

ing to said appraisement, shall not exceed two hundred dollars; and if such tenant, or a member of his family, his agent or attorney, cannot readily be found, such selection may be made by said appraisers; and the goods so selected shall be left for the use of the family of said tenant.

How exemptions selected if landlord fails to proceed.

Revision.

25. That in case the landlord, his attorney or agent, shall not, within two days after being served with a request in writing from his tenant to proceed and have the distrained goods appraised in the manner directed in the sixth section of this act, it shall be lawful for such tenant, after five days' notice thereof to his said landlord, his attorney or agent, to apply to the sheriff or to any constable of the county, and have the said goods inventoried and appraised in the manner appointed in said sixth section; and from such inventory and appraisement the goods exempted for the use of the family of the tenant, may be selected, in the manner provided in the next preceding section, and with like effect.

Extends to under tenant.

26. That the provisions contained in the next two preceding sections shall apply to the case of under-tenants.

Fees.

27. That all sheriffs and constables in this state are hereby required to be aiding in the execution of the next three preceding sections of this act; and for such services they and the appraisers therein mentioned, shall be entitled to the same fees that are provided for like services in the act entitled "An act respecting executions."

## Divorce.

### I. JURISDICTION OF THE COURT OF CHANCERY.

1. Court of Chancery to have jurisdiction of all causes of divorce, alimony or maintenance.

### II. CAUSES FOR DIVORCE.

2. Divorce decreed where either of parties had another husband or wife living.
3. For marriage within degrees prohibited, adultery and desertion.
4. For impotency.
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### III. PROCEDURE AND PRACTICE.

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### V. CUSTODY AND MAINTENANCE OF MINOR CHILDREN.

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24. Also after divorce decree in another state.
25. When children of parents divorced shall not be removed from this state.
26. Control over children of parents living separately.
27. Rights of parents to be equal in absence of misconduct.
28. Power of court as to custody.
29. On death of parent awarded custody, not to revert to surviving parent.

### VI. MISCELLANEOUS PROVISIONS.

30. Collusion of parties.
31. When cohabiting after divorce, incest.
32. When punished as adultery.
33. Suit in forma pauperis.

## An act concerning divorces.

Revision—Approved March 27, 1874.

### I. Jurisdiction of the court of chancery.

1. That the court of chancery shall have jurisdiction of all causes of divorce and of alimony or maintenance, by this act directed and allowed, provided the parties, complainant and defendant, or either of them, were or shall be inhabitants of this state (a) at the time of the injury, desertion or neglect complained of, or where the marriage shall have been solemnized

R. S. 922.

P. L. 1857, p. 399.  
" 1871, p. 15.

Court of chancery to have jurisdiction of all causes of divorces, alimony or maintenance.

R. S. 922, § 1.  
Amended.

(a) The party must have resided in the state for three years before the filing of the bill, where *desertion* is the ground of the application, *Yates v. Yates*, 2 *Beas*, 280. *Brown v. Brown*, 2 *McCart*, 499, reversing S. C. 1 *McCart*, 78. *Goldbeck v. Goldbeck*, 3 *C. E. Gr.* 42. *Coddington v. Coddington*, 5 *C. E. Gr.* 263. Where *adultery* is the ground, a divorce will be a refused to a citizen of another state bringing his effects into this, obviously to procure such divorce, and

immediately commencing suit for that purpose, although the charge be clearly proved, *Winship v. Winship*, 1 *C. E. Gr.* 107. *Query*, whether desertion for three years by complainant, and before any adultery proved against defendant, would bar complainant, *Hedden v. Hedden*, 6 *C. E. Gr.* 61. See *Marsh v. Marsh*, 1 *McCart*, 315. *Adams v. Adams*, 2 *C. E. Gr.* 324.

or taken place within this state, and the complainant shall have been an actual resident in this state at the time of the injury, desertion or neglect complained of and at the time of exhibiting the bill; or where the adultery was committed in this state, and the parties, complainant and defendant, or either of them, reside in this state at the time of exhibiting the bill; or where the complainant or defendant shall be a resident of this state at the time of filing the bill of complaint, and the complainant or defendant shall have been a resident of this state for the term of three years, during which such desertion shall have continued; *provided*, such complainant shall make his or her oath or affirmation, to be annexed to the bill of complaint, that his or her complaint is not made by any collusion between him or her and the defendant, for the purpose of dissolving their marriage, but in truth and good faith for the causes set forth in the bill of complaint.

