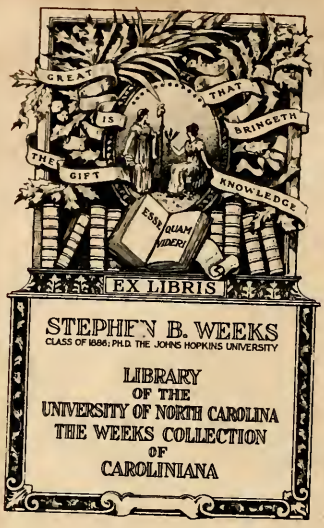

THE CODE

OF

NORTH CAROLINA,

ENACTED MARCH 2, 1883.

PREPARED UNDER CHAPTERS 145 AND 315 OF THE LAWS OF 1881, AND UNDER CHAPTER 191 OF THE LAWS OF 1883.

BY

WILLIAM T. DORTCH, JOHN MANNING, JOHN S. HENDERSON.

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Section.		
39,	line 4,	for "may child be" read "child may be."
87,	" 9,	for "bonnd" read "bond."
163, (3)	" 1,	for "imprisioned" read "imprisoned."
219,	" 5,	for "a" before "title" read "the."
239, (3)	" 2,	for "case" read "cause."
291, (3)	" 6,	for "therof" read "thereof."
326,	" 6,	insert "to" before first word "the."
364,	" 1,	for "officers" read "officer."
364,	" 4,	for "summons" read "summon."
446,	" 5,	for "of" read "or."
505,	" 2,	insert "to" after "according."
654, (3)	" 5,	for "withness" read "witness."

STATE OF NORTH CAROLINA.

IN THE YEAR OF OUR LORD ONE THOUSAND EIGHT HUNDRED AND EIGHTY-THREE.

AN ACT

FOR REVISING AND CONSOLIDATING THE PUBLIC AND GENERAL STATUTES OF THE STATE OF NORTH CAROLINA.

The General Assembly of North Carolina do enact the following named chapters and sections, to be known as THE CODE, that is to say:—

CHAPTER ONE.

ADOPTION OF MINOR CHILDREN.

SECTION.
1. Person desirous of adopting minor may file petition in the superior court.
2. Court may grant letters of adoption.
3. Effect of order.
4. Bond to be given if the minor be an orphan having property.
5. Order to be recorded.
6. Parent or guardian must be party of record.

Section 1. Person desirous of adopting minor children may file petition in superior court. 1872-'3, c. 155, s. 1.

Any person desiring to adopt any minor child may file a petition in the superior court of the county wherein such child resides, setting forth the name and age of such child and the name of its parents, whether the parents or either of them be living, and if there be no living parent the name of the guardian, if any, and if there be no guardian the name of the person having charge of the child or with whom such child resides, the amount and nature of the child's estate, if any, and especially if the the adoption is for the minority or for the life of the child.

Sec. 2. Court may grant letters of adoption. 1872-'3, c. 155, s. 2.

Upon the filing of such petition, and with the consent of the parent or parents, if living, or of the guardian, if any, or of the person with whom such child resides, or who may have charge of such child, the court may, if the petitioner be a proper and suitable person, sanction and allow such adoption by an order granting letters of adoption.

Sec. 3. Effect of order. 1872-'3, c. 155, s. 3.

Such order, when made, shall have the effect forthwith to establish the relation of parent and child between the petitioner and the child during the minority or for the life of such child, according to the prayer of

the petition, with all the duties, powers and rights belonging to the relationship of parent and child, and in case the adoption be for the life of the child, and the petitioner die intestate, such order shall have the further effect to enable such child to inherit the real estate and entitle it to the personal estate of the petitioner in the same manner and to the same extent such child would have been entitled to, if such child had been the actual child of the person adopting it. *Provided*, such child shall not so inherit, and be so entitled to personal estate if the petitioner specially set forth in his petition such to be his desire and intention.

Sec. 4. Bond to be given if the minor be an orphan having property. 1872-'3, c. 155, s. 4.

If such child be an orphan and without guardian, and shall be possessed of any estate, the court shall require from the petitioner such bond as is required by law to be given by guardians.

Sec. 5. Order to be recorded. 1872-'3, c. 155, s. 5.

The order granting letters of adoption shall be recorded in the office of the clerk of the superior court of the county in which it is made, and may be revoked at any time by the court for good cause shown.

Sec. 6. Parent or guardian must be party of record. 1872-'3, c. 155, s. 6.

The parent or guardian, or the person having charge of such child, or with whom it may reside, must be party of record in this proceeding.

CHAPTER TWO.

ALIENS.

SECTION.
7. Aliens may take and hold lands.
8. Prior contracts made valid.

Sec. 7. Aliens may take and hold lands. 1870-'71, c. 255, s. 1.

It shall be lawful for aliens to take both by purchase and descent or other operation of law any lands, tene-

ments or hereditaments, and to hold and convey the same as fully as citizens of this state can or may do, any law or usage to the contrary notwithstanding.

SEC. 8. Prior contracts made valid. 1870-'71, c. 255, s. 2.

All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes.

CHAPTER THREE.

APPRENTICES.

SECTION.
9. Binding to be by indenture.
10. Remedy thereon.
11. Who may be apprenticed.
12. For what time bound.
13. Duties of masters.
14. Duty of clerk.
15. Apprentices, how compelled to serve.
16. Misconduct of masters.

SEC. 9. Binding to be by indenture. C. C. P. s. 482.

The binding of apprentices shall be by indenture, made in the name of the clerk of the superior court of the county of the one part, and of the master or mistress of the other part; which indenture shall be recorded and filed in the office of the clerk of the superior court.

SEC. 10. Remedy thereon. C. C. P. s. 483.

The apprentice may bring an action on such indenture in the name of the clerk and his successors, and recover any damages sustained by reason of the breach of the covenants contained in said indenture.

SEC. 11. Who may be apprenticed. C. C. P., s. 484.

The clerks of the superior courts in their respective counties shall bind out as apprentices:

(1) All orphans whose estates are of so small value that no person will educate and maintain them for the profits thereof;

Stout v. Woody, 63—37; Mitchell v. Mitchell. 67—307; Spears v. Snell, 74—210.

(2) All infants whose fathers have deserted their families and been absent for one year, leaving them without sufficient support;

Stout v. Woody, 63—37.

(3) All infants (not living with the father) whose mother has secured to her such property as the infants may thereafter acquire, provided the clerk deems it improper to permit such infants to remain with the mother;

(4) All infants who make application to the board of commissioners of the county for relief out of the funds for the poor, and such fact is certified by the board to the clerk;

(5) All infants whose parents do not habitually employ their time in some honest, industrious occupation.

Sec. 12. For what time bound. 1869—'70, c. 7. C. C. P., s. 485. 1874—'5, c. 89.

Every male apprentice shall be bound to some discreet person approved by the clerk, till the age of twenty-one, and every female apprentice until the age of eighteen years: *Provided*, that no white child shall be bound to a colored master or mistress.

Sec. 13. Duties of masters. C. C. P., s. 486.

The master shall provide for the apprentice:

(1) Diet, clothes, lodgings and accommodation fit and necessary;

(2) Education in reading, writing and arithmetic;

(3) Six dollars in cash, a new suit of clothes and a new Bible, at the end of the apprenticeship;

(4) Such other education, sum of money, or articles of furniture or implements of trade, as may be agreed on between the clerk and the master, and inserted in the indenture.

Sec. 14. Duty of clerk. C. C. P., s. 487.

On application of any person to have an apprentice bound to him, it is the duty of the clerk to inform himself of the circumstances of the case; and for this purpose he may cite before him the relatives of the orphan or infant, for examination on oath; and he may also examine such other persons as he deems proper. In the selection of a master he shall prefer, so far as may be consistent in other respects with the comfort and in-

terest of the apprentice, some tradesman of a useful art or mystery.

SEC. 15. Apprentices, how compelled to serve. C. C. P., s. 488.

If an apprentice refuses to serve as required by the indenture or by law, the clerk may, on application of the master, compel him, by citation or otherwise, to appear for inquiry into the facts; and if the complaint is well-founded, and the apprentice persists in such refusal, the clerk may commit him by warrant to the house of correction or the common jail of the county until he consents.

SEC. 16. Misconduct of masters. 1762, ss. 19, 20. C. C. P., s. 489.

Upon complaint of any apprentice that the master is guilty of cruelty, ill-usage, refusal of neccesary provisions or clothing, or any other violation of the indenture, or of the law towards such apprentice, the clerk may, by order, compel the appearance of the master before him, when he shall examine and determine the complaint; and if the same is well founded, he shall cancel the indenture and discharge such apprentice from his obligation of service, and may proceed to appoint another master.

Dowd v. Davis, 4 Dev., 61; Wyatt v. Morris, 2 D. & B., 108; Goodbread v. Wells, 2 D. & B., 476; McKay v. Bryson, 5 Ired., 216; Hiatt v. Gilmer, 6 Ired., 450; Hooks v. Perkins, Busb., 21; Allison v. Norwood, Busb., 414; Midgett v. McBryde, 3 Jon., 21; Owens v. Chaplain, 3 Jon., 323; Prue v. Hight, 6 Jon., 265; Ferrell v. Boykin, Phil. 9; *In re* Ambrose, Phil., 91; Beard v. Hudson, Phil., 180; State v. Elam, Phil., 460; Biggs v. Harris, 64–413.

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28. Clerks of courts forbidden to practice law.
29. Power of attorney to be produced and filed by attorney, if required; if necessary to retain the power, what to be done.
30. Right of attorney to speak.

Sec. 17. Attorneys licensed by justices of supreme court. R. C., c. 9, s. 1. 1818, c. 963, s. 3.

Persons who may apply for admission to practice as attorneys in any court, shall undergo an examination before two or more of the justices of the supreme court; and, on receiving certificates from said justices of their competent law knowledge and upright character, shall be admitted as attorneys in the courts specified in such certificates.

Ex parte Thompson, 3 Hawks, 355.

Sec. 18. Persons from other states licensed, when. R. C., c. 9, s.2. 1777, c. 115, s. 8.

No person coming into this state from any other state, or from any foreign country, with an intention to practice the law, shall be admitted to practice as an attorney, unless he shall have previously resided one year in this state, or shall produce to the said justices a testimonial from the chief magistrate of such state or country, or from some other competent authority, that he is of unexceptionable moral character.

Sec. 19. Attorney to take oaths. R. C., c. 9, s. 3. 1777, c. 115, s. 8.

Attorneys before they shall be admitted to practice law shall, in open court before the judges thereof, take the oath prescribed for attorneys, and also the oaths of allegiance to the state, and to support the constitution of the United States, prescribed for all public officers; and, upon such qualification had, and oath taken, may act as attorneys during their good behavior.

Sec. 20. Tax on attorney's license. R. C., c. 99, s. 4. Resolution of 1872-'3.

There shall be a tax of twenty dollars upon each license

to an attorney to practice law in the courts of the state, to be paid at the time of obtaining license, to the clerk of the supreme court, and he shall apply the same as prescribed in the chapter of this code, entitled "Public Libraries." The clerk shall be entitled to six per cent. for receiving and applying said money.

Sec. 21. To pay a tax for license. R. C., c. 9, s. 4. 1806, c. 698.

No attorney shall be permitted to practice until he shall produce the receipt of the clerk, showing that he has paid the tax for his license.

Sec. 22. To pay costs of suit dismissed for his failure to file a complaint. R. C., c. 9, s. 5. 1786, c. 253, s. 6.

When a plaintiff shall be compelled to pay the costs of his suit, in consequence of a failure on the part of his attorney to file his complaint in proper time, he may warrant such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim.

Robbins and Jackson, *ex parte*, 63–309.

Sec. 23. Guilty of fraud, to pay double damages. R. C., c. 9, s. 6. 1743, c. 37.

If any attorney shall commit any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages.

Egerton v. Logan, 81–173.

Sec. 24. Judgment against attorney for wilful failure to pay over money collected for client upon demand. 1881, c. 129, s. 1.

Any attorney into whose hands shall be placed for collection any promissory note, bond, account, chose in action, writing obligatory or any claim calling for the payment of money, who shall collect the same, and, upon the demand of his client, wilfully fail to pay over the amount so collected, shall, upon the ascertainment of the fact by jury, have judgment taken against him for the amount of his delinquency together with interest on the amount of the judgment until the same shall be paid.

Sec. 25. To be debarred for such failure upon notice and production of the judgment. 1881, c. 129, s. 2.

Any attorney who shall wilfully fail as aforesaid to pay

over on demand to his client any moneys which may be due as above set forth, and against whom judgment has been taken as prescribed in the preceding section, shall, if such judgment against him be not paid off in ninety days from its rendition be *ipso facto* debarred from practicing in any courts of the state.

Sec. 26. Attorney not to be debarred except, &c. 1870-'1, c. 216, s. 4.

No person who shall have been duly licensed to practice law as an attorney shall be debarred or deprived of his license and right so to practice law either permanently or temporarily, unless he shall have been convicted, or in open court confessed himself guilty of some criminal offence, showing him to be unfit to be trusted in the discharge of the duties of his profession, and unless he shall be debarred according to the two preceding sections and of the succeeding section.

Ex parte Schenck, 65-353.

Sec. 27. Justices of the peace not to practice as attorneys, 1870-'1, c. 90, s. 1. 1883, c. 406.

It shall not be lawful for any attorney at law or justice of the peace to practice law as an attorney in any of the judicial courts held for the county wherein they hold the office of county commissioner or justice of the peace. And any person offending against this section shall be guilty of a misdemeanor, and, upon conviction, be fined at the discretion of the court not less than two hundred dollars; and by the judgment of the court may be dismissed from the practice of law as an attorney, and be removed from the office of justice of the peace.

Sec. 28. Clerks of Courts forbidden to practice law. 1871-'2, c. 120 s. 1. 1880, c. 43.

It shall not be lawful for any deputy or assistant clerk of the superior court clerk of any county to practice law as an attorney in any of the judicial courts held for the county in which he performs the duties of a deputy or assistant clerk as aforesaid. Any person offending against this section shall be guilty of a misdemeanor, and be find at the discretion of the court, not less than two hundred dollars.

Sec. 29. Power of attorney to be produced and filed by attorney, if required; if necessary to retain the power, what to be done. R. C., c. 31, s. 57 (16). 1844, c. 13.

Every attorney who shall claim to enter an appearance

for any person shall, upon being required so to do, produce and file in the clerk's office of the court, in which he shall claim to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: *Provided*, that when any attorney shall claim to enter an appearance by virtue of a letter to him directed, (whether such letter purport a general or particular employment,) and it shall be necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall note to that effect upon the docket.

Day v. Adams, 63—254; New Berne v. Jones, 63—606; Alspaugh v. Jones, 64—29; Petteway v. Dawson, 64—450; Reese v. Reese, 66—377; University v. Lassiter, 83—38; Hollingsworth v. Harman, 83—153; Koonce v. Brittain, 84—221.

Sec. 30. Right of attorney to speak. R. C., c. 31, s. 57, par. 15. 1874-'5, c. 114.

Any attorney appearing in any civil or criminal action shall be entitled to address the court or the jury for such a space of time as in his opinion may be necessary for the proper development and presentation of his case; and in jury trials he may argue to the jury the whole case as well of law as of fact.

Leach v. Strange, 3 Hawks, 601; Grice v. Ricks, 3 Dev., 62; Greenlee v. McDowell, 4 Ired. Eq., 481; Potts vs. Francis, 8 Ired. Eq., 300; Walton v. Sugg, Phil., 98; Kesler v. Hall, 64—60; *Ex parte* Schenck, 65—353; State v. Williams, 65—505; Kane v. Haywood, 66—1; Moye v. Cogdell, 69—93; Caldwell v. Beatty, 69—365; Mordecai v. Devereux, 74—673; State v. Miller, 75—73; Davis v. Hill, 75—224; State v. Smallwood, 78—560; Coble v. Coble, 79—589; State v. Sykes, 79—618; York v. Merritt, 80—285; Rogers v. McKenzie, 81—164; State v. Braswell, 82—693; Horah v. Knox, 87—483.

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Sec. 31. Justices of the peace to have exclusive original jurisdiction; warrant issued upon complaint of woman or affidavit of county commissioners. 1879, c. 92, s. 2. 1879, c. 116.

Justices of the peace of the several counties shall have exclusive original jurisdiction to issue, try and determine all proceedings in cases of bastardy in their respective counties. A warrant in bastardy shall be issued only, upon the voluntary affidavit and complaint of the mother of the bastard; or, upon the affidavit of one of the county commissioners, setting forth the fact that the bastard is likely to become a county charge.

State v. Collins, 85—511; State v. Wilkie, 85—513; State v. Crouse, 86—617.

SEC. 32. Proceedings; warrant issued for woman; warrant for putative father; issue of paternity; appeal, &c. R. C., c. 12, ss. 1, 4. 1741, c. 30, s. 10. 1799, c. 531, s. 2. 1832, c. 10. 1832, c. 17. 1850, c. 14. 1879, c. 92, s. 2. 1879, c. 116.

When complaint is made on affidavit by one of the county commissioners as set forth in the preceding section, to any justice of the peace of the county in which the woman resides, that any single woman within his county is big with child, or delivered of a child or children, he may cause her to be brought before him, or any other justice of the county, to be examined upon oath respecting the father; and if she shall refuse to declare the father, she shall pay a fine of five dollars, and give a bond payable to the state, with sufficient surety, to keep such child or children from being chargeable to the county, otherwise she shall be committed to prison until she shall declare the same, or pay the fine aforesaid and give such bond; but if such woman shall, upon oath, accuse any man of being the father of such child or children, or if proceedings have been instituted upon her own affidavit and complaint, she shall accuse any man of being the father of such child or children, the justice shall cause him to be brought before some justice of the peace of such county to answer the charge; and, if he shall, upon oath, deny that he is the father of such child or children, the justice shall proceed to try the issue of paternity, and if it shall be found that he is the father of the child or children, or if he shall not deny upon oath that he is the father of the child or children, then he shall stand charged with the maintenance thereof, as the court may order, and shall give bond, with sufficient surety, payable to the state, to perform said order, and to indemnify the county where such child or children shall be born, from charges for his or their maintenance, and may be committed to prison until he find surety for the same, and shall be liable for the costs of the issue or proceeding, and from this judgment and finding, the affiant, the woman, or the defendant, may appeal to the next term of the superior court of the county, where the trial is to be had *de novo*. And upon the trial of the issue, whether before the justice or at term, the examination of the woman, as aforesaid, taken and returned, shall be presumptive evidence against the person accused, subject to be rebutted by other testimony which may be introduced by the defendant; and, if the jury at term shall find that the person accused is the

father of the child or children, then the judge shall make the order for the maintenance and for costs of proceeding, and shall take bond from the defendant and his sureties for the maintenance of the child or children, and to indemnify the county, and pay the costs; and, in default thereof, may imprison the defendant. If the putative father shall escape or be in any other county out of the jurisdiction of such justice issuing the warrant, it shall be issued, endorsed, executed and returned as provided in warrants in criminal actions.

Wilkie v. West, 1 Mur., 319; State v. Barrow, 3 Mur., 121; State v. Petaway, 3 Hawks, 623; State v. Carson, 2 D. & B., 368; State v. Harshaw, 4 D. & B., 371; State v. Robeson, 2 Ired., 46; State v. Ledbetter, 4 Ired., 242; State v. Thompson, 4 Ired., 484; State v. Patton, 5 Ired., 180; State v. Lee, 7 Ired., 265; State v. Cordon, 8 Ired., 179; State v. Long, 9 Ired., 488; State v. Wilson, 10 Ired., 131; State v. Roberts, 10 Ired., 350; State v. Haithcock, 11 Ired., 32; State v. Jenkins, 12 Ired., 121; State v. Ellis, 12 Ired., 264; State v. Auman, 13 Ired., 241; State v. Floyd, 13 Ired., 382; State v. Herman, 13 Ired., 502; State v. Pate, Busb., 244; State v. Brown, 1 Jon., 129; Adams v. Pate, 2 Jon., 14; State v. Thompson, 3 Jon., 365; Ward v. Bell, 7 Jon., 79; Clements v. Durham's Adm'rs, 7 Jon., 100; State v. Henderson, Phil., 229; State v. Martin, Phil., 326; State v. Allison, Phil., 346; State v. Elam, Phil., 460; State v. Palin, 63—471; State v. Waldrop, 63—507; State v. McQuaig, 63—550; State v. McIntosh, 64—607; State v. Hales, 65—244; State v. Beatty, 66—648; State v. Woodruff, 67—89; State v. Broadway, 69—411; State v. Green, 71—172; State v. Higgins, 72—226; State v. Hickerson, 72—421; State v. Beasley, 75—211; State v. Rose, 75—239; State v. Bennett, 75—305; Warlick v. White, 76—175; State v. Britt, 78—439; State v. Rogers, 79—609; State v. Price, 81—516; State v. Bryan, 83—611; State v. Parish, 83—613; State v. Collins, 85—511; State v. Wilkie, 85—513; State v. Ingram, 85—515; State v. Crouse, 86—617.

Sec. 33. Upon appeal parties and witnesses to be recognized; putative father making default, issue to be tried. R. C., c. 12, s. 3. 1799, c. 531, s. 1.

When an appeal shall be taken as provided for in the preceding section, the justice shall recognize the woman, and the person accused of being the father of the child or children, with sufficient surety, for the appearance of such woman and putative father at the next term of the superior court for the county, and to abide by, and perform the order of the court; said justice shall also recognize the witnesses to appear at said superior court, and shall return to said court the original papers in the proceeding and a transcript of his proceedings, as required in other cases of appeal. If the putative father fails to appear, unless for good cause shown, the judge

shall direct the issue of paternity to be tried, and if the issues be found against the person accused, he shall order a *capias* or attachment to be issued for the father, and may also enter up judgment against the father and his surety upon his recognizance.

Sec. 34. Upon issue of paternity, judge or justice to continue the case if he sees fit until woman is delivered; in the meantime to recognize defendant with surety for his appearance. R. C., c. 12, s. 2. 1741, c. 30, s. 11. 1799, c. 531, s. 2. 1850, c. 14.

When the judge or justice trying the issue of paternity, as the case may be, shall deem it proper, he may continue the case until the woman shall be delivered of the child; but when a continuance is granted, the court shall recognize the person accused of being the father of the child with surety for his appearance either at the next term of the court or at a time to be fixed by the justice granting the continuance, which shall be after the delivery of the woman.

State v. Green, 71—172.

Sec. 35. Fine to be ten dollars, and allowance not to exceed fifty dollars. 1879, c. 92, s. 2.

When the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding the sum of ten dollars, which shall go to the school fund of the county, and the court shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such instalments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed in section thirty-two; and in default of such payment he shall be committed to prison.

State v. Harshaw, 4 D. & B., 371; State v. Ellis, 12 Ired., 264.

Sec. 36. Examinations to be taken within three years after birth. R. C., c. 12, s. 6. 1814, c. 871, s. 1.

All examinations upon oath to charge any man with being the father of a bastard child, shall be taken within three years next after the birth of the child, and not after.

Sec. 37. Execution may issue for maintenance. R. C., c. 12, s. 7, 1799, c. 531, s. 3.

When the judge or justice shall charge the father of a bastard child with its maintenance, and the father shall neglect to pay the same, then the judge or justice, notice

being served on the defendant at least ten days before the return day stated in the notice, or such notice being returned by the sheriff or constable that the defendant is not to be found, may order an execution against the goods, chattels, lands and tenements of the father, for such sum as the court shall adjudge sufficient for the maintenance of the bastard child: *Provided*, that the party aggrieved by such non-payment shall apply for the same.

McPherson v. McCoy, 2 Dev., 391; Shaw v. Stewart, 1 D. & B., 412; State v. Beatty, 66—648.

Sec. 38. In certain cases putative father may be committed to house of correction, or instead thereof apprenticed. 1866-'7, c. 10.

In all cases arising under this chapter, when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall, by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper: *Provided*, that such person or putative father, at his discretion, instead of being committed to prison or to the house of correction, may bind himself as an apprentice to any person whom he may select, for such time and at such price as the court may direct. The binding shall be by indenture in open court; and the price obtained shall be paid to the county treasurer. On the indenture being signed by the presiding judge of the court and by the master receiving such apprentice, the person thus bound shall be treated and regarded as an apprentice in all matters, except education.

Sec. 39. Illegitimate children may be legitimated by superior court at term. R. C., c. 12, s. 8. 1829, c. 19, s. 1.

The putative father of any illegitimate child may apply by petition in writing, to the superior court of the county in which the father may reside, praying that such may child be declared legitimate; and if it shall appear that the petitioner is reputed the father of the child, the court may thereupon declare and pronounce the child legitimated; and the clerk shall record the decree.

Drake v. Drake, 4 Dev., 110; Perry v. Newsom, 1 Ired. Eq., 28; Craige v. Neely, 6 Jon., 170.

Sec. 40. Effects of such legitimation; legitimate in all respects as to father. R. C., c. 12, s. 9. 1829, c. 19, s. 3.

The effect of such legitimation shall extend no further than to impose upon the father all the obligations which fathers owe to their lawful children, and to enable the child to inherit from the father only, his real estate, and also to entitle such child to the personal estate of his father, in the same manner as if he had been born in lawful wedlock; and in case of death and intestacy, the real and personal estate of such child shall be transmitted and distributed according to the statute of descents and distribution, among those who would be his heirs and next of kin, in case he had been born in lawful wedlock.

Ivey v. Granberry, 66—223.

CHAPTER SIX.

BILLS, BONDS AND PROMISSORY NOTES.

SECTION.

41. Bills, bonds, and notes for money negotiable as inland bills of exchange; indorsee may sue when the obligee may sue.
42. Orders in writing; drawer or acceptor liable thereon; protest and notice thereof before action against drawer.
43. Days of grace on bill, &c.; except those payable on demand.
44. Interest on bills, &c.; when to accrue.
45. Bills, &c., payable on demand to bear interest.
46. Contracts for delivery of articles bear interest as moneyed contracts.
47. Bills of exchange bear interest from time of payment.
48. Damages on protested bills of exchange at various places.
49. Protest of notary, justice of peace, or clerk of a court of record, evidence of demand.
50. Indorsers of negotiable securities liable as sureties.
51. Bonds payable to clerk, &c., for benefit of suitors, suable in name of state.

Sec. 41. Bills, bonds, and notes for money negotiable as inland bills of exchange; indorsee may sue when the obligee may sue. 3, 4 Anne. c. 9., R. C., c. 13, s. 1. 1762, c. 70, s. 2. 1786, c. 248, s. 1. 1789, c. 314, s. 3.

All notes signed by any person, body corporate, or by the servant or agent of any corporation, banker, mer-

chant, or trader, who is, or shall be usually intrusted to sign such promissory notes for them, whereby such person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, shall promise to pay any person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, the money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, to whom the same is made payable; and the person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, to whom such money is payable, may maintain an action for the same, as they might upon inland bills of exchange; and the same, as likewise all bonds, bills, and notes for money, with or without seal, and expressed, or not, to be payable to order and for value received, may be assignable over in like manner as inland bills of exchange are by custom of merchants in England: and the person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, to whom such promissory note, bill, bond, or sealed note is assigned or indorsed, may maintain an action against the person, body corporate, or the servant or agent of any corporation, banker, merchant, or trader, who shall have signed such promissory note, bond, bill, or sealed note, or any who shall have indorsed the same, as in cases of inland bills of exchange: *Provided*, that the indorsee or assignee of any bill, bond, or note, under seal, may maintain an action on the same in his own name, as indorsee or assignee, provided the original obligee could have maintained an action on the same bill, bond, or note with seal.

Jamieson v. Farr, 1 Hay., 209 (182); Tindall v. Johnston, 1 Hay., 428 (372). Campbell v. Mumford, 1 Hay., 459 (398); Hodges v. Clinton, Mar., 79; Neil v. New Berne, 1 Mur., 133; Jones v. Person, 2 Hawks, 269; Goodloe v. Taylor, 3 Hawks, 458; Lawrence v. Mabry, 2 Dev., 473; Hatcher v. McMorine, 3 Dev., 228; Hatcher v. McMorine, 4 Dev., 122; Purtel v. Morehead, 2 D. & B., 239; Haywood v. McNair, 2 D. & B., 283; Elliott v. Smitherman, 2 D. & B., 338; Alexander v. Oaks, 2 D. & B., 513; Dawson-v. Pettway, 4 D. & B., 396; French v. Barney, 1 Ired., 219; Bloom v. Bowman, 2 Ired., 338; Hubbard v. Williamson, 4 Ired., 266; Hubbard v. Williamson, 5 Ired., 397; Reddick v. Jones, 6 Ired., 107; Phelps v. Call, 7 Ired., 262; Ford v. Vandyke, 11 Ired., 227; Marsh v. Brooks, 11 Ired., 409; Ormond v. Moye, 11 Ired., 564. Hoke v. Carter, 12 Ired., 324; Bank v. Bank, 13 Ired., 75; Respass v. Latham, Busb., 138; Dickey v. Johnson, Busb., 405; McCall v. Clayton, Busb., 422; Martin v. Hayes, Busb., 423; Knight v. R. R. Co., 1 Jon., 357; Nichols v. Pool, 2 Jon., 23; Gregory v. Dozier, 6

Jon., 4; Grace v. Hannah, 6 Jon., 94; Elliot v. White, 6 Jon., 98; McLean v. McDugald, 8 Jon., 383; Johnson v. Olive, Winst., 215; Parker v. Stallings, Phil., 590; Baker v. Robinson, 63—191; Ballentine v. Holloman, 63—475; Whitsill v. Mebane, 64—345; Davis v. Morgan, 64—570; Sutton v. Owen, 65—124; Pace v. Roberson, 65—550; Ransom v. Smith, 66—537; Blackmer v. Phillips, 67—340; Blount v. Windley, 68—1; Glend v. Bank, 70—191; Burroughs v. Bank, 70—283; Crawford v. Lytle, 70—385; Barden v. Southerland, 70—528; Abrams v. Cureton, 74—523; Etheridge v. Venoy, 74—800; Miller v. Tharel, 75—148; Johnson v. Henderson, 76—227; Meadows v. Cozart, 76—450; Belo v. Comrs., 76—489; Kahnweiler v. Anderson, 78—133; Henderson v. Lemly, 79—169; Brown v. Kinsey, 81—245; Hill v. Shields, 81—250; Jackson v. Love, 82—405; Bank v. Bynum, 84—24; Pate v. Brown, 85—166; Havens v. Potts, 86—31; Tredwell v. Blount, 86—33; Pugh v. Grant, 86—39; Roberson v. Dunn, 87—191.

Sec. 42. Orders in writing; drawer or acceptor liable thereon, protest and notice thereof before action against drawer. R. C., c. 13, s. 2. 1762, c. 70, ss. 3, 4.

When any person, by order in writing signed by him, shall direct the payment of any sum of money in the hands or possession of any other person, to the bearer, or any person whatsoever, the money therein specified shall, by virtue thereof, be due and payable to such person to whom the same is drawn payable, and may be put in suit against him who shall draw the same, or against the person on whom the same shall be drawn, after the acceptance thereof by him, by whom the same shall be made payable, and damages may be recovered: *Provided*, that none shall commence any action against him who shall give such order for the money therein mentioned, before the same shall have been first protested for non-acceptance, and notice given thereof to the drawer; and if suit shall be brought on such order before notice and refusal to pay as aforesaid, the plaintiff shall be nonsuited.

—v. Stanton, 1 Hay., 312 (271); Bank v. Seawell, 2 Hawks, 560; Bank v. Lane, 3 Hawks, 453; Taribault v. Ely, 2 Dev., 67; Bissell v. Bozman, 2 Dev. Eq., 154; Jordan v. Farkington, 4 Dev., 357; Spear and Patton v. Atkinson, 1 Ired., 262; Hubbard v. Troy, 2 Ired., 134; Moore v. Tucker, 3 Ired., 347; Denny v. Palmer, 5 Ired., 610; Runyon v. Montfort, Busb., 371; Wiley v. Brice, 70—422; Love v. Johnston, 72—415; Folk v. Howard, 72—527; Long v. Stephenson, 72—569; Mauney v. Coit, 80—300; Cedar Falls Co. v. Wallace, 83—225; Banks v. Pinkers, 83—377; Bank v. Alexander, 84—30; Wittkowsky v. Smith, 84—671.

Sec. 43. Days of grace on bills, &c., except those payable on demand. R. C., c. 13, s. 3. 1848, c. 9.

All bills of exchange payable within the state, at sight,

or at a future day certain, in which there is no express stipulation to the contrary, shall be entitled to days of grace as the same are allowed by the custom of merchants on foreign bills of exchange payable at the expiration of a certain period after date or sight: *Provided*, that no days of grace shall be allowed on any bill of exchange, promissory note, or draft payable on demand.

Jarvis v. McMain and Simmons, 3 Hawks, 10; Fields v. Mallett, 3 Hawks, 465.

Sec. 44. Interest on bills, &c.; when to accrue. R. C., c. 13, s. 4. 1786, c. 248, s. 3.

All bonds, bills, notes, bills of exchange, liquidated and settled accounts, shall bear interest from the time they become due, provided such liquidated and settled accounts be signed by the debtor, unless it be specially expressed that interest is not to accrue until a time mentioned in the said writings or securities.

Caldwell v. Rodman, 5 Jon., 139; Yellowly v. Comrs. 73—164.

Sec. 45. Bills, &c., payable on demand to bear interest. R. C., c. 13, s. 5. 1786, c. 248, s. 4.

All bills, bonds, or notes payable on demand, shall be held and deemed to be due when demandable by the creditor, and shall bear interest from the time they are demandable, unless otherwise expressed.

Ormand v. Moye, 11 Ired., 564; Caldwell v. Rodman, 5 Jon., 139.

Sec. 46. Contracts for delivery of articles bear interest as moneyed contracts. R. C., c. 13, s. 6. 1786, c. 248, s. 5.

All securities for the payment or delivery of specific articles shall bear interest as moneyed contracts; and the articles shall be rated by the jury at the time they become due.

Sec. 47. Bills of exchange bear interest from time of payment. R. C., c. 13. s. 7, 1828, c. 2, s. 1.

Bills of exchange which shall be drawn or indorsed in the state, and shall be protested, shall carry interest, not from the date thereof, but from the time of payment therein mentioned.

Sec. 48. Damages on protested bills of exchange at various places. R. C., c. 13, s. 8; 1741, c. 31; 1796, c. 464, ss. 1, 2. 1828 c. 2, s. 2; 1840, c. 1.

The damages on such protested bills shall be as follows:

that is to say, where the bill shall be drawn or indorsed in this state upon any person or corporation in any other of the United States, or in any of the territories thereof, three per cent. upon the principal sum; where such bill shall be drawn or indorsed upon any person or corporation in any other place in North America (excepting the north-west coast of America), or in any of the West India or Bahama Islands, ten per cent. upon the principal sum; where such bill shall be drawn or indorsed upon any person or corporation in the Island of Madeira, the Canaries, the Azores, the Cape de Verd Islands, or in any other state or place in Europe or South America, fifteen per cent. on the principal sum; and where such bill shall be drawn or indorsed on any person or corporation in any other part of the world, twenty per cent. on the principal sum.

Runyon v. Latham, 5 Ired., 551.

Sec. 49. Protest of notary, justice of peace, or clerk of a court of record, evidence of demand. R. C., c. 13, s. 9. 1812, c. 844. 1819, c. 1003. 1826, c. 15.

In all actions wherein it may be necessary to prove a demand upon, or notice to the drawer, or indorser of a bill of exchange, or promissory note, or other negotiable security; or where it may be necessary to prove a demand upon the acceptor or drawee of a bill of exchange, in any action against the drawer or indorser thereof, the protest of a notary public, or for want of a notary public, of a justice of the peace or clerk of a court of record, setting forth that he made such demand, or gave such notice, and the manner in which he did the same, shall be *prima facie* evidence that such demand was made, or notice given in manner set forth in the protest.

Elliot v. White, 6 Jon., 98.

Sec. 50. Indorsers of negotiable securities liable as sureties. R. C., c. 13, s. 10. 1827, c. 2.

Whenever any bill, or negotiable bond, or promissory note, shall be indorsed, such indorsement, unless it be otherwise plainly expressed therein, shall render the indorser liable as surety to any holder of such bill, bond, or promissory note; and no demand on the maker shall be necessary previous to an action against the indorser: *Provided*, that nothing herein shall in any respect apply to bills of exchange, inland or foreign.

Hatcher v. McMorine, 4 Dev., 122; Williams v. Irvin, 3 D. & B., 74; Ingersoll v. Long, 4 D. & B., 293; Topping v. Blount, 11 Ired., 62; Nichols

v. Pool, 2 Jon., 23; Johnson v. Hooker, 2 Jon., 29; Crawford v. Lytle, 70—385; Henderson v. Lemly, 79—169; Hoffman v. Moore, 82—313.

Sec. 51. Bonds payable to clerk, &c., for benefit of suitors, suable in name of state. R. C., c. 13, s. 11.

Bonds and other obligations taken in the course of any proceeding in law, under the direction of the court, and payable to any clerk, commissioner, or officer of the court, for the benefit of the suitors in the cause, or others having an interest in such obligation, may be put in suit in the name of the state.

Cotten *ex parte*, Phil. Eq., 79.

CHAPTER SEVEN.

BURNING WOODS.

SECTION.

52. No person to fire woods except his own, and notice thereof to be given.
53. Penalty fifty dollars; guilty of a misdemeanor.
54. Wagoners not extinguishing camp fires liable to a penalty and amount of damages.

Sec. 52. No person to fire woods except his own, and notice thereof to be given. R. C., c. 16, s. 1. 1777, c. 123, s. 2.

No person shall set fire to any woods, except it be his own property; nor in that case, without first giving notice in writing to all persons owning lands adjoining to the woodlands intended to be fired, at least two days before the time of firing such woods, and also taking effectual care to extinguish such fire before it shall reach any vacant or patented lands near to or adjoining the lands so fired.

Wright v. Yarborough, N. C. T. R., 263, (687); Tyson v. Rasberry, 1 Hawks, 60; Averitt v. Murrell, 4 Jon., 322; Hall v. Cranford, 5 Jon., 3; Garrett v. Freeman, 5 Jon., 78; Roberson v. Kirby, 7 Jon., 477; Achenbach v. Johnston, 84—264.

SEC. 53. Penalty fifty dollars; guilty of a misdemeanor. R. C., c. 16, s. 2. 1777, c. 123, s. 1.

Every person wilfully offending against the preceding section shall, for every such offence, forfeit and pay to any person who will sue for the same fifty dollars, and be liable to any one injured in an action, and shall moreover be guilty of a misdemeanor.

Roberson v. Kirby, 7 Jon., 477.

SEC. 54. Wagoners not extinguishing camp-fires liable to a penalty and amount of damages. 1865-'6, c. 38.

If any wagoner or other person encamping in the open air shall leave his camp without totally extinguishing his camp-fire, he shall be liable to a penalty of ten dollars, to be recovered by any person suing for the same, and shall be further liable for the full amount of damages that any individual may sustain by reason of any fire getting out from said camp, to be recovered by action in the superior court for the county in which said camp may be situated, or in which said damage may be done: *Provided*, that this section shall apply only to the counties of Cumberland, Harnett, Bladen, Moore, Hertford and Chowan.

CHAPTER EIGHT.

BURNT AND LOST RECORDS.

SECTION.
55. Copies of burnt or destroyed records certified by proper officer, to be received in evidence.
56. How original papers may be again recorded or registered; conveyances of real estate lost, how re-surveyed and estate declared, and its effect.
57. Copies of lost will may be admitted to probate.
58. Copies of wills under certificate of clerk of the superior court shall be competent evidence; letters testamentary to issue.
59. Contents of destroyed wills, how established.
60. Destroyed judgments, how perpetuated.
61. Color of title, how determined.
62. Actions on destroyed official bonds, how prosecuted.
63. Destroyed witness tickets, how made good.
64. Lost conveyances, how replaced.
65. Records of any court in, or out of the state admissible, to prove existence and contents of wills, deeds, &c., destroyed.

SECTION.
66. Copies of deeds, &c., mentioned in preceding section may be recorded.
67. Rules to be observed in petitions and motions under this chapter.
68. Records and registries under this chapter to have the same force and effect as original registries.
69. Written evidence prior to destruction of said recorded deed, registry, will, &c., to be *prima facie* evidence of its existence.
70. Such deeds and conveyances to be received as *prima facie* evidence of the recitals.
71. To what records, &c., the provisions of this chapter are applicable.

Sec. 55. Copies of burnt or destroyed records certified by the proper officer, to be received in evidence. 1866, c. 41, ss. 1, 2.

Whenever the office of any registry shall have been, or may be destroyed by fire or other accident, and the records and other papers thereof be burnt or destroyed, the copies of all such proceedings, instruments and papers as are of record or registry, certified by the proper officer, though without the seal of office, shall be received in evidence whenever the original or duly certified exemplifications would be. Such copies, when the court shall be satisfied of their genuineness, may be ordered to be recorded or registered.

Sec. 56. How original papers may be again recorded or registered; conveyances of real estate lost, how resurveyed and estate declared, and its effect. 1866, c. 41, s. 3.

All original papers, once admitted to record or registry, whereof the record or registry is destroyed, may, on motion, be again recorded or registered, on such proof as the court shall require. Whenever any conveyance of real estate, or any right or interest therein shall have been lost, the registry thereof being also destroyed, any person claiming under the same may cause the boundaries thereof to be established in the manner provided for processioning land, or he may proceed in the following manner to establish both the boundaries and nature of his estate: He shall file his petition before the clerk of the superior court, setting forth the location and boundaries of his land, whose land it adjoins, and the estate claimed therein, and praying to have his own boundaries established, and the nature of his estate declared. All persons claiming any estate in the premises, and those whose lands adjoin, shall be notified of the proceedings, and thereupon, unless they or some of them shall, by

answer on oath, deny the truth of the matters alleged, or some of them, the clerk of the superior court shall order a surveyor to run and designate the boundaries of the petitioner's land, return his survey, with the plot thereof to court, which, when confirmed, shall, with the declaration of the court, as to the nature of the estate of the petitioner, be registered and have, as to the persons notified, the effect of a deed for the same, executed by the person possessed of the same, next before the petitioner: *Provided*, that in all cases wherein the process of surveying shall be disputed, and the surveyor shall be forbidden to proceed by any person interested, the same proceedings shall be had as in like cases of processioning land. The petitioner shall set forth the whole substance of the conveyance as truly and specifically as he can, and if any of the persons notified shall, by answer, deny the truth thereof, the clerk of the superior court shall transfer the issues of fact to the superior court at term, to be tried as other issues of fact are required by law to be tried, and on their verdict and the pleadings, the judge shall adjudge the rights of the parties, and declare the contents of the deed, if any deed be found by the jury, and allow the registration of such judgment and declaration, which shall have the force and effect of a deed.

Fleming v. Roberts, 77—415; Cowles v. Harding, 79—577.

Sec. 57. Copies of lost will may be admitted to probate. 1868-'9, c. 160, s. 1.

In all counties where the original wills on file in the office of clerks of superior courts, and will-books containing copies, have been or may be lost or destroyed, if the executor or any other person has preserved a copy of a will, (the original being so lost or destroyed,) with a certificate appended, signed by a clerk of the court in whose office the will was, or is required to be filed, and stating that said copy is a correct one, such copy may be admitted to probate, under the same rules and in the same manner as now prescribed by law for proving wills; and the proceedings in such cases shall be the same as though such copy was the original offered for the first time for probate, except that the clerk who signed such certificate shall, on oath, acknowledge his signature, or in case it shall appear that said clerk has died or left the state, then his signature shall be proven by a competent witness; and the witness or witnesses to the original, who may be examined, shall be required to swear that he or they signed in the presence of the testator and by his direction a

paper writing purporting to be his last will and testament.

SEC. 58. Copies of wills under certificate of clerk of the superior court shall be competent evidence; letters testamentary to issue. 1868-'9, c, 160, s. 2.

In any action or proceeding at law, wherein it may become necessary to introduce such will to establish title, or for any other purpose, a copy of the will and of the record of the probate, with a certificate signed by the clerk of the superior court for the county where the will may be recorded, stating that said record and copy are full and correct, shall be admitted as competent evidence; and when a copy of a will shall have been admitted to probate, the clerk of the superior court shall thereupon issue letters testamentary.

SEC. 59. Contents of destroyed wills, how established. 1866, c. 41, s. 4.

Any person desirous of establishing the contents of a will destroyed as aforesaid, there being no copy thereof, may file his petition in the office of the clerk of the superior court, setting forth the entire contents thereof, according to the best of his knowledge, information and belief, and all persons having an interest under the same shall be made parties, and if the truth of such petition be denied, the issues of fact shall be transferred to the superior court at term for trial by a jury, whether the will was recorded, and if so recorded, the contents thereof, and the declarations of the judge, shall be recorded as the will of the testator; any devisee or legatee shall be a competent witness as to the contents of every part of said will, except such as may concern his own interest in the same.

SEC. 60. Destroyed judgments, how perpetuated. 1866, c. 41, s. 5.

Every person desirous of perpetuating the contents of any destroyed judgments, order or proceedings of court, or any paper admitted to record or registration, or directed to be filed for safe keeping, other than wills or conveyances of real estate, or some right or interest therein, or any deed or other instrument of writing, required to be recorded or registered but not having been recorded or registered, it being competent to register or record said deed or other instrument at the time of its loss or destruction, may file his petition in the court hav-

ing jurisdiction of like matters with the original proceeding, setting forth the substance of the whole record, deed, proceeding, or paper, which he desires to perpetuate, and if, on the hearing, the court shall declare the existence of such record, deed, or proceeding, or paper at the time of the burning of the office wherein the same was lodged or kept, or other destruction thereof, and that the same was there destroyed, and shall declare the contents thereof, such declaration shall be recorded or registered, or filed, according to the nature of the paper destroyed.

Sec. 61. Color of title, how determined. 1866, c. 41, s. 6.

Every person who shall have been in the continual, peaceable and quiet possession of land, tenements, or hereditaments, situated in the county, claiming, using and occupying them as his own, for the space of seven years, under known boundaries, the title thereto being out of the state, shall be deemed to have been lawfully possessed, under color of title, of such estate therein as has been claimed by him during his possession, although he may exhibit no conveyance therefor: *Provided*, that such possession shall have commenced before the destruction of the registry office, or other destruction as aforesaid, and also that any such person, or any person claiming by, through or under him, will make affidavit and produce such proof as shall be satisfactory to the court that the possession was rightfully taken; and if taken under a written conveyance, that the registry thereof was destroyed by fire or other means, or was destroyed before registry as aforesaid, and that neither the original, nor any copy thereof, is in existence. *Provided further*, that such presumption shall not arise against *femes covert*, infants, persons of non-sane memory, and persons residing out of the state, who were such at the time of possession taken, and were not therefore barred, nor were so barred at the time of the burning of the office or other destruction.

Hill v. Overton, 81—393.

Sec. 62. Action on destroyed official bonds, how prosecuted. 1866, c. 41, s. 7.

Actions on official or other bonds lodged in any office which are destroyed with the registry thereof, may be prosecuted by petition against the principal and sureties

thereto, and the proceedings shall be as in the former courts of equity.

Sec. 63. Destroyed witness tickets, how made good. 1866, c. 41, s. 8.

The court having jurisdiction of the action may allow other witness tickets to be filed in place of such as may be destroyed, upon the oath of the witness or other satisfactory proof.

Sec. 64. Lost conveyances, how replaced. 1866, c. 41, s. 9.

Where any conveyance executed by any person, sheriff, clerk and master, or commissioner of court has been lost, and registry thereof destroyed as aforesaid, and there is no copy thereof, such persons, whether in or out of office, may execute another of like tenor and date, reciting therein that the same is a duplicate, and such deed shall be evidence of the facts therein recited, in all cases wherein the parties thereto are dead, or are incompetent witnesses to prove the same, to the extent as if it was the original conveyance.

Sec. 65. Records of any court in or out of the state admissible to prove existence and contents of wills, deeds, &c., destroyed. 1866, c. 41, s. 10.

The records of any court in or out of the state, and all transcripts of such records, and the exhibits filed therewith in any case, shall be admissible to prove the existence and contents of all deeds, wills, conveyances, depositions and other papers, copies whereof are therein set forth or exhibited in all cases where the records and registry of such as were or ought to have been recorded and registered, or the originals of such as were not proper to be recorded or registered, have been destroyed as aforesaid, although such transcripts or exhibits may have been informally certified; and when offered in evidence shall have the like effect as though the transcript or record was the record of the court whose records are destroyed, and the deeds, wills and conveyances, depositions and other papers therein copied or therewith exhibited, were original.

Sec. 66. Copies of deeds, &c., mentioned in preceding section may be recorded. 1866, c. 41, s. 11.

The copies aforesaid of all such deeds, wills, conveyances and other instruments proper to be recorded or registered, as are mentioned in the preceding section,

may be recorded or registered on application to the clerk of the superior court, and due proof that the original thereof was genuine.

SEC. 67. Rules to be observed in petitions and motions under this chapter. 1866, c. 41, s. 12. 1874-'5, c. 51. 1874-'5, c. 254, s. 3.

The following rules shall be observed in petitions and motions under this chapter: The facts stated in every petition or motion shall be verified by affidavit of the petitioner that they are true according to the best of his knowledge, information and belief; the instrument or paper sought to be established by any petition shall be fully set forth in its substance, and its precise language shall be stated when the same is remembered. All persons interested in the prayers of the petition or decree, shall be made parties. No petition to declare the contents of a deed or will, or any matter of record, shall be filed but within five years next after the loss or destruction thereof: *Provided*, that infants, *femes coverts*, persons of non-sane memory and non-residents, may file such petition within one year after the disability is removed. Petitions to establish a record of any court shall be filed at term in the superior court of the county where the record is sought to be established. Other petitions may be filed in the office of the clerk of the superior court. The costs of every action under this chapter shall be paid as the court may decree. Appeals shall be allowed as in all other cases, and where the error alleged shall be an erroneous finding by the superior court at term, of a matter of fact, the same may be removed on appeal to the supreme court, and the proper judgments directed to be entered below. And it shall be presumed that any order or record of the court of pleas and quarter sessions, which was made and has been lost or destroyed, was made by a legally constituted court, and the requisite number of justices, without naming said justices.

Flemming v. Roberts, 77—415; Dail v. Sugg. 85—104.

SEC. 68. Records and registries under this chapter to have the same force and effect as original registries. 1866, c. 41, s. 14.

The records and registries allowed by the court in pursuance of this chapter shall have the same force and effect as original records and registries.

SEC. 69. Written evidence prior to destruction of said recorded deed, registry, will, &c., to be prima facie evidence of its existence. 1871, c. 64, s. 1.

The recitals, reference to, or mention of any decree, order, judgment or other record of any court of record of any county in which the court-house, or records of said courts, or both, have been destroyed by fire or otherwise, contained, recited or set forth in any deed of conveyance, paper writing, or other *bona fide* written evidence of title, executed prior to the destruction of the court-house and records of said county, by any executor or administrator with a will annexed, or by any clerk and master, superior court clerk, clerk of the court of pleas and quarter sessions, sheriff, or other officer, or commissioners appointed by either of said courts, and authorized by law to execute said deed or other paper writing, shall be deemed, taken and recognized as true in fact, and shall be *prima facie* evidence of the existence, validity and binding force of said decree, order, judgment or other record so referred to or recited in said deed, or paper writing, and shall be to all intents and purposes binding and valid against all persons mentioned or described in said instrument of writing, deed, &c., as purporting to be parties thereto, and against all persons who were parties to said decree, judgment, order or other record so referred to or recited, and against all persons claiming by, through or under them or either of them.

Dail v. Sugg, 85—104.

SEC. 70. Such deeds and conveyances to be received as prima facie evidence of the recitals. 1870-'71, c. 86, s. 2.

Said deed of conveyance, or other paper writing, executed as aforesaid, and registered according to law, shall be allowed to be read in any suit now pending or which may hereafter be instituted in any court of this state, as *prima facie* evidence of the existence and validity of the decree, judgment, order, or other record upon which the same purports to be founded, without any other or further restoration or re-instatement of said decree, order, judgment, or record, than is contained in this chapter.

Dail v. Sugg, 85—104.

SEC. 71. To what records, &c., the provisions of this chapter are applicable. 1871-'2, c. 64, s. 2. 1874-'5, c. 254, s. 2.

This chapter shall extend to records of any court which has been, or may be destroyed by fire or otherwise, and to any deed of conveyance, paper writing, or other *bona fide* evidence of title executed before the destruction of said records.

Dail v. Sugg, 85—104.

CHAPTER NINE.

CLERKS OF THE SUPERIOR COURT.

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Sec. 72. Bond of clerk. C. C. P., s. 137.

At the first meeting of the board of commissioners of each county after the election or appointment of any clerk of a superior court it shall be the duty of the clerk to deliver to such commissioners a bond with sufficient sureties, to be approved by them, in a penalty of ten thousand dollars, payable to the state of North Carolina, and with a condition to be void, if he shall account for, and pay over, according to law, all moneys and effects which have come or may come into his hands, by virtue or color of his office, or under an order or decree of a judge, even though such order or decree be void for want of jurisdiction or other irregularities, and shall diligently preserve and take care of all books, records, papers and property, which have come, or may come into his possession, by virtue or color of his office, and shall in all things faithfully perform the duties of his office as they are, or thereafter shall be prescribed by law. Each surety shall

take and subscribe an oath, before the register of deeds, that he is worth a certain sum, which shall not be less than one thousand dollars over and above all his debts and liabilities and his homestead and personal property exemption, and the sum thus sworn to shall not be less in the aggregate than the penalty of the bond.

Ex parte Daughtry, 6 Ired., 155; Wilmington v. Nutt, 78—177; Buckman v. Com'rs, 80—121; Wilmington v. Nutt, 80—265; Saunders v. Gatling, 81—298; Clark v. Carpenter, 81—309; Morgan v. Bunting, 86—66; Rogers v. Odom, 86—433.

Sec. 73. Bond, how approved, &c. C. C. P., s. 138.

The approval of said bond by the board of commissioners, or a majority of them, shall be recorded by their clerk. Any commissioner approving a bond which he knows or believes to be insufficient, or of the insufficiency of which he has reasonable notice, shall be personally liable as if he were a surety thereto. The said bond shall be acknowledged by the parties thereto, or proved by a subscribing witness, before the clerk of said board of commissioners, or their presiding officer, registered in the register's office in a separate book to be kept by him for the registration of official bonds; and the original, with the approval thereof endorsed, deposited with the register for safe-keeping. The like remedies shall be had upon said bond as are or may be given by law on official bonds.

Judges v. Williams, 1 Dev., 426; State v. Ehringhaus, 8 Ired., 7; State v. Gaines, 8 Ired., 168; State v. Biggs, 1 Jon., 364; White v. Smith, 2 Jon., 4; Richardson v. Smith, 2 Jon., 8; Hunter v. Routlege, 6 Jon., 216; Short v. Currie, 8 Jon., 42; Erwin v. Lowrance, 64—483; McIntyre v. Merritt, 65—558; Cooper v. Williams, 75—94; Havens v. Lathene, 75—505; Cox v. Blair, 76—78; Wilmington v. Nutt, 78—177; Gregory v. Morisey, 79—559; Wilmington v. Nutt, 80—265; Curtis' Heirs, 82—435.

Sec. 74. Qualification of clerks. C. C. P., s. 139

The clerks of the superior court, before entering on the duties of their office, shall take and subscribe before some officer authorized by law to administer an oath, the oaths prescribed by law, and file such oaths with the register of deeds for the county.

Sec. 75. May appoint deputies, &c. R. C., c. 19, s. 15. 1777, c. 115, s. 86.

Clerks of the superior court may appoint deputies, who shall take and subcribe the oath prescribed in the preceding section.

Shepherd v. Lane, 2 Dev., 148; Burke v. Elliott, 4 Ired., 355; Suddereth v. Smyth, 13 Ired., 452.

SEC. 76. Failure to give bond, &c. C. C. P., s. 140.

In case any clerk shall fail to give bond and qualify as above directed, the presiding officer of the board of commissioners of his county shall immediately inform the resident judge of the judicial district thereof, who shall thereupon declare the office vacant and fill the same, and the appointee shall give bond and qualify as above directed.

Buckman v. Com'rs, 80—121.

SEC. 77. Renewed annually; clerk to produce receipts for all public moneys paid before renewing. R. C., c. 19, s. 12. 1793, c. 384, s. 4. 1806, c. 699, s. 1. 1819, c. 990. 1874-'5, c. 151. 1876-'7, c. 276.

The clerks of the superior court shall renew their bonds for the faithful discharge of their duties in office, with good and sufficient sureties, annually, on the first Monday of December; and such as shall neglect to renew their bonds at the time before mentioned, or give other and better sureties when judged necessary by the board of county commissioners, shall be considered as having forfeited their offices: *Provided*, that no clerk shall be permitted to renew his bond unless he shall produce from the treasurer, state and county, receipts in full of all moneys by him received for the use of the state and county, for which he shall have been accountable.

Oats v. Bryan, 3 Dev., 451; Hunter v. Routlege, 6 Jon., 216; Moore v. Boudinot, 64—190.

SEC. 78. Clerks may resign. Const., Art. IV., s. 29.

Any clerk of the superior court may resign his office to the judge of the superior court, residing in the district in which is situated the county of which he is clerk, and said judge shall fill the vacancy.

SEC. 79. Penalty for acting without qualifying. R. C., c. 19, s. 16. 1777, c. 115, ss. 4, 61. 1827, c. 9, s. 5.

If any clerk shall enter on the duties of his office, before he executes and delivers to the authority entitled to receive the same, the bond required by law, he shall be guilty of a misdemeanor.

SEC. 80. Office, where to be kept, when to be open. C. C. P., s. 141.

He shall have an office in the court-house or other place provided by the board of commissioners, in the county town of his county. He shall give due attendance, in

person or by deputy, at his office daily, Sundays and holidays excepted, from nine o'clock, a. m., to three o'clock, p. m., and longer when necessary, for the dispatch of business.

Shepherd v. Lane, 2 Dev., 148; Burke v. Elliott, 4 Ired., 355; Suddereth v. Smyth, 13 Ired., 452; People v. Heaton, 77—18; State v. Norman, 83—687.

Sec. 81. To receive official papers, &c. C. C. P., s. 142.

Immediately after he shall have given bond and qualified as aforesaid, he shall receive from the late clerk of the superior court all the records, books, papers, moneys and property of his office, and give receipts for the same, and if any clerk shall refuse, or fail within a reasonable time after demand to deliver such records, books, papers, moneys and property, he shall be liable on his official bond for the value thereof, and be guilty of a misdemeanor.

Foster v. Woodfin, 65—29; Gregory v. Morrisy, 79—559.

Sec. 82. To keep record, &c. C. C. P., s. 143. 1868-'9, c. 159, s. 4.

He shall be furnished with the requisite stationery and furniture, for official use, by the board of commissioners. He shall keep in bound volumes a complete and faithful record of all his official acts, and give copies thereof to all persons desiring them, on payment of the legal fees. He shall be answerable for all records belonging to his office, and all papers filed in the court, and they shall not be taken from his custody, unless by special order of the court, or on the written consent of the attorneys of record of all the parties; but parties may at all times have copies upon paying the clerk therefor.

Sec. 83. Books to be kept by clerks. C. C. P., s. 144. 1868-'9, c. 159, s. 1.

Each clerk shall keep the following books:

(1) A docket of all writs, summons or other original process issued by him, or returned to his office, which are made returnable to a regular term of the superior court; this docket shall contain a brief note of every proceeding whatever in each action, up to the final judgment inclusive.

(2) A judgment docket in which the substance of the judgment shall be recorded, and every proceeding subsequent thereto, noted.

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(3) A docket of all issues of fact joined upon the pleadings, and of all other matters for hearing before the judge at a regular term of the court, a copy of which shall be furnished to the judge at the commencement of each term.

(4) A direct and reverse alphabetical index of all final judgments in civil actions rendered in the court, with the dates and numbers thereof, and also of all final judgments rendered in other courts and authorized by law to be entered on his judgment docket.

(5) A docket of all criminal actions, containing a note of every proceeding in each.

(6) A minute docket, in which shall be entered a record of all proceedings had in the court during term, in the order in which they occur, and such other entries as the judge may direct to be made therein.

(7) A docket of all writs, summons, petitions, or other original process issued by him, or returnable to his office, and not returnable to a regular term; this docket shall contain a brief note of every proceeding, up to the final judgment inclusive.

(8) A minute docket, in which shall be entered a record of all proceedings had before the clerk, in actions or proceedings not returnable to a regular term of the court.

Norwood v. Thorp, 64—682; Dail v. Sugg, 85—104.

SEC. 84. Books to be furnished by board of commissioners. C. C. P., s. 145.

The books specified in the preceding section shall be supplied to the clerks of the several counties by the board of commissioners of the respective counties, at the expense of the county.

SEC. 85. Money judgments of clerk to be entered on judgment docket.

Judgments for money, rendered by the clerk, shall be entered on the judgment docket of the superior court, and shall have the same effect as to lien, from the time of docketing, as if they had been taken in term time.

SEC. 86. Papers in each action to be kept separate, and filed together. C. C. P., s. 146.

The clerk shall keep the papers in each action in a separate roll or bundle, and at its termination attach them together, properly labeled, and file them in the order of the date of the final judgment.

SEC. 87. Clerks going out of office, and having failed to perform their duties, the court may cause them to be done, and recover the amount paid for such service. R. C., c. 19, s. 19. 1844, c. 5, s. 6.

Whenever, upon the death or resignation, removal from office, or at the expiration of his term of office, any clerk shall have failed to discharge any of the duties of his office, the court, if practicable, shall cause the same to be performed by another person, who shall receive for such services, and as a compensation therefor, the fees allowed by law to the clerk; and such portion thereof as may be paid by the county, may be recovered back by the county, by suit on the official bonnd of the defaulting clerk, to be brought on the relation of the board of commissioners of the county.

SEC. 88. Solicitor to examine records. C. C. P., s. 147.

At every regular term of the superior court, the solicitor for the judicial district shall inspect the office of the clerk and report to the court in writing. If any clerk, after being furnished with the necessary books, shall fail to keep them up, as required by law, he shall be guilty of misdemeanor, and the solicitor shall cause him to be prosecuted for the same. If any solicitor shall fail or neglect to perform the duty hereby imposed on him, he shall be liable to a penalty of five hundred dollars to any person who shall sue for the same.

SEC. 89. Superior court clerk to certify to secretary of state names of appointees to fill vacancies in office of justice of the peace, &c. 1881, c. 326.

In every case of an appointment to fill a vacancy in the office of justice of the peace, it shall be the duty of the clerk of the superior court making the appointment, within ten days after such appointment, to certify and report under his hand and seal of office to the secretary of state the name of the appointee, together with that of the justice whom he succeeds.

SEC. 90. To make annual reports of all public funds which come into their hands. 1874-'5, c. 151. 1876'-7, c. 276.

Clerks of the superior court, into whose hands any public funds may come by virtue or under color of their office, shall make an annual report of the amount and management of the same, on the first Monday in December, or oftener if required, of each and every year to the

board of commissioners of the several counties. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom disbursed, shall be addressed to the chairman of the board of commissioners for the county for which such report is made, and shall be subscribed and verified by the oath of the party making the same before any person allowed to administer oaths.

SEC. 91. To be approved and registered. 1874-'5, c. 151. 1876-'7, c. 276.

The board of commissioners, if they shall approve of the reports mentioned in the preceding section, shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds for the several counties by the board of commissioners, which book shall be marked and styled "record of official reports," with a proper index of all reports recorded therein, and each original report shall, if approved, be endorsed by the chairman of the board with the word "approved," the date of approval, and the endorsement signed by the chairman, and when recorded by the register he shall endorse thereon the date of registration, the page of the "record of official reports" upon which the same is registered, sign the same and file it in his office.

SEC. 92. Failure to report. 1874-'5, c. 151, s. 3. 1876-'7, c. 276.

If any clerk shall fail to report, or if after a report has been made, the board of commissioners disapprove the same, such board may take legal steps to compel a proper report to be made, by suit on the bond of such clerk. Any clerk wilfully and falsely swearing to any report made, shall be guilty of a misdemeanor.

SEC. 93. The duties of clerks of the superior court in relation to bills of cost; clerks to insert detailed items. 1873-'4, c. 116, s. 1.

The clerks of the several superior courts shall insert in the entry of judgment in every criminal action tried at the several terms, whether regular or special, of the superior courts of their counties; and in the bills of cost in such cases where there is no trial, a detailed statement of the different items of cost in such cases, and to whom due, which statements shall at all times be open to the inspection of all persons interested in the same.

SEC. 94. Statement of costs to be made in thirty days. 1873-'4, c. 116, s. 3.

In all criminal actions in the superior court, where the state is liable in whole or part for the costs, it shall be the duty of the clerk of the superior court to make out a statement of such costs from the record or docket, within thirty days after the regular or special terms of the superior court, and file the same with the board of commissioners of their counties; for which services they shall receive the same fees as are now provided by law for like duties.

SEC. 95. Clerks to keep an itemized statement of all fines received by them, and to properly account for the same. 1879, c. 96, s. 1.

It shall be the duty of the clerks of the several courts to enter in a book, to be supplied by the board of commissioners of the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties and forfeitures, and said book shall at all times be open to the inspection of the public.

SEC. 96. Fines, &c., to be paid to county treasurer within sixty days; treasurer to keep itemized account, &c. 1879, c. 96, s. 2.

All fines, penalties and forfeitures so received by any clerk shall within sixty days after being received, be paid over to the county treasurer, or person legally acting as such, who shall give a receipt to every such clerk for the same, and said county treasurer or person legally acting as such shall enter in a book to be kept by him the exact amount of any fine, penalty or forfeiture so paid over to him, giving the date of payment, the name of the clerk so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

SEC. 97. Certified statement of account to be filed with superior court clerk. 1879, c. 96, s. 3.

It shall be the duty of the county treasurer, or person legally acting as such, to file a certified statement, itemized as aforesaid, in the office of the clerk of the superior court, and it shall be the duty of the said clerk to record said statement in a book to be kept in his office for that purpose. Said certified statement shall be filed by said treasurer, or person so acting, in said clerk's office, on the first days of January, April, July and October, in each and every year.

SEC. 98. Fines, &c., heretofore collected, to be paid to the treasurer. 1879, c. 96, s. 4.

All fines, penalties and forfeitures heretofore collected by any such clerks, and which have not been accounted for, shall be paid over to such treasurer or person acting as such.

SEC. 99. Fines, &c., appropriated to the common schools. 1879, c. 96. s. 5.

All fines, penalties and forfeitures above mentioned shall be appropriated and paid out by the county treasurer as aforesaid for the use of the free common schools of the county in which said fines, penalties and forfeitures are collected.

SEC. 100. Day of issuing process to be noted thereon; sheriff to endorse day of receiving, &c. R. C., c. 31, s. 39. 1777, c. 115, s. 13.

The clerk shall note on all precepts, process and executions. the day on which the same shall be issued; and the sheriff or other officer receiving the same for execution, shall in like manner note thereon the day on which he shall have received it, and the day of the execution; and every clerk, sheriff or other officer neglecting so to do, shall forfeit and pay one hundred dollars.

Boyden v. Odeneal, 1 Dev., 177; Fulbright v Tritt, 2 D. & B., 491; Booth v. Leary, 3 D. & B., 21; Hyatt v. Tomlin, 2 Ired., 149; Wyche v. Newsom, 87—144.

SEC. 101. Failure to perform duty a misdemeanor. 1879, c. 96, s. 6.

If any clerk, county treasurer, or person acting as such, shall fail or neglect to perform any of the duties or requirements above named, of this chapter, he shall be guilty of a misdemeanor.

SEC. 102. Office of probate judge abolished.

The office or place of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior court as judges of probate, shall be performed by the clerks of the superior court as clerks of said court, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court.

SEC. 103. Clerks of the Superior Court; their jurisdiction. C. C. P., ss. 417, 418.

The clerks of the superior court have jurisdiction:

(1) To take proof of deeds, bills of sale, official bonds,

letters of attorney, or other instruments permitted or required by law to be registered;

(2) To take proof of wills and grant letters testamentary and of administration;

(3) To revoke letters testamentary and of administration;

(4) To appoint and remove guardians of infants, idiots, inebriates and lunatics;

(5) To bind out apprentices and to cancel the indentures in such cases;

(6) To audit the accounts of executors, administrators, collectors and guardians;

(7) To exercise jurisdiction conferred on them in every other case prescribed by law.

Wadsworth v. Davis, 63—251; Hunt v. Sneed, 64—176; Hunt v. Sneed, 64—180; Reynolds v. State, 64—460; Hellig v. Foard, 64—710; Rowland v. Thompson, 64—714; Miller v. Barnes, 65—67; Sprinkle v. Hutchinson, 66—450; Guion v. Melvin, 69—242; Bryan v. Hubbs, 69—423; Wilson v. Abrams, 70—324; Davis v. Cureton, 70—667; Taylor v. Biddle, 71—1; Ballard v. Kilpatrick, 71—281; Bidwell v. King, 71—287; Williams v. Williams, 71—427; Patterson v. Miller, 72—516; Hodge v. Hodge, 72—616; Williams v. Williams, 74—1; Spears v. Snell, 74—210; Spiers v. Halsted, 74—624; Hendricks v. Mayfield, 74—726; Gardner v. Anderson, 79—24; Haywood v. Haywood, 79—42; Blue v. Blue, 79—69; Wood v. Skinner, 79—92; Sanderson v. Sanderson, 79—369; Barnes v. Brown, 79—401; Bratton v. Davidson, 79—423; Smith v. Pipkin, 79—569; Hoff v. Crafton, 79—592; Southall v. Shields, 81—28; McFadgen v. Council, 81—195; Gregory v. Ellis, 82—225: Simpson v. Jones, 82—323; Pegram v. Armstrong, 82—326; Murrill v. Sandlin, 86—54.

Sec. 104. Disqualification to Act. C. C. P., s. 419. 1871-'2, c. 196, s. 1.

No clerk can act as such in relation to any estate or proceeding:

(1) If he has or claims to have, an interest by distribution, by will, or as creditor, or otherwise;

(2) If he is so related to any person, having or claiming such interest, that he would, by reason of such relationship, be disqualified as a juror; but the disqualification on this ground ceases, unless the objection is made at the first hearing of the matter before him.

(3) If he or his wife is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will; but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to or refused probate by another clerk, or before the judge of the superior court.

(4) If he or his wife is named as executor or trustee in any testamentary or other paper; but this disqualification ceases when the will or other paper is finally admitted to or refused probate by another clerk, or before the judge of the superior court;

(5) Or if he shall renounce the executorship and endorse the same on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if admitted to probate.

Barlow v. Norfleet, 72—535; Gregory v. Ellis, 82—225.

Sec. 105. Waiver of disqualification. C. C. P., s. 420.

The parties may waive the disqualification specified in sub-divisions one, two, three and five of the preceding section, and upon filing in the office such waiver in writing, the clerk shall act as in other cases.

Sec. 106. Removal of proceedings. C. C. P., s. 421.

When any of the disqualifications specified in section one hundred and four exist, and there is no waiver thereof, or cannot be such waiver, any party in interest may apply to the judge of the district or to the judge holding the courts of such district for an order to remove the proceedings to the clerk of the superior court of an adjoining county in the same district.

Sec. 107. Commissioner appointed to audit accounts, approval of judge of Superior court, record made by clerk of superior court. 1871-'2, c. 197, s. 1.

In all cases where the clerk of the superior court shall be executor or administrator of any estate at the time of his election to office, in order to enable him to settle such estate, the judge of the superior court mentioned in the preceding section is empowered to make such order as may be necessary in the settlement of the estate; may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to either of said judges for his approval, and when the accounts are so approved, it shall be his duty to order the proper record to be made by the clerk, and the accounts to be filed in court.

Wilson v. Abrams, 70—324.

Sec. 108. Enumeration of powers. C. C. P., s. 422.

Every clerk has power:

(1) To issue subpœnas to compel the attendance of any

witness residing or being in the state, or to compel the production of any bond or paper, material to any inquiry pending in his court;

(2) To administer oaths and take acknowledgments, whenever necessary, in the exercise of the powers and duties of his office;

(3) To issue commissions to take the testimony of any witness within or without this state;

(4) To issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties;

(5) To enforce all lawful orders and decrees by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him;

(6) To exemplify, under seal of his court, all transcripts of deeds, papers or proceedings therein, which shall be received in evidence in all the courts of the state;

(7) To preserve order in his court and to punish contempts;

(8) To adjourn any proceeding pending before him from time to time;

(9) To open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court, in the same manner as courts of general jurisdiction;

Lovinier v. Pierce, 71—67; Wayhab v. Smith, 82—229.

(10) To award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.

SEC. 109. How party may appear. C. C. P., s. 423.

A party may appear in proceedings in which he is concerned, either in person or by attorney.

SEC. 110. Clerk not to act as attorney, &c. C. C. P., s. 424.

No clerk or any partner or person connected in law business with him shall act as counsel or attorney-at-law in the county wherein he is clerk; and any one violating this provision shall be guilty of a misdemeanor.

SEC. 111. Clerk must file papers. C. C. P., s. 426.

Every clerk must file and preserve all papers in proceedings before him, or belonging to the court; and all such papers and the books kept by him belong to, and

appertain to, his office, and must be delivered to his successor.

SEC. 112. Records to be kept by clerk. C. C. P., s. 427.

The following books must be kept by each clerk:

(1) A record of wills, in which must be recorded all wills, with the certificates of probate thereof;

(2) A record of appointments of executors, administrators, guardians, collectors and masters of apprentices, with revocations of all such appointments;

(3) A record of all orders and decrees passed in his office, which he is required to make in writing, and not required to be recorded in some other book;

(4) A record of accounts, in which must be recorded the quarterly and annual accounts of executors, administrators, collectors and guardians, as audited by him from time to time;

(5) A record of settlements, in which must be entered the final settlements of executors, administrators, collectors and guardians.

SEC. 113. Books to be furnished by board of commissioners; to be indexed. C. C. P., s. 428.

The books required to be kept by the last section must be furnished to the clerk by the board of commissioners; and to each of such books there must be attached an alphabetical index securely bound in the volume, referring to the entries therein by the page of the book. These books must, at all proper times, be open to the inspection of any person.

SEC. 114. Clerks required to keep open office for probate business. 1871-'2, c. 136, s. 1.

The clerks of the superior court shall open their offices every Monday, from 9 a. m. to 4 p. m., for the transaction of probate business, and on each succeeding day till such matter is disposed of.

People v. Heaton, 77—18; State v. Norman, 82—687.

SEC. 115. Forfeiture of office for failure. 1871-'2, c. 136, s. 2.

Any clerk of the superior court failing to comply with the preceding section, unless such failure be caused by sickness or other urgent necessity, shall forfeit his office.

People v. Heaton, 77—18; State v. Norman, 82—687.

Sec. 116. Issues of fact joined before the clerk to be transferred to the superior court; appeals shall lie to judge. C. C. P., ss. 490, 491, 492. 1873-'4, c. 34, s. 3. 1876-'7, c. 241, s. 5.

All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term of said court; and appeals shall lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law. In case of such transfer or appeal, neither party shall be required to give an undertaking for costs; and the clerk shall transmit, on such transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within twenty days after the entry of the order or judgment of the clerk. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof.

Rowland v. Thompson, 64—714; King v. Kinsey, 71—407; Wood v. Skinner, 79—92.

Sec. 117. Lawful to deposit mortgage in lieu of prosecution bond. 1874-'5, c. 103, s. 1.

It shall be lawful for any person desiring to commence any civil action or special proceeding, or to defend the same, his agent or surety, to execute a mortgage on real estate of the value of the bond or undertaking, required to be given at the beginning of said action, or at any stage thereof, to the party to whom the bond or undertaking would be required to be made, conditioned to the same effect as such bond or undertaking with power of sale, which power of sale may be executed upon a breach of any of the conditions of the said mortgage after advertisement for thirty days.

Sec. 118. Executors, &c., and officers may execute mortgage in lieu of bond. 1874-'5, c. 103, s. 2.

Any administrator, executor, guardian, collector or receiver, or any officer required to give an official bond, or the agent or surety of such person or officer, may execute a mortgage on real estate, of the value of the bond required to be given by such administrator, executor, guardian, collector, receiver or officer, to the state of

North Carolina, conditioned to the same effect as the bond should be, were the same given, with a power of sale, which power of sale may be executed by the clerk of the superior court, with whom said mortgage shall be deposited, upon a breach of any of the conditions of said mortgage, after advertisement for thirty days.

Sec. 119. Additional security may be required. 1874-'5, c. 103, s. 5.

If, from any cause, the property mortgaged in the cases provided for in the two preceding sections, shall become of less value than the amount of the bond, in lieu of which the mortgage is given, and it shall so appear upon affidavit of any person having any interest in the matter as a security for which the mortgage was given, it shall be the duty of the mortgagor to give additional security by a deposit of money, or the execution of a mortgage on more property, or justify as required in cases where bond or undertaking is given.

Sec. 120. Any person may execute mortgage in lieu of bond; proviso. 1874-'5, c. 103, s. 3.

Any person required to give a bond or undertaking, or required to enter into a recognizance for his appearance at any court, in any criminal proceeding, or for the security of any costs or fine in any criminal action, may also execute a mortgage on real property of the value of such bond or recognizance, payable to the state of North Carolina, conditioned as such bond or recognizance would be required, with power of sale, which power shall be executed by the clerk of the court in which said mortgage shall be executed, upon a breach of any of the conditions of said mortgage: *Provided*, that when said mortgage is executed before a justice of the peace, the power of sale shall be executed by the clerk of the court, to which the proceedings are returned.

Sec. 121. Affidavit of value required in certain cases. 1874-'5, c. 103, s. 4.

In all cases where a mortgage is executed, as hereinbefore permitted, it shall be the duty of the clerk of the court in which it is executed, or of the justice, to require an affidavit of the value of the property mortgaged, to be made by at least one witness, not interested in the matter, action or proceeding, in which the mortgage is given.

Sec. 122. Clerk may deposit mortgage. 1874-'5, c. 103, s. 6.

In all cases where the clerk of the superior court may be required to give surety, he may deposit a mortgage with the register of deeds, payable to the state, and conditioned as the bond would have been required, with power of sale, which power of sale shall be executed by the register of deeds, upon a breach of any of the conditions of said mortgage; and the register of deeds shall in all cases immediately register the same, at the expense of the said clerk.

Sec. 123. Punishment of the clerk of the superior court on conviction of an infamous crime. 1868-'9, c. 201, s. 53.

Upon the conviction of any clerk of the superior court of an infamous crime, or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

Clarke v. Carpenter, 81—309.

Sec. 124. Going out of office, to transfer records to successor; judge may give order for delivery of records, &c. R. C., c. 19, s. 14.

Upon going out of office for whatever reason, any clerk of the superior, inferior, or criminal court, shall transfer and deliver to his successor, (or to such person, before his successor in office may be appointed, as the court may designate), all records, documents, papers, and money belonging to the office. And the judge appointing any clerk to a vacancy in the clerkship of the superior court, may give to such person an order for the delivery to him, by the person having the custody thereof, of the records, documents, papers and moneys belonging to the office, and he shall deliver the same in obedience to such order. And in case any clerk going out of office as aforesaid, or other person having the custody of such records, documents, papers, and money as aforesaid, shall fail to transfer and deliver them as herein directed, he shall forfeit and pay to the State one thousand dollars, which shall be sued for by the prosecuting officer of that court.

O'Leary v. Harrison, 6 Jon., 339; Clarke v. Carpenter, 81—309.

CHAPTER TEN.

THE CODE OF CIVIL PROCEDURE---Acts 1868.

Mitchell v. Henderson, 63—643; Ragland v. Currin, 64—355; Clerk's office v. Huffsteller, 67—449; Ins. Company v. Davis, 74—78; Lash v. Thomas, 86—313.

TITLE I.

GENERAL DEFINITIONS AND DIVISIONS.

SECTION.
125. Remedies.
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129. Criminal action.
130. Civil action.
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Sec. 125. Remedies. C. C. P., s. 1.

Remedies in the courts of justice are divided into—

(1) Actions.

(2) Special proceedings.

Sec. 126. Actions. C. C. P., s. 2. 1868-'9, c. 277, s. 2.

An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offence.

Wilson & Shober v. Moore, 72—558.

Sec. 127. Special proceedings. C. C. P., s. 3.

Every other remedy is a special proceeding.

Hunt v. Sneed, 64—176; State v. McIntosh, 64—607; Tate v. Powe, 64—644; Woodley v. Gilliam, 64—649; Sumner v. Miller, 64—688; Hyman v. Jarnigan, 65—96; Felton v. Elliott, 66—195; Howerton v. Tate, 66—231; Badger v. Jones, 66—305; Sprinkle v. Hutchinson, 66—450; Pelletier v.

Saunders, 67—261; Bell v. King, 70—330; Herring v. Outlaw, 70—330; Jenkins v. Carter, 70—500; Patterson v. Miller, 72—516; Barnes v. Brown, 79—401.

SEC. 128. Division of actions. C. C. P., s. 4.

Actions are of two kinds—

(1) Civil.

(2) Criminal.

Sutton v. Owen, 65—123.

SEC. 129. Criminal action. C. C. P., s. 5.

A criminal action is:

(1) An action prosecuted by the state as a party, against a person charged with a public offence, for the punishment thereof.

State v. Lupton, 63—483; State v. Simons, 68—378.

(2) An action prosecuted by the state, at the instance of an individual, to prevent an apprehended crime, against his person or property.

State v. Locust, 63—574.

SEC. 130. Civil action. C. C. P., s. 6.

Every other is a civil action.

State v. McIntosh, 64—607; Tate v. Powe, 64—644; Woodley v. Gilliam, 64—649; Rowland v. Thompson, 65—110; Murphy v. Harrison, 65—246; Howerton v. Tate, 66—231; Bunting v. Stancill, 79—180.

SEC. 131. Remedies not merged. C. C. P., s. 7.

Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other.

SEC. 132. Definition of court, to mean clerk, when. C. C. P., s. 9.

In those of the following enactments which confer jurisdiction or power, or impose duties, when the words superior court, or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant.

McAdoo v. Benbow, 63—461; Pelletier v. Sanders, 67—261.

TITLE II.

GENERAL PROVISIONS AS TO CIVIL ACTIONS.

SECTION.	SECTION.
133. Forms of civil actions; distinction between actions at law and suits in equity abolished.	134. Parties designated plaintiff and defendant.
	135. Feigned issues abolished.

Sec. 133. Forms of civil actions; distinction between actions at law and suits in equity abolished. C. C. P., s. 12. Cons., Art. IV., s. 1.

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there shall be hereafter but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Matthews v. McPherson, 65—189; Parsley v. Nicholson, 65—207; Garrett v. Trotter, 65—430; Oates v. Gray, 66—442; Froelich v. Exp. Co., 67—1; Moore v. Edmiston, 70—510; Belmont v. Reilly, 71—260; Bitting v. Thaxton, 72—541.

Sec. 134. Parties designated plaintiff and defendant. C. C. P., s. 13.

In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

Garrett v. Trotter, 65—430

Sec. 135. Feigned issues abolished. C. C. P., s. 15.

Feigned issues are abolished; and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

McAdoo v. Benbow, 63—461; Harkey v. Houston, 65—137; Abrams v. Cureton, 74—523; Blake v. Askew, 76—325.

TITLE III.

LIMITATION OF ACTIONS.

Chap. I. ACTIONS IN GENERAL.
II. ACTIONS FOR THE RECOVERY OF REAL PROPERTY—TIME OF COMMENCING.
III. ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY—TIME OF COMMENCING.
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CHAPTER ONE.

ACTIONS IN GENERAL.

SECTION.
136. To what actions this title shall extend.
137. Time between the 20th of May, 1861, and the 1st January, 1870, not to be counted.
138. Period of limitation—objection must be taken by answer.

SEC. 136. To what actions this title shall extend. C. C. P., s. 16.

This title shall not extend to actions commenced before the twenty-fourth day of August, one thousand eight hundred and sixty-eight, nor to cases where the right of action accrued before that date, but the statutes in force previous to that date shall be applicable to such actions and cases.

Raglaud v. Currin, 64—355; Williams v. Williams, 70—189; Knight v. Braswell, 70—709; Libbett v. Maultsby, 71—345; Woodhouse v. Simmons, 73—30; Barham v. Lomax, 73—76; Ellis v. Scott, 75—108; Covington v. Stewart, 77—148; Batts v. Winstead, 77—238; Johnson v. Parker, 79—475; Cannon v. Morris, 81—139; Briggs v. Smith, 83—306; Blue v. Gilchrist, 84—239; Young v. Griffith, 84—715; White v. Beaman, 85—3; Hall v. Gibbs, 87—4; Crawford v. McLean, 87—169; Johnston v. Jones, 87—393; Vaughan v. Hines, 87—445.

SEC. 137. Time between the twentieth of May, one thousand eight hundred and sixty-one, and the first of January, one thousand eight hundred and seventy, not to be counted. 1866-'7, c. 17, s. 8. 1873-'4, c. 34, s. 5.

The time between the twentieth day of May, one thousand eight hundred and sixty-one, and the first day of January, one thousand eight hundred and seventy, shall not be counted, so as to bar actions or suits, or to presume satisfaction or abandonment of rights.

Neely v. Craige, Phil., 187; Morris v. Avery, Phil., 238; Hinton v. Hinton, Phil., 410; Johnson v. Winslow, 63—552; Howell v. Buie, 64—446; Plott v. R. R. Co., 65—74; Smith v. Rogers, 65—181; Williams v. Williams, 70—189; Benbow v. Robbins, 71—338; Lippard v. Troutman, 72—551; Faison v. Bowden, 74—43; Edwards v. Jarvis, 74—315; Hawkins v. Savage, 75—133; Melvin v. Waddell & Little, 75—361; Lane v. Richardson, 79—159; Badger v. Daniel, 79—372; Pearsall v. Kenan, 79—472; Johnson v. Parker, 79—475; Kitchen v. Wilson, 80—191; Cannon v. Morris, 81—139; Logan v. Fitzgerald, 87—308.

SEC. 138. Period of limitation, objection must be taken by answer. C. C. P., s. 17.

Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

Pegram v. Stoltz, 67—144; Green v. R. R., 73—524; Lewis v. Latham, 74—283; Daniel v. Com'rs, 74—494; Wordsworth v. Davis, 75—159; Privett v. Calloway, 75—233; Robertson v. Pickerel, 77—302; Kahnweller v. Anderson, 78—133; Long v. Bank, 81—41; Freeman v. Sprague, 82—366; Bacon v. Berry, 85—124; Williams v. Mullis, 87—159.

CHAPTER TWO.

ACTIONS FOR THE RECOVERY OF REAL PROPERTY—TIME OF COMMENCING.

