

THE STAR AND NORTH CAROLINA GAZETTE.

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LAWS OF NORTH CAROLINA.

Passed at the Session of 1836-'37.

[Revised Statute.]

No. LXVII.

An Act concerning Courts of Equity.

[Consent.]

Commissions to take testimony may issue directed to any two justices of the peace, who shall have all the powers of commissioners in chancery; and the rules of proceedings in all cases of taking such testimony, shall be conformable to the method of proceeding heretofore observed in the courts of chancery in this State, provided no such testimony shall be taken until at least twenty days notice of the time and place of taking the same be given to the opposite party, unless the court for sufficient reasons, should appoint any other limited time for the notice, which they may do in all cases, either by enlarging or shortening the time hereby appointed for taking such testimony, as the case may require.

Commissions may also issue to any justice or justices of the peace to take the plea, answer, or demurrer of a defendant, who is accustomed in cases in chancery with respect to commissions as are above mentioned, or may himself examine testimony, or take the plea, answer, or demurrer of the defendant, in like manner; he may also grant injunctions or *ne exeat*, when the necessity of the case will not admit of a delay, but still subject to the control and further order of the court; and no *ne exeat* shall issue where sufficient bail has been taken for the party's appearance.

It shall be the duty of the said court to direct the trial of such issues as to the court may appear necessary, according to the rules and practice in chancery in such cases. Costs shall be paid by either party, at the discretion of the court. The court may, at any time during the dependence of the suit, require further security from a defendant, or, on failure thereof, make use of such personal process as was formally used by the court of chancery held in this State, and deemed incident to the chancery jurisdiction; and the court shall, in all cases, have power to order such process, to enforce their sentences and decrees, as have usually belonged to courts of chancery.

Sec. 5. It shall be the duty of the several sheriffs in this State to serve all notices, issuing from clerks and masters in equity, to parties concerned in all references to them made; and for neglect or failure to do the same, they shall be subject to the same penalties as by law provided for omission or neglect in serving other process issuing to them.

Sec. 6. In all cases where decrees shall be made in any suit in equity, for any sum or sums of money, it shall and may be lawful for execution to issue thereon against the defendant's body, or against his goods and chattels, lands and tenements; to satisfy such decrees and costs, in the same manner as executions may or shall issue at law; and lands and tenements, goods and chattels shall be bound by such decrees and execution, in the same manner as lands and tenements, goods and chattels are by judgments and executions at law.

Sec. 7. Whenever any suit shall be brought in any of said courts in equity, in which security shall be given for the prosecution thereof, and a decree shall be entered against the plaintiff for the costs of the defendant's defence, it shall be the duty of the court, upon motion of the defendant, also to make a decree for said costs against the security for the prosecution; whereupon execution shall issue jointly against said plaintiff and securities.

Sec. 8. Where the defendant or defendants in any case now depending, or hereafter to depend, in any of the Courts of Equity within this State, shall die after the service of a copy of the complainant's bill and subpoena, it shall and may be lawful, on suggesting the death of such defendant or defendants, to issue a *scire facias* against the legal representatives of such deceased person or persons, in the same manner, and under the same rules, regulations and restrictions, as are used in suits at common law; and service of such writ, on the legal representatives, shall be as effectual and valid to revive and carry on such suit, as if a bill of revivor had been filed against them, and they served with a copy thereof.

Sec. 9. Whenever a party complainant, in any suit in equity, shall die after filing the bill, it shall and may be lawful for the legal representatives of such deceased person to carry on such suit, provided application to that effect be made by such representatives to the court in which such suit may depend, at or before the second term after the death of such party, and not thereafter.

Sec. 10. No bill, answer, or other paper or proceeding in any suit in any court of Equity in this State (interlocutory decrees excepted) shall be enrolled until the cause is finally decreed on, and then only upon motion by the party to take benefit by such decree; and the court shall have power, and are hereby directed, to adjudge and determine what papers shall and may be enrolled in any suit on motion as aforesaid.

Sec. 11. No injunction commanding the stay of an execution obtained in any court of this State, except on judgment in action of debt, shall be granted by the Judges or any of them for any other or greater sum than what the complainant or complainants shall, on oath, declare to be just, and not until such complainant or complainants shall enter into bond, with sufficient security, before the master of the court of equity where the injunction is used, for the payment into court of the sum complained of, and all costs upon the dissolution of the injunction.