P. L. 1857, p. 399.

**II. Causes for divorce.**

2. Divorces from the bond of matrimony, shall be decreed where either of the parties had another wife or husband living at the time of such second or other marriage;(a) and that all marriages, where either of the parties shall have a former husband or wife living at the time of such marriage, shall be invalid from the beginning and absolutely void, and the issue thereof shall be deemed to be illegitimate, and subject to all the legal disabilities of such issue.

Divorce decreed where either of parties had another husband or wife living.

R. S. 922, § 3. Issue illegitimate.

3. Divorces from the bond of matrimony may be decreed, in case the parties are within the degrees prohibited by law, and in case of adultery(b) in either of the parties; and also for wilful, continued and obstinate desertion for the term of three years;(c) but the decree or sentence of divorce in such cases shall not render illegitimate the issue of any marriage so dissolved.

For marriage within degrees prohibited, adultery and desertion. Ib. § 4.

4. Divorces from the bond of matrimony may be decreed in case the parties, or either of them, were, at the time of such marriage, physically and incurably impotent;(d) and all marriages in such case shall be invalid from the beginning and absolutely void.

P. L. 1857, p. 399. For impotency. Revision.

5. For extreme cruelty in either of the parties, the court of chancery may decree a divorce from the bed and board forever thereafter, or for a limited time, as shall seem just and reasonable.(e)

For extreme cruelty, divorce from bed and board.

R. S. 922, § 8.

**III. Procedure and practice.**

6. The like process and course of practice and procedure shall be had and pursued in all such causes as are usually had and pursued in other causes on the equity side of the said court, except that the answer of defendants shall not be under oath.(g)

Process and answer. Ib. § 2.