SECTION.
139. When the state will not sue.
140. Such possession valid against claimants under the state.
141. When person having title must sue.
142. Proviso, in case of judgment for plaintiff reversed, &c.
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144. When adverse possession for twenty years.
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147. Relation of landlord and tenant.
148. Persons under disabilities.
149. Cumulative disabilities.
150. Railroads, &c., not barred.

SEC. 139. When the state will not sue, thirty years' possession. C. C. P., s. 18.

The state will not sue any person for, or in respect of, any real property, or the issues or profits thereof, by reason of the right or title of the state to the same:

(1) When the person in possession thereof, or those under whom he claims, shall have been in the adverse possession thereof for thirty years, such possession having been ascertained and identified under known and visible lines or boundaries; shall give a title in fee to the possessor.

Osborne v. Johnston, 65—22; Melvin v. Waddell, 75—361; Kitchen v. Wilson, 81—91; Malloy v. Bruden, 86—251; Logan v. Fitzgerald, 87—308.

Twenty-one years' possession under colorable title.

(2) When the person in possession thereof, or those under whom he claims, shall have been in possession under colorable title for twenty-one years, such possession having been ascertained and identified under known and visible lines or boundaries.

Malloy v. Bruden, 86—251.

SEC. 140. Such possession valid against claimants under the state. C. C. P., s. 19.

All such possession as is described in the preceding section, under such title as is therein described, is hereby ratified and confirmed, and declared to be a good and legal bar against the entry or suit of any person, under the right or claim of the state.

SEC. 141. When person having title must sue. C. C. P., s. 20.

When the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title for seven years, no entry shall be made or action sustained against such possessor, by any person having any right or title to the same, except during the seven years next after his right or title

shall have descended or accrued, who in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made; and such possession, so held, shall be a perpetual bar against all persons; subject to the qualifications in sections one hundred and forty-eight one hundred and forty-nine and one hundred and fifty.

McConnell v. McConnell, 64—342; Linker v. Benson, 67—150; Moore v. Thompson, 69—120; Day v. Howard, 73—1; Williams v. Wallace, 78—354; Davis v. McArthur, 78—357; Johnson v. Parker, 79—475; Neely v. Neely, 79—478; Parker v. Banks, 79—480; Dickens v. Barnes, 79—490; Hill v. Overton, 81—393; Henly v. Wilson, 81—405; Gudger v. Hensley, 82—481; Pope v. Matthis, 83—169; Scott v. Elkins, 83—424; Isler v. Dewey, 84—345; Christenbury v. King, 85—229; Edwards v. Tipton, 85—479; Malloy v. Bruden, 86—251; Clayton v. Rose, 87—106; Logan v. Fitzgerald, 87—308.

Sec. 142. Proviso, in case of judgment for plaintiff reversed, &c. C. C. P., s. 21.

If in any action for real property, the plaintiff be nonsuited or judgment be given for him, and the same be reversed for error, or a verdict pass for the plaintiff, and judgment thereon be arrested, then in any such case the plaintiff may commence a new action from time to time, within one year after nonsuit, judgment reversed or stayed as aforesaid, notwithstanding the time limited in the preceding section for bringing such action may have expired, if the action first brought was commenced within the time above prescribed for bringing such actions.

Sec. 143. Seizin within twenty years when necessary. C. C. P., s. 22.

No action for the recovery of real property, or the possession thereof, shall be maintained, unless it appear that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of such action; subject to the qualifications in sections one hundred and forty-eight, one hundred and forty-nine and one hundred and fifty.

Covington v. Stewart, 77—148; Neely v. Neely, 79—478; Jolly v. Bryan, 86—457.

Sec. 144. When adverse possession for twenty years. C. C. P., s. 23.

No action for the recovery of real property, or the possession thereof, or the issues and profits thereof, shall be

maintained when the person in possession thereof, or the defendant in such action, or those under whom he claims, shall have possessed such real property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held, shall give a title in fee to the possessor, in such property, against all persons not under disability.

Mode v. Long, 64—433; McNeill v. Riddle, 66—290; Melvin v. Waddell, 75—361; Covington v. Stewart, 77—148; Malloy v. Bruden, 86—251.

Sec. 145. Action after entry. C. C. P., s. 24.

No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within the time prescribed in this title.

Sec. 146. Possession presumed: occupation when deemed under legal title. C. C. P., s. 25.

In every action for the recovery of real property, or the possession thereof, or damages for a trespass on such possession the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appears that such premises have been held and possessed adversely to such legal title, for the time prescribed by law before the commencement of such action.

Johnston v. Pate, 83—110; London v. Bear, 84—266; Malloy v. Bruden, 86—251.

Sec. 147. Relation of landlord and tenant. C. C. P., s. 26.

Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

Day v. Howard, 73—1; Reid v. Chatham, 75—86; Melvin v. Waddell, 75—361.

SEC. 148. Persons under disabilities. C. C. P., s. 27.

If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents and services out of the same, be, at the time such title shall descend or accrue, 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, or

(4) A married woman;

Then such person may, notwithstanding the time of limitation prescribed in this title be expired, commence his action, or make his entry, within three years next after full age, coming of sound mind, enlargement out of prison, or discoverture; and at no time thereafter.

Lippard v. Troutman, 72—551; Clayton v. Rose, 87—106.

SEC. 149. Cumulative disabilities. C. C. P., s. 28.

When two or more disabilities shall co-exist, or when one disability shall supervene an existing one, the period prescribed within which an action may be brought shall not begin to run until the termination of the latest disability.

Lippard v. Troutman, 72—551.

SEC. 150. Railroads, &c., not barred. R. C., c. 65, s. 23. C. C. P., s. 29.

No railroad, plank road, turnpike or canal company, shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station-house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

CHAPTER THREE.

ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY---TIME OF COMMENCING.

SECTION.
151. Periods of limitation prescribed.
152. Ten years—
(1) Upon a judgment, &c., of any court of the United States or state;
(2) Upon a sealed instrument;
(3) For foreclosure of a mortgage, &c.;
(4) For the redemption of a mortgage.
153. Seven years—
(1) On a judgment of a justice of the peace;
(2) Against a personal or real representative.
154. Six years—
(1) Upon the official bond of a public officer;
(2) Against an executor, administrator or guardian, on his bond;
(3) For injury to any incorporeal hereditament.
155. Three years—
(1) For any contract or obligation not embraced in the preceding section;
(2) Under liability created by statute, other than a penalty, &c.;
(3) Trespass upon real property;
(4) For converting, &c., any goods and chattels, or for their specific recovery;
(5) Criminal conversation, or any other injury not arising under contract;
(6) Against sureties of administrator, &c., on official bond of their principal;
(7) Against bail;
(8) Or fees due any officer by judgment;
(9) For relief on the ground of fraud or mistake.
156. One year—
(1) Against sheriff, &c., for trespass under color of office;
(2) Upon a statute for a penalty or forfeiture;
(3) Libel, assault, battery or false imprisonment;
(4) Against a sheriff or other officer for an escape;
(5) By creditor of a deceased person against his personal representative.
157. Six months—
For slander.
158. For other relief within ten years.
159. Limitations to apply to actions by the state.
160. Actions upon an account current, when cause accrues.

Sec. 151. Periods of limitation prescribed. C. C. P., s. 30.

The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as follows:

Sec. 152. Ten years. C. C. P., ss. 14 31.

Within ten years—

(1) An action upon a judgment, or decree of any court of this state, or of the United States, or of any state or territory thereof, from the date of the rendition of said judgment or decree. But no such action shall be brought more than once, nor have the effect to continue the lien of the original judgment:

Broyles v. Young, 81—315; Pasour v. Rhyne, 82—149; Welfare v. Thompson, 83—276; McClenahan v. Cotten, 83—332; Lyon v. Russ, 84—588; Warren v. Warren, 84—614; Goodman v. Litaker, 85—8; Fox v. Kline, 85—173; McDonald v. Dickson, 85—248; Cotten v. McClenahan, 85—254; Kendall v. Bailey, 86—56; Williams v. Mullis, 87—159; Johnston v. Jones, 87—393; McDonald v. Dickson, 87—404.

(2) An action upon a sealed instrument against the principal thereto;

Welfare v. Thompson, 83—276; Belo v. Spach, 85—122; Torrence v. Alexander, 85—143; Crawford v. McClellan, 87—169.

(3) An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the the same;

Parker v. Banks, 79—480.

(4) An action for the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him shall have been in possession; within ten years after the right of action accrued.

Edwards v. Tipton, 85—478.

Sec. 153. Seven years. C. C. P., s. 32.

Within seven years—

(1) An action on a judgment rendered by a justice of the peace, from the date thereof;

Barringer v. Allison, 78—79; Broyles v. Young, 81—315; Daniel v. Laughlin, 87—433.

(2) By any creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made

upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor shall also be barred of a recovery against any surety to such debt.

McKeithan v. McGill, 83—517; Cox v. Cox, 84—138; Bacon v. Berry, 85—124; Vaughan v. Hines, 87—445; Leake v. Covington, 87—501.

Sec. 154. Six years. C. C. P., s. 33.

Within six years—

(1) An action upon the official bond of any public officer;

Hewlett v. Schenck, 82—234; Hughes v. Newsom, 86—424.

(2) An action against any executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final accounts by the proper officer, and the filing of such audited account as required by law;

Briggs v. Smith, 83—306; Vaughan v. Hines, 87—445.

(3) An action for injury to any incorporeal hereditament.

Boyden v. Achenbach, 79—539.

Sec. 155. Three years. C. C. P., s. 34.

Within three years—

(1) An action upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections;

R. R. Co. v. Avery, 64—491; Knight v. Braswell, 70—709; Guano Co. v. Willard, 73—521; Blackwell v. Claywell, 75—215; Austin v. Dawson, 75—523; Egerton v. Logan, 81—172; Hewlett v. Schenck, 82—234; Welfare v. Thompson, 83—276; Green v. College, 83—449; Capell v. Long, 84—17; Reed v. Exum, 84—130; Oates v. Lilly, 84—643; Timberlake v. Green, 84—658; Miller v. Lash, 85—51; Torrence v. Alexander, 85—143; Jolly v. Bryan, 86—457; Moore v. Com'rs, 87—209; Robertson v. Dunn, 87—191.

(2) An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it;

(3) An action for trespass upon real property;

Spilman v. Roanoke Nav. Co., 74—675; King v. Little, 77—138.

(4) An action for taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery;

Hewlett v. Schenck, 82—234; Etheridge v. Woodley, 83—11; Currie v. McNeill, 83—176.

(5) An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated;

(6) An action against the sureties of any executor, administrator, collector or guardian, on the official bond of their principal; within three years after the breach thereof complained of;

Bushee v. Surles, 77—62; Spruill v. Sanderson, 79—466; Walton v. Pearson, 85—34.

(7) An action against bail; within three years after judgment against the principal, but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail;

(8) Fees due to any clerk, sheriff or other officer, by the judgment of a court; within three years from the time of the judgment rendered, or of the issuing of the last execution therefor.

1879, c. 251.

(9) An action for relief, on the ground of fraud or mistake, in cases which heretofore were solely cognizable by courts of equity, the cause of action in such cases not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting such fraud or mistake.

Young v. Phifer, 72—529; Barham v. Lomax, 73—76; Ross v. Henderson, 77—170; Wilson v. Land Co., 77—445; Blount v. Parker, 78—128; Kahnweiler v. Anderson, 78—133; Spruill v. Sanderson, 79—466; Egerton v. Logan, 81—172; Briggs v. Smith, 83—306; Day v. Day, 84—408; Hughes v. Whitaker, 84—640; Knight v. Houghtalling, 85—17.

Sec. 156. One year. C. C. P., s. 35.

Within one year—

(1) An action against a sheriff, coroner or constable, or other public officer, for a trespass under color of his office;

Hewlett v. Nutt, 79—263.

(2) An action upon a statute, for a penalty or forfeiture, where the action is given to the state alone, or in whole or in part, to the party grieved, or to a common informer, except where the statute imposing it prescribes a different limitation;

Hewlett v. Nutt, 79—263.

(3) An action for libel, assault, battery or false imprisonment;

(4) An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process;

(5) An action by a creditor of any deceased person, on whom personal notice in writing, to present his claim to the personal representative of the deceased, has been served, and who has failed so to do, within one year after the service of such notice; and any such creditor, barred of a recovery against the personal representative of a principal debtor, by reason of such default, shall also be barred of a recovery against the surety for such debt.

Sec. 157. Six months. C. C. P., s. 36.

Within six months—

An action for slander.

Sec. 158. For other relief within ten years. C. C. P., s. 37.

An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued.

Libbett v. Maultsby, 71—345; Ross v. Henderson, 77—170; McDonald v. Dickson, 85—248.

Sec. 159. Limitations to apply to actions by the state. C. C. P., s. 38.

The limitations prescribed in this chapter shall apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

Sec. 160. Actions upon an account current, when cause accrues. C. C. P., s. 39.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account, on either side.

Robertson v. Pickerell, 77—302; Mauney v. Coit, 86—463.

CHAPTER FOUR.

GENERAL PROVISIONS AS TO TIME OF COMMENCING ACTIONS.

SECTION.
161. When action deemed commenced.
162. Time for commencement of action, or enforcement of judgment against defendant out of the state.
163. Exceptions, persons under disabilities.
164. Death of a person entitled before limitation expires; action on claims filed by administrator, &c., and admitted, not barred, &c., applicable to claims already filed.
165. Actions by aliens, time of war not counted.
166. When judgment reversed, &c., plaintiff may commence new action.
167. Time of stay by injunction, &c., not counted.
168. Time during controversy about probate of will, &c., not counted.
169. Disability must exist when the right of action accrued.
170. Where several disabilities, all must be removed.
171. Acknowledgment by partner, &c., after dissolution.
172. Acknowledgment or new promise must be in writing.
173. Co-tenants; when some barred, others not.
174. Title not to affect action to enforce payment of bills, &c.
175. Nor actions against directors, &c., of moneyed corporations, or banking associations; limitations in such cases prescribed.
176. Certain suits against banks barred.

Sec. 161. When action deemed commenced. C. C. P., s. 40.

An action is commenced as to each defendant when the summons is issued against him.

Wheeler v. Cobb, 75—21; Etheridge v. Woodley, 83—11.

Sec. 162. Time for commencement of action, or enforcement of judgment against defendant out of the state. C. C. P., s. 41. 1881, c. 258, ss. 1, 2.

If, when the cause of action accrue or judgment be rendered or docketed against any person, he shall be out of the state, such action may be commenced, or judgment enforced, within the time herein respectively limited, after the return of such person into this state,

and if, after such cause of action shall have accrued or judgment rendered or docketed, such person shall depart from and reside out of, this state, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action, or the enforcement of such judgment.

This section shall apply to all actions that have accrued and judgments rendered, transferred or docketed since the twenty-fourth day of August, one thousand eight hundred and sixty-eight.

Blue v. Gilchrist, 84—239; Campbell v. Brown, 86—376.

Sec. 163. Exceptions, persons under disabilities. C. C. P., s. 42.

If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either—

(1) Within the age of twenty-one years; or

(2) Insane; or

(3) Imprisioned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life; or

(4) A married woman;

Then such person may bring his action within the times before limited, after the disability shall be removed.

Lippard v. Troutman, 72—551; Briggs v. Smith, 83—306.

Sec. 164. Death of a person entitled before limitation expires; action on claims filed by administrator, &c., and admitted, not barred, &c., applicable to claims already filed. C. C. P., s. 43. 1881, c. 80.

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. But if the claim upon which such cause of action is based be filed with the personal representa-

tive within the time above specified, and the same shall be admitted by him, it shall not be necessary to bring an action upon such claim to prevent the bar: *Provided*, that no action shall be brought against the personal representative upon such claim after his final settlement; and this shall apply to claims already filed.

Flemming v. Flemming, 85—127; Hall v. Gibbs, 87—4; Robertson v. Dunn, 87—191; Mauney v. Holmes, 87—428; Daniel v. Laughlin, 87—433; Vaughan v. Hines, 87—445.

SEC. 165. Actions by aliens, time of war not counted. C. C. P., s. 44.

When a person shall be an alien, subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

SEC. 166. When judgment reversed, &c., plaintiff may commence new action. C. C. P., s. 45.

If an action shall be commenced within the time prescribed therefor, and the plaintiff be nonsuited, or a judgment therein be reversed on appeal, or be arrested, the plaintiff, or if he die and the cause of action survive, his heir or representative, may commence a new action within one year after such nonsuit, reversal, or arrest of judgment.

McDowell v. Asbury, 66—444; Straus v. Beardsley, 79—59; Von Glahn v. de Rosset, 81—467; Martin v. Young, 85—156.

SEC. 167. Time of stay by injunction, &c., not counted. C. C. P., s. 46.

When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

Walton v. Pearson, 85—34.

SEC. 168. Time during controversy about probate of will, &c., not counted. C. C. P., s. 47.

In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there be an administrator appointed during the pendency of the action, and it be provided that an action may be brought against him.

Sec. 169. Disability must exist when the right of action accrued. C. C. P., s. 48.

No person shall avail himself of a disability, unless it existed when his right of action accrued.

Sec. 170. Where several disabilities, all must be removed. C. C. P., s. 49.

Where two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

Sec. 171. Acknowledgment by partner, &c., after dissolution. C. C. P., s. 50.

No act, admission or acknowledgment by any partner after the dissolution of the co-partnership, or by any of the makers of a promissory note or bond after the statute of limitation shall have barred the same, shall be received as evidence to repel the statute, except against the partner or maker of the promissory note or bond, doing the act or making the admission or acknowledgment.

Woodhouse v. Simmons, 73—50; Lane v. Richardson, 79—159; Green v. College, 83—449.

Sec. 172. Acknowledgment or new promise must be in writing. C. C. P., s. 51.

No acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

Simonton v. Clark, 65—525; Hornthal v. McRae, 67—21; Fraley v. Kelley, 67—78; Knight v. Braswell, 70—709; Libbett v. Maultsby, 71—345; Faison v. Bowden, 74—43; State v. Bryant, 74—207; Henly v. Lanier, 75—172; Kull v. Farmer, 78—339; Lane v. Richardson, 79—159; Green v. College, 83—449; Grant v. Burgwyn, 84—560; Pool v. Bledsoe, 85—1; White v. Beaman, 85—3; Belo v. Spach, 85—122; Flemming v. Flemming, 85—127; Riggs v. Roberts, 85—151; Haymore v. Com'rs, 85—268; Jones v. McKinnon, 87—294; McDonald v. Dickson, 87—404.

Sec. 173. Co-tenants; when some barred, others not. C. C. P., s. 52.

In actions by tenants in common or joint tenants of personal property to recover the same, or damages for the detention of or injury thereto, and any of them shall be barred of their recovery by limitation of time, the rights of the others shall not be affected thereby; but

they may recover according to their right and interest, notwithstanding such bar.

SEC. 174. Title not to affect action to enforce payment of bills, &c. C. C. P., s. 53. 1874-'5, c. 170.

This title shall not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by moneyed corporations incorporated under the laws of the state.

SEC. 175. Nor actions against directors, &c., of moneyed corporations or banking associations; limitations in such cases prescribed. C. C. P., s. 54.

This title shall not affect actions against directors or stockholders of any moneyed corporation, or banking association incorporated under the laws of this state, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

SEC. 176. Certain suits against banks barred. C. C. P., s. 54 *(a)*, 1872-'3, c. 120.

WHEREAS, many citizens of the state of North Carolina were stockholders in banking institutions chartered in other states before the year one thousand eight hundred and sixty-one, which contain individual liability clauses in the nature of penalties, in the event of failure on the part of said banking corporations to meet their liabilities; and,

WHEREAS, said banking corporations have become insolvent by the results of the late war, thereby entailing upon the stockholders the loss of the investment of their capital therein, and they are threatened with further loss by reason of said individual liability clauses; therefore,

All such causes of action as have not hitherto been commenced in this state against citizens thereof, are hereby declared to be barred by lapse of time.

TITLE IV.

PARTIES TO CIVIL ACTIONS.

SECTION.
177. Action to be by party in interest; action by grantee of land held adversely; assignment of thing in action.
178. Action by and against a married woman.
179. Action by executor, trustee, &c.
180. Infants to sue by guardian or next friend.
181. Infants, &c., to defend by guardian *ad litem*.
182. Guardian *ad litem* to file answer.
183. Who to be plaintiffs.
184. Who to be defendants.
185. Parties to be joined.
186. Parties to bills and notes, &c.
187. Joint contracts of co-partners.
188. Actions, when not to abate.
189. Court may determine controversy and interpleader.

Sec. 177. Action to be by party in interest; action by grantee of land held adversely; assignment of thing in action. C. C. P., s. 55. 1874-'5, c. 256, s. 1.

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of real estate in his own name, whenever he or any grantor or other person through whom he may derive title, might maintain such action, notwithstanding the grant of such grantor or other conveyance be void, by reason of the actual possession of a person claiming under a title adverse to that of such grantor, or other person, at the time of the delivery of such grant or other conveyance. In the case of an assignment of a thing in action the action by the assignee shall be without prejudice to any set-off or other defence, existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

Calvert v. Williams, 64—168; McConnaughey v. Chambers, 64—284; Rankin v. Allison, 64—673; Neal v. Lee, 64—678; Sutton v. Owen, 65—123; Johnson v. Mangum, 65—146; Harris v. Burwell, 65—584; Battle v. Davis, 66—252; School Comm. v. Kesler, 66—323; Mebane v. Mebane, 66—334; Biggs v. Williams, 66—427; Martin v. Richardson, 68—255; McNinn

v. Freeman, 68—341; Andrews v. McDaniel, 68—385; Setzer v. Lewis, 69—133; Leach v. Harris, 69—532; Brown v. Turner, 70—93; Utley v. Foy, 70—303; Wilson v. Arentz, 70—670; Boyle v. Robbins, 71—130; Etheridge v. Vernoy, 71—184; Shuler v. Millsaps, 71—297; Murray v. Blackledge, 71—492; Abrams v. Cureton, 74—523; Miller v. Tharel, 75—148; Buie v. Carver, 75—559; Justice v. Eddings, 75—581; Henley v. Wilson, 77—216; Alexander v. Wriston, 81—191; Jackson v. Love, 82—405; Bank v. Bynum, 84—24; Havens v. Potts, 86—31; Rogers v. Gooch, 87—442.

SEC. 178. Action by and against a married woman. C. C. P., s. 56.

When a married woman is a party, her husband must be joined with her except that,

(1) When the action concerns her separate property, she may sue alone;

Tredwell v. Blount, 86—33; Pugh v. Grant, 86—39.

(2) When the action is between herself and her husband, she may sue or be sued alone;

And in no case need she prosecute or defend by a guardian or next friend.

Wilson v. Arentz, 70—670; Shuler v. Millsaps, 71—297; Lippard v. Troutman, 72—551; Huntley v. Whitner, 77—392; Manning v. Manning, 79—293; Vick v. Pope, 81—22; Gulley v. Macey, 81—356; Nicholson v. Cox, 83—48; Isler v. Koonce, 83—55; Hollingsworth v. Harman, 83—153; Briggs v. Smith, 83—306; McCormac v. Wiggins, 84—278.

SEC. 179. Action by executor, trustee, &c. C. C. P., s. 57.

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

Rankin v. Allison, 64—673; Battle v. Davis, 66—252; School Com. v. Kesler, 66—323; Biggs v. Williams, 66—427; Davidson v. Elms, 67—228; Andrews v. McDaniel, 68—385; Flack v. Dawson, 69—42; Davis v. Fox, 69—435; Abrams v. Cureton, 74—523; Buie v. Carver, 75—559; Jones v. McKinnon, 87—294.

SEC. 180. Infants to sue by guardian or next friend. C. C. P., s. 58. 1870-'71, c. 233, s. 1. 1871-'72, c. 95, s. 1.

In actions and special proceedings whenever any of the parties plaintiff are infants, idiots, lunatics, or persons *non compos mentis*, whether said infants, idiots, lunatics or persons *non compos mentis*, be residents or non-

residents of this State; said infants, idiots, lunatics or persons *non compos mentis* shall appear by their general or testamentary guardian, if they have any within the State; and if there shall be no such guardian, then said infants, idiots, lunatics or persons *non compos mentis* may appear by their next friend.

Rankin v. Allison, 64—673; Branch v. Goddin, 2 Winst., 105; Falls v. Gorrell, 66—455; Mason v. McCormick, 75—263; George v. High, 85—113.

Sec. 181. Infants, &c., to defend by guardian ad litem. C. C. P., s. 59. 1870-'1, c. 233, s. 5. 1871-'2, c. 95, s. 2.

In all actions and special proceedings whenever any of the defendants are infants, idiots, lunatics, or persons *non compos mentis*, said infants, idiots, lunatics, or persons *non compos mentis*, shall defend by their general or testamentary guardian, if they have any within this State, whether said infants, idiots, lunatics, or persons *non compos mentis*, are residents or non-residents of this State; and if said infants, idiots, lunatics, or persons *non compos mentis*, have no general or testamentary guardian within this State, and any of the defendants in said action or special proceeding shall have been summoned, then it shall be lawful for the court, wherein said action or special proceeding is pending, upon motion of any of the parties to the said action, or special proceeding, to appoint some discreet person to act as guardian *ad litem*, to defend in behalf of such infants, idiots, lunatics, or persons *non compos mentis*, and such guardian so appointed shall, if the cause in which he is appointed be a civil action, file his answer to the complaint within the time required for other defendants, unless such time be extended by the court for good cause, and if the cause in which he is so appointed be a special proceeding, a copy of the complaint, with the summons, shall be served on said guardian *ad litem*, and after twenty days' notice of said summons and complaint in such special proceeding, and after answer filed as above prescribed in such civil action, the court may proceed in the cause to final judgment, and decree therein in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person *non compos mentis*, defendants, and any decree or judgment in the case shall conclude the infant, idiot, lunatic, or person *non compos mentis*, defendants, as effectually as if he or they had been personally summoned.

Hyman v. Jarnigan, 65—96; Isler v. Murphy, 71—436; Allen v. Shields, 72—504; Moore v. Gidney, 75—34; Chambers v. Penland, 78—53; Bass v. Bass, 78—374; Gulley v. Macy, 81—356; Nicholson v. Cox, 83—44; Matthews v. Joyce, 85—258.

Sec. 182. Guardian ad litem to file answer. 1870-'1, c. 233, s. 4.

Whenever any guardian *ad litem* shall be appointed, he shall file an answer in said action or special proceeding, admitting or denying the allegations thereof; the costs and expenses of which said answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of a division, shall be charged upon the land, if the sale or division shall be ordered by the court, and if not ordered in any other manner the court shall direct.

Moore v. Gedney, 75—34; Gulley v. Macey, 81—356.

Sec. 183. Who to be plaintiffs. C. C. P., s. 60.

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs except as otherwise provided.

McKesson v. Mendenhall, 64—502; Flack v. Dawson, 69—42; Gregory v. Gregory, 69—522; Wade v. Saunders, 70—277; State v. Blair, 76—78; Rollins v. Rollins, 76—264; Owens v. Alexander, 78—1; Mebane v. Layton, 86—571.

Sec. 184. Who to be defendants. C. C. P., s. 61.

Any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or right of possession to real estate may be made party plaintiff or defendant, as the case may require, to any such action.

Moore *ex parte*, 64—90; Carney v. Whitehurst, 64—426; Harkey v. Housten, 65—137; Bear v. Cohen, 65—511; Falls v. Gamble, 66—455; Isler v. Foy, 66—547; Batchelor v. Macon, 67—181; Rowland v. Gardner, 69—53; Gregory v. Gregory, 69—522; Wade v. Saunders, 70—270; Wade v. Saunders, 70—277; Rollins v. Rollins, 76—264; Colgrove v. Koonce, 76—363; Long v. Swindell, 77—176; Atto. Gen. v. Simonton, 78—57; Winfield v. Burton, 79—388; Paschall v. Brandon, 79—504; Beard v. Hall, 79—506; Cecil v. Smith, 81—285; Gill v. Young, 82—273; Lytle v. Bergen, 82—301; McCaskill v. Lancashire, 83—393; Keathly v. Branch, 84—202; Swepson v. Johnston, 84—449; Maddrey v. Long, 86—383; Nimrock v. Scanlin, 87—119.

Sec. 185. Parties to be joined, &c. C. C. P., s. 62.

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties may be very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Lewis v. McNatt, 65—63; Merwin v. Ballard, 65—168; Flack v. Dawson, 69—42; Gregory v. Gregory, 69—522; Wilson v. Arentz, 70—670; VonGlahn v. Harris, 73—323; VonGlahn v. Lattimer, 73—333; Ten Broeck v. Orchard, 74—409; VonGlahn v. DeRosset, 76—292; Long v. Swindell, 77—176; Gill v. Young, 82—273; McCormac v. Wiggins, 84—278; Bronson v. Ins. Co., 85—411.

Sec. 186. Parties to bills and notes, &c. C. C. P., s. 63.

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff.

Merwin v. Ballard, 65—168; Gudger v. Baird, 66—438; Wooten v. Maultsby, 69—162; Logan v. Wallis, 76—416; Syme v. Bunting, 86—175.

Sec. 187. Joint contracts of co-partners. R. C., c. 31, s. 84. 1871-'2, c. 24, s. 1.

In all cases of joint contracts of co-partners in trade or others, suit may be brought and prosecuted on the same against all, or any number of the persons making such contracts.

McDowell v. Butler, 3 Jon. Eq., 311; Winston v. Dalby, 64—299; Merwin v. Ballard, 65—168; Lane v. Richardson, 79—159.

Sec. 188. Actions, when not to abate. C. C. P., s. 64. R. C., c. 1, s. 4. R. C., c. 46, s. 43.

(1) No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, except in suits for penalties, and for damages merely vindictive, marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in

the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action.

Thompson v. Badham, 70—141; Baggarly v. Calvert, 70—688; Shields v. Lawrence, 72—43; Sledge v. Reid, 73—440; Moore v. R. R., 74—528: Pennington v. Pennington, 75—356; Lord v. Beard, 79—5.

(2) After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of a party.

Thompson v. Badham, 70—141; Shields v. Lawrence, 72—43; Sledge v. Reid, 73—440.

(3) At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months, nor exceeding one year from the granting of the order.

Baggarly v. Calvert, 70—688.

Sec. 189. Court may determine controversy an interpleader. C. C. P., s. 65.

The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject matter thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as

the court shall direct. The court, in its discretion, may make such an order.

Ramsour v. Ramsour, 63—231; McKesson v. Mendenhall, 64—286; Harkey v. Houston, 65—137; Matthews v. McPherson, 65—189; Dewey v. White, 65—225; Bates v. Lilly, 65—232; Bear v. Cohen, 65—511; Clemmons v. Hampton, 70—534; Shuler v. Millsaps, 71—297; Thomas v. Kelly, 74—416; Isler v. Murphy, 76—52; Colgrove v. Koonce, 76—363; Atto.-Gen. v. Simonton, 78—57; Winfield v. Burton, 79—388; Cecil v. Smith, 81—285; Sims v. Goettle, 82—268; Lytle v. Burgen, 82—301; Fox v. Kline, 85—173; Maddrey v. Long, 86—383.

TITLE V.

OF THE PLACE OF TRIAL.

SECTION.
190. Actions to be tried where subject matter situated.
191. Actions to be tried where cause of action arose.
192. Actions to be tried where plaintiff or defendant resides.
193. Actions against executors and administrators, and upon official bond.
194. Actions against foreign corporations; where and by whom brought.
195. Change of place of trial.
196. Judges authorized to remove causes from one county to another.
197. What requisite to authorize such removal.
198. On removal of an action, what to be sent with transcript.

Sec. 190. Actions to be tried where subject matter situated. C. C. P., s. 66.

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided in this code:

(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property;

(2) For the partition of real property;

(3) For the foreclosure of a mortgage of real property;

(4) For the recovery of personal property distrained for any cause.

Fraley v. March, 68—160; Phillips v. Holmes, 71—250; Atto.-Gen. v. Simonton, 78—57; Askew v. Bynum, 81—350.

Sec. 191. Actions to be tried where cause of action arose. C. C. P., s. 67.

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial, in the cases provided in this code:

(1) For the recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offence committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such sound, bay, river, or other body of water, and opposite to the place where the offence was committed;

(2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid, shall do anything touching the duties of such officer.

Johnston v. Com'rs, 67—101; Alexander v. Com'rs, 67—330; Jones v. Com'rs, 69—412; Steele v. Com'rs, 70—137; Phillips v. Holmes, 71—250.

Sec. 192. Actions to be tried where plaintiff or defendant resides. C. C. P., s. 68. 1868-'9, c. 59. 1868-'9, c. 277, s. 6.

In all other cases the action shall be tried in the county in which the plaintiffs or the defendants, or any of them, shall reside at the commencement of the action; or if none of the defendants shall reside in the state, then in the county in which the plaintiffs, or any of them, shall reside; and if none of the parties shall reside within the state, then the same may be tried in any county, which the plaintiff shall designate in his summons and complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

Rankin v. Allison, 64—673; Dewey v. White, 65—225; Phillips v. Holmes, 71—250; Abrams v. Cureton, 74—523; Fox v. Cline, 85—173.

Sec. 193. Actions against executors and administrators, and upon official bonds. C. C. P., s. 68. (a). 1868-'9, c. 258, s. 1.

All actions upon official bonds or against executors and administrators in their official capacity, shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county.

Cloman v. Staton, 78—235; Devereux v. Devereux, 82—12.

SEC. 194. Actions against foreign corporations; where and by whom brought. C. C. P., s. 361. 1876-'7, c. 170.

An action against a corporation created by or under the laws of any other state, government, or country, may be brought in the superior court of any county in which the cause of action arose, or in which it usually did business, or in which it has property, or in which the plaintiffs, or either of them, shall reside, in the following cases:

(1) By a resident of this state, for any cause of action;

(2) By a plaintiff, not a resident of this state, when the cause of action shall have risen, or the subject of the action shall be situated within this state.

SEC. 195. Change of place of trial. C. C. P., s. 69.

If the county designated for that purpose, in the summons and complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

(1) When the county designated for that purpose is not the proper county;

(2) When the convenience of witnesses and the ends of justice would be promoted by the change;

(3) When the judge shall have been, at any time, interested as party or counsel. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court; and the papers shall be filed or transferred accordingly.

R. C., c. 31, ss. 115—118; 1870-'1. c. 20, s. 1.

Rankin v. Allison, 64—673; Carter v. R. R. Co., 68—346; Stanley v. Mason, 69—1; Jones v. Com'rs, 69—412; Phillips v. Holmes, 71—250; Cloman v. Staton, 78—235; State v. Swepson, 81—571.

SEC. 196. Judges authorized to remove causes from one county to another. 1879, c. 45.

In all civil and criminal actions in the superior and

criminal courts, in which it shall be suggested on oath, or by affirmation, on behalf of the state, or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that justice cannot be obtained in the county in which the action shall be pending, the judge shall be authorized to order a copy of the record of said action to be removed to some adjacent county for trial, if he shall be satisfied that a fair trial cannot be had in said county, after hearing all the testimony which may be offered on either side by affidavits.

Smith v. Greenlee, 3 Dev., 387; State v. Seaborn, 4 Dev., 305; State v. Duncan, 6 Ired., 98; State v. Shepherd, 8 Ired., 195; State v. Cunningham, 72—469; Phillips v. Lentz, 83—240; Boyden v. Williams, 84—608.

Sec. 197. What requisite to authorize such removal. 1879, c. 45.

No action, whether civil or criminal, shall be so removed, unless the affidavit shall set forth particularly and in detail the ground of the application. And it shall be competent for the other side to controvert the allegations of fact in said application, and to offer counter affidavits to that end. And the judge shall not order the removal of any such action, unless he shall be satisfied after thorough examination of the evidence as aforesaid, that the ends of justice demand it.

Sec. 198. On removal of an action, what to be sent with transcript. R. C., c. 31, s. 118. 1806, c. 694, s. 12. 1810, c. 787.

When a cause shall be directed to be removed, the clerk shall transmit to the court, to which the same is removed, a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein.

State v. Collins, 3 Dev., 117; State v. Reid, 1 D. & B., 377; State v. Duncan, 6 Ired., 236; State v. Barfield, 8 Ired., 344; State v. Swepson, 81—571; Phillips v. Lentz, 83—240; Com'rs v. Lemley, 85—341.

TITLE VI.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

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Sec. 199. Civil actions commenced by summons. C. C. P., s. 70.

Civil actions shall be commenced by issuing a summons.

Patrick v. Joiner, 63—573; Heilig v. Stokes, 63—612; McArthur v. McEachin, 64—72; Thompson v. Berry, 64—79; Woodley v. Gilliam, 64—649; Guion v. Melvin, 69—242; Steele v. Com'rs, 70—137; Belmont v. Reilly, 71—260; Calvert v. Peebles, 82—334.

Sec. 200. Summons in actions returnable to a regular term of the superior court. 1876-'7, c. 85, s. 1.

The summons shall run in the name of the state, be signed by the clerk of the superior court having jurisdiction to try the action, and shall be directed to the sheriff or other proper officer of the county in which the defendant, or one or more of the defendants, resides or may be found. It shall be returnable to the regular term of the superior court of the county, where the plaintiff, or one or more of them, or the defendant, or one or more of them, resides, and from which it issued; and shall command the sheriff, or other proper officer, to summon the defendant, or defendants, to appear at the next ensuing term of the superior court and answer the complaint of the plaintiff, and shall be dated on the day of its issue. The officer to whom the summons is addressed shall note on it the day of its delivery to him, and shall execute it at least ten days before the beginning of the term to which it shall be returnable, and shall return it on the first day of the term.

Johnson v. Futrell, 86—122; Yeargin v. Siler, 83—348; Wyche v. Newsom, 87—144.

Sec. 201. Summons returnable. 1876-'7, c. 85, s. 2.

If any summons shall be issued within less than ten days of the beginning of the next term of the superior court for the county in which it is issued, it shall be made returnable to the second term of said court next after the date of its issuing, and shall be executed and returned by the proper officer accordingly.

Sec. 202. When the summons is issued more than ten days before the next succeeding term. 1876-'7, c. 85, s. 3.

When the summons shall be issued more than ten days before the next succeeding term of the superior court of the county to which it is returnable, and shall be executed by the proper officer within less than ten days of said term, it shall be returned as if executed in proper time, and the case placed on the summons docket and continued to the next succeeding term, at which term it shall be treated in all respects as if said next succeeding term had been the return term thereof: *Provided*, that the parties to the action may, by agreement, make up the pleadings at the term to which the summons is returnable: *Provided further*, that nothing herein contained shall be construed to release or discharge the sheriff or

other officer from any liability he may incur, by failing to execute the summons in due time.

Yeargin v. Siler, 83—348.

Sec. 203. Summons to be attested. 1876-'7, c. 85, s. 4.

Every summons addressed to the sheriff or other officer of any county, other than that from which it issued, shall be attested by the seal of the court: but when it shall be addressed to the sheriff or other officer of the county in which it issued, it shall not be attested by the seal of the court.

Jones v. Gupton, 65—48; Johnson v. Kenneday, 70—435; Cheatham v. Crews, 81—343; Taylor v. Harris, 82—25; Bank v. McArthur, 82—107; Calvert v. Peebles, 82—334; Lee v. Eure, 82—428; Taylor v. Taylor, 83—116; Yeargin v. Siler, 83—348.

Sec. 204. Summons in the same action may issue to several counties at the same time. R. C., c. 31, s. 44. 1789, c. 314, ss. 1, 2. 1831, c. 14, s. 2.

The plaintiff may issue writs of summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action; and when the said writs are returned, they shall be docketed as if only one had issued, and if any defendant shall not be served with such process, the same proceeding shall be had as in other cases of similar process not executed.

Sec. 205. Sheriff returning that defendant is not to be found, plaintiff may issue alias or pluries summons. R. C., c. 31, s. 52. 1777, c. 115, ss. 23, 71.

When the sheriff shall return in a civil action or special proceeding, that the defendant is not to be found in his county, the plaintiff may sue out an *alias* or *pluries* summons, returnable in the same manner as original process.

McMillan v. Parsons, 7 Jon., 163; Deaver v. Keith, Phil., 428.

Sec. 206. Filing of complaint. 1868-'9, c. 76, s. 3. 1870-'1, c. 42, s. 3.

The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff.

McAdoo v. Benbow, 63—461; Haywood v. Bryan, 63—571; McArthur v. McEachin, 64—72; Moore v. R.R. Co., 67—209; Harvey v. Edmunds, 68—243; Gilchrist v. Kitchen, 86—20; Ellington v. Wicker, 87—14.

Sec. 207. Answer of defendant. 1870-'1, c. 42, s. 4.

The defendant shall appear and demur, or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default.

Howell v. Ferguson, 87—113.

Sec. 208. Reply to answer. 1870-'1, c. 42, s. 5.

The plaintiff shall join issue on the demurrer or reply to the answer at the same term to which such demurrer or answer may be filed; and the issues, whether of law or of fact, shall stand for trial at the next term succeeding the term at which the pleadings are completed.

McAdoo v. Benbow, 63—461; Witkowsky v. Wasson, 69—38; Woody v. Jordan, 69—189; Wilson v. Moore, 72—558; Manix v. Howard, 82—125; Boddie v. Woodard, 83—2.

Sec. 209. Before issuing summons clerk to take undertaking, &c. R. C., c. 31, s. 40. C. C. P., s. 71. 1868-'9, c. 277, s. 13.

Before issuing the summons, the clerk shall require of the plaintiff, either to give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that the same shall be void, if the plaintiff shall pay the defendant all such costs, as the defendant shall recover of him in the action; or to deposit a like sum with him as a security to the defendant for such costs; and in case of such deposit, he shall give to the plaintiff and to the defendant a certificate to that effect; or to file with him a written authority from some judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper.

Bledsoe v. Nixon, 69—81; Hallman v. Dellinger, 84—1; Matthews v. Joyce, 85—258.

Sec. 210. How to sue as a pauper; how obtained. C. C. P., s. 72. 1868-'9, c. 96, s. 1.

Any judge or clerk of the superior court may authorize any person to sue as a pauper in their respective courts, when he shall prove, by one or more witnesses, that he has a good cause of action, and shall make affidavit that he is unable to comply with the last section.

Corn v. Stepp, 84—599; Bushee v. Surles, 85—90.

Sec. 211. Court may assign counsel. 1868-'9, c. 96, s. 2.

The court to which such summons is made returnable may, at its discretion, assign to the person, suing as a pauper, learned counsel, who shall prosecute his action.

Sec. 212. No costs or fees recoverable. 1868-'9, c. 96, s. 3.

Whenever any person shall sue as a pauper, no officer shall require of him any fee, and he shall recover no costs.

Rowark v. Gaston, 67—291; Deal v. Palmer, 68—215; Porter v. Jones, 68—320; Brendle v. Heron, 68—496; Miazza v. Calloway, 74—31; Sumuer v. Candler, 74—265; Bushee v. Surles, 85—90; Hall v. Younts, 87—285.

Sec. 213. What summons to contain. C. C. P., s. 74. 1876-'7, c. 241, s. 1.

There shall be inserted in the summons a notice in substance as follows: that if the defendant shall fail to answer the complaint within the time specified, the plaintiff will apply to the court for the relief demanded in the complaint.

Graham v. R. R. Co., 64—631; Rankin v. Allison, 64—673; Woody v. Jordan, 69—189; Phillips v. Holland, 78—31; Nicholson v. Cox, 83—44; Nicholson v. Cox, 83—48; Price v. Cox, 83—261.

Sec. 214. Service of summons. 1876-'7, c. 241, s. 2.

The summons shall be served in all cases, except as hereinafter provided, by the sheriff or other officer, reading the same to the party or parties named as defendant, and such reading shall be a legal and sufficient service.

Middleton v. Duffie, 73—72; Johnson v. Futrell, 86—122; Webster v. Laws, 86—178.

Sec. 215. Actions against executors and administrators. 1876-'7, c. 241, s. 6.

In addition to the remedy by special proceeding, as provided by law, actions against executors, administrators, collectors and guardians may be brought originally to the superior court at term time; and in all such cases it shall be competent to the court in which said actions shall be pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require.

Pegram v. Armstrong, 82—326.

Sec. 216. Notice of no personal claim. C. C. P., s. 81.

In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a

brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served, unreasonably defends the action, he shall pay costs to the plaintiff.

SEC. 217. Manner of service of summons. C. C. P., s. 82. 1874-'5, c. 168, s. 1.

The summons shall be served by delivering a copy thereof in the following cases:

(1) If the action be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof: *Provided*, that any person receiving or collecting moneys within this state for, or on behalf of, any corporation of this or any other state or government, shall be deemed a local agent for the purpose of this section; but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or when the plaintiff resides in the state, or when such service can be made within the state, personally upon the president, treasurer or secretary thereof;

Kirkland v. Hogan, 65—144; Cunningham v. Ex. Co., 67—425; Turner v. Railroad Co., 70—1; Isler v. Murphy, 71—436; Katzenstein v. R. R. Co., 78—286; Gulley v. Macy, 81—356.

(2) If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed;

(3) If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee and to the defendant personally.

McAden v. Hooker, 74—24.

SEC. 218. Service by publication. C. C. P., s. 83.

Where the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the court, or to a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating

to real property in this state, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

(1) Where the defendant is a foreign corporation, and has property within the state, or the cause of action arose therein;

Turner v. R. R. Co., 70—1; Spiers v. Halstead, 71—209; Wheeler v. Cobb, 75—21; Branch v. Frank, 81—180; Weaver v. Roberts, 84—493.

(2) Where the defendant, being a resident of this state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with a like intent;

(3) Where he is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action;

Spiers v. Halstead, 71—209; Pender v. Griffin, 72—270; Wheeler v. Cobb, 75—21; Windley v. Bradway, 77—333.

(4) Where the subject of the action is real or personal property in this state, and the defendant has, or claims a lien or interest actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein;

(5) Where the action is for divorce, and in all cases where publication is made, the complaint must be filed, before the expiration of the time of publication ordered.

King v. King, 84—32.

SEC. 219. Manner of publication. C. C. P., s. 84. 1876-'7, c. 241, s. 3.

The order must direct the publication in any one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks, a notice, giving a title of the action, the purpose of the same, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, nor mailing of the summons and complaint, shall be deemed necessary.

Pender v. Griffin, 72—270; Burwell v. Lafferty, 76—383; Price v. Cox, 83—261.

SEC. 220. Defendant allowed to defend before and after judgment. C. C. P., s. 85.

The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed

to defend the action: and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as may be just; and if the defence be successful, and the judgment or any part thereof shall have been collected, or otherwise enforced, such restitution may thereupon be compelled as the court may direct; but title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

Utley v. Peters, 72—525.

Sec. 221. Actions for foreclosure of mortgage. C. C. P., s. 86.

In actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and the residence of such party cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear by affidavit to the court, such court may grant an order that a notice be served on such unknown party by publishing for six weeks, once in each week successively, in a newspaper printed in the county where the premises lie, if there be any; if not, then in some newspaper published in Raleigh, which publication shall be equivalent to a personal service on such unknown party.

Nimrock v. Scanlin, 87—119.

Sec. 222. Joint and several debtors; partners. C. C. P., s. 87.

Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

(1) If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct, and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

(2) If the action be against defendants severally liable,

he may proceed against the defendants served, in the same manner as if they were the only defendants;

(3) If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone;

(4) If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

Merwin v. Ballard, 65—168; Guano Co. v. Willard, 73—521.

Sec. 223. Parties not summoned in action, on joint contract, may be summoned after judgment. C. C. P., s. 318.

When a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding, as provided in the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

Guano Co. v. Willard, 73—521; Lane v. Richardson, 79—159; C. C. P., section 87, Mauney v. Holmes, 87—428.

Sec. 224. Party summoned may answer or defend. C. C. P., s. 322.

Any party so summoned may answer within the time specified denying the judgment, or setting up any defence thereto which may have arisen subsequently to such judgment; and may make any defence which he might have made to the action if the summons had been served on him at the time when the same was originally commenced and such defence had been then interposed to such action.

Guano Co. v. Willard, 73—521; Mauney v. Holmes, 87—428.

Sec. 225. Subsequent pleadings and proceedings same as in action. C. C. P., s. 323.

The party issuing the summons may demur or reply to

the answer, and the party summoned may demur to the reply; and the issues may be tried and judgment may be given in the same manner as in an action, and enforced by execution, if necessary.

Mauney v. Holmes, 87—428.

Sec. 226. Answer and reply to be verified as in action. C. C. P., s. 324.

The answer and reply shall be verified in the like cases and manner and be subject to the same rules as the answer and reply in an action.

Mauney v. Holmes, 87—428.

Sec. 227. When service complete. C. C. P., s. 88.

In the cases in which service by publication is allowed, the summons shall be deemed served at the expiration of the time prescribed by the order of publication, and the party shall then be in court.

Nicholson v. Cox, 83—44.

Sec. 228. Proof of service. C. C. P., s. 89.

Proof of the service of the summons or notice must be:

(1) By the certificate of the sheriff or other proper officer;

(2) In case of publication, the affidavit of the printer, or of his foreman or principal clerk, showing the same;

(3) The written admission of the defendant.

Hyman v. Jarnigan, 65—96; Middleton v. Duffy, 73—72; Bank v. Wilson, 80—200; Nicholson v. Cox, 83—44.

Sec. 229. Jurisdiction; appearance, notice of *lis pendens*. C. C. P., s. 90.

From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment shall be issued, or at any time afterwards, the plaintiff, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency

of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of registering the same. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice; to the same extent as if he were made a party to the action. For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice: *Provided*, that such notice shall be of no avail unless it shall be followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be canceled of record, by the clerk of any county in whose office the same may have been filed or recorded; and such cancelation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which, the clerk shall be entitled to a fee of twenty-five cents.

Toms v. Warson, 66—417; Badger v. Daniel, 77—251; Rollins v. Henry, 78—342; Todd v. Outlaw, 79—235; Daniel v. Hodges, 87—95.

Sec. 230. Parties may apply for relief to the superior court in vacation, or in term time. 1871-'2, c. 3, s. 1.

In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election.

Bank v. Wilson, 80—200.

TITLE VII.

THE PLEADINGS IN CIVIL ACTIONS.

CHAP. I. THE COMPLAINT.
II. THE DEMURRER.
III. THE ANSWER.
IV. THE REPLY.
V. DUTIES AND POWERS OF THE CLERK IN RELATION TO THE PLEADINGS AND COLLATERAL MATTER.
VI. GENERAL RULES OF PLEADING.
VII. MISTAKES IN PLEADINGS AND AMENDMENTS.

CHAPTER ONE.

THE COMPLAINT.

SECTION.
231. Forms of pleading.
232. Complaint.
233. Complaint, what to contain.
234. Complaint in action to recover debt contracted for the purchase of land, what to set forth.
235. If answer denies that debt was contracted for purchase of land, issue to be submitted to jury.
236. Form of judgment and execution upon judgment for plaintiff.
237. Defendant to file bond in action for real property.

Sec. 231. Forms of Pleading. C. C. P., s. 91.

The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this Code.

Crump v. Mims, 64—767; Parsley v. Nicholson, 65—207; Garrett v. Trotter, 65—430; Oates v. Gray, 66—442; Moore v. Edmiston, 70—510; Pescud v. Hawkins, 71—299; Bitting v. Thaxton, 72—541; Moore v. Hobbs, 79—535; Jones v. Mial, 82—252; Gorman v. Bellamy, 82—496.

Sec. 232. Complaint. C. C. P., s. 92.

The first pleading on the part of the plaintiff is the complaint.

SEC. 233. Complaint, what to contain. C. C. P., s. 93.

The complaint shall contain:

(1) The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant;

(2) A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation shall be distinctly numbered;

Harkey v. Houston, 65—137; Garrett v. Trotter, 65—430; Oates v. Gray, 66—442; Shelton v. Davis, 69—324; Land Co. v. Beatty, 69—329; Moore v. Hobbs, 77—65; Com'rs v. McPherson, 79—524; Moore v. Hobbs, 79—535; Boyden v. Achenbach, 79—539; Young v. Young, 81—91; Jones v. Mial, 82—252; Gorman v. Bellamy, 82—496; Womble v. Leach, 83—84; Johnston v. Pate, 83—110; Brown v. Morris, 83—251.

(3) A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof must be stated.

Dunn v. Barnes, 73—273; Knight v. Houghtalling, 85—17.

SEC. 234. Complaint in action to recover debt contracted for the purchase of land, what to set forth. 1879, c. 217.

In actions for the recovery of a debt contracted for the purchase of land, it shall be the duty of the plaintiff to set forth in his complaint that the consideration of the debt sued on was the purchase money of certain land, describing said land in an intelligible manner, such as the number of acres, how bounded, and where situated.

Dail v. Sugg, 85—104.

SEC. 235. If answer denies that debt was contracted for purchase of land, issue to be submitted to jury. 1879, c. 217.

If the defendant shall deny in his answer, that the obligation sued on, was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury.

SEC. 236. Form of judgment and execution, upon judgment for plaintiff. 1879, c. 217.

If the answer does not deny the said allegation so set forth in the complaint, or if the said issue shall be found by the jury in favor of the plaintiff, it shall be the duty

of the court to have embodied in the judgment, that the debt sued on was one contracted for the purchase money of said land, describing it briefly; and it shall also be the duty of the clerk to set forth in the execution, that the said debt was one contracted for the purchase of said land, the description of which shall be set out briefly as in the complaint.

Durham v. Bostick, 72—353.

Sec. 237. Defendant to file bond in action for real property. 1869-'70, c. 193, s.1.

In all actions for the recovery of real property, or for the possession thereof, the defendant, before he is permitted to plead, answer or demur, shall execute and file in the office of the clerk of the superior court of the county wherein the suit is pending, an undertaking with good and sufficient surety, in an amount to be fixed by the court, not less than two hundred dollars, to be void upon condition that the defendant pay to the plaintiff all such costs and damages as the plaintiff may recover in the action, including damages for the loss of rents and profits: *Provided*, that no such undertaking shall be required if an attorney practicing in the court wherein the action is pending will certify to the court in writing that he has examined the case of the defendant, and is of the opinion that the plaintiff is not entitled to recover; and if the defendant will also file an affidavit, stating that he is not worth the amount of said undertaking, in any property whatsoever, and is unable to give the same.

Harkey v. Houston, 65—137; Deal v. Palmer, 68—215; Jones v. Fortune, 69—322; Justice v. Eddings, 75—581; Rollins v. Henry, 77—467; Rollins v. Henry, 84—569.

CHAPTER TWO.

THE DEMURRER.

SECTION.	
238. Defendant to demur or answer.	241. Objection not appearing on complaint.
239. When defendant may demur.	242. Objection when deemed waived.
240. Demurrer must specify grounds of objection.	

Sec. 238. Defendant to demur or answer. C. C. P., s. 94.

The only pleading on the part of the defendant is

either a demurrer or an answer. If the plaintiff shall have failed to file his complaint within the time limited for the purpose, the defendant may move for judgment of non-suit.

Hyman v. Devereux, 63—624; Ransom v. McClees, 64—17; McKesson v. Mendenhall, 64—502; Harris v. Johnson, 65—478; Andrews v. Pritchett, 66—387; Oates v. Gray, 66—442; Pescud v. Hawkins, 71—299; Green v. R. R. Co., 73—524; VonGhlan v. DeRossett. 76—292; Pearce v. Mason, 78—37; McClenahan v. Cotten, 83—332; Finch v. Baskerville, 85—205.

Sec. 239. When defendant may demur. C. C. P., s. 95.

The defendant may demur to the complaint when it shall appear upon the face thereof, either:

Love v. Com'rs., 64—706; Walston v. Bryan, 64—764; Lewis v. McNatt, 65—63; Mervin v. Ballard, 65—168; Merwin v. Ballard, 66—398; Davidson v. Elms, 67—228; Green v. Green 69—294; Land Co. v. Beatty, 69—329; Hargrove v. Hunt, 73—24; Dunn v. Barnes, 73—273; Green v. R. R. Co., 73—524; Sloan v. McDowell, 75—29; Cowan v. Baird, 77—201.

(1) That the court has no jurisdiction of the person of the defendant, or of the subject of the action; or

Jacobs v. Smallwood, 63—112; Rives v. Williams, 63—128; Holt v. Iseley, 63—129; Swepson v. Chapman, 63—130; Walton v. McKesson, 64—77; Winslow v. Com'rs. 64—218; Bank v. Britton, 66—365; Winslow v. Weith, 66—433; Flack v. Dawson, 69—42; Green v. Green, 69—294; Hodge v. Hodge, 72—666; McFarland v. McKay, 74—258; Oliver v. Wiley, 75—320; Finley v. Hayes, 81—368; Capps v. Capps, 85—408; Pearson v. Boyden, 86—585; Hawkins v. Hughes, 87—115.

(2) That the plaintiff has not legal capacity to sue; or

Peebles v. Newsom, 74—473; Gordon v. Lowther, 75—193.

(3) That there is another action pending between the same parties for the same case; or

Harris v. Johnson, 65—478; Woody v. Jordan, 69—189; Burns v. Ashworth, 72—496; Glenn v. Bank, 72—626; Righton v. Pruden, 73—61; Dunn v. Barnes, 73—273; Green v. R. R. Co., 73—524; Sloan v. McDowell, 75—29; Smith v. Moore, 79—82; Tuttle v. Harrell, 85—456; Webster v. Laws, 86—178; Hawkins v. Hughes, 87—115.

(4) That there is a defect of parties plaintiff or defendant; or

Lewis v. McNatt, 65—63; Merwin v. Ballard, 65—168; Gudger v. Baird, 66—433; Davidson v. Elms, 67—228; Flack v. Dawson, 69—42; Rowland v. Gardner, 69—53; Green v. Green, 69—294; Wilson v. Arentz, 70—670; Hargrove v. Hilliard, 72—169; Burns v. Ashworth, 72—496; Goodman v. Goodman, 72—508; Wilson v. Bank, 72—621; Hargrove v. Hunt, 73—24; Righton v. Pruden, 73—61; Von Ghlan v. Harris, 73—323; Buie v. B. & L. A., 74—117; McFarland v. McKay, 74—258; Peebles v. Newsom, 74—473; McMillan v. Edwards, 75—81; Oliver v. Wiley, 75—320; Gaster v. Hardie. 75—460; Gill v. Young, 83—273; Hoover v. Berryhill, 84—132; McCormac

v. Wiggins, 84—278; Bronson v. Insurance Co., 85—411; Leach v. Flemming, 85—447; Mebane v. Layton, 86—571.

(5) That several causes of action have been improperly united; or

Land Co. v. Beatty, 69—329; Wooten v. Maultsby, 69—462; Edgerton v. Powell, 72—64; Adams v. Quinn, 74—359; McMillan v. Edwards, 75-81; Bank v. Harris, 84—206; Finch v. Baskerville, 85—205; Syme v. Blunting, 86—175; England v. Garner, 86—366.

(6) That the complaint does not state facts sufficient to constitute a cause of action.

Foard v. Alexander, 64—69; Leak v. Com'rs, 64—132; Harshaw v. Dobson, 64—384; Whitaker v. Forbes, 68—228; Cox v. Long, 69—7; King v. Weeks, 70—372; Howie v. Rea, 70—559; Wilson v. Arentz, 70—670; Tally v. Reid, 72—336; Jones v. Com'rs, 73—182; Haywood v. Rogers, 73—320; Wall v. Fairley, 73—464; Barnes v. Insurance Co., 74—22; Womble v. Little, 74—255; Adams v. Quinn, 74—359; Gordon v. Lowther, 75-193; Powell v. Allen, 75—450; University v. R. R. Co., 76—103; Littlejohn v. Edgerton, 76—468; Bumpass v. Chambers, 77—357; Netherton v. Candler, 78—88; Com'rs v. McPherson, 79-524; Moore v. Hobbs, 79—535; Newhart v. Peters, 80—166; Wilson v. Lineberger, 82—412; Johnston v. Pate, 83—110; Alexander v. Wolfe, 83—272; Foy v. Haughton, 83—467; Hurst v. Addington, 84—143; George v. High, 85—99; Lowery v. Perry, 85—131; Bank v. Bogle, 85—203; Oldham v. Bank, 85—240; Jones v. Com'rs, 85—278; Tucker v. Baker, 86—1.

Sec. 240. Demurrer must specify grounds of objection. C. C. P., s. 96.

The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it does so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

Ransom v. McClees, 64—17; Clark v. Clark, 64—150; Love v. Com'rs, 64—706; Crump v. Mimms, 64—767; Garrett v. Trotter, 65—430; State v. Young, 65—579; George v. High, 85—99; Bank v. Bogle, 85—203; Finch v. Baskerville, 85—205; Johnston v. Smith, 86—498.

Sec 241. Objection not appearing on complaint. C. C. P., s. 98.

When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer.

Lewis v. McNatt, 65—63; Durham v. Bostick, 72—353; Burns v. Ashworth, 72—496; Tucker v. Baker, 86—1.

Sec. 242. Objection when deemed waived. C. C. P., s. 99.

If no such objection be taken either by demurrer or an-

swer, the defendant shall be deemed to have waived the same, excepting only the objection, to the jurisdiction of the court, and the objection, that the complaint does not state facts sufficient to constitute a cause of action.

Ransom v. McClees, 64—17; Love v. Com'rs, 64—706; Lewis v. McNatt, 65—63; Garrett v. Trotter, 65—430; Pescud v. Hawkins, 71—299; Durham v. Bostick, 72—353; Burns v. Ashworth, 72—496; McDougald v. Graham, 75—310; Moore v. Hobbs, 77—65; Pearce v. Mason, 78—37; Young v. Young, 81—91; Bryant v. Fisher, 85—71; Finch v. Baskerville, 85—205; Jones v. Com'rs, 85—278; Tucker v. Baker, 86—1; Hawkins v. Hughes, 87—115.

CHAPTER THREE.

THE ANSWER.

SECTION.
243. Answer; what to contain.
244. Counter-claim.
245. Several defences.
246. Demurrer and answer.
247. Sham and irrelevant defences.

Sec. 243. Answer; what to contain. C. C. P., s. 100.

The answer of the defendant must contain :

(1) A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief ;

Erwin v. Lowry, 64—321; Garrett v. Trotter, 65—430; Walsh v. Hall, 66—233; Swepson v. Harvey, 66—436; Flack v. Dawson, 69—42; Howie v. Rea, 70—559; Schehan v. Malone, 71—440; Bitting v. Thaxton, 72—541; Johnson v. Bell, 74—355; Bank v. Charlotte, 75—45; Heyer v. Beatty, 76—28; Boyett v. Vaughn, 79—528; Hull v. Carter, 83—249; Graybeal v. Powers, 83—561; Durden v. Simmons, 84—555; Hull v. Carter, 86—522.

(2) A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition.

Gaither v. Gibson, 63—93; Harriss v. Burwell, 65—584; Walsh v. Hall, 66—233; Martin v. Richardson, 68—255; Utley v. Foy, 70—303; Sloan v. McDowell, 71—356; Hull v. Com'rs, 74—130; Johnson v. Bell, 74—355; Francis v. Edwards, 77—271; Kitchen v. Wilson, 80—191; Hull v. Carter,

83—249; Holliday v. McMillan, 83—270; McClennahan v. Cotton, 83—332; Bank v. Bynum, 84—24; Reed v. Exum, 84—430; Brown v. Brittain, 84—552; Durden v. Simmons, 84—555; Scott v. Battle, 85—184; Odom v. Bank, 85—241; Boyett v. Vaughn, 85—363; Meneely v. Craven, 86—364; Love v. Rhyne, 86—576.

Sec. 244. Counter-claim. C. C. P., s. 101.

The counter-claim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action.

(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

Hogan v. Kirkland, 64—250; McKesson v. Mendenhall, 64—286; Russell v. Adderton, 64—417; Pearsall v. Mayers, 64—549; Harshaw v. Woodfin, 64—568; Johnson v. McArthur, 64—675; Neal v. Lea, 64—678; Mann v. Blount, 65—99; Battle v. Thompson, 65—406; Harris v. Burwell, 65—584; Street v. Bryan, 65—619; Clark v. Clark, 65—655; Ivey v. Granberry, 66—224; Walsh v. Hall, 66—233; Terrell v. Walker, 66—244; Burton v. Wilkes, 66—604; Bank v. Tiddy, 67—169; Blount v. Windley, 68—1; Flack v. Dawson, 69—42; Woody v. Jordan, 69—189; Winslow v. Wood, 70—430; Johnson v. Kenneday, 70—435; Howie v. Rea, 70—559; Lusk v. Patton, 70—701; Bitting v. Thaxton, 72—541; Johnson v. Bell, 74—355; State v. Quinn, 74—359; Faison v. Johnson, 78—78; Mauney v. Ingram, 78—96; Whedbee v. Reddick, 79—521; Boyett v. Vaughan, 79—528; Johnston v. Rowland, 80—1; Thomas v. Simpson, 80—4; Pernall v. Vaughan, 80—46; Walker v. Dicks, 80—263; Devries v. Warren, 82—356; Hull v. Carter, 83—249; McClenahan v. Cotten, 83—332; Scott v. Timberlake, 83—382; Derr v. Stubbs, 83—539; Boyett v. Vaughan, 85—363; Barbee v. Green, 86—158; Meneely v. Craven, 86—364; Reynolds v. Smathers, 87—24.

(2) In an action arising on contract, any other cause of action, arising also on contract, and existing at the commencement of the action.

Ransom v. McClees, 64—17; McKesson v. Mendenhall, 64—286; Johnston v. Lea, 64—678; Riddick v. Moore, 65—382; McLean v. Leach, 68—95; Sloan v. McDowell, 71—356; Daniel v. Crumpler, 75—184; Hull v. Carter, 83—249; McClenahan v. Cotten, 83—332; Barbee v. Green, 86—158; Reynolds v. Smathers, 87—24; Poston v. Rose, 87—279.

Sec. 245. Several Defences. C. C. P., s. 102.

The defendant may set forth by answer as many defences and counter-claims as he may have, whether they be such as have been theretofore denominated legal, equitable, or both. They must each be separately stated

and numbered, and refer to the cause of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

Sumner v. Shipman, 65—623; Clark v. Clark, 65—655; Walsh v. Hall, 66—233; Hutchinson v. Smith, 68—351; Ten Broeck v. Orchard, 79—518; Melvin v. Stephens, 82—283.

Sec. 246. Demurrer and answer. C. C. P., s. 103.

The defendant may demur to one or more of several causes of action stated in the complaint, and answer to the residue.

State v. Young, 65—579; VonGlahn v. DeRossett, 76—292.

Sec. 247. Sham and irrelevant defences. C. C.P., s. 104.

Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in its discretion impose.

Erwin v. Lowery, 64—321; Swepson v. Harvey, 66—436; Flack v. Dawson, 69—42; Moore v. Edmiston, 70—510; Schehan v. Malone, 71—440; Com'rs v. Piercy, 72—181; Dunn v. Barnes, 73—273; Bank v. Charlotte; 75—45; Cowan v. Baird, 77—201; Long v. Bank, 81—41; Rowland v. Windley, 82—131; Hull v. Carter, 83—249; Brogden v. Henry, 83—274; Foy v. Haughton, 83—467; Boone v. Hardie, 83—470; Hurst v. Addington, 84—143; Best v. Clyde, 86—4; Howell v. Ferguson, 87—113.

CHAPTER FOUR.

THE REPLY.

SECTION.	SECTION.
248. Reply; demurrer to answer.	250. Demurrer to reply.
249. Motion for judgment on answer.	

Sec. 248. Reply; demurrer to answer. C. C. P., s. 105.

When the answer contains new matter constituting a counter-claim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing

new matter, where, upon its face, it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims. And in other cases, when an answer contains new matter constituting a defence by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

Culver v. Eggers, 63—630; Harris v. Johnson, 65—478; Blackwell v. Willard, 65—555; University v. McIver, 72—76; People v. Hilliard, 72—169; Lee v. Beaman, 73—410; Tucker v. City of Raleigh, 75—267; Boyett v. Vaughan, 79—528; Jones v. Cohen, 82—75; Foy v. Haughton, 83—467; Barnhardt v. Smith, 86—473.

Sec. 249. Motion for judgment on answer. C. C. P., s. 106.

If the answer contain a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case require it, an order for an inquiry of damages, by a jury, may be made.

Barnhardt v. Smith, 86—473.

Sec. 250. Demurrer to reply. C. C. P., s. 107.

If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

CHAPTER FIVE.

DUTIES AND POWERS OF THE CLERK IN RELATION TO THE PLEADINGS AND COLLATERAL MATTER.

SECTION.	
251. Jurisdiction of clerk on pleadings, &c.	254. Duty of clerk on appeal prayed.
252. Any party may appeal.	255. Duty of judge on appeal.
253. Appeals, when taken, and by whom.	256. Judgment on matter of law may be appealed from.

Sec. 251. Jurisdiction of clerk on pleadings, &c. C. C. P., s. 108.

The clerk of the superior court shall have jurisdiction

to hear and decide all questions of practice and procedure in this court, and all other matters whereof jurisdiction is given to the superior court, unless the judge of said court, or the court at a regular term thereof, be expressly referred to.

McAdoo v. Benbow, 63—461; McAdoo v. Banister, 63—478; Johnson v. Judd, 63—498; Tate v. Powe, 64—644; Marsh v. Cohen, 68—283; Com'rs v. Blackburn, 68—406; Brendle v. Heron, 68—496; Bryan v. Hubbs, 69—423; Palmer v. Bosher, 71—291; McKethan v. McNeill, 74—663.

Sec. 252. Any party may appeal. C. C. P., s. 109.

Any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference to the judge without undertaking.

Capps v. Capps, 85—408.

Sec. 253. Appeals, when taken, and by whom. C. C. P., s. 492.

An appeal must be taken within ten days after the entry of the order or judgment of the court; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who being entitled to be heard thereon, had no notice or opportunity to be heard; which fact may be shown by affidavit or other proof.

Sec. 254. Duty of clerk on appeal prayed. C. C. P., s. 110.

On such appeal, the clerk, within three days thereafter, shall prepare a statement of the case, of his decision, and of the appeal, and shall sign the same; he shall, within the time aforesaid, exhibit such statement to the parties or their attorneys on request; if such statement is satisfactory, the parties or their attorneys shall sign the same; if either party object to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach such writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district for his decision.

McAden v. Banister, 63—478; Rowland v. Thompson, 64—714; Bear v. Cohen, 65—511; Myers v. Hamilton, 65—567; Morris v. Whitehead, 65—637; Westcott v. Hewlett, 67—191; Lovinier v. Pearce, 70—167; Jones v. Hemphill, 77—42.

Sec. 255. Duty of judge on appeal. C. C. P., s. 113.

It shall be the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he shall have been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for such hearing, and give the attorneys of both parties reasonable notice thereof. He shall transmit his decision in writing, endorsed on, or attached to, the record, to the clerk of the court, who shall immediately acknowledge the receipt thereof, and within three days after such receipt, notify the attorneys of the parties, of the decision, and on request, and the payment of his legal fees, give them a copy thereof; and the parties receiving such notice may proceed thereafter according to law.

Jones v. Hemphill, 77—42; Capps v. Capps, 85—408.

Sec. 256. Judgment on matter of law may be appealed from. C. C. P., s. 115.

Any party within ten days after notice of such judgment, may appeal to the supreme court of the state from such judgment, upon any matter of law or legal inference therein, under the regulations provided for appeals in other cases. But execution shall not be suspended until the undertakings required by this code shall have been given. If issues, both of law and of fact, or issues of fact only, are raised before the clerk of the superior court, he shall transfer the case to the civil issue docket for trial of the issues at the ensuing term of the superior court.

Jones v. Hemphill, 77—42.

CHAPTER SIX.

GENERAL RULES OF PLEADING

SECTION.
257. Pleadings to be subscribed and verified.
258. Pleadings, how verified.
259. Items of account; particulars to be furnished, when.
260. Pleadings, how construed.
261. Irrelevant or redundant; indefinite or uncertain.
262. Judgments, how to be pleaded.
263. Conditions precedent, how to be pleaded; instrument for payment of money only.
264. Private statutes, how pleaded.
265. Libel and slander, how stated in complaint.
266. Answer in such cases.
267. What causes of action may be joined in the same complaint.
268. Allegation not denied, when to be deemed true.

Sec. 257. Pleadings to be subscribed and verified. C. C. P., s. 116.

Every pleading in a court of record must be subscribed by the party or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

Haywood v. Bryan, 63—521; Rankin v. Allison, 64—673; Harkey v. Houston, 65—137; Cowles v. Hardin, 79—577.

Sec. 258. Pleadings, how verified. C. C. P., s. 117. 1868-'9, c. 159, s. 7.

The verification must be to the effect that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of

his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading. Any judge, or clerk of the superior court, notary public, or justice of the peace, shall be competent to take affidavits for the verification of pleadings, in any court or county in the state, and for general purposes.

Benedict v. Hall, 76—113; Paige v. Price, 78—10; Alspaughv. Winstead, 79—526; Cowles v. Hardin, 79—577; Bruff v. Stern, 81—183; Johnson v. Maxwell, 87—18; Bank v. Hutchison, 87—22.

Sec. 259. Items of account; particulars to be furnished, when. C. C. P., s. 118.

It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court or the judge thereof may order a further account when the one delivered is defective; and the court may, in all cases, order a bill of particulars, of the claim of either party to be furnished.

Sec. 260. Pleadings, how construed. C. C. P., s. 119.

In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties.

Wright v. McCormick, 67—27; Moore v. Edmiston, 70—510; Com'rs v. Piercy, 72—181; Jones v. Com'rs, 73—182.

Sec. 261. Irrelevant or redundant; indefinite or uncertain. C. C. P., s. 120.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby, but this motion must be made before

answer or demurrer, or before an extension of time to plead is granted. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

Erwin v. Lowry, 64—321; Swepson v. Harvey, 66—436; Flack v. Dawson, 69—42; Moore v. Edmiston, 70—510; Schehan v. Malone, 71—440; Com'rs v. Piercy, 72—181; Jones v. Com'rs, 73—182; Womble v. Fraps, 77—198; Ten-Broeck v. Orchard, 79—518; Dail v. Harper, 83—4; Hull v. Carter, 83—249; Brogden v. Henry, 83—274; Boon v. Hardie, 83—470; Best v. Clyde, 86—4.

Sec. 262. Judgments, how to be pleaded. C. C. P., s. 121.

In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

Sec. 263. Conditions precedent, how to be pleaded; instrument for payment of money only. C. C. P., s. 122.

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims.

Sec. 264. Private statutes, how pleaded. C. C. P., s. 123.

In pleading a private statute or right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its ratification, and the court shall thereupon take judicial notice thereof.

Trustees v. Satchwell, 71—11.

Sec. 265. Libel and slander, how stated in complaint. C. C. P., s. 124.

In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the

purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

Carson v. Mills, 69—122.

Sec. 266. Answer in such cases. C. C. P., s. 125.

In the actions mentioned in the preceding section, the defendant may, in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Moore v. Edmiston, 70—510.

Sec. 267. What causes of action may be joined in the same complaint. C. C. P., s. 126.

The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal, or equitable, or both, where they all arise out of:

Lee v. Pearce, 68—76; Land Co. v. Beatty, 69—329; Wooten v. Maultsby, 69—462; Edgerton v. Powell, 72—64; Sutton v. McMillan, 72—102; Burns v. Ashworth, 72—496; Hamlin v. Tucker, 72—502; Logan v. Wallis, 76—416; Doughty v. R. R. Co., 78—22; Street v Tuck, 84—605; Finch v. Baskerville, 85—205; Syme v. Bunting, 86—175; England v. Garner, 86—366; Mebane v. Layton, 86—571.

(1) The same transaction; or transaction connected with the same subject of action;

Sumner v. Shipman, 65—623; Land Co. v. Beatty, 69—329; Wooten v. Maultsby, 69—462; Edgerton v. Powell, 72—64; Burns v. Ashworth, 72—496; Hamlin v. Tucker, 72—502; Logan v. Wallis, 76—416; Doughty v. R. R. Co., 78—22.

(2) Contract, express or implied; or,

Sutton v. McMillan, 72—102; Logan v. Wallis, 76—416.

(3) Injuries with or without force to person and property, or to either; or,

(4) Injuries to character; or,

(5) Claims to recover real property, with or without damages for the withholding thereof; and the rents and profits of the same; or,

(6) Claims to recover personal property, with or without damages for the withholding thereof; or,

Logan v. Wallis, 76—416; Doughty v. R. R. Co., 78—22; Young v. Young, 81—91.

(7) Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated. In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises, against such other person, and may enforce such judgment as in other cases.

Land Co. v. Beatty, 69—329; Sutton v. Millan, 72—102; Logan v. Wallis, 76—416.

Sec. 268. Allegation not denied, when to be deemed true. C. C. P., s. 127.

Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, shall for the purposes of action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

McKesson v. Mendenhall, 64—286; Erwin v. Lowry, 64—321; Jenkins v. Ore Dressing Co., 65—563; Oates v. Gray, 66—442; Moore v. Edmiston, 70—510; Price v. Eccles, 73—162; Bank v. Charlotte, 75—45; Skinner v. Wood, 76—109; Green v. R. R. Co., 77—95; Bonham v. Craig, 80—224.

CHAPTER SEVEN.

MISTAKES IN PLEADINGS AND AMENDMENTS.

SECTION.
269. Material variance.
270. Immaterial variance.
271. A failure of proof, when.
272. Amendments of course after allowance of demurrer.
273. Amendments by order.
274. Relief in case of mistake, surprise or excusable neglect.
275. When plaintiff ignorant of name of defendant.
276. Errors or defects not substantial, to be disregarded.
277. Supplemental pleadings.

Sec. 269. Material variance. C. C. P., s. 128.

No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice in maintaining his action upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he had been misled; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

Garrett v. Trotter, 65—430; Gibbs v. Fuller, 66—116; Pegram v. Stoltz, 67—144; McKee v. Lineberger, 69—217; Shelton v. Davis, 69—324; Horton v. Newberry, 69—456; Moore v. Edmiston, 70—510; Wilson v. Moore, 72—558; Com'rs v. Blair, 76—136; Clawson v. Wolfe, 77—100; Ten-Broeck v. Orchard, 79—518; Webb v. Taylor, 80—305; Hoffman v. Moore, 82—313; Brown v. Morris, 83—251; Carpenter v. Huffsteller, 87—273.

Sec. 270. Immaterial variance. C. C. P., s. 129.

Where the variance is not material as provided in the preceding section, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

Shelton v. Davis, 69—324; Haughton v. Newberry, 69—456; Wilson v. Moore, 72—558; Com'rs v. Blair, 76—136; Webb v. Taylor, 80—305; Brown v. Morris, 83—251; Carpenter v. Huffsteller, 87—273.

Sec. 271. A failure of proof, when. C. C. P., s. 130.

Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the preceding section, but a failure of proof.

Shelton v. Davis, 69—324; Carpenter v. Huffsteller, 87—273.

Sec. 272. Amendments of course after allowance of demurrer. C. C. P., s. 131. 1871-'2, c. 173, s. 1.

Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires: or it can be so amended at any time, unless it be made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appear to the court or judge that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court or judge may seem just. After the decision of a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. If the demurrer be allowed for the reason that several causes of action have been improperly united, the judge shall, upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

Ransom v. McClees, 64—17; Love v. Com'rs, 64—706; Merwin v. Ballard, 65—168; Garrett v. Trotter, 65—430; Brown v. Hawkins, 65—645; Walsh v. Hall, 66—233; Wilson v. Moore, 72—558; Dunn v. Barnes, 73—273; Hinton v. Deans, 75—18; Adams v. Reeves, 76—412; Moore v. Hobbs, 77—65; Cowan v. Baird, 77—201; Doughty v. R. R. Co., 78—22; Pearce v. Mason, 78—37; Mabry v. Irwin, 78—45; Netherton v. Candler, 78—88; Matthews v. Copeland, 80—30; Street v. Tuck, 84—605; Finch v. Baskerville, 85—205; Bronson v. Insurance Co., 85—411; England v. Garner, 86—366; Reynolds v. Smathers, 87—24; Carpenter v. Huffsteller, 87—273; Jones v. McKinnon, 87—294.

Sec. 273. Amendments by order. C. C. P., s. 132.

The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the fact proved.

Penny v. Smith, Phil., 35; Thomas v. Womack, 64—657; Garrett v. Trotter, 65—430; Bullard v. Johnson, 65—436; Robinson v. Willoughby, 67—84; Oats v. Kendall, 67—241; Deal v. Palmer, 68—215; Bledsoe v. Nixon, 69—81; Shelton v. Davis, 69—324; Haughton v. Newberry, 69—456; State v. Cauble, 70—62; Williams v. Sharpe, 70—582; Stafford v. Harris,

72—198; Lippard v. Roseman, 72—427; Righton v. Pruden, 73—61; Hinton v. Deans, 75—18; Heyer v. Beatty, 76—28; Com'rs v. Blair, 76—136; Adams v. Reeves, 76—412; Murrill v. Humphrey, 76—414; Lane v. Morton, 78—7; Pearce v. Mason, 78—37; Faison v. Johnson, 78—78; Dobson v. Chambers, 78—334; Askew v. Capehart, 79—17; March v. Verble, 79—19; Todd v. Outlaw, 79—235; Johnson v. Rowland, 80—1; Thomas v. Simpson, 80—4; Bank v. Creditors, 80—9; Glenn v. Bank, 80—97; Webb v. Taylor, 80—305; Weiller v. Lawrence, 81—65; Henderson v. Graham, 84—496; Walton v. Pearson, 85—34; Martin v. Young, 85—156; Gilchrist v. Kitchen, 86—20; Henry v. Cannon, 86—24; Reynolds v. Smathers, 87—24; Wiggins v. McCoy, 87—499.

Sec. 274. Relief in case of mistake, surprise or excusable neglect. C. C. P., s. 133.

The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order to enlarge such time; and may also in his discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding; and whenever any proceeding taken by a party fails to conform in any respect of this code, the judge may, in like manner and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

Jacobs v. Burgwin, 63—196; Jarman v. Saunders, 64—367; Waddell v. Wood, 64—624; Griel v. Vernon, 65—76; Hudgins v. White, 65—393; Burke v. Stokely, 65—569; Clegg v. White Soapstone Co., 66—391; Kirkman v. Dixon, 66—406; Powell v. Weith, 66—423; McDowell v. Asbury, 66—444; Watson v. Shields, 67—235; Clegg v. White Soapstone Co., 67—302; Williams v. Green, 68—183; Deal v. Palmer, 68—215; McCullock v. Doak, 68—267; Powell v. Weith, 68—342; Perry v. Pearce, 68—367; McRae v. McNair, 69—12; Isler v. Brown, 69—125; Cowles v. Hayes, 69—406; Austin v. Clarke, 70—458; Williams v. Sharpe, 70—582; Williams v. Williams, 70—665; Howell v. Harrell, 71—161; White v. Snow, 71—232; Simonton v. Lanier, 71—198; Long v. Cole, 72—20; Harris v. Jenkins, 72—183; Coffield v. Warren, 72—223; Johnson v. Duckworth, 72—244; Daniel v. Owen, 72—340; Smith v. New Berne, 73—303; Wade v. New Berne, 73—318; Long v. Cole, 74—267; Horne v. Horne, 75—101; Skinner v. Brice, 75—287; Sluder v. Rollins, 76—271; Quincy v. Perkins, 76—295; McDaniel v. Watkins, 76—399; Bradford v. Coit, 77—72; Bank v. Foot, 77—131; Simmons v. Dowd, 77—155; Pearce v. Mason, 78—37; Mabry v. Erwin, 78—45; Rollins v. Henry, 78—342; Askew v. Capehart, 79—17; Harrell v. Peebles, 79—26; Blue v. Blue, 79—69; Monroe v. Whitted, 79—508; Jones v. Swepson, 79—510; Hyman v Capehart, 79—511; Com'rs v. McPher-

son, 79—524; Oldham v. Sneed, 80—15; Kerchner v. Fairley, 80—24; Mcbane v. Mebane, 80—34; Boyden v. Williams, 80—95; Smith v. Hahn, 80—240; Paschall v. Bullock, 80—329; Vick v. Pope, 81—22; Hodgin v. Matthews, 81—289; Cobb v. O'Hagan, 81—293; Kerchner v. Baker, 82—169; Hiatt v. Waggoner, 82—173; Clayton v. Johnston, 82—423; Weaver v. Jones, 82—440; University v. Lassiter, 83—38; Nicholson v. Cox, 83—48; Mabry v. Henry, 83—298; Walker v. Gurley, 83—429; Hutchison v. Rumfelt, 83—441; Parker v. Railroad, 84—118; McLean v. McLean, 84—366; Stump v. Long, 84—616; Walton v. Pearson, 85—34; Bryant v. Fisher, 85—69; Henry v. Clayton, 85—371; DePriest v. Patterson, 85—376; Smith v. Reeves, 85—594; Gilchrist v. Kitchen, 86—20; Henry v. Cannon, 86—24; Wynne v. Prairie, 86—73; Franks v. Sutton, 86—78; Norwood v. King, 86—80; Twitty v. Logan, 86—712; Ellington v. Wicker, 87—14; Skinner v. Bland, 87—168; Parker v. Bledsoe, 87—221; English v. English, 87—497.

Sec. 275. When plaintiff ignorant of name of defendant. C. C. P., s. 134.

When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Sec. 276. Errors or defects not substantial to be disregarded. R. C., c. 3, ss. 5, 6. C. C. P., s. 135.

The court and the judge thereof shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected, by reason of such error or defect.

Simpson v. Simpson, 64—427; Oates v. Kendall, 67—241; Moore v. Edmiston, 70—510; Com'rs v. Blair, 76—136; Clawson v. Wolfe, 77—100; Jones v. Mial, 82—252; Gorman v. Bellamy, 82—496.

Sec. 277. Suppplemental pleadings. C. C. P., s. 136.

The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made, and either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of such action, determining the matter in controversy in said action, or any part thereof, and if said judgment be set up by the plaintiff, the same shall be without

prejudice to any provisional remedy theretofore issued or other proceedings had, in said action on his behalf.

Crump v. Mims, 64—767.

TITLE VIII.

PROCEDURE IN SPECIAL PROCEEDINGS.

SECTION.

278. Provisions of code applicable to special proceedings.
279. Summons in special proceedings, what to contain.
280. Return of summons.
281. Complaint in case of special proceedings; when filed.
282. Plaintiff failing to file complaint or petition within the time for defendant's appearance, may be non-suited.
283. Time of filing pleadings may be enlarged.
284. When all parties ask same relief.
285. In what cases clerk may hear summarily.
286. If any of the petitioners are infants, judge must review order.
287. How special proceedings to be commenced.
288. Orders, &c., to be signed by judge.
289. No reports set aside for trivial defects.

Sec. 278. Provisions of code applicable to special proceedings.

The provisions of the code of civil procedure are applicable to special proceedings, except as otherwise provided.

Sec. 279. Summons in special proceedings; what to contain.