Sec. 12. No injunction to stay an execution shall issue but within four months after the judgment at law is obtained, unless it shall appear, from the oath of the complainant or complainants, to the Judge before whom application is made for an injunction, that such application has been delayed in consequence of the fraud or false promises of the plaintiff at law, practised or made at the time of, or after, obtaining judgment, or unless it shall appear, on oath, that the said complainant or complainants was or were out of the State at the time of entering up judgment, so that application could not be made within the time aforesaid.

Sec. 13. In all cases where bonds are given on obtaining an injunction, upon the dissolving of the injunction, said bond shall be proceeded on in the same manner, and under the same rules, regulations and restrictions that bond given upon appeals from the county to the Superior Courts are proceeded on.

Sec. 14. No injunction, bill or other process in equity, requiring a stay of any execution obtained against a citizen or citizens, on the part of the State, shall be granted by the Judges thereof, or any of them, until the complainant or complainants shall first produce a receipt from the public Treasurer, or other public officer, shewing the actual payment and discharge in full of all such part of the judgment obtained, authorised to give the same as aforesaid, as he or they, by their bill of complaint, shall not, on oath, declare is unjust.

Sec. 15. In any of the Courts of Equity, where any of the parties defendant is an infant or person non compos, and resides out of this State, having no guardian residing within the State, it shall be lawful for the said courts to appoint a guardian to such infant or person non compos to defend his or her interest in the suit to which he or she may be defendant: Provided nevertheless, that the said infant or person non compos, may, at any time within three years after the decree shall be made in

said suit, appear in said court and petition to be heard with respect to the matter of such decree; and such proceedings, decree and execution may be had thereon as there might have been in case the proceedings had been then newly begun, or as if no former decree or proceedings had been in the same cause.

Sec. 16. In any case which now is, or hereafter may be, pending in any Court of Equity, it shall and may be lawful for each court, on sufficient cause shewn by affidavit, rendering such a removal necessary for the purposes of justice, to order the said cause, before a hearing, to be removed into the Supreme Court: Provided, that such removal shall not be permitted until such cause shall have been set down for hearing; nor shall any parol evidence be received in the Supreme Court, either before the Judges thereof or the jury whom they may cause to be empanelled for the trial of any issues of fact, except witnesses to prove exhibits on other documents.

Sec. 17. No bill of review or a petition for a re hearing shall lie or be allowed upon a final decree, in any of the Courts of Equity within this State, but within five years next after such decree shall have been made, and not after; saving, nevertheless, the rights of infants, *feme covert* and persons non compos mentis, so that they avail themselves of the benefit of the writ of error or bill of review within three years after their disabilities shall have been removed.

[Ratified 4th January, 1837.]

[Revised Statute.]

No. LXIX.

JUSTICES OF THE PEACE.

An Act Concerning the power and jurisdiction of Justices of the Peace.

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That every person appointed a justice of the peace, before entering upon and executing the said office, shall, within twelve months thereafter, and not after that time, unless re-appointed, publicly, in the Court House of his county on a court day, take the oaths appointed, or which shall be appointed, by the General Assembly for the qualification of public officers, and also an oath of office. And if any person shall presume to execute the office of a justice of the peace, without first qualifying himself in the manner by this act required, he shall, for every such offence forfeit and pay the sum of two hundred dollars, one half thereof to the county, the other half to the person suing for the same, to be recovered with costs, by action of debt, in any court of record within this State, where the same is cognizable.

Sec. 2. No justice of the peace, being a candidate for the office of a Sheriff, County Court Clerk, Register, Entry Taker, Surveyor, County Trustee, or Ranger of his county, shall vote or sit on the bench at the election of such officer. And if any justice of the peace shall sit on the bench or vote in such election his vote shall not be counted, and he shall forfeit and pay, for every such offence, the sum of one hundred dollars, to be recovered by action of debt, one half to the person suing for the same, and the other half to the use of the county.

Sec. 3. When any justice of the peace hath or shall remove himself out of the county for which he is or shall be appointed, and shall not return within twelve months to reside therein, his appointment shall be void: And it shall not be lawful for such justice to act as a justice of the peace unless re-appointed by the General Assembly, under a penalty of one hundred dollars for every such illegal act, to be recovered by action of person suing for the same.

Sec. 4. All justices of the peace shall, within their respective counties, have full power and authority to maintain, keep and preserve the peace, solemnize the rites of matrimony, and issue necessary process to enforce the collection of debts and other contracts coming within their jurisdiction.