(a) See *Zule v. Zule*, Sax. 96.  
 (b) Charges of adultery and cruelty cannot be united in the same bill, *Decamp v. Decamp*, 1 Gr. Ch. 294. *Snover v. Snover*, 2 Stock. 261. What allegations in a bill for adultery as to time, place, &c., are sufficient, *Clutch v. Clutch*, Sax. 474. *Marsh v. Marsh*, 1 C. E. Gr. 391. *Mills v. Mills*, 3 C. E. Gr. 444. *Miller v. Miller*, 5 C. E. Gr. 216. *Goodwin v. Goodwin*, 8 C. E. Gr. 210. *Noel v. Noel*, 9 C. E. Gr. 137. See RULES OF CHANCERY, § 158. How recrimination must be set up and proved, *Jones v. Jones*, 3 C. E. Gr. 33. *Flavell v. Flavell*, 5 C. E. Gr. 211; 7 C. E. Gr. 599. *Reid v. Reid*, 6 C. E. Gr. 331. A bill for discovery whether the defendant has not committed adultery, with whom and at what time and place, &c., cannot be sustained, *Marsh v. Marsh*, 1 C. E. Gr. 391. Evidence in particular cases sufficient to sustain the charge, *Day v. Day*, 3 Gr. Ch. 444. *Bray v. Bray*, 2 Hal. Ch. 628. *Adams v. Adams*, 2 C. E. Gr. 324. *Jones v. Jones*, 2 C. E. Gr. 351. *Flavell v. Flavell*, 5 C. E. Gr. 211; 7 C. E. Gr. 599. *Derby v. Derby*, 6 C. E. Gr. 37. What evidence is insufficient, *Clutch v. Clutch*, Sax. 474. *Miller v. Miller*, 1 Gr. Ch. 139. *Cummins v. Cummins*, 2 McCart. 138. *Mount v. Mount*, 2 McCart. 162. *Berckmans v. Berckmans*, 1 C. E. Gr. 122; 2 C. E. Gr. 453. *Reid v. Reid*, 2 C. E. Gr. 101. *Clare v. Clare*, 4 C. E. Gr. 37. *Larrison v. Larrison*, 5 C. E. Gr. 100. *Miller v. Miller*, 5 C. E. Gr. 216. *Hedden v. Hedden*, 6 C. E. Gr. 61. *Mayer v. Mayer*, 6 C. E. Gr. 246. *Reid v. Reid*, 6 C. E. Gr. 331. What variance between the allegations and proof is fatal, *Zule v. Zule*, Sax. 96. *Moore v. Moore*, 1 C. E. Gr. 275. *Mills v. Mills*, 3 C. E. Gr. 444. *Miller v. Miller*, 5 C. E. Gr. 216. *Prince v. Prince*, 10 C. E. Gr. 310. What proof of the marriage is necessary, *Goldbeck v. Goldbeck*, 3 C. E. Gr. 42. See *Vreeland v. Vreeland*, 3 C. E. Gr. 43. *Condonation*, Hal. Dig. p. 386, § 2. *Marsh v. Marsh*, 2 Beas. 281. *Stevens v. Stevens*, 1 McCart. 374. *Jones v. Jones*, 3 C. E. Gr. 33. *Hedden v. Hedden*, 6 C. E. Gr. 61. *Reid v. Reid*, 6 C. E. Gr. 333. Rights and duties of the parties while the suit is pending, *Marsh v. Marsh*, 1 McCart. 315. *Cummins v. Cummins*, 2 McCart. 138. *Chapman v. Chap-*

*man*, 10 C. E. Gr. 394. A decree for a divorce obtained in another state before a court of competent jurisdiction, although procured by collusion, binds the parties, *Kirriegan v. Kirriegan*, 2 McCart. 146. *Nichols v. Nichols*, 10 C. E. Gr. 60. See *Hedden v. Hedden*, 6 C. E. Gr. 61. For effect of decree in this court, see *Vreeland v. Jacobus*, 4 C. E. Gr. 231, ante p. 114, note (a).  
 (c) Mere separation does not constitute desertion, *Lewis v. Lewis*, 2 Hal. Ch. 22. *Marker v. Marker*, 3 Stock. 256. *Jennings v. Jennings*, 2 Beas. 88. *Cook v. Cook*, 2 Beas. 263. *Marsh v. Marsh*, 1 McCart. 315. *Rogers v. Rogers*, 3 C. E. Gr. 445. *Test v. Test*, 4 C. E. Gr. 342. *Laing v. Laing*, 6 C. E. Gr. 248. *Woodworth v. Woodworth*, 6 C. E. Gr. 251. *Drake v. Drake*, Hal. Dig. 385. What constitutes, and is sufficient proof of desertion, *Miller v. Miller*, Sax. 386. *Begbie v. Begbie*, 3 Hal. Ch. 98. *Martin v. Martin*, 4 Hal. Ch. 563. *Marker v. Marker*, 3 Stock. 256. *Anshutz v. Anshutz*, 1 C. E. Gr. 162. *Palmer v. Palmer*, 7 C. E. Gr. 88. See RULES OF CHANCERY, § 159. What is not a desertion or evidence thereof, *Ford v. Ford*, 2 Hal. Ch. 542. *Cory v. Cory*, 3 Stock. 400. *Conger v. Conger*, 2 Beas. 286. *Goldbeck v. Goldbeck*, 3 C. E. Gr. 42. *Reid v. Reid*, 6 C. E. Gr. 331. *Cornish v. Cornish*, 8 C. E. Gr. 208. *Leaning v. Leaning*, 10 C. E. Gr. 241. *Bowlby v. Bowlby*, 10 C. E. Gr. 406. 570. *Stone v. Stone*, 10 C. E. Gr. 445.  
 (d) Before the passage of this section a marriage could not be annulled for impotence, *Anonymous*, 9 C. E. Gr. 19.  
 (e) What constitutes extreme cruelty, *Clutch v. Clutch*, Sax. 474. *Graecen v. Graecen*, 1 Gr. Ch. 459. *Cook v. Cook*, 3 St. 195. *Anshutz v. Anshutz*, 1 C. E. Gr. 162. *Moore v. Moore*, 1 C. E. Gr. 275. *Fischer v. Fischer*, 3 C. E. Gr. 300. *Davis v. Davis*, 4 C. E. Gr. 180. *Thomas v. Thomas*, 5 C. E. Gr. 97. *Laing v. Laing*, 6 C. E. Gr. 248. *Close v. Close*, 10 C. E. Gr. 526. See *Amos v. Amos*, 3 Gr. Ch. 171.  
 (g) The answer, although sworn to, cannot be considered as evidence for any purpose, *Miller v. Miller*, Sax. 386. *S. C. 1 Gr. Ch. 140. Bray v. Bray*, 2 Hal. Ch. 27. *Anthony v. Anthony*, 3 Stock. 70. *Tomkins v. Tomkins*, cited in Sax. 388.