The summons in special proceedings shall command the officer to summon the defendant to appear at the office of the clerk of the superior court, on a day named in the summons, to answer the complaint or petition of the plaintiff. The number of days within which the defendant is summoned to appear shall in no case be less than ten exclusive of the day of service.

Guion v. Melvin, 69—242; Phillips v. Holland, 78—31.

Sec. 280. Return of summons. C. C. P., s. 75.

The officer to whom the summons is addressed, shall note on it the day of its delivery to him; if required by

the plaintiff, he shall execute the same immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it.

Jones v. Gupton, 65—48; Johnson v. Kennedy, 70—435; Wasson v. Linster, 83—575.

Sec. 281. Complaint in case of special proceedings; when filed. C. C. P., s. 76. 1876-'7, c. 241, s. 4.

It shall be sufficient for the plaintiff to file his complaint or petition with the clerk of the court, to which the summons is returnable, at the time of issuing the summons, or within ten days thereafter.

Sec. 282. Plaintiff failing to file complaint or petition within the time for defendant's appearance, may be non-suited. C. C. P., s. 78.

If the plaintiff shall fail to file his complaint or petition within the time limited by the summons for the appearance and answer of the defendant, the defendant shall be entitled to demand judgment of non-suit against the plaintiff.

McKesson v. Mendenhall, 64—502; Andrews v. Pritchett, 66—387; Purnell v. Vaughan, 80—46.

Sec. 283. Time of filing pleadings may be enlarged. C. C. P., s. 79.

The time for filing the complaint, petition, or of any pleading whatever, may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party.

Best v. Clyde, 86—4.

Sec. 284. When all parties ask same relief. C. C. P., s. 418. 1868-'9, c. 93, s. 1.

If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceeding shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded.

Fulton v. Elliott, 66—195; Ballard v. Kilpatrick, 71—281.

Sec. 285. In what cases clerk may hear summarily. C. C. P., s. 419. 1868-'9, c. 93, s. 2.

In such cases, if all persons to be affected by the decree, or their attorney, shall have signed the petition, and they be of full age, the clerk of the superior court shall have power to hear the petition summarily, and to decide the same, if either or any of the petitioners shall be residing out of the state, an authority from him or them, to the attorney, in writing, must be filed with the clerk, before he shall make any order or decree to prejudice their rights.

Sec. 286. If any of the petitioners are infants, judge must review order. C. C. P., s. 420. 1868-'9, c. 93, s. 3.

If any of the petitioners be an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case, and capable of being prejudicial to the infant, shall be valid, unless submitted to, and approved by, the judge of the court in or out of term.

Stafford v. Harris, 72—198.

Sec. 287. How special proceedings to be commenced. C. C. P., s. 421. 1868-'9, c. 93, s. 4.

When special proceedings are had against adverse parties, they shall be commenced as is prescribed for civil actions.

Sec. 288. Orders, &c., to be signed by judge. C. C. P., s. 422. 1868-'9, c. 93, s. 5. 1872-'3, c. 100.

Every order or judgment in a special proceeding, which is required to be made by a judge of the superior court, either in or out of term, shall be authenticated by his signature.

Thompson v. Berry, 64—81; Foreman v. Bibb, 65—128; McDowell v. Ashbury, 66—444; Guion v. Melvin, 69—242; Rollins v. Henry, 78—342; Matthews v. Joyce, 85—258.

Sec. 289. No report set aside for trivial defects. C. C. P., s. 424. 1868-'9, c. 93, s. 7.

No report or return made by any commissioners shall be set aside and sent back to them, or others for a new report, by reason of any defect or omission not affecting the substantial rights of the parties, but such defect or omission may be amended by the court, or by the commissioners, by permission of the court.

Tate v. Powe, 64—644.

TITLE IX.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chap. I. ARREST AND BAIL.
II. CLAIM AND DELIVERY OF PERSONAL PROPERTY.
III. INJUNCTION.
IV. ATTACHMENT.
V. APPOINTMENT OF RECEIVERS AND OTHER PROVISIONAL REMEDIES.

CHAPTER ONE.

ARREST AND BAIL.

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Sec. 290. No person to be arrested except as prescribed. C. C. P., s. 148.

No person shall be arrested in a civil action, except as prescribed by this chapter; but this provision shall not apply to proceedings for contempt.

Jarman v. Ward, 67—32; Houston v. Walsh, 79—35.

Sec. 291. In what cases. C. C. P., s. 149. 1869-'70, c. 79, s. 1.

The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property;

Hughes v. Person, 63—548; Wilson v. Barnhill, 64—121; Wood v. Harrell, 74—338; Houston v. Walsh, 79—35; Hoover v. Palmer, 80—313; Peebles v. Foote, 83—102.

(2) In an action for a fine or penalty, or for seduction, or for money received, or for property embezzled or fraudulently misapplied by a public officer, or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment;

Melvin v. Melvin, 72—384; McNeely v. Haynes, 76—123; Moore v. Mullen, 77—327; Peebles v. Foote, 83—302.

(3) In an action to recover the possession of personal property, unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit therof;

(4) When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention or conversion of which,

the action is brought, or when the action is brought to recover damages for fraud or deceit;

Melvin v. Melvin, 72—384; McNeely v. Haynes, 76—122; Bahnsen v. Chesebro, 77—325.

R. C., c. 31, s. 54, 1777, c. 118, s. 6.

(5) When the defendant has removed, or disposed of, his property, or is about to do so, with intent to defraud his creditors;

But no woman shall be arrested in any action, except for a wilful injury to person, character or property; and no person shall be arrested on Sunday.

Smith v. Gibson, 74—684; Paige v. Price, 78—10; Hoover v. Palmer, 80—313.

Sec. 292. Order of arrest; from whom obtained. C. C. P., s. 150.

An order for the arrest of the defendant must be obtained from the court in which the action is brought, or from a judge thereof.

Woody v. Jordan, 69—189; Tucker v. Davis, 77—330; Houston v. Walsh, 79—35.

Sec. 293. Order obtained on affidavit, and to what actions applicable. C. C. P., s. 151, 1869-'70, c. 79, s. 1.

The order may be made where it shall appear to the court or judge thereof, by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those provided for in this sub-chapter.

Wilson v. Barnhill, 64—121; Clark v. Clark, 64—150; Benedict v. Hall, 76—113; Bahnsen v. Chesebro, 77—325; Tucker v. Davis, 77—330; Paige v. Price, 78—10; Peebles v. Foote, 83—102; Johnston v. Pate, 83—110; Devries v. Summit, 86—126; Roulhac v. Brown, 87—1.

Sec. 294. Undertaking required before issuing order. C. C. P., s. 152, 1868-'9, c. 277, s. 7.

Before making the order, the court or judge shall require a written undertaking on the part of the plaintiff, with sufficient surety payable to the defendant, to the effect that if the defendant recover judgment, the plaintiff will pay all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars.

Rowark v. Homesley, 68—91.

Sec. 295. Time when order may issue, its form; time to answer or move to vacate. C. C. P., s. 153.

The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order, at a place and time therein mentioned, to the clerk of the court in which the action is brought, and notice of such return shall be served on the plaintiff or his attorney as prescribed in chapter ten for the service of other notices.

But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days after the service of the order of arrest, in which to move to vacate the order of arrest, or to reduce the amount of bail.

Houston v. Walsh, 79—35.

Sec. 296. Sheriff to have order and affidavits, and copies to be delivered to defendant by sheriff on his arrest. C. C. P., s. 154.

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof.

Sec. 297. Order, how executed. C. C. P., s. 155.

The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law; and may call the power of the county to his aid in the execution of the arrest.

Sec. 298. Defendant, how discharged. C. C. P., s. 156.

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

Sec. 299. Undertaking of defendant; form of. C. C. P., s. 157.

The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he

be arrested for the cause mentioned in the third subdivision of section two hundred and ninety-one, an undertaking to the same effect as that provided by section three hundred and twenty-six.

Sedberry v. Carver, 77—319; Miller v. Hahn, 84—226.

Sec. 300. Surrender of defendant. C. C. P., s. 158.

At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested in the following manner:

(1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.

(2) Upon the production of a copy of the undertaking and sheriff's certificate, the court, or a judge thereof, may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in sub-division three of section two hundred and ninety-one, so as to discharge the bail from an undertaking given to the effect provided by section three hundred and twenty-six.

Sec. 301. Bail may arrest defendant. C. C. P., s. 159.

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, indorsed on a certified copy of the undertaking, may empower any person over twenty-one years of age to do so.

Sedberry v. Carver, 77—319.

Sec. 302. Bail to be proceeded against by motion. C. C. P., s. 160.

In case of failure to comply with the undertaking, the bail may be proceeded against by motion in the cause on ten days' notice to such bail.

Charleton v. Sloan, 64—702; McDowell v. Ashbury, 66—444; Insurance Co. v. Davis, 74—78.

Sec. 303. Bail, how exonerated. C. C. P., s. 161.

The bail may be exonerated, either by the death of the defendant, or his imprisonment in a state prison, or by

his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, at any time before final judgment against the bail.

Adrian v. Scanlin, 77—317; Sedberry v. Carver, 77—319.

Sec. 304. Undertaking of bail to be delivered to clerk and notice thereof to plaintiff, and its acceptance or rejection by him. C. C. P., s. 162.

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return indorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it, and the sheriff shall be exonerated from the liability.

Sec. 305. Notice of justification; new bail. C. C. P., s. 163.

On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or his attorney, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in section two hundred and ninety-nine.

Sec. 306. Qualifications of bail. C. C. P., s. 164.

The qualifications of bail must be as follows:

(1) Each of them must be a resident and freeholder within the state;

(2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

Sec. 307. Justification of bail. C. C. P., s. 165.

For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the

peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such a manner as the court, the justice of the peace, or the judge, in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

Sec. 308. If bail adjudged sufficient, examination to be certified, and sheriff exonerated. C. C. P., s. 166.

If the court, justice of the peace or judge find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

Sec. 309. Defendant may make deposit instead of bail with sheriff. C. C. P., s. 167.

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged from custody.

Sec. 310. Sheriff within four days to pay deposit into court. C. C. P., s. 168.

The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquencies.

Sec. 311. Bail substituted for deposit and deposit refunded. C. C. P., s. 169.

If money be deposited, as provided in the two preceding sections, bail may be given and justified upon notice, as prescribed in section three hundred and seven, any time before judgment; and thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly.

Sec. 312. Plaintiff obtaining judgment, deposit applied to its payment. C. C. P., s. 170.

When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied.

Sec. 313. Sheriff liable as bail, when. C. C. P., s. 171.

If, after being arrested, the defendant escape, or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail at any time before process against the person of the defendant, to enforce an order or judgment in the action.

Sec. 314. Judgment against sheriff; action on his official bond. C. C. P., s. 172.

If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

Sec. 315. Bail liable to Sheriff. C. C. P., s. 173.

The bail taken upon the arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action, for damages which he may sustain by reason of such omission.

Sec. 316. Defendant before judgment may apply on motion to vacate. C. C P., s. 174.

A defendant arrested may at any time before judgment apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

Clark v. Clark, 64—150; Bear v. Cohen, 65—511; Rowark v. Homesley, 68—91; Raulhac v. Brown, 87—1.

Sec. 317. Motion to vacate made on affidavit; plaintiff may oppose the same by affidavits or other proof. C. C. P., s. 175.

If the motion be made upon affidavits on the part of

the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made.

Wilson v. Barnhill, 64—121; Clark v. Clark, 64—150; Weiller v. Lawrence, 81—65; Devries v. Summit, 86—126.

Sec. 318. Defendant confined for want of bail, may give bail, and bond returned to next court. R. C., c. 11, s. 8. C. C. P., s. 175 (*a*).

If any person for want of bail shall be lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail-bond shall be regarded, in every respect, as other bail-bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond at the first court which is held after it is taken.

Sec. 319. Bail to pay costs in certain cases. R. C., c. 11, s. 10. C. C. P., s. 175 (*b*).

Whenever a notice shall issue against any person, as the bail of any other person, and the bail, at or before the term of the court at which such bail is bound to appear, or ought to plead, shall not be discharged from his liability as bail by the death or surrender of his principal or otherwise; in that case the bail shall be liable for all costs which may accrue on said notice, notwithstanding the bail may be afterwards discharged, by the death or surrender of the principal, or otherwise.

Clark v. Latham, 8 Jon., 1.

Sec. 320. Bail not discharged by amendment of process. R. C., c. 11, s. 11. C. C. P., s. 175 (*c*).

No amendment of process shall discharge the bail of the party arrested thereon, unless the amendment be to enlarge the sum demanded beyond the sum expressed in the bail-bond.

CHAPTER TWO.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION.
321. Delivery to be claimed at the time of issuing the summons.
322. Affidavit and requisites.
323. Fiat of clerk to sheriff to deliver property.
324. Undertaking of plaintiff for delivery of property.
325. Exceptions to undertaking.
326. Undertaking of defendant to retain property.
327. Justification of defendant's sureties.
328. Qualification and justification of defendant's sureties, how.
329. Property concealed in buildings, how taken.
330. Property when taken, how kept.
331. Property taken, claimed by a third person.
332. Sheriff not bound to keep the property, but may deliver to claimant.
333. Undertaking and affidavit, when and where to be filed.

Patapsco Co. v. Magee, 86—350.

Sec. 321. Delivery to be claimed at the time of issuing the summons. C. C. P., s. 176.

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this subchapter.

Hirsh v. Whitehead, 65—516; Jarman v. Ward, 67—32; Ashbrook v. Shields, 67—333; Woody v. Jordan, 69—189; Haughton v. Newberry, 69—456; Holmes v. Godwin, 69—467; Clemmons v. Hampton, 70—534; Potter v. Mardre, 74—36; Hopper v. Miller, 76—402; Ray v. Horton, 77—334; Jones v. Ward, 77—337; Churchill v. Lee, 77—341; Manny v. Ingram, 78—96; Manix v. Howard, 79—553; Webb v. Taylor, 80—305; Williamson v. Buck, 80—308; McCraw v. Gilmer, 83—162; Moore v. Woodward, 83—531; Miller v. Hahn, 84—326; Patapsco v. Magee, 86—350.

Sec. 322. Affidavit and requisites. C. C. P., s. 177. 1881, c. 134.

Where a delivery is claimed, an affidavit must be made, before the clerk of the court in which the action is required to be tried, or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing:

Hirsh v. Whitehead, 65—516; Jarman v. Ward, 67—32; Webb v. Taylor, 80—305; Manix v. Howard, 82—125; Cotten v. Willoughby, 83—75; Rhea v. Deaver, 85—337.

(1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

Blakely v. Patrick, 67—40; Potter v. Mardre, 74—36; Hopper v. Miller, 76—402; Cotton v. Willoughby, 83—75.

(2) That the property is wrongfully detained by the defendant;

(3) The alleged cause of the detention thereof, according to his best knowledge, information and belief;

(4) That the same has not been taken for tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

Hirsh v. Whitehead, 65—516; Baxter v. Baxter, 77—118; Jones v. Ward, 77—337; Churchill v. Lee, 77—341.

(5) The actual value of the property.

Hirsh v. Whitehead, 65—516; Jarman v. Ward, 67—32.

Sec. 323. Fiat of clerk to sheriff, to deliver property. C. C. P., s. 178.

The clerk of the court shall, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff: *Provided*, the plaintiff shall give the undertaking prescribed in the succeeding section.

Hirsh v. Whitehead, 65—516; Jarman v. Ward, 67—32; Ins. Co. v. Davis, 68—17; Woody v. Jordan, 69—189; Potter v. Mardre, 74—36 Phillips v. Holland, 78—31.

Sec. 324. Undertaking of plaintiff for delivery of property. C. C. P., s. 179.

Upon the receipt of the order from the clerk with a written undertaking payable to the defendant executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertak-

ing, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

Hirsh v. Whitehead, 65—516; Jarman v. Ward, 67—32; Woody v. Jordan, 69—189; Hopper v. Miller, 76—402; Mannix v. Howard, 82—125.

SEC. 325. Exceptions to undertaking. C. C. P., s. 180.

The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff personally, or by leaving a copy at his office in the county town of the county, or if he have no such office, at the office of the clerk of the court, that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or until new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the succeeding section.

Hirsh v. Whitehead, 65—516.

SEC. 326. Undertaking of defendant to retain property. C. C. P., s. 181.

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required, within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section three hundred and thirty-one.

Hirsh v. Whitehead, 65—516; Ins. Co. v. Davis, 74—78; Miller v. Hahn, 84—226; Hughes v. Newsom, 86—424.

See. 327. Justification of defendant's sureties. C. C. P., s. 182.

The defendant's sureties, upon a notice to the plaintiff of not less than two or more than six days, shall justify before the court, a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

Hirsh v. Whitehead, 65—516.

Sec. 328. Qualification and justification of defendant's sureties, how. C. C. P., s. 183.

The qualifications of sureties, and their justification, shall be as prescribed, in respect to bail upon an order of arrest.

Hirsh v. Whitehead, 65—516.

Sec. 329. Property concealed in buildings, how taken. C. C. P., s. 184.

If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county, and if the property be upon the person the sheriff or other officer may seize the person, and search for and take the same.

Hirsh v. Whitehead, 65—516.

See. 330. Property when taken, how kept. C. C. P., s. 185.

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

Hirsh v. Whitehead, 65—516.

Sec. 331. Property taken, claimed by a third person. R. C., c. 7, s. 10. 1810, c. 583, ss. 1, 2. C. C. P., s. 186.

When the property taken by the sheriff shall be claimed by any person other than the plaintiff or the defendant,

the claimant may interplead upon his filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title; and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in plaintiff's complaint, for the delivery of the property to the person entitled to the same, and for the payment of all such costs and damages as may be awarded against him; this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of property. A copy of this undertaking and accompanying affidavits to be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in said action, when the court trying the same shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint; and the finding of the jury shall be conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. *Provided*, that in a court of a justice of the peace, he may try such issue unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before courts of justices of the peace.

Simpson v. Harry, 1 D. & B., 202; McLean v. Douglass, 6 Ired., 233; Evans v. Transportation Co., 5 Jon., 331; Cherry v. Nelson, 7 Jon., 141; Bank v. Spurling, 7 Jon., 398; Bear v. Cohen, 65—511; Hirsh v. Whitehead, 65—516; Clemmons v. Hampton, 70—534; Sims v. Goettle, 82—268; Sims v. Goettle, 82—271.

Sec. 332. Sheriff not bound to keep the property, but may deliver to claimant. R. C., c. 7, s. 10. 1810, c. 583, ss. 1, 2. C. C. P., s. 186. (*a.*)

Upon the filing by the claimant of the undertaking set forth in the preceding section, the sheriff shall not be bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff shall execute and deliver to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity.

Sec. 333. Undertaking and affidavit, when and where to be filed. C. C. P., s. 187.

The sheriff shall return the undertaking, notice and affidavit with his proceedings thereon to the court in

which the action is pending within ten days after taking the property mentioned therein.

Hirsh v. Whitehead, 65—516; Insurance Co. v. Davis, 74—78; Harker v. Arendell, 74—85.

CHAPTER THREE.

INJUNCTION.

SECTION.
334. Injunction as a provisional remedy abolished, and injunction by order substituted.
335. What judge to grant injunctions and restraining orders.
336. Before what judge returnable.
337. Parties to application for injunction may by written stipulation designate a judge to hear the same: Proviso.
338. Injunction, in what cases allowed.
339. At what time granted; copy of affidavit to be served.
340. Injunction after answer, allowed upon notice.
341. Undertaking upon injunction; damages, how ascertained.
342. Order to show cause; restraint in the meantime.
343. Injunction to suspend business of corporation not granted, unless undertaking is given.
344. Injunction without notice, vacated or modified upon notice.
345. Application to modify or vacate upon affidavit, may be opposed by affidavit.
346. Restraining order shall not be granted for more than twenty days without notice; but continue until dissolved on notice.

Sec. 334. Injunction as a provisional remedy abolished, and injunction by order substituted. C. C. P., s. 188.

The writ of injunction as a provisional remedy is abolished, and a temporary injunction by order is substituted therefor. The order may be made by any judge of a superior court, in the cases provided in section three hundred and thirty-eight, and may be enforced as the order of the court. Upon such order, it shall be issued by the clerk of the court in which the action is required to be tried.

Foard v. Alexander, 64—69; Chambers v. Penland, 78—53; Jones v. Cameron, 81—154.

Sec. 335. What judge to grant injunctions and restraining orders. 1876-'7, c. 232, s. 1. 1879, c. 63, ss. 1, 3.

The judges of the superior court of this state shall have jurisdiction to grant injunctions and issue restraining or-

ders in all civil actions and proceedings, which are authorized by law: *Provided*, that a judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he may have jurisdiction to hear, and determine under the commission issued to him, and the same shall be returnable as directed by the judge in the order.

Brown v. R. R. Co., 83—128; Galbreath v. Everett, 84—546.

Sec. 336. Before what judge returnable. 1876-'7, c. 232, s. 2. 1879, c. 635, ss. 2, 3. 1881, c. 51, s. 1.

All restraining orders and injunctions granted by any of the judges of the superior court, except a judge holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is depending, within twenty days from date of order. And if the judge before whom the same is returned shall, from sickness, inability, or from any cause, fail to hear said motion and application, or to continue the same to some other time and place, then it shall be competent for any judge resident in some adjoining district, or a judge assigned to hold the court of some adjoining district, or the judge holding by exchange the court of some adjoining district, to hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise, that the judge before whom the same was returnable failed to act upon the same, or to continue the same to some other time and place. The effect of such removal shall be to continue in force the motion and application theretofore granted, till the same can be heard and determined by the judge having jurisdiction of the same.

Corbin v. Berry, 83—27; Galbreath v. Everett, 84—546.

Sec. 337. Parties to application for injunction may by written stipulation designate a judge to hear the same. 1883, c. 33.

By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorney, to the effect that the matter may be heard before any judge, to be designated in such stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an in-

junction order, shall, upon receipt of such stipulations, forward the same and all the papers to the judge designated in the stipulation, whose duty it shall thereupon be to hear and decide the matter, and return all the papers to the court out of which they issued: *Provided*, that the necessary postage or expressage money be furnished to said judge.

Sec. 338. Injunction, in what cases allowed. C. C. P., s. 189.

(1) DEPENDS UPON NATURE OF THE ACTION.

(1) When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission, or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or

Fox v. Cline, 85—173.

(2) AND (3) DEPEND UPON EXTRINSIC FACTS.

(2) When, during the litigation, it shall appear by affidavit of plaintiff or any other person, that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain him therefrom;

Heilig v. Stokes, 63—612; Wilder v. Lee, 64—50; Foard v. Alexander, 64—69; Jones v. Hill, 64—198; Smith v. Dewey, 64—463; Patterson v. Hubbs, 65—119; Howes v. Mauney, 66—218; Sprinkle v. Hutchinson, 66—450; R. R. Co. v. Battle, 66—540; Dockery v. French, 69—308; Bryan v. Hubbs, 69—423; Johnston v. Rankin, 70—550; Faison v. McIlwaine, 72—312; Chambers v. Penland, 78—53; Dobson v. Simonton, 78—63; Jones v. Thorne, 80—72; Banks v. Parker, 80—157; Tillery v. Wren, 86—217; Walton v. Mills, 86—280.

(3) And where, during the pendency of an action, it shall appear by affidavit of plaintiff or any other person, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud the plaintiff, a temporory injunction may be granted to restrain such removal or disposition.

Bell v. Chadwick, 71—329; German v. Clarke, 71—417; Baldwin v. York, 71—463; Amalgamating Co. v. Dressing Co., 73—468; Campbell v. Wolfenden, 74—103; Johnson v. Jones, 75—206; McCorkle v. Brem, 76—407; Cohen v. Com'rs, 77—2; Baxter v. Baxter, 77—118; Moore v. Valentine, 77—188; Capehart v. Biggs, 77—261; Purnell v. Vaughan, 77—268.

Sec. 339. At what time granted; copy of affidavit to be served. C. C. P., s. 190.

The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment; upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

Patrick v. Joyner, 63—573; Heilig v. Stokes, 63—612; Foard v. Alexander, 64—69; McArthur v. McEachin, 64—72; Backalan v. Littlefield, 64—233; Hirsh v. Whitehead, 65—516; Martin v.Sloane, 69—128.

Sec. 340. Injunction after answer, allowed upon notice. C. C. P., s. 191.

An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction.

Heilig v. Stokes, 63—612; Foard v. Alexander, 64—69; Jarman v. Saunders, 64—367; Faison v. McIlwaine, 72—312.

Sec. 341. Undertaking upon injunction; damages, how ascertained. C. C. P., s. 192.

Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof, that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties to be justified before, and approved by, the said clerk, or by the judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the judge shall direct, and the decision of the court thereupon shall be conclusive as to the amount of damages upon all the persons who have an interest in the undertaking.

Sledge v. Blum, 63—374; McArthur v. McEachin, 64—72; Richards v. Baurman, 65—162; Hirsh v. Whitehead, 65—516; Burke v. Stokely, 65—569; Hyman v. Devereux, 65—588; McKesson v. Hennessee, 66—473; Miller v. Parker, 73—58; Amalgamating Co. v. Ore Dressing Co., 79—48; Burnett v. Nicholson, 79—548; Sternberger v. Hawley, 85—141.

Sec. 342. Order to show cause; restraint in the meantime. C. C. P., s. 193.

If the judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.

Faison v. McIlwaine, 72—312; Sternberger v. Hawley, 85—141.

Sec. 343. Injunction to suspend business of corporation not granted, unless undertaking is given. C. C. P., s. 194.

An injunction to suspend the general and ordinary business of a corporation shall not be granted without due notice of the application therefor, to the proper officers of the corporation, except where the state is a party to the proceeding, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

Sec. 344. Injunction without notice, vacated or modified upon notice. C. C. P., s. 195.

If the injunction be granted without notice, the defendant, at any time before the trial, may apply, upon ten days' notice to the judge having jurisdiction thereof, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer; but if no such application be made, the injunction shall continue, and be in force until such application shall be made and determined by the judge, and a verified answer has the effect only of an affidavit.

Sharpe v. King, 3 Ired. Eq., 402; Perkins v. Hollowell, 5 Ired. Eq., 24.; Sledge v. Blum, 62—374; Bear v. Cohen, 65—511.; Perry v. Michaux, 79—94.

Sec. 345. Application to modify or vacate upon affidavit, may be opposed by affidavit. C. C. P., s. 196.

If the application be made upon affidavits on the part

of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted.

Clark v. Clark, 64—150; Howerton v. Sprague, 64—451; Craycroft v. Morehead, 67—422; Woodfin v. Beach, 70—455; Lowe v. Com'rs, 70—532; Ponton v. McAdoo, 71—101; Mitchell v. Com'rs, 74—487; Chambers v. Penland, 78—53; Jones v. Boyd, 80—258; Weiller v. Lawrence, 81—65; Young v. Rollins, 85—485.

Sec. 346. Restraining order shall not be granted for more than twenty days without notice; but continue until dissolved on notice. C. C. P., s. 345.

No restraining order, or order to stay proceedings for a longer time than 20 days, shall be granted by a judge out of court, except upon due notice to the adverse party; but the said order shall continue and remain in force until vacated upon notice.

CHAPTER FOUR.

ATTACHMENT.

SECTION.

347. In what actions attachment may be issued.
348. Warrant to accompany summons, or to be issued afterwards.
349. What must be shown to procure warrant.
350. Warrant issued by justice of the peace; publication to be made.
351. Warrant, by whom granted.
352. Warrant, how served.
353. When warrant granted by a justice of the peace.
354. Justice's attachments levied on land, what to be done.
355. Warrant procured; affidavits to be filed.
356. Undertaking before issuing warrant.
357. Warrant, to whom directed and what to require.
358. Validity of undertaking.
359. Warrant, how executed.
360. Proceedings when property attached is perishable, or a vessel.
361. Defendant may replevy before sale.
362. Interest in corporations or associations liable to attachments.
363. Attachment, how executed on property incapable of manual delivery.
364. A garnishee summoned to answer on oath; judgment against garnishee.
365. Proceedings against garnishee failing to appear.

SECTION.
366. Garnishee denying he has any property; issue to be made up.
367. Articles confessed by garnishee, to be valued by jury and judgment for their value; in what cases garnishee excused.
368. Judgment conditional against garnishee, when.
369. Certificate of defendant's interest to be furnished.
370. Judgment, how satisfied.
371. When action to recover notes, &c., of defendant may be prosecuted by plaintiff in the action in which the attachment issued.
372. Bond of plaintiff, how disposed of, or judgment for defendant.
SECTION.
373. Attachment discharged, and property or its proceeds returned to defendant on his appearance in action.
374. Undertaking of defendant on appearance to discharge the property.
375. Property claimed by third party, may interplead.
376. When the sheriff to return warrant, with his proceedings thereon.
377. Motion to vacate or modify a warrant, or increase security.
378. Exception to and justification of sureties.

SEC. 347. In what actions attachment may be issued. C. C. P., s. 197.

A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in this chapter, when the action is to recover a sum of money only, or damages for one or more of the following causes:

(1) Breach of contract, express or implied;

(2) Wrongful conversion of personal property;

(3) Any other injury to personal property, in consequence of negligence, fraud, or other wrongful act.

Maxwell v. McBrayer, Phil., 527; Marsh v. Williams, 63—371; Hughes v. Person, 63—548; Wilson v. Barnhill, 64—121; Backalan v. Littlefield, 64—233; Mixer v. Guano Co., 65—552; Toms v. Warson, 66—417; Wheeler v. Cobb, 75—21; Montgomery v. Riley, 75—144; Windley v. Bradway, 77—333; Grant v. Burgwyn, 79—513; Price v. Cox, 83—261; Faulk v. Smith, 84—501.

SEC. 348. Warrant to accompany summons, or to be issued afterward. C. C. P., s. 197.

The warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action. Personal service of the summons must be made upon the defendant against whose property the attachment is granted, within thirty days after the granting thereof, or else upon the expiration of the same time, service of summons by publication must be commenced pursuant to an order obtained therefor, and

if publication has been, or is thereafter commenced, t service must be made complete, by the continuance thereof.

Price v. Cox, 83—261.

SEC. 349. What must be shown to procure the warrant. C. C. P., s. 201.

To entitle the plaintiff to such a warrant, he must show by affidavit to the satisfaction of the court granting the same, as follows:

(1) That one of the causes of action specified in section three hundred and forty-seven exists against the defendant. If the action is to recover damages for breach of contract, the defendant must show that the plaintiff is entitled to recover a sum stated therein, over and above all counter-claims known to him.

(2) That the defendant is either a foreign corporation, or not a resident of the state; or, if he is a natural person, and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid service of summons, or keeps himself concealed therein with like intent; or, if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with the like intent.

Marsh v. Williams, 63—371; Hughes v. Person, 63—548; Gashine v. Baer, 64—108; Wilson v. Barnhill, 64—121; Clark v. Clark, 64—150; Backalan v. Littlefield, 64—233; Brown v. Hawkins, 65—645; Love v. Young, 69—65; Spiers v. Halstead, 71—209; Palmer v. Bosher, 71—201; Wood v. Harrel, 74—338; Smith v. Gibson, 74—684; Wheeler v. Cobb, 75—21; Burwell v. Lafferty, 76—383; Hess v. Brower, 76—428; Windley v. Bradway, 77—333; Branch v. Frank, 81—180; Bruff v. Stern, 81—183; Peebles v. Foote, 83—102; Faulk v. Smith, 84—501; Devries v. Summit, 86—126.

SEC. 350. Warrant issued by justice of the peace; publication to be made. C. C. P., s. 198. 1868-'9, c. 95, s. 3. 1870-'1, c. 166, s. 4. 1874-'5, c. 111.

The plaintiff, within thirty days after obtaining a warrant of attachment from a justice of the peace, shall cause publication thereof to be made for four successive weeks at the court-house door and four other public places in the county where the warrant is returnable.

Marsh v. Williams, 63—371; Love v. Young, 69—65; Spiers v. Halstead, 71—209; Wheeler v. Cobb, 75—21; Burwell v. Lafferty, 76—383.

Sec. 351. Warrant, by whom granted. C. C. P. s. 199. 1869-'70, c. 147. 1870-'1, c. 166, ss. 1, 3. 1874-'5, c. 111. 1876-'7, c. 251, s. 1.

If the action be not founded on a contract, or if founded on a contract and the sum demanded exceed two hundred dollars, a warrant of attachment may be obtained from the judge of the district embracing the county in which the action has been instituted, or from the clerk of the superior court from which the summons in the action issued; and it may be issued to any county in the state where the defendant has property, money, effects, choses in action or debts due him, and shall be made returnable in term time to the court from which the summons issued.

Sec. 352. Warrant, how served. 1870-'1, c. 166, s. 3, 1874-'5, c. 111, s. 2.

When the warrant of attachment is taken out at the time of issuing the summons, and the summons is to be served by publication, the order shall direct that notice be given in said publication to the defendant of the issuing of the attachment, and when the warrant of attachment is obtained after the issuing of the summons, the defendant shall be notified by publication of the fact for four successive weeks in some newspaper published in the county to which it is returnable, or if there be none such, then in one published in the judicial district including said county, and if there be no newspaper published in the district, then in any newspaper published in the state. Said publication shall state the names of the parties, the amount of the claims, and in a brief way the nature of the demand and the time and place to which the warrant is returnable: *Provided*, that in proceedings by attachment begun and had before justices of the peace, advertisement in a newspaper shall not be necessary, but in all such cases, advertisement at the court-house door and four other public places in the county shall be sufficient publication, both as to the summons and warrant of attachment.

Sec. 353. When warrant granted by a justice of the peace. C. C. P., s. 200. 1876-'7, c. 251.

If the action be not founded on contract, and the value of the property in controversy does not exceed the sum of fifty dollars, the warrant of attachment may, or if the action be founded on contract, and the sum demanded does not exceed two hundred dollars, the warrant of at-

tachment must be obtained from, and made returnable before some justice of the peace of a county, to the superior court of which it might have been returnable had the sum demanded exceeded two hundred dollars, or had the action not have been founded on contract.

Grier v. Rhyne, 67—338.

SEC. 354. Justice's attachment levied on land; what to be done. 1868-'9, c. 95, s. 4.

If the attachment be levied on real property, the justice shall proceed to try the action, but shall issue no execution to sell the real property, and shall return the papers in the case to the office of the clerk of the superior court of his county, where the judgment shall be docketed. The levy of the attachment, however, shall be a lien on the real estate.

SEC. 355. Warrant procured; affidavits to be filed. C. C. P., s. 201.

It shall be the duty of the plaintiff procuring a warrant of attachment, within ten days from the issuing thereof, to file the affidavits on which the same was granted in the office of the clerk of the superior court to which, or with the justice of the peace before whom the process is made returnable.

SEC. 356. Undertaking before issuing a warrant. C. C. P., s. 202.

Before issuing the warrant, the officer issuing the same shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect, that if the defendant recover judgment, or the attachment be set aside by order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

Wheeler v. Cobb, 75—21.

SEC. 357. Warrant, to whom directed and what to require. C. C. P., s. 203.

The warrant shall be directed to the sheriff of any county in which the property of such defendant may be, or in case it be issued by a justice of the peace to such sheriff, or to any constable of such county, provided such county be that of the justice issuing the warrant, and shall require such sheriff or constable to attach and safe-

ly keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, together with costs and expenses; it must also state when and where it shall be returned. Several warrants may be issued at the same time to the sheriffs of different counties.

Backalan v. Littlefield, 64—233; Wade v. New Berne, 72—198; Gamble v. Rhyne, 80—183.

Sec. 358. Validity of undertaking.

It shall not be a defence to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

Sec. 359. Warrant, how executed. C. C. P., s. 204.

The officer to whom such warrant of attachment is directed and delivered, shall seize and take into his possession the tangible personal property of the defendant, or so much thereof as may be necessary, and he shall be liable for the care and custody of such property, as if the same had been seized under execution; he shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant, an inventory of the property seized or levied on; subject to the direction of the court, he shall collect and receive into his possession all debts owing to the defendant, and take such legal proceedings, either in his own name, or in that of the defendant, as may be necessary for that purpose.

Backalan v. Littlefield, 64—233; Alexander v. Com'rs, 67—330; Insurance Co. v. Davis, 68—17; Palmer v. Bosher, 71—291; Com'rs v. Riley, 75—144; Carmer v. Evers, 80—55; Gamble v. Rhyne, 80—183; Blair v. Puryear, 87—101.

Sec. 360. Proceedings when property attached is perishable, or a vessel. R. C., c. 7, s. 6. 1777, c. 115, s. 28. C. C. P., s. 205.

If any property, so seized, shall be perishable, or of such character that the expense of keeping it until the determination of the suit would be likely to exceed one-fifth of its value, or if any part of it consists of a vessel, or of any share or interest therein, and the person to whom it belongs, or his agent, shall not within ten days after the serving of such attachment, reclaim the same, the sheriff or other officer having possession thereof,

shall apply to the court for authority to sell the same, stating the circumstances; and the same shall be sold, under the order and direction of the court, and the proceeds of such sale shall be liable to the judgment obtained upon such attachment, and shall be retained by the sheriff or other officer to await such judgment.

Haywood v. Hardie, 76—384.

Sec. 361. Defendant may replevy before sale. R. C., c. 7, s. 5. 1777, c. 115, s. 28.

The person owning the property, advertised to be sold according to the provisions of this sub-chapter, his agent or attorney may, at any time before sale, replevy the same, by giving an undertaking, in double the amount of the value of the property, with sufficient surety, to the effect that he will return the property to the sheriff, or other officer, if return thereof be adjudged by the court, and pay all costs that may be awarded against him; and if return of said property cannot be had, then that he will pay plaintiff the value of said property, and all costs and damages that may be awarded against him. And upon the execution of this undertaking, the sheriff, or other officer, shall deliver said property to the person owning the same.

Cherry v. Nelson, 7 Jon., 141; Barry v. Sinclair, Phil., 7; Sims v. Goettle, 82—268.

Sec. 362. Interest in corporations or associations liable to attachment. C. C. P., s. 206.

The rights or shares which the defendant may have in the stock of any association or corporation, together with the interests and profits thereon, and all other property in this state of such defendant, shall be liable to be attached and levied on, and sold to satisfy the judgment and execution.

Sec. 363. Attachment, how executed on property incapable of manual delivery. C. C. P., s. 207.

The execution of the attachment upon any such rights, shares, or any debts or other property incapable of manual delivery to the sheriff, shall be made, by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or with the secretary, cashier or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

Sec. 364. A garnishee summoned to answer on oath; judgment against garnishee. R. C., c. 7, s. 7. 1777, c. 115, s. 28.

When the sheriff or other officers shall serve an attachment on any person supposed to be indebted to, or to have any effects of the defendant in the attachment, he shall at the time summons such person as a garnishee in writing, to appear at the court to which the attachment shall be returnable, or if issued by a justice of the peace at a place and time named in the notice, not exceeding twenty days from date of notice, to answer upon oath what he owes to the defendant, and what effects of the defendant he hath in his hands, and had at the time of serving such attachment, and what effects or debts of the defendant there are in the hands of any other, and what person, to his knowledge and belief; and when an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee, for all sums of money due to the defendant from him, and for all effects and estates of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of any garnishee belonging to the defendant, shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment.

Russell v. Hinton, 1 Mur., 468; Freeman v. Grist, 1 D. & B., 217; Patton v. Smith, 7 Ired., 438; Myers v. Beeman, 9 Ired., 116; Houston v. Porter, 10 Ired., 174; Ormond v. Moye, 11 Ired., 564; Tindell v. Wall, Busb., 3; Spruill v. Trader, 5 Jon., 39; Cherry v. Nelson, 7 Jon., 141; Barry v. Sinclair, Phil., 7; Parker v. Scott, 64—118; Shuler v. Bryson, 65—201; Tate v. Morehead, 65—681.

Sec. 365. Proceedings against garnishee failing to appear. R. C., c. 7, s. 8. 1777, c. 115, s. 28. 1838, c. 2.

When any garnishee shall be summoned as aforesaid, and shall fail to appear and discover on oath as directed, the court, after solemnly calling the garnishee, shall enter a conditional judgment against him, and thereupon a notice shall issue against him returnable to the court having jurisdiction, to show cause why final judgment shall not be entered against him; and if, upon due exe-

cution thereof, such garnishee shall fail to appear at the time and place named in the notice, and discover on oath in manner aforesaid, the court shall confirm said judgment and award execution for the plaintiff's whole judgment and costs; and if, upon examination of the garnishee, it shall appear to the court that there is any of the defendant's estate in the hands of any person who has not been summoned, the court shall, upon motion of the plaintiff, grant a judicial attachment, to be levied in the hands of every such person having any of the estate of the defendant in his custody or possession, who shall appear and answer, and shall be liable as other garnishees.

Sec. 366. Garnishee denying he has any property; issue to be made up. R. C., c. 7, s. 9. 1793, c. 389, s. 2.

When any garnishee shall deny that he owes to, or has in his possession any property of, the defendant, and the plaintiff shall on oath suggest to the court the contrary; or when any garnishee shall make such a statement of facts that the court cannot proceed to give judgment thereon, then the court shall order an issue to be made up, which shall be tried by a jury, and on their verdict judgment shall be rendered: *Provided*, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted, in all respects, as in jury trials before courts of justices of the peace.

Cowles v. Oaks, 3 Dev., 96.

Sec. 367. Articles confessed by garnishee, to be valued by jury and judgment for their value; in what cases garnishee excused. R. C., c. 7, s. 11. 1793, c. 389, s. 1. 1794, c. 424, s. 1.

When a garnishee shall on oath confess that he has in his hands any property of the defendant of a specific nature, or is indebted to such defendant by any security or assumption for the delivery of any specific article, except as hereinafter excepted, then the court shall immediately order a jury to be impaneled and sworn to inquire of the value of such specific property, and the verdict of the jury shall subject such garnishee to the payment of the valuation, or so much thereof as shall be sufficient to satisfy the debt or damages, and costs to the plaintiff: *Provided*, that in a court of a justice of the peace, he may try such issue, unless a jury be demanded, and then proceedings are to be conducted in all respects as in jury trials before

courts of justices of the peace. *Provided, further*, that if such garnishee shall also state in his answer that said specific property was left, or deposited, in his possession by the defendant as a bailment, or that he hath tendered said specific articles agreeable to contract, and that they were refused by the defendant, and that he then was, and always had been, ready to deliver the same; or that he had such specific articles at the time and place specified in such covenant or agreement ready to be delivered, and is still ready to deliver the same; and such statement shall be admitted by the plaintiff or found by a jury or the court, then in any such case, the garnishee shall be exonerated by the delivery of such specific articles to the sheriff, who shall proceed as if the attachment had been originally levied on the property.

Cherry v. Hooper, 7 Jon., 82.

Sec. 368. Judgment conditional against garnishee, when. R. C., c. 7, s. 12. 1794, c. 424, s. 2.

When any garnishee shall declare in his answer, that the money or specific article due by him will become payable or deliverable at a future day, and the same shall be admitted by the plaintiff or found by a jury or the court, in such case conditional judgment shall be entered against the garnishee, and the plaintiff may obtain judgment against the defendant for his demand, but shall not take final judgment against the garnishee without notice to show cause.

Sec. 369. Certificate of defendant's interest to be furnished. C. C. P., s. 208.

Whenever the sheriff or other lawful officer with a warrant of attachment or execution, shall apply to any officer mentioned in section three hundred and sixty three, or to any debtor or individual, for the purpose of attaching or levying on the property of the defendant in such warrant, such officer, debtor or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to the defendant. If such officer, debtor or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

Gamble v. Rhyne, 80—183.

Sec. 370. Judgment, how satisfied. C. C. P., s. 209.

In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose:

(1) By paying over to such plaintiff the proceeds of all property sold by him, and of all debts or credits collected by him, or so much as shall be necessary to satisfy such judgment;

(2) If any balance remain due, and an execution shall have been issued on such judgment, he shall proceed to sell under such execution so much of the attached property, real or personal, except as provided in sub-division four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant;

(3) If any of the attached property belonging to the defendant, shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose, shall have all the authority which he had to seize the same under the attachment: and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured;

(4) Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached, under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months, from the docketing of the judgment, the court shall have power upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff, since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used due diligence, and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same, any part or portion thereof, to order the sheriff

to sell the same upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or to his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to service of notice, and time of service, as shall be deemed just. When the judgment and all costs of the proceedings shall have been paid, the sheriff upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.

Copper Co. v. Martin, 70—300; Com'rs v. Riley, 75—144; Gamble v. Rhyne, 80—183.

Sec. 371. When action to recover notes, &c., of defendant may be prosecuted by plaintiff in the action in which the attachment issued. C. C. P., s. 210.

The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff, of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases when required by the sheriff, justify by making an affidavit that each is a freeholder, and worth double the amount of the penalty of the bond, over and above all demands, liabilities and exemptions.

Shuler v. Bryson, 65—201; Carmer v. Evers, 80—55.

Sec. 372. Bond of plaintiff, how disposed of, on judgment for defendant. C. C. P., s. 211.

If the foreign corporation, or the absent, absconding, or concealed defendant, recover judgment against the plaintiff in such action, any bond taken upon the issuing of the warrant of attachment, and any bond taken by the sheriff, except such as are mentioned in the preceding section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant or to his agent, on request, and the warrant shall be discharged and the property released.

Sec. 373. Attachment discharged, and property or its proceeds returned to the defendant on his appearance in action. C. C. P., s. 212. 1870-'1, c. 166.

Whenever the defendant shall have appeared in such ac-

tion, he may apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the same; and if the same be granted, all the proceeds of sale, and moneys collected in such action, and all the property attached remaining in the hands of any officer of the court, under any process or order in such action, shall be delivered or paid to the defendant or to his agent, and released from the attachment. And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant, whose several property has been seized, may apply in like manner for relief.

Bear v. Cohen, 65—511; Palmer v. Bosher, 71—291; Rahity v. Stringfellow, 72—328; Palmer v. Bosher, 72—371; Devries v. Summit, 86—126.

Sec. 374. Undertaking of defendant on appearance to discharge the property. C. C. P., s. 213.

Upon such application the defendant shall deliver to the court an undertaking, executed by two sureties residing in this state, approved by such court, to the effect that such surety will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit, that the property attached be of less value than the amount claimed by the plaintiff, the court or judge may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court an undertaking, in accordance with this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all of this section, applicable to such an undertaking, shall be applied thereto.

Stephenson v. Todd, 63—368; Bear v. Cohen, 65—511; Myers v. Hamilton, 65—567; Brown v. Hawkins, 65—645; Canal Co. v. McAllister, 74—159; Weller v. Lawrence, 81—65; Bruff v. Stern, 81—183.

Sec. 375. Property claimed by third party, may interplead. R. C., c. 7, s. 10. 1793, c. 389, s. 3.

When the property attached shall be claimed by any

other person, the claimant may interplead, as provided in section three hundred and thirty-one.

Simpson v. Harry, 1 D. & B., 202; McLean v. Douglass, 6 Ired., 233· Evans v. Mining Co., 5 Jon., 331; Cherry v. Nelson, 7 Jon., 141; Bank v. Spurling, 7 Jon., 398; Sims v. Goettle, 82—268; Sims v. Goettle, 82—271; Blair v. Puryear, 87—101.

Sec. 376. When the sheriff to return warrant, with his proceedings thereon. C. C. P., s. 214.

The sheriff shall return the warrant of attachment, and the undertakings provided for in this chapter, with a statement of his proceedings thereon, at the time and place at which it is on its face returnable, and upon, or at any time after, such return, he may obtain from the court to which the same was returnable, a certified copy thereof, which shall be held and deemed for the purpose of giving him authority, the same as the original, and when the warrant shall have been fully executed or discharged, the sheriff shall return the same, with his proceedings, to said court.

Sec. 377. Motion to vacate or modify warrant, or increase security.

The defendant, or a person who has acquired a lien upon, or interest in, his property after it was attached, may at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to the court having jurisdiction to vacate or modify the warrant, or to increase the security given by the plaintiff, or for one or more of those forms of relief, together or in the alternative, as in cases of other provisional remedies.

Bear v. Cohen, 65—511; Brown v. Hawkins, 65—645; Bruff v. Stern, 81—183; Devries v. Summit, 86—126.

Sec. 378. Exception to and justification of sureties.

The sureties to all undertakings in all proceedings for attachment may be excepted to, and justified as required in action for claim and delivery.

CHAPTER FIVE.

APPOINTMENT OF RECEIVERS AND OTHER PROVISIONAL REMEDIES.

SECTION.
379. Appointment of receivers.
380. Property held by trustees.
381. Judge may punish disobedience to order.
382. Judgment for sum admitted to be due.
383. Receiver to give security.

SEC. 379. Appointment of receivers. C. C. P., s. 215. 1876-'7, c. 223. 1879, c. 63. 1881, c. 51.

A judge of the superior court having authority to grant restraining orders and injunctions, as prescribed in title nine, sub chapter three of this chapter, shall have the like jurisdiction in appointing receivers, and all motions to show cause shall be returnable as is provided for injunctions.

A receiver may be appointed—

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court;

(2) After judgment, to carry the judgment into effect;

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment;

(4) In cases provided in said chapter and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this state of foreign corporations. Receivers of the property within this state of foreign or other corporations shall be allowed such commissions as may be fixed by the judge appointing them, not exceeding five per cent on the amount received and disbursed by them.

Parks v. Sprinkle, 64—637; Richards v. Baurman, 65—162; Skinner v.

Maxwell, 66—45; Howes v. Mauney, 66—218; Battle v. Davis, 66—252; Skinner v. Maxwell, 68—400; Rankin v. Minor, 72—424; Righton v. Pruden, 73—64; Gray v. Gaither, 74—237; Ten-Broeck v. Orchard, 74—409; Rollins v. Henry, 77—467; Dobson v. Simonton, 78—63; Kerchner v. Fairley, 80—24; Twitty v. Logan, 80—69; Corbin v. Berry, 83—27; Nesbitt v. Turrentine, 83—535; Oldham v. Bank, 84—304.

Sec. 380. Property held by trustees. C. C. P., s. 215.

When it is admitted, by the pleading or examination of a party that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the judge.

Parker v. Bledsoe, 87—231.

Sec. 381. Judge may punish disobedience to order. C. C. P., s. 215.

Whenever, in the exercise of his authority, a judge shall have ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge.

Sec. 382. Judgment for sum admitted to be due. C. C. P., s. 215.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

Skinner v. Maxwell, 68—400; Rankin v. Minor, 72—424; Gray v. Gaither, 74—237; Rollins v. Henry, 77—467.

Sec. 383. Receiver to give security.

A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court wherein the action is pending, an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge or justices, making the appointment, conditioned for the faithful discharge of his duties as receiver. And

the judge or justices, having jurisdiction thereof, may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, with the like condition. But this section does not apply to a case where special provision is made by law, for the security to be given by a receiver, nor for increasing the same, nor for removing a receiver.

Lord v. Mcroney, 79—14; Bank v. Creditors, 86—223.

TITLE X.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chap. I. JUDGMENT UPON FAILURE TO ANSWER.
II. ISSUES AND THE MODE OF TRIAL.
III. TRIAL BY JURY.
IV. TRIAL BY COURT.
V. TRIAL BY REFEREE.
VI. THE MANNER OF ENTERING JUDGMENT.

CHAPTER ONE.

JUDGMENT UPON FAILURE TO ANSWER.

SECTION.
384. Judgment defined.
385. Judgment by default final, in what cases.
386. In all other actions upon failure to answer, judgment by default and inquiry.
387. Judgment against infants in certain cases validated.
388. Judgment on frivolous demurrer, answer or reply.
389. Provisions of this chapter applicable to courts of justices of the peace.
390. In actions to recover real property or the possession thereof.

Sec. 384. Judgment defined. C. C. P., s. 216.

A judgment is either interlocutory, or the final determination of the rights of the parties in the action.

Gibson v. Groner, 63—10; Mitchell v. Henderson, 63—643; Garrett v.

Smith, 64—93; Brown v. Foust, 64—672; Lee v. Pearce, 68—76; Hutchinson v. Smith, 68—354; Dunn v. Barnes, 73—273; Davidson v. Alexander, 84—621; Miller v. Justice, 86—26; McDonald v. Dickson, 87—404.

Sec. 385. Judgment by default final, in what cases. C. C. P., s. 217. 1870-'1, c. 42.

Judgment by default final may be had on failure of defendant to answer, as follows:

(1) Where complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered at the return term for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants, in the cases provided in section two hundred and twenty-two.

(2) Where the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counter-claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment-roll.

(3) In actions where the service of the summons was by publication, the plaintiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security, to abide the order of the court, touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives shall

apply and be admitted to defend the action, and shall succeed in such defence.

Price v. Cox, 83—261; Avery v. Henry, 83—298; Wynne v. Prairie, 86—73; Rogers v. Moore, 86—85.

Sec. 386. In all other actions upon failure to answer, judgment by default and inquiry.

In all other actions, except those mentioned in the preceding section, when the defendant shall fail to answer, and upon a like proof, judgment by default and inquiry may be had at the return term, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account be necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court, or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases, the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law.

Wynne v. Prairie, 86—73; Rogers v. Moore, 86—85.

Sec. 387. Judgment against infants in certain cases validated. 1879, c. 257. 1880, c. 23.

In any and all civil actions, and special proceedings pending on the fourteenth day of March, one thousand eight hundred and seventy-nine, or theretofore determined, in any of the courts, wherein any or all of the defendants were infants, idiots, lunatics or persons *non compos mentis*, on whom there was no personal service of the summons, the proceedings, actions, decrees and judgments taken, had and made by such courts in such civil actions and special proceedings shall be valid, effectual and binding against and upon such infants, idiots, lunatics and persons *non compos mentis*, and their rights and estates in like manner, as if they had been personally served with a summons therein: *Provided*, that this section shall not have the effect, nor be construed, to prevent any of the proceedings, actions, judgments or decrees hereby rendered regular and confirmed, from being impeached and set aside for fraud.

Gully v. Macy, 86—721.

Sec. 388. Judgment on frivolous demurrer, answer or reply. C. C. P., s. 218. 1870-'1, c. 42.

If a demurrer, answer or reply be frivolous, the party prejudiced thereby may apply to the court, or to the

judge thereof, for judgment thereon, and judgment may be given accordingly.

Erwin v. Lowery, 64—321; Clayton v. Jones, 68—497; Moore v. Edmiston, 70—510; Stith v. Lookabill, 71—25; Baldwin v. York, 71—463; Dunn v. Barnes, 73—273; Mabry v. Erwin, 78—45; Twitty v. Logan, 80—69.

Sec. 389. This chapter applicable to courts of justices of the peace.

This chapter shall apply, as near as may be, to proceedings in courts of justices of the peace.

Sec. 390. In actions to recover real property or the possession thereof. 1869-'70, c. 193, s. 4.

In all actions in the superior court for the recovery of real property, or for the possession thereof, upon failure of the defendant to file the undertaking required by section two hundred and thirty-seven, or upon failure of sureties to justify as provided in section five hundred and sixty, the plaintiff shall have judgment for the relief demanded in the complaint, unless the defendant is excused from giving said undertaking before answering.

Jones v. Fortune, 69—322; Lambert v. Kinnery, 74—348; Justice v. Eddings, 75—581; Rollins v. Henry, 77—467.

CHAPTER TWO.

ISSUES AND THE MODE OF TRIAL.

SECTION.	
391.	Issues defined; different kinds of issues.
392.	Issue of law.
393.	Issue of fact.
394.	On issues of both law and fact, issue of law to be tried first.
395.	When and by whom issues to be made up.
396.	Issues should be in concise and direct terms.
397.	Trial defined.
398.	Issues, how tried.
399.	Other issues to be tried by the court or judge.
400.	Issues of fact, when to be tried.
401.	Trial may be postponed by clerk or judge before the trial term on notice.
402.	Trial postponed by judge in term time, when.
403.	Order of business.

Sec. 391. Issues defined; different kinds of issues. C. C. P., s. 219.

Issues arise upon the pleadings, when a material fact

or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds:

(1) Of law; and

(2) Of fact.

Heilig v. Stokes, 63—612; Kluttz v. McKensie, 65—102; Clegg v. Soapstone Co., 66—391; Foushee v. Pattershall, 67—453; Armfield v. Brown, 70—27; Keener v. Finger, 70—35; Lippard v. Roseman, 72—427; Love v. Dickson, 85—5; Moore v. Hill, 85—218; Alexander v. Robinson, 85—275.

Sec. 392. Issue of law. C. C. P., s. 220.

An issue of law arises upon a demurrer to the complaint, answer or reply, or to some part thereof.

Kluttz v. McKensie, 65—103; Swepson v. Harvey, 69—387.

Sec. 393. Issue of fact. C. C. P., s. 221.

An issue of fact arises—

(1) Upon a material allegation in the complaint controverted by the answer; or,

(2) Upon new matter in the answer, controverted by the reply; or,

(3) Upon new matter in the reply, except an issue of law is joined thereon.

Neal v. Fesperman, 1 Jon., 446; Martin v. Milbourne, 66—321; Albright v. Mitchell, 70—445; McBride v. Patterson, 73—478; McRae v. Lawrence, 75—289; Jones v. Hemphill; 77—42; Brandon v. Phelps; 77—44; Churchhill v. Lee, 77—341; Hudson v. Wetherington, 79—3; Fickey v. Merrimon, 79—585; Hoff v. Crafton, 79—592; McElwee v. Blackwell, 82—345; Cedar Falls v. Wallace, 83—225.

Sec. 394. On issues of both law and fact, issue of law to be tried first. C. C. P., s. 222.

Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

Sec. 395. When and by whom issues to be made up.

The issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action, and reduced to writing, or by the judge presiding, before or during the trial.

Kidder v. McIlheny, 81—123; Curtis v. Cash, 84—41; Bryan v. Fisher, 85—71; Alexander v. Robinson, 85—275; Rhea v. Deaver, 85—337.

Sec. 396. Issues should be in concise and direct terms. Rule IV of Sup. Ct. June Term, 1871.

Issues shall be framed in concise and direct terms, and

prolixity and confusion must be avoided, by not having too many issues.

School Committee v. Kesler, 66—323.

Sec. 397. Trial defined. C. C. P., s. 223.

A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

Sec. 398. Issues, how tried. C. C. P., s. 224.

An issue of law must be tried by the judge or court, unless it be referred. An issue of fact must be tried by a jury, unless a trial by jury be waived, or a reference be ordered.

Erwin v. Lowery, 64—321; Andrews v. Pritchett 66—387; Swepson v. Harvey, 66—436; Goldsborough v. Turner, 67—403; Armfield v. Brown, 70—27; Isler v. Murphy, 71—436; Lippard v. Roseman, 72—427; Womble v. Fraps, 77—198; Chasteen v. Martin, 81—51.

Sec. 399. Other issues to be tried by the court or judge. C. C. P., s. 225.

Every other issue is triable by the court, or the judge thereof who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. And when a compulsory reference is ordered either party has the right to have the issues of fact tried by a jury.

Andrews v. Pritchett, 66—387; Goldsborough v. Turner, 67—403; Green v. Castlebury, 70—20; Keener v. Finger, 70—35; Stith v. Lookabill, 71—25.

Sec. 400. Issues of Fact, when to be tried. C. C. P., s. 226.

Every issue of fact joined on the pleadings, and inquiry of damages required to be tried by a jury, shall be tried at the term of the court next ensuing such joinder of issue or order for inquiry: *Provided*, such issue shall have been joined or order for inquiry made, more than thirty days before such term, but if not, they shall be tried at the second term after such joinder or order.

Sec. 401. Trial may be postponed by clerk or judge before the trial term on notice. C. C. P., s. 227.

Any party to an action may apply to the court in which it is pending, or to the judge therof, after three days' notice in writing to the adverse party, to have the trial deferred to a term subsequent to that in which it is regularly triable; such application must be made thirty days

before the trial term, and must be on affidavit. The court or judge may defer the trial as asked for, on such terms as shall be just, if satisfied—

(1) That the applicant has used due diligence to have his case ready for trial; and,

(2) That by reason of circumstances beyond his control, which he shall set forth, he cannot have a fair trial at the regular trial term; if the application is made by reason of the expected absence of a witness, it shall state the name and residence of the witness, the facts expected to be proved by him, and the grounds for the expectation of his non-attendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant shall in all cases pay the costs of the application.

Sec. 402. Trial postponed by judge in term time, when. C. C. P., s. 228.

The judge at any time during the term at which an action is triable, may postpone the trial on the application of either party, and on such terms as shall be just, if satisfied:

(1) That the applicant has used due diligence to be ready for trial;

(2) That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application be the non-attendance of a witness, the affidavit shall contain the particulars required by sub-division two of the preceding section. Unless the applicant shall also set forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in the preceding section, and that his application is made as soon as it reasonably could be after the knowledge of such facts, the postponement shall not be granted, except on the terms of the payment of the costs in the action for the term.

Moore v. Dickson, 74—423; Isler v. Dewey, 79—1. R. C., c. 31, s. 57 (13, 14).

Sec. 403. Order of business. C. C. P., s. 229.

The criminal calendar shall be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issues on the civil calendar shall be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

(1) Issues of fact to be tried by a jury;
(2) Issues of fact to be tried by the court;
(3) Issues of law.

Armfield v. Brown, 70—27; Lippard v. Roseman, 72—427; Thomas v. Myers, 87—31.

CHAPTER THREE.

TRIAL BY JURY.

SECTION.
404. Jury, how drawn.
405. Petit jurors sworn in civil cases; defaulting persons fined.
406. Names of jurors to be called before impaneled; right of challenge.
407. Separate trials.
408. General and special verdicts defined.
409. When jury may render either a general or special verdict, and when judge may direct a special finding.
410. On special finding with general verdict, former to control.
411. Jury to assess defendant's damages in certain cases.
412. Entry of the verdict; motion for new trial on judge's minutes; exceptions how taken, and how deemed taken.
413. Judge to explain law, but to express no opinion on facts.
414. Judge to put his instructions in writing.
415. Counsel to put their prayers for instruction in writing.

Sec. 404. Jury, how drawn. R. C., c. 31, s. 33. 1779, c. 157, s. 11.

The judges of the superior court, at the term of their courts, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn, shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

State v. Davis, 2 Ired., 153; State v. Heaton, 77—505; State v. Smith, 80—410.

Sec. 405. Petit jurors sworn in civil cases; defaulting persons fined. R. C., c. 31, s. 34. 1790, c. 321. 1822, c. 1133, s. 1.

The clerk shall, at the beginning of the court, swear such of the petit jury as are of the original panel, to try all civil cases; and if there should not be enough of the

original panel, the talesmen shall be sworn; and the petit jurors of the original panel, as well as talesmen, shall be sworn as prescribed in the chapter entitled "Oaths": *Provided*, that nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any of them; and if by reason of such challenge, any juror shall be withdrawn, his place on the jury shall be supplied by any of the original *venire*, or from the bystanders qualified to serve as jurors, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors in both civil and criminal actions. Any juror failing to appear shall be fined by the court the sum of forty dollars, and notice shall issue to such juror to appear at the next term of the court and show cause why the judgment should not be made absolute.

Sec. 406. Names of jurors to be called before impaneled; right of challenge. R. C., c. 31, s. 35. 1796, c. 452, s. 2. 1812, c. 833.

The clerk, before a jury shall be impaneled to try the issues in any civil suit, shall read over the names of the jury upon the panel in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily four jurors upon the said panel, without showing any cause therefor, which shall be allowed by the court.

Ward v. Bell, 7 Jon., 79; Bryan v. Harrison, 76—360.

Sec. 407. Separate trials. C. C. P., s. 230.

A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

Sec. 408. General and special verdicts defined. C. C. P., s. 232.

A general verdict is that, by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

School Committee v. Kesler, 66—323.

Sec. 409. When jury may render either a general or special verdict, and when judge may direct a special finding. C. C. P., s. 233.

In an action for the recovery of specific personal prop-

erty, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

Outlaw v. Hurdle, 1 Jon., 150; Watson v. Davis, 7 Jon., 178; Henry v. Rich, 64—379; Coughlan v. White, 66—102; School Committee v. Kesler, 66—323; Holmes v. Godwin, 69—467; Armfield v. Brown, 70—27; Williams v. Thomas, 78—47; Grant v. Bell, 87—34.

Sec. 410. On special finding with general verdict, former to control. C. C. P., s. 234.

Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

Sec. 411. Jury to assess defendant's damages in certain cases. C. C. P., s. 235.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

Sec. 412. Entry of the verdict; motion for new trial on judge's minutes; exceptions how taken, and when deemed taken. C. C. P., s. 236.

(1) Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict.

(2) If an exception be taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same shall be entered in the judge's minutes and be filed with the clerk as a part of the case upon appeal.

(3) If there shall be error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections.

(4) The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

Bledsoe v. Nixon, 69—81; Holmes v. Godwin, 69—467; Armfield v. Brown, 70—27; Shehan v. Malone, 72—59; Winburne v. Bryan, 73—47; England v. Duckworth, 75—309; Quincy v. Perkins, 76—295; Henry v. Smith, 78—27; Tankard v. Tankard, 79—54; Ballard v. Stanly, 79—627.

Sec. 413. Judge to explain law, but to express no opinion on facts. C. C. P., s. 237. R. C., c. 31, s. 130. 1796, c. 452, s. 1.

No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.

Orbison v. Morrison, 3 Mur., 551; Tate v. Greenlee, 3 Mur., 556;

Sneed v. Creath, 1 Hawks, 309; Reel v. Reel, 2 Hawks, 63; McNeill v. Massey, 3 Hawks, 91; State v. Morris, 3 Hawks, 388; Reed v. Shenck, 2 Dev., 415; State v. Moses, 2 Dev., 452; State v. Lipsey, 3 Dev., 485; State v. May, 4 Dev., 328; State v. Davis, 4 Dev., 612; State v. Haney, 2 D. & B., 390; State v. Johnson, 1 Ired., 354; State v. Angel, 7 Ired., 27; McEntire v. Durham, 7 Ired., 151; Bynum v. Bynum, 11 Ired., 632; Overman v. Coble, 13 Ired., 1; Baily v. Pool, 13 Ired., 404; Melvin v. Easley, 1 Jon., 386; State v. Cain, 2 Jon., 201; Wells v. Clements, 3 Jon., 168; State v. Whit, 5 Jon., 224; State v. Clara, 8 Jon., 25; State v. Norton, 1 Winst., 303; Gaither v. Ferebee, 1 Winst., 310; State v. Dick, 2 Winst., 45; State v. Summey, 2 Winst., 108; State v. Vinson, 63—335; Glenn v. R. R. Co., 63—510; State v. Dunlop, 65—288; State v. Parker, 66—624; Reiger v. Davis, 67—185; State v. Jones, 67—285, Powell v. R. R. Co., 68—395; Witkowsky v. Wasson, 71—451: Johnson v. Ray, 72—273; Barlow v. Norfleet, 72—535; Davis v. Hill, 75—224; State v. Dixon, 75—275; State v. Locke, 77—481; State v. Dancy, 78—437; State v. Matthews, 78—523: State v. Browning, 78—555; State v. Laxton, 78—564; March v. Verble, 79—19; Sever v. McLaughlin, 79—153; Wiseman v. Penland, 79—197; Fickey v. Merrimon, 79—585; State v. Sykes, 79—618; State v. Austin, 79—624; Wilson v. White, 80—280; State v. Hardee, 83—619; State v. Grady, 83—643; State v. Jenkins, 85—544; State v. Robertson, 86—628; State v. Reynolds, 87—544; State v. Jones, 87—547.

Sec. 414. Judge to put his instructions in writing. C. C. P., s. 238.

Every judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, shall put his instructions in writing, and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action.

Stout v. Woody, 63—37; Powell v. R. R. Co., 68—395; Morgan v. Smith, 77—37; Brink v. Black, 77—59; Williamson v. Canal Co., 78—156.

Sec. 415. Counsel to put their prayers for instruction in writing. C. C. P., s. 239.

Counsel praying of the judge instructions to the jury, shall put their request in writing entitled of the cause, and sign them; otherwise the judge may disregard them; they shall be filed with the clerk as a part of the record.

Stout v. Woody, 63—37; Brink v. Black, 77—59; Williamson v. Canal Co., 78—156.

CHAPTER FOUR.

TRIAL BY THE COURT.

SECTION.
416. Trial by jury; how waived.
417. On trial by the court, judgment, how given.
418. Exception; how and when taken.
419. Proceedings upon judgment on issue of law.

SEC. 416. Trial by jury, how waived. C. C. P., s. 240.

Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions in the manner following:

(1) By failing to appear at the trial;

(2) By written consent, in person or by attorney, filed with the clerk;

(3) By oral consent, entered in the minutes.

Armfield v. Brown, 70—27; Isler v. Murphy, 71—436; Benbow v. Robbins, 72—422; Strauss v. Beardsley, 79—59; Chastain v. Coward, 79—543; Chasteen v. Martin, 81—51; University v. Lassiter, 83—38; Isler v. Koonce, 83—55.

SEC. 417. On trial by the court, judgment, how to be given. C. C. P., s. 241.

Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk during the court at which the trial takes place. Judgment upon the decision shall be entered accordingly.

Jacobs v. Burgwin, 63—196; McAden v. Banister, 63—478; Heilig v. Stokes, 63—612; Clegg v. Soapstone Co., 66—391; Foushee v. Pattershall, 67—453; Strauss v. Beardsley, 79—59; Chastain v. Coward, 79—543; Meekins v. Tatem, 79—546; Burke v. Turner, 85—500.

SEC. 418. Exceptions, how and when taken. C. C. P., s. 242.

(1) For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after the judgment, in the same

manner and with the same effect as upon a trial by jury: *Provided*, that where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

(2) And either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case must briefly specify the facts found by him, and his conclusions of law.

Jacobs v. Burgwin, 63—196; Foushee v. Pattershall, 67—453; Green v. Castleberry, 70—20; Burke v. Turner, 85—500.

Sec. 419. Proceedings upon judgment on issue of law. C. C. P., s. 243.

On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two sub-divisions of section three hundred and eighty-five, upon failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in section three hundred and eighty-six.

Ransom v. McClees, 64—17.

CHAPTER FIVE.

TRIAL BY REFEREES.

SECTION.	
420. All issues referrable by consent.	422. Mode of trial; effect of report; review.
421. When reference may be compulsorily ordered.	423. Referees, how chosen; who may be referee; report.

Sec. 420. All issues referrable by consent. C. C. P., s. 244.

All, or any, of the issues in the action, whether of fact or of law, or both, may be referred, upon the written

consent of the parties, except in actions to annul a marriage, or for divorce and separation.

Hall v. Craige, 65—51; Kluttz v. McKenzie, 65—102; Gudger v. Baird, 66—438; Johnston v. Haynes, 68—509; Green v. Castleberry, 70—20; Armfield v. Brown, 70—27; Keener v. Finger, 70—35; Lusk v. Clayton, 70—184; Lippard v. Roseman, 72—427; Armfield v. Brown, 73—81; Price v. Eccles, 73—162; Perry v. Tupper, 77—413; Atkinson v. Whitehead, 77—418; Grant v. Reese, 82—72; Sloan v. McMahon, 85—296; Neal v. Becknell, 85—299; Barrett v. Henry, 85—321; Syme v. Bunting, 86—175; White v. Utley, 86—415; Chalk v. Bank, 87—200.

Sec. 421. When reference may be compulsorily ordered. C. C. P., s. 245.

Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

(1) Where the trial of an issue of fact shall require the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

(2) Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment order into effect; or,

(3) When the case involves a complicated question of boundary, or one which requires a personal view of the premises;

(4) Where a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action. But the compulsory reference under this section shall not deprive either party of his right to a trial of the issues of fact arising on the pleadings, by a jury.

Douglas v. Caldwell, 64—372; Heilig v. Foard, 64—710; Hall v. Craig, 65—51; Kluttz v. McKenzie, 65—102; Rowland v. Thompson, 65—110; Riddick v. Moore, 65—382; Martin v. Wilbourne, 66—321; Eubanks v. Mitchell, 67—34; Maxwell v. Maxwell, 67—383; Johnston v. Haynes, 68—509; Flack v. Dawson, 69—42; Green v. Green, 69—294; Green v. Castleberry, 70—20; Armfield v. Brown, 70—27; Armfield v. Brown, 73—81; Wall v. Covington, 76—150; Atkinson v. Whitehead, 77—418; Gold Co. v. Ore Co., 79—48; Bernheim v. Waring, 79—56; Sutton v. Schonwald, 80—20; R. R. Co. v. Morrison, 82—141; University v. Lassiter, 83—38; Isler v. Koonce, 83—55; Barrett v. Henry, 85—321; Com'rs v. Magoin, 85—114; Sloan v. McMahon, 85—296; McPeters v. Ray, 85—462; Chalk v. Bank, 87—200; Leak v. Covington, 87—501.

Sec. 422. Mode of trial; effect of report; review. C. C. P., s. 246.

The trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately; and their decision must be given, and may be excepted to and reviewed in like manner, and with like effect in all respects as in cases of appeal; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report shall have the effect of a special verdict.

Kluttz v. McKenzie, 65—102; Gudger v. Baird, 66—438; Green v. Castleberry, 70—20; Armfield v. Brown, 70—27; Whitford v. Foy, 71—527; Earp v. Richardson, 75—84; McCampbell v. McCling, 75—393; Green v. Castleberry, 77—164; Cain v. Nicholson, 77—411; Green v. Jones, 78—265; Suit v. Suit, 78—272; Gold Co. v. Ore Co., 79—48; Bushee v. Surles, 79—51; Lawrence v. Hyman, 79—209; Norment v. Brown, 79—363; Morrison v. Baker, 81—76; LaFontaine v. Southern Underwriters, 83—132; Com'rs v. Magnin, 85—114; Miller v. Bryan, 86—167; Hanner v. McAdoo, 86—370; Long v. Logan, 86—535; White v. Utley, 86—415.

Sec. 423. Referees, how chosen; who may be referee; report. C. C. P., s. 247.

In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. The referee shall make and de-

liver a report within such time as may be ordered by the court. The report of the referee shall be made to the clerk of the court in which the action is pending; either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review such report, and set aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge.

Gudger v. Baird, 66—438; State v. Peebles, 67—97; Maxwell v. Maxwell, 67—383; Green v. Green, 69—294; Green v. Castleberry, 70—20; Armfield v. Brown, 70—27; Schehan v. Malone, 71—440; Earp v. Richardson, 75—84; McCampbell v. McClung, 75—393; Cain v. Nicholson, 77—411; Perry v. Tupper, 77—413; Flemming v. Roberts, 77—415; Williams v. Thomas, 78—47; Bushee v. Surles, 79—51; University v. Lassiter, 83—38; Long v. Logan, 86—535.

CHAPTER SIX.

MANNER OF ENTERING JUDGMENT.

SECTION.
424. Judgment may be for or against any of the parties; may grant defendant affirmative relief; complaint may be dismissed for neglect to prosecute action; judgment against married woman.
425. The relief to be awarded to the plaintiff.
426. Judgment in certain cases to be a conveyance of title.
427. Judgment to be regarded as a deed and to be registered.
428. Copy of judgment from register's office to be evidence.
429. Judgment to be registered as deeds.
SECTION.
430. Rates of damages where damages are recoverable.
431. Judgment in action for recovery of personal property.
432. What judge to approve judgments, orders and decrees.
433. Judgments to be docketed and indexed; judgments at same term, when held to be docketed.
434. Judgment roll.
435. Judgments, when and how to be docketed; secured on appeal.
436. Judgments in supreme court may be docketed in superior court; lien of judgment; when transcript may be obtained.

SEC. 424. Judgment may be for or against any of the parties; may grant defendant affirmative relief; complaint may be dismissed for neglect to prosecute action; judgment against married woman. C. C. P., s. 248.

(1) Judgment may be given for or against one or more

of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves;

(2) And it may grant to the defendant any affirmative relief to which he may be entitled;

(3) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper;

(4) The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both, for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise.

Harkey v. Houston, 65—137; Burke v. Stokely, 65—569; Ivey v. Granberry, 66—223; Walsh v. Hall, 66—233; Hutchinson v. Smith, 68—354; Lusk v. Clayton, 70—184; Clark v. Williams, 70—679; Sloan v. McDowell, 71—356; Sloan v. McDowell, 75—29; Hare v. Jernigan, 76—471; Bradford v. Coit, 77—72; Lung v. Swindell, 77—176; Harrell v. Peebles, 79—26; Weeks v. Weeks, 79—77; Wiseman v. Penland, 79—197; Beard v. Hall, 79—506; Fickey v. Merrimon, 79—585; Halyburton v. Carson, 80—16; Hughes v. Boone, 81—204; Ruffin v. Harrison, 81—208; Melvin v. Stephens, 82—283; Hall v. Younts, 87—285.

Sec. 425. The relief to be awarded to the plaintiff. C. C. P., s. 249.

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.

Foard v. Alexander, 64—69: Powell v. Hill, 64—169; Gudger v. Baird, 66—438; Oates v. Kendall, 67—241; Haughton v. Newberry, 69—456; Jones v. Mial, 79—164; Jones v. Mial, 82—252; Knight v. Houghtalling, 85—17; Carpenter v. Huffsteller, 87—273.

Sec. 426. Judgment in certain cases to be a conveyance of title. R. C., c. 32, s. 24. 1850, c. 107, s. 1. 1874-'5, c. 17, s. 1.

In any action, wherein the court shall declare that a party is entitled to the possession of property, real or personal, the legal title whereof may be in another or others,

parties to the suit, and the court shall order a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court shall order that one of the parties holding property in trust shall convey the legal title therein to be held in trust to another person, although not a party, the court, after declaring the right and ordering the conveyance, shall have power also, to be used in its discretion, to declare in the order then made, or in any, made in the progress of the cause, that the effect thereof shall be to transfer to the party to whom the conveyance is directed to be made, the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered was in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as may be adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. And any party taking benefit under the judgment may have the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed.

Thaxton v. Williamson, 72—125, Rollins v. Henry, 78—342; Davis v. Rogers, 84—412.

Sec. 427. Judgment to be regarded as a deed, and to be registered. R. C., c. 32, s. 25. 1850, c. 17, s. 3. 1874-'5, c. 17, s. 2.

Every judgment, in which the transfer of title shall be so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the same rules and regulations as may be prescribed for conveyances of similar property executed by the party; and all laws which may be passed for extending the time for registration of deeds shall be deemed to include such judgments, provided the conveyance, if actually executed, would be so included.

Rollins v. Henry, 78—342.

Sec. 428. Copy of judgment from register's office to be evidence. R. C., c. 32, s. 26. 1850, c. 107, s. 3. 1874-'5, c. 17, s. 3.

In all legal proceedings, touching the right of parties derived under such judgment, a certified copy thereof

from the register's books shall be evidence of its existence and of the matters therein contained, as fully as if the same were proved by a perfect transcript of the whole case.

Rollins v. Henry, 78—342.

SEC. 429. Judgment to be registered as deeds. R. C., c. 32, s. 27. 1850, c. 107, s. 4. 1874-'5, c. 17, s. 4.

The party desiring registration of such judgment shall produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate.

Rollins v. Henry, 78—342.

SEC. 430. Rates of damages where damages are recoverable. C. C. P., s. 250.

Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

SEC. 431. Judgment in action for recovery of personal property. C. C. P., s. 251.

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery cannot be had, and the damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same.

Jarman v. Ward, 67—32; Woody v. Jordan, 69—180; Patapsco Co. v. Magee, 86—350.

SEC. 432. What judge to approve judgments, orders and decrees. 1876-'7, c. 233, s. 3. 1879, c. 63. 1881, c. 51.

In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions.

Sec. 433. Judgments to be docketed and indexed; judgments at the same term, when held to be docketed. C. C. P., s. 252. Rule XVIII.

Every judgment of the superior court, affecting the right to real property, and any judgment requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of said court. The entry shall contain the names of the parties, and the relief granted, date of judgment and date of docketing; and the clerk shall keep a cross index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the superior court thereof, during a term of the court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term.

Rhyne v. McKee, 73—259.

Sec. 434. Judgment roll. C. C. P., s. 253.

Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together, and file the following papers, which shall constitute the judgment-roll:

(1) In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any and a copy of the judgment;

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment.

Sec. 435. Judgments, when and how to be docketed; secured on appeal. C. C. P., s. 254.

Upon filing a judgment-roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment-roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof a transcript of the original docket, and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real

property is situated, or which he shall acquire at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in title thirteen of this chapter, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and thereupon it shall cease, during the pendency of said appeal, to be a lien on the real property of the judgment-debtor, as against purchasers and mortgagees in good faith.

Harris v. Ricks, 63—653; Rule xviii., 63—669; Thompson v. Berry, 64—79; Norwood v. Thorp, 64—682; Perry v. Morris, 65—221; McKeithan, v. Walker, 66—95; Hutchinson v. Symons, 67—156; Hoppock v. Shober, 69—153; Bryan v. Hubbs, 69—423; Dougherty v. Logan, 70—558; Murchison v. Williams, 71—135; Halyburton v. Greenlee, 72—316; Rhyne v. McKee, 73—259; Isler v. Colgrove, 75—334; Sharpe v. Williams, 76—87; Manix v. Ihrie, 76—299; King v. Portis, 77—25; Wall v. Fairley, 77—105; Green v. Castleberry, 77—164; Williams v. Green, 80—76; Cannon v. Parker, 81—320; Dixon v. Dixon, 81—323; King v. Portis, 81—382; Pasour v. Rhyne, 82—149; Whitehead v. Latham, 83—232; Lyon v. Russ, 84—588; Morton v. Rippy, 84—611; Fox v. Cline, 85—173; McDonald v. Dickson, 85—248; Cotten v. McClenehan, 85—254; Williams v. Williams, 85—383; Worsley v. Bryan, 86—343; Rollins v. Henry, 86—714; Wilson v. Patten, 87—318; Surratt v. Crawford, 87—372.

Sec. 436. Judgments in supreme court may be docketed in superior court; lien of judgment; when transcript may be obtained. 1881, c. 75, ss. 1, 4.

It shall be the duty of the clerk of the supreme court, on application of the party obtaining judgment in said court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to

certify under his hand and the seal of said court a transcript of said judgment, setting forth the title of said court, the names of the parties thereto, the relief granted, that said judgment was so rendered by said court, the amount and date of said judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerks of the superior court of such counties as he may be directed; and the clerk of the superior court receiving the said certificate and transcript shall docket the same in like manner as judgment rolls of the superior court may be docketed. And when so docketed, the lien of said judgment shall be the same in all respects, be subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same may be applicable. The party desiring the certificate and transcript provided for in this section, may obtain the same at any time after such judgment has been rendered, unless the supreme court shall otherwise direct.

TITLE XI.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

Chap. I. THE EXECUTION.
II. DEFENDANT'S CLAIM FOR IMPROVEMENTS BEFORE EXECUTION.
III. PROCEEDINGS SUPPLEMENTARY TO EXECUTION.
IV. EXEMPTIONS FROM EXECUTIONS.

CHAPTER ONE.

THE EXECUTION.

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SEC. 437. Execution within three years of course. C. C. P., s. 255.

The party in whose favor judgment has been heretofore or shall hereafter be given, and in case of his death, his per-

sonal representatives duly appointed, may at any time within three years after the entry of judgment, proceed to enforce the same, by execution, as provided in this chapter.

Williams v. Williams, 85—383; Williams v. Mullis, 87—159.

SEC. 438. After judgment party may pay the same, although no execution has been issued. R. C., c. 31, s. 127. 1823, c. 1212, s. 1.

The party against whom any judgment for the payment of money may be rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same may have been rendered, at any time thereafter, although no execution may have issued on such judgment; and such payment of money shall be good and available to the party making the same, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county, to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court, and file the original with the judgment roll in the action.

Purvis v. Jackson, 69—474; Bynum v. Barefoot, 75—576.

SEC. 439. Clerk to pay the money to the party entitled. R. C., c. 31, s. 128. 1823, c. 1212, s. 2.

The clerk, to whom money shall be paid as aforesaid, shall pay the same to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution.

Blackburn v. Brooks, 65—413.

SEC. 440. After three years, to be issued only by leave of court; leave, how obtained. C. C. P., s. 256.

After the lapse of three years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service, in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or by other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the

judgment within the three years next preceding the suing for execution, and return thereof unsatisfied in whole or in part.

McAden v. Banister, 63—478; McDowell v. Ashbury, 66—444; Phillips v. Trezevant, 70—176; Aycock v. Harrison, 71—432; Isler v. Murphy, 71—436; Baldwin v. York, 71—463; Blum v. Ellis, 73—293; Moore v. R. R. Co., 74—528: McKethan v. McNeill, 74—663; Dawson v. Hartsfield, 79—334; Withers v. Stinson, 79—341; Bell v. Cunningham, 81—83; Broyles v. Young, 81—315; Latham v. Dixon, 82—55; Lee v. Eure, 82—428; Sanderson v. Daily, 83—67; Rush v. Steamboat Co., 84—703; McDonald v. Dickson, 85—248; Williams v. Williams, 85—383; Williams v. Mullis, 87—159; Surratt v. Crawford, 87—372; Johnston v. Jones, 87—393; Daniel v. Laughlin, 87—433.

Sec. 441. Judgments, how enforced. C. C. P., s. 257.

Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or office who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for contempt.

Sec. 442. The different kinds of execution. C. C. P., s. 258.

There shall be three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court.

Finley v. Smith, 4 Dev., 95; Bryan v. Hubbs, 69—423; Houston v. Walsh, 79—35.

Sec. 443. To what counties execution may be issued; execution against a married woman. C. C. P., s. 259.

When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

Rollins v. Henry, 78—342; Mebane v. Mebane, 80—34; Kidder v. McIlhenny, 81—123; Pasour v. Rhyne, 82—149.

SEC. 444. Executions to issue from the court in which the judgment was rendered, and return made to the same court. 1871-'2, c. 74, s. 1. 1881, c. 75.

The executions provided in this chapter, and other process for the enforcement of such judgments, shall issue only from the court in which the judgment for the enforcement of such execution, other final process, or any of them may issue, was rendered; and such executions or other final process against the property of the defendant or defendants, or any one or more of them, may be issued under the seal of the court to any county in which such last mentioned judgment may be docketed; and such executions or other final process may issue to two or more counties at the same time as now provided by law, and executions against the person or persons of the defendant or defendants, or any of them, may issue to any one, or more counties; and the returns of all such executions or other final process shall be made to the court of the county from which the same issued.

SEC. 445. Returns on executions to be noted on judgment docket, and in certain cases clerk to send copies. 1871-'2, c. 74, s. 2. 1881, c. 75.

When any such execution shall be returned as herein provided, the return of the sheriff or other officer shall be noted by the clerk on the judgment docket; and when the same shall be returned satisfied, or partially satisfied, it shall be the duty of the clerk of the court to which the same is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, whose duty it shall be to note such copy in his judgment docket, opposite said judgment, and to file said copy with

the transcript of the docket of said judgment in his office. Any clerk failing to send a copy of the payments on said execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and any clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars *nisi* for said failure, and said conditional judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county.