Sec. 5. No justice of the peace shall practise as an attorney in the Courts of Pleas and Quarter Sessions of the county for which he is such justice; nor shall he be appointed, or act as clerk or deputy thereof, or as sheriff or deputy sheriff, constable, or county trustee, or jailor, within his county. And if any justice shall accept any of such appointments, he shall thereby vacate his office as such justice: And if he shall, after the acceptance of any such appointment, act as a justice, without a re-appointment by the General Assembly, he shall, for every such act, forfeit and pay the sum of one hundred dollars, to be recovered in any court having cognizance thereof, in the name of the wardens of the poor of such county, to be by them applied to the use of the poor.

Sec. 6. All debts and demands due on bonds, notes and liquidated accounts, when said accounts shall be stated in writing, and signed by the party from whom the same shall be due, when the principal does not exceed one hundred dollars, although the principal and interest together may exceed that sum; and all debts and demands of sixty dollars and under, for a balance, due on any special contract, note or agreement, or for goods, wares and merchandise, sold and delivered, or for work or labor done, or for specific articles, whether due by obligation, note or assumpsit, or for any judgment which may have been granted by a single magistrate, and no execution have issued thereon within twelve months, or for any forfeitures or penalty incurred by any act of the General Assembly, shall be cognizable and determinable by any one justice of the peace out of court.

Sec. 7. All warrants issued by a justice of the peace, shall be made returnable on or before thirty days from the date thereof, Sundays excepted, and not after; and when issued against any person, executors and administrators, female debtors excepted, shall command the sheriff, constable or other officer to take the body of the person therein mentioned as defendant, if to be found in his county, to answer the complaint of the plaintiff in such warrant, before some justice of his county; and such officer, when required by the plaintiff, shall take bond, with sufficient security, of the party arrested, in double the sum for which such person shall be held in arrest, (which sum and how due shall be expressed in the warrant,) conditioned for his appearance at a certain time and place therein to be specified, before some justice of the county where the warrant issued; which bond shall be assigned by such officer to the plaintiff, and returned with the warrant, and shall be filed by the justice that shall try the warrant with the other papers in the suit; and in case the sheriff, constable or other officer shall fail or neglect to take such bond, with security as aforesaid, he shall be held and deemed special bail, and the plaintiff may proceed to judgment against him according to the rules hereinafter prescribed.

Sec. 8. When any sheriff, constable or other officer shall serve a warrant on any person or persons, who shall refuse to give bond and security for his or her appearance as aforesaid, such officer is hereby required to commit such person or persons to the jail of his county, in order that he may have such person or persons forth coming at the day appointed for trial; and it shall be the duty of such officer to produce his prisoner at such trial; and all warrants, whether by summons, arrest or attachment, shall be heard or determined on the day appointed by the officer serving the warrant as aforesaid, which day shall be on or before the return day set forth in the warrant, unless the justice shall, for good reasons, put off the trial to some other day at his discretion. And in case the plaintiff shall fail to attend or prosecute his suit on the day appointed as aforesaid, the defendant appearing shall be discharged; and it is hereby declared to be the duty of the officer serving a warrant, to notify the plaintiff of the time and place appointed to try and de-

termine the cause; provided, that when the sheriff, constable or other officer shall have committed any defendant to jail as aforesaid, it shall be the duty of such officer to give immediate notice thereof to some justice in the county; and such justice shall appoint a day for the trial, and notice of the time of such trial shall be given and served on the plaintiff by the officer who served the warrant.

Sec. 9. All bail taken according to the directions of this act, shall be liable to the recovery of the plaintiff; but the plaintiff, after final judgment, shall not take out execution against the bail until an execution against the body of the defendant be first returned by the sheriff, constable or other officer, that the defendant is not found in his county, and not until a notice, in writing, issued against the bail by the justice who has possession of the papers in the original suit, hath been made known to the bail; and after the return of such execution against the principal, and notice against the bail, execution may issue against the principal and bail, or any of them, or any of their estates, unless the bail shall make it appear that the principal is dead, or that the judgment has been satisfied, or unless the bail shall surrender the principal at or before the return of such notice to the officer who served the notice; in which latter case the justice shall commit the principal to the jail of his county, until he shall satisfy the judgment and costs.

Sec. 10. Such bail shall, at any time before final judgment had against him, have full power and authority to arrest the body of his principal and secure him, until he shall have an opportunity of surrendering him in discharge of himself to the officer who made the arrest or served the notice; and such officer is hereby required to receive such surrender, and hold the body of defendant in custody as if bail had never been given.