- Suits by petition,  
Ib. § 12. 7. All suits in the court of chancery for divorces, may be commenced by filing a petition<sup>(a)</sup> with the clerk of the court; which petition shall plainly and fully state the cause or causes of the application for such divorce and the relief prayed; and the complainant shall make his or her oath or affirmation to be annexed to said petition, that his or her complaint is not made by any collusion between him or her and the defendant, for the purpose of dissolving their marriage, but in truth and good faith for the cause or causes set forth in the petition.
- Citation and copy  
of petition served.  
Ib. § 13. 8. Upon filing the said petition, the clerk shall, if required, make out a certified copy thereof to be served on the defendant, and issue a citation under the seal of the court for the defendant to answer the said petition on or before the first day of the next stated term of the court; which citation shall bear date the day of issuing thereof, and be tested in the name of the chancellor.
- By whom.  
Ib. § 14. 9. It shall be the duty of the sheriff or coroner, as the case may require, of any county in this state, to whom any such citation and certified copy of the petition shall be directed or delivered, to serve the same, and to make return of the said citation at the time and place therein mentioned, which shall be filed by the clerk.
- How served.  
Ib. § 15. 10. Every such citation shall be served either by delivering to the defendant a copy thereof, together with a certified copy of the petition, or by leaving the said copies at his or her dwelling house or usual place of abode, at least twenty entire days before its return.<sup>(b)</sup>
- Proceedings,  
after citation  
returned served.  
Answer.  
Ib. § 16. 11. On a citation being returned "served" or "cited" by the sheriff or coroner, as the case may require, the defendant shall, on the day mentioned therein for him or her to answer the said petition, or within three days thereafter, file his or her answer to the said petition, unless the court shall grant the defendant further time for that purpose; which answer shall plainly and fully set forth the cause or causes of his or her defence, and shall be signed by the defendant, but not sworn to; after which without any replication or further pleadings or rule, the parties shall proceed to take their evidence as in other cases in the court of chancery, so that the cause may be heard at the next stated term thereafter, unless the court, for good cause and upon such terms as shall be considered by the court just and reasonable, shall think proper to put off the hearing thereof to another term.
- If no answer,  
order for proofs.  
Ib. § 17. 12. If a defendant upon the citation being returned "served" or "cited" as aforesaid, shall not file his or her answer to the petition within the time limited by this act or granted by the court, the court may make an order that the petitioner proceed to take depositions and other evidence to substantiate and prove the allegations in the petition, and to bring on the hearing of the cause *ex parte*.
- Order for publi-  
cation if defend-  
ant absent.  
Ib. § 18. 13. In case a petition as aforesaid shall be filed, and it shall be made to appear by affidavit or otherwise, to the satisfaction of the chancellor, that such defendant is out of this state, or cannot upon due inquiry be found therein, or that he or she conceals himself or herself within this state, the chancellor may thereupon, by order, direct such defendant to answer the said petition, at a certain day therein named, not less than two nor more than six months from the date of such order, which order shall, within twenty days thereafter, be served on such defendant, by delivery of a copy thereof to him or her, or by leaving it at his or her dwelling house or usual place of abode, or be published in one of the newspapers printed in this state, and designated in such order, and continued therein for four weeks successively, at least once in every week, and shall be published in such other manner as the particular circumstances of the case may require, if in the opinion of the chancellor, any other or further publication shall be necessary, and in case such defendant shall not file his or her answer within the time so limited, or within some further time, to be allowed by the chancellor, on proof of due service or publication of said order the court may order and direct the petitioner to produce depositions or other evidence to substantiate and prove the allegations in the petition,