Sec. 446. Notice of judgment nisi, how given. 1871-'2, c. 74, s. 4.

In all cases where any sheriff, or other officer, shall be amerced for failure to make due return of any execution, or other process placed in his hands, or for any default whatsoever in office, and judgment *nisi* or otherwise, for the penalty of forfeiture in such case made and provided, shall be entered, it shall be sufficient to give such sheriff notice, according to law, under the hand of the clerk and seal of the court, where such judgment may be entered, of a motion for a judgment absolute, or for execution as the case may be, and no other notice, summons or suit shall be necessary to enforce the same; and such proceedings shall be deemed and held in aid of a suit or other proceedings already instituted in court.

Franks v. Sutton, 86—78.

Sec. 447. Execution against the person, in what cases. C. C. P., s. 260.

If the action be one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the state, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in title nine, sub-chapter one of this chapter, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section two hundred and ninety-one.

McAden v. Banister, 63—478; Claflin v. Underwood, 75—485; Houston v. Walsh, 79—35; Peebles v. Foote, 83—102.

Sec. 448. Form of execution. C. C. P., s. 261. 1868-'9, c. 148, s. 1. 1870-'1, c. 42, s. 7.

The execution must be directed to the sheriff, or cor-

oner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment-roll of transcript is filed, the names of the parties, the amount of the judgment, if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Peebles v. Pate, 86—437; Barnes v. Hyatt, 87—315.

AGAINST PROPERTY—NO LIEN ON PERSONAL PROPERTY UNTIL LEVY.

(1) If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor shall be a lien on the personal property of such debtor, as against any *bona fide* purchaser from him for value, or as against any other execution, except from the levy thereof.

Harris v. Ricks, 63—653; Phillips v. Trezevant, 70—176; Grant v. Hughes, 82—216; Peebles v. Pate, 86—437; Barnes v. Hyatt, 87—315.

AGAINST PROPERTY IN HANDS OF PERSONAL REPRESENTATIVE.

(2) If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees, it shall require the officer to satisfy the judgment out of such property.

Grant v. Newsom, 81—36; Kidder v. McIlhenny, 81—123.

AGAINST THE PERSON.

(3) If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment or be discharged according to law.

FOR DELIVERY OF SPECIFIC PROPERTY.

(4) If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

Johnson v. Nevill, 65—677; Grier v. Rhyne, 69—346; Whissenhunt v. Jones, 78—361; Clark v. Wagner, 78—367.

Sec. 449. Executions tested as of preceding term, and returnable to the next succeding term. 1870-'1, c. 42, s. 7; 1873-'4, c. 7, s. 668.

All executions issued under this chapter shall be tested as of the term next before the day on which they were issued, and shall be returable to the term of the court next after that from which they bear teste, and no execution against property shall issue until the end of the term during which the judgment was rendered.

Person v. Newsom, 87—142.

Sec. 450. What may be sold under execution. R. C., c. 45, ss. 1, 3, 4, 5. 5 Geo. II., c. 7, s. 4. 1777, c. 115, s. 29. 1812, c. 830, ss. 1, 2. 1822, c. 1172.

The property, estate and effects of the judgment debtor, not exempted from sale under the constitution and laws of this state, may be levied on and sold under execution as hereinafter prescribed:

(1) The goods, chattels, houses, lands, tenements and other hereditaments, and real estate belonging to him.

Perkins v. Bullinger, 1 Hay., 442 (368); Allemong v. Allison, 1 Hawks, 325; Gilkey v. Dickerson, 2 Hawks, 341; Brasfield v. Whitaker, 4 Hawks, 309; Yarborough v. Bank, 2 Dev., 23; Palmer v. Clarke, 2 Dev., 354; Arrington v. Sledge, 2 Dev., 3; Hoke v. Henderson, 3 Dev., 12; Hardy v. Jasper, 3 Dev., 158; Ricks v. Blount, 4 Dev., 128; Wood v. Harrison, 1 D. & B., 365; Poppleston v. Skinner, 4 D. & B., 156; Jones v. Judkins, 4 D. & B., 454; Finley v. Smith, 2 Ired., 225; Spencer v. Hawkins, 4 Ired.

Eq., 288; Mangum v. Hamlet, 8 Ired., 44; Williamson v. James, 10 Ired., 162; Brazier v. Thomas, Busb., 28; Campbell v. Smith, 1 Jon. Eq., 156; Jimmerson v. Duncan, 3 Jon., 537; Williams v. Council, 4 Jon., 206; Morris v. Rippy, 4 Jon., 533; Nixon v. Harrell, 5 Jon., 76; Woodley v. Gilliam, 67—237; Thompson v. Peebles, 85—418; Worsley v. Bryan, 86—343; Peebles v. Pate, 86—437; Beckwith v. Mining Co., 87—155; Sheppard v. Bland, 87—163.

(2) All leasehold estates of three years' duration or more, owned by him;

(3) The equity of redemption, and legal right of redemption, in lands, tenements, rents or other hereditaments, pledged or mortgaged by him;

Camp v. Coxe, 1 D. & B., 52; Davis v. Evans, 5 Ired., 525; McRary v. Fries, 4 Jon. Eq., 233; McKeithan v. Walker, 66—95; Hutchison v. Symons, 67—156; Hinsdale v. Thornton, 75—381; Joyner v. Farmer, 78—196; Rollins v. Henry, 86—714.

(4) Any lands, tenements, rents and hereditaments, or any goods and chattels, of which any person shall be seized or possessed in trust for him.

Brown v. Graves, 4 Hawks, 342; Harrison v. Battle, 1 Dev. Eq., 537; Mordecai v. Parker, 3 Dev., 425; Gillis v. McKay, 4 Dev., 172; Cloud v. Martin, 1 D. & B., 397; Burgin v. Burgin, 1 Ired., 160; Gowing v. Rich, 1 Ired., 553; Davis v. Garrett, 3 Ired., 459; Frost v. Reynolds, 4 Ired. Eq., 494; Barham v. Massey, 5 Ired., 192; McGee v. Hussey, 5 Ired., 255; Battle v. Petway, 5. Ired., 576; Williams v. Williams, 6 Ired. Eq., 20; McLeran v. McKethan, 7 Ired. Eq., 70; Page v. Goodman, 8 Ired. Eq., 16; Badham v. Cox, 11 Ired., 456; Jennings v. Hardin, Busb. Eq., 275; Nelson v. Hughes, 2 Jon. Eq., 33; McKeithan v. Walker, 66—95; Hutchinson v. Symons, 67—156; Hinsdale v. Thornton, 74—167; Tally v. Reed, 74—463; Hinsdale v. Thornton, 75—381.

Sec. 451. On sale of equity of redemption, what sheriff to set forth in deed. R. C., c. 45, s. 5. 1812, c. 830, s. 2. 1822, c. 1172.

The sheriff selling the equity of redemption and legal right of redemption, as set forth in the preceding section, sub-division three, shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property, and sale.

Bruce v. Faucett, 4 Jon., 391.

Sec. 452. Sale of trust estates; purchaser holds the same discharged of trust. R. C., c. 45, s. 4. 1812, c. 830, s. 1.

Upon the sale under execution of the estates mentioned in section four hundred and fifty, sub-division four, the

sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the person so seized, or possessed in trust as aforesaid.

Sec. 453. Execution not to be levied on growing crops. R. C., c. 45, s. 11. 1844, c. 35.

No execution shall be levied on growing crops until the same are matured.

Smith v. Tritt, 1 D. & B., 241; State v. Poor, 4 D. & B., 384; Shannon v. Jones, 12 Ired., 206.

Sec. 454. Sale days under execution, or by order. 1876-'7, c. 216, ss. 2, 3. 1883, c. 94, ss. 1, 2.

All real property sold under execution, or by order of court, shall be sold at the court-house door of the county in which the property or some part thereof is situate, on the first Monday in every month, or during the first three days of the term of the superior court of said county, unless in the order directing the sale, some other place and time is designated; and then it shall be sold as directed in such order, on any day except Sunday or holidays, after advertising the same as required by law.

Mordecai v. Speight, 3 Dev., 428; Avery v. Rose, 4 Dev., 549; State v. Rives, 5 Ired., 297; Brooks v. Ratcliffe, 11 Ired., 321; Briggs v. Bickell, 68—239; Wade v. Saunders, 70—270; Hayes v. Hunt, 85—306; Mayers v. Carter, 87—146.

Sec. 455. Sale may be postponed from day to day, but not more than six days. 1868-'9, c. 237, s. 9.

The sheriff or other person making the sale, for the absence of bidders or any other just cause, may postpone the same from day to day, but not for more than six days in all, and upon such postponement he shall post a notice thereof on the court-house door of his county.

Mayers v. Carter, 87—146.

Sec. 456. Sale, how advertised. 1876-'7, c. 216. 1881, c. 278.

No real property shall be sold under execution until notice of said sale shall have been published once a week for four weeks, immediately preceding such sale in a newspaper, if any there be, published in the county where such sale is to be made: *Provided*, that the costs of such publication shall not, in any case, exceed three dollars, to be taxed as other costs in such proceedings or action.

If no newspaper be published in a county wherein

the sale is to take place, then, in lieu of such publication, notice of such sale shall be posted for thirty days at the door of the court house of the county in which the sale is to take place, and at three other public places in such county.

Sec. 457. Notice of sale to be served on defendant, and in certain cases on the governor. 1868-'9, c. 237, s. 11. 1876-'7, c. 224, s. 1.

In addition to the advertisement above required, the sheriff shall in every case, at least ten days before a sale of real property under execution, serve a copy of so much of the advertisement as relates to the real property of any defendant on him personally, if he be found in the county, or on his agent if he have a known agent therein, or if he cannot be found within the county, and has no known agent therein, but his address be known, by mail to such address; and the date of service shall be ascertained by the usual course of the mail from the place where sent to the place of its address: *Provided*, that in case of the sale under execution, or under the order of any court, of any property, real or personal, in which the state shall be interested as a stockholder or otherwise, notice in writing shall be served upon the governor and attorney general, at least thirty days before the sale, of the said time and place of sale, and under what process the sale is made, otherwise said sale shall be invalid.

Sec. 458. All private acts allowing land to be sold repealed. 1868-'9, c. 237, s. 12.

All private acts, by which lands in particular counties are required or allowed to be sold at places, or at times, other than those hereinafter prescribed, are hereby repealed.

Sec. 459. Time of commencing sale. R. C., c. 45, s. 17. 1794, c. 41, s. 1.

No sale under an execution or decree shall commence before ten o'clock in the morning, or after four o'clock in the evening, of the day on which the sale is to be made.

Sec. 460. Sale of personal property under execution, when and where advertised. R. C., c. 45, s. 16. 1808, c. 753, s. 2. 1820, c. 1066, s. 1.

No sale of personal property under execution shall be made until the same has been advertised for ten days at the door of the court house of the county in which the

same is to be sold, and at three other public places in said county, and the advertisement shall designate the place and the time of said sale.

SEC. 461. Penalty for selling contrary to law. R. C., c. 45, s. 18. 1820, c. 1566, s. 2. 1822, c. 1153, s. 3.

Any sheriff or other officer, who shall make any sale contrary to the true intent and meaning of this subchapter, shall forfeit and pay two hundred dollars to any person suing for the same, one-half for his own use and the other half to the use of the county where the offence is committed.

McKee v. Lincberger, 69—217.

SEC. 462. No sale for want of bidders, what officer shall state; penalty. R. C., c. 45, s. 19. 1815, c. 887, s. 1.

Whenever a sheriff or other officer shall return upon any execution, that he has made no sale for want of bidders, he shall state in his return the several places at which he has advertised the sale of the property levied on, and the places at which he hath offered the same for sale; and any officer failing to make such specification, shall on motion be subject to a fine of forty dollars; and every constable, for a like omission of duty, shall be subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which the execution shall be returned; or, in the case of a justice's execution, by any justice to whom the execution shall be returned: *Provided*, that nothing in this section, nor any recovery under the same, shall be a bar to any action for a false return against the sheriff or other officer.

SEC. 463. Forthcoming bond may be taken for personal property. R. C., c. 45, s. 21. 1807, c. 731, s. 3. 1828, c. 12, s. 2.

If any sheriff or other officer, who may have levied an execution or other process upon personal property, shall permit the same to remain with the possessor, such officer may take a bond for the forthcoming thereof to answer the said execution or process, which bond shall be attested by a credible witness; but the officer shall nevertheless, in all respects, remain liable as heretofore to the plaintiff's claim.

Foster v. Frost, 4 Dev., 424; Gray v. Bowles, 1 D. & B., 437; Poteet v. Bryson, 7 Ired., 337; Grady v. Threadgill, 13 Ired., 228.

Sec. 464. Surety to be furnished with a list of the property. R. C., c. 45, s. 22. 1844, c. 34. 1846, c. 50.

When such bond shall be taken, the officer shall specify therein the property levied upon, and shall furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale; and the property so levied upon shall be deemed in the custody of the surety, as the bailee of the officer: and all other executions thereafter levied on said property shall create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of said property; but the officer thereafter levying shall not take the property out of the custody of the surety: *Provided*, that in all such cases, sales of chattels shall take place within thirty days after the first levy; and, if sale shall not be made within the time aforesaid, any other officer who may have levied upon the property, may seize and sell the same.

Sec. 465. Officer, how to proceed on bond, if condition broken. R. C., c. 45, s. 23. 1822, c. 1141, s. 1.

If the condition of such bond be broken, the sheriff or other officer, on giving ten days' previous notice, in writing, to any obligor therein, may, on motion, have judgment against him in a summary manner, before the superior court, or before a justice of the peace, as the case may be, of the county in which such officer may reside, for all such damages as said officer may have sustained, or be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice.

Sec. 466. Officer allowed pay for keeping horses, &c. R. C., c. 45, s. 25. 1807, c. 731, s. 1.

The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property, the keeping of which may be chargeable to them, taken into their custody under legal process; and such allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold.

Sec. 467. Officer to make out his account and file it with execution. R. C., c. 45, s. 26. 1807, c. 731, s. 2.

Every such officer shall make out his account, and if required shall give the debtor or his agent a copy thereof, signed by his own hand, and shall return the account with the execution or other process, under which the property has been seized or sold, to the justice or the court to whom the execution or process is returnable, and shall swear to the correctness of the several items therein set forth; otherwise he shall not be permitted to retain the same.

Sec. 468. Purchaser at execution sale may recover of defendant in the execution, when the title to property sold is defective. R. C., c. 45, s. 27. 1807, c. 723.

Where property, real or personal, shall be sold on any execution or decree, by any officer authorized to make the sale, and the sale is legally and in good faith made, and such property be not the property of the person against whose estate such execution or decree may have issued, by reason of which the purchaser may have been deprived of the same property, or may have been compelled to pay damages in lieu thereof to the owner; in every such case the purchaser, his executors or administrators, may sue the person against whom such execution or decree may have issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment: *Provided*, that such property, if the same is personal property, be present at the sale, and actually delivered to the purchaser.

Haleombe v. Loudermilk, 3 Jon., 491; Laws v. Thompson, 4 Jon., 104; Brown v. Smith, 8 Jon., 331; McDougald v. McLean, 1 Winst., 120; Pemberton v. McRae, 75—497; Wall v. Fairley, 77—105; Holliday v. McMillan, 83—270.

Sec. 469. Defendant dying in execution, debt not discharged; new execution against the property. R. C., c. 45, s. 2. 21 James 1, c. 24, s. 223.

Parties, at whose suit the body of any person shall be taken in execution for any judgment recovered, their executors or administrators may, after the death of the person so taken and dying in execution, have new execution against the property of the person deceased, as they might have had if such person had never been in execution.

Sec. 470. Clerks to issue executions within six weeks; penalty of one hundred dollars for failure. R. C., c. 45, s. 29. 1850, c. 17, ss. 1, 2, 3.

The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff therein, within six weeks of the rendition of the judgment, and shall indorse upon the record the date of such issue; and if the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks shall issue *alias* executions, within six weeks thereafter, unless otherwise instructed as aforesaid. And every clerk who shall fail to comply with the requirements of this section, shall be liable to be amerced in the sum of one hundred dollars, for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and shall be further liable to the party injured by suit upon his bond.

Bank v. Stafford, 2 Jon., 98; State v. McLeod, 5 Jon., 318; Simpson v. Simpson, 63—534; Badham v. Jones, 64—655; *ex parte* Schenck, 65—353; McKee v. Lineberger, 69—217.

Sec. 471. Officer to prepare deeds for property sold. R. C., c. 45, s. 30. 1848, c. 39.

Sheriffs or other officers, selling lands by authority of any execution or process, shall, upon payment of the price, prepare, execute and deliver to the purchaser a deed for the property purchased: *Provided*, that the purchaser of land shall furnish the officer with a description of the land.

Patrick v. Carr, Winst. Eq., 87; Skinner v. Warren, 81—373; Fox v. Cline, 85—173.

Sec. 472. Costs on execution satisfied in part or in whole to be paid to clerk; penalty forty dollars for failure. R. S., c. 76, s. 5. 1822, c. 1149, s. 1.

The sheriff or other officer shall pay the costs on all executions which shall be satisfied in whole or in part, to the clerk of the court from which the execution issued, and to no other person, on the second day of the term of the court; and any such officer making default herein shall forfeit and pay forty dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs.

CHAPTER TWO.

DEFENDANT'S CLAIM FOR IMPROVEMENT BEFORE ISSUING EXECUTION.

SECTION.
473. Petition to be filed by claimant; execution suspended; jury to assess damages and allowance.
474. Jury to estimate the annual value of land.
475. Defendant not liable for more than three years, unless he claims improvements.
476. Value of defendant's improvements to be estimated.
477. Improvements to balance rents.
478. Jury to find a verdict for the balance for plaintiff or defendant.
479. Balance due defendant to constitute a lien until paid.
480. Plaintiff claiming a less estate, and paying defendant allowance, may recover out of remainderman.
SECTION.
481. Does not apply to action brought by mortgagee.
482. Defendant claiming allowance, plaintiff may have his estate valued without improvement.
483. Value of premises, how made.
484. Plaintiff may elect to let defendant take premises at valuation.
485. Payments to be made in court; land bound; if payments not made, land sold.
486. When plaintiff is a *feme covert* minor or insane, what is to be done with proceeds.
487. When defendant evicted by force of a better title, he or his representatives may recover from plaintiff.

Sec. 473. Petition to be filed by claimant; execution suspended; jury to assess damages and allowance. 1871-'2, c. 147, s. 1.

Any defendant against whom a judgment shall be rendered for land, may, at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he, or those under whom he claims, while holding the premises under a color of title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements: *Provided,*

that in any such action, such inquiry and assessment may be made upon the trial of the cause.

Pope v. Whitehead, 63—191; Daniel v. Crumpler, 75—184; Merritt v. Scott, 81—385; Reed v. Exum, 84—430; Wharton v. Moore, 84—479; Scott v. Battle, 85—184.

Sec. 474. Jury to estimate the annual value of land. 1871-'2, c. 147, s. 2.

The jury in assessing such damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession thereof, exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims, and also the damages for waste, or other injury, to the premises committed by the defendant.

Wetherell v. Gorman, 74—603.

Sec. 475. Defendant not liable for more than three years, unless he claims improvements. 1871-'2, c. 147, s. 3.

The defendant shall not be liable for such annual value for any longer time than three years before the suit, or for damages for any such waste or other injury done before said three years, unless when he claims for improvements as aforesaid.

Sec. 476. Value of defendant's improvements to be estimated. 1871-'2, c. 147, s. 4.

If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the said premises, permanent and valuable improvements, they shall estimate in his favor, the value of such improvements as were so made before notice, in writing of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment.

Daniel v. Crumpler, 75—184.

Sec. 477. Improvements to balance rents. 1871-'2, c. 147, s. 5.

If the sum estimated for the improvements exceed the damages estimated by the jury against the defendant as aforesaid, they shall then estimate against him for any time before the said three years, the rents and profits accrued against, or damages for waste or other injury done

by him, or those under whom he claims, so far as may be necessary to balance his claim for improvements; but in such case he shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements.

Sec. 478. Jury to find a verdict for the balance, for plaintiff or defendant. 1871-'2, c. 147, s. 6.

After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for the improvements, if any, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict.

Sec. 479. Balance due defendant to constitute a lien until paid. 1871-'2, c. 147, s. 7.

Any such balance due to the defendant shall constitute a lien upon the land recovered by the plaintiff until the same shall be paid.

Sec. 480. Plaintiff claiming a less estate, and paying defendant allowance, may recover out of remainderman. 1871-'2, c. 147, s. 8.

If the plaintiff claim only an estate for life in the land recovered and pay any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and shall have a lien therefor on the premises in like manner as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it be paid.

Sec. 481. Does not apply to action brought by mortgagee. 1871-'2, c. 147, s. 9.

Nothing herein shall extend or apply to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises.

Wharton v. Moore, 84—479.

Sec. 482. Defendant claiming allowance, plaintiff may have his estate valued without improvement. 1871-'2, c. 147, s. 10.

When the defendant shall claim allowance for improvements, the plaintiff may by entry on the record require

that the value of his estate in the premises without the improvements shall also be ascertained.

Sec. 483. Value of premises, how made. 1871-'2, c. 147, s. 11.

The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made on the premises by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided, for estimating the value of improvements.

Sec. 484. Plaintiff may elect to let defendant take premises at valuation. 1871-'2, c. 147, s. 12.

The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit: *Provided*, he pay therefor the said value with interest in the manner in which the court may order it to be paid.

Sec. 485. Payments to be made in court; land bound; if payments not made, land sold. 1871-'2, c. 147, s. 13.

The payments shall be made to the plaintiff, or into court for his use, and the land shall be bound therefor, and if the defendant fail to make the said payments within or at the times limited therefor respectively, the court may order the land to be sold and the proceeds applied to the payment of said value and interest, and the surplus, if any, to be paid to the defendant; but if the said net proceeds be insufficient to satisfy the said value and interest, the defendant shall not be bound for the deficiency.

Sec. 486. When plaintiff is a feme covert, minor or insane, what is to be done with proceeds. 1871-'2, c. 147, s. 14.

If the party by or for whom the land is claimed in the suit be a *feme covert*, minor, or insane, such value shall be deemed to be real estate, and be disposed of as the court may consider proper for the benefit of the persons interested therein.

Sec. 487. When defendant evicted by force of a better title, he or his representatives may recover from plaintiff. 1871-'2, c. 147, s. 15.

If the defendant, his heirs or assigns shall, after the premises are so relinquished to him, be evicted thereof by force of any better title than that of the original plaintiff, the person so evicted may recover from such plaintiff or his representatives, the amount so paid for the premises, as so much money had and received by such plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of such payment.

CHAPTER THREE.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

SECTION.

488. (1) Execution returned unsatisfied, order to answer concerning his property.
(2) Execution issued, not returned, order to issue upon affidavit.
(3) Either party to examine witness.
(4) Debtor leaving the state, or concealing himself, upon affidavit of plaintiff that he has property which he refuses to apply, may be arrested and ordered to give undertaking.
(5) No person to be excused from answering because it may criminate him, nor because he has executed a conveyance, but his answer not to be used against him in any criminal prosecution.
(6) Court or judge may forbid transfer of property.

489. Execution issued, any debtor of judgment debtor may pay to sheriff.

SECTION.

490. Execution issued and returned, upon affidavit, order to issue to any person having property of judgment debtor or to any person indebted to him over ten dollars, to appear and answer; proceedings against joint debtors.

491. Witness required to testify as on trial of an issue.

492. Party or witness to appear before referee and compelled to answer under oath; examination certified to court or judge; corporations to answer by an officer.

493. Property of debtor not exempt from execution to be applied to payment of judgment; exception.

494. Judge to appoint receiver; transfer of property forbidden; other creditors having instituted supplementary proceedings to be notified; no

SECTION.
more than one receiver appointed.
495. Clerk of superior court to file order, record it, provide receiver with a copy; receiver to be vested with property; receiver subject to control of judge.
496. Order to be filed in the office of what clerk, before vested with real property.
497. Property claimed by a third party, or debt denied, receiver to bring action, and in meantime transfer or payment forbidden.
498. Judge may order a reference, to report the evidence or facts.
499. Costs to be allowed.
500. Disobedience to order; punishment.

Sec. 488. Execution returned unsatisfied, order to answer concerning his property. C. C. P., s. 264. 1868-'9, c. 95, s. 2.

(1) When an execution against property of the judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he do not reside in the state, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned unsatisfied, in whole or in part, the judgment creditor, at any time after such return made, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned, or from the judge thereof, requiring such debtor to appear and answer concerning his property, before such court or judge, at a time and place specified in the order, within the county to which the execution was issued.

Hogan v. Kirkland, 64—250; Parks v Sprinkle, 64—637; Walston v. Bryan, 64—764; McKeithan v. Walker, 66—95; Hutchison v. Symons, 67—156; Woody v. Jordan, 69—189; Rankin v. Minor, 72—424; Whitehead v. Hellen, 74—679; Hasty v. Simpson, 77—69; Blake v. Respass, 77—193; Rand v. Rand, 78—12; La Fountaine v. Southern Underwriters, 79—514; Runion v. Ramsay, 80—60; Weiller v. Lawrence, 81—65; La Fountaine v. Southern Underwriters, 83—132; Hinsdale v. Sinclair, 83—338; Bronson v. Ins. Co., 85—411.

EXECUTION ISSUED, NOT RETURNED, ORDER TO ISSUE UPON AFFIDAVIT.

(2) After the issuing of an execution against property, and upon proof by affidavit, of a party, his agent or attorney, to the satisfaction of the court, or a judge thereof, that any judgment debtor residing in the

judicial district where such judge or officer resides, has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution, and the judgment creditor shall be entitled to the order of examination under this sub-division, and under sub-division one of this section, although the judgment debtor may have an equitable estate in land subject to the lien of the judgment, or may have choses in action, or other things of value unaffected by the lien of the judgment, and incapable of levy.

Howey v. Miller, 67—459; Bronson v. Insurance Co., 85—411 Young v. Rollins, 85—485.

EITHER PARTY TO EXAMINE WITNESSES.

(3) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness.

La Fountain v. Southern Underwriters, 83—132; Bronson v. Insurance Co., 85—411.

DEBTOR LEAVING THE STATE, OR CONCEALING HIMSELF, UPON AFFIDAVIT OF PLAINTIFF, THAT HE HAS PROPERTY WHICH HE REFUSES TO APPLY, MAY BE ARRESTED AND ORDERED TO GIVE UNDERTAKING.

1868-'9, c. 148, s. 4. 1868-'9, c. 277.

(4) Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor leaving the state, or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such court or judge. Upon being brought before the court or judge, he may be examined on oath, and, if it then appears that there is danger of

the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for a contempt.

Bronson v. Ins. Co., 85—411.

NO PERSON TO BE EXCUSED FROM ANSWERING BECAUSE IT MAY CRIMINATE HIM, NOR BECAUSE HE HAS EXECUTED A CONVEYANCE, BUT ANSWER NOT TO BE USED AGAINST HIM IN ANY CRIMINAL PROSECUTION.

(5) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. Nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution.

La Fountain v. Southern Underwriters, 83—132.

COURT OR JUDGE MAY FORBID TRANSFER OF PROPERTY.

(6) The court or judge may, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, or any interference therewith.

Biggs *ex parte*, 64—202; Hogan v. Kirkland, 64—250; Parks v. Sprinkle, 64—637; Walston v. Bryan, 64—764; Howey v. Miller, 67—459; Phillips v. Trezevant, 70—176; Perry v. Bank, 70—309; Righton v. Pruden, 73—61; La Fountain v. Southern Underwriters, 79—514; Idem., 83—132; Bronson v. Insurance Co., 85—411.

Sec. 489. Execution issued, any debtor of judgment debtor may pay to sheriff. C. C. P., s. 265.

After the issuing of execution against property, all

persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

Clerk's office v. Allen, 7 Jon., 156; Parks v. Sprinkle, 64—637; Clerk's office v. Bank, 66—214; Howey v. Miller, 67—459; Phillips v. Trezevant, 70—176; Righton v. Pruden, 73—61; Weiller v. Lawrence, 81—65; Smith v. McMillan, 84—593; Bronson v. Ins. Co., 85—411.

Sec. 490. Execution issued and returned, upon affidavit, order to issue to any person having property of judgment debtor or to any person indebted to him over ten dollars to appear and answer; proceedings against joint debtors. C. C. P., s. 266. 1869-'70, c. 79, s. 2.

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by an order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him or it proper.

The proceedings mentioned in this section and in section four hundred and eighty-eight may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in the like manner and to the like effect. These provisions shall apply to all proceedings and actions pending and to those terminated by final decree or judgment.

Parks v. Sprinkle, 64—637; McKeithan v. Wulker, 66—95; Sutton v. Askew, 66—172; Hutchison v. Symons, 67—156; Howey v. Miller, 67—459; Keener v. Finger, 70—35; Phillips v. Trezevant, 70—176; Perry v. Bank, 70—309; Righton v. Pruden, 73—61; Blake v. Respass, 77—193; Rand v. Rand, 78—12; La Fountain v. Southern Underwriters 79—514; Weiller v. Lawrence, 81—65; *In re.* Davis, 81—72; Bronson v. Ins. Co., 85—411.

Sec. 491. Witness required to testify as on trial of an issue. C. C. P., s. 267.

Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

Bronson v. Insurance Co., 85—411

Sec. 492. Party or witness to appear before referee, and compelled to answer under oath; examination certified to court or judge; corporations to answer by an officer. C. C. P., s. 268. 1870-'1, c. 245, s. 1.

The party or witness may be required to attend before the court or judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof.

Clerk's office v. Bank, 66—214; Hasty v. Simpson, 77—69; La Fountain v. Southern Underwriters, 83—132; Bronson v. Ins. Co., 85—411.

Sec. 493. Property of debtor not exempt from execution to be applied to payment of judgment; exception. C. C. P., s. 269. 1870-'1, c. 245, s. 1.

The court or judge may order any property, whether subject or not to be sold under execution, (except the homestead and personal property exemptions of the judgment debtor,) in the hands either of himself or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or in part by his labor.

Clerk's office v. Allen, 7 Jon., 156; Clerk's office v. Bank, 66—214; Rand v. Rand, 78—12; Bronson v. Ins. Co., 85—411.

Sec. 494. Judge to appoint receiver; transfer of property forbidden; other creditors having instituted supplementary proceedings to be notified; no more than one receiver appointed. C. C. P., s. 270. 1870-'1, c. 245, s. 1. 1876-'7, c. 223. 1879, c. 63. 1881, c. 51.

The court or judge having jurisdiction over the appointment of receivers may also by order in like manner,

and with like authority, appoint a receiver in proceedings under this chapter, of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of such receiver, the court or judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The court or judge may also, forbid a transfer or other disposition of the property of the judgment debtor not exempt from execution, as homestead or personal property exemptions, and any interference therewith. The title of the receiver shall relate back to the service of the restraining order, hereinbefore and hereinafter provided for.

Parks v. Sprinkle, 64—637; LaFountain v. Southern Underwriters, 79—514; Bronson v. Ins. Co., 85—411.

Sec. 495. Clerk of superior court to file order, record it, provide receiver with a copy; receiver to be vested with property; receiver subject to control of judge. C. C. P., s. 270. 1870-'1, c. 245, s. 1.

Whenever the court or a judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders, appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order shall have been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor shall be subject to the direction and control of the court in

which the judgment was obtained upon which the proceedings are founded.

Rankin v. Minor, 72—424; Righton v. Pruden, 73—61; Rand v. Rand, 78—12; Corbin v. Berry, 83—27; Bronson v. Ins. Co., 85—411.

Sec. 496. Order to be filed in the office of what clerk, before vested with real property. C. C. P., s. 270.

But before the receiver shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the superior court of the county in which such judgment debtor resides.

Bronson v. Ins. Co., 85—411.

Sec. 497. Property claimed by a third party, or debt denied, receiver to bring action, and in meantime transfer or payment forbidden. C. C. P., s. 271. 1870-'71, c. 245, s. 1.

If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution, but such order may be modified or dissolved by the court or judge having jurisdiction, at any time, on such security as he shall direct.

Williams v. Green, 68—183; Bronson v. Ins. Co., 85—411.

Sec. 498. Judge may order a reference, to report the evidence or facts. C. C. P., s. 272.

The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may, in his discretion, appoint such referee in the first order, or at any time.

Hasty v. Simpson, 77—69; Bronson v. Ins. Co., 85—411.

Sec. 499. Costs to be allowed. C. C. P., s. 273.

The court or judge may allow to the judgment creditor,

or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements.

Bronson v. Ins. Co., 85—411.

Sec. 500. Disobedience to order; punishment. C. C. P., s. 274. 1869-'70, c. 79, s. 3.

If any person, party, or witness, disobey an order of the court or judge or referee, duly served, such person, party or witness, may be punished by the judge as for a contempt. And in all cases of commitment under this sub-chapter, the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as may be just.

Parks v. Sprinkle, 64—637; Bond v. Bond, 69—97; Justice v. Bank, 83—8; Etheridge v. Woodley, 83—11; La Fountain v. Southern Underwriters, 83—132; Bronson v. Ins. Co., 85—411.

CHAPTER FOUR.

PROPERTY EXEMPT FROM EXECUTION, AND PROCEEDINGS TO LAY OFF THE SAME.

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Sec. 501. Exemptions from sale under execution in force at the time the debt was contracted, or cause of action arose, are to be set apart. 1879, c. 256, s. 1.

There shall be exempt from sale under execution or other final process issued for the collection of any debt upon all judgments heretofore, or which may be hereafter rendered, such property as the judgment debtor may have been entitled to have set apart and allotted to him at the time the debt was contracted, or cause of action accrued, as follows:

Earle v. Hardie, 80—177; Carlton v. Watts, 82—212; Grant v. Hughes, 82—216; Watkins v. Overley, 83—165; Lamb v. Chamness, 84—379; Dail v. Sugg, 85—104; Leach v. Jones, 86—404.

R. C., c. 45, s. 7. 1848, c. 38, s. 1.

(1) UPON DEBTS CONTRACTED PRIOR TO FEBRUARY TWENTY-FIFTH, ONE THOUSAND EIGHT HUNDRED AND SIXTY-SEVEN.

The wearing apparel, working tools, arms for muster, one wheel and two pairs of cards, one loom, one Bible and testament, one hymn-book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution, and

Henson v. Edwards, 10 Ired., 43; Abrams v. Pender, Busb., 260.

R. C., c. 45, s. 8. 1844, c. 32. 1846, c. 53. 1848, c. 38, s. 8.

In addition to the foregoing articles there shall be, in favor of every housekeeper complying with this chapter, exempt from execution on debts contracted since the first day of July, one thousand eight hundred and forty-five, and prior to February twenty-fifth day, one thousand eight hundred and sixty-seven, the following property,

provided the same shall have been set apart before seizure, to wit: one cow and calf, ten bushels of corn or wheat, fifty pounds of bacon, beef, or pork, or one barrel of fish, all necessary farming tools for one laborer, one bed, bedstead, and covering for every two members of the family, and such other property as the freeholders appointed for that purpose may deem necessary for the comfort and support of such debtor's family; such other property not to exceed in value the sum of fifty dollars at cash valuation: *Provided*, that this section shall not be extended to any person, against whom judgment is obtained and execution awarded for liability incurred for failure or neglect to work on the public roads, or to muster, or pay his poll tax.

Ballard v. Waller, 7 Jon., 84; Massey v. Warren, 7 Jon., 143; Lloyd v. Durham, Winst., 288; Weaver v. Parker, 1 Phil., 479; Carlton v. Watts, 82—212; Grant v. Hughes, 82—216.

1866-'7, c. 61, s. 7. 1879, c. 256, s. 1.

(2) DEBTS CONTRACTED SINCE FEBRUARY TWENTY-FIFTH, ONE THOUSAND EIGHT HUNDRED AND SIXTY SEVEN, AND PRIOR TO APRIL TWENTY-FOURTH, ONE THOUSAND EIGHT HUNDRED AND SIXTY-EIGHT.

The wearing apparel, working tools, arms for muster, one wheel and two pair of cards, one loom, one Bible and testament, one hymn-book, one prayer-book, and all necessary school books, the property of the defendant, shall be exempt from seizure under execution. And the following property of each head of a family or housekeeper shall be exempt from execution except for taxes: All necessary farming and mechanical tools, one work horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, five hundred pounds of pork or bacon, fifty bushels of corn, twenty bushels of wheat or rice, household and kitchen furniture not to exceed in value two hundred dollars, the libraries of licensed attorneys at law, practicing physicians and ministers of the gospel, and the instruments of surgeons and dentists used in their professions: *Provided*, that the value of the personal property exemptions shall not exceed five hundred dollars.

Carlton v. Watts, 82—212; Grant v. Hughes, 82—216.

(3) UPON DEBTS CONTRACTED AND CAUSES OF ACTIONS ACCRUED SINCE APRIL THE TWENTY-FOURTH, ONE THOUSAND EIGHT HUNDRED AND SIXTY-EIGHT, AND PRIOR TO MAY FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SEVEN.

The property, real and personal, as set forth in article ten of the constitution of the state.

Hill v. Kessler, 63—437; McKeithan v. Terry, 64—25; Horton v. McCall, 66—159; Ladd v. Adams, 66—164; Johnson v. Cross, 66—167; Watts v. Leggett, 66—197; Dellinger v. Tweed, 66—206; Burnes v. Harris, 67—140; Martin v. Hughes, 67—293; Barrett v. Richardson, 76—429; Adrian v. Shaw, 82—474; Watkins v. Overby, 83—165; Simpson v. Wallace, 83—447; Lamb v. Chamness, 84—379; Smith v. High, 85—93; Wyche v. Wyche, 85—96; Fox v. Cline, 85—173; McDonald v. Dickson, 85—248; Cotton v. McClenahan, 85—254; Grant v. Edwards, 86—513; Gill v. Edwards, 87—76; Murchison v. Plyler, 87—79; Cummings v. Bloodworth, 87—83; Burton v. Spiers, 87—87; Wilson v. Patten, 87—318; Butler v. Stainback, 87—216.

1876-'7, c. 253, s. 1.

(4) UPON DEBTS CONTRACTED OR CAUSES OF ACTION ACCRUING SINCE MAY FIRST, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-SEVEN.

The property, real and personal, specified in sub-division three of this section, and the homestead of any resident of this state shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, except such as may be rendered or issued to secure the payment of obligations contracted for the purchase of the said real estate, or for laborers' or mechanics' liens, for work done and performed for the claimant of said homestead, or for lawful taxes.

Whitaker v. Elliott, 73—186; Brodie v. Batchelor, 75—51; Bank v. Green, 78—247; Gamble v. Watterson, 83—573; Smith v. High, 85—93; McDonald v. Dickson, 85—248; Gregory v. Ellis, 86—579; Cummings v. Bloodworth, 87—83; Wharton vs. Taylor, to appear in 88 N. C. R.

Sec. 502. Sheriff to summon appraisers. 1868-'9, c. 137, s. 2.

Before levying upon the real estate of any resident of this state, who is entitled to a homestead under this chapter, and the constitution of this state, article ten, the sheriff or other officer charged with such levy, shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest, near or remote, in the homestead exemption of C. D., and that I will faithfully perform the

duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God."

Lute v. Reilly, 65—20; Coble v. Thom., 72—121; Whitaker v. Elliott, 73—186; Chambers v. Penland, 74—340; Lambert v. Kinnery, 74—348; Littlejohn v. Egerton, 77—379; Grant v. Edwards, 86—513; Burton v. Spiers, 87—87.

Sec. 503. Duty of appraisers. 1868-'9, c. 137, s. 3.

The said appraisers shall thereupon proceed to value the homestead, with its dwelling and buildings thereon, and lay off to said owner such portion as he may select, or to any agent, attorney, or other person in his behalf, not exceeding in value one thousand dollars, and to fix and describe the same by metes and bounds.

Lambert v. Kinnery, 74—348; Hoskins v. Wall, 77—249; Littlejohn v. Egerton, 77—379.

Sec. 504. Appraisers to make return. 1868-'9, c. 137, s. 4.

They shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county, and in all judicial proceedings the original return or a certified copy thereof may be read in evidence.

Burton v. Spiers, 87—87.

Sec. 505. Levy to be made on the excess. 1868-'9, c. 137, s. 5.

The levy may be made upon the excess of the homestead, not laid off according this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors, (as the case may be,) who set off to X. Y., the homestead exempt by law. Levy made upon the excess."

Scott v. Walton, 67—109; Andrews v. Pritchett, 72—135; Edwards v. Kearsey, 74—241; Lambert v. Kinnery, 74—348; Waters v. Stubbs, 75—28; Brodie v. Batchelor, 75—51; Burton v. Spiers, 87—87.

Sec. 506. No election; appraisers to elect. 1868-'9, c. 137, s. 6.

In case no election is made by the owner, his agent, attorney, or any one acting in his behalf, of the homestead, to be laid off as exempt, the appraisers shall make such election for him, including always the dwelling and buildings used therewith.

Burton v. Spiers, 87—87.

Sec. 507. Personal property, how appraised; how return to be made. 1868-'9, c. 137, ss. 12, 13.

Whenever the personal property of any resident of this state shall be levied upon by virtue of any execution or other final process issued for the collection of any debt, and the owner or any agent, or attorney in his behalf, shall demand that the same, or any part thereof, shall be exempt from sale under such execution, the sheriff or other officer making such levy, shall summon three appraisers, as heretofore provided, who having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he, or another in his behalf, may select, and to which he may be entitled under this chapter and the constitution of the state, in no case to exceed in value five hundred dollars, which articles shall be exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption.

Dellinger v. Tweed, 66—206; Duval v. Rollins, 68—220; Frost v. Naylor, 68—325; Smith v. Hunt, 68—482; State v. Carr, 71—106; Duvall v. Rollins, 71—218; Curlee v. Thomas, 74—51; Com'rs v. Riley, 75—144; Carlton v. Watts, 82—212; Grant v. Hughes, 82—216.

Sec. 508. Appraisers to take an oath; fees of. 1868-'9, c. 137, s. 14.

The persons summoned to appraise the personal property exemption shall take the same oath and be entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers shall lay off both and be entitled to but one fee.

Sec. 509. Tracts not contiguous may be included in homestead. 1868-'9, c. 137, s. 15.

Different tracts or parcels of land not contiguous may be included in the same homestead, when a homestead of contiguous lands is not of the value of one thousand dollars.

Martin v. Hughes, 67—293; Mayho v. Cotten, 69—289.

Sec. 510. Costs, how taxed and by whom paid. 1868-'9, c. 137, s. 16.

The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead.

Sec. 511. Homestead and personal property exemption may be set off upon petition. 1868-'9, c. 137, s. 7.

Whenever any resident of this state may desire to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the constitution of this state, or by this chapter, such resident, his agent or attorney, shall apply to any justice of the peace of the county in which he resides, and said justice of the peace shall appoint as assessors, three disinterested persons, qualified to act as jurors residing in said county, who shall, on notice by order of said justice, meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Lute v. Reilly, 65—20; Taylor v. Rhyne, 65—530; Vannoy v. Haymore, 71—128; McAfee v, Bettis, 72—28; Bruce v. Strickland, 81—267: Murchison v. Phyler, 87—79; Burton v. Spiers, 87—87.

Sec. 512. Assessors to set apart personal property, and return the same to register of deeds. 1868-'9, c. 137, s. 8.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he may be entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make and sign a descriptive list thereof, and return the same to the register of deeds.

Sec. 513. Register to indorse on return the date, and register the same. 1868-'9, c. 137, s. 9.

It shall be the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without

unnecessary delay. The said register shall receive for registering the said returns the same fees that may be allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of said returns by the register.

Sec. 514. When persons die, homestead not set apart, who may have the same set apart. 1868-'9, c. 237, s. 10.

If any person entitled to a homestead exemption, die without having had the same set apart, his widow, if he leave no children, or his child or children under the age of twenty-one years, if he leave such, may proceed to have said homestead exemption laid off according to sections five hundred and eleven and five hundred and twelve.

Johnson v. Cross, 66—167; Watts v. Leggett, 66—197; Hager v. Nixon, 69—108; Allen v. Shields, 72—504; Wharton v. Leggett, 80—169; Simpson v. Wallace, 83—477; Gregory v. Ellis, 86—579.

Sec. 515. How petition is to be filed and advertisement made. 1868-'9, c. 137, s. 11.

When any person entitled to a homestead and personal property exemption shall file his or her petition before a justice of the peace to have the same laid off and set apart under the four preceding sections, the said justice shall make advertisement in some newspaper published in the county, if there be one, for six successive weeks, and if there be no newspaper in the county, then at the court house door of the county in which the petition is filed, notifying all creditors of said applicant of the time and place, when and where the said petition will be heard; and the same shall not be heard nor any decree made in the cause in less than six months nor more than twelve months, from the day of making advertisement as above required.

Sec. 516. Liability of officer making levy, refusing or neglecting to lay off homestead. 1868-'9, c. 137, s. 17.

Any officer making a levy, who shall refuse or neglect to summon and qualify appraisers as heretofore provided, or who shall fail to make due return of their proceedings, or who shall levy upon the homestead set off by said appraisers or assessors, (as the case may be,) except as herein provided, shall be liable to indictment for a mis-

demeanor, and he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action.

State v. Carr, 71—106; Lambert v. Kinnery, 74—348; Richardson v. Wicker, 80—172.

Sec. 517. Liability of officer, appraiser or assessor conspiring with debtor. 1868-'9, c. 137, s. 18.

Any officer, appraiser or assessor, (as the case may be,) who shall wilfully or corruptly conspire with any judgment debtor or other appraiser or assessor, (as the case may be,) to undervalue the homestead or personal property exemption of such debtor, or shall assign false metes and bounds, or make or procure to be made a false and fraudulent return thereof, shall be liable to indictment for a misdemeanor, and shall be answerable to the judgment creditor for all costs and damages in a civil action.

Sec. 518. Liability of officer, appraiser or assessor conspiring with creditor. 1868-'9, c. 137, s. 19.

Any officer, appraiser or assessor who shall wilfully or corruptly conspire with any judgment creditor, or other appraiser or assessor, to overvalue the homestead or personal property exemption of any debtor or applicant, or shall assign false metes and boundaries, or make, or procure to be made, false and fraudulent return thereof, shall be liable to indictment for a misdemeanor, and shall be answerable to the party injured for all costs and damages in a civil action.

Sec. 519. Judgment creditor dissatisfied, how to proceed. 1883, c. 357, s. 1.

If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, shall be dissatisfied with the valuation and allotment of the appraisers or assessors, (as the case may be), he, within ten days thereafter, or any other creditor, within six months, and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the said allotment shall be made a transcript of the return of the appraisers or assessors, (as the case may be), which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return; and thereupon the said clerk shall

put the same on the civil issue docket of said superior court, for trial at the next term thereof as other civil actions, and such issue joined shall have precedence over all other issues at such term. And the sheriff shall not sell the excess until after the determination of said action.

Sec. 520. When exemption made or allotted on petition; objection thereto, how to be made.

When the homestead or personal property exemption is made or allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of said assessment or appraisal, and upon ten days' notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of said county, who shall place the same on the civil issue docket, and the same shall be tried as provided in the preceding section for homestead and personal property exemptions set off under execution.

Sec. 521. Costs of re-assessment, how paid.

If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant shall be reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining.

Sec. 522. Undertaking of objector.

The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors (as the case may be) under execution or petition, shall file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party, of such costs as shall be adjudged against him.

Sec. 523. Appraisal or assessment may be set aside, for what.

Any appraisal or allotment by appraisers or assessors, hereinbefore provided, may be set aside for fraud, complicity or other irregularity; but whenever any allotment or assessment shall be made or confirmed by the superior

court at term time, as hereinbefore provided, the said homestead shall not thereafter be set aside or again laid off by any other creditor.

Sec. 524. Return to be registered—forms.

When the homestead and personal property exemption shall be decided by the court at term time, the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which copy shall be registered as deeds are now registered by law; and in all judicial proceedings the original or a certified copy of said return may be introduced in evidence.

The following forms shall be substantially followed in proceedings under this chapter:

[No. 1.]

APPRAISERS' RETURN.

I. WHEN THE HOMESTEAD IS VALUED AT LESS THAN ONE THOUSAND DOLLARS, AND PERSONAL PROPERTY ALSO APPRAISED.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of ..... Township, ... County, by C. D., sheriff (or constable or deputy,) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of ..... and ..... is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed, the following articles of personal property, selected by said A. B., (*here specify the articles and their value, to be selected by the debtor or his agent,*) which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this.....day of.....18....

O. K....., (*L. S.*)
L. M....., (*L. S.*)
R. S....., (*L. S.*)

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable.)

[No. 2.]

II. PETITION FOR HOMESTEAD BEFORE A JUSTICE OF THE PEACE.

In the matter of A. B. } Before.....J. P.
.....County.

A. B. respectfully shows that he (she *or* they, *as the case may be,*) is (*or* are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (*Here describe the property.*) The true value of which he (she *or* they, *as the case may be,*) believes to be one thousand dollars, including the dwelling and buildings thereon. He (she *or* they) further shows that he (she *or* they, *as the case may be,*) is (*or* are) entitled to a personal property exemption from execution, to the value of (*here state the value*) consisting of the following property: (*Here specify.*) He (she *or* they, *as the case may be,*) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3.]

III. FORM FOR APPRAISAL OF PERSONAL PROPERTY EXEMPTION.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of.....Township,..... County, and to lay off the exemption given by law thereto, by C. D. (Sheriff *or other officer,*) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed the following articles of personal property selected by the said A. B., to wit:..... .....which we declare to be a fair valuation, and that said articles are exempt under said execution

We hereby certify, each for himself, that we are not related by blood or marriage, to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this.....day of....., 18....

O. K....., (*L. S.*)
L. M....., (*L. S.*)
R. S....., (*L. S.*)

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable.)

[No. 4.]

IV. CERTIFICATE OF QUALIFICATION TO BE INDORSED ON RETURN BY SHERIFF.

The within named B. F., G. H. and J. R. were summoned and qualified according to law, as appraisers of the ..... exemption of the said A. B., under an execution in favor of X. Y., this ..... day of ..... 18....

C. D....., (Sheriff.)

[No. 5.]

V. MINUTE ON EXECUTION DOCKET.

X.....Y.....
vs.
A.....B.....

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OF THE COSTS IN CIVIL ACTIONS.

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Sec. 525. When allowed of course to the plaintiff; several actions on one instrument. C. C. P., s. 276.

Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

(1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

(2) In an action to recover the possession of personal property;

(3) In actions of which a court of a justice of the peace has no jurisdiction;

1874-'5, c. 119, s. 2.

(4) In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars damages, he shall recover no more costs than damages. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions shall have been within the state and not secreted at the commencement of the previous action or actions.

Coates v. Stephenson, 7 Jon., 124; Wall v. Covington, 76—150; Noble v. Koonce, 76—405; R. R. Co. v. Phillips, 74—49; Mayo v. Jones, 78—406; Porter v. Durham, 79—596; Vestal v. Sloan, 83—555; R. C., c. 31, s. 78, Hartman v. Spiers, 87—28.

Sec. 526. When allowed to defendant. C. C. P., s. 277.

Costs shall be allowed of course to the defendant, in the actions mentioned in the preceding section, unless the plaintiff be entitled to costs therein.

Swain v. McCullock, 75—195; Wall v. Covington, 76—150.

Sec. 527. When allowed to either party in the discretion of the court. C. C. P., s. 278.

In other actions, costs may be allowed or not, in the discretion of the court. In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. In the following cases the costs of an appeal to any court shall be in the discretion of the court:

(1) When a new trial shall be ordered;

(2) When a judgment shall be affirmed in part, and reversed in part.

Mitchell v. Henderson, 63—643; Sedberry v. Com'rs, 66—486; Jones v Mial, 85—597.

Sec. 528. What costs allowed. C. C. P., s. 279.

To either party for whom judgment shall be given there shall be allowed as costs his actual disbursements for fees to the officers, witnesses, and other persons entitled to receive the same.

Sec. 529. Interest, when allowed. C. C. P., s. 282.

When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

Sec. 530. Interest on contracts, except penal bonds, and on all judgments; jury to distinguish principal from interest. R. C., c. 31, s. 90. 1786, c. 253, s. 1. 1789, c. 314, s. 4. 1807, c. 721.

All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied. In like manner, the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section.

Deloach v. Worke, 3 Hawks, 36. Trice v. Turrentine, 13 Ired., 212; Hall v. Craige, 68—305; Barlow v. Norfleet, 72—535; Farmer v. Willard, 75—401; Wall v. Covington, 83—144; Long v. Long, 85—415; Patapsco v. Magee, 86—350; Jolly v. Bryan, 86—457; McRae v. Malloy, 87—196.

Sec. 531. In judgments final by default, interest ascertained by clerk. R. C., c. 31, s. 91. 1797, c. 475, s. 1.

Whenever a suit shall be instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, and the defendant shall not plead to issue thereon, upon judgment, the clerk of the court shall ascertain the interest due by law, without a writ of inquiry, and the amount shall be included in the final judgment of the court as damages, which judgment shall be rendered therein in the manner prescribed by the preceding section.

Hartsfield v. Jones, 4 Jon., 309; Griffin v. Hinson, 6 Jon., 154; Moore v. Mitchell, Phil., 304; Parker v. Smith, 64—291; Rogers v. Moore, 86—85.

Sec. 532. Costs, how to be inserted in judgment; interlocutory costs adjusted. C. C. P., s. 283. 1869-'70, c. 192.

The clerk shall insert in the entry of judgment the sum of the allowances for cost, as provided in this code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees. The disbursements shall be stated in detail. Whenever it shall be necessary to adjust costs in any interlocutory proceedings, or in any special proceedings, the same shall be adjusted by the clerk of the court to which the proceedings were returned, except in those matters in which the allowance is required and to be made by the judge.

Sec. 533. Referee's fees. C. C. P., s. 285.

The fees of a referee shall be fixed by the court or judge, unless the parties themselves shall agree upon a rate of compensation.

Wall v. Covington, 76—150.

Sec. 534. Costs against infant plaintiff. C. C. P., s. 286.

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor.

Sec. 535. Costs in action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. C. C. P., s. 287.

(1) In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defence.

Lewis v. Johnston, 67—38; Lewis v. Johnston, 69—392; Wall v. Covington, 76—150; Hewlett v. Nutt, 79—263.

(2) And whenever any claim against a deceased person shall be referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law.

Wall v. Covington, 76—150; sections 276, 277, 343, C. C. P.

Sec. 536. Costs in civil actions by the State. C. C. P., s. 288.

In all civil actions prosecuted in the name of the state, by an officer duly authorized for that purpose, the state shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the state as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the state till after execution issued therefor against such private party and returned unsatisfied.

State v. R. R. Co., 74—287.

Sec. 537. Costs in action by the State for a private person. C. C. P., s. 289.

In an action prosecuted in the name of the state for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the state.

Sec. 538. Costs in appeals by State to the Supreme Court of the United States. C. C. P., s. 289 (a) 1871-'2, c. 26, s. 1.

In all cases, whether civil or criminal, to which the state of North Carolina is a party, and which may be carried from the courts of this state, or from the circuit court of the United States, by appeal or writ of error to the supreme court of the United States, and the state shall be adjudged to pay the costs, it shall be the duty of the attorney general to certify the amount of such costs to the governor, who shall thereupon issue a warrant for the same, directed to the state treasurer, who shall pay the same out of any moneys in the treasury not otherwise appropriated.

Sec. 539. Costs against assignee after action brought. C. C. P., s. 290.

In actions in which the cause of action shall become by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party.

Sec. 540. Costs on appeals generally. C. C. P., s. 292.

On an appeal from a justice of the peace to a superior court, or from a superior court or a judge thereof, to the

supreme court, if the appellant shall recover judgment in the appellate court, he shall recover the costs of the appellate court and those he ought to have recovered below, had the judgment of that court been correct, and also restitution of any costs of the court appealed from which he shall have paid under the erroneous judgment of such court. If in any court of appeal there shall be judgment for a new trial, or for a new jury, or if the judgment appealed from be not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court.

Sec. 541. Costs in special proceedings. C. C. P., s. 294.

The costs in special proceedings shall be as herein allowed in civil actions, unless where otherwise specially provided.

Noble v Koonce, 76—405; Mayo v. Jones, 78—406.

Sec. 542. On appeals from justices of the peace. C. C. P., s. 295.

After an appeal from the judgment of a justice of the peace shall be filed with a clerk of a superior court, the costs in all subsequent stages shall be as herein provided for actions originally brought to the superior court.

Smith v. R. R. Co., 72—62.

Sec. 543. Judgment for costs against plaintiff and sureties on failure to maintain action. R. C., c. 31, s. 126. 1831, c. 46, ss. 1, 2.

Whenever an action shall be brought in any court in which security shall be given for the prosecution thereof, or when any case shall be brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit shall have been given, and judgment shall be rendered against the plaintiff for the costs of the defendant, the appellate court, upon motion of the defendant, shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety.

TITLE XIII.

OF APPEAL IN CIVIL ACTIONS.

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Sec. 544. Writs of error abolished, and appeals substituted. C. C. P., s. 296.

Writs of error in civil actions are abolished; and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

Teague v. James, 63—91; State v. Swepson, 82—541.

Sec. 545. Writs of certiorari, recordari, and supersedeas. 1874-'5, c. 109.

Writs of *certiorari*, *recordari* and *supersedeas* are hereby authorized as heretofore in use. The writs of *certiorari* and *recordari*, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the *supersedeas*, to suspend execution, shall not issue until an undertaking is filed, or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where the execution is stayed.

Syme v. Broughton, 84—114; Brown v. Williams, 84—116; Parker v. Railroad, 84—118; Bryson v. Lucas, 85—397; Chastain v. Chastain, 87—283; McDaniel v. Pollac, 87—503; State v. Randall, 87—571.

Certiorari, Bat. Dig., vol. 1, p. 208 *et seq.*; vol. 3, p. 26; vol. 4, p. 64; Bailey's Dig., p. 61; State v. Lawrence, 81—522.

Recordari, Bat. Dig., vol. 2, p. 1040 *et seq.*; Bailey's Dig., p. 436

Sec. 546. Orders made out of court, how vacated or modified. C. C. P., s. 297.

An order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

Sledge v. Blum, 63—374; Bank v. Jenkins, 64—719; Clayton v. Jones, 68—497; Mitchell v. Sloan, 69—10; Gray v. Gaither, 71—55; State v. Hawkins, 72—180; State v. Patrick, 72—217; Blue v. Blue, 79—69; Capel v. Peebles, 80—90; State v. Spurtin, 80—362.

Sec. 547. Who may appeal. C. C. P., s. 298.

Any party aggrieved may appeal in the cases prescribed in this title.

Rush v. Steamboat Co., 67—47; Clemmons v. Hampton, 70—534; Rollins v. Rollins, 76—264; Johnson v. Maxwell, 87—18.

Sec. 548. Appeal, in what cases it may be taken. C. C. P., s. 299.

An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

State v. Bullock, 63—570; Smith v. Mitchell, 63—620; Simonton v.

Chipley, 64—152; Carroll v. Haywood, 64—481; Bank v. Jenkins, 64—719; Jenkins v. Ore Dressing Co., 65—563; Rush v. Steamboat Co., 67—47; Bank v. Tiddy, 67—169; Skinner v. Maxwell, 67—257; Bryan v. Heck, 67—322; Vest v. Cooper, 68—131; Johnston v. Neville, 68—177; Childs v. Martin, 68—307; Falkner v. Hunt, 68—475; Lovinier v. Pearce, 70—167; Moore v. Edmiston, 70—471; Gray v. Gaither, 71—55; Hinton v. Whitehurst, 71—66; Mason v. Osgood, 71—212; Watts v. Bell, 71—405; State v. Hawkins, 73—180; State v. Patrick, 72—217; Maxwell v. Caldwell, 72—450; Wade v. New Berne, 72—498; Horne v. Horne, 72—534; Windburne v. Bryan, 73—47; Bellamy v. Pippin, 74—46; Johnson v. Bell, 74—355; Wallington v. Montgomery, 74—372; Hinton v. Deans, 75—18; Rouse v. Quinn, 75—354; French v. Wilmington, 75—387; Rollins v. Rollins, 76—264; Perry v. Whitaker, 77—102; Crawley v. Woodfin, 78—4; Wake County v. Maguin, 78—181; Bryde v. Patterson, 78—412; Isler v. Dewey, 79—5; Ashcroft v. Lea, 79—34; Bushee v. Surles, 79—51; Sutton v. Schonwald, 80—20; Capel v. Peebles, 80—90; R. R. v. Richardson, 82—343; Gay v. Brookshire, 82—409; Wilson v. Lineberger, 82—412; May v. Darden, 83—237; Telegraph Co. v. R. R. Co., 83—420; R. R. Co. v. R. R. Co., 83—498; Wilson v. Seagle, 84—110; Syme v. Broughton, 84—114; Hines v. Hines, 84—122; Tulington v. Williams, 84—125; State v. McDowell, 84—798; Sternberger v. Hawley, 85—141; Moore v. Askew, 85—199; Spaugh v. Boner, 85—208; Cromartie v. Com'rs, 85—211; Moore v. Hill, 85—218; Alexander v. Robinson, 85—275; Sloan v. McMahon, 85—296; Best v. Clyde, 86—4; Henry v. Cannon, 86—24; Long v. Logan, 86—535; Long v. Gooch, 86—709; Roulhac v. Brown, 87—1; Thomas v. Myers, 87—31; Wiggins v. McCoy, 87—499; Leak v. Covington, 87—501; McDaniel v. Pollock, 87—503; Moore v. Hinnant, 87—505; State v. Owens, 87—565.

Sec. 549. When taken, execution not suspended, when. C. C. P., s. 300.

The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required.

C. C. P., 303—312; Stroat v. Woody, 63—37; Rowland v. Thompson, 64—714; Skinner v. Maxwell, 67—257; Bryan v. Hubbs, 69—423; Richardson v. Debnam, 75—390; Taylor v. Brower, 78—8; Williamson v. Canal Co., 78—156; Meekins v. Tatum, 79—546; Applewhite v. Fort, 85—596.

Sec. 550. Appeals to be entered by clerk on judgment docket; case, how stated and settled. C. C. P., s. 301. C. C. P., s. 311.

Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party. He shall cause to be pre-

pared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the requests of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within five days from the entry of the appeal taken; within three days after such service, the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved; if returned with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him; and the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of such request; and at the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or if the attorneys be not present, file a copy in the office of the clerk of the court: *Provided*, that if the judge shall have left the district before the notice of disagreement, he may settle the case without returning to the district. In settling the case, the written instructions signed by the judge, and the written requests for instructions signed by the counsel, and the written exceptions shall be deemed conclusive as to what such instructions, requests and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter, file the same with the clerk, and in case he fails to do so, the respondent may file his copy. The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the district shall have ended, and if the judge in the meantime shall have gone out of office, he shall settle the case as if he were still in office, and any judge failing to comply with this section shall be liable to a penalty of five hundred dollars, for the use of any person who will sue for the same.

Kane v. McCarthy, 63—299; Campbell v. Allison, 63—568; Bland v. O'Hagan, 64—471; Cardwell v. Cardwell, 64—621; Whitesides v. Williams, 66—141; Kirkman v. Dixon, 66—406; Skinner v. Maxwell, 67—257; Sudderth v. McCombs, 67—353; Marsh v. Cohen, 68—283; Green v. Castle

bury, 70—20; Armfield v. Brown, 70—27; Sampson v. R. R. Co., 70—404; Duval v. Rollins, 71—218; Schehan v. Malone, 71—440; Brumble v. Brown, 71—513; Isler v. Haddock, 72—119; Mason v. Osgood, 72—120; Wade v. New Berne, 72—498; Adams v. Reeves, 74—106; Wilson v. Hutchinson, 74—432; Swepson v. Summey, 74—551; Kirk v. Barnhart, 74—653; Brink v. Black, 77—59; Taylor v. Brower, 78—8; McNeill v. Chadbourn, 79—149; Meekins v. Tatem, 79—546; Eure v. Paxton, 80—17; Smith v. Lyon, 82—2; Sanders v. Norris, 82—4; State v. Thompson, 83—595; Turner v. Foard, 83—683; Bryan v. Fisher, 85—71; Howerton v. Henderson, 86—718; Surratt v. Crawford, 87—372; Bost v. Bost, 87—477; McDaniel v. Pollock, 87—503.

Sec. 551. Clerk to make copy of judgment roll, and send to clerk of supreme court. C. C. P., s. 302.

The clerk on receiving a copy of the case settled, as required in the preceding section, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified to the clerk of the supreme court.

Morrison v. Cornelius, 63—346; McLean v. Chisholm, 64—323; Skinner v. Maxwell, 67—257; Sudderth v. McCombs, 67—353; Farmer v. Willard, 75—401; Bradley v. Jones, 76—204; Howerton v. Henderson, 86—718.

Sec. 552. On appeal security must be given or deposit made, unless waived. C. C. P., s. 303. 1871-'2, c. 31, s. 1.

To render an appeal effectual for any purpose in any civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not to exceed the sum of two hundred and fifty dollars, to the effect that the appellant will pay all costs which may be awarded against him on the appeal; or such sum as may be ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal; such undertaking or deposit may be waived by a written consent on the part of the respondent.

Robeson v. Lewis, 64—734; Felton v. Elliott, 66—195; Weber v. Taylor, 66—412; Clerk's Office v. Huffsteller, 67—449; Bledsoe v. Nixon, 69—81; Bryan v. Hubbs, 69—423; State v. Dixon, 71—204; Mason v. Osgood, 71—212; Smith v. Railroad Co., 72—62; Martin v. Chasteen, 75—96; State v. Morgan, 77—510; Hancock v. Bramlett, 85—393; Bryson v. Lucas, 85—397; Smith v. Reeves, 85—594; Mauney v. Gidney, 86—717; Howerton v. Henderson, 86—718; Chastain v. Chastain, 87—283.

Sec. 553. Appeal in *forma pauperis*. 1873-'4, c. 60.

When any party to a civil action tried and determined in the superior court shall, at the time of trial, desire an

appeal from the judgment rendered in said action to the supreme court, and shall be unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge of said superior court to make an order allowing said party to appeal from said judgment to the supreme court as in other cases of appeal, without giving security therefor: *Provided*, that the party desiring to appeal from said judgment shall make affidavit that he is unable by reason of his poverty to give the security required by law for said appeal, and that said party is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action: *Provided further*, that said affidavit shall be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and that he is of opinion that the decision of the superior court, in said action, is contrary to law.

Mitchell v. Sloan, 69—10; Mason v. Osgood, 71—212; Martin v. Chasteen, 75—96; Lindsay v. Moore, 83—444; Stell v. Barham, 85—88; Leach v. Jones, 86—404; Stell v. Barham, 86—727; Hall v. Younts, 87—285.

Sec. 554. On judgment for money, security to stay execution; new undertaking, on sureties becoming insolvent; perishable property may be sold. C. C. P., ss. 304, 311.

If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking,

with surety or sureties, he may in lieu thereof, deposit with the officer into court as the case may require, money to the amount for which such bond or undertaking is to be given. The court in which such action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court, at any time, upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit made, pursuant to such order, shall be of the same effect as if made with such officer.

The perfecting of an appeal by giving the undertaking mentioned in this section, shall stay proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

Clerk's office v. Huffsteller, 67—449; Cox v. Hamilton, 69—30; Bledsoe v. Nixon, 69—81; Bryan v. Hubbs, 69—423; Hancock v. Bramlett, 85—393; Leach v. Jones, 86—404; Burnett v. Nicholson, 86—728.

Sec. 555. If judgment be to deliver document, or personal property, it must be deposited or security be given. C. C. P., s. 305.

If the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

Bryan v. Hubbs, 69—423; Hancock v. Bramlett, 85—393.

Sec. 556. If to execute conveyance, it must be executed and deposited. C. C. P., s. 306.

If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

Tate v. Powe, 64—644; Bryan v. Hubbs, 69—423; Hancock v. Bramlett, 85—393.

SEC. 557. Security where judgment is to deliver real property, or for a sale of mortgaged premises. C. C. P., s. 307.

If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with one or more sureties, to the effect that, during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

Tate v. Powe, 64—644; Cox v. Hamilton, 69—30; Bryan v. Hubbs, 69—423; Meroney v. Wright, 84—336; Hancock v. Bramlett, 85—393.

SEC. 558. Stay of proceedings upon security being given. C. C. P., s. 308.

Whenever an appeal is perfected as provided by this code it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum.

C. C. P., sections 304, 305, 306, 307; Bledsoe v. Nixon, 69—81; Johnston v. Rankin, 70—550; Carlton v. Byers, 71—331; Phifer v. R. R. Co., 72—433; McRae v. New Hanover Co., 74—415; Hancock v. Bramlett, 85—393; Leach v. Jones, 86—404.

SEC. 559. Undertaking may be in one instrument or several. C. C. P., s. 309.

The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on

the adverse party, with the notice of appeal, unless the required deposit is made, and notice thereof given.

C. C. P., sections 304, 305, 306, 307. Robeson v. Lewis, 64—734; Bryan v. Hubbs, 69—423; Hancock v. Bramlett, 85—393.

Sec. 560. Sureties to justify, or undertaking of no effect. C. C. P., s. 310.

An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties within ten days after the notice of the appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

C. C. P., sections 165, 166; Saulsbury v. Cohen, 68—289; Bryan v. Hubbs, 69—425; Wade v. New Berne, 72—498; Hancock v. Bramlett, 85—393; Bryson v. Lucas, 85—397; Smith v. Reeves, 85—594; Mauney v. Gidney, 86—717; Howerton v. Henderson, 86—718; Chastain v. Chastain, 87—283.

Sec. 561. Undertaking must be filed with clerk. C. C. P., s. 312.

The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. This chapter as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to all appeals taken to the supreme court.

Jacobs v. Burgwyn, 63—196; Bryan v. Hubbs, 69—423.

Sec. 562. Intermediate orders affecting the judgment may be reviewed on appeal. C. C. P., s. 313.

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

Long v. Holt, 68—53; McKethan v. Ray, 71—165; Hinton v. Deanes, 75—18; Jones v. Boyd, 80—258.

Sec. 563. Judgment on appeal; restitution; undertakings on appeals and writs of certiorari. C. C. P., s. 314. R. C., c. 4, s. 10. 1785, c. 233, s. 2. 1810, c. 793, s. 1. 1831, c. 46, s. 2.

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When

the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

Undertakings for the prosecution of appeals and on writs of *certiorari* shall make a part of the record sent up to the supreme court, on which judgment may be entered against the appellant or person prosecuting the writ of *certiorari* and his sureties, in all cases where judgment shall be rendered against the appellant or person prosecuting said writ.

Whitehead v. Smith, 8 Jon., 351; Clerk's Office v. Huffsteller, 67—449; Wade v. New Berne, 72—494; Green v. Hobgood, 74—234; State v. R. R. Co., 74—287; Rouse v. Quinn, 75—354; Heyer v. Beatty, 76—28; Lane v. Morton, 78—7; Bernard v. Johnston, 78—25; Howerton v. Henderson, 86—718; Boyett v. Vaughan, 86—725; Burnett v. Nicholson, 86—728; Chastain v. Chastain, 87—283.

Sec. 564. On appeal, or *recordari* of defendant from justice's judgment, court may compel plaintiff to secure costs. R. C., c. 31, s. 104. 1831, c. 29, s. 1.

When any defendant shall appeal from the judgment of a justice of the peace to the superior court, or when the judgment of such justice shall be removed by the defendant, by *recordari* or otherwise, to a superior court, the court having cognizance of such appeal or *recordari* may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect.

Lea v. Brooks, 4 Jon., 423.

Sec. 565. Appeals, from a justice to be tried at first term of court; judgment against party cast and his sureties; how to have amount of judgment ascertained in case of default. R. C., c. 31, s. 105. 1777, c. 115, s. 63. 1794, c. 414, s. 1.

When an appeal shall be taken from the judgment of a justice of the peace to a superior court, the same shall be reheard by the court; whereupon an issue shall be made up and tried by a jury at the first term to which it is returned, unless continued; and judgment shall be given therein against the party cast and his sureties. And when the defendant shall make default, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases

may have his inquiry of damages executed forthwith by a jury.

Ramsour v. Harshaw, 8 Ired., 480; Williams v. Beasley, 13 Ired., 112; Hartsfield v. Jones, 4 Jon., 309; Spaugh v. Boner, 85—208; Brown v. Brittain, 84—552.

Sec. 566. If plaintiff appeal and do not recover a greater sum, he shall not recover costs, but be liable to pay. R. C., c. 31, s. 106. 1794, c. 414, s. 17.

If judgment be entered for the plaintiff, and he shall not recover on his appeal a greater sum than was recovered before the justice, besides interest accrued since the rendition of the judgment, he shall not recover the costs of the appeal, but shall be liable at the discretion of the court to pay the same.

TITLE XIV.

OF THE MISCELLANEOUS PROCEEDINGS IN CIVIL ACTIONS, AND GENERAL PROVISIONS.

Chap. I. SUBMITTING A CONTROVERSY WITHOUT ACTION.
II. CONFESSION OF JUDGMENT WITHOUT ACTION.
III. OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.
IV. ADMISSION OR INSPECTION OF WRITINGS.
V. EXAMINATION OF PARTIES.
VI. EXAMINATION OF WITNESSES.
VII. MOTIONS AND ORDERS.
VIII. COMPUTATION OF TIME.
IX. NOTICES AND FILING AND SERVICE OF PAPERS.
X. DUTIES OF SHERIFFS AND CORONERS.
XI. POWERS OF REFEREES.
XII. MISCELLANEOUS PROVISIONS.

CHAPTER ONE.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

SECTION.
567. Controversy, how submitted without action.
568. Judgment roll.
SECTION.
569. Judgment, how enforced and appealed from.

SEC. 567. Controversy, how submitted without action. C. C. P., s. 315.

Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall thereupon hear and determine the case, and render judgment thereon as if an action were pending.

Bates v. Lilly, 65—232; Johnson v. Cross, 66—167; Hervey v. Edmunds, 68—243; Pullen v. Raleigh, 68—451; Hager v. Nixon, 68—108; McKethan v. Ray, 71—165; Lewis v. County of Wake, 74—194; Holland v. Isler, 77—1; Dixon v. Coke, 77—205; Miller v. Churchill, 78—372; Harrell v. Peebles, 79—26; Grant v. Newsom, 81—36; Davis v. Moss, 81—303; State v. Alphin, 81—566; Busbee v. Macy, 85—329; Busbee v. Lewis, 85—332; Pearson v. Boyden, 86—585; Moore v. Hinnant, 87—505.

SEC. 568. Judgment roll. C. C. P., s. 316.

Judgment shall be entered in the judgment docket, as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

SEC. 569. Judgment, how enforced and appealed from. C. C. P., s. 317.

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

CHAPTER TWO.

CONFESSION OF JUDGMENT WITHOUT ACTION.

SECTION.
570. Judgment may be confessed for debt due on contingent liability.
571. Statement in writing and form thereof.
572. Judgment and execution.

SEC. 570. Judgment may be confessed for debt due on contingent liability. C. C. P., s. 325.

A judgment by confession may be entered, without

action, either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

Hervey v. Edmunds, 68—243; McAden v. Hooker, 74—24; Davidson v. Alexander, 84—621.

Sec. 571. Statement in writing and form thereof. C. C. P., s. 326.

A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

(1) It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor;

(2) If it be for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due;

(3) If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

McAden v. Hooker, 74—24; Davidson v. Alexander, 84—621.

Sec. 572. Judgment and execution. C. C. P., s. 327.

The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the state, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in instalments, and the instalments are not all due, the execution may issue upon such judgment for the collection of such instalments as have become due, and shall be in the usual form; but shall have indorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execu-

tion, the judgment shall remain as security for the instalments thereafter to become due; and whenever any further instalment become due, execution may, in like manner, be issued for the collection and enforcement of the same.

McAden v. Hooker, 74—24.

CHAPTER THREE.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

SECTION.
573. Offer of compromise.
574. Effect of compromises in general.
575. Defendant may offer to liquidate damages conditionally.
576. Effect of acceptance or refusal of offer.
577. In trespass upon real property, defendant may disclaim title and plead tender in bar.

Sec. 573. Offer of compromise. C. C. P., s. 328, (1.)

The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer; and in case the defendant shall set up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing, to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitle him to judgment, or

if the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment, or to establish his counter-claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer.

Sec. 574. Effect of compromises in general. 1874-'5, c. 178, s. 1.

In all claims, or money demands, of whatever kind, and howsoever due, where an agreement shall have been or shall be made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of such less amount according to any such agreement in compromise of the whole, shall be a full and complete discharge of the same.

Curry v. Kennedy, 78—91; Fickey v. Merrimon, 79—585; Williamson v. Canal Co., 84—629.

Sec. 575. Defendant may offer to liquidate damages conditionally. C. C. P., s. 329.

In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, ten days before the trial, and on the trial have a verdict, the damages shall be assessed accordingly.

Sec. 576. Effect of acceptance or refusal of offer. C. C. P., s. 330.

If the plaintiff does not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

Sec. 577. In trespass upon real property, defendant may disclaim title and plead tender in bar. R. C., c. 31, s. 79. 1715, c. 2, s. 7.

In actions of trespass upon real estate, wherein the defendant in his answer shall disclaim to make any title

or claim to the lands on which the trespass is by the complaint supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be permitted to make a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass; whereupon, or upon some of them, the plaintiff shall join issue, and if the issue be found for the defendant, or if the plaintiff shall be nonsuited, he shall be barred from the said action and all other suits concerning the same.

Blackburn v. Bowman, 1 Jon., 441; Wooley v. Robinson, 7 Jon., 30.

CHAPTER FOUR.

ADMISSION OR INSPECTION OF WRITINGS.

SECTION.

578. Inspection and copy of books, papers, and documents, how obtained.

Sec. 578. Inspection and copy of books, papers, and documents, how obtained. R. C., c. 31, s. 82. R. S., c. 31, s. 86. 1821, c. 1095. 1828, c. 7. C. C. P., s. 331.

Either party may exhibit to the other, or to his attorney at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court, on

motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

Graham v. Hamilton, 3 Ired., 381; McGibboney v. Mills, 13 Ired., 163; Branson v. Fentress, 13 Ired., 165; Fuller v. McMillan, Busb., 206; Ward v. Simmons, 1 Jon., 404; Murchison v. McLeod, 2 Jon., 239; Maxwell v. McDowell, 5 Jon., 391; Morrow v. Allman, 65—508; Linker v. Benson, 67—150; Justice v. Bank, 83—8; McLeod v. Bullard, 84—515; Knight v. Houghtalling, 85—17; Com'rs v. Lemly, 85—341.

CHAPTER FIVE.

EXAMINATION OF PARTIES.

SECTION.	
579.	Action for discovery abolished.
580.	A party may be examined as a witness except in certain cases.
581.	Such examination also allowed before trial.
582.	Party, how compelled to attend.
583.	Testimony of party may be rebutted.
584.	Effect of refusal to testify.
585.	Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him.
586.	Persons for whom action is brought or defended may be examined.
587.	Examination of co-plaintiff or co-defendant.
588.	Husband and wife witnesses.

Sec. 579. Action for discovery abolished. C. C. P., s. 332.

No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

School Committee v. Kesler, 66—323; Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 580. A party may be examined as a witness except in certain cases. C. C. P., s. 333. 1879, c. 183. 1883, c. 310, ss. 1, 2.

A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness to testify, either at the trial or conditionally or upon commission: *Provided,*

no person who is or shall be a party to an action founded on a judgment rendered before the first day of August, one thousand eight hundred and sixty-eight, or on any bond executed prior to said date, or the assignor, endorser or any person who has at the time of the trial, or ever has had any interest in such judgment or bond, shall be a competent witness on the trial of such action, but this proviso shall not apply to the trial of any action commenced before the first day of August, one thousand eight hundred and sixty-eight, nor to the trial of any action in which the defendant therein relies upon the plea of payment in fact, or pleads a counter-claim and also introduces himself as a witness to establish the truth of such plea, but in all such cases the rules of evidence as contained in this code shall prevail.

Whitesides v. Green, 64—307; McKesson v. Hennessee, 66—473; Taylor v. Taylor, 76—433; Cannon v. Morris, 81—130; Smith v. Hanes, 82—448; Tabor v. Ward, 83—291; Wilkerson v. Buchanan, 83—296; Strudwick v. Brodnax, 83—401; Macay, *ex parte*, 83—63; Jones v. Henry, 84—320; Com'rs v. Lemly, 85—341; Pugh v. Grant, 86—39; Morgan v. Bunting, 86—66; Johnston v. Jones, 87—393.

Sec. 581. Such examination also allowed before trial. C. C. P., s. 334.

The examination instead of being had at the trial, as provided in the preceding section, may be had at any time before the trial, at the option of the party claiming it, before a judge or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge shall order otherwise. But the party to be examined shall not be compelled to attend in any county other than that of his residence, or where he may be served with a summons for his attendance.

Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 582. Party, how compelled to attend. C. C. P., s. 335.

The party to be examined, as in the preceding section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge or clerk in like manner, and may be read by either party on the trial.

Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 583. Testimony of party may be rebutted. C. C. P., s. 336.

The examination of the party thus taken may be rebutted by adverse testimony.

Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 584. Effect of refusal to testify. C. C. P., s. 337.

If a party refuses to attend and testify, as in the four preceding sections provided, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out.

Phillips v. Trezevant, 70—176; Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 585. Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him. C. C. P., s. 338.

A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

Taylor v. Taylor, 76—433; Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 586. Persons for whom action is brought or defended may be examined. C. C. P., s. 339.

A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 587. Examination of co-plaintiff or co-defendant. C. C. P., s. 340.

A party may be examined on behalf of his co-plaintiff or of a co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co defendant, and as to which a separate and not joint ver-

dict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in behalf of the party examined. And whenever one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defence, and shall be so received.

Boykin v. Boykin, 70—262; Penny v. Brink, 75—68; Strudwick v. Brodnax, 83—401; Com'rs v. Lemly, 85—341.

Sec. 588. Husband and wife witnesses. C. C. P., s. 341. 1866, c. 40, s. 2.

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, as any other witness, on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

Rice v. Keith, 63—319; Barringer v. Barringer, 69—179; Boykin v. Boykin, 70—262; Horne v. Horne, 75—101; Taylor v. Taylor, 76—433; Com'rs v. Lemly, 85—341.

CHAPTER SIX.

EXAMINATION OF WITNESSES.

SECTION.
589. Interest not to exclude a witness.
590. When party may be examined and when not.
591. In what actions, for what sums, and within what time book accounts may be proved by a party.
592. Book accounts, how proved by executors and administrators.
593. Copies of account are evidence unless notice given to produce original.

Sec. 589. Interest not to exclude a witness. C. C. P., s. 342.

No person offered as a witness shall be excluded by reason of his interest in the event of the action.

State v. McIntosh, 64—607; Isenhour v. Isenhour, 64—640; Gray v. Cooper, 65—183; Murray, v. Blackledge, 71—492; Ballard v. Ballard, 75—190; Lewis v. Fort, 75—251; Mason v. McCormick, 75—263; Taylor v. Taylor, 76—433; Gidney v. Logan, 79—214; Pepper v. Broughton, 80—251.

Sec. 590. When party may be examined and when not.

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

Whitesides v. Green, 64—307; Merony v. Avery, 64—312; Peoples v. Maxwell, 64—313; State v. McIntosh, 64—607; Isenhour v. Isenhour, 64—640; Brower v. Hughes, 64—642; Halyburton v. Harshaw, 65—88; Gray v.

Cooper, 65—183; Isler v Dewey, 67—93; Howerton v. Lattimer, 68—370; Andrews v. McDaniel, 68—385; Gilmer v. McNairy, 69—335; Bryant v. Morris, 69—444; Redman v. Redman, 70—257; Leggett v. Glover, 71—211; Woodhouse v. Simmons, 73—30; Henry v. Willard, 73—35; Jackson v. Evans, 73—128; Murphy v. Ray, 73—588; Lewis v. Wake Co., 74—194; McCanless v. Reynolds, 74—301; Thomas v. Kelly, 74—416; Kirk v. Barnhart, 74—653; Penny v. Brink, 75—68; Ballard v. Ballard, 75—190; Lewis v. Fort, 75—251; Mason v. McCormick, 75—263; Taylor v. Taylor, 76—433; Bushee v. Surles, 77—62; Peebles v. Stanley, 77—243; March v. Verble, 79—19; Lawrence v. Hyman, 79—209; Gidney v. Logan, 79—214; Shields v. Smith, 79—517; Mason v. McCormick, 80—244; Pepper v. Broughton, 80—251; Gregg v. Hill, 80—255; Molyneux v. Huey, 81—106 Latham v. Dixon, 82—55; Williams v. Johnston, 82—283; Tabor v. Ward, 83—291; Wilkerson v. Buchanan, 83—296; Thompson v. Humphrey, 83—416; Macay, *ex parte*, 84—63; Perry v. Jackson, 84—230; McLearly v. Norment, 84—235; Gulley v. Macy, 84—434; Syme v. Broughton, 85—367; Mull v. Martin, 85—406; Hawkins v. Carpenter, 85—482; Allen v. Gilkey, 86—64; Morgan v. Bunting, 86—66; Sumner v. Candler, 86—71; Lockhart v. Bell, 86—443; Gidney v. Moore, 86—484; McKee v. Lineberger, 87—181; Love's Ex'rs v. Harbin, 87—249; Grier v. Cegle, 87—377; Johnston v. Jones, 87—393. C. C. P., s. 343.

Sec. 591. In what actions, for what sums, and within what time book accounts may be proved by a party. R. C., c. 15, s. 1. 1756, c. 57, ss. 2, 6, 7. C. C. P., s. 343 (*a.*)

When any person shall bring an action upon a contract, or shall plead, or give notice of, a set-off or counter-claim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of set-off or counter-claim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book; in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved were *bona fide* delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer

standing, nor for any greater amount than sixty dollars.

Mitchell v. Clarke, Mar., 25; Carlton v. Lawry, Mar., 26; Thomeguex v. Bell, Mar., 44; Kitchen v. Tyson, 3 Mur., 314; Stevelie v. Greenlee, 1 Dev., 317; Colbert v. Piercy, 3 Ired., 77; McWilliam v. Cosby, 4 Ired., 110; Adkinson v. Simmons, 11 Ired., 416; Alexander v. Smoot, 13 Ired., 461; Waldo v. Jolly, 4 Jon., 173; Pannell v. Scroggin, 8 Jon., 408; Bland v. Warren, 65—372; Leggett v. Glover, 71—211.

Sec. 592. Book accounts, how proved by executors and administrators. R. C., c. 15, s. 2. 1756, c. 57, s. 2. 1796, c. 465. C. C. P., s. 343 (*b.*)

In actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: *Provided*, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: *Provided further*, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party.