Sec. 11. When any judgment is given by a single magistrate, it shall be in his power or that of any other justice of the peace, to award execution against the goods and chattels, lands and tenements, or body of the party cast, which process shall be executed and returned by the sheriff, constable or other lawful officer to whom the same may be directed, in the same manner as other writs of *fiat facias*, or *capias ad satisfaciendum*, are to be executed and returned: Provided always, that where a judgment shall be given by a justice of the peace as aforesaid, execution thereon shall be stayed in the following manner, viz: For all sums not exceeding four dollars, twenty days; for all sums above four dollars, and not exceeding ten dollars, sixty days; for all sums above ten dollars, and not exceeding twenty dollars, one hundred and twenty days; and for all sums above twenty dollars, six months. And for the true and faithful payment thereof, with interest and costs, the party praying such stay of execution shall, if required, give sufficient security; and the acknowledgment of such security entered by the justice, and signed by the party, shall be sufficient to bind him; and if the judgment shall not be discharged at the time to which the execution has been stayed, then it shall be lawful for the justice who has possession of the judgment, to issue execution as aforesaid against the principal and security.

Sec. 12. When any warrant shall be granted on a former judgment, on the trial of such warrant, the former judgment shall be evidence of the debt, subject to such deductions as the defendant may make appear to have been paid; and if judgment in such case passes against the defendant, he shall not be entitled to any stay on the same.

Sec. 13. Every justice of the peace, before whom a warrant is brought for trial, shall have full power and authority, on sufficient cause shewn, on oath, by either the plaintiff or defendant, to continue for trial the same: Provided such continuance or postponement shall in no case exceed thirty days; and it shall be lawful for any justice of the peace to act on said postponement or continuance, the original date of the warrant exceeding thirty days notwithstanding.

Sec. 14. When, on the trial of a civil warrant, the testimony of a witness not resident within the county where the same is pending, is required by either party, the deposition of said witness, taken by a single magistrate of the county where the witness may be, upon reasonable notice to the adverse party of the time and place of taking the same, shall be read in evidence; and the magistrate, if the deposition is taken within this State, shall have power to issue a summons to compel the attendance of the witness.

Sec. 15. Whenever a judgment shall be given in the absence of either plaintiff or defendant, by any justice of the peace, whether execution hath been issued or not, on application of such absent party, his or her agent or attorney, within ten days after the date of said judgment, to the justice who awarded the same, on sufficient cause shewn, on oath or affirmation, why he, she or they could not attend the day of trial, it shall be the duty of the said justice to issue his order to the plaintiff, defendant or officer, as the case may require, in possession of the papers relative to the suit, to forbear any further proceedings thereon, and immediately to bring the same before him or some other justice for re-consideration, provided that the applicant shall give sufficient security for his appearance: It shall also be the duty of the justice aforesaid to issue his summons, directed to some proper officer, to cause the parties, with their witnesses, to appear before him or some other justice, at such time and place, not exceeding thirty days, as he may think proper, where the case shall undergo a fair investigation, and be subject to the same proceedings as if it had never been acted on; and the officer to whom the summons may be directed, shall receive for his trouble in executing the same, the same fees he is entitled to for summoning witnesses, to be taxed against the party at whose instance it issued.

Sec. 16. All executions issued by a justice of the peace, against the estate of any person or persons, shall be made returnable in three months from the date thereof, and shall be directed to the sheriff, constable or other lawful officer, commanding him that of the goods and chattels of the party cast, he make such sum or sums of money therein mentioned, or for want of such goods and chattels to satisfy said execution, then he levy on the lands and tenements of such person or persons, and make return thereof to the justice who issued the same, setting forth on the execution the money he has made of goods and chattels, and what lands and tenements he has levied on, where situate, on what water course, and whose land it is adjoining; and the justice to whom the return is made, shall return such execution, with all other papers on which the judgment was given, to the next court to be held for his county; which land shall, by order of said court, be sold by the sheriff of said county, or so much thereof as shall be sufficient to satisfy said judgment, in the same manner as real property is sold by writs of *fiat facias* or *venditioni exponas* issuing from such court; and the clerk of the court where such papers are returned, shall, in a well bound book kept for that purpose, record the whole of the papers and proceedings had before the justice; and when any execution shall be returned to a justice not fully satisfied and discharged, it shall be lawful for any justice of the peace for said county to issue another execution for the sum so remaining due on the former execution.

Sec. 17. Any justice of the peace is hereby authorized and required, on application of either plaintiff or defendant named in any original process issued by a single justice, to direct the sheriff, constable or other lawful officer, by an order in writing on the process, to summon witnesses to appear and give testimony in such suit, at the time and place appointed for trial; and such witnesses failing to appear and give evidence, shall forfeit and pay the sum of four dollars to the party at whose instance he was summoned, and further be liable to the action of

the party petitioned for damage sustained by his non attendance.