(a) Where the marriage is not one declared originally void by the statute, and the case is one which cannot be considered within its provisions, as included in the term *void*, the suit must be by bill, *Selah v. Selah*, 8 C. E. Gr. 185.

(b) An acknowledgment of service of a copy of the citation, is not evidence of a legal service to give the court jurisdiction, there should be evidence of a service of a copy of the petition also, *Stone v. Stone*, 10 C. E. Gr. 445.

and the said petitioner may then proceed *ex parte*, and bring on the hearing of said cause.

14. No petition, citation, answer, or other proceedings in any suit commenced by petition, as aforesaid, shall be set aside or otherwise annulled or made void for any defect in matter of form, or for any mistake or omission not affecting the real merits of the cause, and the chancellor may permit either party to amend his or her petition, answer or other proceedings in the cause, either in matters of form or substance, and proceed to give judgment according to the merits of the case. No proceeding by petition void for defect of form. *Ib.* § 19.

15. In all cases where the proceedings shall be commenced by petition, as aforesaid, it shall and may be lawful for the chancellor, where not otherwise herein directed, to proceed as directed and allowed by this act in other cases, and to make such decree as authorized in such cases, which decree shall be carried into effect in the manner herein directed and provided for, and the court is hereby invested with all powers necessary to the conducting and finally determining such cases, according to the true intent and meaning of this act. Decree and how executed. *Ib.* § 20.

16. When any cause shall be finally determined, which shall be commenced by petition, as aforesaid, the clerk of the court of chancery shall enter or enroll together, in order, the petition, answer, decretal, orders, reports and final decree in such cause, in his book of decrees, which enrollment shall be signed as is authorized and required in other cases. Enrollment. *Ib.* § 21,

17. There shall be allowed in the taxation of costs, for the petition, the sum of one dollar; for the answer, the sum of one dollar; to the clerk, for the citation and certified copy of the petition, seventy-five cents; to the sheriff, for serving and returning the citation, one dollar and fifty cents; and to the examiner, for taking the examination of every witness, for each sheet, ten cents, and for certifying every exhibit shown to a witness, ten cents; and that no other or greater fees shall be allowed for the said services. Fees. *Ib.* § 22.

18. If, in the opinion of the chancellor, any matter of fact shall render the intervention of a jury necessary in any suit or proceeding for a divorce, then the court of chancery is hereby authorized to direct an issue for the trial of the same in the supreme court, or in one of the circuit courts. When issue ordered. *Ib.* § 23.