Stevelie v. Greenlee, 1 Dev., 317; Coxe v. Skeen, 3 Ired., 443.

Sec. 593. Copies of account are evidence unless notice given to produce original. R. C., c. 15, s. 3. 1756, c. 57, s. 3. C. C. P., s. 343 (*c.*)

A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or set-off as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or ten days before the trial, that he will require the book to be produced at the trial; and in that case no such copy shall be admitted as evidence.

Morgan v. Bass, 3 Ired., 243.

CHAPTER SEVEN.

MOTIONS AND ORDERS.

SECTION.
594. Definition of an order; motions, how and where made; compelling parties to testify; decision on motion.
595. Notice of motion.

Sec. 594. Definition of an order; motions, how and where made; compelling parties to testify; decision on motion. C. C. P., ss. 344, 345.

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order:

(1) An application for an order is a motion;

(2) Motions may be made to a clerk of a superior court, or to a judge out of court; except for a new trial on the merits;

(3) Motions must be made within the district in which the action is triable;

(4) A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions;

(5) When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue;

(6) Whenever a motion shall be made in any cause or proceeding in any of the courts, to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or a motion to vacate or modify the same is made, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion within ten days after the day upon which such motion shall or may be submitted to him for decision.

Foard v. Alexander, 64—69; Erwin v. Lowery, 64—321; Williams v. Rockwell, 64—325; Jarman v. Saunders, 64—367; Church v. Furniss, 64—659; Council v. Rivers, 65—54; Foreman v. Bibb, 65—128; McDowell v.

Asbury, 60—444; Seymour v. Cohen, 67—345; Birdsey v. Harris, 68—92; Deal v. Palmer, 68—215; Childs v. Martin, 68—307; Clayton v. Jones, 68—497; Aycock v. Harrison, 71—432; Mauncy v. Montgomery County, 71—486; Long v. Cole, 72—20; Sutton v. McMillan, 72—102; Faxton v. Williamson, 72—125; Lyon v. McMillan, 72—392; Folk v. Howard, 72—527; Lord v. Beard, 79—5; Askew v. Capehart, 79—17; Skinner v. Bland, 87—168.

Sec. 595. Notice of motion. C. C. P., s. 346.

When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

Wheeler v. Lawrence, 81—65.

CHAPTER EIGHT.

COMPUTATION OF TIME.

SECTION.

596. Time, how computed.

Sec. 596. Time, how computed. C. C. P., s. 348.

The time within which an act is to be done, as herein provided, shall be computed, by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Branch v. R. R. Co., 77—347; Keeter v. R. R. Co., 86—346.

CHAPTER NINE.

NOTICES AND FILING AND SERVICE OF PAPERS.

SECTION.

597. Notices and other papers, how served; subpœna for witnesses; when this section does not apply.

Sec. 597. Notices and other papers, how served; subpœna for witnesses. C. C. P., ss. 349, 353. 1876-'7, c. 64, s. 1.

Notices shall be in writing; notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter:

(1) If upon an attorney, service may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office: or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion;

(2) If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion;

(3) If upon a person who cannot be found after due diligence, or who is not a resident of this state, the service thereof may be made by the publication of the notice once a week for four successive weeks in some newspaper published in the county from which the notice is issued; and if no newspaper be published therein, then in some newspaper published within the judicial district; and the proof of service shall be as is required by law in the case of a service of a summons by publication;

(4) Service of a subpœna for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpœna for witnesses need not be signed by the clerk of the court; it shall be sufficient if subscribed by the party or by his attorney. This section shall not apply to the service of a summons, or other process, or of any paper, to bring a party into contempt.

Faison v. McIlwaine, 72—312; Surratt v. Crawford, 87—372.

CHAPTER TEN.

DUTIES OF SHERIFFS AND CORONERS.

SECTION.
598. Duty of sheriff and coroner in serving or executing process, and how enforced; may return process by mail.

Sec. 598. Duty of sheriff and coroner in serving or executing process, and how enforced; may return process by mail. C. C. P., s. 354.

Whenever the sheriff may be required to serve or ex-

ecute any summons, order or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and this chapter relating to sheriffs shall apply to coroners when the sheriff is a party. Sheriffs and coroners may return process by mail. Their liabilities in respect to the execution of process shall be as prescribed by law.

Thompson v. Berry, 64—79; Tate v. Powe, 64—644; Jones v. Gupton, 65—48.

CHAPTER ELEVEN.

POWERS OF REFEREES.

SECTION.
599. Powers of referees.

Sec. 599. Powers of referees. C. C. P., s. 356.

Every referee shall have power to administer oaths in any proceeding before him, and shall have generally the power vested in a referee by law.

CHAPTER TWELVE.

MISCELLANEOUS PROVISIONS.

SECTION.
600. Paper lost or withheld, copy to be used.
601. Where undertakings to be filed.
602. Time for publication of notices, how computed.

Sec. 600. Paper lost or withheld, copy to be used. C. C. P., s. 357.

If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

SEC. 601. Where undertakings to be filed. C. C. P., s. 358.

The various undertakings required to be given by chapter ten must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on claim and delivery of personal property, after the justification of the sureties, shall be delivered by the sheriff, or filed as therein provided.

SEC. 602. Time for publication of notices, how computed. C. C. P., s. 359.

The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication.

TITLE XV.

ACTIONS IN PARTICULAR CASES.

Chap. I. ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATIONS IN THE NATURE OF QUO WARRANTO.
II. MANDAMUS.
III. ACTIONS FOR WASTE AND NUISANCE.

CHAPTER ONE.

ACTIONS IN PLACE OF SCIRE FACIAS, QUO WARRANTO, AND OF INFORMATIONS IN THE NATURE OF QUO WARRANTO.

SECTION.
603. *Scire facias* and *quo warranto* abolished, and this chapter substituted.
604. Action may be brought by attorney general to vacate a charter, by direction of the Legislature.

SECTION.
605. Action to annul a corporation, when and how brought by the attorney general, by leave of the supreme court.
606. Leave, how obtained.
607. Action upon information or complaint.
608. When attorney general to grant leave to private relator to bring action.
609. Complaint and arrest of defendant, in action for usurping an office.
610. Judgment in such actions.
611. Assumption of office by relator, when judgment in his favor.
612. Proceedings against defendant on refusal to deliver books or papers.
SECTION.
613. Damages, how recovered.
614. One action against several persons, claiming office or franchise.
615. Penalty for usurping office or franchise, how awarded.
616. Trial in such cases to be expedited.
617. Judgment of forfeiture against a corporation.
618. Costs against corporation or persons claiming to be such, how collected.
619. Restraining corporation and appointment of receiver.
620. Copy of judgment roll, where to be filed.
621. Action for forfeiture of property to state.

Sec. 603. *Scire facias* and *quo warranto* abolished and this chapter substituted. C. C. P., s. 362. R. C., c. 26, ss. 5, 25.

The writ of *scire facias*, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this sub-chapter.

Parker v. Shannonhouse, 1 Phil., 209; Mardre v. Felton, 1 Phil., 279; Riddick v Hinton, 1 Phil., 291; Bingham v. Richardson, 1 Phil., 315; Kingsbury v Hughes, 1 Phil., 328; Thompson v. Berry, 64—79; Jones v. Gupton, 65—48; McDowell v. Asbury, 66—444; Lewis v. Johnston, 69—392; Brown v. Turner, 70—93; Saunders v. Gatling, 81—298.

Sec. 604. Action may be brought by attorney general to vacate a charter, by direction of the legislature. C. C. P., s. 363.

An action may be brought by the attorney general, in the name of the state, whenever the legislature shall so direct against a corporation for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion, or concealment of a material fact, by the person incorporated, or by some of them, or with their knowledge and consent.

Sec. 605. Action to annul a corporation, when and how brought by the attorney general, by leave of the supreme court. C. C. P., s. 364. R. C., c. 26, s. 25.

An action may be brought by the attorney general in the name of the state, on leave granted by the supreme court or a justice thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

(1) Offend against the act or acts, creating, altering, or renewing such corporation; or,

(2) Violate any law by which such corporation shall have forfeited its charter by abuse of its powers; or,

(3) Whenever it shall have forfeited its privileges or franchises by failure to exercise its power; or,

(4) Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

(5) Whenever it shall exercise a franchise or privilege not conferred upon it by law;

(6) For non-user of its powers for two or more years consecutively;

(7) For insolvency, manifested by the return of an execution unsatisfied, upon a judgment against the company docketed in the superior court of the county where it has its entry or principal place of business.

And it shall be the duty of the attorney general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted, to bring the action, in every case of public interest, and also in every other case in which satisfactory security shall be given to indemnify the state against the costs and expenses to be incurred thereby.

Sec. 606. Leave, how obtained. C. C. P., s. 365.

Leave to bring the action may be granted upon the application of the attorney general; and the court or justice may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

Loftin v. Sowers, 65—251.

Sec. 607. Action upon information or complaint. C. C. P., s. 366.

An action may be brought by the attorney general in the name of the state, upon his own information, or

upon the complaint of any private party, against the parties offending in the following cases:

(1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation created by the authority of this state; or

(2) When any public officer, civil or military, shall have done or suffered an act which, by law, shall make a forfeiture of his office; or,

(3) When any association or number of persons shall act within this state as a corporation, without being duly incorporated.

Culver v. Eggers, 63—630; Patterson v. Hubbs, 65—119; Loftin v. Sowers, 65—251; Clark v. Stanley, 66—59; Howerton v. Tate, 66—231; Ellis v. Deaf and Dumb and the Blind, 68—423; Nichols v. McKee, 68—429; Welker v. Bledsoe, 68—457; Howerton v. Tate, 68—546; Brown v. Turner, 70—93; Hargrove v. Hilliard, 72—169; Hargrove v. Hunt, 73—24; Norfleet v. Staton, 73—546; Moore v. Jones, 76—182; People v. Heaton, 77—18; Saunders v. Gatling, 81—298; Davis v. Moss, 81—303; State v. Norman, 82—687; Eliason v. Coleman, 86—235; Deloatch v. Rogers, 86—357.

Sec. 608. When attorney general to grant leave to private relator to bring action. 1874-'5, c. 76, s. 1. 1881, c. 330.

When application shall be made to the attorney general by a private relator to bring such an action, he shall grant leave for the same to be brought in the name of the state, upon the relation of such applicant, upon his tendering to the attorney general satisfactory security to indemnify the state against all costs and expenses, which may accrue in consequence of the bringing of such action.

Patterson v. Hubbs, 65—119; Loftin v. Sowers, 65—251; Howerton v. Tate, 66—231; Ray v. Castle, 79—580; Saunders v. Gatling, 81—298.

Sec. 609. Complaint and arrest of defendant, in action for usurping an office. C. C. P., s. 369. 1883, c. 102.

Whenever such action shall be brought against a person for usurping an office, the attorney general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order shall be granted by a judge of the superior court for the arrest of such defendant, and holding him to

bail; and thereupon he shall be arrested and held to bail in the manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

Patterson v. Hubbs, 65—119; Tate v. Morehead, 65—681; Howerton v. Tate, 70—161; Threadgill v. Railway Co., 73—178; Bladen Co. v. Clarke, 73—255; Norfleet v. Staton, 73—255; State v. Long, 76—254; Vann v. Pipkin, 77—408; Saunders v. Gatling, 81—298.

Sec. 610. Judgment in such actions. C. C. P., s. 370.

In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

People v. Bledsoe, 68—457; Hargrove v. Hilliard, 72—169.

Sec. 611. Assumption of office, &c., by relator, when judgment in his favor. C. C. P., s. 371.

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

Sec. 612. Proceedings against defendant on refusal to deliver books or papers. C. C. P., s. 372.

If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers as are prescribed by law.

Sec. 613. Damages, how recovered. C. C. P., s. 373.

If judgment be rendered, upon the right of the person so alleged to be entitled, in favor of such person, he may recover by action the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

Howerton v. Tate, 70—161; Swain v. McRae, 80—111; Jones v. Jones, 80—127.

Sec. 614. One action against several persons claiming office or franchise. C. C. P., s. 374.

Where several persons claim to be entitled to the same

office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

Sec. 615. Penalty for usurping office or franchise how awarded. R. C., c. 95, s. 1. C. C. P., s. 375.

When the defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the state.

Nichols v. McKee, 68—429.

Sec. 616. Trial in such cases to be expedited. 1874'-5, c. 173.

All actions to try the title, or right to any office, state, county or municipal, shall stand for trial at the return term of the summons, if a copy of the complaint shall have been served with the summons, at least ten days before the return day thereof; and it shall be the duty of the judges to expedite the trial of such actions, and to give them precedence over all other actions, civil or criminal. But it shall be unlawful to appropriate any public funds to the payment of counsel fees in any such action.

Nichols v. McKee, 68—429.

Sec. 617. Judgment of forfeiture against a corporation. C. C. P., s. 376.

If it shall be adjudged that a corporation against which an action shall have been brought, has forfeited by neglect, abuse, or surrender, its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved.

Sec. 618. Costs against corporation or persons claiming to be such, how collected. C. C. P., s. 377.

If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation,

the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

Sec. 619. Restraining corporation and appointment of receiver. C. C. P., s. 378.

When such judgment shall be rendered against a corporation, the court shall have the power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make a distribution thereof among its creditors; and it shall be the duty of the attorney general immediately after the rendition of such judgment to institute proceedings for that purpose.

Sec. 620. Copy of judgment roll, where to be filed. C. C. P., s. 379.

Upon the rendition of such judgment against a corporation, it shall be the duty of the attorney general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state.

Sec. 621. Action for forfeiture of property to state. C. C. P., s. 381.

Whenever any property, real or personal, shall be forfeited to the state, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court.

Brown v. Turner, 70–93; Steele v. Rutherford Co., 70—137; Belmont v. Riley, 71—260.

CHAPTER TWO.

MANDAMUS.

SECTION.
622. Applications for writs of *mandamus*.
623. Manner in which summons for applications for writs of *mandamus* shall issue.

Sec. 622. Application for writs of *mandamus*. 1871-'2, c. 75.

All applications for writs of *mandamus* shall be made by summons and complaint, and the complaint shall be duly verified.

Sec. 623. Manner in which summons for application for writs of *mandamus* shall issue. 1871-'2, c. 75, ss. 2, 3.

In all such applications, when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice shall be the same as is prescribed for civil actions. When the plaintiff seeks relief other than the enforcement of a money demand, the summons shall be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall proceed to hear and determine the action, both as to law and fact: *Provided*, that when an issue of fact is raised by the pleading, it shall be the duty of the court, upon the motion of either party, to continue the action until said issue of fact can be decided by a jury at the next regular term of the court.

Worthy v. Barrett, 63—199; Pegram v. Com'rs, 64—557; Carson v. Com'rs, 64—566; Gooch v. Gregory, 65—142; Railroad v. Jenkins, 65—173; Lutterloh v. Com'rs, 65—403; Howerton v. Tate, 66—231; Bayne v. Jenkins, 66—356; Sedberry v. Com'rs, 66—486; Thomas v. Com'rs, 66—522; Johnston v. Com'rs, 67—101; Alexander v. Com'rs, 67—330; R. R. Co. v. Jenkins, 68—502; Steele v. Com'rs, 70—137; Webb v. Com'rs, 70—307; Uzzle v. Com'rs, 70—564; Edwards v. Com'rs, 70—571; Belmont v. Riley, 71—260; Gas Light Co. v. Raleigh, 75—274; Moore v. Jones, 76—182; Moore v. Jones, 76—188; Fry v. Com'rs, 82—304.

CHAPTER THREE.

ACTIONS FOR WASTE AND NUISANCE.

SECTION.	
624.	Waste, how remediable.
625.	For and against whom an action for waste lies.
626.	Tenant for life aliening, still liable.
627.	Action by tenant against co-tenant.
628.	Heirs shall have the action.
629.	Judgment for treble damages and place wasted.
630.	Remedies for injuries heretofore remediable by writ of nuisance.

Sec. 624. Waste, how remediable. C. C. P., s. 383.

Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment

may be for damages, forfeiture of the estate of the party offending, and eviction from the premises.

Shields v. Lawrence, 72—43; McCormick v. Nixon, 83—113.

Sec. 625. For and against whom an action for waste lies. R. C., c. 116, s. 1. 52 Hen. III, c. 23. 6 Edw. I, c. 16. 20 Edw. I, s. 2. 11 Hen. VI, c. 5.

In all cases of waste, an action shall lie in the superior court at the instance of him in whom the right is, against all persons committing the same, as well tenant for term of life as tenant for term of years and guardians.

Ballentine v. Poyner, 2 Hay., 110; Ward v. Sheppard, 2 Hay., 283; Parkins v. Coxe, 2 Hay., 339; Brown v. Blick, 3 Mur., 511; Shine v. Wilcox, 1 D. & B. Eq., 631; Carr v. Carr, 4 D. & B., 179; Davis v. Gilliam, 5 Ired. Eq., 308; Dalton v. Dalton, 7 Ired. Eq., 197; Williams v. Lanier, Busb., 30; Smith v. Sharpe, Busb., 91; Dozier v. Gregory, 1 Jon., 100; Thompson v. Williams, 1 Jon. Eq., 176; Bogey v. Shute, 1 Jon. Eq., 180; Gorden v. Lowther, 75—193; McCormick v. Nixon, 83—113.

Sec. 626. Tenant for life aliening, still liable. R. C., c. 116, s. 2. 11 Hen. VI, c. 5.

Where tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action shall lie against the said tenant for life or years.

Southerland v. Jones, 6 Jon., 321.

Sec. 627. Action by tenant against co-tenant. R. C., c. 116, s. 4. 13 Edw. I, c. 22.

Where a joint-tenant or a tenant in common commits waste, an action shall lie against him at the instance of his co-tenant or joint-tenant.

Sec. 628. Heirs shall have the action. R. C., c. 116, s. 5. 52 Hen. III, c. 23. 6 Edw. I, c. 5. 11 Hen. VI, c. 5. 20 Edw. I, st. 2.

Every heir shall have his action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own.

Sec. 629. Judgment for treble damages and place wasted. R. C., c. 116, s. 3. 6 Edw. I, c. 5. 20 Edw. I, st. 2.

In all cases of waste, when judgment shall be against the defendant, the court may give judgment for thrice the amount of the damages assessed by the jury, and also

that the plaintiff recover the place wasted, if the said damages shall not be paid on or before a day to be named in the judgment.

Sec. 630. Remedies for injuries heretofore remediable by writ of nuisance. C. C. P., s. 387.

Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or for both.

CHAPTER ELEVEN.

COMMISSIONERS OF AFFIDAVITS.

SECTION.
631. Clerks and commissioners to take and certify affidavits.
632. Governor may appoint commissioners to take and certify probate of deeds, &c., in other states and foreign countries.
633. Such commissioner to take an oath, to be filed in secretary of state's office; his power and authority.
634. Commissioners recorded by secretary of state and certified to clerks of courts, and there recorded; certified copy of appointment or removal evidence.
635. Secretary of state to prepare list of commissioners.
636. List to be printed.
637. To be printed in all subsequent volumes of acts of assembly.
638. List to be conclusive evidence.
639. List of revocations to be published.
640. Clerk of a court of record in any other state, a commissioner of affidavits and deeds.

Sec. 631. Clerks and commissioners to take and certify affidavits. R. C., c. 21, s. 1. 1818, c. 965, s. 1. 1876-'7, c. 207.

The clerks of the supreme and superior courts and notaries public, are authorized to take and certify affidavits to be used before any justice of the peace, judge or court of the state; and the affidavits so taken by a clerk shall be certified under the hands of the said clerk, and if to be used out of the county where taken, also under the seal of the court of which they are respectively clerks, and if by a notary, under his notarial seal.

Sec. 632. Governor may appoint commissioners to take and certify probate of deeds, &c., in other states and foreign countries. R. C., c. 21, s. 2. 1830, c. 31, s. 1. 1873-'4, c. 73. 1873-'4, c. 173.

The governor is hereby authorized to appoint and commission one or more commissioners in any foreign country, state or republic; and in such of the states of the United States, or in the District of Columbia, or any of the territories, as he may deem expedient, who shall continue in office for two years from the date of their appointment, unless sooner removed by the governor, and shall have authority to take the acknowledgment or proof of any deed, mortgage or other conveyance of lands, tenements, or hereditaments lying in this state, and to take the private examination of married women, parties thereto, or any other writings to be used in this state. And such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner, shall have the same force and effect for all purposes, as if the same had been made or taken before any competent authority in this state.

Sec. 633. Such commissioner to take an oath to be filed in secretary's office; his power and authority. R. C., c. 21, s. 3. 1830, c. 31, s. 2.

Every commissioner appointed by the governor aforesaid, before he shall proceed to perform any duty by virtue of this chapter, shall take and subscribe an oath, before a justice of the peace in the city or county in which such commissioner shall reside, well and faithfully to execute and perform all the duties of such commissioner, according to the laws of North Carolina; which oath shall be filed in the office of the secretary of state: And thereupon he shall have full power and authority to administer an oath or affirmation to any person, who shall be willing or desirous to make such oath or affirmation before him, and to take depositions and to examine witnesses under any commission emanating from the courts of this state, relating to any cause depending, or to be brought in said courts, and every deposition, affidavit, or affirmation made before him, shall be as valid as if taken before any proper officer in this state.

Young v. Rollins, 85—485.

Sec. 634. Commissioners recorded by secretary of state and certified to clerks of courts, and there recorded; certified copy of appointment or removal, evidence. R. C., c. 21, s. 4. 1830, c. 31, s. 4. 1873-'4, c. 73.

It shall be the duty of the governor to cause to be recorded by the secretary of state the names of the persons who are appointed and qualified as commissioners, and for what state, territory, county, city, or town; and the secretary of state, when the oath of the commissioner shall be filed in his office, shall forthwith certify the appointment to the several clerks of the superior court of the state, who shall record the certificate of the secretary at length; and all removals of commissioners by the governor, and all commissioners whose commissions have expired by law, and which have not been renewed, shall be recorded and certified in like manner; and a certified copy thereof from the clerk, or a certificate of the appointment or removal aforesaid from the secretary of state, shall be sufficient evidence of the appointment or removal of such commissioner.

Sec. 635. Secretary to prepare list of commissioners. 1869-'70, c. 194, s. 1. 1873-'4, c. 73.

The secretary of state shall, as soon as may be, prepare and cause to be printed a list of all persons who, since the first day of January, one thousand eight hundred and eighty-one, have been appointed commissioners of affidavits and to take the probate of deeds in any foreign country and in the several states and territories of the United States and in the District of Columbia, under this chapter setting forth the states, territory or district or foreign country, for which such persons were appointed, and the dates of their respective appointments, and he shall send a certified copy of said list to every clerk of a court in this state.

Sec. 636. List to be printed. 1869-'70, c. 194, s. 2.

The secretary of state shall cause a copy of said list to be printed in each volume of the acts of the general assembly.

Sec. 637. To be printed in all subsequent volumes of acts of assembly. 1869-'70, c. 194, s. 3.

He shall also have printed in every subsequent volume of the acts of the general assembly a list as aforesaid of all such commissioners appointed since the date of the previous list.

Sec. 638. List to be conclusive evidence. 1869-'70, c. 194, s. 4.

The list of commissioners so published in any volume of the acts of the general assembly shall be conclusive evidence in all courts of the appointments therein stated, and of the dates thereof.

Sec. 639. List of revocations to be published. 1869-'70, c. 194, s. 5.

The secretary shall also add to each of said lists that may be published after that provided for in this chapter a list of all such commissioners whose appointments have been revoked, or have resigned, removed or died since the date of the list previously published, as far as the same may be known to him, with the dates of such revocation, resignation, removal or death.

Sec. 640. Clerk of a court of record in any other state, a commissioner of affidavits and deeds. 1879, c. 77.

Every clerk of a court of record in any other state shall have full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds for the state.

CHAPTER TWELVE.

COMMON LAW.

SECTION.

641. Common law declared to be in force.

Sec. 641. Common law declared to be in force. R. C., c. 22. 1715, c. 5, ss. 2, 3. 1778, c. 133.

All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this state and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this state.

Sherrod v. Davis, 1 Hay., 327 (282); Shaw v. Moore, 4 Jon., 25; Winder v. Blake, 4 Jon., 332; In the matter of Bryan, Winst., 1; State v. Haughton, 63—491.

CHAPTER THIRTEEN.

CONSTABLES.

[Constitution, Art. IV., s. 24.]

SECTION.
642. Oath of office to be taken.
643. Power and duty of constables.
644. Constables to execute notices concerning matters within justice's jurisdiction, by delivering copy; return evidence.
645. Special constables in certain cases appointed by justices.
646. Vacancies filled by board of commissioners.
647. Bond to be given by constable to be registered; copy to be read in evidence; fees, how paid.

Sec. 642. Oath of office to be taken. R. C., c. 24, s. 8. 1741, c. 24, s. 2. 1791, c. 342, ss. 1, 2.

All constables, before they shall be qualified to act, shall take before the board of county commissioners, the oaths prescribed for public officers, and also an oath of office.

State v. Lane, 13 Ired., 253.

Sec. 643. Power and duty of constables. R. C., c. 24, s. 9. 1741, c. 24, s. 3. 1790, c. 330, s. 1. 1874-'5, c. 253.

Constables are hereby invested with, and may execute the same power and authority as they have been by law heretofore vested with, and have executed; and, in discharge of their duties, they shall execute all precepts and process of whatever nature, to them directed by any justice of the peace or other competent authority, within their county or upon any bay, river or creek adjoining thereto; and the said precepts and process shall be returned to the magistrates, or other proper authority.

State v. Ferguson, 76—197.

Sec. 644. Constables to execute notices concerning matters within justice's jurisdiction, by delivering copy; return evidence. R. C., c. 24, s. 10. 1796, c. 466, s. 1. 1800, c. 557, s. 1.

Constables shall likewise execute within the places aforesaid, all notices tendered to them, which are required by law to be given for the commencement, or in the prosecution of any cause before a justice of the peace; and the service thereof shall be made by delivering a copy to the person to be notified, or by leaving a

copy at his usual place of abode, if in the jurisdiction of said constable; which service, with the time thereof, he shall return on the notice; and such return shall be evidence of its service; and, on demand of the same, the constable shall deliver the notice to the party at whose instance it was issued.

Calvert v. Peebles, 71—274.

Sec. 645. Special constables in certain cases appointed by justices. R. C., c. 24, s. 11. 1741, c. 24, s. 9.

For the better executing any precept or mandate in extraordinary cases, any justice of the peace may direct the same in the absence of, or for want of a constable, to any person not being a party, who shall be obliged to execute the same, under like penalty that any constable would be liable to.

Calvert v. Peebles, 71—274.

Sec. 646. Vacancies filled by board of commissioners. R. C., c. 24, s. 6. 1741, c. 24, s. 7.

Upon the death, failure to qualify or removal of any constable out of the township in which he was elected or appointed constable, the board of commissioners may appoint another person to fill the vacancy, who shall be qualified and act until the next election of constables.

State v. Lane, 13 Ired., 253.

Sec. 647. Bond to be given by constable to be registered; copy to be read in evidence; fees, how paid. R. C., c. 24, s. 7. 1818, c. 980, s. 1. 1820, c. 1045, s. 2. 1833, c. 17. 1869-70', c. 185, s. 10.

The board of commissioners of each county shall require of each constable, elected or appointed for a township, on entering upon the duties of his office, to give a bond with good surety, payable to the state of North Carolina, in a sum not less than five hundred dollars, nor more than two thousand dollars, conditioned as well for the faithful discharge of his duty as constable, as for his diligently endeavoring to collect all claims put into his hands for collection, and faithfully paying over all sums thereon received, either with or without suit, unto the persons to whom the same may be due. Said bond shall be duly proved and registered, and after registration, filed in the office of the register of deeds; and certified copies of the same from the register's office shall be received and read in evidence in all actions and proceedings where the original might be.

The fees for proving and registering the bond of constable shall be paid by the constable.

Dade v. Morris, 3 Mur., 146; Governor v. Bailey, 3 Hawks, 463; Governor v. Franklin, 4 Hawks, 274; Governor v. Coble, 2 Dev., 489; Governor v. Davidson, 3 Dev., 361; Governor v. Carraway, 3 Dev., 436; State v. Halcombe, 2 Ired., 211; State v. Lackey, 3 Ired., 25; State v. Stephens, 3 Ired., 92; State v. Sugg, 3 Ired., 96; Williams v. Williamson, 6 Ired., 281; State v. Johnson, 7 Ired., 77; Miller v. Davis, 7 Ired., 198; State v. Wall, 9 Ired. 20; State v. Corpening, 10 Ired., 58; State v. Outland, 11 Ired., 134; State v. Hooks, 11 Ired., 371; State v. McGowan, 12 Ired., 44; Morgan v. Horne, Busb., 25; State v. Bean, Busb., 318; Grier v. Hill, 6 Jon., 572; Nixon v. Bagby, 7 Jon., 4; Hearne v. Parker, 7 Jon., 150; Dunton v. Doxey, 7 Jon., 222; Reid v. Humphreys, 7 Jon., 258; Chipley v. Albea, 8 Jon., 204; Lipscomb v. Cheek, Phil., 332; Kivett v. Massey, 63—240; Taylor v. Galbraith, 65—409; State v. Furguson, 76—199; State v. James, 78—455; King v. McLure, 84—153.

CHAPTER FOURTEEN.

CONTEMPT.

SECTION.
648. What constitutes contempt.
649. Contempt, its punishment.
650. Court may punish summarily.
651. Who may punish.
652. Commissioners may punish.
653. When offender to appear and show cause.
654. Punish as for contempt.
655. Proceedings as for contempt, how prosecuted.
656. What necessary to sustain proceeding.

Sec. 648. What constitutes contempt. 1868-'9, c. 177, s. 1. 1870-'1, c. 216, ss. 2, 3.

Any person guilty of any of the following acts may be punished for contempt:

(1) Disorderly, contemptuous, or insolent behavior committed during the sitting of any court of justice, in immediate view and presence of the court, and directly tending to interrupt its proceedings, or to impair the respect due to its authority;

State v. Mott, 4 Jon., 449.

(2) Behavior of the like character committed in the presence of any referee or referees, while actually engaged in any trial or hearing pursuant to the order of any

court, or in the presence of any jury while actually sitting for the trial of a cause, or upon any inquest or other proceedings authorized by law;

(3) Any breach of the peace, noise or other disturbance directly tending to interrupt the proceedings of any court;

State v. Mott, 4 Jon., 449.

(4) Wilful disobedience of any process or order lawfully issued by any court;

(5) Resistance wilfully offered by any person to the lawful order or process of any court;

(6) The contumacious and unlawful refusal of any person to be sworn as a witness, or when so sworn, the like refusal to answer any legal and proper interrogatory;

(7) The publication of grossly inaccurate reports of the proceedings in any court, about any trial, or other matter pending before said court, made with intent to misrepresent or to bring into contempt the said court; but no person can be punished as for a contempt in publishing a true, full and fair report of any trial, argument, decision or proceeding had in court;

(8) Misbehavior of any officer of the court in any official transaction;

(9) The several acts, neglects and omissions of duty, malfeasances, misfeasances, and nonfeasances, above specified and described, shall be the only acts, neglects and omissions of duty, malfeasances, misfeasances and nonfeasances which shall be the subject of contempt of court. And if there be any parts of the common law now in force in this state which recognized other acts, neglects, omissions of duty, malfeasances, misfeasances and nonfeasances besides those specified and described above, the same are hereby repealed and annulled.

Robins and Jackson, *ex parte*, 63—309; *In re.* Moore, 63—397; Biggs, *ex parte*, 64—202; *ex parte* Schenck, 65—353; Kane v. Haywood, 66—1; Bond v. Bond, 69—97; Phillips v. Trezevant, 70—176; Daniel v. Owen, 72—340; *In re.* Brinson, 73—278; Pain v. Pain, 80—322; *In re.* Davis, 81—72; La-Fontaine v. Underwriters, 83—132; Cromartie v. Com'rs, 85—211; Baker v. Cordon, 86—116; Cromartie v. Com'rs, 87—134.

Sec. 649. Contempt, its punishment. 1868-'9, c. 177, s. 2.

Punishment for contempt for matters set forth in the preceding section, shall be by fine or imprisonment, or both, in the discretion of the court. The fine not to ex-

ceed two hundred and fifty dollars, and the imprisonment not to exceed thirty days.

In re. Rhodes, 65—518; Morris v. Whitehead, 65—637; *In re.* Walker, 82—95; Cromartie v. Com'rs, 85—211.

Sec. 650. Court may punish summarily. R. C., c. 34, s. 117. 1868-'9, c. 177, s. 3.

Contempt committed in the immediate view and presence of the court may be punished summarily, but the court shall cause the particulars of the offence to be specified on the record, and a copy of the same to be attached to every committal, attachment or process in the nature of an execution founded on such judgment or order.

Ex parte Summers, 5 Ired., 149; Weaver v. Hamilton, 8 Jon., 347; State v. Mott, 4 Jon., 449; Pritchard v. Oldham, 8 Jon., 439.

Sec. 651. Who may punish. 1868-'9, c. 177, s. 4.

Every justice of the peace, referee, commissioner, clerk of the superior court, inferior court, criminal court, or judge of the superior court, or justice of the supreme court, shall have power to punish for contempt while sitting for the trial of causes or engaged in official duties.

In re. Brinson, 73—278.

Sec. 652. Commissioners may punish. 1868-'9, c. 177, s. 5.

The board of commissioners of each county shall have power to punish for contempt for any disorderly conduct or disturbance, tending to interrupt them in the transaction of their official business.

Sec. 653. When offender to appear and show cause. 1868-'9, c. 177, s. 6.

Whenever the contempt shall not have been committed in the immediate presence of the court, or so near as to interrupt its business, proceedings thereupon shall be by an order directing the offender to appear, within reasonable time, and show cause why he should not be attached for contempt. At the time specified in the order, the person charged with the contempt may appear and answer, and, if he fail to appear and show good cause why he should not be attached for the contempt charged, he shall be punished as provided in this chapter.

Sec. 654. Punish as for contempt. 1868-'9, c. 177, s. 7.

Every court of record shall have power to punish as for contempt:

(1) Any clerk, sheriff, register, solicitor, attorney, counsellor, coroner, constable, referee, or any other person in any manner selected or appointed to perform any ministerial or judicial service, for any neglect or violation of duty or any misconduct, by which the rights or remedies of any party in a cause or matter pending in such court may be defeated, impaired, delayed or prejudiced for disobedience of any lawful order of any court or judge, or any deceit or abuse of any process or order of any such court or judge;

Cromartie v. Com'rs, 85—211.

(2) Parties to suits, attorneys, and all other persons for the non-payment of any sum of money ordered by such court, in cases where execution cannot be awarded for the collection of the same;

(3) All persons for assuming to be officers, attorneys or counsellors of the court, and acting as such without authority, for receiving any property or person which may be in custody of any officer by virtue of any order or process of the court, for unlawfully detaining any witness or party to any suit, while going to, remaining at, or returning from the court where the same may be set for trial, or for the unlawful interference with the proceedings in any action;

(4) All persons summoned as witnesses in refusing or neglecting to obey such summons to attend, be sworn, or answer, as such witness;

LaFontaine v. Underwriters, 83—132.

(5) Parties summoned as jurors for impropriety, conversing with parties or others in relation to an action to be tried at such court or receiving communication therefrom;

(6) All inferior magistrates, officers and tribunals for disobedience of any lawful order of the court, or for proceeding in any matter or cause contrary to law, after the same shall have been removed from their jurisdiction;

(7) All other cases where attachments and proceedings as for contempt have been heretofore adopted and practiced in courts of record in this state, to enforce the civil remedies or protect the rights of any party to an action.

Sec. 655. Proceedings as for contempt, how prosecuted. 1868-'9, c. 177, s. 8.

Proceedings as for contempt shall be prosecuted and carried on, as provided in other special proceedings.

Sec. 656. What necessary to sustain proceeding. 1868-'9, c. 177, s. 9.

To sustain a proceeding as for contempt, the act complained of must have been such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court.

CHAPTER FIFTEEN.

CORONER.

SECTION.	
657. Coroner to hold inquests; his duty; physician to be summoned at the request of the jury.	660. Coroner to take proof of number of days and mileage of jurors; audited by board of commissioners.
658. When there is no sheriff, coroner to act.	661. Bond given and recorded annually; oath taken.
659. Jurors at coroner's inquest allowed compensation.	662. Bonds, to be registered.

Sec. 657. Coroner to hold inquests; his duty; physician to be summoned at the request of the jury. R. C., c. 25, s. 4. 4 Edw. I. st., s. 4. 1881, c. 263. 1881, c. 308.

It shall be the duty of the several coroners, whenever it is made to appear, by the affidavit of some responsible person, that the deceased probably came to his death by the criminal act or default of some person or persons, to go to the place, where the body of such deceased person is and forthwith to summon a jury of six good and lawful men; whereupon the coroner, upon oath of said jury at the said place, shall make inquiry when, how, and by what means such deceased person came to his death, and his name if it was known, together with all the material circumstances attending his death. And if it shall appear that the deceased was slain, then who was guilty either as principal or accessory, if known, or in any manner the cause of his death. And as many persons as are found

culpable, by inquisition in manner aforesaid, shall be taken and delivered to the sheriff and committed to jail; and such persons as are found to know anything of the matters aforesaid and are not culpable themselves, shall be bound in a recognizance with sufficient surety to appear at the next superior court to give evidence; of all which matters and things the coroner must note up a record of his inquisition signed by the jurors, and return the same to the next superior court of his proper county. It shall be the duty of every coroner, when the jury investigating the case shall require it, to summon a physician or surgeon, who shall be paid for his attendance and service such sum as the court may deem reasonable.

State v. Knight, 84—789; State v. Morgan, 85—581; *Ibid*, 86—732.

Sec. 658. Where there is no sheriff, coroner to act. R. C., c. 25, s. 5. 1779, c. 156, s. 1.

If at any time there be no person properly qualified to act as sheriff in any county, the coroner of such county is hereby required to execute all process, civil or criminal, lawfully issuing on judgments, orders, or sentences of any court, and in all other things to act as sheriff, until some person shall be appointed sheriff in said county; and such coroner shall be under the same rules and regulations, and subject to the same forfeitures, fines, and penalties as sheriffs are by law, for neglect or disobedience of the same duties.

Wittkowsky v. Wasson, 69—38; Edwards v. Tipton, 77—222; Yeargin v. Siler, 83—348.

Sec. 659. Jurors at coroner's inquest allowed compensation. 1881, c. 53, s. 1.

All persons who may be summoned to act as jurors in any inquest held by a coroner over dead bodies, and who, in obedience thereto, shall appear and act as such jurors, shall be entitled to the same compensation in per diem and mileage as is allowed by law to jurors acting in the superior courts.

Sec. 660. Coroner to take proof of number of days and mileage of jurors; audited by board of commissioners. 1881, c. 53, s. 2.

The coroners of the respective counties are hereby authorized and empowered to take proof of the number of days of service of each juror so acting and also of the number of miles traveled by such juror in going to and returning from such place of inquest, and shall file with

the board of commissioners of the county a correct account of the same, which shall be, by such commissioners, audited and paid in the manner provided for the pay of jurors acting in the superior courts.

Sec. 661. Bond given and renewed annually; oath taken. R. C., c. 25, s. 2. 1791, c. 342, ss. 1, 2. 1820, c. 1047, ss. 1, 2.

Every coroner shall execute an undertaking for the faithful discharge of the duties of his office with good surety, in the sum of two thousand dollars, (or in a larger sum if required by the court,) payable to the State of North Carolina and approved by the board of county commissioners, which he shall annually renew, or no longer hold said office. He shall also take the oaths of public officers and an oath of office.

Mabry v. Turrentine, 8 Ired., 201.

Sec. 662. Bonds to be registered. 1860-'61, c. 18.

All official bonds of coroners shall be duly proved, certified, registered and filed as sheriffs' bonds are required to be; and certified copies of the same, from the register's office, shall be received and read in evidence in the like cases, and in like manner as such copies of sheriffs' bonds are now allowed to be read in evidence.

Greene v. Wynne, 66—530; Heilig v. Lemly, 74—250; Yeargin v. Siler, 83—348; State v. Knight, 84—789.

CHAPTER SIXTEEN.

CORPORATIONS.

SECTION.	
663. General powers of corporations.	666. Land may be held and conveyed.
664. By-laws to determine the manner of calling and conducting meetings, &c.	667. Corporations to continue three years after charter expires, to close their concerns.
665. First meeting, how notified when not provided for specially.	668. When corporations expire, &c., receivers or trustees appointed to settle their affairs; their powers.

SECTION.
669. Jurisdiction over receivers or trustees.
670. Receivers to pay debts and distribute surplus.
671. What executions to issue, and what may be sold.
672. Executions levied on personal property; property may be sold independent of the franchise and real property belonging to such corporation.
673. Who shall be deemed the highest bidder.
674. Officer making sale to convey the right of fare and toll, and deliver possession of property connected with franchise.
675. Purchaser of franchise to have same remedies as corporation for damages.
676. Liabilities of corporation to continue after sale.
677. How certain business and other corporations may be formed; corporations to enter into articles of agreement; what articles to set forth.
678. Articles to be proved and recorded; book to be kept for that purpose; index to be made; twenty-five dollars to be collected by clerk for benfit of school fund; penalty for not collecting, &c.; sureties on clerk's bond responsible, and also a misdemeanor.
679. Clerk to issue letters declaring its incorporation; notice thereof to be published in some newspaper; notice to set forth substance of articles.
680. Fees of clerk.
681. No dividend, if debts exceed two-thirds of assets.
682. Copies of letters admissible in evidence, and *prima facie* evidence of incorporation.

SECTION.
683. Contracts exceeding one hundred dollars to be in writing.
684. Such corporations forbidden to bank.
685. How corporations may convey by deed; void as to existing creditors.
686. Attorney general may bring an action to restrain corporations from exercising powers not granted, and to bring certain officers to account, &c.; managers of corporations personally liable for fraud.
687. Corporations, how long to exist; dissolution not to extinguish debts.
688. Two years of non-user a forfeiture of charter.
689. Shares in corporations personal estate.
690. Corporations may hold not over thirty years; when lands may be forfeited to the state.
691. Duty of grand jury and solicitor.
692. Lands how sold, &c.
693. Existing corporations affected.
694. How corporations may be dissolved; abuse of power; nonuser; insolvency; criminal conviction.
695. How summons in such cases served.
696. Tax on bill for incorporation presented to general assembly.
697. Sales under deeds of trust.
698. Corporation created by sale shall succeed to rights, &c., and when it expires, property to go to pay debts, &c.
699. Tax collectors to levy upon and take into possession property of corporations, &c., whether in hands of receiver or not.

SECTION.
700. Not necessary to obtain order of court for the payment of tax, if property in hands of receiver.
701. This chapter to apply to all corporations, unless otherwise declared herein, or in the chapter on railroads and telegraphs.

Passim, Railroad Co. v. Leach, 4 Jon., 340; Bank v. Charlotte, 85—433.

SEC. 663. General powers of corporations. R. C., c. 26, s. 1. 1850, c. 50.

All corporations shall, where no other provision is specially made, be capable in their corporate name to sue and be sued, appear, prosecute and defend to final judgment and execution, in any courts or elsewhere; to have a common seal, which they may alter at pleasure; to elect, in such manner as they shall determine to be proper, all necessary officers, and to fix their compensation and define their duties and obligations; and to make by-laws and regulations, consistent with the laws of the state, for their own government, and for the due and orderly conducting of their affairs, and the management of their property.

Mauney v. Motz, 4 Ired. Eq., 195; Thompson v. Guion, 5 Jon. Eq., 113; R. R. Co. v. Wright, 5 Jon., 304; R. R. Co. v. Thompson, 7 Jon., 387.

SEC. 664. By-laws to determine the manner of calling and conducting meetings, &c. R. C., c. 26, s. 2. 1850, c. 50.

All corporations may, by their by-laws, where no other provision is specially made, determine the manner of calling and conducting all meetings; the number of members that shall constitute a quorum; the number of shares that shall entitle the members to one or more votes; the mode of voting by proxy; the mode of selling shares for the non-payment of assessments; and the tenure of office of the several officers; and the manner in which vacancies in any of the offices shall be filled till a regular election, and they may annex suitable penalties to such by-laws, not exceeding in any case the sum of twenty dollars for any one offence: *Provided*, that no such by-law shall be made by any corporation repugnant to any provision of its charter: *And provided further*, that if the chief or other authorized officer of any company shall issue any certificate of stock in any other way or to any other person than as provided by the by-laws of said company, the officer issuing such certificate shall be guilty of a misdemeanor, and shall be punished by

fine or imprisonment, or both, at the discretion of the court.

Sec. 665. First meeting, how notified when not provided for specially. R. C., c. 26, s. 3. 1850, c. 50.

The first meeting of all corporations, unless otherwise provided for in their acts of incorporation, shall be called by a notice signed by any one or more of the persons named in the act of incorporation, and setting forth the time, place and purposes of the meeting; and such notice, ten days at least before the meeting, shall be delivered to each member or published in some newspaper printed nearest to the proposed place of meeting.

Sec. 666. Land may be held and conveyed. R. C., c. 26, s. 4. 1881, c. 124.

Every corporation may hold lands to an amount authorized by law, and may convey the same. But no corporation formed under this chapter, except mining and manufacturing companies, and companies for supplying the cities and towns of the state with water, shall have power to hold at the same time more than three hundred acres of land in fee simple, or for a longer term than thirty years.

Sec. 667. Corporations to continue three years after charter expires, to close their concerns. R. C., c. 26, s. 5.

All corporations, whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which such corporations may have been established.

Von Glahn v. Harris, 73—323; Von Glahn v. DeRosset, 81—467; Dobson v. Simonton, 86—492.

Sec. 668. When corporations expire, &c., receivers or trustees appointed to settle their affairs; their powers. R. C., c. 26, s. 6.

When the charter of any corporation shall expire or be annulled as provided in the preceding section, or the cor-

poration is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, either for nonuser or abuser, or any other cause, the judge of the superior court having jurisdiction of the appointment of receivers as provided in chapter ten, on application of any creditor of such corporation, or of any stockholder or member thereof at any time within said three years, or if for insolvency within three years from the time of said insolvency, may appoint one or more persons to be receivers or trustees of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend, in the name of the corporation, or in the name of such receivers or trustees, all such actions as may be necessary or proper for the purpose aforesaid; and to appoint agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation; and the powers of such receivers may be continued beyond the said three years, and as long as the court shall think necessary for the purposes aforesaid.

Fox v. Horah, 1 Ired. Eq., 358; Von Glahn v. DeRosset, 81—467; Attorney General v. Roanoke Nav. Co., 84—705; Young v. Rollins, 85—485; Dobson v. Simonton, 86—492.

Sec. 669. Jurisdiction over receivers or trustees. R. C., c. 26, s. 7.

The court or judge shall have jurisdiction of such application and of all questions arising in the proceedings thereon, and make such orders, injunctions and decrees therein as justice and equity shall require.

Sec. 670. Receivers to pay debts, and distribute surplus. R. C., c. 26, s. 8.

The said receivers shall pay all debts due from the corporation, if the funds in their hands shall be sufficient therefor; and if not, they shall distribute the same ratably among all the creditors, who shall prove their debts in the manner that shall be directed by any order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of said debts, the receivers shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders or members of the corporation, or their legal representatives.

Sec. 671. What executions to issue, and what may be sold. R. C., c. 26, s. 9. 1820, c. 1056, s. 4.

If any judgment or decree shall be rendered against a corporation, the plaintiff may sue out such executions against the property of a corporation as is provided in this code to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation; and if the judgment or decree be against any corporation authorized to receive fare or tolls, the franchise of such corporation, with all the rights and privileges thereof, so far as relates to the receiving of fare or tolls, and also all other corporate property, real and personal, may be taken on execution and sold under the rules regulating the sale of real estate.

State v. Rives, 5 Ired., 297; State v. R. R. Co., 72—634; Gooch v. McGee, 83—59; Attorney General v. Roanoke Nav. Co., 84—705.

Sec. 672. Executions levied on personal property; property may be sold independent of the franchise and real property belonging to such corporation.

When an execution has been sued out and levied upon the personal property of a corporation, such personal property may be sold, and the title to such property shall pass to the purchaser at said sale, independent of the franchise and real estate of such corporation.

Attorney General v. Roanoke Nav. Co., 84—705.

Sec. 673. Who shall be deemed the highest bidder. R. C., c. 26, s. 10.

In the sale of the franchise of any corporation, the person who shall satisfy the execution with all costs thereon, or who shall agree to take such franchise for the shortest period of time, and to receive during that time all such fare and toll as the said corporation would by law be entitled to demand, shall be considered as the highest bidder.

Taylor v. Jerkins, 6 Jon., 316; Gooch v. McGee, 83—59; Attorney General v. Roanoke Nav. Co., 84—705.

Sec. 674. Officer making sale to convey the right of fare and toll, and deliver possession of property connected with franchise. R. C., c. 26, s. 11.

The officer making sale shall by deed convey to the purchaser all the immunities and privileges which by law belong to the corporation, so far as relates to the right of demanding fare and toll; and the officer shall, im-

mediately after such sale, deliver to the purchaser possession of all the corporate real property connected with the franchise belonging to such coporation, in whatever county the same may be situated: and the purchaser may thereupon demand and receive to his own use all the fare and toll which may accrue within the time limited by the term of his purchase in the same manner and under the same regulations as such corporation was before authorized to demand and receive the same.

Gooch v. McGee, 83—59; Attorney General v. Roanoke Nav. Co., 84—705.

Sec. 675. Purchaser of a franchise to have same remedies as corporation for damages. R. C., c. 26, s. 12.

Any person who may have purchased, or shall, under this chapter, hereafter purchase the franchise of any corporation, and the assignee of such person may recover in such action as the corporation might have brought, any penalties imposed by law for an injury to the franchise or for any other cause, and which such corporation would have been entitled to recover, during the time limited in the said purchase of the franchise; and during that time, the corporation shall not be entitled to prosecute for such penalties.

Attorney General v. Roanoke Nav. Co., 84—705.

Sec. 676. Liabilities of corporation to continue after sale R. C., c. 26, s. 13.

The corporation whose franchise shall have been sold as aforesaid shall in all other respects retain the same powers and be bound to the discharge of the same duties and liable to the same penalties and forfeitures as before such sale.

Sec. 677. How certain business and other corporations may be formed; corporations to enter into articles of agreement; what articles to set forth. R. C., c. 26, s. 14. 1866-'7, c. 78. 1871-'2, c. 199, s. 1.

Any number of persons not less than three who may be desirous of engaging in any business not unlawful, except building railroads, or banking or insurance, at any place within the state, may, if it please them, become incorporated in the manner following, that is: such persons shall, by articles of agreement, under their hands and seals, set forth before the clerk of the superior court of the county where such mining is to be conducted or manufactory established, and in case of any other association, before the clerk of the superior court of the

county where the meetings may be held: 1. The corporate name. 2. The business proposed. 3. The place where it is proposed to be carried on. 4. The length of time desired, not exceeding thirty years, except as to mining corporations, the term for which shall not exceed sixty years. 5. The names of persons who have subscribed. And, in the case of mining and manufacturing, shall also state: 6. The amount of capital; and 7. The number of shares, and the amount of each (the same not less than fifty dollars each).

Sec. 678. Articles to be proved and recorded; book to be kept for that purpose; index to be made; twenty-five dollars to be collected by clerk for benefit of school fund; penalty for not collecting, &c.; sureties on clerk's bond responsible, and also a misdemeanor.

The said articles of agreement, after having been proved by a subscribing witness, or acknowledged before the clerk, shall be recorded by the said clerk in a book to be kept for this purpose in his office and marked "record of incorporations," and said clerk shall keep in said book an alphabetical index of the names of the corporations: *Provided*, that the said clerk, before recording the said articles of agreement, shall collect from the persons signing said articles, the sum of twenty-five dollars, to be paid by the said clerk to the treasurer of the county, for the benefit of the public school fund of the county; and the said clerk shall, at the next regular meeting of the board of commissioners of the county, report the fact of such collection and payment to the treasurer, to the said board, to the end that the said treasurer may be charged with the same: *Provided further*, that if said clerk shall fail to collect said sum of twenty five dollars, or when collected, shall fail to pay over the same to the county treasurer, or shall fail to report the fact of such collection and payment to the board of commissioners, he shall forfeit and pay the sum of fifty dollars, one-half to the use of the public school fund of the county, and the other half to the person suing for the same; and his sureties on his official bond shall also be liable for said penalty, and said clerk shall be guilty of a misdemeanor, and fined not exceeding fifty dollars.

Sec. 679. Clerk to issue letters declaring its incorporation; notice thereof to be published in some newspaper; notice to set forth substance of articles. R. C., c. 26, s. 15. 1852, c. 67, ss. 1, 2. 1852, c. 81, ss. 1, 2, 3.

After the said articles of agreement shall have been

recorded, the clerk under the seal of the superior court, shall issue letters declaring said persons and their successors to be, and thenceforth they shall be, a corporation, for the purpose and according to the terms prescribed in said articles, and shall cause notice thereof to be published in some newspaper, if any there be, printed in the county, or nearest to the place where said articles may be recorded, in which shall be set forth the substance of the articles, and (in case of companies having a capital,) the amount of capital, and value of shares.

Young v. Rollins, 85—485.

Sec. 680. Fees of clerk. R. C., c. 26, s. 16. 1852, c. 67, s. 3. 1852, c. 81, ss. 4, 10.

Every company incorporated by letters under articles of agreement, shall pay the clerk of the superior court a fee of two dollars for taking the probate and recording the articles of agreement, also the expense of publication, and one dollar for the certificate declaring its incorporation.

Sec. 681. No dividend, if debts exceed two-thirds of assets. R. C., c. 26, s. 18. 1852, c. 81, s. 5.

No such company shall declare any dividend, when its debts, whether due or not, shall exceed two-thirds of its assets.

Sec. 682. Copies of letters admissible in evidence, and *prima facie* evidence of incorporation. R. C., c. 26, ss. 19, 20. 1852, c. 81, ss. 7, 8.

All such letters issued under the authority of this chapter, and copies thereof certified by the clerk of the superior court of the county where the same are recorded, shall in all cases be admissible in evidence; and the letters aforesaid shall, in all judicial proceedings, be deemed *prima facie* evidence of the complete organization and incorporation of the company, purporting thereby to have been established.

Sec. 683. Contracts exceeding one hundred dollars to be in writing. 1871-'2, c. 199, s. 23.

Every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto.

Sec. 684. Such corporations forbidden to bank. R. C., c. 26, s. 21. 1852, c. 81, s. 9.

No corporation created by letters of agreement under this chapter for the purposes herein allowed shall, under any pretence, engage in the business of banking: *Provided*, that in the transaction of their business, they may make, and take and indorse, when necessary, all such bonds, notes and bills of exchange, as the particular business may require.

Sec. 685. How corporations may convey by deed; void as to existing creditors. R. C., c. 26, s. 22. 1798, c. 514, s. 4.

Any corporation may convey lands, and all other property which is transferrable by deed, by deed of bargain and sale, or other proper deed, sealed with the common seal and signed by the president or presiding member or trustee, and two other members of the corporation, and attested by witnesses. But any conveyance of its property, whether absolutely or upon condition, in trust, or by way of mortgage executed by any corporation, shall be void and of no effect as to the creditors of said corporation, existing prior to, or at the time of the execution of said deed, and as to torts committed by such corporation, its agents or employees, prior to, or at the time of the execution of said deed: *Provided*, said creditors, or persons injured, or their representatives shall commence proceedings or actions to enforce their claims against said corporation within sixty days after the registration of said deed, as required by law.

Taylor v. Heggie, 83—244.

Sec. 686. Attorney general may bring an action to restrain corporations from exercising powers not granted, and to bring certain officers to account, &c., managers of corporations personally liable for fraud. R. C., c. 26, s. 28. 1831, c. 24, s. 5.

It shall be the duty of the attorney general to bring an action in the superior court of the county as in this code directed, to restrain by injunction, any corporation from assuming or exercising any franchise, or transacting any business not allowed by its charter; to restrain any person from exercising corporate franchises not granted; to bring directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care; to remove

such officers or trustees upon proof of gross misconduct; to secure, for the benefit of all interested, the property or funds aforesaid; to set aside and restrain improper alienations thereof, and generally to compel the faithful performance of duty, and prevent all malversation, peculation and waste. And in case of fraud by the president, directors, managers, or stockholders, in any corporation, the court shall render personally liable to creditors and others injured thereby such of the directors, and stockholders as may have been concerned in the fraud.

Atto. Gen. v. R. R. Co., 6 Ired., 456; R. R. Co. v. Leach, 4 Jon., 340; Bank v. Charlotte, 85—433.

Sec. 687. Corporations, how long to exist; dissolution not to extinguish debts. R. C., c. 26, s. 29. 1836, c. 10, s. 1.

No body corporate, hereafter to be established, shall exist for a longer term than sixty years, unless otherwise provided in the act creating the same; but in the case of a dissolution of a corporation by any judgment or decree, the debts due to, or from it, shall not be extinguished.

Von Glahn v. DeRossett, 81—467.

Sec. 688. Two years of non-user a forfeiture of charter. R. C., c. 26, s. 30. 1836, c. 10, s. 2.

When any act shall have passed, or letters of agreement, as provided in this chapter, shall have been recorded, creating a body corporate, and the corporators, for two years, shall neglect or fail to organize the company, and carry into effect the intent of the act; or when organized, if they at any time for two years together shall cease to act, then such disuse of their corporate privileges and powers shall be deemed and taken as a forfeiture of the charter.

Sec. 689. Shares in corporations personal estate. R. C., c. 26, s. 31. 1836, c. 11.

The shares of stock in all incorporated joint-stock companies shall be deemed personal estate.

Redding v. Allen, 3 Jon. Eq., 358.

Sec. 690. Corporations may hold not over thirty years; when lands may be forfeited to the state. 1871-'2, c. 199, s. 29.

Any corporation may take a mortgage upon any quantity of land to secure a debt owing to the corporation, and may take a conveyance of any quantity of land in

partial or total satisfaction of a debt due the corporation; and may purchase any quantity of land at a sale under execution against a debtor of the corporation or at any individual sale of the property of a debtor of the corporation; but the corporation purchasing such land to a quantity exceeding, with its lands previously owned, three hundred acres, shall not be capable of holding the same for more than thirty years from the date of such purchase, and all lands so purchased in excess of the limited quantity and held by any corporation shall at the end of thirty years from the date of such purchase be forfeited to the state, and may be recovered in an action brought in the name of the state by its proper officer. The corporation purchasing such land may at any time within thirty years next ensuing the date of its purchase convey by deed to a *bona fide* purchaser for value under its common seal such estate in said lands as it would have had under its purchase but for the limitation herein contained.

Sec. 691. Duty of grand jury and solicitor. 1871-'2, c. 199, s. 30.

It shall be the duty of the grand jury in each county to inquire and report to the solicitor what lands at any time are held by any corporation in violation of this chapter; and it shall be the duty of every solicitor, either upon or without such report, to institute proceedings for the forfeiture of all such lands, and to report the same to the governor from time to time.

Sec. 692. Lands, how sold, &c. 1871-'2, c. 199, s. 31.

The lands recovered by the state under this chapter shall not be the subject of entry, but shall be sold at public sale for cash, under the direction of the governor and attorney general, and the proceeds paid into the state treasury; and the sale shall be reported to the general assembly at its next ensuing session.

Sec. 693. Existing corporations affected. 1871-'2, c. 199, s. 32. 1881, c. 124.

All corporations (except railroad, mining, manufacturing corporations, and companies to supply the cities and towns of the state with water), which shall be seized in fee, or for a longer term than three lives in being, or possessed for a longer time than thirty years of any lands or tenements, exceeding three hundred acres in quantity, are required, within said time, to dispose of such excess.

Sec. 694. How corporations may be dissolved; abuse of power; non-user; insolvency; criminal conviction. 1871-'2, c. 199, ss. 33, 34, 35, 36, 37.

All corporations formed under this chapter may be dissolved by special proceeding, instituted by the company or by any corporator, or by any judgment creditor, whose execution issued to the county in which the corporation has its only or principal place of business, shall be returned unsatisfied, or by the authority of the attorney general in the name of the state, for the causes hereinafter mentioned, to-wit:

(1) For any abuse of its powers to the injury of the public or of the corporators, or of its creditors or debtors;

(2) For non-user of its powers for two years or more consecutively;

(3) For insolvency manifested by the return of an execution unsatisfied upon a judgment against the company, docketed in the superior court of the county where it has its only or principal place of business;

(4) Upon any conviction of the company of a criminal offence if such offence be persistent.

Sec. 695. How summons in such cases served. 1871-'2, c. 199, s. 38.

Upon any special proceedings for the dissolution of a corporation, the summons shall be served on the chief or other officer of the corporation authorized for that purpose as writs of summons are required to be in like cases, and shall be served on the corporators, creditors, dealers and others interested in the affairs of the company, by publishing a copy thereof at least weekly for not less than three successive weeks in some newspaper printed in the county in which such corporation has its only or principal place of business, or if there be no such newspaper published, then by posting a copy of such summons at the door of the court house of such county, and publishing a copy thereof for the time and in the manner aforesaid in the newspaper published nearest the county seat of the county in which such corporation has its only or principal place of business, or in some newspaper published in the city of Raleigh; and such publication shall be deemed and held sufficient service on all the corporators, creditors of, or dealers with, such corporation, and all such corporators, creditors or dealers or other parties interested, may intervene in said proceedings and become parties thereto for themselves, or for others in like in-

terest, under such rules as the court for the purpose of justice shall prescribe.

Sec. 696. Tax on bills for incorporation presented to general assembly. 1881, c. 116. Sch. C., s. 6. 1883, c. 87.

Every bill introduced in either house of the general assembly, to incorporate any company, or for the benefit thereof, or to amend any act relating to such company or corporation, shall be accompanied by a receipt from the state treasurer for one hundred dollars. This section shall not be construed to apply to benevolent, charitable, literary or religious associations, nor to rail road companies, nor companies to build turnpike roads, nor bridges over non-navigable streams.

Sec. 697. Sales under deeds of trust. 1872-'3, c. 131, s. 1.

If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property, and there be a conveyance pursuant thereto, such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage but any works which the corporation may after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the purchaser, the said corporation shall *ipso facto* be dissolved, and the said purchaser shall forthwith be a new corporation by any name which may be set forth in the said conveyance, or in any writing signed by him and recorded, in the same manner in which the conveyance shall be recorded.

Gooch v. McGee, 83—59.

Sec. 698. Corporation created by sale shall succeed to rights, &c., and when it expires, property to go to pay debts, &c. 1872-'3, c. 131, ss. 2, 3.

The corporation created by, or in consequence of, such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been, or should have been, performed by the first corporation, but for such sale and conveyance, save only that the corporation so created, shall not be entitled to the debts due to the first corporation, and shall not be liable for any debts of, or claims against, the first corporation, which may not be expressly assumed in the con-

tract of purchase; nor shall the property, franchise or profits of such new corporations be exempt from taxation. And that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein, as he or they may think proper, not exceeding the amount of stock in the first corporation at the time of the sale, and assign the same in a book to be kept for that purpose. The said shares shall thereupon be on the footing of shares in joint stock companies generally, except only, that the first meeting of the stockholders shall be held on such day, and at such place as shall be fixed by the said purchaser, of which notice shall be published for two weeks in a newspaper. And when a corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property and debts among those entitled thereto.

Gooch v. McGee, 83—59; Young v. Rollins, 85—485.

Sec. 699. Tax collectors to levy upon and take into possession property of corporations, &c., whether in hands of receiver or not. 1879, c. 245, s. 1.

Whenever taxes are duly assessed, charged and extended against any corporation having chartered rights, or doing business in this state, or having property in this state, or against any person resident in this state or doing business, or having property in this state, and the tax list is in the hands of any officer or tax collector, it shall be competent for such officer or tax collector, whenever said taxes, whether listed or unlisted, are due and unpaid, to levy upon, seize and take into his possession such part of the property belonging to such person or corporation as may be necessary to pay such taxes listed or unlisted, whether the property of such corporation or person be in the hands of a receiver duly appointed or not.

Sec. 700. Not necessary to obtain order of court for the payment of tax, if property in hands of receiver. 1879, c. 245, ss. 2, 3, 4.

In all cases provided for in the preceding section, it shall not be necessary for such officer or tax collector to apply to and obtain from the court appointing such receiver, or having jurisdiction of the property or of the receiver, an order for the payment of such taxes, but the same may be collected as aforesaid, by distraint and seizure, as if the property or corporation was not in the hands of a receiver. This section and the preceding section shall apply to all taxes, whether state, county, town, or municipal; and shall be liberally construed in favor of, and in furtherance of, the collection of said taxes.

Sec. 701. This chapter to apply to all corporations, unless otherwise declared herein, or in the chapter on railroads and telegraphs.

This chapter, unless otherwise declared herein, or in the chapter entitled Railroads and Telegraphs, shall apply to all corporations, whether created by special act of assembly, by letters of agreement under this chapter, or by the chapter entitled Railroads and Telegraphs. And this chapter and the chapter on Railroads and Telegraphs, so far as the same are applicable to railroad corporations, shall govern and control anything in the special act of assembly to the contrary notwithstanding, unless in the act of the general assembly creating the corporation, the section or sections of this chapter, and of the chapter entitled "Railroad and Telegraph Companies," intended to be repealed, shall be specially referred to by number, and as such, specially repealed.

CHAPTER SEVENTEEN.

COUNTIES, COUNTY COMMISSIONERS AND COUNTY GOVERNMENT.

SECTION.
702. Every county a body politic.
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Sec. 702. Every county a body politic. 1868, c. 20, s. 1. 1876-'7, c. 141, s. 1.

Every county is a body politic and corporate, and shall have the powers prescribed by statute, and those necessarily implied by law, and no other.

Winslow v. Com'rs, 64—218; Satterthwaite v. Com'rs, 76—153.

Sec. 703. How its powers can be exercised. 1868, c. 20, s. 2.

Its powers can only be exercised by the board of commissioners, or in pursuance of a resolution adopted by them.

Pegram v. Com'rs, 65—114.

Sec. 704. Corporate powers. 1868, c. 20, s. 3.

A county is authorized:

(1) To sue and be sued in the name of the board of commissioners;

(2) To purchase and hold lands within its limits and

for the use of its inhabitants, subject to the supervision of the general assembly;

(3) To make such contracts, and to purchase and hold such personal property, as may be necessary to the exercise of its powers;

(4) To make such orders for the disposition or use of its property as the interest of its inhabitants require.

Winslow v. Com'rs, 64—218; Gooch v. Gregory, 65—142.

Sec. 705. Proceedings by or against a county. 1868, c. 20, s. 4.

All actions or proceedings by or against a county, in its corporate capacity, shall be in the name of the board of commissioners of the county.

Pegram v. Com'rs, 65—114; Askew v. Pollock, 66—49; Steele v. Com'rs, 70—137; Jones v. Com'rs, 85—278.

Sec. 706. Meetings of the board. 1868, c. 20, ss. 5, 6, 7. 1868-'9, c. 259. 1881, c. 287.

The board of commissioners in each county shall hold a regular meeting at the court house, on the first Mondays in December and June. Special meetings may be held on the first Monday in every month, but shall not continue longer in session than two days. Meetings may be held at other times for the more convenient dispatch of business at the call of the chairman, on the written request of one member of the board, but public notice of the time and place of all such called meetings shall be posted at the court house door for not less than six days, and published one time in a county newspaper, if there is one. The board shall receive no compensation for attending such called meetings. The board may adjourn its regular meetings in December and June from day to day until the business before it is disposed of. Every meeting shall be open to all persons. A majority of the board shall constitute a quorum. At each regular December meeting the board shall choose one of its members as chairman for the ensuing year; in his absence the members present shall choose a temporary chairman.

King v. Hunter, 65—603; People v. Green, 75—329.

Sec. 707. Powers of the board of commissioners. 1868, c. 20, s. 8. 1871-'2, c. 66, s. 1. 1876-'7, c. 141, s. 1.

(1) WHEN, HOW AND BY WHOM COUNTY TAXES TO BE LEVIED, TIME FOR THE COLLECTION MAY BE EXTENDED.

The board of commissioners is authorized, with the

concurence of a majority of the justices of the peace sitting with them, to levy, in like manner with the state taxes, the necessary taxes for county purposes; but the taxes so levied, shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the general assembly. All county taxes shall be levied at the regular meeting of the board and of the justices on the first Monday in June. The board may extend the time for the collection and settlement of the county taxes to such time as may be deemed expedient, not to extend beyond the first day of May next after the taxes were levied.

Winslow v. Com'rs, 64—218; Mauney v. Com'rs, 71—486; Satterthwaite v. Com'rs, 76—153; Long v. Com'rs, 76—273; Com'rs v. Com'rs, 79—565; Watson v. Com'rs, 82—17; Fry v. Com'rs, 82—304; State v. Selby, 83—617; Com'rs v. R. R. Co., 86—541; Cromartie v. Com'rs, 87—134.

(2) EXEMPTION FROM CAPITATION TAX.

To exempt from capitation tax in special cases, on account of poverty and infirmity.

(3) TO PROVIDE FOR THE PAYMENT OF DEBT.

To provide by taxation or otherwise, for the prompt and regular payment with interest, of any existing debt owing by any county.

Trull v. Com'rs, 72—388; Davis v. Com'rs, 74—374; French v. Com'rs, 74—692; Belo v. Com'rs, 76—489; Brickell v. Com'rs, 81—240; Cromartie v. Com'rs, 87—134.

(4) TO SUBMIT PROPOSITIONS TO CONTRACT DEBT TO A VOTE OF ELECTORS.

To submit to a vote of the qualified electors in the county, after having obtained the approval of the general assembly, any proposition to contract a debt, or loan the credit of the county, under section seven, article seven, of the constitution; to order the time for voting upon such proposition, which shall be upon public notice thereof at one or more places in each township in the county, and publication in one or more county newspapers, if there be any, for three months next immediately preceding the time fixed on; and such election shall take place and be conducted under the laws as prescribed for the election of members of the general assembly; and the commissioners shall provide for giving effect, in case

of the adoption of the proposition, to the expressed will of a majority of the qualified voters in such election;

Norment v. Charlotte, 85—387.

(5) TO MAKE ORDERS RESPECTING CORPORATE PROPERTY.

To make such orders respecting the corporate property of the county as may be deemed expedient;

(6) TO AUDIT ACCOUNTS.

To audit accounts against the county, and direct the raising of the sums necessary to defray them;

Winslow v. Com'rs, 64—218; Mauney v. Com'rs, 71—486; Cromartie v. Com'rs, 85—211.

(7) TO PURCHASE PROPERTY FOR ANY PUBLIC BUILDING, AND AT EXECUTION SALE. 1879, c. 144, s. 1.

To purchase real property necessary for any public county building, and for the support of the poor; and to determine the site thereof, where it has not been already located; and to purchase land at any execution sale, when it shall be deemed expedient to do so, to secure a debt due the county. The deed shall be made to the board of commissioners, and the board may, in its discretion, sell any lands so purchased;

(8) TO DESIGNATE SITE FOR COUNTY BUILDINGS.

With the concurrence of a majority of the justices of the peace sitting with them, to remove or designate a new site for any county building; but the site of any county building already located shall not be changed, unless by an unanimous vote of all the members of the board and by a majority of the justices at the regular December meeting, and unless upon notice of the proposed change, specifying the new site. Such notice shall be published in a newspaper printed in the county, if there is one, and posted in one or more public places in every township in the county for three months, next immediately preceding the annual meeting, at which the final vote on the proposed change is to be taken. Such new site shall not be more than one mile distant from the old, except upon the special approval of the general assembly;

Winslow v. Com'rs. 64—218.

(9) TO ERECT AND REPAIR COUNTY BUILDINGS.

With the concurrence of a majority of the justices of the peace, to erect and repair the necessary county buildings, and to raise by taxation, the moneys therefor;

Winslow v. Com'rs, 64—218; Long v. Com'rs, 76—273; Cromartie v. Com'rs, 87—134.

(10) TO CONSTRUCT AND REPAIR BRIDGES.

To construct and repair bridges in the county, and to raise by tax, the money necessary therefor, and when a bridge is necessary over a stream, which divides one county from another, the board of commissioners of each county shall join in constructing or repairing such bridge; and the charge thereof shall be defrayed by the counties concerned, in proportion to the number of taxable polls in each: *Provided*, the cost of said bridges does not exceed five hundred dollars; and, if the cost exceeds five hundred dollars, with the concurrence of a majority of the justices of the peace;

Winslow v. Com'rs, 64—218; Long v. Com'rs, 76—273, State v. Selby, 83—617; Cromartie v. Com'rs, 87—134.

(11) TO BORROW MONEY.

To borrow money for the necessary expenses of the county with the assent of a majority of the justices of the peace therein, and not otherwise, and to provide for its payment, with interest, in yearly instalments, by taxation;

Winslow v. Com'rs, 64—218.

(12) TO RAISE HIGHWAY MONEYS.

To raise by tax the necessary highway moneys, in such manner as may be prescribed by law;

Winslow v. Com'rs, 64—218; Long v. Com'rs, 76—273.

(13) TO DIVIDE COUNTY INTO DISTRICTS.

To divide each county into convenient districts, called townships, and to determine the boundaries, and prescribe the names of said townships. A map and survey of said townships shall be filed in the office of the clerk of the board of commissioners, and also in the office of the secretary of state;

Winslow v. Com'rs, 64—218.

(14) TO ERECT, DIVIDE OR ALTER TOWNSHIPS. 1876-'7, c. 141, ss. 3, 5.

To erect, divide, change the names of, or alter townships in the manner following: In any county, any three freeholders of each township to be affected, may, after the notice presently to be mentioned, apply by petition to the board of commissioners, to erect a new township, or divide an existing township, or change the name of or alter the boundaries thereof. Notice of the application shall be posted in one or more public places in each of such townships, and published in a newspaper printed in the county, if there is one, for at least four weeks preceding the meeting at which the application is made to the board. But the action of the board in creating or altering townships shall not be operative, until approved by the justices of the peace at a regular meeting. No township shall have or exercise any corporate powers whatsoever, unless authorized by an act of the general assembly, to be exercised under the supervision of the board of commissioners;

Wallace v. Trustees, 81—164; Jones v. Com'rs, 85—278.

(15) TO ORDER THE LAYING OUT, ALTERATION OR DISCONTINUING OF HIGHWAYS.

To exercise authority in laying out, altering, repairing and discontinuing highways; in establishing and settling ferries; in building and keeping up bridges; in laying off or discontinuing cart-ways; in providing draws in all bridges, where the same may be necessary for the convenient passage of vessels; in appointing overseers of highways; in excusing persons from working on the highways; in allowing and contracting for the building of toll-bridges, and taking bond from the builders thereof; and in licensing the erection of gates across highways. This authority shall be exercised under the rules, regulations, restrictions and penalties in all respects prescribed and imposed in the chapter entitled Roads, Ferries and Bridges;

McArthur v. McEachin, 64—454; State v. Selby, 83—617.

(16) TO APPOINT AN INSPECTOR OF HIGHWAYS AND BRIDGES.

To appoint an inspector of highways and bridges for the county, if deemed necessary; to fix and provide for

his compensation and regulate his duties, not inconsistent with the laws of the state. The commissioners of two or more counties may unite in employing an inspector of highways and bridges, and apportioning his compensation between the respective counties as may be agreed;

(17) TO PROVIDE FOR A HOUSE OF CORRECTION.

With the concurrence of a majority of the justices of the peace, to make provision for the erection in each county of a house of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed; to regulate the employment of labor therein; to appoint a superintendent thereof, and such assistants as may be deemed necessary, and to fix their compensation;

State v. Garrell, 82—580.

(18) TO PROVIDE FOR THE EMPLOYMENT OF PRISONERS.

To provide for the employment on the highway or public works in the county, of all persons condemned to imprisonment with hard labor, and not sent to the penitentiary;

State v. Shaft, 78—464.

(19) TO APPOINT PROXIES TO REPRESENT COUNTY.

To appoint proxies to represent in any annual or other meeting, the shares or interest held by any county in a railroad company, or other corporation, under the charter of such corporation, or under any special acts of the general assembly, authorizing county subscriptions in such cases;

(20) TO SELL OR LEASE REAL PROPERTY.

To sell or lease any real property of the county, with the assent of a majority of the justices therein, and to make deeds or leases for the same to any purchaser or lessee;

(21) TO PROVIDE FOR THE MAINTENANCE OF THE POOR.

To provide by tax for the maintenance, comfort and well-ordering of the poor; to employ, biennially, by

public letting or otherwise, some competent person as overseer of the poor; to institute proceedings by the warrant of the chairman against any person coming into the county who is likely to become chargeable thereto, and cause the removal of such poor person to the county where he was last legally settled; and to recover by action in the superior court from the said county, all the charges and expenses whatever, incurred for the maintenance or removal of such poor person;

Long v. Com'rs, 76—273.

(22) TO ESTABLISH PUBLIC HOSPITALS.

To establish public hospitals for the county in cases of necessity, and to make rules, regulations and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby, the same not being inconsistent with the laws of the state; and to raise by taxation the necessary moneys to defray the charges and expenses so incurred;

(23) TO PROCURE WEIGHTS AND MEASURES. R. C., c. 117, s. 4. 1868, c. 20, s. 26.

To procure for each county sealed weights and measures, according to the standard prescribed by the congress of the United States; and to elect a standard-keeper, who shall qualify before the board and give bond approved by the board, as prescribed by law;

(24) TO APPOINT COMMISSIONERS TO OPEN RIVERS AND CREEKS.

To appoint a commissioner to open and clear the rivers and creeks within the county, or where such river or creek forms a county line or a part thereof. For this purpose the board is authorized to withdraw from the public roads such hands as may be deemed necessary, and allot them to such work under overseers and the direction of the commissioner. The board may impose the duties of this sub-division on the inspector of highways and bridges when appointed; and shall in all respects conduct the opening and clearing of such rivers and creeks as prescribed by law;

(25) TO LICENSE PEDDLERS AND RETAILERS OF SPIRITOUS LIQUORS.

To license peddlers and retailers of spiritous and other liquors as prescribed by law. No license shall be good for more than one year, nor granted to two or more persons to peddle as partners in trade. And the board of commissioners shall grant licenses for the sale of spirituous liquors to all persons possessing the qualifications required by law, except in those localities where the sale of spirituous liquors shall be prohibited by law;

(26) TO ESTABLISH PUBLIC LANDINGS, PLACES OF INSPECTION, AND INSPECTORS.

To establish such public landings and places of inspection as the board of commissioners may think proper; and to appoint such inspectors in any town or city as may be authorized by law;

(27) TO LICENSE AUCTIONEERS.

To license for the term of one year any number of persons to exercise the trade and business of auctioneers in each county, and to take their bonds as prescribed by law;

(28) TO INDUCT INTO OFFICE COUNTY OFFICERS AND TO APPROVE THEIR BONDS. 1874–'5, c. 237, s. 3.

To qualify and induct into office at the meeting of the board on the first Monday in the month next succeeding their election or appointment the following named county officers, to-wit: clerk of the superior court, clerk of the inferior court, sheriff, coroner, treasurer, register of deeds, surveyor and constable; and to take and approve the official bonds of said officers, which the board shall cause to be registered in the office of the register of deeds. The original bonds shall be deposited with the clerk of the superior court, except the bond of the said clerk, which shall be deposited with the register of deeds for safe keeping;

Com'rs v. Magnin, 78—182; Dixon v. Com'rs, 80—118; Jones v. Jones, 80—127; Worley v. Smith, 80—305; Swain v. McRae, 80—111; Worley v. Smith, 81—304.

(29) TO REQUIRE FROM ANY COUNTY OFFICER A REPORT UNDER OATH.

To require from any county officer, or other person employed and paid by the county, a report under oath at any time, on any matters connected with his duties. A neglect to comply with such requirement by any such officer shall be a misdemeanor;

McNeil v. Green, 75—329.

(30) TO AUTHORIZE CHAIRMAN TO ISSUE SUBPŒNAS.

To authorize the chairman to issue subpœnas to compel the attendance before the board, of persons, and the production of books and papers relating to the affairs of the county for the purpose of examination, on any matter within the jurisdiction of the board. The subpœna shall be served by the sheriff or any constable to whom it is delivered; and upon return of personal service thereof, whoever neglects to comply with the subpœna or refuses to answer any proper question, shall be guilty of contempt and punishable therefor by the board. A witness is bound in such case to answer all the questions which he would be bound to answer in like case in a court of justice; but his testimony given before the board shall not be used against the witness on the trial of any criminal prosecution other than for perjury committed on the examination;

McNeil v. Green, 75—329.

(31) TO ADOPT A COUNTY SEAL.

To adopt a seal for the county, a description and impression whereof shall be filed in the office of superior court clerk and of the secretary of state.

Sec. 708. When the board to qualify and enter upon office. 1868, c. 20, s. 14.

The board of commissioners shall qualify and enter upon the duties of their office on the first Monday of December next succeeding their election, and they may take the oaths of office before any person authorized by law to administer oaths. The oaths of office severally taken and subscribed by them, shall be deposited with the clerk of the superior court.

Jones v. Jones, 80—127.

Sec. 709. Compensation of the board. 1868, c. 20, s. 15. 1872-'3, c. 108. 1881, c. 318.

Except where otherwise provided by law, each commissioner shall receive for his services and expenses in attending the meetings of the board not exceeding two dollars per day, as a majority of the board may fix upon, and they may be allowed mileage to and from their respective places of meeting, not to exceed five cents per mile: *Provided*, that in the counties of Mecklenburg, Pasquotank and Halifax, a majority of the justices of the peace may allow the chairman of the board such compensation as they shall think proper. The accounts of each commissioner shall be audited and verified, as other claims.

Sec. 710. Compensation of clerk of the board. 1868, c. 20, s. 16.

The board shall fix the compensation of its clerk.

Sec. 711. Neglect of duty by commissioner a misdemeanor. 1868, c. 20, s. 17.

Any commissioner who shall neglect to perform any duty required of him by law as a member of the board, shall be guilty of a misdemeanor, and shall also be liable to a penalty of two hundred dollars for each offence, to be paid to any person who shall sue for the same.

Sec. 712. Duty of clerk. 1868, c. 20, s. 13.

It is the clerk's duty :

(1) To record in a book to be provided for the purpose all the proceedings of the board;

(2) To enter every resolution or decision concerning the payment of money;

(3) To record the vote of each commissioner on any question submitted to the board, if required by any member present;

(4) To preserve and file in alphabetical, or other due order, all accounts presented or acted on by the board, and to designate upon every account audited, the amount allowed and the charges for which it was allowed;

(5) To keep the books and papers of the board free to the examination of all persons.

Sec. 713. Clerk to publish an annual statement. 1868, c. 20, s. 19.

The clerk shall annually, on or within five days next before the first Monday of December, make out and cer-

tify, and cause to be posted at the court house, and published in a newspaper printed in the county, if there be one, for at least four weeks, a statement for the preceding year, showing:

(1) The amount, items and nature of all compensation audited by the board to the members thereof severally;

(2) The number of days the board was in session, and the distance traveled by the members respectively in attending the same;

(3) Whether any unverified accounts were audited, and if any, how much and for what.

Sec. 714. Neglect of clerk to publish statement a misdemeanor. 1868, c. 20, s. 20.

Any clerk who intentionally neglects to post and publish the statement required by the preceding section, or knowingly posts and publishes a false statement, shall be guilty of a misdemeanor.

Sec. 715. Certified copies of records of the board may be read in evidence. 1868, c. 20, s. 21.

Copies of the records of the board, certified by the clerk under his hand and the seal of the county, are declared evidence in all the courts of the state.

Sec. 716. Board of commissioners to be elected by the justices of the peace. 1876-'7, c. 141, s. 5.

The justices of the peace for each county, on the first Monday in June, one thousand eight hundred and eighty-four, and on the first Monday in June every two years thereafter, shall assemble at the court house of their respective counties, and a majority being present, shall proceed to the election of not less than three nor more than five persons, to be chosen from the body of the county, who shall be styled the board of commissioners for the county of....., and shall hold their offices for two years from the date of their qualification, and until their successors shall be elected and qualified. They shall be qualified by taking the oath of office before the clerk of the superior court, or some judge or justice of the peace, and the register of deeds shall be *ex officio* clerk of the board of commissioners.

Sec. 717. Meetings of the justices of the peace. 1876-'7, c. 141, s. 5.

For the proper discharge of their duties, the justices

of the peace shall meet annually with the board of commissioners on the first Monday in June, unless they shall be oftener convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months. For attending such meetings, the justices of the peace shall receive no compensation; but they shall keep a record of their meetings. The register of deeds shall be *ex officio* the clerk of the justices of the peace, and he shall receive such compensation for his services as the board of commissioners shall provide.

Sec. 718. Purchase of county indebtedness. 1868-'9, c. 269, s. 2.

The board of commissioners may purchase at any price, not exceeding their par value and accumulated interest, any of the outstanding bonds or other indebtedness of the county.

Sec. 719. Vacancies in boards of county commissioners to be filled by justices of the peace. 1879, c. 231.

In case of a vacancy occurring in the board of commissioners of a county, the justices of the peace for the county shall appoint to said office for the unexpired term.

Sec. 720. The board of commissioners to fill certain vacancies. 1868, c. 4. Const., Art. IV., s. 24.

Whenever a vacancy shall occur in the offices of sheriff, constable, coroner, register of deeds, county treasurer or county surveyor, the board of commissioners of the county shall fill the same by appointment.

Jones v. Jones, 80—127; Sneed v. Bullock, 80—132.

Sec. 721. Disputed lines between counties, how settled. R. C., c. 27, s. 1. 1836, c. 3, s. 1.

Whenever there shall be any dispute concerning the dividing line between counties, the board of commissioners of each county interested in the adjustment of said line, a majority of the board consenting thereto, may appoint one or more commissioners, on the part of each county, to settle and fix the line in dispute; and their report, when ratified by a majority of the commissioners in each county, shall be conclusive of the location of the true line, and shall be recorded in the register's office of each county, and in the office of the secretary of state.

SEC. 722. Commissioners to be sworn and paid. R. C., c. 27, s. 2. 1836, c. 3, s. 2.

Such commissioners, before entering on the duties assigned them, shall be sworn before a justice of the peace; and they, with all others employed, shall be allowed reasonable pay for their labors.

CHAPTER EIGHTEEN.

COUNTY REVENUE AND CHARGES, AND COSTS IN CRIMINAL ACTIONS.

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Sec. 723. County taxes collected by sheriff as state taxes. R. C., c. 28, s. 2. 1798, c. 509, s. 2. 1811, c. 823.

The county taxes shall be collected by the sheriff of the county, who shall be entitled to the same commissions and subject to the same rules and regulations in respect to his settlement of the said taxes with the county treasurer as he is in his settlement of the public taxes with the treasurer of the state; and he shall also settle with the county treasurer or board of commissioners for the taxes on the unlisted property in his county, under the same rules and regulations as he accounts with the auditor of the state.