Sec. 18. When any execution shall issue to a sheriff, constable or other officer, in virtue of a judgment obtained before court, and it shall be the duty of the person or persons against whom such judgment may be obtained, to surrender him or herself to any other county within this State, and the sheriff, constable or other officer cannot find any property whereon to levy execution, then and in such case, the said sheriff, constable or other officer shall return such execution to the next court to be held for said county, on application, shall be entitled to a writ of *habeas corpus* for the whole or any part of said execution, which writs shall be issued by the clerk of the court, on the return of such officer, and the clerk by order of the said court shall make a record of the same, and issue execution to the county where the defendant or defendants reside, in the same manner and under the same rules as in cases of judgments obtained in said courts.

Sec. 19. It shall and may be lawful for any person having forth therein, a judgment or execution against any person from a justice of the peace, and the said defendant has no property in the county of the peace, to return the execution to a next term of the Court of Pleas and Quarter Sessions, first giving security for prosecuting such appeal.

Sec. 20. It shall and may be lawful for any justice of the peace, who now or may be hereafter appointed, to accept and execute any civil office or appointment of profit or trust under the authority of the United States, the duties of which shall be confined to this State; any law to the contrary required, on application of either of the parties, to issue such writ, directed to the sheriff or other lawful officer in any county in this State, for witnesses to appear and give testimony in such suit, at the time and place appointed for trial; and the officer to whom the summons may be directed, shall receive for his trouble in executing the same, the same fees he is entitled to for summoning witnesses, to be taxed against the party at whose instance it issued.

Sec. 21. No process issued by a justice of the peace shall be returnable for the want of form, if the essential matters are so stated in the writ as to be understood by the parties, and the officer to whom the same may be directed, shall be bound to execute the same, notwithstanding any defect in form.

Sec. 22. If either the parties to a trial before a justice of the peace shall be dissatisfied with the judgment given thereon, they may appeal to a next term of the Court of Pleas and Quarter Sessions, first giving security for prosecuting such appeal.

Sec. 23. In all cases where appeals shall be granted from the judgment of a just, the acknowledgment of the security, given by the appellant, shall be filed by the justice, and the appellant shall be bound to abide by and perform the judgment of the court.

Sec. 24. When a justice of the peace shall grant an appeal, he shall be the duty of such justice to issue his order to the plaintiff, defendant or officer, as the case may require, in possession of the papers relative to the suit, to forbear any further proceedings thereon, and immediately to bring the same before him or some other justice for re-consideration, provided that the applicant shall give sufficient security for his appearance: It shall also be the duty of the justice aforesaid to issue his summons, directed to some proper officer, to cause the parties, with their witnesses, to appear before him or some other justice, at such time and place, not exceeding thirty days, as he may think proper, where the case shall undergo a fair investigation, and be subject to the same proceedings as if it had never been acted on; and the officer to whom the summons may be directed, shall receive for his trouble in executing the same, the same fees he is entitled to for summoning witnesses, to be taxed against the party at whose instance it issued.

Sec. 25. Where any person, against whom a judgment shall be rendered by a single magistrate, shall be desirous to appeal from the judgment, he shall be bound to give sufficient security for his appearance, and the appellant shall be bound to abide by and perform the judgment of the court.

Sec. 26. When a justice of the peace shall grant an appeal, he shall be the duty of such justice to issue his order to the plaintiff, defendant or officer, as the case may require, in possession of the papers relative to the suit, to forbear any further proceedings thereon, and immediately to bring the same before him or some other justice for re-consideration, provided that the applicant shall give sufficient security for his appearance: It shall also be the duty of the justice aforesaid to issue his summons, directed to some proper officer, to cause the parties, with their witnesses, to appear before him or some other justice, at such time and place, not exceeding thirty days, as he may think proper, where the case shall undergo a fair investigation, and be subject to the same proceedings as if it had never been acted on; and the officer to whom the summons may be directed, shall receive for his trouble in executing the same, the same fees he is entitled to for summoning witnesses, to be taxed against the party at whose instance it issued.

Sec. 27. Any justice of the peace is hereby authorized and required, on application of either plaintiff or defendant named in any original process issued by a single justice, to direct the sheriff, constable or other lawful officer, by an order in writing on the process, to summon witnesses to appear and give testimony in such suit, at the time and place appointed for trial; and such witnesses failing to appear and give evidence, shall forfeit and pay the sum of four dollars to the party at whose instance he was summoned, and further be liable to the action of

(Continued on fourth page.)