#### IV. Alimony and maintenance.

19. When a divorce shall be decreed, it shall and may be lawful for the court of chancery to take such order touching the alimony and maintenance of the wife, (a), and also touching the care and maintenance of the children, or any of them, (b) by the said husband, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; and in case the wife is the complainant, to order the defendant to give reasonable security for such alimony and maintenance; and upon his neglect or refusal to give such reasonable security as shall be required of him, or upon default of him and his surety, if any there be, to pay or provide such alimony and maintenance, to award and issue process for the immediate sequestration of the defendant's personal estate, and the rents and profits of his real estate, and to appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied towards such maintenance and allowance, or to such maintenance and allowance as to the said court shall from time to time seem reasonable and just, or to enforce the performance of the said decree or orders by such other lawful ways and Of alimony and maintenance. *Ib.* § 9.

(a) In fixing the amount of alimony the character and condition, as well as the amount of the husband's estate, will be considered, *Richmond v. Richmond*, 1 Gr. Ch. 90. *Close v. Close*, 10 C. E. Gr. 434; and also the wife's pecuniary circumstances, *Marker v. Marker*, 3 Stock. 256. A gross sum may be decreed to be paid, or a certain part of the husband's property conveyed or transferred in full discharge of all future claims and demands of the wife, *Calame v. Calame*, 9 C. E. Gr. 440; 10 C. E. Gr. 548. An application to increase or diminish the amount may be made by petition, *Richmond v. Richmond*, 1 Gr. Ch. 90. *Snover v. Snover*, 2 Beas. 261; 2 C. E. Gr. 85. The burden of proof is on the petitioner, *Walling v. Walling*, 1 C. E. Gr. 389. It may be referred to a

master to ascertain the facts, both as to the application and proper amount, or, if all the circumstances are before the court, it may be disposed of without such reference, *Ibid.* *Cory v. Cory*, 3 Stock. 400. Alimony will be denied where a divorce has already been obtained in another state, *Kirri-gan v. Kirri-gan*, 2 McCart. 146. *Nichols v. Nichols*, 10 C. E. Gr. 60.

(b) The allowance will be according to the condition in life of the father, *Richmond v. Richmond*, 1 Gr. Ch. 90. *Valentine v. Valentine*, 4 Hal. Ch. 219. *Snover v. Snover*, 2 Beas. 261; 2 C. E. Gr. 85. No allowance will be made where the children are grown up, *Amos v. Amos*, 3 Gr. Ch. 171. See *Walling v. Walling*, 1 C. E. Gr. 389.

Sequestration of estate.

means as is usual, and according to the course and practice of the court of chancery.(a)

When husband compelled to support wife.  
Ib. § 10.

20. In case a husband, without any justifiable cause, shall abandon his wife or separate himself from her, and refuse or neglect to maintain and provide for her, it shall and may be lawful for the court of chancery to decree and order such suitable support and maintenance, to be paid and provided by the said husband for the wife and her children, or any of them, by that marriage, or out of his property, and for such time as the nature of the case and the circumstances of the parties render suitable and proper in the opinion of the court, and to compel the defendant to give reasonable security for such maintenance and allowance, and from time to time to make such further orders touching the same as shall be just and equitable, and to enforce such decree and orders in the manner mentioned in the last preceding section of this act; but during the time such maintenance shall be allowed by the decree or sentence of the court, the husband shall not be chargeable with her debts.(b)

Security for costs required.  
Ib. § 11.

21. In any such suit as is mentioned in the last preceding section, it shall and may be lawful for the chancellor, if applied for before answer filed, to order a bond to be given in one hundred dollars, by one or more sufficient freeholders, with condition to pay such costs as shall or may be awarded by the court to be paid to the defendant.(c)

#### V. Custody and maintenance of minor children.

Court may control custody of minor children, pendente lite.  
P. L. 1871, p. 15, § 1.

22. The court of chancery may, on application of either party in a suit for divorce, make such order, concerning the care and custody of the minor children of the parties, during the pendency of the suit, as shall be deemed expedient and for the benefit of the children.(d)

After decree of divorce, may make further decree as to custody.  
Ib. § 2.