Lockhart v. Harrington, 1 Hawks, 408; King v. Hunter, 65—603; Davis v. Com'rs, 74—374.

SEC. 724. Fines, forfeitures and penalties to be paid to county treasurer. R. C., c. 28, s. 3. Const., Art. IX., s. 5. 1879, c. 96, s. 5.

All fines, forfeitures, penalties and amercements collected in the several counties by any court or otherwise, shall be accounted for and paid to the county treasurer by the officials receiving them, and shall be faithfully appropriated by the board of commissioners for the establishment and maintenance of free public schools; and the amounts collected in each county shall be annually reported to the superintendent of public instruction on or before the first Monday in January, by the board of commissioners.

SEC. 725. Clerks and justices to keep itemized statement of fines, &c. 1873-'4, c. 116, s. 4. 1879, c. 96, s. 1.

It shall be the duty of the clerks of the several courts, and of the several justices of the peace, to enter in a book, to be supplied by the county, an itemized and detailed statement of the respective amounts received by them in the way of fines, penalties, amercements and forfeitures, and said books shall at all times be open to the inspection of the public.

SEC. 726. Fines, &c., to be paid to county treasurer within sixty days. R. C., c. 28, s. 6. 1830, c. 1, s. 13. 1879, c. 96, s. 2.

All fines, penalties, amercements and forfeitures received by any clerk or justice of the peace shall within sixty days thereafter be paid over to the county treasurer, who shall give a receipt to every such clerk or justice for the same; and said county treasurer shall enter in a book, to be kept by him, the exact amount of any fine, penalty or forfeiture so paid over to him, giving the date of payment, the name of the clerk or justice so paying the same, the name of the party from whom such fine, penalty or forfeiture was collected, and in what case.

SEC. 727. County treasurer to file certified statement with superior court clerk. 1879, c. 96, s. 3.

It shall be the duty of the county treasurer to file a certified statement, itemized as aforesaid, in the office of the clerk of the superior court, and it shall be the duty of the said clerk to record said statement in a book to be kept in his office for that purpose. Said certified statement shall be filed by said treasurer in said clerk's office, on the first days of January, April, July and October in each year.

Sec. 728. County officers to make annual reports of public funds to the board of commissioners. 1874-'5, c. 151, s. 1. 1876-'7, c. 276, s. 1.

Sheriffs, treasurers, clerks of any court, registers of deeds and all other officers of the several counties, into whose hands any public funds may come by virtue or under color of their office, shall make an annual account and report of the amount and management of the same, on the first Monday of December, or oftener if required, in each year, to the board of commissioners. Such report shall give an itemized and detailed account of the public funds received and disbursed, the amount, date and source from which it was received, and the amount, date and person to whom paid, shall be addressed to the chairman of the board of commissioners for the county, and shall be subscribed and verified by the oath of the party making the same, before any person authorized to administer oaths.

Suttle v. Doggett, 87—203.

Sec. 729. Reports to be registered, if approved by the board of commissioners. 1874-'5, c. 151, s. 2. 1876-'7, c. 276, s. 2.

The board of commissioners, if it shall approve of any of the said reports, shall cause the same to be registered in the office of the register of deeds in a book to be furnished to the register of deeds by the county, which book shall be marked and styled "Record of Official Reports," with a proper index of all reports recorded therein, and each official report shall, if approved, be indorsed by the chairman of the board with the word "approved," with the date of approval, and when recorded by the register of deeds he shall indorse thereon the date of registration, the page of the "Record of Official Reports" upon which the same is registered, sign the same and file it in his office.

Sec. 730. Failure of officers to report. 1874-'5, c. 151, s. 3. 1876-'7, c. 276, s. 3.

If any person required to make any of the reports hereinbefore provided, shall fail to do so, or if, after a report has been made, the board of commissioners shall disapprove the same, such board may take such legal steps to compel a proper report to be made, either by suit on the bond of such officer failing to comply or otherwise, as said board may deem best.

Sec. 731. Penalty for wilfully swearing falsely to report. 1874-'5, c. 151, s. 4. 1876-'7, c. 276, s. 4.

Any person wilfully swearing falsely to any report made as herein required, shall be guilty of a misdemeanor, and on conviction, shall be fined or imprisoned, or both, in the discretion of the court.

Sec. 732. Tax fees in civil and criminal actions to be set apart for the payment of jurors. R. C., c. 28, s. 4. 1830, c. 1, s. 8. 1879, c. 325. 1881, c. 249.

On every indictment or criminal proceeding, tried or otherwise disposed of in the superior, criminal or inferior courts, the party convicted, or who shall be adjudged to pay the costs, shall pay a tax of two dollars. In every civil action in any court of record, the party who shall be adjudged to pay the costs shall pay a tax of three dollars; but this tax shall not be charged unless a jury shall be empaneled. Said tax fees shall be charged by the clerks in the bill of costs, and collected by the sheriff, and by him paid into the county treasury. And the fund thus raised in any county, shall be set apart for the payment of the jurors attending the courts thereof.

Hunter v. Routledge, 6 Jon., 216; Little v. Richardson, 6 Jon., 305; Hewlett v. Nutt, 79—263.

Sec. 733. Bills of costs in criminal actions to be itemized and audited. 1873-'4, c. 116, s. 1. 1879, c. 264, s. 5.

It shall be the duty of the clerks of the several courts of record, at each term of the court, to make up an itemized statement of the bill of costs in every criminal action tried or otherwise disposed of at said term, which shall be signed by the clerk, and approved by the solicitor. And the judge or justice, may, in his discretion, for satisfactory cause appearing, direct that the witnesses, or any of them, shall receive no pay, or only a portion of the compensation authorized by law. And no county shall pay any such costs, unless the same shall have been approved, audited and adjudged against the county as herein provided. The clerk shall receive for every such bill of costs the sum of twenty-five cents, to be taxed as a part of said costs.

Sec. 734. Justices of the peace to make out itemized bills of costs. 1873-'4, c. 116, s. 2.

It shall be the duty of every justice of the peace to insert in the entry of judgment in every criminal action

tried or otherwise disposed of by him, a detailed statement of the different items of costs, and to whom due.

SEC. 735. Bills of costs to be open to the public. 1873-'4, c. 116, ss. 1, 2.

Every bill of costs shall at all times be open to the inspection of any person interested therein.

SEC. 736. Statement of costs for which the county is liable to be filed with the board of commissioners. 1873-'4, c. 116, s. 3.

In all criminal actions in the superior, criminal or inferior courts, or before justices of the peace, where the county is liable in whole or in part for such costs, it shall be the duty of the clerks of such courts, and of the justices of the peace, to make out a statement of such costs from the record or docket, within thirty days after the hearing, trial, determination, or other disposition thereof, and file the same with the board of commissioners of the county.

SEC. 737. Costs to be paid by prosecutor in certain cases. 1799, c. 4, s. 19. 1800, c. 558, s. 1. 1868-'9, c. 277. 1874-'5, c. 151, s. 1. 1879, c. 49, s. 1. R. C., c. 35, s. 37. C. C. P., s. 560.

In all criminal actions, if the defendant be acquitted, *nolle prosequi* entered, or judgment against him arrested, the costs including the fees of all witnesses summoned for the accused, whom the judge, court or justice of the peace before whom the trial took place shall certify to have been proper for the defence, shall be paid by the prosecutor, whether marked on the bill or warrant or not, whenever the judge, court or justice shall be of opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. And every judge, court or justice is hereby fully authorized to determine who the prosecutor is at any stage of a criminal proceeding, whether before or after the bill of indictment shall have been found, or the defendant acquitted: *Provided*, that no person shall be made a prosecutor after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecutor of record.

State v. Lupton, 63—483; State v. Darr, 63—516; Moore v. Com'rs, 70—340; Cantwell v. Com'rs, 71—154; State v. Hodson, 74—151; Pegram v. Com'rs, 75—120; State v. Cannady, 78—539; State v. Spencer, 81—519; State v. Crosset, 81—579; State v. Hughes, 83—665; State v. Norwood,

84—794; State v. Moore, 84—724; State v. Adams, 85—560; State v. Murdock, 85—598; State v. Powell, 86—640; State v. Owens, 87—565.

SEC. 738. Prosecutor, when imprisoned for non-payment of costs. R. C., c. 35, s. 37. 1800, c. 558, s. 1. 1879, c. 49, s. 2. 1881, c. 176.

Every such prosecutor may be adjudged not only to pay the costs, but he shall also be imprisoned for the non-payment thereof, when the judge, court, or justice of the peace before whom the case was tried shall adjudge that the prosecution was frivolous or malicious.

State v. Lumbrick, 1 C. L. R., 543; State v. Lupton, 63—483; Pegram v. Com'rs, 75—120; State v. Cannady, 78—539; State v. Hughes, 83—665.

SEC. 739. Costs to be paid by the county in certain cases. R. C., c. 28, s. 8. R. S., c. 28, s. 12. C. C. P., s. 561. 1874-'5, c. 247, s. 1.

If there be no prosecutor in a criminal action, and the defendant shall be acquitted, or convicted and unable to pay the costs, or a *nolle prosequi* be entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees only; except in capital felonies and in prosecutions for forgery, perjury and conspiracy, when they shall receive full fees.

Moore v. Com'rs, 70—340; Cantwell v. Com'rs, 71—154; Bunting v. Com'rs, 74—633; Clerk's office v. Com'rs, 79—598; State v. Crosset, 81—579; State v. Hughes, 83—665.

SEC. 740. Witnesses for state, when paid by county. R. C., c. 28, s. 9. 1804, c. 665, ss. 1, 2, 3. 1819, c. 1008. 1824, c. 1253.

Witnesses summoned or recognized on behalf of the state to attend on any criminal prosecution in the superior, inferior, or criminal courts where the defendant is insolvent, or by law shall not be bound to pay the same, and the court does not order them to be paid by the prosecutor, shall be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence in behalf of the state, and the defendant shall be discharged, and in cases where the defendant shall break jail and shall not afterwards be retaken, the court shall order the witnesses to be paid.

Moore v. Com'rs, 70—340; Lewis v. Com'rs, 74—194; Pegram v. Com'rs, 75—120.

Sec. 741. County wherein the offence is committed to pay costs and receive fines, &c. R. C., c. 28, s. 10. 1810, c. 799, s. 1.

In all cases where the county is liable to pay costs, that county wherein the offence shall have been charged to be committed shall pay them. And all fines, forfeitures and amercements accruing in the case shall be accounted for and paid to the treasurer of that county.

Moore v. Com'rs, 70—340; Pegram v. Com'rs, 75—120.

Sec. 742. Costs incurred by county in prosecuting charges of bribery, in certain cases to be a charge against the state. 1868-'9, c. 176, s. 6. 1874-'5, c. 5.

The expenses which shall be incurred by any county in investigating and prosecuting any charge of bribery, or attempt to bribe any state officer or member of the general assembly within said county, and of receiving bribes by any state officer or member of the general assembly in said county, shall be a charge against the state, and the properly attested claim of the county commissioners shall be paid by the treasurer of the state.

Sec. 743. When witness before grand jury to be paid for attendance. 1879, c. 264, s. 1.

No witness shall receive pay for attendance in a criminal case before a grand jury unless such witness shall have been summoned by direction in writing of the foreman of the grand jury, or of the solicitor prosecuting, addressed to the clerk of the court, commanding him to summon such witness, stating the name or names of the parties against whom his or her testimony may be needed, or shall have been bound or recognized by some justice of the peace to appear before the grand jury.

Sec. 744. When witness on the trial of criminal action to be paid; not more than two witnesses to be paid. 1871-'2, c. 186, s. 3. 1879, c. 264, s. 2.

No person shall receive pay as a witness for the state on the trial of any criminal action unless such person shall have been summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed; and no solicitor shall direct that more than two witnesses shall be summoned for the state in any prosecution for a misdemeanor, nor shall any county or defendant in any such prosecution be liable for or taxed with the fees of more than two witnesses, unless the court, upon satisfac-

tory reasons appearing, shall otherwise direct. And no witness summoned in a criminal action or proceeding shall be paid by the county for atttendance in more than one case for any one day; nor shall the county be required to pay any such witness if his attendance shall be taxed in more than one case on the same day.

Sec. 745. On appeal from justice in criminal action, only two witnesses to be bound over. 1879, c. 264, s. 3.

When the defendant shall appeal from the judgment of the justice of the peace, in any criminal action, it shall be the duty of such justice of the peace to select and bind over on behalf of the state not more than two witnesses, and neither the county nor the defendant shall be liable for the fees of more than two witnesses on such appeal, unless additional witnesses shall be summoned by order of the appellate court as provided in the preceding section.

Sec. 746. Witnesses to be discharged by solicitor, who shall file a certificate of their attendance with clerk. 1879, c. 264, s. 4. 1881, c. 312, s. 1.

It shall be the duty of all solicitors prosecuting in the several courts, as each criminal prosecution shall be disposed of by trial, removal, continuance or otherwise, to call and discharge the witnesses for the state, either finally or otherwise, as the disposition of the case may require; and he shall thereupon file with the clerk of the court a certificate giving the names of the witnesses entitled to prove their attendance, with the date of their discharge. The said certificate shall be in the following or similar form, and blanks thereof shall be furnished to the solicitor by the clerk at the county expense, viz:

NORTH CAROLINA, } .....Court, ...Term. 188..
.....COUNTY. } State vs. ....
Witness.....
.....
discharged..... day of ....., 188...
....., Solicitor.

Sec. 747. When court to order county to pay defendant's witnesses. 1879, c. 264, s. 4. 1881, c. 312, s. 1.

When the defendant shall be acquitted, a *nolle prosequi* entered, or judgment against him arrested, and it shall be made to appear to the court by certificate of counsel or otherwise, that said defendant had witnesses,

duly subpœnaed, bound or recognized, in attendance, and that they were necessary for his defence, it shall be the duty of the court, unless the prosecutor be adjudged to pay the costs, to make and file an order in the cause directing that said witnesses be paid by the county in such manner and to such extent as is authorized by law for the payment of state's witnesses in like cases.

Sec. 748. No witness entitled to his fees unless his name is included in the certificate of the solicitor or order of court. 1879, c. 264, s. 4. 1881, c. 312, s. 2.

No county, prosecutor or defendant, shall be liable to pay any witness, nor shall his fees be embraced in the bill of costs to be made up as hereinbefore provided, unless his name be certified to the clerk by the solicitor, or included in the order of the court as required by the preceding section: *Provided*, that the court, at any time within one year after judgment, may order that any witness may be paid, who for any good reason satisfactory to the court failed to have his fees included in the original bill of costs.

Sec. 749. Confession of judgment to secure fine and costs not to operate as a discharge of original judgment. 1879, c. 264, s. 6.

In cases where the court permits a defendant convicted of any criminal offence, to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid.

Sec. 750. Defendant failing to pay fine and cost may again be arrested. 1879 c. 264, s. 7.

In default of payment of such fine and costs, it shall be the duty of the court at any subsequent term thereof on motion of the solicitor of the state to order a *capias* to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law.

Sec. 751. Claims, &c., against county numbered by clerk and copy furnished to chairman annually. R. C., c. 28, s. 12. 1793, c. 387, s. 1.

The clerk of the board of commissioners, if so ordered

by the board, shall number all claims, orders and certificates that may be allowed by the board in a book kept for that purpose, and he shall annually, the day before the board proceeds to lay a county tax for the ensuing year, furnish the chairman of the board with a copy of the same.

SEC. 752. Publication to be made annually of county revenue and charges. R. C., c. 28, s. 14. 1786, c. 256, s. 4. 1868, c. 20, s. 13. 1873-'4, c. 143. 1876-'7, c. 264. 1881, c. 278.

The board shall cause to be posted at the court house within five days after each regular December meeting and for at least four successive weeks, the name of every individual whose account has been audited, the amount claimed and the amount allowed; and also at the same time a full statement of county revenue and charges, showing by items the income from every source and the disbursements on every account for the past year, together with the permanent debt of the county, if any, when contracted, and the interest paid or remaining unpaid thereon. The board shall also publish the said statement in some newspaper in the county: *Provided*, the cost of such publication shall not exceed one-half of a cent a word.

SEC. 753. Power of board of commissioners to dispose of county funds. R. C., 28, s. 16. 1777, c. 129, s. 4.

The board of commissioners is invested with full power to direct the application of all moneys arising by virtue of this chapter for the purposes herein mentioned, and to any other good and necessary purpose for the use of the county.

State v. McAlpin, 4 Ired., 140; Abernathy v. Phifer, 84—711.

SEC. 754. No account shall be audited unless itemized and verified by claimant. 1868, c. 20, s. 10.

No account shall be audited by the board for any services or disbursements, unless it is first made out in items and has attached to and filed with it the affidavit of the claimant that the services therein charged have been in fact made and rendered, and that no part thereof has been paid or satisfied. Each account shall state the nature of the services, and where no specific compensation is provided by law, it shall also state the time necessarily devoted to the performance thereof. The board may dis-

allow or require further evidence of the account, notwithstanding the verification.

Leach v. Com'rs, 84—829.

Sec. 755. Accounts to be numbered. 1868, c. 20, s. 12.

All accounts presented in any year, beginning at each regular meeting in December, shall be numbered from one upwards, in the order in which they are presented; and the time of presentation, the names of the persons in whose favor they are made out, and by whom presented, shall be carefully entered on the minutes of the board; and no such account shall be withdrawn from the custody of the board or its clerk, except to be used as evidence in a judicial proceeding, and after being so used it shall be promptly returned.

Sec. 756. Claims against counties, cities and towns to be presented for payment within two years after maturity or forever barred of collection. 1874-'5, c. 243, s. 1.

All claims against the several counties, cities and towns of this state, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of such claims, or the holders of such claims shall be forever barred from a recovery thereof.

Wharton v. Com'rs, 82—11; Hawley v. Com'rs, 82—22; Moore v. Com'rs, 87—209.

Sec. 757. Claims against municipal corporations must be presented for payment and refused, before an action can be maintained because of their non-payment.

No person shall sue any city, county, town, or other municipal corporation for any debt or demand whatsoever unless the claimant shall have made a demand upon the proper municipal authorities. And every such action shall be dismissed unless the complaint shall be verified and contain the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and allowed, and that they had neglected to act upon it, or had disallowed it; or (2) that he had presented to the treasurer of said municipal corporation the claim sued on, which had been so allowed and audited, and that such treasurer had notwithstanding neglected to pay it.

Love v. Com'rs, 64—706; Jones v. Com'rs, 73—182; Cromartie v. Com'rs, 85—211.

Sec. 758. Finance committee. R. C., c. 28, s. 17. 1838, c. 31, s. 1. 1871-'2, c. 71, s. 1.

The justices of the peace at their meeting on the first Monday in June in each year, a majority of them being present, may elect by ballot three discreet, intelligent tax-paying citizens, to be known as the "finance committee," whose duty it shall be to inquire into, investigate and report by public advertisement, at the court house and one public place in each township of the county, or in a newspaper, at their option, if one be published in the county, a detailed and itemized account of the condition of the county finances, together with any other information appertaining to any funds, misappropriation of county funds, or any malfeasance in office by any county officers.

King v. Hunter, 65—603; Moore v. Com'rs, 87—209.

Sec. 759. Finance committee may send for persons and papers; and administer oaths. 1831, c. 31, s. 3. 1871-'2, c. 71, s. 2. R. C., c. 28, s. 9. 1883, c. 252.

The finance committee shall have power and authority to send for persons and papers, and to administer oaths; and any person failing to obey their summons, or to produce promptly any paper relating or supposed to relate to any matter appertaining to the duties of the finance committee, shall be guilty of a misdemeanor, and on conviction in the superior court, shall be fined and imprisoned at the discretion of the court.

Sec. 760. Penalty on officer failing to settle after ten days' notice. R. C., c. 28, s. 19. 1831, c. 31, s. 3.

If any clerk, sheriff, constable, county treasurer, register of deeds, justice of the peace, or other officer or commissioner, who may hold any county money, shall fail duly to account for the same, the finance committee shall give such person ten days' previous notice, in writing, of the time and place at which they will attend to make a settlement; and every officer receiving notice and failing to make settlement as required by this chapter, shall forfeit the sum of five hundred dollars, to be sued for in the name of the state and prosecuted for the use and at the expense of the county, unless the court shall release the officers from the forfeiture.

Sec. 761. Finance committee to publish statement. 1871-'2, c. 71, s. 3.

It shall be the duty of the finance committee to make

and publish their report as hereinbefore directed on or before the first Monday of December in each year.

Sec. 762. Oath of members of finance committee. 1871-'2, c. 71, s. 4.

The members of the finance committee before entering upon their duties shall, before the clerk of the superior court, subscribe to the following oath or affirmation :

"I, A. B., do solemnly swear (or affirm) that I will diligently inquire into all matters relating to the receipts and disbursements of county funds and a true report make, without partiality. So help me, God."

Sec. 763. Compensation of finance committee. 1871-'2, c. 71, s. 5. 1873-'4, c. 107.

The members of the finance committee shall each receive such compensation for the performance of his duties as the board of commissioners may allow, not exceeding three dollars per day; but they shall not be paid for more than ten days in any one year.

Sec. 764. Penalty on clerks and other county officers for failing to account for and pay over county funds. R. C., c. 28, s. 7. 1808, c. 756. 1809, c. 769. 1813, c. 864. 1830, c. 1, ss. 11, 12, 13.

If any clerk, sheriff, justice of the peace, or other officer, shall fail or neglect to account for and pay over as required by law any taxes on suits, or any fines, forfeitures and amercements as required by this chapter, or shall fail to make the returns herein specified, he shall forfeit and pay five hundred dollars, to be recovered in the name of the board of commissioners for the use of the county.

Sec. 765. Failure of clerk or other officer to perform requirements of this chapter a misdemeanor. 1879, c. 96, s. 6.

If any clerk, justice of the peace, sheriff, register of deeds, constable, commissioner, county treasurer, or other county officer, shall neglect to perform any of the requirements of this Code, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, in the discretion of the court.

CHAPTER NINETEEN.

COUNTY TREASURER.

SECTION.
766. County treasurer to give good bond.
767. Delivering of books, papers and money to successor.
768. Justices of the peace may abolish office of treasurer.
769. Bond of sheriff, acting as treasurer, to cover his liabilities as such.
770. County treasurer to include party acting as such. Compensation.
771. The board of commissioners to bring action on treasurer's bond.
772. County treasurer not to speculate in county claims.
773. Duties of county treasurer prescribed.
774. Compensation of examining committee.
775. Penalty for refusal by officers to account and pay over funds when collected.
776. Penalty for failure of treasurer to perform duties.
777. County treasurer to pay no claim against the county unless the board of commissioners shall audit it.
778. Property held in trust by any person for a county to be held and administered by the county treasurer.
779. The county treasurer to take charge of all such trust funds and property.
780. The board of commissioners to keep a record of such property or funds.
781. County treasurer to exhibit to the board of commissioners the amount and condition of all trust funds and property.

Sec. 766. County treasurer to give good bond. 1868-'9, c. 157, s. 4.

The county treasurer, before entering upon the duties of his office, shall give bond with three or more sufficient sureties, to be approved by the board of commissioners, payable to the state, conditioned that he will faithfully execute the duties of his office, and pay according to law, and on the warrant of the chairman of the board of commissioners, all moneys which shall come into his hands as treasurer, and render a just and true account thereof to the board when required by law, or by the board of commissioners. The penalty of his bond shall be at least double the amount of county revenue for the preceding year, and the board of commissioners at any time, by an order, may require him to renew or enlarge his bond. A failure to do so within ten days after the service of such

an order shall vacate his office and the board shall appoint a successor.

Kilburn v. Latham, 81—312; Com'rs v. Magnin, 86—285.

Sec. 767. Delivering of books, papers and money to successor. 1868-'9, c. 157, s. 5.

Whenever the right of any county treasurer to his office expires, the books and papers belonging to his office, and all moneys in his hands by virtue of his office shall, upon his oath, or in case of his death, upon the oath of his personal representative, be delivered to his successor.

Com'rs v. Magnin, 86—285.

Sec. 768. Justices of the peace may abolish office of treasurer. R. C., c. 29, s. 10. 1852, c. 6. 1876-'7, c. 141, s. 2. 1881, c. 362.

The justices of the peace in any county may abolish the office of county treasurer; and thereupon, the duties and liabilities attached to the office shall devolve upon the sheriff, who shall be *ex-officio* county treasurer. And in any county where the office of treasurer has been abolished, the justices of the peace may also, if they shall deem it expedient to do so, restore the office of treasurer.

Sec. 769. Bond of sheriff, acting as treasurer, to cover his liabilities as such. 1879, c. 202, s. 1.

In counties where the office of county treasurer may be abolished, and where the sheriff is authorized to perform the duties of county treasurer, the bond he gives as sheriff shall be construed to include his liabilities and duties as such county treasurer, and may be increased to such amount by the board of commissioners, as may be deemed necessary to cover the trust funds coming into his hands.

Sec. 770. County treasurer to include person acting as such. Compensation. 1874-'5, c. 49. 1879, c. 202, s. 2.

The office of county treasurer shall always be construed to refer to, and include, the person authorized by law to perform the duties of that office in any county, if there is no county treasurer therein. The county treasurer shall be *ex-officio* the treasurer of the county board of education.

The said treasurer shall receive as a compensation in full for all services required of him such a sum not exceeding one half of one per cent. on moneys received and

not exceeding two and a half per cent. on moneys disbursed by him as the board of commissioners of the county may allow: *Provided*, that in counties where his compensation cannot exceed the sum of two hundred and fifty dollars, the said treasurer may be allowed a sum not exceeding two and a half per cent. on his receipts and his disbursements.

Com'rs v. Magnin, 78—181; Com'rs v. Magnin, 86—285.

Sec. 771. The board of commissioners to bring action on treasurer's bond. 1868-'9, c. 157, s. 6.

The board of commissioners shall bring an action on the treasurer's bond, whenever they have knowledge or a reasonable belief of any breach of the bond.

Com'rs v. Magnin, 78—181; Com'rs v. Magnin, 86—285.

Sec. 772. County treasurer not to speculate in county claims. 1868-'9, c. 157, s. 8.

No county treasurer purchasing a claim against the county at less than its face value, shall be entitled to charge the county a greater sum than what he actually paid for the same; and the board of commissioners may examine him as well as any other person on oath concerning the matter; and any county treasurer who shall be concerned or interested in any such speculation shall forfeit his office.

Sec. 773. Duties of county treasurer prescribed. 1777, c. 129, s. 3. R. C., c. 29, s. 4. 1868-'9, c. 157, s. 9. 1879, c. 33, s. 1.

It shall be the duty of the treasurer—

(1) TO KEEP COUNTY MONEYS.

To receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, to keep them separate and apart from his own affairs, and to apply them and render account of them as required by law.

State v. McAlpin, 4 Ired., 140; Jones v. Com'rs, 73—182; Hewlett v. Nutt, 79—263; Com'rs v. McPherson, 79—524; Cromartie v. Com'rs, 85—211.

(2) TO KEEP TRUE ACCOUNTS.

To keep a true account of the receipts and expenditures of all such moneys, taking proper vouchers in every case in books provided for that purpose at the expense of the

SEC. 779. The county treasurer to take charge of all such trust funds and property. 1869-'70, c. 85, s. 2.

It shall be the duty of the county treasurer to take charge of all such trust funds and property; but he shall not do so, without giving a bond payable to the state, in a penalty double the estimated value of said property or funds, with three or more sureties, each of whom shall be worth at least the amount of the penalty of the bond, over and above all his liabilities, and property exempt from execution, which bond shall be taken by the board of commissioners, and shall be recorded and otherwise treated, and dealt with, as the official bond of the treasurer.

SEC. 780. The board of commissioners to keep a record of such property or funds. 1869-'70, c. 85, s. 3.

The board of commissioners shall keep a proper record of all such trust property or charitable funds, and when necessary shall institute proceedings to recover for the treasurer, all such as may be unjustly withheld.

SEC. 781. County treasurer to exhibit to the board of commissioners the amount and condition of all trust funds and property. 1869-'70, c. 85, s. 4.

The county treasurer, whenever he is required to exhibit to the board of commissioners the financial condition of the county, shall exhibit also distinctly and separately the amount and condition of all such trust funds and property, how invested, secured, used, and other particulars concerning the same.

CHAPTER TWENTY.

COURT HOUSES, PRISONS AND WORK HOUSES.

SECTION.
782. Court houses and jails to be built and kept in repair by the board of commissioners.
783. Jails to have separate apartments.
784. Common jails to be heated by furnaces, stoves or otherwise.
785. The grand jury to visit the jail at each court.
786. Board of commissioners may establish public work houses.
787. Board to appoint directors, their duties, &c.

SECTION.
788. Board to appoint a bonded manager, his duties, &c.
789. Compensation of manager and his subordinates.
790. Board empowered to levy taxes.
791. Penalties incurred by absconding offenders.
792. Vagrant persons may be released.
793. Duties of sheriffs.
794. Managers to assign offenders employment.
795. Term of office of directors.
SECTION.
796. Board may issue bonds to establish work houses.
797. Whenever a work house established, chairman of board to certify the same to governor.
798. Suit to be brought in name of board of county commissioners.
799. Any two or more counties may jointly establish work houses.
800. A general board of directors appointed.
801. General manager appointed by the general board of directors.

SEC. 782. Court houses and jails to be built and kept in repair by the board of commissioners. R. C., c. 30, s. 1. 1741, c. 43, ss. 1, 2. 1795, c. 432, s. 1. 1816, c. 911, s. 1.

There shall be kept and maintained in good and sufficient repair in every county, a court house and common jail, at the expense of the county, wherein the same are situated; and the boards of commissioners of the several counties respectively shall lay and collect taxes, from year to year, as long as may be necessary, for the purpose of building, repairing and furnishing, their several court houses and jails, in such manner as they shall think proper; and from time to time shall order and establish such rules and regulations for the preservation of the court house, and for the government and management of the prisons, as may be conducive to the interests of the public, and the security and comfort of the persons confined.

State v. Justices, 4 Hawks, 194; McKenzie v. Buchanan, 6 Jon., 31.

SEC. 783. Jails to have separate apartments. R. C., c. 30, s. 2. 1795, c. 433, s. 4. 1816, c. 911, s. 1.

The common jails of the several counties shall be provided with at least five separate and suitable apartments; one for the confinement of white male criminals; one for white female criminals; one for colored male criminals; one for colored female criminals; and one for other prisoners.

SEC. 784. Common jails to be heated by furnaces, stoves, or otherwise. 1879, c. 25.

It shall be the duty of the board of commissioners in

every county to have the common jails so heated by furnaces, stoves, or otherwise, as to render them warm and comfortable. And any county commissioner failing to comply with the requirements of this section, shall be liable to indictment, and upon conviction, may be punished by fine or imprisonment, or both, in the discretion of the court.

SEC. 785. The grand jury to visit the jail at each court. R. C., c. 30, s. 3. 1816, c. 911, s. 3.

Every grand jury, while the court is in session, shall visit the jail, examine the same, and especially the apartments in which prisoners shall be confined; and they shall report to the court the condition of the jail and of the prisoners confined therein, and also the manner in which the jailor has discharged his duties.

SEC. 786. Board of commissioners may establish public work houses. 1866, c. 35, s. 1.

The board of commissioners may, when they deem it necessary, establish within their respective counties, one or more convenient houses of correction, with work shops and other suitable buildings for the safe keeping, correcting, governing, and employing of offenders legally committed thereto. They may also, to that end, procure machinery and material suitable for such employment in said houses, or on the premises; and moreover attach thereto a farm or farms; and all lands purchased for the purposes aforesaid, shall vest in the directors hereinafter provided for, and their successors in office. The said board shall also have power to make, from time to time, such rules and regulations as it may deem proper, for the kind and mode of labor, and the general management of the said houses.

State v. Garrell, 82—580.

SEC. 787. Board of commissioners to appoint directors; duties of directors. 1866, c. 35, s. 2.

The board of commissioners shall, annually, appoint not less than five nor more than nine directors for each house of correction which may be established, whose duty it shall be to superintend and direct the manager hereinafter named in the discharge of his duties; to visit said houses at least once in every three months; to see that the laws, rules and regulations relating thereto are duly executed and enforced, and that the persons committed to his charge are properly cared for, and not

abused or oppressed. The directors shall keep a journal of their proceedings, and publish annually an account of the receipts and expenditures. They shall further make a quarterly report to their respective county commissioners of the general condition of their charge, and of the receipts and expenditures of the institution. They shall also make such by-laws and regulations for the government thereof as shall be necessary, which shall be reported to, and approved by, the said commissioners. The directors shall be paid for the services rendered, by the county treasurer, each director first making appear to the satisfaction of the board of county commissioners, by his oath, the character and extent of the services rendered for which he claims compensation; and such payment shall be made by the county treasurer out of any funds in his hands not otherwise appropriated.

Sec. 788. The board of commissioners to appoint a bonded manager; duties of manager. 1866, c. 35, s. 3.

The board of commissioners shall appoint a manager for each house or establishment, who shall give a bond, with two or more able sureties, in such sum as may be required, payable to the state of North Carolina, conditioned for the faithful discharge of his duties. He shall hold his office during the pleasure of the board, and be at all times under the supervision of the directors; and in case of his misconduct, of which they shall be the sole judges, he may be forthwith removed by them and a successor appointed, who shall discharge the duties of the office until another manager shall be appointed by the board of commissioners. It shall be the duty of the manager to receive all persons sent to the house of correction, to keep them during the time of their sentence, and to employ and control them according to the rules and regulations established therefor. He shall have the direction and control over the subordinate officers, assistants and servants, who may be appointed by the directors. He shall make monthly reports to the directors of his management of the institution and his receipts and expenditures.

Sec. 789. Compensation of manager and his subordinates. 1866, c. 35, s. 4.

The said board of commissioners shall direct what compensation the manager and such subordinate officers, assistants and servants, as shall be appointed, shall receive, and shall provide the payment thereof.

SEC. 790. The board of commissioners empowered to levy taxes. 1866, c. 35, s. 5.

The board of commissioners, with the assent of a majority of the justices of the peace, in addition to the ordinary county taxes, shall also, at the time said taxes are laid, lay such tax as may be necessary to carry into effect this chapter, which shall be collected and paid to the manager at the same time as other county taxes are to be paid; for which, and such other funds as may come into his hands as manager, he shall be accountable; and he shall disburse the same under the authority of the directors.

SEC. 791. Penalties incurred by absconding offenders. 1866, c. 35, s. 6.

If any offender shall abscond, escape or depart from any house of correction without license, the manager shall have power to pursue, retake and bring him back, and to require all necessary aid for that purpose; and when brought back, the manager may confine him to his work by fetters or shackles, or in such manner as he may judge necessary, or may put him in close confinement in the county jail or elsewhere, until he shall submit to the regulations of the house of correction; and for every escape each offender shall be held to labor in the house of correction for the term of one month in addition to the time for which he was first committed.

SEC. 792. Vagrant persons may be released. 1866, c. 35, s. 7.

If any person shall behave well and reform, he may, on the certificate of the manager, be released by the directors, if committed as a vagrant; but if otherwise committed, he may be released by the committing authority, upon the certificate of the manager and directors.

SEC. 793. Duties of sheriffs. 1866, c. 35, s. 8.

Whenever any person shall be sentenced to a work house, he shall forthwith be committed by the court to the custody of the sheriff, to whom the clerk shall immediately furnish a certified copy of the sentence, in which it shall be stated (if the fact be so) that the offender is committed as a vagrant. The sheriff shall convey the offender to the work house, and deliver him to the manager with the certified copy aforesaid, and take the manager's receipt for the body; which receipt the sheriff shall return to the clerk of the board of commissioners, with his

indorsement of the times when the offender was committed to him and delivered to the manager, and the clerk shall record the same in a book kept for that purpose, and file the original with the papers in the case.

Sec. 794. Manager to assign offenders employment. 1866, c. 35, s. 9.

The manager shall assign to each person sent to the work house the kind of work in which such person is to be employed.

Sec. 795. Term of office of directors. 1866, c. 35, s. 10.

The directors shall continue in office until others shall be appointed; and if any vacancy happens among them, it shall be filled by the residue of the directors.

Sec. 796. Board of commissioners may issue bonds to establish work houses. 1866, c. 35, s. 11.

The board of commissioners, with the assent of a majority of the justices of the peace, may, if deemed advisable by them, issue county bonds to raise money to establish the houses and farms herein provided for.

Sec. 797. Whenever a work house is established, the chairman of the board of commissioners to certify fact to governor. 1866, c. 35, s. 12.

Whenever any work house or house of correction shall be established in pursuance of this chapter, it shall be the duty of the chairman of the board of commissioners of the county wherein the same shall be established, to certify the fact to the governor, who shall cause it to be noted in a book kept for that purpose.

Sec. 798. Suit to be brought in name of board of county commissioners. 1866, c. 35, s. 13.

All suits brought on behalf of the institution shall, unless it be otherwise prescribed, be brought in the name of the board of commissioners of the county, to the use of the directors of the work house, without designating such directors by name.

Sec. 799. Any two or more counties may jointly establish work houses. 1866-'7, c. 130, s. 1.

Any two or more counties, acting through their respective boards of commissioners, may jointly establish one

or more convenient houses of correction, as is provided in the preceding sections, for the joint use of the counties so agreeing together; and the same may be established at such place or places, and be in all respects managed under such by-laws, rules and regulations as a majority of the general board of directors, to be appointed as hereinafter directed, shall determine.

Sec. 800. A general board of directors appointed. 1866-'7, c. 130, s. 2.

The board of commissioners of each of the respective counties agreeing as aforesaid to the establishment of one or more houses of correction for use jointly with any other county or counties shall annually appoint five directors in behalf of their several counties, and the directors so appointed by each of such counties shall together constitute the general board of directors of any such joint establishment.

Sec. 801. General managers to be appointed by the general board of directors. 1866-'7, c. 130, s. 3.

Said general board of directors shall appoint a manager or superintendent for every such joint establishment, and such assistants and servants as they may deem necessary. The manager shall give bond with two or more able sureties, to be approved by said board, in such sum as may be required, payable to the state of North Carolina, and conditioned for the faithful performance of his duties. He shall hold his office during the pleasure of the general board of directors, and be, at all times, under their supervision; and of his misconduct they shall be the sole judges, and they may at any time remove him. He shall perform all such duties as may be prescribed by such general board of directors, and all such as may be incident to the office of manager by virtue of this chapter. The compensation of the manager and such subordinate officers, assistants and servants, as may be appointed by the general board, shall be fixed by said general board.

CHAPTER TWENTY-ONE.

COURTS, INFERIOR.

SECTION.
802. Inferior courts.
803. May decline to elect justices of the inferior court.
804. Terms, how often held in each year.
805. If the business cannot be determined in one day, courts to adjourn from day to day.
806. Majority of the court failing to meet, sheriff to adjourn from day to day.
807. Process continued.
808. Jurisdiction.
809. Practice, pleading, &c.; appeals
810. Issues of fact.
811. Jurors provided in same manner as for superior courts.
812. Justices may elect a clerk. Board of commissioners to take bond.
813. Notices, summons, executions and other process.
814. Justices shall elect an attorney.
815. Presiding justice; compensation
816. Vacancies, how filled.
817. May enforce its orders, &c.

Sec. 802. Inferior courts. 1876-'7, c. 154, s. 1.

Courts of record inferior to the supreme court are established for the trial of criminal actions, and such courts shall have all the rights and powers incident to courts of record, and shall have such jurisdiction as shall be conferred and prescribed by law. The courts herein provided for shall be held by three persons, to be chosen by the justices of the peace, or a majority of them, from the body of the county, the justices included; such persons shall be of good moral character, of fair ability, and men of integrity, and when so elected shall be the justices of said inferior court. They shall hold their offices for two years, and until their successors are elected and qualified.

Sec. 803. May decline to elect justices of the inferior court. 1876-'7, c. 154, s. 2.

If, in the opinion of the justices of the peace of any county, or a majority of them, it will not promote the best interests of the people for such courts to be held in such county, it shall be lawful for the said justices of the peace, or a majority of them, to decline to elect the justices of such inferior courts, and in that event there shall be no inferior court held in such county; but if, in the opinion of the justices of the peace, or a majority of them, the general good of the county would be pro-

moted, then, and in that event, the said justices of the peace, or a majority of them, shall provide that said inferior courts shall be held for the trial of criminal actions only; and in such case such inferior courts shall exercise only the criminal jurisdiction hereinafter conferred.

Sec. 804. Terms, how often held in each year, 1876-'7, c. 154, s. 3.

Said courts shall be held for their respective counties four times in each year, unless otherwise determined, on such days as may be determined on and fixed by a majority of the justices of the peace; but no term of said courts shall be held within less than three months, from and after the first day of the preceding term; and whenever the justices of the peace of any county shall have elected the justices of the said inferior court, the said inferior court shall continue to be held; but if after three months' notice to that effect, to be posted at the court house door and at one or more public places in each township in the county, the justices of the peace of any county, shall determine to discontinue the holding of said courts; then the said courts shall be discontinued, and the records, books and papers of said courts shall be filed in the office of the clerk of the superior court of said county, and all causes and matters and things then pending shall be thereby transferred to the said superior courts, to be therein proceeded in and tried as if the same had been therein docketed upon appeals from courts of justices of the peace: *Provided*, that no case herein transferred shall be dismissed for want of jurisdiction in justices of the peace.

Sec. 805. If the business cannot be determined in one day, court to adjourn from day to day. 1876-'7, c. 154, s. 4. 1881, c. 332.

If the business of the said courts cannot be determined on the first day of the term, the courts may adjourn from day to day not exceeding six days, except in the counties of Wake, New Hanover, Granville and Mecklenburg, in which the courts may be held for two weeks, at the end of which time the causes and matters which may be pending, and not finally determined, shall be continued to the next succeeding term.

Sec. 806. Majority of the court failing to meet, sheriff to adjourn from day to day. 1876-'7, c. 154, s. 5.

If, for any cause, a majority of any court shall not

meet for holding the term on a day appointed, any one of the court, and, in the absence of all the members of the court, then the sheriff may adjourn the court from day to day not exceeding three days, until a sufficient number of the justices of the court can attend.

Sec. 807. Process continued. 1876-'7, c. 154, s. 6.

No inferior court, nor any process there pending, shall be discontinued by reason of its justices failing to hold court upon the day appointed, or by any alteration of the day appointed for holding it; but in every such case, all process, matters and things pending shall stand continued; and all appearances, upon returns of process, shall be made to the next succeeding term, in the same manner as if such succeeding term had been the term to which said process had been continued, or such returns or appearance had been made; and all recognizances, bonds and obligations for appearances, and all returns, shall be of the same force and validity for the appearance of any person at such succeeding term, and all subpœnas for witnesses as effectual as if the next succeeding term had been expressly mentioned therein.

Sec. 808. Jurisdiction. 1876-'7, c. 154, s. 7. 1879, c. 92, s. 11. 1881, c. 210.

Said inferior courts shall have jurisdiction to inquire of, try, hear and determine all crimes and misdemeanors, except those whereof exclusive original jurisdiction is given to courts of justices of the peace, and except the crimes of murder, manslaughter, arson, rape, assault with intent to commit rape, burglary, horse-stealing, libel, perjury, forgery and highway robbery. Said inferior courts shall also have jurisdiction of all such affrays as shall be committed within one mile of the place where and during the time such courts are being held, and of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not, within six months after the commission of the offence, proceed to take official cognizance thereof.

State v. Lane, 78—547; State v. Spurtin, 80—362; State v. Williamson, 81—540; State v. Moore, 82—659; State v. Benthall, 82—664; State v. Ham, 83—590; State v. Thompson, 83—595; State v. Taylor, 83—601; State v. Berry, 83—603; State v. Taylor, 84—743; State v. Reaves, 85—553.

Sec. 809. Practice, pleading, &c.; appeals. 1876-'7, c. 154, s. 9. 1879, c. 141. Const., Art. IV., s. 8.

The practice, pleading, process and procedure in such

courts shall be, in all respects, as provided for the superior courts. Appeals may be taken from these courts to the superior courts in term time for error assigned in matters of law in the same manner and under the same restrictions provided by law for appeals from the superior courts to the supreme court, and the final decision of each superior court shall be certified to the court below, that final judgment may be rendered.

State v. Lane, 78—547; State v. Spurtin, 80—362; State v. Lawrence, 81—522; State v. Ham, 83—590; State v. Thompson, 83—595; State v. Pollard, 83—597; State v. Moore, 84—724; State v. McDowell, 84—798.

Sec. 810. Issues of fact. 1876-'7, c. 154, s. 11.

In all issues of fact, founded upon trials of petit misdemeanors, the parties may, by a written stipulation filed in the cause, waive their right to have the same determined by a jury, and submit it to a decision of the justices of said inferior courts, and the finding of said justices, or a majority of them, upon the facts, shall have the force and effect of a verdict of a jury.

Sec. 811. Jurors provided in same manner as for superior court. 1876-'7, c. 154, s. 12.

Thirty jurors shall be provided for each term of said courts in the same manner that jurors are provided for the superior courts, of which jurors, fifteen, drawn and sworn in the same manner that grand jurors are drawn and sworn in the superior courts, shall constitute the grand jury, with the same powers and duties of grand juries in the superior courts; the other fifteen shall be petit jurors for the trial of causes, and when the regular pannel shall be exhausted, talesmen may be summoned and sworn under the same rules as govern such cases in the superior courts.

Sec. 812. Justices may elect a clerk, board of commissioners to take bond. 1876-'7, c. 154, s. 13. 1883, c. 289, s. 2.

In each county in which the said courts shall be held, a majority of the justices of the peace may elect a clerk of said inferior court, who shall enter into a good and sufficient bond in a sum not less than five thousand dollars, with sureties thereto, to be accepted and approved by the board of commissioners of the county as is authorized and required in other cases of county officers giving bonds, for the discharge of all the duties of his office, who shall keep the records of his court in suitable

manner, in books to be furnished by the board of county commissioners, and shall receive the same fees for services by him rendered as are provided for clerks of the superior courts for similar services, and shall hold his office for two years, and until his successor is chosen and qualified, and shall be subject to the same laws and regulations as are provided for the qualifications, duties, responsibilities and liabilities of clerks of the superior courts: *Provided*, that if the justices of the peace of any county, or a majority of them, shall fail or decline to elect a clerk, as herein provided, then and in that event, the clerk of the superior court shall be *ex officio* clerk of said inferior court, and shall give like bond, and be subject to the same duties and be liable in the same manner and to the same extent as if he had been elected by the justices of the peace.

Davis v. Moss, 80—141.

Sec. 813. Notices, summons, executions and other process. 1876-'7, c. 154, s. 14.

It shall be the duty of the clerks of said inferior courts to issue all notices, summons, executions and other process that may be required by said courts; and it shall be the duty of the sheriff, deputy sheriffs or coroner, as the case may be, to execute the same, and make due returns thereon, as now required in the superior courts, and they shall be entitled to like fees, and liable to the same fines and penalties as in the superior courts.

Sec. 814. Justices shall elect an attorney. 1876-'7, c. 154, s. 15.

The justices of the peace of such county, a majority being present, shall elect an attorney, properly qualified to act for and in behalf of the state, in the county, who shall hold his office for the term of two years, and until his successor is chosen and qualified, and shall prosecute all matters cognizable in such court in behalf of the state, and he shall receive the same fees on conviction as are allowed solicitors in the superior courts.

Sec. 815. Presiding justice; compensation. 1876-'7, c. 154, s. 16.

The court shall elect one of their own number presiding justice, who shall hold his office until his successor is appointed. The compensation of each member of the court shall be fixed by a majority of the justices of the peace of the county, not to exceed the sum of three dol-

lars per day each: *Provided*, in counties where the business of the court would be thereby facilitated, a majority of the justices of the peace may allow the presiding justice such compensation as they may deem proper and necessary.

SEC. 816. Vacancies, how filled. 1876-'7, c. 154, s. 17.

The justices of the peace of any county, or a majority of them, shall fill all vacancies occurring in any of the offices herein provided.

SEC. 817. May enforce its orders, &c. 1876-'7, c. 154, s. 18.

The said courts shall have the same power and authority to enforce their orders, judgments and decrees, and the general conduct of their business and punish contempts as are conferred upon the superior courts. Each court shall have a seal with the proper device, and stamped with the words, "inferior court, ... county, ...," and the clerk of the court shall affix the same to his official acts and signatures when necessary.

CHAPTER TWENTY-TWO.

COURTS—JUSTICES OF THE PEACE.

SECTION.

818. Provisions of article seven of the constitution abrogated; exceptions.
819. Justices of the peace to be elected by the general assembly; additional justices for cities and towns; secretary of state to give certificate; governor to appoint.
820. Two additional justices in each township; terms of office.
821. Within what time to qualify.
822. Removal out of township six months, to forfeit office.
823. Resignation.
824. May issue process and try causes, where.
825. Office under the United States.
826. Punishment on conviction of infamous crimes, &c.
827. Filing dockets with clerks.
828. Delivery of unfilled dockets to successor.
829. Filing and delivery, how enforced.
830. Summons.
831. A civil and a criminal docket to be furnished each justice.
832. Summons, by whom issued.
833. Service and return of summons.
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835. Justices to dismiss action when the principal sum demanded exceeds two hundred dollars.

SECTION.
836. Answer where title to real estate is brought in issue.
837. Action to be dismissed, when.
838. Another action may be brought.
839. Docketing justice's judgment.
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851. Order of arrest, by whom made.
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855. Justice to keep jury box.
856. Names of jurors to be deposited in jury box.
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858. Jury drawn and trial postponed.
859. Summoning of the jury.
860. The jury for the trial of the cause.
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862. What names to be returned to the jury box, or destroyed.
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866. Less than six may be a jury, when.
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868. Jurors serving on trial.
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872. Process issued from a justice of the peace in one county on a party in another county rendered valid by endorsement of justice in defendant's county.
873. Certificate of the clerk of superior court; entry of date.
874. No process served under ten days' notice.
875. Appeal; execution.
876. Appeal, when to be taken.
877. When appellant not to give written notice.
878. Justice to make return of the appeal to the clerk of appellate court within ten days.
879. If return defective it may be amended.
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881. The appeal to be heard on the original papers.
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883. Appellant may give undertaking.
884. Same, undertaking to be given.
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886. Restitution.
887. Jurisdiction, where property does not exceed fifty dollars.
888. Recovery of damages to real estate.
889. Claim and delivery of personal property.
890. When a delivery is claimed.
891. Sufficiency of surety.
892. Criminal jurisdiction of justices of the peace.

SECTION.
893. Additional jurisdiction, peace warrants, bastardy, &c.
894. Proceedings on peace warrant.
895. Party convicted to pay costs; if accused acquitted, complainant to pay costs.
896. When justice has not final jurisdiction, must commit accused to prison, or require recognizance for his appearance to the next term of the court having jurisdiction.
897. When justice is satisfied that he has jurisdiction, he shall proceed to determine the case.
898. Jury to be allowed if asked for.
899. What to be submitted to the jury.
900. Accused may appeal; trial *de novo* in superior court.
901. Justice to transmit papers to clerk of appellate court; what his return to set forth.
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902. Either party paying fees, entitled to copy of complaint and other papers.
903. Finding and sentence pleaded in bar of indictment.
904. Justice to imprison the guilty party, if fine and cost not paid.
905. Imprisoned party to pay costs before discharged.
906. Justices of the peace to make returns of all criminal actions disposed of by them to the clerk of the superior, criminal or inferior court.
907. Actions removable from one justice of the peace to another upon affidavit; proviso.
908. Process, &c., not to be quashed for want of form.
909. Forms to be used in justice's court.

SEC. 818. Provisions of article seven of the constitution abrogated; exceptions. 1876-'7, c. 141, s. 7.

All the provisions of article seven of the constitution inconsistent with this chapter, except those contained in sections seven, nine and thirteen, are hereby abrogated, and the provisions of this chapter substituted in their place; subject, however, to the power of the general assembly to alter, amend or abrogate the provisions of this chapter, and to substitute others in their stead, as provided in section fourteen of article seven of the constitution.

SEC. 819. Justices of the peace to be elected by the general assembly; additional justices for cities and towns; secretary of state to give certificate; governor to appoint. 1876-'7, c. 141, s. 4.

Justices of the peace shall be elected by the general assembly. At each regular biennial session, one justice of the peace shall be elected for each township in the several counties of the state, and shall hold his office for the term of six years. In addition to the justices of the peace above provided for, and when the terms of those now in office shall expire, there shall be elected by the

general assembly, for each township in which any city or incorporated town is situated, one justice of the peace, and also one for every one thousand inhabitants in such city or town, who shall hold his office for the term of six years. The term of office of a justice of the peace shall begin on the first Thursday in August next after his election; and those heretofore, or hereafter elected, shall remain in office until their respective terms expire. The secretary of state shall certify to the clerks of the superior court of the several counties, a list of all justices of the peace elected for their several counties, and this shall be their commission, and the clerk of the superior court shall notify said justices of their election. When new townships shall be established, if the general assembly shall not be in session, the governor shall appoint the justices of the peace therein, and they shall hold their office until the next meeting of the general assembly, and until their successors shall be elected and qualified.

Sec. 820. Two additional justices in each township; terms of office. 1883, c. 125, ss. 1, 2.

The general assembly, at the session of 1883, shall elect two justices of the peace for the several townships of the state in addition to those provided for by the preceding section, one half of whom shall be elected for the term of four years and the other half for the term of six years, and their successors thereafter for the term of six years.

Sec. 821. Within what time to qualify. C. C. P., s. 546.

Every person elected or appointed a justice of the peace, shall, within thirty days after his term of office begins, take and subscribe the prescribed oath of office before the clerk of the superior court; which oath shall be filed by the clerk of said court. And any person presuming to execute the office of a justice of the peace without qualifying as herein directed, shall be guilty of a misdemeanor.

State v. Cansler, 75—442.

Sec. 822. Removal out of township six months to forfeit office. C. C. P., s. 547.

When any justice of the peace removes out of his township and does not return therein for the space of six months, he shall forfeit and lose his office; and any such justice of the peace presuming to act thereafter, contrary to this section, unless re-elected or re-appointed, shall be guilty of a misdemeanor.

Sec. 823. Resignation. C. C. P., s. 548.

Justices of the peace wishing to resign, must deliver their letters of resignation to the clerk of the superior court, who shall file the same.

Sec. 824. May issue process and try causes, where. C. C. P., s. 549.

A justice of the peace may issue a summons or other process anywhere in his county, but he shall not be compelled to try a cause out of the township for which he was elected or appointed.

Sec. 825. Office under the United States. C. C. P., s. 550.

Any justice of the peace may accept a civil office or appointment of trust or profit, under the authority of the United States, the duties of which confine him to the county where he is resident.

Sec. 826. Punishment on conviction of infamous crimes, &c. C. C. P., s. 551.

Upon the conviction of any justice of the peace, of an infamous crime or of corruption and malpractice in office, he shall be removed from office, and he shall be disqualified from holding or enjoying any office of honor, trust or profit under this state.

State v. Zachary, Busb., 432; State v. Hawkins, 77—494; State v. Sneed, 84—816.

Sec. 827. Filing dockets with clerks. C. C. P., s. 552.

Each justice of the peace, as often as he has filled his docket, shall file the same with the clerk of the superior court for his county.

Sec. 828. Delivery of unfilled docket to successor. C. C. P., s. 553.

When a vacancy exists, from any cause, in the office of a justice of the peace, whose docket is not filled, or when such justice goes out of office by expiration of his term, such former justice, if living, and his personal representative, if dead, shall deliver such docket, and all official papers to his successor, who is authorized to hear and determine any unfinished action on said docket, in the same manner as if such action had been originally brought before such successor.

Sec. 829. Filing and delivery, how enforced. C. C. P., s. 554.

The duty imposed on the justice, or his personal representative, by the two preceding sections may be enforced, on ten days' notice in writing to such justice or his representative, by attachment.

Sec. 830. Summons. C. C. P., s. 495. 1868-'9, c. 159, s. 9.

Civil actions in these courts shall be commenced by the issuing of a summons.

Kirkland v. Hogan, 65—144.

Sec. 831. A civil and a criminal docket to be furnished each justice.

A civil and a criminal docket shall be furnished each justice, at the expense of the county, by the board of county commissioners, in which shall be entered a minute of every proceeding had in any action before such justice.

Sec. 832. Summons, by whom issued. C. C. P., s. 496. 1874-'5, c. 234.

The summons shall be issued by the justice and signed by him. It shall run in the name of the state, and be directed to any constable or other lawful officer, commanding him to summon the defendant to appear and answer the complaint of the plaintiff at a place, within the county, to be therein specified, and at a time to be therein named, not exceeding thirty days from the date of the summons. It shall also contain the amount of the sum demanded by the plaintiff.

Allen v. Jackson, 86—321.

Sec. 833. Service and return of summons. C. C. P., s. 497.

The officer to whom the summons is delivered shall execute the same within five days after its receipt by him, or immediately, if required to do so by the plaintiff. Before proceeding to execute it, he is entitled to require of the plaintiff his fees for the service. When executed he shall immediately return the summons, with the date and manner of the service, to the justice who issued the same.

Sec. 834. Jurisdiction. C. C. P., s. 498. 1868-'9, c. 159, s. 2.

Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract, except:

(1) Wherein the sum demanded, exclusive of interest, exceeds two hundred dollars.

(2) Wherein the title to real estate is in controversy.

Wilmington v. Davis, 63—582; Hedgecock v. Davis, 64—650; Edenton v. Wool, 65—379; Steadman v. Jones, 65—388; Winslow v. Weith, 66—432; Froclick v. Express Co., 67—1; Rowark v. Gaston, 67—291; State v. Porter, 69—140; Caldwell v. Beatty, 69—365; Boyle v. Robbins, 71—130; State v. Rosseau, 71—194; Tompleton v. Summers, 71—269; Latham v. Rollins, 72—454; Washington v. Hammond, 76—33; London v. Headen, 76—72; State v. Rice, 76—194; Green v. R. R. Co., 77—95; Perry v. Shepherd, 78—83; Evans v. Williamson, 79—86; Reeves v. Davis, 80—209; Brunhild v. Freeman, 80—212; McDonald v. Cannon, 82—245; Dalton v. Webster, 82—279; Davis v. Davis, 83—71; Womble v. Leach, 83—84; Jones v. Palmer, 83—303; Derr v. Stubbs, 83—539; Fisher v. Webb, 84—44; Robinson v. Howard, 84—151; Katzenstein v. R. R. Co., 84—688; Lowery v. Perry, 85—131; Morris v. Saunders, 85—138; Coggins v. Harrell, 86—317; Allen v. Jackson, 86—321; McAdoo v. Callum, 86—419; Mebane v. Layton, 86—571; Love v. Rhyne, 86—577; Hahn v. Latham, 87—172; Lutz v. Thompson, 87—334; Hannah v. R. R. Co., 87—351; McDonald v. Dickson, 87—404.

Sec. 835. Justices to dismiss action when the principal sum demanded exceeds two hundred dollars. C. C. P., s. 499. 1868-'9, c. 159, s. 3. 1876-'7, c. 63.

Where it appears, in any action brought before a justice, that the principal sum demanded exceeds two hundred dollars, the justice shall dismiss the action and render a judgment against the plaintiff for the costs, unless the plaintiff shall remit the excess of principal, above two hundred dollars, with the interest on said excess, and shall, at the time of filing his complaint, direct the justice to make this entry: "The plaintiff, in this action, forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess."

Murphy v. McNeil, 82—221; Derr v. Stubbs, 83—539; Fisher v. Webb, 84—44; Brickell v. Bell, 84—82.

Sec. 836. Answer where title to real estate is brought in issue. C. C. P., s. 500.

In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter

of defence, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing; signed by the defendant or his attorney, and delivered to the justice.

Heyer v. Beatty, 76—28; Evans v. Williamson, 79—86; Hahn v. Latham, 87—572.

Sec. 837. Action to be dismissed, when. C. C. P., s. 501.

If it appears on the trial, that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs.

Turner v. Lowe, 66—413; Dulin v. Howard, 66—433; Foster v. Perry, 77—160; Davis v. Davis, 83—71; Nesbit v. Turrentine, 83—535; Parker v. Allen, 84—466; Hahn v. Latham, 87—172.

Sec. 838. Another action may be brought. C. C. P., s. 502.

When an action, before a justice, is dismissed upon answer, and proof by the defendant, that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court, and the defendant shall not be admitted in that court. to deny the jurisdiction by an answer contradicting this answer in the justice's court.

Dulin v. Howard, 66—433; Evans v. Williamson, 79—86.

Sec. 839. Docketing justice's judgment. C. C. P., s. 503. 1868-'9, c. 272, s. 3.

A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof which may be filed and docketed in the office of the superior court clerk of the county where the judgment was rendered. Or in such case he shall also deliver to the defendant, or his attorney, a transcript of any stay of execution issued, or which may thereafter be issued, by him on such judgment, which may be in like manner filed and docketed in the office of the clerk of said court. The time of the receipt of the transcript by the clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the superior court in all respects. The execution thereon shall be issued by the clerk of the superior court to the sheriff of the county, and shall have the same effect, and be executed in the same manner, as other executions of the superior court: *Provided*, that in case a stay of execution upon such judgment shall be granted, as provided herein, executions upon

such judgment shall not be issued by the clerk of the superior court until the expiration of such stay. A certified transcript of such judgment may be filed and docketed in the superior court clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript.

McAdoo v. Benbow, 63—461; McAden v. Banister, 63—478; Norwood v. Thorpe, 64—682; Bates v. Bank, 65—81; Bates v. Hinsdale, 65—423; McKeithan v. Walker, 66—95; Broyles v. Young, 81—315; Morton v. Ripey, 84—611; Williams v. Williams, 85—383; Surratt v. Crawford, 87—372.

Sec. 840. Rules of proceeding in justice's court. C. C. P., s. 504.

RULE I.

The pleadings in these courts are—
(1) The complaint of the plaintiff;
(2) The answer of the defendant.

Poston v. Rose, 87—279.

RULE II.

The pleadings may be either oral or written; if oral, the substance must be entered by the justice on his docket; if written, they must be filed by the justice, and a reference to them be made on his docket.

RULE III.

The complaint must state, in a plain and direct manner, the facts constituting the cause of action.

RULE IV.

The answer may contain a denial of the complaint, or of any part thereof, and also a notice, in a plain and direct manner, of any facts constituting a defence or counter-claim.

Derr v. Stubbs, 83—539; Fisher v. Webb, 84—44; Boyett v. Vaughan, 85—363; Barbee v. Green, 86—158; Webster v. Laws, 86—178; Meneeley v. Craven, 86—364; Mebane v. Logan, 86—571; Love v. Rhyne, 86—576; Poston v. Rose, 87—279.

RULE V.

Pleadings are not required to be in any particular form,

but must be such as to enable a person of common understanding to know what is meant.

RULE VI.

Where a defendant does not appear and answer, the plaintiff must still prove his case before he can recover.

RULE VII.

In an action or defence, founded on an account or an instrument for the payment of money only, it is sufficient for a party to deliver the account or instrument to the justice and state that there is due him thereon from the adverse party a specified sum, which he claims to recover or set off.

Evans v. Williamson, 79—86.

RULE VIII.

A variance between the evidence on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled to his prejudice thereby.

RULE IX.

The pleadings may be amended at any time, before the trial, or during the trial, or upon appeal, when by such amendment, substantial justice will be promoted. If the amendment be made after the joining of the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party.

Hinton v. Deans, 75—18.

RULE X.

The justice may at the joining of issue, require either party, at the request of the other, at that or some other specified time to exhibit his account or demand, or state the nature thereof as far forth as may be in his power; and in case of his default, the justice shall preclude him from giving evidence of such parts thereof as have not been so exhibited or stated.

RULE XI.

Either party may demur to a pleading of his adversary, or to any part thereof, when it is not sufficiently explicit to enable him to understand it, or contains no cause of action or defence, although it be taken as true.

RULE XII.

If the justice deem the objection well founded, he shall order the pleading to be amended on such terms as he may think just; and if the party refuse to amend, the defective pleading shall be disregarded.

RULE XIII.

The justice shall enter all his proceedings in a cause tried before him in his docket. No part of such proceedings must be entered on the summons, on the pleadings or on any other paper in the cause.

RULE XIV.

Execution may be issued on a judgment, rendered in a justice's court, at any time within one year after the rendition thereof, and shall be returnable sixty days from the date of the same.

Williams v. Williams, 85—383.

RULE XV.

The code of civil procedure, respecting forms of actions, parties to actions, the times of commencing actions, and the service of process, shall apply to justice's courts.

Katzenstein v. R. R. Co., 78—286.

RULE XVI.

The defendant may, on the return of process and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceeding be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof,

and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

Rand v. Harris, 83—486.

RULE XVII.

Any justice before whom an action is brought, may, on sufficient excuse therefor shown on the affidavit of either party or any person for him, continue such action from time to time for trial; but such continuance shall not exceed thirty days.

SEC. 841. Execution, on what and from what time, a lien. C. C. P., s. 505. 1868, c. 159, s. 5.

Executions issued by a justice, which must be directed to any constable or other lawful officer of the county, shall be a lien on the goods and chattels of the defendant named therein, from the levy thereof only, but shall not be levied on or enforced in any manner against real estate; but when a justice's judgment shall be made a judgment of the superior court, as is elsewhere provided, the execution shall be capable of being levied and collected out of any property of the defendant, in execution, and it shall be a lien on the real estate of said defendant from the time when it becomes a judgment of the superior court.

SEC. 842. Stay of execution; stay granted by justice. C. C. P., s. 505 (a). 1868-'9, c. 272.

In all actions founded on contract, whereon judgments are rendered in justices' courts, stay of execution, if prayed for at the trial by the defendant or his attorney, shall be granted by the justices in the following manner: For any sum not exceeding twenty-five dollars, one month; any sum above twenty-five dollars and not exceeding fifty dollars, three months; for any sum above fifty dollars and not exceeding one hundred dollars, four months; for any sum above one hundred dollars, six months. But no stay of execution shall be allowed in any action wherein judgment is rendered on a former judgment taken before a justice of the peace.

SEC. 843. Security on stay of execution. C. C. P., s. 506.

The party praying for a stay of execution shall, within ten days after the trial, give sufficient security, approved

by the justice, for payment of the judgment, with interest thereon till paid, and cost; and the acknowledgment of the surety, entered by the justice in his docket and signed by the surety, shall be sufficient to bind such surety. If the judgment be not discharged at the time to which execution has been stayed, the justice who awarded the judgment shall issue execution against the principal, or surety, or both.

Barringer v. Allison, 78—79.

Sec. 844. Former judgment. C. C. P., s. 507.

On the trial of an action founded on a former judgment, the judgment itself shall be evidence of the debt, subject to such payments as have been made.

Sec. 845. Application for re-hearing. C. C. P., s. 508.

When a judgment has been rendered by a justice, in the absence of either party, and when such absence was caused by the sickness, excusable mistake or neglect of, the party, such absent party, his agent or attorney, may within ten days after the date of such judgment, apply for relief to the justice who awarded the same, by affidavit, setting forth the facts, which affidavit must be filed by the justice; whereupon the justice, if he deem the affidavit sufficient, shall open the case for reconsideration; and to this end, he shall issue a summons, directed to a constable, or other lawful officer to cause the adverse party, together with the witnesses on both sides, to appear before him at a place and at a time, not exceeding twenty days, to be specified in the summons, when the complaint shall be re-heard, and the same proceedings had as if the case had never been acted on. If execution has been issued on the judgment, the justice shall direct an order to the officer having such execution in his hands, commanding him to forbear all further proceedings thereon, and to return the same to the justice forthwith.

Hogan v. Kirkland, 64—250; Froneburger v. Lee, 66—333.

Sec. 846. Justice's judgment removed to another county, how. C. C. P., s. 509.

Any person, who may desire to have a justice's judgment in his favor removed to another county to be enforced against the goods and chattels of the defendant, must obtain from the justice who rendered the judgment a transcript thereof, under his hand; and must further procure a certificate from the clerk of the superior court of the county where the judgment was rendered, under

the seal of his court, that the justice who gave the judgment was, at the rendition thereof, a justice of said county. On such transcript of the judgment, thus certified, any justice in any other county may award execution for the sum therein expressed.

McAden v. Bannister, 63—478.

Sec. 847. Witnesses, penalties, &c. C. C. P., s. 510.

The justice, on application of either party, shall, by a subpœna or by an order in writing on the process, direct the constable or other officer to summon witnesses to appear and give testimony at the time and place appointed for the trial. Each witness, failing to appear, shall forfeit and pay eight dollars to the party at whose instance he was summoned, and shall be further liable to such party for all damage sustained by non-attendance. The fine herein imposed may be recovered, on motion, before the justice who tried the action, unless the witness, on a notice of five days, by affidavit or other proof, show sufficient excuse for his failure to attend.

Sec. 848. Penalty for swearing before a justice, &c. R. C., c. 115, s. 2. 1741, c. 30, s. 3.

If any person shall profanely swear or curse in the hearing of a justice of the peace, holding his court, the justice may commit him for a contempt, or fine him fifty cents.

Sec. 849. Code of civil procedure applicable. C. C. P., s. 511.

The code of civil procedure is applicable, except as herein otherwise directed, to proceedings in justice's courts concerning "*arrest and bail*," substituting the word "*constable*" for the word "*sheriff*," and the words "*justice of the peace*" for the words "*judge, court or clerk*," whenever they occur in said chapter.

Sec. 850. Arrest, in what cases. C. C. P., s. 512.

The defendant may be arrested in the following cases:

(1) When the defendant has been guilty of a fraud in contracting the debt or obligation for which the action is brought;

(2) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

(3) In an action to recover the possession of personal property unjustly detained, when the property or any

part thereof has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff or constable, and with the intent that it should not be so found or taken, or with intent to deprive the plaintiff of the benefit thereof, or for damages for injuring or for wrongfully taking or converting personal property.

Sec. 851. Order of arrest, by whom made. C. C. P., s. 513.

An order for the arrest of the defendant must be obtained from the justice of the peace before whom the action is brought.

Sec. 852. Affidavit to obtain order. C. C. P., s. 514.

The order may be made where it appears to the justice of the peace, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in this chapter.

Sec. 853. Code of civil procedure applicable. C. C. P., s. 516.

The code of civil procedure is applicable to proceedings by attachment before justices of the peace, in all cases founded on contract wherein the sum demanded does not exceed two hundred dollars, and where the title to real estate is not in controversy.

Weaver v. Roberts, 84—493; Faulk v. Smith, 84—501.

Sec. 854. Jury list furnished to each justice. C. C. P., s. 517.

The clerk of the board of commissioners shall furnish, on demand, to each justice of the peace in the county, a list of the jurors for the township for which such justice is elected or appointed.

Sec. 855. Justice to keep jury box. C. C. P., s. 518.

Each justice shall keep a jury box, having two divisions marked respectively number one and number two, and having two locks, the key to be kept by the justice.

Sec. 856. Names of jurors to be deposited in jury box. C. C. P., s. 519.

Each justice shall cause the names on his jury list to be written on small scrolls of paper of equal size, and to be placed in the jury box, in division marked number one, until drawn out for the trial of an issue as required by law.

SEC. 857. When trial by jury demanded or waived. C. C. P., s. 520.

A trial by jury must be demanded at the time of joining the issue of fact, and if neither party demand at such time a jury, they shall be deemed to have waived a trial by jury.

SEC. 858. Jury drawn and trial postponed. C. C. P., s. 521.

When a trial by jury is demanded, the justice shall immediately, in the presence of the parties, proceed to draw the names of twelve jurors from division marked number one of the jury box; and the trial of the cause shall thereupon be postponed to a time and place to be fixed by the justice.

SEC. 859. Summoning of the jury. C. C. P., s. 522.

A list of the jurors so drawn shall be immediately delivered by the justice to any constable, or other lawful officer, with an order indorsed thereon, directing him to summon the persons named in the list to appear as jurors at the time and place fixed for the trial; and it is the duty of the officer to proceed forthwith to summon such jurors, or so many of them as can be found, according to the order; and he shall make return thereof at the time and place appointed, stating in his return the names of the jurors summoned by him.

SEC. 860. The jury for the trial of the cause. C. C. P., s. 523.

At the time and place appointed, and on return of the order, if the trial be not further adjourned, and if adjourned, then at the time and place to which the trial shall be adjourned, the justice shall proceed, in the presence of the parties, to draw from the jurors summoned the names of six persons to constitute the jury for the trial of the issue.

SEC. 861. Challenge. C. C. P., s. 524.

Each party shall be entitled to challenge, peremptorily, two of the persons drawn as jurors.

SEC. 862. What names to be returned to the jury box, or destroyed. C. C. P., s. 525.

The scrolls containing the names of jurors not summoned, if any, and of those summoned, but not drawn, and of those drawn, but challenged and set aside, must

be returned by the justice to his jury box, in division marked number one; *Provided*, that the scrolls containing the names of such as are not legally liable, or legally qualified to serve as jurors, shall be destroyed.

SEC. 863. Tales jurors may be summoned. C. C. P., s. 526.

If a competent and indifferent jury is not obtained from the twelve jurors drawn, as before specified, the justice may direct others to be summoned, from the bystanders, sufficient to complete the jury.

SEC. 864. Jury sworn and impaneled; verdict. C. C. P., s. 527.

The jury shall be sworn and impaneled by the justice, who shall record their verdict in his docket and enter a judgment in the case according to such verdict.

SEC. 865. New trial; appeal. C. C. P., s. 528.

A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the superior court, as hereinafter prescribed.

Froneberger v. Lee, 66—333.

SEC. 866. Less than six may be a jury, when. C. C. P., s. 529.

Six jurors shall constitute a jury in a justice's court, but, by consent of both parties, a less number may constitute it.

SEC. 867. Not compelled to serve out of township. C. C. P., s. 530.

No person is compelled to serve as a juror in a justice's court out of his own township, except as a talesman.

SEC. 868. Jurors serving on trial. C. C. P., s. 531.

The scrolls containing the names of the jurors who serve on the trial of an issue must be placed in the jury-box in division marked number two, until all the scrolls in division marked number one have been drawn out. As often as that may happen, the whole number of scrolls shall be returned to division marked number one, to be drawn out as in the first instance.

SEC. 869. Deposit of jury fees. C. C. P., s. 532.

Before a party is entitled to a jury, he shall deposit with the justice the sum of three dollars for jury fees, and the

justice shall pay to all persons who attend, pursuant to the summons, as well to those who do not actually serve as to those who do serve, twenty-five cents each, to be included in the judgment as part of the costs, in case the party demanding the jury recover judgment, but not otherwise. The justice shall refund to the party the fees of all jurors who do not attend.

Sec. 870. Adjournment after return of the jury. C. C. P., s. 533.

No adjournment shall be granted after the return of the jury, unless the party asking the same shall, in addition to the other conditions imposed on him by law or by the justice, deposit with the justice, to be immediately paid to the jurors attending, the sum of twenty-five cents each, such amount to be in no case included in the judgment as part of the costs. On such adjournment, the jurors shall attend at the time and place appointed, without further summons or notice; and the fees for the jury, deposited with the justice according to the preceding section, shall remain in his hands until the jury are impaneled on the trial, and shall be then immediately paid to the jurors or to the party entitled thereto.

Sec. 871. No process issued by justice outside his own county, &c. 1876-'7, c. 287, s. 1.

No process shall be issued by any justice of the peace to any county other than his own, unless one or more *bona fide* defendants shall reside in, and also one or more *bona fide* defendants shall reside outside of, his county; in which case, only, he may issue process to any county in which any such non-resident defendant resides.

Lilly v. Purcell, 78—82.

Sec. 872. Process issued from a justice of the peace in one county on a party in another county rendered valid by indorsement of justice in defendant's county. 1870-'1, c. 60, s. 1.

In all civil actions in courts of justices of the peace where one or more of the defendants may reside in a county other than that of the plaintiff, it shall be lawful for any justice of the peace within the county where such defendant or defendants may reside, upon proof of the handwriting of the justice of the peace who issued the process, to indorse his name on the same, or a duplicate thereof, and such process so indorsed shall be

executed in like manner as if it had been originally issued by the justice indorsing it.

Wooten v. Maultsby, 69—462; Self v. Jenkins, 71—578; Sossamer v. Hinson, 72—578; Lilly v. Purcell, 78—83.

Sec. 873. Certificate of the clerk of superior court; entry of date. 1870-'1, c. 60, s. 2.

In all cases referred to in the preceding section, it shall be lawful for the clerk of the superior court of the county in which the action is brought, to certify, under the seal of his court, on the process or a duplicate thereof, that the justice of the peace who issued the same is an acting justice of the peace in his county. And in all such cases it shall be the duty of any sheriff or constable to whom it may be directed, to make an entry of the date of its reception, and to execute the same as provided for the service of civil process in courts of justices of the peace, and return it by mail to the justice of the peace from whose court it issued.

Sec. 874. No process served under ten days' notice. 1870-'1, c. 60, s. 3. 1876-'7, c. 57.

No justice of the peace shall enter a judgment under the two preceding sections against any defendant who may be a non-resident of his county, unless it shall appear that the process was duly served upon him at least ten days before the return day of the same.

Sec. 875. Appeal; execution. C. C. P., s. 534. 1876-'7, c. 251, s. 6.

The party against whom judgment is rendered in any civil action in a justice's court may appeal to the superior court from the same; but no appeal shall prevent the issuing of an execution on such judgment or work a stay thereof, except as hereinafter provided.

Marshall v. Lester, 2 Mur., 227; Grissett v. Smith, 1 Phil., 164; Critcher v. McCadden, 64—262; Steadman v. Jones, 65—388; Froneberger v. Lee, 66—333; Marsh v. Cohen, 68—283; Green v. Hobgood, 74—234; Carmer v. Evers, 80—55; Koonce v. Pelletier, 82—236; State v. Crouse, 86—617; Hahn v. Latham, 87—172.

Sec. 876. Appeal; when to be taken. C. C. P., s. 535. 1876-'7, c. 251, s. 7.

The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant

did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for.

Steadman v. Jones, 65—388; Marsh v. Cohen, 68—283; Green v. Hobgood, 74—234; McDaniel v. Watkins, 76—399; Sparrow v. Davidson College, 77—35; R. R. Co. v. Richardson, 82—343; Spaugh v. Boner, 85—208; Hahn v. Latham, 87—172.

SEC. 877. When appellant not to give written notice. 1869-'70, c. 187, s. 1. 1876-'7, c. 251, s. 8.

Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party.

Shepherd v. Lane, 2 Dev., 148; Croom v. Morrisey, 63—591; Steadman v. Jones, 65—388; Marsh v. Cohen, 68—283; Com'rs v. Capeheart, 71—156; Richardson v. Debnam, 75—390; Suttle v. Green, 78—76.

SEC. 878. Justice to make return of the appeal to the clerk of the appellate court within ten days. C. C. P., s. 537.

The justice shall, within ten days after the service of the notice of appeal on him, make a return to the appellate court and file with the clerk thereof the papers, proceedings and judgment in the case, with the notice of appeal served on him. He may be compelled to make such return by attachment. But no justice shall be bound to make such return until the fees, prescribed by law for this service, be paid him. The fee so paid shall be included in the costs, in case the judgment appealed from is reversed.

Ledbetter v. Osborne, 66—379; Poston v. Rose, 87—279.

SEC. 879. If return defective, it may be amended. C. C. P., s. 538.

If the return be defective, the judge or clerk of the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with the order by attachment.

SEC. 880. Clerk of superior court to docket appeal. C. C. P., s. 539. 1876-'7, c. 251, s. 8.

When the return is made, the clerk of the appellate court shall docket the case on his trial docket, for a new

trial of the whole matter at the ensuing term of said court.

Cowles v. Hays, 67—128; Com'rs v. Addington, 68—254; Com'rs v. Capeheart, 71—156.

Sec. 881. The appeal to be heard on the original papers. C. C. P., s. 540.

The appeal shall, in all cases, be heard on the original papers, and no copy thereof need be furnished for the use of the appellate court.

Ledbetter v. Osborne, 66—379; Com'rs v. Capeheart, 71—156.

Sec. 882. Execution of judgment, how stayed. C. C. P., s. 541.

If the appellant desire a stay of execution of the judgment, he may apply, at any time, to the clerk of the appellate court for leave to give the undertaking, as provided in a subsequent section; who shall, upon the undertaking being given, make an order that all proceedings on the judgment be stayed.

Rush v. Steamboat Co., 68—72; Derr v. Stubbs, 83—539.

Sec. 883. Appellant may give undertaking. 1869-'70, c. 187, s. 2.

In all cases of appeal from justices' courts the appellant may give an undertaking for the appeal before the justice who tried the cause, and who shall indorse his approval thereon, instead of before the clerk of the appellate court.

Sec. 884. Same, undertaking to be given. C. C. P., s. 542. 1879, c. 68.

The undertaking shall be in writing, executed by one or more sufficient sureties, to be approved by the justice or clerk making the order, to the effect that if judgment be rendered against the appellant, the sureties will pay the amount together with all costs awarded against the the appellant, and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties.

Rush v. Steamboat Co., 68—72; Bank v. McArthur, 82—107; Hamilton v. Mooney, 84—12; Brown v. Brittain, 84—552.

Sec. 885. Same, delivery and service of order on whom. C. C. P., s. 543.

A delivery of a certified copy of the order hereinbefore mentioned to the justice of the peace, shall stay the issuing of the execution on the judgment; if it have been

issued, the service of a certified copy of such order on the officer holding the execution shall stay further proceedings thereon. A certified copy of such order shall also be served on the respondent, or on his agent or attorney, within ten days after the making thereof.

SEC. 886. Restitution. C. C. P., s. 544.

If the judgment appealed from, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored, with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing of the appeal, on a previous notice of six days. If the order be obtained before the judgment of reversal is entered, the amount may be included in the judgment.

SEC. 887. Jurisdiction, where property does not exceed fifty dollars. 1876-'7, c. 251, s. 1.

Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed fifty dollars.

Krider v. Ramsay, 79—354; McDonald v. Cannon, 82—245; Womble v. Leach, 83—84; Jones v. Palmer, 83—303; Boyce v. Williams, 84—275; Allen v. Jackson, 86—311; Boing v. R. R. Co., 87—360.

SEC. 888. Recovery of damages to real estate. 1876-'7, c. 251, s. 2.

All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court.

SEC. 889. Claim and delivery of personal property. 1876-'7, c. 251, s. 3.

The code of civil procedure is applicable, except as herein otherwise provided, to proceedings in justices' courts concerning claim and delivery of personal property, substituting the words "justice of the peace" for "clerk or clerks of the court," and inserting the words, "or constable" after "sheriff," whenever they occur.

Sec. 890. When a delivery is claimed. 1876-'7, c. 251, s. 4.

When a delivery is claimed an affidavit must be made by the plaintiff, his agent or attorney, before the justice in whose court the action is to be tried or some other justice of the peace, showing:

(1) That the plaintiff is the owner of the property claimed (particularly describing it) or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which shall be set forth;

(2) That the property is wrongfully detained by the defendant;

(3) The alleged cause of detention thereof according to his best knowledge, information and belief;

(4) That the same has not been taken for a tax assessment or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized that it is by statute exempt from such seizure; and

(5) The actual value of the property.

Poston v. Rose, 87—279.

Sec. 891. Sufficiency of sureties. 1876-'7, c. 251, s. 5.

The defendant within three days after the service of a copy of the affidavit and undertaking may give notice to the officer serving the same, to the plaintiff or his attorney, that he excepts to the sufficiency of the sureties; if he fail to do so he shall be deemed to have waived all objection to them. When the defendant excepts to the sureties they shall justify before the justice on giving to the defendant or his attorney notice of the time and place, which shall not be more than three days from the service of notice of the exception, and the sheriff or constable shall be responsible for the sufficiency of the sureties until the objection to them is waived as above provided, or until they shall justify or new sureties shall be substituted and justify.

Sec. 892. Criminal jurisdiction of justices of the peace. Const., Art. IV., s. 27. 1879, c. 92, ss. 2, 11. 1881, c. 210.

Justices of the peace shall have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for

thirty days: *Provided*, that justices of the peace shall have no jurisdiction over assaults with intent to kill, or assaults with intent to commit rape, except as committing magistrates: *Provided further*, that nothing in this section shall prevent the superior, inferior or criminal courts from finally hearing and determining such affrays as shall be committed within one mile of the place where and during the time such court is being held; nor shall this section be construed to prevent said courts from assuming jurisdiction of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace, within six months after the commission of the offence, shall not have proceeded to take official cognizance of the same.

Passim, 1868-'9, c. 178, sub. c. 4, s. 2 ; State v. Johnson, 64—591; State v. Hampton, 77—526; State v. Edney, 80-360; State v. Moore, 82—659; State v. Taylor, 83—601; State v. Berry, 83—603; State v. Taylor, 84—773; State v. Watts, 85—517; State v. Reaves, 85—553; State v. Powell, 86—640.

Sec. 893. Additional jurisdiction, peace warrants, bastardy, &c. 1879, c. 92, s. 2.

Justices of the peace shall also have exclusive original jurisdiction of all such peace warrants and proceedings thereunder as they shall assume jurisdiction of, and of all bastardy proceedings and issues arising thereunder, and to take bonds from defendants in such proceedings, as provided for in the chapter entitled "Bastardy."

State v. Bass, 75—139; State v. Cooley, 78—538; State v. Parish, 83—613; State v. Sneed, 84—816; State v. Crouse, 86—617.

Sec. 894. Proceedings on peace warrant. 1879, c. 92, s. 9.

Whenever any person complained of on a peace warrant shall be brought before a justice of the peace, such person may be required to enter into a recognizance, payable to the state of North Carolina in such sum not exceeding one thousand dollars, as such justice shall direct, with one or more sufficient sureties, to appear before some justice of the peace within a period not exceeding six months, and not depart the court without leave, and in the meanwhile to keep the peace and be of good behavior towards all the people of the state, and particularly towards the person requiring such security.

SEC. 895. Party convicted to pay costs; if accused acquitted, complainant to pay costs. 1868-'9, c. 178, sub chap. 4, s. 19. 1879, c. 92, s. 3. 1881, c. 176.

The party convicted in a criminal action or proceeding before a justice, shall always be adjudged to pay the costs; and if the party charged be acquitted, the complainant shall be adjudged to pay the costs; and may be imprisoned for the non-payment thereof, if the justice shall adjudge that the prosecution was frivolous or malicious. But in no action or proceeding, commenced or tried in a court of a justice of the peace, shall the county be liable to pay any costs.

State v. Murdock, 85—598.

SEC. 896. When justice has not final jurisdiction, must commit accused to prison, or require recognizance for his appearance to the next term of the court having jurisdiction. 1868-'9, c. 178, sub chap. 4, s. 7. 1879, c. 302, s. 2.

In all cases where a justice of the peace shall not have final jurisdiction of the offence, he shall desist from any final determination of the action or complaint, and either commit the accused to prison, or require from him a recognizance with sufficient sureties and in a sufficient amount for his appearance at the next term of any court of his county having jurisdiction, to answer the charge. He shall also bind the complainant and the witnesses over to appear in like manner and testify; and he shall return the papers, with a statement of his proceedings, to the clerk of the court on or before the first day of the next term thereof.

