husband..... 132
services of, right of compensation for 134, 157
earnings of, in furnishing board 136, 157
liability of, when husband and, live upon land 139
insurance on husband's life, for benefit of 140
rights of creditors to 142
ante-nuptial debts of, liability of husband for 148
contract of, not to bind husband 149
husband's liability for necessaries furnished to 149
may convey to husband 152
right of action by or against for torts 154
abandonment of, by husband, disorderly conduct 260
See ABANDONMENT.

Will:
appointing testamentary guardian to be proved before guardian acts 233