23. Upon a decree of nullity or divorce, the court may make such further decree or order as may be deemed expedient, concerning the care, custody and maintenance of the minor children of the parties, and determine with which of the parents the children, or any of them, shall remain; and may also from time to time afterwards, on the petition of either of the parents, revise and alter such decree or order, and make a new decree or order, as the circumstances of the parents and the benefit of the children shall require.

Also after divorce decreed in another state.  
Ib. § 3.

24. After a divorce decreed in any other state or country, if minor children of the marriage are inhabitants of this state, the court of chancery, on the petition of either parent, or of a next friend in behalf of the children, such notice being given to both parents as the court shall direct, may make such decree concerning their care, custody, education and maintenance as if the divorce had been obtained in this state.

When children of parents divorced shall not be removed from this state.  
Ib. § 4.

25. When the court of chancery has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this state, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while

(a) The allowance may be declared to be a lien on the husband's real estate in this state, and he may also be required to give security for its punctual payment, *Snover v. Snover*, 2 *Beas.* 261. See *Richmond v. Richmond*, 1 *Gr. Ch.* 90. Effect of sequestration, *Vreeland v. Jacobus*, 4 *C. E. Gr.* 231. An injunction to restrain the husband from alienating his property will not be granted upon the mere apprehension of an abandonment, *Anshutz v. Anshutz*, 1 *C. E. Gr.* 162.

(b) Both the abandonment and refusal to support must be charged and proved, *Anshutz v. Anshutz*, 1 *C. E. Gr.* 162. *Walling v. Walling*, 1 *C. E. Gr.* 389. A mere allegation that the husband does not "provide his wife with support," is insufficient, *Davis v. Davis*, 4 *C. E. Gr.* 180. The allowance will be made to the wife although she leaves her husband without cause, if she returns and he refuses to provide for her, *Cory v. Cory*, 3 *Stock.* 400. *Begbie v. Begbie*, 3 *Hal. Ch.* 98. *Martin v. Martin*, 4 *Hal. Ch.* 563: Where the wife leaves the husband and goes and continues to reside elsewhere, it is *prima facie* abandonment by her, and she must show clearly that her going away was compulsory, *Starkey v. Starkey*, 6 *C. E. Gr.* 135. The court has no power to decree alimony except as incident to divorce, and under this section, *Yule v. Yule*, 2 *Stock.* 138. *Anshutz v. Anshutz*, 1 *C. E. Gr.* 162. See *Melony v. Melony*, cited in *Sax.* 389. It may be allowed although the parties are living apart under articles of separation, *Miller v. Miller*, *Sax.* 386. *Moore v. Moore*, 1 *C. E. Gr.* 276. See *Dixon v. Dixon*, 8 *C. E. Gr.* 316; 9 *C. E. Gr.*

133. *Emery v. Neighbor*, 2 *Hal.* 142. If a husband, who has ample means, takes his wife to a retired country tavern against her wishes, and leaves her there without notice or knowledge by her of the place to which he has gone, or whether he has made any provision for her support there or elsewhere, it is an abandonment, *Boyce v. Boyce*, 8 *C. E. Gr.* 337; 9 *C. E. Gr.* 588. Alimony *pendente lite* may be allowed to the wife, *Vreeland v. Vreeland*, 3 *C. E. Gr.* 43. *Paterson v. Paterson*, 1 *Hal. Ch.* 389; but it will not be if there is no foundation for the bill, *Dougherty v. Dougherty*, 4 *Hal. Ch.* 540. See *Martin v. Martin*, 4 *Hal. Ch.* 563. For allowance or refusal of costs and counsel fees on an application for alimony, see *ante*, p. 124, note(a).

(c) Query, whether this is imperative, *Ballentine v. Ballentine*, 1 *Hal. Ch.* 519.