State v. Sneed, 84—816.

SEC. 897. When justice is satisfied that he has jurisdiction, he shall proceed to determine the case. 1868-'9, c. 178, sub chap. 4, s. 8.

When the justice shall be satisfied that he has jurisdiction, if no jury shall be asked for, he shall proceed to determine the case, and shall either acquit the accused or find him guilty, and sentence him to such punishment as the case may require, not to exceed in any case a fine of fifty dollars, or imprisonment in the county jail for thirty days.

SEC. 898. Jury to be allowed, if asked for. 1868-'9, c. 178, sub chap. 4, s. 9.

If either the complainant or the accused shall ask for

it, the justice shall allow a trial by jury, as is provided in civil actions before justices of the peace.

SEC. 899. What to be submitted to the jury. 1868-'9, c. 178, sub chap. 4, s. 10.

In case a trial by jury shall be had, the justice shall submit to the jury in each case simply the question of the guilt or innocence of the accused of the offence charged, and shall enter the verdict on his docket, and adjudge accordingly.

SEC. 900. Accused may appeal; trial *de novo* in superior court. 1868-'9, c. 178, sub chap. 4, s. 11. 1879, c. 92, s. 10.

The accused may appeal from the sentence of the justice to the superior court of the county. On such appeal being prayed, the justice shall recognize both the prosecutor and the accused, and all the material witnesses, to appear at the next term of the court, in such sums as he shall think proper; and he may require the accused to give sureties for his appearance as aforesaid. In all cases of appeal, the trial shall be anew, without prejudice from the former proceedings.

State v. Quick, 72—241; State v. Tyler, 85—569; State v. Murdock, 85—598; State v. Powell, 86—640.

SEC. 901. Justice to transmit papers to clerk of appellate court; what his return to set forth. 1868-'9, c. 178, sub chap. 4, s. 12.

In every case whether an appeal shall be prayed or not, the justice shall forthwith transmit to the clerk of the superior court of the county all papers in the case, together with a copy of his preliminary finding, of the verdict, if any, of his determination of the facts if there shall have been no trial by jury, and of the sentence, in which shall be set forth all the facts found by him, as well as his finding of those which were alleged in the complaint, and which were found by him not to be proved.

SEC. 902. Either party paying fees, entitled to copy of complaint and other papers. 1868-'9, c. 178, sub chap. 4, s. 13.

He shall give to either party on request, and on payment of his lawful fee, a copy of the complaint and of his finding and sentence.

Sec. 903. Finding and sentence pleaded in bar of indictment. 1868-'9, c. 178, sub chap. 4, s. 14.

Such finding and sentence may be pleaded in bar of any indictment subsequently found for the same offence.

Sec. 904. Justice to imprison the guilty party, if fine and costs not paid. 1868-'9, c. 178, sub chap. 4, s. 15.

If the justice shall sentence the party found by him to be guilty to pay a fine and costs, and the same shall not be immediately paid, the justice shall commit the guilty person to the county jail until the same shall be paid, or until he shall be otherwise discharged according to law.

Sec. 905. Imprisoned party to pay costs before discharged. 1868-'9, c. 178, sub chap. 4, s. 16.

If the sentence be that the guilty person be imprisoned for a time certain, and that he pay the costs, there shall be added to it that he shall remain in prison after the expiration of the fixed time for his imprisonment until the costs shall be paid; or until he shall otherwise be discharged according to law.

State v. Cannady, 78—539.

Sec. 906. Justices of the peace to make returns of all criminal actions disposed of by them to the clerk of the superior, criminal or inferior court. 1869-'70, c. 110.

It shall be the duty of each justice of the peace on or before Monday of every term of the superior, criminal or inferior court of his county, to furnish the clerk of said court with a list of the names and offences of all parties tried and finally disposed of by such justice of the peace, together with the papers in each case, in all criminal actions, since the last term of the superior, criminal or inferior court. The clerk of the court shall hand a copy of such list to the solicitor and to the grand jury at each term of the court; and no indictment shall be found against any party whose case has been so finally disposed of by any justice of the peace: *Provided*, that this section shall not be deemed to extend or enlarge or otherwise affect the jurisdiction of justices of the peace, except as provided by law.

Sec. 907. Actions removable from one justice of the peace to another upon affidavit; proviso. 1880, c. 15. 1883, c. 66.

In all proceedings and trials, both criminal and civil, before justices of the peace, the justice before whom the

writ or summons is returnable, shall upon affidavit made by either party to the action that he is unable to obtain justice before him, move the same to some other justice residing in the same township, or to the justice of some neighboring township if there be no other justice in said township: *Provided*, that no cause shall be more than once removed; *Provided further*, that such motion to remove shall be made before evidence is introduced

Sec. 908. Process, &c., not to be quashed for want of form. R. C., c. 3, s. 1. R. C., c. 62, s. 22. R. S., c. 3, s. 1. 1794, c. 414, s. 16.

No process or other proceeding begun before a justice of the peace, whether in a civil or a criminal action, shall be quashed or set aside, for tho want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

Meade v. Young, 2 D. and B., 526; Clark v. Hellen, 1 Ired., 421; Green v. DeBerry, 2 Ired., 344; Green v. Cole, 13 Ired., 425; State v. Bryson, 84—780.

Sec. 909. Forms to be used in justice's court. 1868-'9, c. 191.

The following forms, or substantially similar, shall be sufficient in all cases of proceedings in civil actions, provided for in this chapter:

[No. 1.]

COMMON FORM.

A.....B.....
against } Justice's Court.
C.....D.....

State of North Carolina, to any constable or other lawful officer of .....county, GREETING:

We command you to summon C. D. to appear before G. W. H., Esq., one of the justices of the peace for the county of....., on the....day of....., 18..., at his office, (or elsewhere, as the justice may appoint the place of trial,) in said county, to answer A. B. in a civil action for the recovery of.....dollars; and have you then and there this precept with the date and manner of its service.

Hereof fail not. Witness our said justice, this....day of....., 18...

G. W. H.....
Justice of the Peace.

[No. 2.]

FORM ON ALLOWING APPLICATION TO RE-HEAR.

(Title, &c., as in No. 1.)

WHEREAS, A. B., plaintiff above-named, (or C. D., defendant above-named) has applied by affidavit, which is filed, for a re-hearing in the above entitled action; wherein judgment was rendered against the said plaintiff, (or defendant) in his absence, at the trial thereof, before the undersigned on the....day of....., 18 ..; and such application having been allowed, and the cause opened for reconsideration.

Now, therefore, we command you to summon the said plaintiff (or defendant) to appear before G. W. H., Esq., one of the justices of the peace for the county of....., on the.....day of....., 18..., at....., in said county; when and where the complaint will be re-heard and the same proceedings be had as if the case had not been acted on; and have you then and there this precept with the date and manner of its service.

Hereof fail not. Witness our said justice, this....day of....., 18...

G. W. H.....
Justice of the Peace.

[No. 3.]

AFFIDAVIT TO OBTAIN ATTACHMENT.

General Form.

A.....B.....
against } County of.....
C.....D.....

A. B., plaintiff above-named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of .....dollars, (state any cause of action founded on contract, specifying the amount of the claim, and the grounds thereof.)

2. That the said defendant (state any fact or facts, so as to bring the case within one of the classes in which an attachment may issue. The facts must be stated positively and affirmatively, not merely upon information and belief, except where a fact is alleged with a particular intent. The intent in such case may be stated as on information and belief. See No. 4).

A. B.....

Sworn to and subscribed before me, this....day of....., 18...

G. W. H.....
Justice of the Peace.

[No. 4.]

ANOTHER FORM OF AFFIDAVIT.

(Title, &c., as in No. 3).

A. B., plaintiff above-named, being duly sworn, deposes and says:

1. That the defendant, C. D., is indebted to plaintiff in the sum of .....dollars, for goods sold and delivered to said defendant by the plaintiff on or about the.....day of....., 18...

2. That the said defendant has departed from this state, or keeps himself concealed therein with intent, as defendant is informed and believes, to avoid the service of a summons (or with intent, &c., to defraud defendant's creditors).

A. B.....

(Sworn to, &c., as in No. 2.)

[No. 5.]

AFFIDAVIT AGAINST A FOREIGN CORPORATION.

A..... B.....
against
The Highland Mining Company. } County of .....

A. B., the plaintiff above named, being duly sworn, deposes and says:

1. That the defendant above named is indebted to the plaintiff in the sum of ..... dollars, for the use and occupation of certain premises, by permission of plaintiff, from the .... day of ....., 18.., until the .... day of ....., 18..

2. That the defendant is a foreign corporation, created under the laws of the state of .....

3. That the cause of action above stated, arose in this state.

A. B.....

(Sworn to, &c., as in No. 3.)

[No. 6.]

UNDERTAKING UPON ATTACHMENT.

(Title as in No. 3 or 5.)

WHEREAS, the plaintiff above named is about to apply for a warrant of attachment against the property of the above named defendant:

Now, therefore, we, J. W. B., of ..... county, and W. D. M., of ..... county, undertake in the sum of ..... dollars (the sum must be at least two hundred dollars), that if the said warrant be granted, and the defendant recover judgment in this action, or the attachment be set aside by order of the court, the plaintiff shall pay all costs that may be awarded to defendant in the same, and all damages which he may sustain by reason of such attachment.

J. W. B.....
W. D. M.....

Signed and delivered in the presence of G. W. H., Esq., this .... day of ....., 18..

G. W. H.....,
Justice of the Peace.

[No. 7.]

WARRANT OF ATTACHMENT.

A..... B.....
against
C..... D..... } Justice's Court.

State of North Carolina, to any constable or other lawful officer of ..... county, GREETING:

It appearing by affidavit to the undersigned that a cause of action exists in favor of the plaintiff against the defendant for the sum of ..... dollars, and that the defendant is not a resident of this state (or otherwise, as the fact may be), and the plaintiff having giving the undertaking as required by law:

Now, therefore, you are commanded forthwith to attach and safely keep all the property of the said defendant C. D. in your county, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, with costs and expenses; and have you this warrant before G. W. H., one of the justices of the peace for your county, at his office in said county, on the ..... day of ....., 18.., with your proceedings hereon.

Witness our said justice this ..... day of ....., 18..

G. W. H.....,
Justice of the Peace.

[No. 8.]

OFFICER'S RETURN TO BE INDORSED ON ATTACHMENT.

I, O. P. M., constable (or sheriff) of ..... county, do hereby return that, by virtue of the within attachment, I have seized and taken into my possession the tangible personal property (or, have levied on the real estate, as the case may be,) of the defendant within named, specified in the inventory hereto annexed.

Dated this ..... day of ....., 18..

O. P. M.....

[No. 9.]

INVENTORY OF PROPERTY ATTACHED TO ABOVE RETURN.

A..... B..... } County of ....
against
C.....D..... ... }

I do hereby certify that the following is a true and just inventory of all the property seized or levied on by me under a warrant of attachment, issued in the above entitled action by G. W. H., Esq., with a statement of the books, vouchers, papers, rights and credits taken into my custody by virtue of said warrant. (Insert list of property by items.)

I do further testify that the following property mentioned in the above inventory is perishable, and that the expense of keeping the same until the termination of the suit would exceed one-fifth of its value; and I do hereby apply to this court for authority to sell the same. (Insert a list of perishable property.)

Dated this ..... day of ....., 18..

O. P. M.....,
Constable (or Sheriff.)

[No. 10.]

ORDER DIRECTING SALE OF PERISHABLE PROPERTY.

A..... B..... } Justice's Court.
against
C..... D..... }

County of .....

It appearing by the inventory returned by O. P. M., constable (or sheriff,) under the warrant of attachment granted in this action, that the

following property mentioned in said inventory is perishable, to wit: (Insert here the list of perishable property.)

It is therefore ordered that the said property be sold by the said officer at public auction, at such time and place as he shall deem advisable, and that the said officer give notice of such sale as the sale of personal property on execution.

It is further ordered that the proceeds of such sale be retained by said officer, and disposed of in the same manner as the property itself, if the same had not been sold.

Dated thia ..... day of ....., 18..

G. W. H.....,
Justice of the Peace.

[No. 11.]

NOTICE OF LEVY ON PROPERTY NOT CAPABLE OF MANUAL DELIVERY.

To H. B.....:

Take notice that by warrant of attachment issued in this action, a certified copy of which is herewith served upon you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to ..... dollars or thereabouts, to the defendant above named. (Describe as particularly as possible the shares, debts or property levied upon.)

Dated this ..... day of ....., 18...

O. P. M.....,
Constable (or Sheriff.)

The officer will indorse on the copy of the attachment served with the above notice, the following certificate:

I do hereby certify that the within is a true copy of the warrant of attachment in my possession, issued in thia action and of the whole thereof.

Dated this..... day of ....., 18...

O. P. M.....,
Constable (or Sheriff.)

[No. 12.]

ORDER DIRECTING THIRD PERSON (H. B.) TO APPEAR AND BE EXAMINED.

A..... B.....
against } Justice's Court.
C..... D.....

County of .....

It appearing to me by the certificate of O. P. M., constable (or sheriff) of said county, that the said officer, with a warrant of attachment against the property of C. D., the defendant in this action, has applied to H. B. for the purpose of levying upon a debt owing to the defendant by said H. B. (or upon property of said defendant held by said H. B., or otherwise), and that the said H. B. refuses to furnish said officer with a certificate designating the amount and description of the property held by said H. B. for the benefit of the defendant.

Now, therefore, I do order and require the said H. B. to attend before me at my office, on the ..... day of ....., 18.., and be examined on oath concerning the same.

Dated this ..... day of ....., 18...

G. W. H.....,
Justice of the Peace.

[No. 13.]

ATTACHMENT TO ENFORCE OBEDIENCE TO ABOVE ORDER.

A..... B.....
against } Justice's Court.
C..... D.....

State of North Carolina, to any constable or other lawful officer of..... county, GREETING:

WHEREAS, it appears that H. B. was duly served on the .... day of ....., 18.., with an order issued by G. W. H., Esq., one of our justices of the peace for said county, requiring said H. B. to attend before said justice at his office, in said county, on the .... day of ....., 18.., and be examined on oath concerning a certain debt owing to the defendant, named in the above action, by the said H. B. (or property held by the said H. B. for the benefit of the defendant, or otherwise, as the case may be).

And whereas, the said H. B., in contempt of said order, has refused or neglected, and doth still refuse or neglect, to appear and be examined on oath, as in said order he is required to do;

Now, therefore, we command you that you forthwith attach the said H. B., so as to have his body before G. W. H., Esq., one of our justices of the peace for your county, on the .... day of ... ., 18.., at his office in said county, then and there to answer, touching the contempt which he, as is alleged, hath committed against our authority; and further, to perform and abide by such order as our said justice shall make in his behalf. And have you then and there this writ, with a return, under your hand, of your proceedings thereon.

Hereof, fail not at your peril.

Witness, our said justice, this .... day of ....., 18...

G. W. H.....,
Justice of the Peace.

[No. 14.]

UNDERTAKING ON DISCHARGE OF ATTACHMENT.

(Title of the Cause as in No. 3.)

WHEREAS, the property of the above named C. D. has been attached, and the defendant desires a discharge of said attachment on giving security according to law.

Now, therefore, we, B. B., of..... county, and D. D., of..... county, undertake in the sum of.... dollars, (the sum named must be at least double the amount claimed by plaintiff,) that if the said attachment be discharged, we will pay to the plaintiff, on demand, the amount of the judgment that may be recovered against the defendant in this action.

Dated this....day of....., 18....

(Signed)

B. B.....
D. D.....

ACKNOWLEDGMENT AND AFFIDAVIT OF SURETIES.

County of.....

On this.....day of....., 18...., before me personally appeared the above named B. B. and D. D., known to me to be the persons

described in, and who executed the above undertaking, and severally acknowledged that they executed the same.

And the said B. B. and D. D., being severally sworn, each for himself, says that he is a resident of the state of North Carolina, and a householder (or freeholder) therein.

B. B.....
D. D.....

Sworn to and subscribed the day above written before me.

G. W. H....., *Justice of the Peace.*

[No. 15.]

ORDER VACATING ATTACHMENT ON SECURITY BEING GIVEN.

A..... B.....
against
C..... D..... } Justice's Court.

County of.....

The defendant having appeared in this action, and applied to discharge the attachment on giving security; and the said defendant having delivered to the court an undertaking in due form of law, which has been duly approved by the court;

It is ordered that the attachment issued in this action on the.....day of....., 18.., be and the same is hereby vacated and discharged, and the defendant is released therefrom in all respects. It is further ordered, that any and all proceeds of sales, and money collected by O. P. M., constable (or sheriff,) and all property attached, now in said officer's possession, be paid and delivered to the said defendant or his agent.

Dated this .....day of....., 18....

G. W. H....., *Justice of the Peace.*

[No. 16.]

FORM OF PUBLICATION TO BE MADE BY PLAINTIFF IN ATTACHMENT.

A..... B .....
against
C..... D..... } Attachment.

Seventy-five dollars due by note, (or otherwise as the fact may be.) Warrant of attachment returnable before G. W. H., Esq., a justice of the peace for.....county, at his office (or otherwise, as the case may be,) on the ....day of ....., 18...., when and where the defendant is required to appear and answer the complaint.

Dated this....day of....., 18....

A. B..... , *Plaintiff.*

[No. 17.]

AFFIDAVIT FOR ARREST ON DEBT FRAUDULENTLY CONTRACTED.

A..... B.....
against
C..... D..... } County of.....

A. B., plaintiff above named, being duly sworn, deposes and says:

1. That the defendant C. D. is indebted to the plaintiff in the sum of

.....dollars on an inland bill of exchange, drawn on the.....day of ....., 18...., by defendant on the First National Bank of Charlotte, North Carolina, payable at sight to the order of plaintiff;

2. That on the....day of....., 18...., the defendant applied to the plaintiff to purchase a bill of goods amounting to .... dollars, which the plaintiff offered to sell to the defendant for cash; that the defendant, contriving to defraud the plaintiff, represented that he had money on deposit at said National Bank for more than the amount of the proposed purchase, and offered to give plaintiff a sight draft on said bank; that the plaintiff, relying upon the representations of the said defendant, and solely induced thereby, sold and delivered a bill of goods amounting to ..... dollars to the defendant, who thereupon drew the sight order on said bank above referred to; that on the .... day of ....., 18...., the plaintiff presented said draft at said bank for acceptance, when the same was not accepted for want of any funds in said bank to the credit of the defendant; that notice of non-acceptance was given to the defendant, who has wholly refused to pay the draft or any part thereof; that the representations made as aforesaid by the defendant were, and each and every of them was, as deponent is informed and believes, untrue; and that the defendant, as deponent is informed and believes, did not have, nor expect to have, any funds on deposit at said bank, at the making of the representations above mentioned, but said defendant was then and is now wholly insolvent.

A. B. .....

Sworn to and subscribed before me, this .... day of ....., 18....

G. W. H. .....

Justice of the Peace.

[No. 18.]

UNDERTAKING ON ARREST.

A.....B.....
against
C.....D.....
} County of .....

Whereas, the plaintiff above named is about to apply (or, has applied) for an order to arrest the defendant, C. D.:

Now, therefore, we, J. J., of ..... county, and P. P., of ..... county, undertake in the sum of ..... dollars (the sum must be at least one hundred dollars), that if the said defendant recover judgment in this action, the plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of his arrest in this action.

J. J. .....

P. P. .....

Signed in my presence, this ..... day of ....., 18....

G. W. H. ....

Justice of the Peace.

[No. 19.]

ORDER OF ARREST.

A.....B.....
against
C.....D.....
} Justice's Court.

NORTH CAROLINA,
County of.....

To any constable or other lawful officer of said county:

For the causes stated in the annexed affidavit:

You are required forthwith to arrest C. D., the defendant named above, and hold him to bail in the sum of ..... dollars (the sum should be the amount of the plaintiff's claim), and to return this order before the undersigned at his office in said county, on the .... day of ..... 18....; of which return you will serve a notice on plaintiff or his attorney.

Dated this .... day of ....., 18....

G. W. H. .....,
Justice of the Peace.

[No. 20.]

UNDERTAKING OF BAIL ON ARREST.

A..... B..... } County of.....
against
C ..... D..... }

WHEREAS, the above-named defendant, C. D., has been arrested in this action:

Now, therefore, we, B. B., of.....county (tailor), and D. D., of .....county (merchant), undertake, in the sum of.....dollars (the sum should be the same as mentioned in the order of arrest), that, if the defendant is discharged from arrest, he shall, at all times, render himself amenable to the process of the court during the pendency of this action, and to such as may be issued to enforce judgment therein.

B. B.....
D. D.....

Signed in my presence, this.....day of.....18...

G. W. H.....,
Justice of the Peace.

[No. 21.]

NOTICE OF EXCEPTION TO BAIL.

A..... B..... }
against
C. ..... D..... }

To O. P. M., constable (or sheriff) of the county of.....:

Take notice, that the plaintiff does not accept the bail offered by the defendant in this action (and if the undertaking is defective in form or otherwise, add also), and further he excepts to the form and sufficiency of the undertaking.

Yours, &c.,
A. B....., *Plaintiff*,
(or M. W. N....., *Attorney for Plaintiff*).

Dated this.....day of..... ...., 18...

[No. 22.]

NOTICE OF JUSTIFICATION OF BAIL

A..... B..... } County of.....
against
C ..... D..... }

To A. B., plaintiff (or M. W. N., attorney for plaintiff):

Take notice, that the bail in this action will justify before G. W. H.,

Esq., a justice of the peace for said county, at the office of said justice, in said county, on the.....day of....., 18...

C. D.....,
(or attorney for C. D.), *Defendant.*

Dated this.....day of....., 18...

[No. 23.]

NOTICE OF OTHER BAIL.

(Title, &c., as in last form).

Take notice, that R. S., of.....county (physician), and Y. Y., of.....county (farmer), are proposed as bail, in addition to (or in place of) B. B. and D. D., the bail already put in; and that they will justify (conclude as in last form). Date, &c.

[No. 24.]

JUSTIFICATION OF BAIL.

A..... B.....
against } Justice's court.
C..... D... ....

County of .....

On this ..... day of ....., 18.., before G. W. H., Esq., a justice of the peace for said county, personally appeared B. B. and D. D., (or R. S. and Y. Y., as the case may be,) the bail given by the defendant C. D., in this action, for the purpose of justifying pursuant to notice; and the said B. B., being duly sworn, says:

1. That he is a resident and householder (or freeholder) in this state;

2. That he is worth the sum of ..... dollars, (the amount specified in the order of arrest,) exclusive of property exempt from execution.

And the said D. D., being duly sworn, says:

(As with the other bail.)

(And so on, with each bail offered.)

[Signatures of bail.]

Examination taken and sworn to before me, this ..... day of ....., 18....

G. W. H.....,
Justice of the Peace.

[No. 25.]

ALLOWANCE OF BAIL.

A..... B.....
against } Justice's court.
C..... D.....

County of .....

The bail of the defendant, C. D., within mentioned, having appeared before me and justified, I do find the said bail sufficient and allow the same.

Dated this .... day of ....., 18....

G. W. H.....,
Justice of the Peace.

[No. 26.]

SUBPŒNA TO TESTIFY.

STATE OF NORTH CAROLINA, }
.....County. }

To S. T..... Greeting: (The Justice may insert any number of necessary names)

You (and each of you) are commanded to appear personally before G. W. H., Esq., a justice of the peace for said county, at his office in said county, on the .... day of ..... , 18...., to give evidence in a certain civil action, now pending before said justice, and then and there to be tried, between A. B., plaintiff, and C. D., defendant, on the part of the defendant (or plaintiff.)* Hereof fail not, under the penalty prescribed by law. Witness our said justice, this .... day of ....., 18..

G. W. H.....,
Justice of the Peace.

[No. 27.]

N. B.—The justice may, instead of a formal subpœna, indorse on the summons or other process an order for witnesses, substantially as follows:

"The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff: .....; and the following as witnesses for the defendant: .....; and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated .... day of ... ., 18...

G. W. H.....,
Justice of the Peace.

[No. 28.]

SUBPŒNA DUCES TECUM.

If any witness has a paper or document, which a party desires as evidence at the trial, the justice will pursue the form number 26 as far down as the asterisk*; and then add the following clause:

"And you, S. T., are also commanded to bring with you and there produce as evidence a certain bond (describe particularly) which is now in your possession or under your control, together with all papers, documents, writings or instruments in your custody, or under your control." (Conclude as in form number 26.)

[No. 29.]

FORM OF OATH TO WITNESS.

You swear that the evidence you will give as to the matters in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth, and nothing but the truth. So help you, God.

[No. 30.]

PROCEEDINGS AGAINST DEFAULTING WITNESS.

When a witness, under subpœna, fails to attend, the justice will note the fact in his docket by some such entry as the following:

"R. P., a witness summoned on behalf of the plaintiff, called and failed."

If the party, who suffers by default of the witness, wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

A.....B .....
against } County of.....
C.....D.....

To R. P.:

Take notice, that on the....day of....., 18.., the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the ...day of....., 18.., for judgment against you for the sum of.....dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this....day of....., 18..

A. B.....,
Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A.....B.....
against } Justice's Court.
C.....D ..... } Motion for penalty against R. P., defaulting witness.

....day of....., 18..... A. B., above-named, appears, and, according to a notice filed and duly served on R. P., moved for the penalty of..... dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the....day of..... ...., 18.., as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf, S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion:

It is adjudged, on motion of A. B., that A. B. do recover of R. P. the the sum of.....dollars, penalty forfeited by reason of the premises, and the further sum of.....dollars, costs of this motion.

[No. 31.]

FORM OF A VENIRE.

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of.....county:

You are hereby directed to summon the persons named within to appear as jurors before me at my office, in your county, on the ..... day of ...., for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this.....day of....., 18..

G. W. H.....,
Justice of the Peace.

[No. 32.]

FORM OF JUROR'S OATH.

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33.]

FORM OF OATH TO CONSTABLE IN CHARGE OF THE JURY.

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together, in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them; and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34.]

SUMMONS AGAINST DEFAULTING JUROR TO SHOW CAUSE.

State of North Carolina, to any constable or other lawful officer of ..... county, greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on.... day of....., 18.., to show cause why he, the said R. S., should not be fined according to law, for his non-attendance as a juror before our said justice, at his office in said county, on the....day of.....18.., in a certain cause then and there pending, in which A. B. was plaintiff, and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this ...day of....., 18..

G. W. H.....,
Justice of the Peace.

[No. 30.]

PROCEEDINGS AGAINST DEFAULTING WITNESS.

When a witness, under subpœna, fails to attend, the justice will note the fact in his docket by some such entry as the following:

"R. P., a witness summoned on behalf of the plaintiff, called and failed."

If the party, who suffers by default of the witness, wishes to move for the penalty against him, he will serve substantially the following notice on the witness:

A.....B .....
against
C.....D..... } County of.....

To R. P.:

Take notice, that on the....day of....., 18.., the plaintiff in the above action will move G. W. H., Esq., the justice before whom the trial of said action was had, on the ..day of....., 18.., for judgment against you for the sum of.....dollars, forfeited by reason of your failure to appear and give evidence on said trial as you were summoned to do.

Dated this....day of....., 18..

A. B.....,
Plaintiff.

The justice will enter the proceedings on the foregoing notice on his docket as follows:

A.....B.....
against
C.....D ..... } Justice's Court. Motion for penalty against R. P., defaulting witness.

....day of....., 18..... A. B., above-named, appears, and, according to a notice filed and duly served on R. P., moved for the penalty of..... dollars forfeited by the said R. P. by reason of his failure to attend and give evidence on the trial of a cause, wherein A. B. was plaintiff and C. D. was defendant, tried before me at my office on the....day of..... ...., 18.., as appears by entry duly made on my docket; when and where the said R. P., a witness summoned on the part of the plaintiff in that action, was called and did fail.

R. P. appears and assigns for excuse "high water," and offers his own affidavit, which is filed. He also offers as a witness in his behalf, S. S., who, being duly sworn, testifies that (state what S. S. says about the condition of the water at the time). R. P., having no other evidence, closed the case on his part. Whereupon A. B. offered M. Y. as a witness, who, being sworn, testifies (state what witness says).

Neither party having any other evidence, and after hearing all the proofs and allegations submitted for and against the motion:

It is adjudged, on motion of A. B., that A. B. do recover of R. P. the the sum of.....dollars, penalty forfeited by reason of the premises, and the further sum of.....dollars, costs of this motion.

[No. 31.]

FORM OF A VENIRE.

The justice will make a list of the persons drawn by him as jurors, and indorse thereon substantially as follows:

To O. P. M., constable of.....county:

You are hereby directed to summon the persons named within to appear as jurors before me at my office, in your county, on the ..... day of ...., for trial of a civil action now pending between A. B., plaintiff, and C. D., defendant, then and there to be tried. And have you then and there the names of the jurors you shall summon, with this precept.

Dated this.....day of....., 18..

G. W. H.....,
Justice of the Peace.

[No. 32.]

FORM OF JUROR'S OATH.

You swear well and truly to try the matter in difference between A. B., plaintiff, and C. D., defendant, and a verdict to give thereon according to the evidence in the cause. So help you, God.

[No. 33.]

FORM OF OATH TO CONSTABLE IN CHARGE OF THE JURY.

You swear that you will, to the utmost of your ability, keep the persons sworn as jurors on this trial together, in some private and convenient place, without any meat or drink, except such as may be ordered by the court; that you will not suffer any communication, orally or otherwise, to be made to them; and that you will not communicate with them yourself, orally or otherwise, unless by order of the court. So help you, God.

[No. 34.]

SUMMONS AGAINST DEFAULTING JUROR TO SHOW CAUSE.

State of North Carolina, to any constable or other lawful officer of ..... county, greeting:

We command you to summon R. S. to appear before G. W. H., Esq., a justice of the peace for your county, at his office in said county, on.... day of....., 18.., to show cause why he, the said R. S., should not be fined according to law, for his non-attendance as a juror before our said justice, at his office in said county, on the....day of.....18.., in a certain cause then and there pending, in which A. B. was plaintiff, and C. D. was defendant; and have you then and there this precept, with the date and manner of your service thereof.

Witness, our said justice, this ...day of....., 18..

G. W. H.....,
Justice of the Peace.

[No. 35.]

DEMURRER TO COMPLAINT.

A..... B.....
against
C..... D .....
} Justice's court.

County of .....

The defendant demurs to the complaint in this action, for that the said complaint does not state facts sufficient to constitute a cause of action, (or, for that the said complaint is not sufficiently explicit to enable this defendant to understand it.) (Signature of defendant or defendant's attorney.)

[No. 36.]

DEMURRER TO ANSWER.

(Title as above.)

The plaintiff demurs to the answer of the defendant, for that, the facts stated in the answer are not legally sufficient to constitute a defence to this action, (or for that the said answer is not sufficiently explicit to make this plaintiff understand it.) (Signature of plaintiff or plaintiff's attorney.)

[No. 37.]

JUDGMENT UPON DEMURRER.

NOTE.—If the justice thinks the objection raised by the demurrer to the pleadings is well founded, he will make this entry on his docket :

"Demurrer to the complaint (or to the answer) filed, heard and sustained; and, whereupon, it is ordered that the said pleading be amended without cost," (or upon payment of costs, as the case may be.)

This order to amend the defective pleading is a matter of course, and is the only judgment which the justice can render upon demurrer. He cannot give a final judgment in the cause at this stage, for the party may choose to amend in his pleadings and try the case on the facts. If, however, the party refuse to amend the defective pleading, the justice will disregard the same, and proceed to render final judgment, as follows :

"The plaintiff (or defendant) having refused to amend his complaint (or his answer) demurred to, it is adjudged that the defendant go without day and recover of the plaintiff the sum of ..... dollars, costs of this action," (or that the plaintiff recover of the defendant the sum of ..... dollars, damages, and the further sum of ..... dollars, costs of this action.)

If the justice deem the objection, raised by the demurrer, not well founded, he will enter in his docket as follows :

"Demurrer to the complaint (or to the answer) filed, heard and overruled;" and he will then proceed to the evidence in the cause.

[No. 38.]

NOTE.—The following is offered as a general precedent of the manner in which the justice will make the entries in his docket:

A.....B.....
against } Justice's court.
C.....D.....

....., 18.. Summons issued; returnable on the .... instant at my office.

....., 18.. Summons returned, served on defendant by O. P. M., constable, on the .... instant, both parties appear, the plaintiff in person, the defendant by R. H. R., Esq., attorney.

The plaintiff complains of a promissory note executed by the defendant to him, dated ....., 18.., payable one day after date, for $...., and also for goods, sold and delivered to the defendant, and claims damages for $....

The defendant answers and denies each and every allegation in the complaint, and claims a set off of $.... for wood sold and delivered to the plaintiff, and also of $ ... for work and labor performed for the plaintiff.

On joining issue of fact as above, the action is, by consent of parties, adjourned to the .... instant, at my office.

A venire is also issued at the plaintiff's (or defendant's) demand, returnable at the time and place last mentioned.

...., 18.. The parties appear and proceed to the trial of the cause. The following jurors are returned as summoned upon the venire by O. P. M., constable. (Insert the names of all jurors summoned.) The following jurors, who are returned as summoned, do not appear. (Insert their names.) The following jurors appear according to the summons. (Insert their names.) The following jurors are sworn to try the action. (Insert their names).

H. P. and J. M., witnesses for the plaintiff, and W. F., a witness for the defendant, are sworn and testify; J. S., a witness on the part of the defendant, is offered, but objected to by the plaintiff on the ground, (state the ground) and rejected.

Having heard the evidence, (and the arguments of counsel, if any,) the cause is submitted to the jury, who retire, under charge of O. P. M., a constable duly sworn for that purpose, and afterwards return into open court and publicly deliver their verdict, by which they find in favor of the plaintiff for $.... damages; whereupon, I adjudge that the plaintiff do recover of the defendant—

Damages..... ....$....
Costs..... ....

....., 18.. Execution issued for above judgment to O. P. M., constable.

....., 18.. Notice of appeal served on me by defendant; my fee paid and return to the appeal made by me.

N.B.—If the action is tried by the justice without a jury, all that relates to the *venire* and the verdict in the

above form must be left out, and the judgment will be entered as follows:

"After hearing the proofs and allegations of the respective parties, I do adjudge that the plaintiff recover," &c., (as above.)

[No. 39.]

FORM OF NOTICE OF APPEAL TO THE SUPERIOR COURT, WHERE A NEW TRIAL OF THE WHOLE MATTER IS TO BE HAD.

A .....B..... } Justice's court.
against
C.... .....D..... }

County of.....

To G. W. H., Esq., a justice of the peace for said county.

Take notice, that the defendant in the above action appeals to the Superior Court from the judgment rendered therein by you on the ... . day of ..... 18.., in favor of the plaintiff for the sum of sixty-five dollars damages, and the further sum of three dollars and seventy-five cents, costs, and that this appeal is founded upon the ground that the said judgment is contrary to law and evidence.

Dated this .... day of ..... 18..

W. W.....
Attorney for Appellant.

[No. 40.]

RETURN TO NOTICE OF APPEAL LIKE THE FOREGOING.

A..... B..... } County of .....
against
C ..... D..... }

To the Superior Court of..... County:

An appeal having been taken in this action by the defendant, I, G. W. H., the justice before whom the same was tried, in pursuance of the notice of appeal hereto annexed, do hereby certify and return that the following proceedings were had by and before me in said action:

On the first of February, one thousand eight hundred and sixty-nine, at the request of the plaintiff, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place, the parties personally appeared.

The plaintiff complained for goods sold and delivered to defendant to the amount of $75. The defendant denied the right of the plaintiff to recover that amount for the goods, on the ground that he had paid, at or shortly after the purchase of said goods, ... dollars thereon; and he also claimed to have a set-off against the plaintiff to the amount of $85 for board and lodging furnished to plaintiff, and work and labor done for him; and he claimed to be entitled to judgment against the plaintiff for $.....

Both parties introduced evidence upon the claims so made by them, and after hearing their proofs and allegations, I rendered judgment in favor of the plaintiff and against the defendant, on the tenth February, eighteen hundred and sixty-nine, for $65 damages, and for the further sum of $3.75, costs of the action.

I also certify that on the eleventh February, eighteen hundred and sixty-nine, the defendant served the annexed notice of appeal on me, and at the same time paid me my fee of $1 for making my return.

All of which I send, together with the process, pleadings, and other papers in the cause.

Dated this 15th day of February, 1869.

G. W. H.....
Justice of the Peace.

N. B. If the cause was tried by a jury, state the fact and set forth the verdict, with the judgment thereon. It is not necessary to set out in the return a copy of any process, pleading, affidavit or other paper. It is sufficient to refer to such a paper as filed and as herewith sent.

[No. 41.]

WHERE THE SUM DEMANDED EXCEEDS TWO HUNDRED DOLLARS.

It appearing that the sum demanded by the plaintiff in this action exceeds two hundred dollars, it is ordered that the action be dismissed, and judgment is rendered against A. B., plaintiff, for the sum of .... dollars, costs.

[No. 42.]

WHERE THE TITLE TO REAL ESTATE IS IN QUESTION.

N. B. The defendant, if he wishes to make answer to title, must file a written answer to the complaint, setting forth the facts.

ANSWER OF TITLE.

A..... B.....
against
C..... D..... } Justice's Court.

The defendant answers to the complaint:

1. That no allegation thereof is true.

2. That the plaintiff ought not to have or maintain his action against the defendant, because the premises mentioned and described in the complaint, at the time when the rent and render, for wh'ch said action is brought, is alleged to be due, was and is now the land and freehold of one J. D., and not that of the plaintiff; nor was the plaintiff then, nor is he now, entitled to the possession thereof; and the defendant further answers that the title to said premises was, at the time aforesaid, and is now, in said J. D., and will come in question on the trial of this action.

Dated this ..... day of ....., 18....

C. D.....,
Defendant.

It appearing from the answer and proof of the defendant, that the title to real estate is in controversy in this action, it is ordered that the action be dismissed, and judgment is rendered against the plaintiff for ..... dollars costs.

[No. 43.]

OFFER OF JUDGMENT.

A..... B..... }
against } Justice's Court.
C..... D..... }

To A. B.....

Take notice, that the defendant hereby offers to allow judgment to be taken against him by the plaintiff in the above action for the sum of fifty dollars, with costs.

Dated this ..... day of ...., 18....

C. D.....,
Defendant.

[No. 44.]

ACCEPTANCE OF OFFER OF JUDGMENT.

(Title as above.)

To C. D.....

Take notice, that the plaintiff hereby accepts the offer to allow the plaintiff to take judgment in the above action, for the sum of fifty dollars, with costs, and the justice will enter up judgment accordingly.

Dated this ..... day of ....., 18....

A. B.....,
Plaintiff.

[No. 45.]

FORM OF JUDGMENT OR OFFER.

(Title as above.)

N. B.—The justice will state all the proceedings in the action from the issuing of the summons down to the appearance of the parties and the complaint of the plaintiff, and then proceed as follows:

Whereupon the said defendant, before answering said complaint, made and served an offer, in writing, to allow the plaintiff to take judgment against him for the sum of fifty dollars with costs;* and the said plaintiff thereupon accepted such offer, and gave notice thereof to the defendant in writing; said offer and acceptance thereof being filed:

Now, therefore, judgment is accordingly rendered in favor of the plaintiff and against the defendant, for the sum of fifty dollars damages, and the further sum of one dollar costs.

If notice of acceptance is not given, the entry will be as follows:

(*Follow the foregoing form down to the asterisk,* (*) *and then add):*

"And the said plaintiff having refused to accept such offer, the defendant answered the complaint by denying," &c., (*state the defence of the defendant, down to the judgment, which, in case the plaintiff fails to recover more than the sum mentioned in the offer, will be entered thus*):

After hearing the proofs and allegations of the respective parties, I adjudge that the plaintiff do recover the sum of fifty dollars damages, and the further sum of one dollar costs;

I further adjudge that the defendant do recover of the plaintiff the sum of two dollars and seventy-five cents, costs accruing in the action subsequent to the offer of the defendant referred to.

[No. 46.]

GENERAL FORM—EXECUTION.

State of North Carolina, to any Constable or other lawful officer of .....
..... County, GREETING:

WHEREAS, judgment has been rendered by G. W. H., Esq., a justice of the peace for said county, against C. D., in favor of A. B., for the sum of ..... dollars damages, and the further sum of ..... dollars costs, on the ..... day of ....., 18...;

You are therefore commanded, forthwith to levy of the goods and chattels of the said C. D., (excepting such goods and chattels as are by law exempt from execution) the amount of such judgment, with interest from the date thereof, until the money is recovered.

And make due return, according to law, in sixty days from the date hereof.

Dated this ..... day of ....., 18...

G. W. H.....,
Justice of the Peace.

[No. 47.]

EXECUTION IN ATTACHMENT.

State of North Carolinia, to any Constable or other lawful officer of.....
County, GREETING:

WHEREAS, in pursuance of a warrant of attachment, dated the..... day of....., 18.., issued by G. W. H., Esq., a justice of the peace of said county, in an action wherein A. B. was plaintiff, and C.D. defendant, the following property of the defendant was, on the .....day of ....., 18.., duly levied on and attached:

(*Here insert a list of property.*)

And whereas, judgment was rendered in said action, on the..... day of .....18.., in favor of said plaintiff, and against the said defendant, in the sum of ..... dollars.

Therefore, we command you that you satisfy the said judgment out of the property so attached as aforesaid, by the sale of the same or so much thereof as shall be sufficient to satisfy the said judgment; and if a sufficient sum be not realized therefrom, then you satisfy the said judgment out of any other goods and chattels of the said judgment debtor within your county.

And make due return thereof according to law within sixty days from the date hereof.

Witness, our said justice, this..... day of....., 18...

G. W. H.....,
Justice of the Peace.

[No. 48.]

RECORD OF CONVICTION OF A CONTEMPT.

The justice will make an entry in his docket stating the particular circumstances of the contempt, of which the following is offered as an example:

WHEREAS, on the .....day of ....., 18.., while engaged in the trial of an action (*or other judicial act, as the case may be*) in which A. B. was plaintiff, and C. D. was defendant, at my office in .... county, M. B. did wilfully and contemptuously interrupt me, and did then and there conduct himself so disorderly and insolently towards me, and by making a loud noise did disturb the proceedings on said trial (*or other judicial act*) and impair the respect due to the authority of the law; and on being ordered by me to cease making such noise and disturbance, the said M. B. refused so to do, but on the contrary, did publicly declare and with loud voice (*state whatever offensive words were used*), and whereas, when immediately called upon by me to answer for the said contempt, said M. B. did not make any defence thereto, nor excuse himself therefrom; the said M. B. is therefore convicted of the contempt aforesaid, and is adjudged to pay a fine of five dollars and be imprisoned in the county jail for the term of two days, and until he pays such fine or is duly discharged from imprisonment according to law.

G. W. H.....
Justice of the Peace.

[No. 49.]

WARRANT OF COMMITMENT FOR A CONTEMPT.

State of North Carolina, to the Keeper of the common jail of ..... county, GREETING:

WHEREAS, &c., (*recite the record of conviction so as to show the entire matter of contempt, together with the judgment therefor; and then proceed as follows:*)

Therefore, you are hereby commanded to receive the said M. B. into your custody in the said jail, and him there safely keep during the said term of two days, and until he pays the said fine, or is duly discharged according to law. Hereof fail not.

Dated this .... day of ....., 18..

G. W. H....,
Justice of the Peace.

CHAPTER TWENTY-THREE.

COURTS—SUPERIOR.

SECTION.	
910.	Superior courts; state divided into nine judicial districts; courts, how opened and held.
911.	Rotation of judges.
912.	Notification of ridings.
913.	Special terms; exchange of courts.
914.	Special terms.
915.	Notice to chairman.
916.	Powers, &c.
917.	Terms to last, how long.
918.	Certificate of attendance.
919.	All persons bound to attend, as at regular terms; no process except subpœnas returnable thereto.
920.	Subpœnas.
921.	Grand juries.
922.	Original jurisdiction of superior court.

SECTION.
923. Appellate jurisdiction.
924. Judge to take oath; oaths subscribed and returned to secretary of state.
925. Minutes of preceding day to be read each morning.
926. If judge of a superior court not present, court to be adjourned, when.
927. Constable attending juries to be sworn, for what purpose.
928. Process not to be executed on Sunday.
929. When there is no officer, or he will not execute process, on affidavit, the clerk shall direct process to the sheriff of adjoining county.
930. When process to issue to sheriff of adjoining county.
931. Sheriff executing process out of his county to have extra pay.
932. If defendant in penal suit plead former judgment, plaintiff may reply fraud; release of the action void; defendant pleading falsely indictable.
933. Payment or satisfaction may be pleaded in suits on bond and judgment; also payment or satisfaction after the day of paying; in suits on bonds conditioned to be discharged by a less sum.
934. In suits on penal bonds, the sum due, interest and costs being brought into court, penalty shall be discharged.
935. Judgments to stand till reversed.
936. Non-suit not allowed after verdict.
937. Party in execution not to be discharged on *habeas corpus*.
938. Death between verdict and judgment, not error, if, &c.
939. Surveys ordered in case of disputed boundary; how and by whom made; charges for surveys to be taxed as costs.
940. Return on notice; evidence.
941. Speedy collection of proceeds of judicial sales, by motion.
942. Purchasers under judicial sales protected; deemed legal owners.
943. Quakers may wear hats in court.
944. Certain cases pending in courts of equity and county courts to be transferred.

SEC. 910. Superior courts; state divided into nine judicial districts; courts, how opened and held. Const. Art. IV., s. 10. 1876-'7, c. 255.

A superior court shall be held by a judge thereof at the court house in each county. The state shall be divided into nine judicial districts, and the superior courts in the several counties shall be opened and held at the times hereinafter expressed, and each court shall continue in session one week or more, as the business may require and this chapter will allow, unless the business thereof shall be sooner disposed of, namely:

FIRST JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1876-'7, c. 288, ss. 1, 2. 1879, c. 20, s. 1. 1879, c. 275, ss. 1, 2.

The first judicial district shall be composed of the fol-

lowing counties, and the superior courts thereof shall be held at the following times, to wit:

Currituck—First Monday of March and September.
Camden—Second Monday of March and September.
Pasquotank—Third Monday of March and September.
Perquimans—Fourth Monday of March and September.
Chowan—First Monday after the fourth Monday of March and September.
Gates—Second Monday after the fourth Monday of March and September.
Hertford—Third Monday after the fourth Monday of March and September.
Washington—Fourth Monday after the fourth Monday of March and September.
Tyrrell—Fifth Monday after the fourth Monday of March and September.
Dare—Sixth Monday after the fourth Monday of March and September.
Hyde—Seventh Monday after the fourth Monday of March and September.
Pamlico—Eighth Monday after the fourth Monday of March and September.
Beaufort—Ninth Monday after the fourth Monday of March and September, and continue two weeks.
Martin—Eleventh Monday after the fourth Monday of March and September, and continue two weeks.

The second judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

SECOND JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1879, c. 292. 1879, c. 307. 1883, c. 172. 1883, c. 361, ss. 1, 2.

Wake—First Monday in January, second Monday in February, fourth Monday in June, second Monday in August, and shall continue three weeks.
Warren—First Monday in March and September, and continue two weeks.
Northampton—Fourth Monday after the first Monday of March and September.
Edgecombe—Sixth Monday after the first Monday of March and September.
Bertie—Eighth Monday after the first Monday of March and September.

Halifax—Ninth Monday after the first Monday of March and September, and continue three weeks.

Craven—Twelfth Monday after the first Monday of March and September.

Whenever during any term of Craven superior court, two-thirds of all the members of the bar regularly attending the terms of such court shall certify to the presiding judge that it is necessary that either the spring or fall term of such court should be continued for one week beyond the time fixed by law; it shall be lawful for such judge, and he is hereby required to extend the term of such court for one week; and such judge is authorized and empowered to retain two or more jurors, and to order the sheriff to summon a sufficient number of talesmen to compose a jury for such week.

The third judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

THIRD JUDICIAL DISTRICT. 1876–'7, c. 255, s. 1. 1881, c. 123. 1881, c. 229. 1883, c. 147. 1883, c. 213.

Wayne—Fifth Monday before the first Monday of March, and continue three weeks.

Nash—Monday before the first Monday in March, and continue one week, and second Monday before the first Monday in September and continue two weeks.

Wilson—First Monday in March and continue two weeks, and first Monday in September and continue one week.

Pitt—Third Monday of March and September, and continue two weeks.

Greene—Fourth Monday after the first Monday of March and September.

Jones—Fifth Monday after the first Monday of March and September.

Onslow—Sixth Monday after the first Monday of March and September.

Lenoir—Seventh Monday after the first Monday of March and September, and second Monday of September.

Carteret—Eighth Monday after the first Monday of March and September.

Wayne—Ninth Monday after the first Monday of March and September, and continue two weeks.

Duplin—Eleventh Monday after the first Monday of

March and September, and second Monday before the first Monday of March.

Sampson—Twelfth Monday after the first Monday of March and September.

New Hanover—Thirteenth Monday after the first Monday of March and September, and continue two weeks.

Pender—Fifteenth Monday after the first Monday of March and September.

The fourth judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

Fourth Judicial District. 1883, c. 408.

Cumberland—Monday before the last Monday in January.

Robeson—Last Monday in January.

Moore—First Monday in February and August, and continue two weeks.

Harnett—Third Monday in February and August.

Bladen—First Monday after the third Monday of February and August, and continue two weeks.

Columbus—Third Monday after the third Monday of February and August, and continue two weeks.

Brunswick—Fifth Monday after the third Monday of February and August.

Johnston—Sixth Monday after the third Monday of February and August, and continue two weeks.

Robeson—Eighth Monday after the third Monday of February and August, and continue two weeks.

Anson—Tenth Monday after the third Monday in February and August, and continue two weeks.

Richmond—Twelfth Monday after the third Monday in February and August, and continue two weeks.

Cumberland—Fourteenth Monday after the third Monday in February and August, and continue two weeks.

The January terms of Cumberland and Robeson, as above provided for, shall be held by the resident judge of the district, unless otherwise directed by the governor, and the judge holding said January courts shall receive as compensation therefor one hundred dollars for each court, to be paid by the counties of Cumberland and Robeson.

The fifth judicial district shall be composed of the fol-

lowing counties, and the superior courts thereof shall be held at the following times, to wit:

FIFTH JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1876-'7, c. 293, ss. 1, 2. 1879, c. 58. 1881, c. 113, s. 7. 1883, c. 319.

Durham—First Monday of February and August, and continue two weeks.

Alamance—Second Monday before the first Monday of March and September.

Randolph—Monday before the first Monday of March and September.

Guilford—First Monday of March and September, and continue two weeks.

Chatham—Second Monday after the first Monday of March and September.

Orange—Fourth Monday after the first Monday of March and September, and continue two weeks.

Granville—Sixth Monday after the first Monday of March and September, and continue two weeks.

Franklin—Eighth Monday after the first Monday of March and September, and continue two weeks.

Person—Tenth Monday after the first Monday of March and September.

Caswell—Eleventh Monday after the first Monday of March and September.

Rockingham—Twelfth Monday after the first Monday of March and September.

Vance—Monday after the Rockingham Fall and Spring terms, and continue two weeks.

The sixth judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

SIXTH JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1879, c. 28. 1879, c. 110. 1881, c. 298, ss. 1, 2, 3. 1883, c. 114.

Mecklenburg—Last Monday of February and August, and continue three weeks.

Cabarrus—Third Monday of March and September.

Stanly—Fourth Monday of March and September.

Montgomery—First Monday after the fourth Monday of March and September.

Union—Second Monday after the fourth Monday of March and September, and continue two weeks.

Lincoln—Fourth Monday after the fourth Monday of March and September.

Gaston—Fifth Monday after the fourth Monday of March and September, and continue two weeks.

Cleveland—Seventh Monday after the fourth Monday of March and September, and continue two weeks.

Rutherford—Ninth Monday after the fourth Monday of March and September, and continue two weeks.

Polk—Eleventh Monday after the fourth Monday of March and September, and continue two weeks.

The seventh judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

SEVENTH JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1879, c. 90. 1883, c. 257. 1883, c. 298.

Davie—First Monday of March and September.

Yadkin—Second Monday of March and September.

Davidson—Third Monday of March and September, and continue two weeks.

Wilkes—First Monday after the fourth Monday of March and September, and continue two weeks.

Alleghany—Third Monday after the fourth Monday of March and September.

Surry—Fourth Monday after the fourth Monday of March and September, and continue two weeks at Spring term, and one week at Fall term.

Stokes—Sixth Monday after the fourth Monday of March and fifth Monday after fourth Monday of September, and continue one week at Spring term, and two weeks at Fall term.

Forsyth—Seventh Monday after the fourth Monday of March and September, and continue two weeks.

Rowan—Ninth Monday after the fourth Monday of March and September, and continue two weeks.

The eighth judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to-wit:

EIGHTH JUDICIAL DISTRICT. 1876-'7, c. 255, s. 1. 1879, c. 79. 1879, c. 277. 1880, c. 4. 1881, c. 66. 1881, c. 142.

Catawba—Last Monday of August and February, and continue two weeks.

Burke—Second Monday of March and September, and continue two weeks.

McDowell—Fourth Monday of March and September, and continue two weeks.

Yancey—Second Monday after the fourth Monday of March and September, and continue two weeks.

Mitchell—Fourth Monday after the fourth Monday of March and September.

Watauga—Sixth Monday after the fourth Monday of March and September, and continue two weeks.

Ashe—Seventh Monday after the fourth Monday of March and September, and continue two weeks.

Caldwell—Ninth Monday after the fourth Monday of March and September.

Alexander—Tenth Monday after the fourth Monday of March and September, and continue two weeks.

Iredell—Second Monday before the last Monday of August and February, and continue two weeks.

The ninth judicial district shall be composed of the following counties, and the superior courts thereof shall be held at the following times, to wit:

NINTH JUDICIAL DISTRICT. 1883, c. 164.

Madison—First Monday of March and August, and continue two weeks.

Henderson—Third Monday of March and August, and continue two weeks.

Transylvania—Fourth Monday after the first Monday of March and August.

Haywood—Fifth Monday after the first Monday of March and August, and continue two weeks.

Jackson—Sixth Monday after the first Monday of March and August.

Macon—Seventh Monday after the first Monday of March and August.

Clay—Eighth Monday after the first Monday of March and August.

Cherokee—Ninth Monday after the first Monday of March and August, and continue two weeks.

Graham—Eleventh Monday after the first Monday of March and August.

Swain—Twelfth Monday after the first Monday of March and August.

Buncombe—Thirteenth Monday after the first Monday of March and third Monday of November, and continue

four weeks, unless the business shall sooner be disposed of.

The boards of commissioners of Buncombe, Madison, Henderson, Haywood, and Cherokee counties are authorized to draw a separate jury for each week of the superior court of said counties.

Sec. 911. Rotation of judges. R. C., c. 31, s. 20. 1876-'7, c. 27. 1879, c. 11.

The judges of the superior court shall hold the courts of the several judicial districts successively, as provided in chapter eleven of the public acts of the year one thousand eight hundred and seventy-nine.

Sec. 912. Notification of ridings. 1879, c. 11, s. 11.

The judges shall cause a notification of the ridings to be published in some newspaper by the first of January and first of July preceding each circuit.

Sec. 913. Special terms; exchange of courts. R. C., c. 31, s. 20. 1879, c. 11, s. 12.

The governor shall have power to appoint any judge to hold special terms of the superior court in any county, and by consent of the governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years; and whenever a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor.

State v. Adair, 66—298; State v. Watson, 75—136; State v. Graham, 75—256; State v. Munro, 80—373; State v. McGimsey, 80—377; State v. Bowman, 80—432.

Sec. 914. Special terms. R. C., c. 31, s. 22. 1868-'9, c. 273, s. 1. 1876-'7, c. 44.

Whenever it shall appear to the governor by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that there is such an accumulation of criminal or civil actions in the superior court of any county, as to require the holding of a special term for its dispatch, he shall issue an order to the judge of the judicial district, in which such county is, or to any other judge of the superior court, requiring him to hold a special term of the superior court for such county, to begin on a certain Monday, not to interfere with any of the regular terms of the courts of his district. The judge shall attend and hold such court.

State v. Ketchey, 70—621; Royster v. Chandler, 6 Ired. Eq., 291.

SEC. 915. Notice to chairman. 1868-'9, c. 273, s. 2.

Whenever the governor shall call a special term of the superior court for any county, he shall notify the chairman of the board of commissioners of the county of such call, and such chairman shall take immediate steps to cause twenty-four, or if a grand jury be needed, thirty-eight qualified persons to be drawn and summoned as jurors for said term; and also to advertise said term at the court house and at one public place in every township of his county, or by publication of at least two weeks in some newspaper published in his county in lieu of such township advertisement.

SEC. 916. Powers, &c. 1868-'9, c. 273, s. 3.

The special terms of the superior court held in pursuance of this chapter shall have all the jurisdiction and powers that regular terms of the superior court have.

SEC. 917. Terms to last, how long. 1868-'9, c. 273, s. 4.

The said terms shall last until all the business of the court shall be disposed of.

SEC. 918. Certificate of attendance. 1868-'9, c. 273, s. 5.

The clerk shall give the judge a certificate of attendance for the number of days occupied by the court, and the judge shall thereupon be entitled to receive from the commissioners of the county in which the court is held, his expenses, at the rate of one hundred dollars per week as his compensation for holding said term.

Buxton v. Com'rs, 82—91.

SEC. 919. All persons bound to attend as at regular terms; no process except subpœnas returnable thereto. R. C., c. 31, ss. 23, 24. 1844, c. 10, s. 2. 1848, c. 29.

All persons and witnesses summoned at the regular or special term, and officers or others who may be bound to attend the next regular term of the court, shall attend the special term, under the same rules, forfeitures and penalties as if the term were a regular term. But no process shall be made returnable thereto except subpœnas, or other process for the attendance of witnesses.

Askew v. Stevenson, Phil., 288.

SEC. 920. Subpœnas, &c. 1868-'9, c. 273, s. 8.

Subpœnas may issue returnable on any day of any special term.

Sec. 921. Grand Juries. 1868-'9, c. 273, s. 9.

There shall be no grand jury at any special term, unless the same shall be ordered by the governor.

Sec. 922. Original jurisdiction of superior court. Const., Art. IV., ss. 12, 27. 1866-'7, c. 251. 1879, c. 92, s. 11. 1881, c. 210.

The superior court shall have original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other court; and of all criminal actions in which the punishment may exceed a fine of fifty dollars, or imprisonment for thirty days; and of all such affrays as shall be committed within one mile of the place where, and during the time, such court is being held; and of all offences whereof exclusive original jurisdiction is given to justices of the peace, if some justice of the peace shall not within six months after the commission of the offence proceed to take official cognizance thereof.

Rives v. Guthrie, 1 Jon., 84; Donaldson v. Waldrop, 63—507; Wilmington v. Davis, 63—582; State v. Johnson, 64—581; Hedgecock v. Davis, 64—650; Credle v. Gibbs, 65—192; Edenton v. Wool, 65—379; State v. Deaton, 65—496; State v. Pendleton, 65—617; Froneberger v. Lee, 66—333; Winslow v. Weith, 66—432; Dulin v. Howard, 66—433; Froelich v. S. Ex. Co., 67—1; Davis v. Baker, 67—388; State v. Porter, 69—140; Caldwell v. Beatty, 69—365; State v. Yarborough, 70—250; State v. Heidelburg, 70—496; R. R. Co. v. Johnson, 70—509; Bullenger v. Marshall, 70—520; Brandon v. Com'rs, 71—62; State v. Rouseau, 71—194; State v. Vermington, 71—264; Templeton v. Summers, 71—269; Griffith v. Com'rs, 71—340; Watts v. Bell, 71—405; Barnes v. Brown, 71—507; State v. Perry, 71—522; Sutton v. McMillan, 72—102; State v. Upchurch, 72—146; State v. Pressly, 72—264; State v. Quick, 72—241; Willoughby v. Threadgill, 72—438; Latham v. Rollins, 72—454; State v. Bailey, 73—70; State v. Buck, 73—266; State v. Buck, 73—630; Bellamy v. Pippin, 74—46; Forsythe v. Bullock, 74—135; State v. Griffice, 74—316; Hendrick v. Mayfield, 74—626; Pullen v. Green, 75—215; Privett v. Calloway, 75—233; Oliver v. Wiley, 75—320; Nance v. R. R. Co., 76—9; State v. Threadgill, 76—17; Washington v. Hammond, 76—33; State v. Styles, 76—156; Brown v. Hoover, 77—40; Claywell v. Sudderth, 77—287; Com'rs v. R. R. Co., 77—297; McMillan v. Hamilton, 77—300; State v. Hampton, 77—526; Perry v. Shepherd, 78—83; Netherton v. Candler, 78—88; Evans v. Williamson, 79—86; Bratton v. Davidson, 79—423; Walton v. Walton, 80—26; Bank v. Wilson, 80—200; State v. Edney, 80—360; State v. Monroe, 80—373; State v. Anderson, 80—429; Murphy v. McNeill, 82—221; McDonald v. Cannon, 82—245; State v. Moore, 82—659; State v. Taylor, 83—601; State v. Berry, 83—603; State v. Mitchell, 83—674; Brickell v. Bell, 84—82; Greer v. Cagle, 84—385; State v. Reaves, 85—553; Kirkman v. Phipps, 86—428; Hannah v. R R. Co., 87—351.

Sec. 923. Appellate jurisdiction. Const., Art. IV., s. 16.

The superior court shall have appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for error assigned, in matters of law, as provided in this code.

Pearce v. Lovenier, 71—248; Smith v. R. R. Co., 72—62; McBryde v. Patterson, 73—478; McDaniel v. Watkins, 76—399; Suttle v. Green, 78—76; Faison v. Johnson, 78—78; Evans v. Williamson, 79—86; Brown v. Brittain, 84—552; Boyett v. Vaughan, 85—363; Allen v. Jackson, 86—321; State v. Mott, 86—621; Boing v. R. R. Co., 87—360.

Sec. 924. Judge to take oath; oaths subscribed and returned to secretary of state. R. C., c. 31, ss. 18, 19. 1777, c. 115, ss. 5, 6. 1806, c. 694, s. 13. 1848, c. 45.

Every judge before he shall act as such, shall, in open court, or before the governor, or before one of the judges of the supreme or superior courts, or before some justice of the peace, take the oath appointed for public officers, and also an oath of office. The officer or court before whom said judge shall qualify, shall cause the judge to subscribe the oaths by him taken, and having certified the same, shall return said oaths to the secretary of state, who shall carefully preserve them; and if any judge shall act in his office before he shall have taken the oaths directed, he shall forfeit and pay two thousand dollars, one half to the use of the state and the other half to the person who shall sue for the same.

Sec. 925. Minutes of preceding day to be read each morning. 1861, c. 3.

Every morning during the term the judge presiding shall order the reading of the minutes of said court for the day preceding, and the minutes of the last day shall be read immediately preceding the final adjournment of said term.

Sec. 926. If judge of a superior court not present, court to be adjourned, when. R. C., c. 31, s. 21. C. C. P., s. 396. 1879, c. 11.

If the judge of a superior court shall not be present to hold any term of a court at the time fixed therefor, it shall be the duty of the sheriff to adjourn the court from day to day until the fourth day of the term inclusive, unless he shall be sooner informed that the judge from any cause cannot hold the term; if by sunset on the fourth

day the judge shall not appear to hold the term, or if the sheriff shall be sooner advised that the judge cannot hold the term, it shall then be the duty of the sheriff to adjourn the court until the next term.

Williams v. Rockwell, 64—325; Norwood v. Thorp, 64—682; State v. McGimsey, 80—377.

Sec. 927. Constable attending juries to be sworn, for what purpose. R. C., c. 31, s. 36. 1801, c. 592, s. 2.

When any officer (except such as are appointed to attend the grand jury) shall be appointed or summoned to attend any superior court, the clerk, at the time of the first going out of a jury on the trial of any civil or criminal action, shall administer an oath to such officer, faithfully to attend the several juries that may be put under his care during that term, that shall be charged in the trial of any civil or criminal action; and after such officer shall be once so sworn, he shall be considered to all intents and purposes as acting upon the same oath while attending every jury, that he may be called to attend during that term.

Sec. 928. Process not to be executed on Sunday. R. C., c. 31, s. 54. 1777, c. 118, s. 6.

It shall not be lawful for any sheriff, constable, or other officer to execute any summons, *capias*, or other process on Sunday, unless the same be issued for treason, felony or misdemeanor.

Cowles v. Brittain, 2 Hawks, 204; Bland v. Whitfield, 1 Jon., 122; Devries v. Summit, 86—126.

Sec. 929. When there is no officer, or he will not execute process, on affidavit, the clerk shall direct process to the sheriff of adjoining county. R. C., c. 31, s. 55. 1879, c. 156, s. 3. 1821, c. 1080. 1822, c. 1132, s. 1. 1846, c. 61.

If at any time there should not be in the county a proper officer to whom precepts or process, original, mesne or final, of a court of record, shall or ought to be directed, who can lawfully execute the same; or if there be such officer who shall refuse or neglect to execute such precept or process, then the clerk of the court from which the same hath issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such precept or process to the sheriff of any adjoining county, who shall have

power to execute, and shall execute the same, in like manner as if he were sheriff of the county.

Collais v. McLeod, 8 Ired., 221; Bowen v. Jones, 13 Ired., 25.

Sec. 930. When process to issue to sheriff of adjoining county. 1869-'70, c. 175, s. 1.

In all cases where the sheriff of any county shall be interested, if there is no coroner in said county, process may be issued to and shall be executed by the sheriff of any adjoining county.

Yeargin v. Siler, 83—348.

Sec. 931. Sheriff executing process out of his county to have extra pay. R. C., c. 31, s. 56. 1822, c. 1132, s. 2.

Whenever any precept or process shall be directed to the sheriff of an adjoining county, to be served out of his county as aforesaid, such sheriff shall have for such service, not only the fees allowed by law, but a further compensation of five cents for every mile of travel in going to and returning from service of such precept or process: *Provided*, that whenever any execution of five hundred dollars or upwards shall be directed to the sheriff of an adjoining county, under this chapter, such sheriff shall not be allowed mileage, but only the commissions to which he shall be entitled.

Sec. 932. If defendant in penal suit plead former judgment, plaintiff may reply fraud; release of the action void; defendant pleading falsely indictable. R. C., c. 31., s. 100. 4 Hen. VII, c. 20.

If an action be brought in good faith by any person to recover a penalty under a law of this state, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual; and every person pleading such false defence shall be guilty of a misdemeanor.

Sec. 933. Payment or satisfaction may be pleaded in suits on bond and judgment; also payment or satisfaction after the day of paying in suits on bond, conditioned to be discharged by a less sum. R. C., c. 31, s. 101. 4 Hen. VII., s. 20.

When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manuer than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payment were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded.

Sec. 934. In suits on penal bonds, the sum due, interest and costs being brought into court, penalty shall be discharged. R. C., c. 31, s. 102. 4 Anne, c. 16, s. 13.

If at any time, pending an action on any such bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also all such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge

of said bond, and the court shall give judgment accordingly.

Governor v. Sutton, 4 D. & B., 484; Thoroughgood v. Walker, 2 Jon., 15.

Sec. 935. Judgments to stand till reversed. R. C., c. 31, s. 103. 4 Hen. IV., c. 23.

Every judgment given in a court of record having jurisdiction of the subject, shall be, and continue in force until reversed according to law.

Hamilton v. Wright, 4 Hawks, 283; Armstrong v. Harshaw, 1 Dev., 187; White v. Albertson, 3 Dev., 241; Jones v. Jones, 3 Dev., 360; Barnard v. Roe, 4 Dev., 295; Irby v. Wilson, 1 D. & B. Eq., 568; Skinner v. Moore, 2 D. & B., 138; Winslow v. Anderson, 3 D. & B., 9; Jennings v. Stafford, 1 Ired., 404; Hafner v. Erwin, 4 Ired., 529.

Sec. 936. Non-suit not allowed after verdict. R. C., c. 31, s. 110. 2 Hen. IV., c. 7.

In actions where a verdict shall pass against the plaintiff, he shall not be non-suited.

Sec. 937. Party in execution not to be discharged on habeas corpus. R. C., c. 31, s. 111. 2 Hen. V., c. 2.

When a *certiorari* or writ of *habeas corpus cum causa* shall issue, and the sheriff or other officer to whom it is directed shall return upon the same that the prisoner is condemned, by judgment given against him, and held in custody by virtue of an execution issued against him, the prisoner shall not be let to bail, but shall be presently remanded, where he shall remain until discharged in due course of law.

Sec. 938. Death between verdict and judgment, not error, if, &c. R. C., c. 31, s. 112. 17 Chas. II., c. 8, s. 1.

In no action shall the death of either party between the verdict and the judgment be alleged for error, if such judgment be entered within two terms after the verdict.

Sec. 939. Surveys ordered in cases of disputed boundary; how and by whom made; charges for surveys to be taxed as costs. R. C., c. 31, s. 119. 1779, c. 157, s. 7. 1786, c. 252, ss. 1, 2.

Whenever in any suit pending in the superior court, the bounds of lands shall be drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, agreeable to the bounds and lines expressed in each party's titles, and such other surveys as shall be deemed useful; which surveys shall be made by two sur-

veyors appointed by the court, one to be named by each of the parties, or by one surveyor, if the parties agree; and the surveyors shall attend according to the order of the court, and make the surveys, and shall make as many accurate plans thereof as shall be ordered by the court; and for such surveys, the court shall make a proper allowance, to be taxed as among the costs of the suit.

Sec. 940. Return on notice, evidence. R. C., c. 31, s. 123. 1799, c. 537.

When a notice shall issue to the sheriff, his return thereon that the same has been executed shall be deemed sufficient evidence of the service thereof.

Sec. 941. Speedy collection of proceeds of judicial sales, by motion. R. C., c. 31, s. 129.

The supreme and other courts ordering a judicial sale, or having possession of the bonds which may have been taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money may become due against the debtors or any of them, unless for good cause shown the court shall direct some other mode of collection.

Cotten *ex parte*, Phil. Eq., 79; Blackburn v. Brooks, 65—413; Mauney v. Pemberton, 75—219; Chambers v. Penland, 78—53; Smith v. Moore, 79—83.

Sec. 942. Purchasers under judicial sales protected; deemed legal owners. 1858-'9, c. 50.

Any person let into possession under any judicial sale confirmed, where the title may be retained as a security for the price, shall be deemed the legal owner of the premises for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession taken or continued, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit so brought shall be under the control of the court ordering the sale.

Sec. 943. Quakers may wear hats in court. R. C., c. 31, s. 131. 1784, c. 209.

The people called Quakers may wear their hats in courts of judicature, as elsewhere, according to the custom of their sect.

Sec. 944. Certain cases pending in courts of equity and county courts to be transferred. 1871-'2, c. 161. 1873-'4, c. 183. 1874-'5, c. 81. 1876-'7, c. 9.

All suits, petitions and other proceedings pending in the late courts of equity, and in the late courts of pleas and quarter sessions, and not determined by final judgment or decree, and all such cases wherein any act was decreed to be done or deed to be executed, and said act was not done nor deed executed, may be transferred to the superior court of the county in which they were pending, at the instance of any person interested. And said superior court shall have power to make all orders, judgments and decrees as shall be necessary for finally adjudicating and settling the same.

Curtis' heirs *ex parte*, 82—435; Lash v. Thomas, 86—313.

CHAPTER TWENTY-FOUR.

COURT--SUPREME.

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Sec. 945. Supreme court, its jurisdiction. Const., Art. IV., s. 8. C. C. P., s. 413.

The supreme court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over "issues of fact" and "questions of fact" shall be the same exercised by it before the adoption of the constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.

Bethea v. McLennon, 1 Ired., 523; Runyon v. Anderson, 3 Ired., 586; State v. Crayton, 6 Ired., 164; Am. Bible So. v. Ex'rs of Hollister, 1 Jon. Eq., 10; Smith v. Cheek, 5 Jon., 213; State v. Jenkins, 6 Jon., 19; Caroon v. Rogers, 6 Jon., 240; Rodman v. Davis, 8 Jon., 134; Cates v. Whitfield, 8 Jon., 266; Grissett v. Smith, Phil., 297; Heilig v. Stokes, 63—612; Biggs *ex parte*, 64—202; Rogers v. Goodwin, 64—278; Walton v. Jordan, 65—170; State v. Jefferson, 66—309; Isler v. Brown, 67—175; Foushee v. Pattershall, 67—453; Rush v. Steamboat Co., 68—72; McKinnon v. Faulk, 68—279; Bledsoe v. Nixon, 69—81; Keener v. Finger, 70—35; State v. Ketchey, 71—147; Duvall v. Rollins, 71—218; State v. West, 71—263; Holmes v. Godwin, 71—306; Perry v. Tupper, 71—380; Sprinkle v. Foote, 71—411; Williams v. Williams, 71—427; State v. Armstrong, 72—193; Watson v Dodd, 72—240; Whitford v. Foy, 72—247; Benbow v. Robbins, 72—422; Phifer v. R. R. Co., 72—433; Maxwell v. Caldwell, 72—450; Horne v Horne, 72—534; State v. Powell, 74—270; State v. R. R. Co., 74—287; Brink v. Black, 74—329; Johnson v. Bell, 74—355; Wallington v. Montgomery, 74—372; McRae v. Com'rs, 74—415; Mitchell v. Kilburn, 74—483

Swepson v. Summey, 74—551; *In re.* Schenck, 74—607; Hinton v. Deans, 75—18; Horne v. Horne, 75—101; State v. Applewhite, 75—229; Oliver v. Wiley, 75—320; Rouse v. Quinn, 76—354; Barnes v. Fort, 77—28; Cansler v. Cobb, 77—30; Long v. Swindell, 77—176; Gragg v. Wagner, 77—246; Com'rs v. R. R. Co., 77—297; Rollins v. Henry, 77—467; Crawley v. Woodfin, 78—4; Bernard v. Johnson, 78—25; Henry v. Smith, 78—27; Perry v. Shepherd, 78—83; Williamson v. Canal Co., 78—156; Com'rs v. Magnin, 78—181; McBryde v. Patterson, 78—412; Driver's case, 78—423; State v. Lindsey, 78—499; State v. Lane, 78—547, State v. Smallwood, 78—560; Smith v. Moore, 79—82; Oldham v. Kerchner, 79—106; Dobson v. Chambers, 79—142; Hill v. Oxendine, 79—331; Chastain v. Coward, 79—543; Meekins v. Tatem; 79—546; Paschall v. Bullock, 80—8; Bank v. Creditors, 80—9; Brooks v. Headen, 80—11; Skinner v. Badham, 80—14; Oldham v. Sneed, 80—15; Halyburton v. Carson, 80—16; Sutton v. Schonwald, 80—20; Jones v. Boyd, 80—258; Pain v. Pain, 80—322; Whissenhunt v. Jones, 80—348; State v. Edney, 80—360; State v. Spurtin, 80—362; State v. Murray, 80—364; State v. Scott, 80—365; State v. McGimsey, 80—377; State v. Davis, 80—384; State v. Secrest, 80—450; State v. Keeter, 80—472; State v. Blackburn, 80—474; Earp v. Richardson, 81—5; Haywood v. Daves, 81—8; Devereux v. Devereux, 81—12; Lewis v Rountree, 81—20; *In re.* Daves, 81—72; Bell v. Cunningham, 81—83; Simmons v. Foscue, 81—86; Kidder v. McIlhenny, 81—123; Cannon v. Morris, 81—139; Clifton v. Wynn, 81—160; State v. Lawrence, 81—522; State v. Thorn, 81—555; State v. Fox, 81—576; Mizell v. Simmons, 82—1; Sanders v. Norris, 82—4; White v. Clark, 82—6; Grant v. Reese, 82—72; Williams v. Kivett, 82—110; Saunders v. Norris, 82—243; Dalton v. Webster, 82—297; McCurry v. McCurry, 82—296; R. R. Co. v. Richardson, 82—343; Ammon v. Ammon, 82—398; Gay v. Brookshire, 82—409; Wilson v. Lineberger, 82—412; Clayton v. Johnson, 82—433; Badger v. Daniel, 82—468; Bank v. Graham, 82—489; Gorman v. Bellamy, 82—496; Shields v. Whitaker, 82—516; Sudderth v. McCombs, 82—535; State v. Leitch, 82—539; State v. Hinson, 82—540; State v. Swepson, 82—541; State v. Padgett, 82—544; State v. Keeter, 82—547; State v. Crockett, 82—599; State v. Baxter, 82—602; State v. Jones, 82—691; State v. Braswell, 82—693; Gordon v. Sanderson, 83—1; Corbin v. Berry, 83—27; Sanderson v. Dailey, 83—67; Womble v. Leach, 83—84; Jones v. Holmes, 83—108; May v. Darden, 83—237; Phillips v. Lentz, 83—210; Hull v. Carter, 83—249; Perry v. Adams, 83—266; Walton v. Pearson, 83—309; Wellons v. Jordan, 83—371; Bank v. Pinkers, 83—377; Telegraph Co. v. R. R. Co., 83—420; Hutchinson v. Rumfelt, 83—441; Lindsay v. Moore, 83—444; Andrews v. Whisnant, 83—446; Foy v. Haughton, 83—467; Adams v. Thomas, 83—521; Howell v. Ray, 83—558; State v. Swepson, 83—584; State v. Ham, 83—590; State v. Pollard, 83—597; State v. Hardee, 83—619; State v. Keath, 83—626; State v. Grady, 83—643; State v. Donaldson, 83—683; Greensboro v. Scott, 84—184; Belden v. Snead, 84—243; Bryant v. Fisher, 85—71; McMillan v. Baker, 85—291; Tucker v. Baker, 86—1; Allen v. Baker, 86—91; Ray v. Patton, 86—386; Howerton v. Henderson, 86—718; Burnett v. Nicholson, 86—728; State v. Randall, 87—571.

Sec. 946. Cases, how taken to the supreme court. C. C. P., s. 414.

Cases shall be taken to the supreme court by appeal as provided in this code.

Grissett v. Smith, Phil., 297; Clerk's office v. Huffsteller, 67—449; State v. Ketchy, 71—147; State v. Griffin, 71—304; State v. Hawkins, 72—180; State v. Patrick, 72—217; Wade v. New Berne, 72—498; Adams v. Reeves, 74—106; Greene v. Hobgood, 74—234; Wilson v. Hutchinson, 74—432; Kirk v. Barnhart, 74—653; Martin v. Chasteen, 75—96; Richardson v. Debnam, 75—390; Bradley v. Jones, 76—204; Green v. Castleberry, 77—164; State v. Morgan, 77—510; Taylor v. Brower, 78—8; Meekins v. Tatem, 79—546; Sutton v. Schonwald, 80—20; State v. Spurlin, 80—362; State v. Scott, 80—365; State v. Keeter, 80—472; Smith v. Lyon, 82—2; Sever v. McLaughlin, 82—332; Wadsworth v. Carroll, 82—333; Hutchinson v. Rumfelt, 82—425; Walton v. Pearson, 82—464; State v. Walker, 82—696; State v. Donaldson, 83—683; Brown v. Williams, 83—684; Wilson v. Scagle, 84—110; Syme v. Broughton, 84—114; Brown v. Williams, 84—116; Parker v. R. R. Co., 84—118; Hines v. Hines, 84—122; Turlington v. Williams, 84—125; State v. Vann, 84—722; State v. Moore, 84—724; State v. McDowell, 84—798.

Sec. 947. Claims against the state. C. C. P., s. 415. Const., Art. IV., s. 9.

The supreme court shall have original jurisdiction to hear claims against the state, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.

Bledsoe v. The State, 64—392; Reynolds v. The State, 64—460; Rand v. The State, 65—194; Battle v. Thompson, 65—406; Boner v. Adams, 65—639; Bayne v. Jenkins, 66—356; Sinclair v. The State, 69—47; Clements v. State, 77—142; Horne v. The State, 82—382; Horne v. The State, 84—362.

Sec. 948. Manner of prosecuting claims against the state. C. C. P., s. 416.

Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior

court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term.

Bledsoe v. The State, 64—392; Boner v. Adams, 65—639; Henry v. The State, 68—465; Clements v. The State, 76—199; Clements v. The State, 77—142; Horne v. The State, 82—382.

Sec. 949. Justices of supreme court may take probate of deeds, &c. C. C. P., s. 417. 1868-'9, c. 277, s. 11.

The several justices of the supreme court shall have like powers to take the probate of deeds, and to examine married women respecting their free consent to deeds made by them, to issue and hear writs of *habeas corpus*, to issue warrants for the arrest of persons charged with crime, and to discharge such persons on bail, as is or may be given to the judges of the superior courts.

In re. Bryan, 1 Winst., 1.

Sec. 950. Justices of the supreme court to appoint a marshal, how paid. 1873-'4, c. 34. 1881, c. 306.

The justices of the supreme court may appoint an officer to be styled marshal of the supreme court, removable at will, who shall attend upon the court during its sessions, and said marshal shall be entitled to receive five hundred dollars per annum, payable monthly by the state treasurer upon the certificate of the clerk of the court.

Sec. 951. Compensation of servant of supreme court to be fixed by the court; how selected or removed. 1873-'4, c. 122. 1880, c. 61.

The servant and messenger attending and waiting upon the supreme court and attorney general's office shall be allowed such pay for his services, per month, as may be fixed and certified to by the justices of said court; said servant or messenger to be selected or removed by the justices thereof.

SEC. 952. Rooms set apart for preserving certain records. 1873-'4, c. 117.

The room in the capitol heretofore occupied as the office of the superintendent of public works, is assigned to the clerk of the supreme court for the proper care and safety of records of said court.

SEC. 953. Supreme court to convene on the first Mondays in February and October. 1881, c. 178.

There shall be held at the seat of government of the state in each year two terms of the supreme court, commencing on the first Monday in February and the first Monday in October.

SEC. 954. To sit till business is dispatched; name and style of court; to stand adjourned if no justice attends during first week. R. C., c. 33, s. 2. 1804, c. 660, s. 2. 1805, c. 674, s. 1. 1818, c. 962, s. 2. 1828, c. 13. 1842, c. 15. 1846, cs. 28, 29.

The court shall sit at each term until all the business on the docket shall be determined or continued on good cause shown. The court shall bear the name and style of "The Supreme Court of North Carolina," and shall be a court of record; and the papers and records belonging to the clerk's office thereof shall be constantly kept within the city of Raleigh: *Provided*, that in case no one of the justices shall attend the term during the first week thereof, at the end of that time the court shall stand adjourned till the next term, and the causes on the docket be continued.

SEC. 955. Justices to take and subscribe oaths to be filed, &c. R. C., c. 33, s. 3. 1818, c. 963, s. 1.

The justices, before they act as such shall, before the governor or some judicial officer, take and subscribe the oaths appointed for the qualification of public officers, and also an oath of office, which shall be certified by the officer taking the same and delivered to the secretary of state, to be safely kept.

SEC. 956. Two, in case of illness, &c., to hold court. R. C., c. 33, s. 4. 1834, c. 13.

When any one of the justices is disabled from attending, from illness or other inevitable cause, two of the justices shall hold the court, hear and determine causes, and possess and exercise every other authority which by law may appertain to said court as fully to all intents

and purposes as if all the justices of the court were present.

SEC. 957. Court to render judgment on review of record; if to superior court, final judgment to be certified to that court; in criminal cases, decisions certified to court below; how that court to proceed. R. C., c. 33, s. 6. 1799, c. 520, ss. 1, 3. 1818, c. 963, s. 4. 1830, c. 2, s. 1. 1868, c. 962, s. 4.

In every case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon; and it may at its discretion make the writs of execution which it may issue returnable either to the said court, or to the superior court: *Provided*, that when an execution shall be made returnable as last mentioned, a certificate of the final judgment of the supreme court shall always be transmitted to the superior court aforesaid, and there be recorded: *Provided further*, that the said superior court may enforce obedience to the execution, and in the event of its not being executed may issue new or further execution or process thereon in the same manner as though the first execution had issued from the said superior court: *Provided also*, that in criminal cases the decision of the supreme court shall be certified to the superior court from which the case was transmitted, which superior court shall proceed to judgment and sentence agreeable to the decision of the supreme court and the laws of the state.

Bethea v. McLennon, 1 Ired., 523; Runyon v. Anderson, 3 Ired., 586; State v. McIntyre, 1 Jon., 1; Am. Bible Society v. Executors of Hallister, 1 Jon. Eq., 10; State v. Jacobs, 2 Jon., 52; Smith v. Cheek, 5 Jon., 213; Caroon v. Rogers, 6 Jon., 240; Jones v. McLaurine, 7 Jon., 392; Rodman v. Davis, 8 Jon., 134; Cates v. Whitfield, 8 Jon., 266; Grissett v. Smith, Phil., 297; Greenlee v. Sudderth, 65—470; Rush v. Steamboat Co., 68—72; State v. Ketchey, 71—147; Simmons v. Foscue, 81—86; McDaniel v. Pollock, 87—503.

SEC. 958. Clerk of the supreme court, his bond and oath; where office to be kept. R. C., c. 33, s. 9. 1812, c. 829, s. 2. 1818, c. 963, s. 5. 1846, c. 28, s. 3.

Before undertaking his duties, the clerk of the supreme court shall enter into bond, with sufficient surety, payable to the state of North Carolina, in the sum of fifteen thousand dollars, conditioned for the faithful discharge of his duties and for the safe keeping of all records committed to his custody, which bond shall be lodged with

the secretary of state; and he shall also before said justices, or one of them, take the oaths which are prescribed for clerks of the superior court, and shall keep his office in the city of Raleigh.

Sec. 959. Clerk to record such parts of proceedings as the court shall direct. R. C., c. 33, s. 11. 1831, c. 20, s. 1.

The court may order the clerk to record such parts of the record of cases as it may deem necessary.

Sec. 960. Clerk's pay for such services. R. C., c. 33, s. 12. 1831, c. 20, s. 2.

In estimating the allowance to the clerk for making the record as directed, the justices shall not exceed the sum of thirty cents for each page recorded.

Sec. 961. Justices to prescribe rules of practice for supreme and superior courts. R. C., c. 33, s. 13. C. C. P., s. 394. 1818, c. 963, s. 0.

The justices of the supreme court shall prescribe and establish from time to time rules of practice for that court and also for the superior court. The clerk shall certify to the judges of the superior court the rules of practice for said court, to be entered on the records thereof in each county.

Johnson v. Sedberry, 65—1; Perry v. Morris; 65—221; Rules of the Supreme Court, 80—488, 81—609, 83—689.

Sec. 962. On appeal from interlocutory judgment, &c., no judgment to be entered; opinion with instructions to be certified to court below. R. C., c. 33, s. 14. 1831, c. 20, s. 3.