(d) Where a separation for three years was decreed on evidence of extreme cruelty, the child, being of tender years, was committed to the custody of the mother, *Clutch v. Clutch*, *Sax.* 474. A child five years old was ordered to be given up to the father, four years after a separation and allowance for support, *Valentine v. Valentine*, 4 *Hal. Ch.* 219. Other cases where the father was decreed to retain the children, *State v. Stigall*, 2 *Zab.* 286. *Magee v. Holland*, 3 *Dutch.* 86. *Bennet v. Bennet*, 2 *Beas.* 114. *State, Baird v. Torrey*, 3 *C. E. Gr.* 194, modified in 4 *C. E. Gr.* 481. Custody awarded to the mother, *Thomas v. Thomas*, 5 *C. E. Gr.* 97. *Noel v. Noel*, 9 *C. E. Gr.* 137. See *Landis v. Landis*, 9 *Vr.*

under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order; the court, upon application of any person in behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the purposes of this and the preceding sections.

26. When the parents of minor children live separately, the court of chancery, upon petition of either parent, shall have the same power to make decrees or orders concerning their care, custody, education and maintenance as concerning children whose parents are divorced.

Control over children of parents living separately. *Ib.* § 5.

27. In making an order or decree relative to the custody of the children pending a controversy between their parents, or in regard to their final possession, the rights of both parents, in the absence of misconduct, shall be held to be equal, and the happiness and welfare of the children shall determine the custody or possession.

Rights of parents to be equal. *Ib.* § 6.

28. The said court may make the necessary orders and decrees, from time to time, in relation to such custody or possession.

Power of court as to custody. *Ib.* § 7.

29. In case of a death of the parent to whom the care and custody of the minor children shall be awarded by the court of chancery, on account of the misconduct or incapacity of the other parent, or when the parents are living separately, in case of the death of the parent in whose custody the children actually are, no award as to the custody of such children having been made, the care and custody of such minor children shall not revert to the surviving parent without a decree of said court to that effect; and the said court shall have the right, upon petition of a next friend on behalf of the children, to appoint such friend or other suitable person, guardian of such minor children, and shall have the right to remove such guardian, and to appoint a new guardian or guardians, and to make such orders, from time to time, as the circumstances of the case and the benefit of the children shall require.

On death of parent awarded custody, not to revert to surviving parent. *Ib.* § 8.

Guardian may be appointed.

VI. Miscellaneous provisions.

30. If it appear to the court that the adultery complained of shall have been occasioned by the collusion of the parties, and done with an intention to procure a divorce, or that the complainant was consenting thereto,<sup>(a)</sup> or that both parties have been guilty of adultery,<sup>(b)</sup> then no divorce shall be decreed.

Collusion of parties. *R. S. 922, § 5.*

31. If any persons, who shall be divorced on account of their being within the prohibited degrees, shall, after such divorce, cohabit together, such persons so offending shall be liable to all the pains and penalties provided by the then existing laws against incest.

When cohabiting after divorce, incest. *Ib.* § 6.

32. If any person shall cohabit or live together in the same house, after a divorce for the cause of adultery or prior marriage, such person so offending shall be liable to all the pains and penalties provided by the laws against adultery.

When punished as adultery. *Ib.* § 7.

33. Whenever any poor person shall have cause of suit under this act, and shall make an affidavit or affirmation that he or she is not worth one hundred dollars clear estate, the chancellor may, at his discretion, assign to such poor person a solicitor and counsel learned in the law, to prosecute the said cause, who, together with all other officers, shall perform their respective duties therein without fee or reward.<sup>(c)</sup>

Suit in forma pauperis. *Ib.* § 24.

(a) If a husband connives at adultery by his wife with one person, he will be deemed to assent to it with others and will not be entitled to a divorce for such or any other subsequent act of adultery, *Hedden v. Hedden*, 6 C. E. Gr. 61.  
(b) What proof of adultery to bar a divorce is required,

*Reid v. Reid*, 6 C. E. Gr. 331. An act of adultery which has been forgiven for years is not sufficient, *Jones v. Jones*, 3 C. E. Gr. 33.  
(c) Would this section include defendants also? See *Pickle v. Pickle*, *Hal. Dig.* 241, § 14.