When an appeal shall be taken to the supreme court from any interlocutory judgment, the supreme court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to said opinion, and the court below shall enter upon its records the opinion at length, and proceed in the cause according to the instructions.

Grissett v. Smith, Phil., 297.

SEC. 963. Exhibits in cases proved by witnesses to be examined by supreme court; rules as to such witnesses. R. C., c. 32, s. 20. R. C., c. 33, s. 15. 1818, c. 962, s. 5. 1820, c. 1043. 1848, c. 30.

Exhibits or other documents relative to cases pending in the supreme court may be proved by the parol testimony of witnesses to be examined in said court in the same manner and under the same rules as such exhibits or documents may be proved in the superior court; and suitors in said court may have subpœnas to enforce the attendance of witnesses, who shall be liable to the same penalties and actions for non-attendance, and be entitled to the same pay for traveling, ferriage and attendance as witnesses in the superior court: *Provided*, that witnesses attending the supreme court shall be taxed in the bill of costs and paid by the party on whose behalf they may be summoned.

Ray v. Ray, 6 Ired. Eq., 355.

SEC. 964. Justices to deliver their opinions in writing; no certificate of decision, nor execution to be issued, until the opinion of the court is delivered to the clerk. R. C., c. 33, s. 16. 1810, c. 794.

The justices shall deliver their opinions or judgments in writing, and the clerk shall make no entry upon the records of the court that any cause pending therein is decided, nor give to any person a certificate of such decision, nor issue execution in such suit, until after the opinion of the court shall have been delivered publicly in open court, and a written copy of the same opinion shall have been delivered to the clerk; which shall afterwards be filed among the records of the court and published in the reports of the decisions made by the court.

State v. Ketchey, 71—147.

SEC. 965. Court may amend any proceeding; may amend by making parties; may allow further testimony to be taken. R. C., c. 33, s. 17. 1777, c. 115, s. 75. 1785, c. 233, s. 2. 1792, c. 360, s. 1. 1831, c. 46, s. 2.

The supreme court shall have power to amend any process, pleading or proceeding either in form or substance for the purpose of furthering justice, on such terms as shall be deemed just at any time before final judgment. Also to amend by making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe. And also whenever it shall appear nec-

essary for the purposes of justices, to allow and direct the taking of further testimony in any case which may be pending in said court under such rules as may be prescribed, or the court may remand the case to the intent that amendments may be made, further testimony taken or other proceedings had in the court below.

Kent v. Bottoms, 3 Jon. Eq., 69; Emmons v. McKesson, 5 Jon. Eq., 92; Fleming v. Murph, 6 Jon. Eq., 59.

Sec 966. When petition to re-hear final judgment may be filed, &c. R. C., c. 33, s. 18.

A petition to re-hear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined.

Mauney v. Gidney, 86—717.

Sec. 967. Suits may be dismissed for failure to prosecute after notice. R. C., c. 33, s. 20. 1848, c. 28, s. 2.

Suits and appeals pending in the supreme court may be dismissed on failure to prosecute the same, after a rule obtained for that purpose and served on the plaintiff or appellant, his agent or attorney, at least thirty days before the term next ensuing that of entering the rule; when, if the party shall fail to prosecute his suit or appeal, the court shall, at the election of the adverse party, dismiss the suit or appeal at the costs of the plaintiff or appellant, or proceed to hear and determine it.

Thompson v. Burnett, 6 Jon., 486; Burnett v. Thompson, 7 Jon., 407.

Sec. 968. Certificates of decisions transmitted to courts below on the rise of the court; execution for costs in the supreme and superior courts is issued from those courts respectively. R. C., c. 33, s. 21. 1820, c. 1070. 1825, c. 1282. 1842, c. 1, s. 3.

The clerk shall immediately after the rise of each term thereof transmit by some safe hand or by mail to the clerks of the superior court certificates of the decisions of the supreme court in cases sent from said court; and thereupon the said clerks respectively shall issue execution for the costs incurred in the courts from which the

cases were sent: and the clerk of the supreme court shall issue execution for the costs incurred in that court, including all publications in newspapers made in the progress of the cause in that court, and by order of the same, and all postage of letters which concern the transfer of original papers. And if the clerk shall fail for the space of twenty days to perform the duty herein enjoined of transmitting the said certificates of decisions, he shall forfeit and pay to the party or parties in whose favor the supreme court shall have decided, one hundred dollars.

Sparks v. Wood, 1 D. & B., 489.

SEC. 969. In the absence of the attorney general, court to appoint counsel for the state. R. C., 33, s. 22. 1846, c. 29, s. 4.

If the attorney general should fail at any term of the supreme court to attend to the business which by law is assigned him, the court may appoint some counsel learned in the law to discharge his duties during the term.

CHAPTER TWENTY-FIVE.

CRIMES AND PUNISHMENTS.

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1068. Larceny, the felonious, injury to, or pursuit of, live stock, with intent to appropriate the same, a misdemeanor.

1069. Larceny of growing crops or vegetables.

1070. Larceny of wood, or other property growing or being upon land.

1071. Larceny or obliteration of public records, or fraudulent removal of registration books; unnecessary to allege ownership or value.

1072. Larceny, fraudulent concealment or destruction of wills.

1073. Larceny, fraudulent disposition by clerk, or other custodian of the public laws, reports of supreme court, or other public documents, a misdemeanor.

1074. Larceny, receivers of stolen goods, punishment of.

1075. Larceny, distinction between grand and petit larceny abolished.

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1077. Liquor selling to minors forbidden.

1078. Liquor selling to minors; the father, mother, guardian and employer of minor may sue liquor dealer for damages.

1079. Liquor selling within two miles of public, political speakings prohibited.

1080. Maiming, with malice aforethought.

1081. Malicious injury to real property.

1082. Malicious injury to personal property.

1083. Marriages, unlawful with females under fourteen years of age without consent of father.

1084. Marriages, unlawful between whites and negroes.

1085. Marriages, unlawful for register of deeds, clergymen and justices of the peace to consent to the marriage of a negro to a white person.

1086. Mills, owners of, to keep up bridges over ditches, drains and canals.

1087. Mills, the destruction or obstruction of dams, canals or water channels, connecting with a mill, factory or machine works, indictable.

1088. Monuments and tombstones, unlawful to remove or deface.

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1104. Rape, assault with intent to have carnal knowledge of married woman by fraud in personating her husband, how punished.
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1112. Sheriffs, constables or other officers failing to execute process, making a false return thereon, or refusing to discharge any other duties, indictable.
1113. Slander of women by charge of incontinency, penalty.
1114. Springs, wells and cisterns, wilful injuring, penalty.
1115. Sunday, hunting on, prohibited.
1116. Sunday, fishing on with seines or nets prohibited; punishment.
1117. Sunday, sale of intoxicating liquors on, a misdemeanor.
1118. Telegraph, telephone poles or wires, injury to, a misdemeanor.
1119. Treasurer of the state, fraudulent entries and statements by, a misdemeanor.
1120. Trespass on lands without a license, after being forbidden, a misdemeanor.
1121. Trespass on public lands, penalty therefor.
1122. Trout, unlawful to catch mountain trout with seine at all times; the taking by shooting or otherwise between the fifteenth day of October and the thirteenth day of December, a misdemeanor.
1123. Water courses, obstruction of, penalty.

Sec. 970. Abandonment of wife and children by husband. 1868-'9, c. 209, s. 1. 1873-'4, c. 176, s. 10. 1879, c. 92.

If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor.

State v. Deaton, 65—496; State v. Brown, 67—470; State v. Dunston, 78—418; State v. Davis, 79—603.

Sec. 971. Abandonment, failure to provide support presumptive evidence thereof. 1868-'9, c. 209, s. 3.

If the fact of abandonment and failure to provide adequate support of wife and children shall be proved, or while being with such wife, neglect by the husband to provide for the adequate support of such wife or children, shall be proved, then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, but is found sauntering about, endeavoring to maintain himself by gaming or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is wilful.

Sec. 972. Adequate support, failure of husband to provide for wife and children. 1868-'9, c. 209, s. 2. 1873-'4, c. 176, s. 11. 1879, c. 92.

If any husband, while living with his wife shall wilfully neglect to provide adequate support for such wife or the children which he has begotten upon her, he shall be guilty of a misdemeanor.

State v. Davis, 79—603.

Sec. 973. Abduction of children. 1879, c. 81.

Any one who shall abduct, or by any means induce any child under the age of fourteen years, who shall reside with the father, mother, uncle, aunt, brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, shall be guilty of a crime, and on conviction shall be fined or imprisoned at the discretion of the court, or may be sentenced to the penitentiary for a period not exceeding fifteen years.

Sec. 974. Abduction; conspiracy. 1879, c. 81, s. 2.

Every one who shall conspire to abduct, or by any

means shall induce any child under the age of fourteen years, who shall reside with any of the persons aforesaid, or at school, to leave the persons aforesaid or the school, shall be guilty of a like offence, and on conviction shall be punished as prescribed in the preceding section: *Provided*, that no one who may be a nearer blood relation to the child than the persons named in said section shall be indicted for either of said offences.

State v. Sullivan, 85—506.

SEC. 975. Abortion, felony to administer to a woman pregnant any medicine to destroy her child, or to use an instrument with the same intent. 1881, c. 351, s. 1.

Every person who shall wilfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and imprisoned in the penitentiary for not less than one year or more than ten years, and be fined at the discretion of the court.

SEC. 976. Abortion, misdemeanor to administer medicine to pregnant woman or use any instrument with intent to procure miscarriage. 1881, c. 351, s. 2.

Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and imprisoned in the jail or penitentiary for not less than one year nor more than five years, and be fined, at the discretion of the court.

SEC. 977. Accessories to felonies before the fact, when, where and how tried and punished. R. C., c. 34, s. 53. 1797, c. 485, s. 1. 1852, c. 58.

If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring, or commanding, shall

be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counseling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony or where the principal felony is triable, although such offence may have been committed at any place within or without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the offence of counseling, procuring or commanding shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished in either of such counties: *Provided*, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

State v. Mann, 1 Hay., 4: State v. Graff, 1 Mur., 270; State v. Barden, 1 Dev., 518; State v. Hardin, 2 D. & B., 407; State v. Hildreth, 9. Ired., 440; State v. Cheek, 13 Ired., 114; State v. Ludwick, Phil., 401; State v. Dewer, 65—572; State v. Davis, 87—514.

Sec. 978. Accessories to felonies after the fact, when, where and how tried and punished. R. C., c. 34, s. 54. 1797, c. 485, s. 1. 1852, c. 58.

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made, or to be made, such person shall be guilty of a misdemeanor, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such misdemeanor, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished by imprisonment in the penitentiary or county jail, for not less than four

months nor more than ten years; and may also be fined in the discretion of the court. And the offence of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the state; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such person guilty of a misdemeanor as aforesaid, may be inquired of, tried, determined, and punished in either of said counties: *Provided*, that no person, who shall be once duly tried for such misdemeanor, shall be again indicted or tried for the same offence.

State v. Chittem, 2 Dev., 49; State v. Smith, 2 Ired., 402; State v. Duncan, 6 Ired., 98—236; State v. Ives, 13 Ired., 339; State v. Beatty, Phil., 52; State v. Ludwick, Phil., 401; State v. Winton, Phil., 196; State v. Tyler, 85—569.

Sec. 979. Accessories, how proceeded against and punished where principal is not attainted. R. C., c. 34, s. 55.

In order that accessories may be convicted and punished in all cases, it is enacted, that if any principal offender shall be in anywise convicted, it shall be lawful to proceed against an accessory, either before or after the fact, in the same manner as if the principal felon shall die or be pardoned, or otherwise delivered before or after sentence or punishment; and every such accessory shall suffer the same punishment, if he be in anywise convicted, as he should have suffered if the principal had been sentenced or punished.

Sec. 980. Accessories before the fact, how punished. 1868, c. 31, s. 2. 1874-'5, c. 212.

Any person who shall be convicted as an accessory, before the fact in either of the crimes of murder, arson burglary or rape, shall be imprisoned for life in the penitentiary. An accessory before the fact to the stealing of any horse, mare, gelding or mule, on being duly convicted thereof, shall be imprisoned at hard labor in the penitentiary for not less than five nor more than twenty years, in the discretion of the court. Every accessory

before the fact, in any other felony, shall be punished by imprisonment in the penitentiary or county jail, for not more than ten years, or may be fined, in the discretion of the court.

State v. Davis, 87—514.

Sec. 981. Advertisements and legal notices, destruction or defacing of, punished. 1876-'7, c. 215.

Any person who shall wilfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacing, tearing down, removing or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Sec. 982. Adulterated liquors, penalty for making or selling. 1858-'9, c. 57, ss. 1, 4.

If any person shall adulterate any spirituous, alcoholic, vinous or malt liquors by mixing the same with any substance of whatever kind, except as hereinafter provided, or if any person shall sell or offer to sell any spirituous, alcoholic, vinous or malt liquors, knowing the same to be thus adulterated, or shall import into this state any spirituous or intoxicating liquors, and sell or offer to sell such liquor, knowing the same to be adulterated, he shall be guilty of a misdemeanor, and fined and imprisoned, or both, at the discretion of the court.

Sec. 983. Adulterated and poisonous liquors, penalty for manufacturing or selling. 1873-'4, c. 180, ss. 1, 2.

Any person who shall manufacture, sell, or in any way deal out spirituous liquors, of any name or kind, to be used as a drink or beverage, and the same shall be found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a high misdemeanor, and imprisoned in the penitentiary not less than five years, and may be fined in the discretion of the court. It shall be competent for any citizen after making purchase of any spirituous liquors, to cause the same to be analyzed by some known competent chemist, and if upon such analysis it shall be found to contain any foreign poisonous matter it shall be *prima facie* evidence against the party making such a sale.

SEC. 984. Adulterating liquors, penalty for selling recipes for. 1858-'9, c. 57, ss. 2, 3.

Any person who shall sell or offer to sell any recipe or formula whatever for adulterating any spirituous or alcoholic liquors, by mixing the same with any substance of whatever kind, except as is hereinafter provided, shall be guilty of a misdemeanor, and fined and imprisoned as is provided in the preceding section: *Provided*, that this section and the two preceding sections shall not be so construed as to prevent druggists, physicians, and persons engaged in the mechanical arts, from adulterating liquors for medical and mechanical purposes.

SEC. 985. Arson and other burnings, punishment for. R. C., c. 34, s. 2. 1870-'1, c. 222.

(1) Any person convicted according to due course of law of the crime of arson, shall suffer death.

State v. Bullock, 63—570; State v. Jones, 69—364.

1863, c. 17. 1868-'9, c. 167, s. 5.

(2) Every person convicted of any wilful burning of any gin house or tobacco house, or any part thereof, or, in the night time, of any stable containing a horse or a mule, shall be imprisoned in the penitentiary not less than five, nor more than ten years.

State v. England, 78—552; State v. Lawrence, 81—522; State v. Thorne, 81—555; State v. Green, 85—600; State v. Dunn, 86—731.

R. C., c. 34, s. 7. 1830, c. 41, s. 1. 1868-'9, c. 167, s. 5.

(3) Any person who shall wilfully and maliciously burn the state house, or any of the public offices of the state, or any court house, jail, arsenal, clerk's office, register's office, or any house belonging to any county or incorporated town in the state, or to any incorporated company whatever, in which are kept the archives, documents, or public papers of such county, town, or corporation, shall, on conviction, be imprisoned in the penitentiary for not less than five, nor more than ten years.

State v. Mitchell, 5 Ired., 350; State v. Upchurch, 9 Ired., 454; State v. Laughlin, 8 Jon., 455.

R. C., c. 34, s. 30. 1825, c. 1278.

(4) If any person, with intent to destroy the same, shall wilfully and maliciously set fire to and burn any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house, or any house belonging to any county or incorporated town, used for public purposes other than the keeping of archives,

documents and public papers, or any house belonging to an incorporated company and used in the business of such company; or if any person shall wilfully and maliciously attempt to burn any of the said houses or bridges, or any of the houses or buildings mentioned in this chapter, the person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

1874-'5, c. 133.

(5) Any person who shall wilfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, shall be guilty of a misdemeanor, and punished by imprisonment in the county jail or penitentiary for not less than four months nor more than five years.

1874-'5, c. 228. 7 and 8 Geo. IV., c. 30, s. 2.

(6) Whoever shall unlawfully and maliciously set fire to any church, chapel or meeting house, or shall unlawfully or maliciously set fire to any stable, coach house, out-house, warehouse, office, shop, mill, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person or persons, body politic or corporation, shall be guilty of felony, and imprisoned in the penitentiary for not less than five nor more than forty years.

State v. Janes, 78—504; State v. England, 78—552; State v. Thorne, 81—555; State v. Jenkins, 84—812.

1876-'7, c. 13.

(7) Any person who shall wilfully attempt to burn any dwelling house, uninhabited house, barn, stable, or out-house, or mill, manufacturing house, cotton gin, tobacco barn, granary or turpentine distillery, the property of another, the person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, and may also be fined, in the discretion of the court.

State v. Gillis, 4 Dev., 606; State v. Sandy, 3 Ired., 570; State v. Clark, 7 Jon., 167; State v. Laughlin, 8 Jon., 354, 455; State v. Jim, 8 Jon., 459;

State v. Cherry, 63—493; State v. Wise, 66—120; State v. Jones, 69—364; State v. King, 69—419; State v. Gailor, 71—88.

SEC. 986. Artificial islands or lumps; penalty for erecting. 1883, c. 109.

It shall be unlawful for any person to erect artificial islands or lumps in any of the waters of the state east of the Wilmington and Weldon Railroad and Petersburg and Weldon Railroad.

Any person violating this section shall be guilty of a misdemeanor.

SEC. 987. Assault, punishment therefor. 1870-'1, c. 43, s. 2. 1873-'4, c. 176, s. 6. 1879, c. 92. ss. 2, 6.

In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court: *Provided*, that where no deadly weapon has been used and no serious damage done, the punishment in assaults, assaults and batteries, and affrays, shall not exceed a fine of fifty dollars or imprisonment for thirty days; but this proviso shall not apply to cases of assault with intent to kill, or with intent to commit rape.

State v. Heidleburg, 70—496; *In re.* Schenck, 74—607; State v. McNeill, 75—15; State v. Miller, 75—73; State v. Taylor, 83—601; State v. Berry, 83—603; State v. Martin, 85—508; State v. Watts, 85—517; State v. Gainus, 86—632.

SEC. 988. Bigamy, what and how punished. 9 Geo. IV., c. 31, s. 22. R. C., c. 34, s. 15. 1790, c. 323. 1809, c. 783. 1829, c. 9.

If any person being married, shall marry any other person, during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina, or elsewhere, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of felony, and imprisoned in the penitentiary or county jail, for any term not less than four months nor more than ten years; and any such offence may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county: *Provided*, that nothing herein shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have

been living within that time, nor shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage, nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

State v. Norman, 2 Dev., 222; State v. Patterson, 2 Ired., 346; State v. Robbins, 6 Ired., 23; State v. Bray, 13 Ired., 289; State v. Barnett, 83—615.

Sec. 989. Blackmailing by accusation, threatening letter or other threats. R. C., c. 34, s. 110.

If any person shall knowingly send or deliver any letter or writing demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, or imprisonment in the penitentiary, with a view or intent to extort or gain from such person any chattel, money, or valuable security, every such offender shall be guilty of a misdemeanor.

Sec. 990. Bribery of jurors. R. C., c. 34, s. 34. 5 Edw. III., c. 10. 34 Edw. III., c. 8. 38 Edw. III., c. 12.

If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a state prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be guilty of an infamous crime, and imprisoned in the penitentiary or county jail not less than four months nor more than ten years.

Sec. 991. Bribery; officers receiving bribes, guilty of felony. 1868-'9, c. 176, s. 2.

Any person hold ng office under the laws of this state who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, shall be guilty of a felony, and punished by imprisonment in the peni-

tentiary for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court.

SEC. 992. Bribery; offering a bribe punished. 1870-'1, c. 232.

Any person offering a bribe, whether it be accepted or not, shall be guilty of felony, and punished by imprisonment for a term not less than one year nor more than five years in the penitentiary or county jail, in the discretion of the court.

SEC. 993. Bridges, misdemeanor to demolish, break or injure. 1883, c. 271.

If any person shall unlawfully and wilfully demolish, destroy, break or tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the state, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court.

SEC. 994. Burglary, how punished. 1870-'1, c. 222.

Any person convicted, according to due course of law, of the crime of burglary, shall suffer death.

State v. Wise, 66—120, 67—281; State v. Evans, 69—40; State v. Jones, 69—364; State v. Johnson, 75—123.

SEC. 995. Burglary, breaking out of dwelling house in the night time. R. C., c. 34, s. 8. 12 Anne, c. 7, s. 3. 78 Geo. IV., c. 29, s. 11. 24, 25 Vic. c. 96, s. 51.

If any person shall enter the dwelling house of another with intent to commit any felony or other infamous crime therein, or being in such dwelling house, shall commit any felony or other infamous crime therein, and shall, in either case, break out of the said dwelling house, in the night time, such person shall be guilty of burglary.

State v. Henry, 9 Ired., 463; State v. Boone, 13 Ired., 244; State v. Whit., 4 Jon., 349; State v. Jenkins, 5 Jon., 430; State v. Willis, 7 Jon., 190; State v. McDaniel, Winst., 249; State v. Jake, 2 Winst., 80; State v. Johnson, Phil., 186; State v. McPherson, 70—239.

SEC. 996. Burglary, breaking into certain houses or buildings, a misdemeanor. 1874-'5, c. 166. 1879, c. 323.

If any person shall break or enter a dwelling house of another otherwise than by a burglarious breaking; or shall break and enter a store-house, shop, ware-house, banking-house, counting-house, or other building, where any merchandise, chattel, money, valuable security, or

other personal property shall be; or shall break and enter any uninhabited house; with intent to commit a felony or other infamous crime therein; every such person shall be guilty of an infamous crime, and imprisoned in the penitentiary or county jail, not less than four months, nor more than ten years.

State v. Dozier, 73—117; State v. Hughes, 86—662.

Sec. 997. Burglary or other felony, the intent to commit, an infamous crime. 24, 25 Vict., c. 96, s. 58.

If any person shall be found by night, armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit a felony or other infamous crime therein; or shall be found by night, having in his possession, without lawful excuse, any pick lock, key, bit or other implement of house breaking; or shall be found by night in any such building, with intent to commit a felony or other infamous crime therein, such person shall be guilty of an infamous crime, and punished by fine or imprisonment, or both, in the discretion of the court.

State v. Dozier, 73—117.

Sec. 998. Buying and selling offices. R. C., c. 34, s. 33. 5, 6 Edw. VI., c. 16, ss. 1, 5.

If any person shall bargain or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward, or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or profit, for an office or the deputation of an office, or any part thereof, which office or any part thereof shall touch or concern the administration or execution of justice, or the receipt, collection, control, or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or profit, or shall make any promise, agreement, bond or assurance for any of the said offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court.

Sec. 999. Castration with malice aforethought. R. C., c. 34, s. 4. 1831, c. 40, s. 1. 1868-'9, c. 167, s. 6.

If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim, or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall suffer imprisonment in the penitentiary for not less than five nor more than sixty years.

State v. Peter, 8 Jon., 19; State v. King, 69—419; State v. Skidmore, 87—509.

Sec. 1000. Castration or maiming without malice aforethought. R. C., c. 34, s. 47. 1754, c. 56. 1791, c. 339, ss. 2, 3. 1831, c. 40, s. 2.

If any person shall, on purpose and unlawfully, but without malice aforethought, cut or slit the nose, bite or cut off a nose, lip or ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim, or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person; the person so offending shall be imprisoned in the county jail or penitentiary not less than six months nor more than ten years, and fined, in the discretion of the court.

State v. Irwin, 1 Hay., 112; State v. Evans, 1 Hay., 281; State v. Orman, 1 D. & B., 119; State v. Martin, 3 Dev., 329; State v. Girken, 1 Ired., 121; State v. Green, 7 Ired., 39; State v. Miller, 75—73; State v. Skidmore, 87—509.

Sec. 1001. Cattle and live stock, mismarking, a misdemeanor. R. C., c. 34, s. 57. 1797, c. 485, s. 2.

If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, or ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

State v. Goode, 1 Hawks, 463; State v. Collins, 3 Dev., 117; State v. Davis, 2 Ired., 153; State v. O'Neal, 7 Ired., 251; State v. Allen, 72—114; State v. King, 84—737.

Sec. 1002. Cattle and live stock, the wilful killing or injuring of, running at large in the range. R. C., c. 34, s. 104. 1850, c. 94, ss. 1, 2.

If any person shall unlawfully and on purpose kill,

maim, or injure any live stock, lawfully running at large in the range, or in the field or pasture of the owner, whether done with the actual intent to injure the owner, or to drive the stock from the range, or any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor: *Provided*, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places.

State v. Waters, 6 Jon., 276; State v. Butler, 65—309; State v. Manuel, 72—201; State v. Simpson, 73—269; State v. Hill, 79—656; State v. Pollard, 83—597.

Sec. 1003. Cattle and live stock, injury to, in unlawful inclosure. 1868-'9, c. 253.

If any person shall wilfully and unlawfully kill or abuse any horse, mule, hog, sheep or other cattle, the property of another, in any inclosure not surrounded by a lawful fence, such person shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court: *Provided*, that this section shall not apply to any county or territory where the stock law prevails.

State v. Staton, 66—640; State v. Allen, 69—23; State v. Painter, 70—70; State v. Manuel, 72—201; State v. Simpson, 73—269; State v. Hill, 79—656; State v. Parker, 81—531, 548; State v. Whitaker, 85—566.

Sec. 1004. Concealing birth of child. R. C., c. 34, s. 28. 1818, c. 985. 1883, c. 390. 21 Jac. 1, c 27. 43 Geo. III, c. 58, s. 3. 9 Geo. IV, c. 31, s. 14.

If any woman or other person shall by secretly burying or otherwise disposing of the dead body of a new born child of such woman, or any other woman, or endeavors to conceal the birth of such child, such person shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, such imprisonment to be in the county jail or penitentiary, at the discretion of the court: *Provided*, that the imprisonment in the penitentiary shall in no case exceed a term of ten years: *Provided further*, that nothing in this section shall be construed to prevent the mother, who may be guilty of the homicide of her child, from being prosecuted and punished for the same according to the principles of the common law. And any person aiding, counseling or abetting any woman in concealing the birth of her child, shall be guilty of a misdemeanor.

State v. Jeffreys, 3 Mur., 480; State v. Joiner, 4 Hawks, 350.

Sec. 1005. Concealed weapons, the carrying of unlawfully, a misdemeanor. 1879, c. 127. 1883, c. 81.

If any one, except when on his own premises, shall carry concealed about his person any pistol, bowie knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or razor or other deadly weapon of like kind, he shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the court. And if any one, not being on his own lands, shall have about his person any such deadly weapon, such possession shall be *prima facie* evidence of the concealment thereof. This section shall not apply to the following persons: officers and soldiers of the United States army, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the state guard when called into actual service, officers of the state, or of any county, city or town, charged with the execution of the laws of the state, when acting in the discharge of their official duties.

State v. Wilson, 84—777; State v. Woodfin, 85—598; State v. Speller 86—697; State v. Roten, 86—701; State v. Woodfin, 87—526; State v. Gilbert, 87—527.

Sec. 1006. Cotton, sale of, within certain hours prohibited. 1873-'4, c. 62. 1874-'5, c. 70.

If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor.

Sec. 1007. Cotton, weighing of, regulated. 1874-'5, c. 58, ss. 1, 3.

If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale or package of lint cotton, for or on account of the draft, turn or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined three hundred dollars or imprisoned, in the discretion of the court: *Provided*, that the weigher may make such proper deduction as shall be agreed on by him, and the seller, or his agent, for water,

dirt or other foreign substance, in or on such bag, bale, or package of cotton, or for other just cause.

Sec. 1008. Cotton weigher's oath, the failure of the weigher to make, subscribe, and file with the register of deeds, a misdemeanor. 1874-'5, c. 58, s. 2.

Every public weigher of cotton shall, before entering on the duties of his office, make and subscribe the oath prescribed for cotton weighers, which, when made, shall be filed in the office of the register of deeds for the county in which the person acts as weigher, and said register shall make a note of the same, and any person acting as weigher without making and filing the oath, shall be guilty of a misdemeanor, and shall be fined twenty-five dollars for every bag, bale, or package of cotton which he shall have unlawfully weighed before being qualified to do so.

Sec. 1009. County claims, speculation in, indictable. 1868-'9, c. 260.

If any clerk, sheriff, register of deeds, county treasurer, or other county, city, town or state officer shall engage in the purchasing of any county, city, town or state claim at a less price than its full and true value, or at any rate of discount thereon, or be interested in any speculation in any such claims, he shall be guilty of a misdemeanor, and fined or imprisoned, and also shall be liable to removal from office at the discretion of the court.

Sec. 1010. Crime against nature. R. C., c. 34, s. 6. 1868-'9, c. 167, s. 6. 25 Hen. VIII, c. 6. 5 Eliz., c. 17.

If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the penitentiary not less than five nor more than sixty years.

State v. King, 69—419.

Sec. 1011. Directors, commissioners and other public officers forbidden to become contractors. R. C., c. 34, s. 38. 1825, c. 1269. 1826, c. 29.

No person, appointed or elected a commissioner or director to discharge any trust wherein the state or any county, city, or town may be in any manner interested, shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or

in the profits thereof, either privately or openly, singly or jointly with another; and any person so offending shall be guilty of a misdemeanor.

Sec. 1012. Dueling, sending, accepting or bearing a challenge, a misdemeanor. R. C., c. 34, s. 48. 1802, c. 608, s. 1.

If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and moreover, be ineligible to any office of trust, honor or profit in the state, any pardon or reprieve notwithstanding.

State v. Farrier, 1 Hawks, 487.

Sec. 1013. Dueling, when death ensues, murder. R. C., c. 34, s. 3. 1802, c. 608, s. 2.

If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall suffer death; and all their aiders or abettors shall be considered accessories before the fact.

Sec. 1014. Embezzlement punished as larceny. 1871-'2, c. 145, s. 2. 21 Hen. VII, c. 7. 39 Geo. III, c. 85. 7 and 8 Geo. IV, c. 39, s. 47. 24 and 25 Vict., c. 96, s. 68.

If any officer, agent, clerk, employee or servant of any corporation, person or copartnership, (except apprentices and other persons under the age of sixteen years,) shall embezzle or fraudulently convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, which shall have come into his posession or under his care, he shall be guilty of felony, and punished as in cases of larceny.

Sec. 1015. Embezzlement of state bonds or other property of the state, by state officers or employees. 1874-'5, c. 52.

If any officer, agent or employee of the state, or other

person having or holding in trust for the same any bonds issued by said state, or any security, or other property and effects of the same, shall embezzle or knowingly and wilfully misapply or convert the same to his own use, or otherwise wilfully or corruptly abuse the said trust, such offender and all persons aiding and abetting, or otherwise assisting therein, shall be guilty of felony, and fined not less than ten thousand dollars, or imprisoned in the penitentiary not less than twenty years, or both, at the discretion of the court.

Sec. 1016. Embezzlement of trust funds by public officers, felony. 1876-'7, c. 47.

If any officer, agent, or employee of any city, county, or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise wilfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be guilty of felony, and fined and imprisoned in the discretion of the court.

State v. Heaton, 81—542.

Sec. 1017. Embezzlement by treasurer of benevolent or religious institution, a misdemeanor. 1879, c. 105.

If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation, to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

Sec. 1018. Embezzlement by officer of railroad company, felony. 1870-'1, c. 103, s. 1.

If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company, shall embezzle any moneys, bonds, or other valuable funds, or securities, with which such president, secretary, treasurer, director, engineer, agent, or other officer, shall be charged by virtue of his office, or agency, or shall in any way, directly or indirectly, apply or appropriate the same, for the use or benefit of himself, or any other person,

state, or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent, or other officer, for every such offence the person so offending shall be guilty of felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be imprisoned in the penitentiary, not less than three, nor more than ten years, and fined not less than one thousand, nor more than ten thousand dollars.

State v. Jackson, 82—565.

Sec. 1019. Embezzlement, conspiracy with officer of railroad. 1870-'1, c. 103, s. 2.

If any person shall agree, combine, collude, or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company, to commit any offence specified in the preceding section, such person so offending shall be guilty of felony, and on conviction in the superior or criminal court of a county through which the railroad of any company against which such offence may be perpetrated passes, shall be imprisoned in the penitentiary for not less than three, nor more than ten years, and fined not less than one thousand, nor more than ten thousand dollars.

State v. Jackson, 82—565.

Sec. 1020. Embezzlement, sufficiency of indictment for. 1871-'2, c. 145, s. 2.

In indictments for embezzlement, except when the offence shall relate to a chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved

Sec. 1021. Escape, prison-breach by criminal. R. C., c. 34, s. 19. 1 Edw. II., st. 2d.

Any person who shall break prison, being lawfully confined therein, shall be guilty of a misdemeanor.

State v. Brown, 82—585.

Sec. 1022. Escape, officer indictable for, what necessary for state to prove. R. C., c. 34, s. 35. 1791, c. 343, s. 1.

When any person charged with a crime or misde-

meanor, or sentenced by the court upon conviction of any offence, shall be legally committed to any sheriff, constable or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any *capias* issuing on a bill of indictment, information, or other criminal proceeding, and such sheriff, deputy sheriff, coroner, constable or jailer, wilfully or negligently, shall suffer such person, so charged, or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, constable or jailer so offending, being thereof convicted, shall be removed from office, and fined at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: *Provided*, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable, as if such conviction and removal had not been had.

State v. Garrell, 82—580.

Sec. 1023. Escape, duty of solicitor in such a case. R. C., c. 34, s. 36. 1791, c. 343, s. 2.

It is hereby declared to be the duty of solicitors, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offence against the state, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, constable or jailer, to take the necessary measures to prosecute such sheriff, or other officer so offending.

Sec. 1024. False lights, holding out, on or near seashore. R. C., c. 34, s. 58. 1831, c. 42.

Any person who shall make or display, or cause to be made or displayed any false light or beacon, on or near the sea-coast, for the purpose of deceiving and misleading masters of vessels, and thereby put them in danger of shipwreck, shall be guilty of a felony, and imprisoned in the penitentiary for not less than four months nor more than ten years.

Sec. 1025. False pretence and false token, cheating by. R. C., c. 34, s. 67. 1811, c. 814, s. 2. 24, 25 Vict., c. 96, s. 88. 33 Hen. VIII, c. 1, ss. 1, 2. 30 Geo. II, c. 24, s. 1. 52 Geo. III, c. 64, s. 1. 7 and 8 Geo. IV, c. 29, s. 53.

If any person shall knowingly and designedly, by means of any forged or counterfeited paper, in writing or in print, or by any false token, or other false pretence whatsoever, obtain from any person or corporation within the state any money, goods, property, or other thing of value, or any bank-note, check, or order for the payment of money, issued by, or drawn on, any bank or other society or corporation within this state or any of the United States, or on any treasury warrant, debenture, certificate of stock, or public security, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, with intent to cheat or defraud any person or corporation of the same, such person shall be guilty of a misdemeanor for fraud and deceit, and imprisoned in the penitentiary not less than four months nor more than ten years, and fined, in the discretion of the court. *Provided*, that if, on trial of any one indicted for such misdemeanor, it shall be proved that he obtained the property in such manner as to amount to larceny, he shall not, by reason thereof, be entitled to be acquitted of the misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts: *Provided further*, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.

State v. Simpson, 3 Hawks, 620; State v. Patilio, 4 Hawks, 348; State v. Justice, 2 Dev., 199; State v. Burrows, 11 Ired., 477; State v. Phifer, 65—320; State v. Jones, 65—395; State v. Jones, 70—75; State v. Johnson, 75—123; State v. Fitzgerald, 1 D. & B., 408; State v. Gillespie, 80—396; State v. Reese, 83—637; State v. Allred, 84—749; State v. Heffner, 84—751; State v. Eason, 86—674; State v. Wilbourne, 87—529.

Sec. 1026. False pretence, obtaining signature by. 1871-'2, c. 92.

Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretence, obtain the signature of any person or persons to any written instrument, the false making of which would be punishable as forgery, or obtain from any person or persons any money, goods, wares, merchandise or other property or valuable thing whatsoever, shall be punishable by fine not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary for a term not less than one year nor more than five years, or both, at the discretion of the court.

State v. Phifer, 65—321; State v. Jones, 70—75; State v. Young, 76—258; State v. Pickett, 78—459; State v. Munday, 78—460; State v. Austin, 79—624; State v. Lambreth, 80—393; State v. Gillespie, 80—396; State v. Holmes, 82—607; State v. Reese, 83—637; State v. Allred, 84—749; State v. Heffner, 84—751; State v. Eason, 86—674.

Sec. 1027. False pretence; obtaining advances upon representation of ownership of property, and promising to apply the same to payment of the debt, and failing to do so. 1879, cs. 185, 186.

If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description, from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel, or personal property, which said property, or the proceeds of which, the said owner in said representation thereby agrees to apply to the discharge of the debt so created as aforesaid, and the said owner shall fail to apply said produce or other property, or the proceeds thereof, in accordance with said agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. This offence shall be punishable as in the preceding section.

Sec. 1028. Forcible entry and detainer. R. C., c. 49, s. 1. 5 Rich. II., c. 8.

No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with

multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor.

State v. Fort & Gause, 4 D. & B., 192; State v. Smith, 2 Ired., 127; State v. Prigden, 8 Ired., 84; State v. Whitfield, 8 Ired., 315; Jordan v. Rouse, 1 Jon., 119; State v. Bordeaux, 241; State v. Eason, 70—88; State v. Yarborough, 70—250; R. R. Co. v. Johnston, 70—348; R. R. v. Sharpe, 70—509; Perry v. Shepherd, 78—83; State v. Shepard, 82—614; State v. Loney, 87—535.

Sec. 1029. Forgery, how punished. R. C., c. 34, s. 59. 1801, c. 572. 5 Eliz., c. 14, ss. 2, 3, &c. 21 Jac. 1, c. 26 (A. D. 1623).

If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to be forged or made, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance, or receipt for money or goods; or any receipt, or release for any bond, note, bill, or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished by imprisonment in the penitentiary or county jail not less than four months nor more than ten years, and fined, in the discretion of the court.

State v. Dalton, 1 Hawks 3; State v. Daurden, 2 Dev., 443; State v. Britt., 3 Dev., 122; State v. Morgan, 2 D. & B., 348; State v. Batemon, 3 Ired., 474; State v. Thornburg, 6 Ired., 79; State v. Gherkin, 7 Ired., 206; State v. Weaver, 13 Ired., 491; State v. Lytle, 64—255; State v. Lamb, 65—419; State v. Thorn, 66—644; State v. Leak, 80—403; State v. Lane, 80—407; State v. Hastings, 86—596; State v. Williams, 86—671.

Sec. 1030. Forgery and counterfeiting bank-notes, checks and other securities. R. C., c. 34 s. 60. 1819, c. 994, s. 1.

If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this state, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier there-

of; or any of the securities purporting to be issued by or on behalf of the state, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the state, the person so offending shall be guilty of felony, and punished in like manner as if he had been convicted under the preceding section.

State v. Twitty, 2 Hawks, 248; State v. Ward, 2 Hawks, 443; State v. Peter, 8 Jon., 19; State v. Tom, Busb., 214.

Sec. 1031. Forgery and counterfeiting, passing, or attempting to pass, notes forged or counterfeited. R. C., c. 34, s. 61. 1819, c. 994, s. 2.

If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check, or security, as is mentioned in the preceding section; or shall pass, or deliver, or attempt to pass, or deliver any of them to another person, (knowing the same to be falsely forged or counterfeited), the person so offending shall be punished by imprisonment in the county jail or penitentiary, not less than four months nor more than ten years.

State v. Harris, 5 Ired., 287.

Sec. 1032. Forgery and counterfeiting of certificates of stock by officer or agent of a corporation. R. C., c. 34, s. 62.

If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, or holder, or bearer, is entitled to or has interest in the stock of such corporation, when in fact such person, or holder, or bearer, is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign, or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall suffer the same punishment as is prescribed in the preceding section.

Sec. 1033. Forgery and counterfeiting, selling forged judgments, bonds or other securities. R. C., c. 34, s. 63.

If any person shall sell, by delivery, indorsement, or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a justice of the peace, or any bond, promissory note, bill of exchange, order, draft, or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

State v. Davis, 84—787; State v. Collins, 85—511.

Sec. 1034. Forgery of names to petitions and certain other papers; punishment therefor and for using such forged paper. 1883, c. 275.

Any person who shall wilfully sign, or cause to be signed, or wilfully assents to the signing of the name of any person without his consent, or of any deceased or fictitious person to any petition or recommendation with the intent of procuring any commutation of sentence, pardon, or reprieve of any person convicted of any crime or offence, or for the purpose of procuring such pardon, reprieve or commutation, to be refused or delayed by any public officer, or with the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, or imprisoned in the county jail or penitentiary not exceeding five years, or both, at the discretion of the judge; and any person who shall wilfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, shall be guilty of a misdemeanor, and punished in like manner and degree.

Sec. 1035. Forgery and counterfeiting of foreign coin, passing or attempting to pass such coin. R. C., c. 34, s. 64. 1811, c. 814, s. 3.

If any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or coun-

terfeited, or willingly aid or assist in falsely making, forging, or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any foreign coin of gold or silver, which is in common use and received in the discharge of contracts by the citizens of the state; or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or bring into the state from any other place, with intent to pass, utter, publish, or sell as true, any such false, forged, or counterfeited coin, knowing the same to be false, forged, or counterfeited, with intent to defraud any corporation, or any person whatsoever, every person so offending shall be guilty of a misdemeanor, and punished by imprisonment in the penitentiary or county jail, for not less than four months nor more than ten years.

Sec. 1036. Forgery and counterfeiting, having in possession instruments for counterfeiting foreign coin. R. C., c. 34, s. 65. 1811, c. 814, s. 4.

If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other foreign coin made of gold or silver, which is in common use and received in discharge of contracts by the citizens of the state, and shall be duly convicted thereof, the person so offending shall suffer as prescribed in the preceding section, and shall be further liable to be fined, at the discretion of the court, not more than five hundred dollars, and be imprisoned not more than twelve months.

State v. Collins, 3 Hawks, 191.

Sec. 1037. Forgery and counterfeiting, fraudulently connecting different parts of several genuine bank notes, or other instruments. R. C., c. 34, s. 66.

If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged.

Sec. 1038. Forgery and counterfeiting of private marks, stamps or labels. 1870-'1, c. 253, s. 1.

Every person who shall knowingly and wilfully forge, or counterfeit or cause or procure to be forged or counter-

feited, the private marks, tokens, stamps or labels of any mechanic, manufacturer or other person being a resident of this state or of the United States, with intent to deceive and defraud the purchasers, mechanics or manufacturers of any goods, wares or merchandise whatsoever, upon conviction thereof shall be punished by a fine of not less than fifty dollars and not exceeding one thousand dollars, or by imprisonment of not less than thirty days or more than five years, or both fine and imprisonment, at the discretion of the court.

Sec. 1039. Forgery and counterfeiting, penalty for selling merchandise with forged or counterfeited marks, stamps or labels. 1870-'1, c. 253, s. 2.

Every person who shall vend any goods, wares or merchandise having thereon any forged or counterfeited marks, tokens, stamps or labels purporting to be the marks, tokens, stamps or labels of any person being a resident of the state or of the United States, knowing the same at the time of the purchase thereof by him to be forged or counterfeited, shall be guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Sec. 1040. Forgery and counterfeiting, fraudulent use of brands. 1874-'5, c. 225.

If any person shall knowingly use the mark or brand of any other person on any sack, or shall knowingly impress on any sack the mark or brand of another person, with intent to defraud or for the purpose of enhancing the value of his own property, the person so offending shall be guilty of a misdemeanor, and punished as if convicted of larceny.

Sec. 1041. Fornication and adultery. R. C., c. 34, s. 45. 1805, c. 684.

If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: *Provided*, that the admissions or confessions of one shall not be received in evidence against the other.

State v. Cox, N. C. T. R., 165; State v. Aldridge, 3 Dev., 331; State v. Dickenson, 1 D. & B., 349; State v. Jolly, 3 D. & B., 110; State v. Fore, 1 Ired., 378; State v. Waters, 3 Ired., 455; State v. Cowell, 4 Ired., 231, State v. Hooper, 5 Ired., 201; State v. Mainor, 6 Ired., 340; State v. Poteet;

8 Ired., 23; State v. Parham, 5 Jon., 416; State v. Lyerly, 7 Jon., 158; State v. Melton, Busb., 49; State v. Schlachter, Phil., 520; State v. Hairston, 63—451; State v. Reinhardt, 63—547; State v. Custer, 65—339; State v. Adams, 65—537; State v. Vermington, 71—264; State v. Perry, 71—522; State v. Folly, 74—322; State v. Phipps, 76—203; State v. Ross, 76—242; State v. Kennedy, 76—251; State v. Ballard, 79—627; State v. Waller, 80—401; State v. Lashley, 84—754; State v. Kemp, 87—538.

Sec. 1042. Gambling, betting at cards in tavern or retail house, a misdemeanor. R. C., c. 34, s. 75. 1799, c. 526. 1801, c. 581. 1831, c. 26.

If any person shall bet money, property, or other thing of value, whether the same be in stake or not, at any game of cards which shall be played in any ordinary, tavern, or house of entertainment, or in any house wherein spirituous liquors are retailed, or on any part of the premises occupied with such ordinary, tavern, house of entertainment, or house wherein spirituous liquors are sold as aforesaid, or shall play at such game of cards; the person so offending shall be guilty of a misdemeanor, and any fine imposed shall not be less than ten dollars.

State v. Terry, 4 D. & B., 185; State v. Smitherman, 1 Ired., 14; State v. Black, 9 Ired., 378; State v. Keisler, 6 Jon., 73; State v. Brannen, 8 Jon., 208.

Sec. 1043. Gambling, keeper of tavern or liquor shop, allowing games to be played in his house, guilty of a misdemeanor. R. C., c. 34, s. 76. 1799, c. 526. 1801, c. 581. 1831, c. 26.

If any keeper of an ordinary, or house of entertainment, or of a house wherein liquors are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or on any part of the premises occupied therewith; or shall furnish persons so playing or betting with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and fined not less than ten dollars, and be imprisoned not more than thirty days.

State v. Keisler, 6 Jon., 73.

Sec. 1044. Gambling, faro-banks and tables prohibited. R. C., c. 34, s. 71. 1848, c. 34. 1856-'7, c. 25.

If any person shall open, establish, use, or keep a faro-bank or a faro-table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property, or thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor and

fined at least two hundred dollars and imprisoned not less than three months.

State v. Keisler, 6 Jon., 73; State v. Brannen, 8 Jon., 208; State v. Bryant, 74—207.

Sec. 1045. Gambling, gaming tables of every kind prohibited. R. C., c. 34, s. 72. 1791, c. 336. 1798, c. 502, s. 2.

If any person shall establish, use or keep any gaming-table (other than a faro-bank) by whatever name such table may be called, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars, and be imprisoned not less than thirty days; and every person who shall play thereat or thereat bet any money, property or thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and any fine imposed on the offender shall not be less than ten dollars.

State v. Bishop, 8 Ired., 266; State v. Gupton, 8 Ired., 271; State v. Bryant, 74—207.

Sec. 1046. Gambling, person allowing gaming-tables on his premises indictable. R. C., c. 34, s. 73. 1798, c. 502, s. 3. 1800, c. 552.

If any person shall knowingly suffer to be opened, kept or used in his house or any part of the premises occupied therewith, any of the gaming-tables by this chapter prohibited, he shall forfeit and pay to any one who will sue therefor two hundred dollars, and shall also be guilty of a misdemeanor and fined and imprisoned.

State v. Keisler, 6 Jon., 73.

Sec. 1047. Gambling, lotteries forbidden. R. C., c. 34, s. 69. 1834, c. 19, s. 1. 1874-'5, c. 96.

If any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person, by such way and means, expose or set to sale any house or houses, real estate, or any goods or chattels, cash, or written evidence of debt, or certificates of claims, or anything of value whatsoever; every person so offending shall be guilty of a misdemeanor, and be fined not exceeding two thousand dollars, or imprisoned not exceeding six months, or both, in the discretion of the court. Any person or society, association, company or organization of persons whatsoever, who engage in disposing of any species of

property whatsoever, money or evidences of debt, or in any manner distribute gifts or prizes upon tickets or certificates sold for that purpose, shall be held liable to indictment and prosecution under this section.

State v. Krebs, 64—604; State v. Bryant, 74—207; State v. Morris, 77—512.

Sec. 1048. Gambling, sale of lottery tickets forbidden. R. C., c. 34, s. 70. 1834, c. 19, s. 2.

If any person shall sell, barter or dispose of any lottery ticket or order, for any number or shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the state for or on behalf of any such lottery, to be drawn or paid either out of or within the state, such person shall be guilty of a misdemeanor, and punished as in the preceding section.

Sec. 1049. Gambling, justices of the peace and other officers directed to destroy gaming tables. R. C., c. 34, s. 74. 1791, c. 336. 1798, c. 502, s. 2.

All justices of the peace, sheriffs, constables, and officers of police are hereby authorized and directed, on information made to them on oath, that any gaming table prohibited to be used by this chapter, is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect their destruction.

Sec. 1050. Gambling, justices and other judicial officers authorized to summon witnesses touching the whereabouts of gaming tables. 1858-'9, c. 34, s. 1.

All justices of the peace, intendants and magistrates of police, mayors of towns, and judges of the supreme or superior court, who shall have good reason to believe that any person within their jurisdictions has knowledge of the existence and establishment of any faro-bank or faro-table, or gambling tables, prohibited by this chapter, in any town or county within their several jurisdictions, and such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice of the peace, intendant and magistrate of police, mayor of town, or judge of supreme or superior court, to issue to the sheriff of the county, or any constable of the town or township in which said faro-bank or faro-table, or gaming table or tables are supposed to be, a subpœna

capias ad testificandum, or summons in writing, commanding such person to appear immediately before said justice of the peace, intendant or magistrate of police, mayor or judge. and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of said gaming table or tables, faro-bank or faro-table, and the names and personal description of the keepers thereof; and such evidence when obtained shall be considered and held in law as an information on oath, and said justice, intendant, magistrate, mayor or judge, may thereupon proceed to seize and arrest said keepers and destroy said tables, or issue process therefor, in like manner as they may do by authority of the preceding section.

Sec. 1051. Gambling, money or property bet at any prohibited game liable to be seized. R. C., c. 34, s. 77. 1798, c. 502, s. 3.

All moneys, or other property or thing of value exhibited for the purpose of alluring persons to bet at any prohibited game, or actually staked or bet on such game, shall be liable to be seized by any justice of the peace, or by any person acting under his warrant. And the moneys or other property or thing, which shall be so seized, shall belong one-half to the person seizing them, and the other half to the use of the poor.

Sec. 1052. Gambling, persons opposing destruction of gaming tables or seizure of moneys staked on forbidden games, how punished. R. C., c. 34, s. 78. 1798, c. 502, s. 4.

If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property, or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars, for the use of the state and the person so opposed; and shall, moreover, be guilty of a misdemeanor.

Sec. 1053. Ginseng, penalty for digging, between April and September. 1866-'7, c. 60.

Any person digging ginseng between the first day of April and the first day of September, shall forfeit and pay the sum of ten dollars for each day or part of a day's digging, and shall also be guilty of a misdemeanor:

Provided, that no man shall be prevented from destroying ginseng upon his own premises.

Sec. 1054. Highways and public roads, overseer of, neglecting his duty. R. C., c. 34, s. 39. 1786, c. 256, s. 4.

Every overseer of a road, who shall wilfully neglect any of the duties imposed on him by law, shall be guilty of a misdemeanor.

State v. Everit, 2 Car. L. R., 633; State v. Nicholson, 2 Mur., 135; State v. Small, 11 Ired., 571; State v. Long, 76—254; State v. Long, 81—563; State v. McDowell, 84—798.

Sec. 1055. Homicide, manslaughter, punishment therefor. 1879, c. 255. R. C., c. 34, s. 24. 4 Hen. VII, c. 13. 1816, c. 918.

Every person who shall commit the crime of manslaughter shall be punished by imprisonment in the county jail or penitentiary not less than four months nor more than twenty years.

Sec. 1056. Homicide, manslaughter, punishment for second offence. R. C., c. 34, s. 25.

Every person who, having been convicted of the crime of manslaughter and sentenced thereon, shall be convicted of a second crime of the like nature, shall be imprisoned in the penitentiary not less than five nor more than sixty years; and in every such case of conviction for such second offence, the prior conviction of the same person and sentence thereon may be shown to the court.

Sec. 1057. Homicide, murder, its punishment. 1868-'9, c. 167, s. 1. R. C., c. 34, s. 2. 1 Edw. VI, c. 12, s. 10. 23 Hen. VIII, c. 1, s. 3. 25 Hen. VIII, c. 3. 8 Eliz., c. 4. 18 Eliz., c. 7, s. 1.

Every person who is convicted, in due course of law, of any wilful murder of malice prepense, shall suffer death.

State v. King, 64—419.

Sec. 1058. Hunting for deer by fire-light. R. C., c. 34, s. 95. 1784, c. 212, ss. 1, 3. 1801, c. 595. 1856-'7, c. 24. 1879, c. 92.

If any person shall hunt for deer with a gun or guns in the woods in the night-time, by fire-light, the person so offending shall be guilty of a misdemeanor, and shall

pay a fine not exceeding fifty dollars, or be imprisoned not exceeding thirty days.

SEC. 1059. Hunting by fire-light, accomplices. R. C., c. 34, s. 96. 1774, c. 103.

When more persons than one are engaged in committing the offence of fire-hunting, any one may be compelled to give evidence against all others concerned; and the witness, upon giving such information, shall be acquitted and held discharged from all penalties and pains to which he was subject by his participation in the offence.

SEC. 1060. Incest, carnal intercourse between grand parent and grand child, parent and child, brother and sister, a felony. 1879, c. 16, s. 1.

In all cases of carnal intercourse between grand parent and grand child, parent and child, and brother and sister, of the half or whole blood, the parties shall be guilty of felony, and punished for every such offence by imprisonment in the county jail or penitentiary for a term not exceeding five years, in the discretion of the court.

State v. Keesler, 78—469.

SEC. 1061. Incest, carnal intercourse between uncle and niece, nephew and aunt, a misdemeanor. 1879, c. 16, s. 2.

In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and punished by fine or imprisonment, in the discretion of the court.

SEC. 1062. Injuries to houses, churches and fences. R. C., c. 34, s. 103.

If any person shall, by any other means than burning or attempting to burn, unlawfully and wilfully demolish, destroy, deface, injure, or damage any of the houses or buildings previously mentioned in this chapter; or shall unlawfully and wilfully burn, demolish, pull down, destroy, deface, damage, or injure any church, uninhabited house, outhouse, or other house or building not mentioned before in this chapter; or shall unlawfully and wilfully burn, destroy, pull down, injure, or remove any fence, wall, or other inclosure, or any part thereof surrounding or about any yard, garden, cultivated field or pasture, or about any church, grave-yard, factory, or

other house in which machinery is used, every person so offending shall be guilty of a misdemeanor.

State v. Upchurch, 9 Ired., 454; State v. Allen, 13 Ired., 36; State v. Mason, 13 Ired., 341; State v. Hedrick, 3 Jon., 375; State v. Clark, 7 Jon., 167; State v. Graham, 8 Jon., 397; State v. Williams, Busb., 197; State v. Perry, 64—305; State v. Mace, 65—344; State v. Roseman, 66—634; State v. Roseman, 70—235; State v. Hovis, 76—117; State v. McMinn, 81—585; State v. Padgett, 82—544; State v. Midgett, 85—538; State v. Watson, 86—626.

Sec. 1063. Landmarks, penalty for altering or removing. 1858-'9, c. 17.

If any person shall wilfully or fraudulently remove, alter or deface any landmark, in any wise whatsoever, such person shall be guilty of a misdemeanor: *Provided*, that this section shall not apply to such landmarks as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels.

Sec. 1064. Larceny or robbery of bank notes and other securities. R. C., c. 34, s. 20. 1811, c. 814, s. 1.

If any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check, or order for the payment of money issued by, or drawn on any bank, or other society or corporation within this state, or within any of the United States, or any treasury warrant, debenture, certificate of stock, or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation, (notwithstanding any of the said particulars may be termed in law a chose in action,) such felonious stealing, taking and carrying away, or taking by robbery, shall be felony of the same nature and degree, and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods, or property of any value, and such offender for every such offence, shall suffer such punishment, and be subject to the same pains, penalties and disabilities as he should or might have suffered, if he had feloniously stolen or taken by robbery money, goods, or other property of value.

State v. Rout, 3 Hawks, 618; State v. Brown, 8 Jon., 443; State v. Fulford, Phil., 563; State v. Banks; Phil., 577; State v. Thomason, 71—146; State v. Carter, 72—99; State v. Collins, 72—144; State v. Freeman, 72—521; State v. Dill, 75—257.

Sec. 1065. Larceny, by servant of master's goods. R. C., c. 34, s. 18. 21 Hen. VIII, c. 7, ss. 1, 2. 39 Geo. III, c. 85. 7, 8 Geo. IV, c. 29, s. 47. 24, 25 Vict., c. 96, s. 68.

If any servant or employee, to whom any money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned in the preceding section, by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master, and go away with the said money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods, or other chattels, or any of the articles, securities, or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or defraud his master thereof, the servant so offending shall be fined, or imprisoned in the penitentiary or county jail, not less than four months nor more than ten years, at the discretion of the court: *Provided*, that nothing in this section contained shall extend to apprentices, or servants, within the age of eighteen years.

State v. Higgins, Mar., 62 (59); State v. Jarvis, 63—566; State v. Edwards, 86—666.

Sec. 1066. Larceny, horse-stealing. 1868, c. 37, s. 1. 1879, c. 234, s. 2. 1866-'7, c. 62.

Every person who shall steal any horse, mare, gelding or mule, shall suffer imprisonment at hard labor for not less than five nor more than twenty years, at the discretion of the judge.

A count under this section may be joined in a bill of indictment with a count under the succeeding section.

State v. Adams, 1 Hay, 463 (534); State v. Putney, Phil., 543; State v. Evans, 69—40; State v. Bryant, 74—124; State v. Johnson, 75—123; State v. Lawrence, 81—126.

Sec. 1067. Larceny, stealing horse for temporary use or purpose. 1879, c. 234, s. 1.

If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of said property, with intent to deprive the owner of

said property of the special or temporary use of the same, or with the intent to use said property for a special or temporary purpose, the person so offending shall be guilty of larceny, and punished by imprisonment in the penitentiary or county jail, not less than four months nor more than ten years, and fined, in the discretion of the court: *Provided*, this section shall not be construed to repeal or in any way affect the preceding section.

Sec. 1068. Larceny, the felonious injury to, or pursuit of, live stock, with intent to appropriate the same, a misdemeanor. 1866, c. 57.

If any person shall pursue, kill or wound any horse, mule, ass, jenny, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a misdemeanor, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. And all persons commanding, counselling, advising, aiding or abetting any of such unlawful acts shall be punished in like manner, and may be prosecuted alone, or with the principal actor.

State v. Butler, 65—309; State v. Holder, 81—527.

Sec. 1069. Larceny of growing crops or vegetables. 1811, c. 816. R. C., c. 34, s. 21. 1868-'9, c. 251.

If any person shall steal, or feloniously take and carry away any maize, corn, wheat, rice, or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, or any fruit, vegetable, or other product cultivated for food or market, growing, standing or remaining ungathered, in any field or ground, he shall be guilty of larceny, and punished accordingly.

Flynt v. Conrad, Phil. 190; State v. Cherry, 72—123; State v. Graham, 76—195; State v. Liles, 78—496; State v. Foy, 82—679; State v. Bragg, 86—687; State v. Copeland, 86—691; State v. Webb, 87—558.

Sec. 1070. Larceny of wood or other property, growing or being upon land. 1866, c. 60.

If any person, not being the present owner or *bona fide* claimant thereof, shall wilfully and unlawfully enter upon the lands of another and carry off or be engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be

done with felonious intent, be guilty of larceny, and punished as for that offence. And if not done with such intent, shall be guilty of a misdemeanor.

State v. Crossett, 81—579; State v. Dudley, 83—660.

Sec. 1071. Larceny or obliteration of public records, or fraudulent removal of registration book; not necessary to allege ownership or value. R. C., c. 34, s. 31. 8 Hen. VI, c. 12. 1881, c. 17.

If any person shall steal, or for any fraudulent purpose, shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatscever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offence it shall not be necessary to allege that the article, in respect to which the offence is committed, is the property of any person or that the same is of any value. And if any person shall steal, or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and wilfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration, or record required to be kept by the register of deeds, or shall unlawfully destroy, obliterate, deface or remove any record of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor.

Sec. 1072. Larceny, fraudulent concealment or destruction of wills. R. C., c. 34, s. 32.

If any person, either during the life of the testator or after his death, shall steal or for any fraudulent purpose destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor.

Sec. 1073. Larceny, fraudulent disposition by clerk, or other custodian of the public laws, reports of supreme court or other public documents, a misdemeanor. 1881, c. 151.

It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the general assembly, supreme court reports, or other public documents, are transmitted or deposited for the use of the county or the state, to safely keep the same in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and wilfully dispose of the same, by sale or otherwise; or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, at the discretion of the court.

Sec. 1074. Larceny, receivers of stolen goods, punishment of. R. C., c. 34, s. 56. 1797, c. 485, s. 2.

If any person shall receive any chattel, property, money, valuable security, or other thing whatsoever, the stealing or taking whereof shall amount to larceny or felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security, or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession, or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny.

State v. Ives, 13 Ired., 338; State v. Minton, Phil., 196; State v. Beatty, Phil., 52; State v. Phelps, 65—459; State v. Rushing, 69—29; State v. Brite, 73—26; State v. Caveness, 78—484; State v. Lawrence, 81—522; State v. Jones, 82—685; State v. Morrison, 85—561.

Sec. 1075. Larceny, distinction between grand and petit larceny abolished. R. C., c. 34, s. 26.

All distinctions between petit and grand larceny, where

the same hath had the benefit of clergy, is abolished; and the offence of felonious stealing, where no other punishment shall be specifically prescribed therefore by statute, shall be punished as petit larceny is: *Provided*, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the penitentiary for a period not exceeding ten years.

State v. Minton, Phil., 196; State v. Kearzey, Phil., 481; State v. Haughton, 63—491; State v. Ratts, 63—503; State v. Brite, 73—26; State v. Gaston, 73—96; State v. Lawrence, 81—525; State v. Tyler, 85—569.

Sec. 1076. Liquor selling, retailing without license. R. C., c. 34, s. 94. 1825, c. 1272, s. 5. 1874-'5, c. 39. *Passim*, 1798, c. 501. 1816, c. 906.

If any person shall retail spirituous liquors by the small measure in any other manner than is prescribed by law, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court.

State v. Shaw, 2 Dev., 198; State v. Morrison, 3 Dev., 299; State v. Faucett, 4 D. & B., 107; State v. Kirkham, 1 Ired., 384; State v. Moore, 1 Jon., 276; Commissioners of Raleigh v. Kane, 2 Jon., 288; State v. Bell, 2 Jon., 337; State v. Gerhardt, 3 Jon., 178; State v. McNeely, 1 Winst., 234; State v. Dobson, 65—346; State v. Simmons, 66—622; State v. Stamey, 71—202; State v. Wray, 72—253; State v. Lowry, 74—121; State v. Hampton, 77—526; State v. Packer, 80—439; State v. Joyner, 81—534; State v. McMinn, 83—668; State v. Midgett, 85—538; State v. Poteat, 86—612; State v. Wool, 86—708; State v. Propst, 87—560.

Sec. 1077. Liquor selling to minors forbidden. 1873-'4, c. 68. 1881, c. 242.

It shall be unlawful for any dealer of intoxicating drinks or liquors to sell, or in any manner to part with for a compensation therefor, either directly or indirectly, or to give away such drinks or liquors, to any unmarried person under the age of twenty-one years, knowing the said person to be under the age of twenty-one years: *Provided*, that such sale or giving away shall be *prima facie* evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit, shall be considered a dealer within the meaning of this section. And any person violating this section shall be guilty of a misdemeanor.

Sec. 1078. Liquor selling to minors; the father, mother, guardian and employer of minor may sue liquor dealer for damages. 1873-'4, c. 68. 1881, c. 242, s. 2.

The father, or if he be dead, the mother, guardian or

employer of any minor to whom a sale or gift shall be made in violation of the preceding section, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such illicit sale or gifts, shall recover from such party or parties so offending, such exemplary damages as a jury may assess: *Provided*, that such assessment shall not be less than twenty-five dollars.

Sec. 1079. Liquor selling within two miles of public political speakings prohibited. 1879, c. 212.

It shall be unlawful for any person to sell or to give away, either directly or indirectly, any spirituous liquors, wine or bitters containing alcohol, within two miles of any place at which political public speaking shall be advertised to take place, and does take place, this prohibition to continue only during the day on which said public political speaking shall take place. And any person who shall violate this section shall be guilty of a misdemeanor, and be fined not less than ten dollars nor more than twenty dollars, or imprisoned not exceeding twenty days. Justices of the peace shall have original jurisdiction of this offence, upon view, or written information duly sworn to.

Sec. 1080. Maiming with malice aforethought. R. C., c. 34, s. 14. 1754, c. 56. 1791, c. 339, s. 1. 1831, c. 12. 22 & 23 Car. II, c. 1, A. D. 1670, (called the Coventry Act).

If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offence, shall, for the first offence, be punished by imprisonment in the penitentiary or county jail not less than four months nor more than ten years, and be fined, in the discretion of the court; and for the second offence shall be imprisoned in the penitentiary not less than five nor more than sixty years.

State v. Irwin, 1 Hay., 130 (113); State v. Bridges, 1 Mur., 134; State v. Crawford, 2 Dev., 425; State v. Girkin, 1 Ired., 121; State v. Green, 7 Ired., 39; State v. Skidmore, 87—509.

Sec. 1081. Malicious injury to real property. R. C., c. 34, s. 111. 1873-'4, c. 176, s. 5.

If any person shall maliciously commit any damage,

injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: *Provided*, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing or the pursuit of game. When the owner or one of the owners of an estate in possession, shall complain of the injury before a justice of the peace of the county in which the offence is charged to have been committed before the regular term of the superior court next after the commission of the offence, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offence, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

State v. Ross, 4 Jon., 315; State v. Batchelor. 72—468.

Sec. 1082. Malicious injury to personal property. 1876-'7, c. 18.

If any person shall wilfully injure the personal property of another, through malice to the owner, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

Sec. 1083. Marriages, unlawful with female under fourteen years of age without consent of father. R. C., c. 34, s. 46. 1820, c. 1041, ss. 1, 2.

If any person shall marry a female under the age of fourteen years, he shall be guilty of a misdemeanor

State v. Watts, 10 Ired., 369.

Sec. 1084. Marriages, unlawful between whites and negroes. Const., Art. XIV., s. 8. R. C., c. 68, s. 7. 1834, c. 24. 1838-'9, c. 24.

All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited, and shall be void. And any person violating this section shall be guilty of an infamous crime, and punished by imprisonment in the county jail or penitentiary, not less than four months nor more than ten years, and may also be fined in the discretion of the court.

State v. Fore and Chestnut, 1 Ired., 378; State v. Walters, 3 Ired., 455;

State v. Hooper, 5 Ired., 201; State v. Melton and Byrd, Busb., 49; State v. Hairston, 63—451; State v. Reinhardt, 63—547; State v. Ross, 76—242; State v. Kennedy, 76—251.

Sec. 1085. Marriages, unlawful for register of deeds, clergyman and justice of the peace to consent to the marriage of a negro to a white person. R. C., c. 34, s. 80. 1830, c. 4. s. 2.

If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel, or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

Sec. 1086. Mills, owners of, to keep up bridges over ditches, drains and canals. R. C., c. 34, s. 40. 1819, c. 941, s. 3.

Every owner of a water-mill, situated on any public road, and also every person whose duty it is to keep up and repair bridges built across any ditch, drain, or canal, in the chapter entitled "Roads, Ferries and Bridges," who shall refuse or neglect to keep up and repair, or who shall suffer to remain out of repair for the space of ten days, any bridge which by law he may be required to keep up and repair, shall be guilty of a misdemeanor.

State v. Yarrell, 12 Ired., 130.

Sec. 1087. Mills, the destruction or obstruction of dams, canals or water channels, connected with a mill, factory or machine works, indictable. 1866, c. 48.

Any person who shall cut away, destroy, or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal, or water channel erected, opened, used, or constructed, for the purpose of furnishing water for the operations of any mill, factory or machine works, or for the escape of water therefrom, shall be liable to be indicted in the county in which the offence shall have been committed; and upon conviction shall be fined or imprisoned, or both, at the discretion of the court, and shall also be liable to an action in said court for damages, by the person or company thus injured.

State v. Tomlinson, 77—528.

Sec. 1088. Monuments and tombstones, unlawful to deface or remove. R. C., c. 34, s. 102. 1840, c. 6.

If any person shall, unlawfully and on purpose, remove from its place any monument of marble, stone, brass,

wood or other material, erected for the purpose of designating the spot where any dead body is interred, or for the purpose of preserving and perpetuating the memory, name, fame, birth, age or death of any person, whether situated in or out of the common burying ground, or shall unlawfully or on purpose break or deface such monument, or alter the letters, marks or inscription thereof, he shall be guilty of a misdemeanor.

Sec. 1089. Mortgaged property, unlawful to dispose of; sufficiency of indictment and proof. 1873-'4, c. 31. 1874-'5, c. 215. 1883, c. 61.

If any person, after executing a chattel mortgage, deed in trust or other lien for a lawful purpose shall, after the execution thereof, make any disposition of any personal property embraced in such mortgage, deed in trust or lien, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending and every person with a knowelege of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, in the discretion of the court.

In all indictments for violations of the said provisions of this section, it shall not be necessary to allege or prove the person to whom any sale or disposition of said property was made, but proof of the possession of the property embraced in such chattel mortgage, deed in trust or lien, by the grantor thereof, after the execution of said chattel mortgage, deed in trust or lien, and while it is in force, and further proof of the fact that the sheriff or other officer charged with the execution of said process cannot after due diligence find said property under process directed to him for its seizure, for the satisfaction of such chattel mortgage, deed in trust or lien, or that the mortgagee demanded the possession thereof of the mortgagor for the purpose of sale to foreclose said mortgage, deed in trust or lien, after the right to such foreclosure had accrued, and that the mortgagor failed to produce, deliver or surrender the same to the mortgagee for that purpose, shall be *prima facie* proof of the fact of a disposition or sale of said property, by said grantor, with the intent to hinder, delay or defeat the rights of the per-

son to whom said chattel mortgage, deed in trust or lien was made.

State v. Pickins, 79—652; State v. Burns, 80—376: State v. Jones, 83—657.

Sec. 1090. Officers failing to discharge their duties, may be indicted and removed from office. R. C., c. 34, s. 119. 1777, c. 115. s. 4.

If any clerk, sheriff, justice of the peace, or any other officer, who is required, in entering upon his office, to take an oath of office, shall wilfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, the clerk or other officer so offending shall be guilty of a misdemeanor. And if it shall be proved, that any such officer, after his qualification, shall have violated his said oath, and willingly and corruptly have done anything contrary to the true intent and meaning thereof, such officer shall be guilty of misbehaviour in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offence; and shall also be fined and imprisoned, in the discretion of the court.

Mitchell v. Ward, 6 Jon. Eq., 69; Fentress v. Brown, Phil., 373; Cain v. Haywood, 66—1; State v. Powers, 75—281; State v. Furguson, 76—197; State v. Heaton, 77—505; State v. Hawkins, 77—494; State v. Norman, 82—688; State v. Snuggs, 85—541; McKee v. Wilson, 87—300.

Sec. 1091. Peddling without license. R. C., c. 34, s. 44. 1835, c. 17, s. 3.

If any person shall unlawfully hawk or peddle any goods, wares or merchandise, or shall fail, upon the application of the sheriff or his deputy, or any justice of the peace, to show his license as required by law, he shall be guilty of a misdemeanor.

Sec. 1092. Perjury, its punishment. R. C., c. 34, s. 49. 1791, c. 338, s. 1.

If any person shall wilfully and corruptly commit perjury on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the state, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of, or concerning any matter or thing, whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars, and imprisoned in

the county jail or penitentiary, not less than four months nor more than ten years.

State v. Alexander, 4 Hawks, 182; State v. Hoyle, 6 Ired., 1; State v. Ledford, 6 Ired., 5; State v. Groves, Busb., 402; State v. Knox, Phil., 312; State v. Davis, 84—787; State v. Mace, 86—688.

Sec. 1093. Perjury, subornation of. R. C., c. 34, s. 50. 1791, c. 338, s. 2.

If any person shall, by any means, procure another person to commit such wilful and corrupt perjury as is mentioned in the preceding section, the person so offending shall be punished in like manner as the person committing the perjury.

Sec. 1094. Poison, unlawful to put in streams, for purpose of catching, killing or driving away fish. 1883, c. 290.

It shall be unlawful for any person to put any poisonous substance for the purpose of catching, killing or driving off any fish in any of the waters of a creek or river and any person violating this section shall be guilty of a misdemeanor.

Sec. 1095. Political societies, secret, prohibited. 1870-'71, c. 133. 1868-'9, c. 267. 1871-'2, c. 143.

If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or for resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character, or shall form or organize, or combine and agree with any other person or persons to form or organize any such organization, or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or pass-words, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object, and shall take or administer any extra-judicial oath, or any secret solemn pledge, or any like secret means, or if any two or more persons for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or for circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or pass-words, or any disguise of the person or voice, or other disguise whatsoever; or shall take or

administer any extra-judicial oath or other secret solemn pledge, or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction, or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control, or if any person being a member of any such secret political or military organization, shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and fined not less than ten nor more than two hundred dollars, or be imprisoned, or both, at the discretion of the court.

Sec. 1096. Punishments for felonies not specified. R. C., c. 34, s. 27.

Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute, shall be imprisoned in the county jail or penitentiary not exceeding two years, and be fined, in the discretion of the court, or if the offence be infamous, the person offending shall be imprisoned in the county jail or penitentiary, not less than four months nor more than ten years, and be fined.

State v. Bailey, 65—426; State v. Brite, 73—26; State v. Driver, 78—423.

Sec. 1097. Punishments for misdemeanors not specified. R. C., c. 34, s. 120.

Offences made misdemeanors by statute, where a specific punishment is not prescribed, shall be punished as misdemeanors at common law; but if the offence be infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender shall be punished by imprisonment in the county jail or penitentiary, not less than four months nor more than ten years, and be fined.

In re. Schenck, 74—607; State v. McNeill, 75—15; State v. Driver, 78—423; State v. Jackson, 82—565; State v. Norman, 82—687.

Sec. 1098. Railroads, plank roads, turnpikes and canals, maliciously destroying, obstructing and injuring, penalty when death ensues, and when not. R. C., c. 34, ss. 99, 100. 1838, c. 38. 1879, c. 255, s. 2.

If any person shall wilfully and maliciously put or place any matter or thing upon, over, or near any railroad track;

or shall wilfully and maliciously destroy, injure, or remove the road-bed, or any part thereof, or any rail, sill, or other part of the fixture appurtenant to, or constituting or supporting any portion of the track of such railroad; or shall wilfully and maliciously do any other thing with intent to obstruct, stop, hinder, delay, or displace the cars traveling on such road, or to stop, hinder or delay the passengers or others passing over the same; or shall wilfully and maliciously injure the road-bed or the fixtures aforesaid, or any part thereof, with any other intent whatsoever, such person so offending shall be guilty of a misdemeanor, and fined not exceeding one thousand dollars nor less than two hundred dollars, and be imprisoned in the penitentiary or county jail, not less than four months nor more than ten years, and shall be committed to jail till he find surety for his good behavior, for a space of time not less than three nor more than seven years. And if it shall happen that by reason of the commission of the offences aforesaid, or any of them, any engine or car shall be displaced from the track, or shall be stopped, hindered or delayed, so that any one thereby be instantly killed, or so wounded or hurt as to die therefrom in twelve calendar months thereafter, or shall thereby be maimed or be disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, on conviction, shall suffer death, if the persons were killed, and shall be imprisoned in the penitentiary not less than five nor more than sixty years, if the persons were maimed or disabled. And if any person shall maliciously destroy or injure any plank road, turnpike or canal, or any appurtenance or fixture belonging thereto, or used therewith, or shall maliciously destroy or injure any lock, dam or sluice, the same being a part of any work erected or made for the purposes of navigation, or improving the navigation of any water, the person so offending shall be guilty of a misdemeanor, and shall suffer the like punishment as in this section provided for maliciously injuring a railroad.

Sec. 1099. Railroads, wilful injury to, without malice. R. C., c. 34, s. 101.

If any person, unlawfully and on purpose, but without malice, shall commit any of the offences mentioned in the preceding section, he shall be guilty of a misdemeanor. And if it shall happen that by reason of the commission of any such offence any person shall be instantly killed, or so wounded or hurt as to die therefrom in twelve calen-

dar months thereafter, or shall thereby be maimed or disabled in the use of any limb or member, then, and in every such case, the party so offending, his counselors, aiders and abettors, shall be imprisoned not less than twelve months, and fined, at the discretion of the court.

Sec. 1100. Railroads, shooting at or throwing into cars, locomotives or trains, punishment. 1876-'7, c. 4.

If any person shall cast, or throw, or shoot, any stone rock, bullet, shot, pellet, or other missile, at, against or into, any railroad car, locomotive or train, while the said car or locomotive shall be in progress from one station to another, or while the said car, locomotive or train shall be stopped for any purpose, with intent to injure said car or locomotive, or any person therein or thereon, the person so offending shall be guilty of a misdemeanor, and punished by fine or imprisonment in the county jail or penitentiary, at the discretion of the court.

State v. Hinson, 82—597; State v. Boyd, 86—634.

Sec. 1101. Rape punished with death. R. C., c. 34, s. 5. 18 Eliz., c. 7. 1868-'9, c. 167, s. 2.

Every person, who is convicted of ravishing and carnally knowing any female of the age of ten years or more by force and against her will, or who is convicted, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death.

State v. Farmer, 4 Ired., 224; State v. Jefferson, 6 Ired., 305; State v. Clark, 7 Jon., 167; State v. Peter, 8 Jon., 19; State v. Gray, 8 Jon., 170; State v. Sam, Winst., 300: State v. Hodges, Phil., 231; State v. Smith, Phil., 302; State v. Storkey, 63—7; State v. Hargrave, 65—466; State v. King, 69—419; State v. Brooks, 76—1; State v. Johnston, 76—209; State v. Dancy, 83—608.

Sec. 1102. Rape, assault with intent to commit, a misdemeanor. 1868-'9, c. 167, s. 3. R. C., c. 107, s. 44. 1823, c. 1229.

Every person convicted of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the penitentiary not less than five nor more than fifteen years.

State v. Jim, 1 Dev., 142; State v. Martin, 3 Dev., 329; State v. Jesse, 2 D. & B., 297; State v. Boon, 13 Ired., 244; State v. Tom, 2 Jon., 414; State v. Ellick, 7 Jon., 68; State v. Peter, 8 Jon., 19; State v. McDaniel, Winst., 249; State v. Sam, Winst., 300; State v. Scott, 72—461; State v. Neely, 74—425; State v. Johnston, 76—209; State v. Perkins, 83—681;

State v. Jones, 83—605; State v. Dancy, 83—608; State v. Massey, 86—658; overules State v. Neely, 74—425; State v. Daniel, 87—507.

SEC. 1103. Rape, carnal knowledge of married woman by fraud in personating her husband declared to be felony. 1881, c. 89, s. 1.

Every person who shall have carnal knowledge of any married woman by fraud in personating her husband, shall be guilty of a felony, and punished by imprisonment in the penitentiary at hard labor not less than ten nor more than twenty years.

State v. Brooks, 76—1.

SEC. 1104. Rape, assault with intent to have carnal knowledge of married woman by fraud in personating her husband, how punished. 1881, c. 89, s. 2.

Every person convicted of an assault upon any married woman, with intent to have knowledge of her by fraud in personating her husband, shall be punished by imprisonment in the penitentiary at hard labor not less than five nor more than fifteen years.

SEC. 1105. Rape and buggery, what proof sufficient in. 1860-'61, c. 30.

It shall not be necessary upon the trial of any indictment for the offences of rape, carnally knowing and abusing any female child under ten years of age, and buggery, to prove the actual emission of seed in order to constitute the offence, but the offence shall be completed upon proof of penetration only.

State v. Gray, 8 Jon., 170; State v. Hodges, Phil., 231; State v. Storkey, 63—7; State v. Hargrave, 65—466; State v. Johnston, 76—209.

SEC. 1106. Rebellion or insurrection against the state, a high crime. 1868, c. 60, s. 2. 1861, c. 18. 1866, c. 54. Const., Art. IV, s. 5.

If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the state of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid, shall be guilty of a high crime, and punished by imprisonment at hard labor for not more than fifteen years, and be fined not more than ten thousand dollars.

Sec. 1107. Rebellion or insurrection, conspiracy to destroy the government of the state by. 1868, c. 60, s. 1.

If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of this state, or to oppose by force the authority of said government, or by force, or by threats, to intimidate, or to prevent, hinder or delay the execution of any law of the state, or by force or fraud to seize or take possession of any fire arms or property of the state aforesaid, against the will or contrary to the authority of said state, every person so offending in any of the ways aforesaid, shall be guilty of a high crime, and imprisoned not more than ten years, and be fined not exceeding five thousand dollars.

State v. Jackson, 82—565.

Sec. 1108. Seamen, enticing from vessels, a misdemeanor. 1879, c. 219, s. 1. 1881, c. 256, s. 1.

Any person who shall induce any seaman, in the employment of any domestic or foreign vessel, in any of the ports of North Carolina, to leave any such vessel before his term of service shall have expired, shall be guilty of a misdemeanor, and fined not exceeding fifty dollars, or imprisoned not exceeding thirty days.

Sec. 1109. Seamen, unlawful to secrete or harbor those who have deserted. 1879, c. 219, s. 2. 1881, c. 256, s. 2.

Any person who shall secrete or harbor any such seaman, who has deserted from any domestic or foreign vessel, knowing that such seaman has deserted, shall be guilty of a misdemeanor, and be fined not exceeding fifty dollars or imprisoned not exceeding thirty days; and if such seaman be found concealed or secreted by any person on his premises, such concealment and secretion shall be deemed *prima facie* evidence that such person knew that such seaman was a deserter.

Sec. 1110. Seamen, justices of the peace authorized to issue search warrants for those who have deserted. 1881, c. 256, s. 3.

If any credible witness shall prove, upon oath before any justice of the peace, that any person has concealed on his premises any seaman who has deserted from any such domestic or foreign vessel, it shall be lawful for such justice to grant a search warrant to be executed within

the limits of his county to any proper officer, authorizing him to search for such seaman, and to arrest the person on whose premises he may be found, and the person on whose premises such seaman shall be found shall be adjudged to pay the costs of such search warrant, if on examination it shall appear that such seaman was secreted or concealed by such person; otherwise the costs shall be paid by the party making the complaint.

Sec. 1111. Seamen, either party may appeal, justice to reduce to writing testimony of all material witnesses and return to appellate court; fees of justice. 1881, c. 256, ss. 4, 5.

In all cases arising under the three preceding sections, if any appeal is prayed by either party at the time of the trial, it shall be granted; but no appeal shall be granted by any justice at any time after the final hearing of the case; in case an appeal is prayed at the trial, it shall be the duty of the justice to immediately proceed to reduce the testimony of any witness whose testimony is material to writing (if such witness shall be master, officer, or seaman on board of any vessel), in the presence of the adverse party, who may cross-question such witness, which testimony shall be subscribed by such witness and returned by the justice with the papers in the case; and on the hearing in the appellate court, the testimony so taken and reduced to writing by such justice shall be read, heard and accepted as the true and lawful testimony of such witness, as if such person were in person present to give evidence. For reducing such testimony to writing the justice shall receive the same fees as are allowed for taking depositions.

Sec. 1112. Sheriffs, constables or other officers failing to execute process, making a false return thereon, or refusing to discharge any other duties, indictable. R. C., c. 34 s. 118. 1818, c. 980, s. 3. 1827, c. 20, s. 4.

Any sheriff, constable, or other officer, whether state or municipal, refusing or neglecting to return any precept, notice, or process, to him tendered or delivered, which it is his duty to execute, or making a false return thereon; or any person who shall presume to act as any such officer, not being by law authorized so to do, shall forfeit and pay to any one who will sue for the same one hundred dollars, and shall moreover be guilty of a misdemeanor.

Fentriss v. Brown, Phil., 373.

Sec. 1113. Slander of woman by charge of incontinency, penalty. 1879, c. 156.

If any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and fined or imprisoned in the discretion of the court.

State v. McDaniel, 84—803; State v. Aldrich, 86—680; Sowers v. Sowers, 87—303.

Sec. 1114. Springs, wells and cisterns, wilful injuring, penalty. R. C., c. 34, s. 97. 1850, c. 104.

If any person shall wilfully put into the well, spring or cistern of water of any other person, any substance or thing, whereby such well, spring or cistern may be endamaged, or the water thereof be made less wholesome or fit for use, he shall be guilty of a misdemeanor.

Sec. 1115. Sunday, hunting on, prohibited; penalty. 1868-'9, c. 18, s. 1.

If any person whomsoever shall be known to hunt on the Lord's day, commonly called Sunday, with a dog or dogs, or shall be found off of his own lands on Sunday, having a shot gun, rifle or pistol, every person so offending shall be subject to indictment; and shall pay a fine not to exceed fifty dollars, at the discretion of the court, two thirds of such fine to enure to the benefit of the free public schools in the county of which such convict is a resident, the remainder to the informant.

State v. Brown, 3 Mur., 224; State v. Drake, 64—589; State v. Howard, 67—24; State v. Ricketts, 74—187; State v. Wilson, 84—777.

Sec. 1116. Sunday, fishing on with seines or nets prohibited; punishment. 1883, c. 338.

It shall be unlawful for any person to fish on Sunday with a seine, drag net or other kind of net, except such as are fastened to stakes; and any person violating this section shall be guilty of a misdemeanor, and fined not less than two hundred nor more than five hundred dollars, or imprisoned not more than twelve months.

Sec. 1117. Sunday, sale of intoxicating liquors on, a misdemeanor. 1876-'7, c. 38.

If any person shall sell spirituous, or malt, or other intoxicating liquors on Sunday, except on the prescription

of a physician, and then only for medical purposes, the person so offending shall be guilty of a misdemeanor, and punished by fine, or imprisonment, or both, in the discretion of the court.

State v. Wray, 72—283; State v. Packer, 80—439; State v. Wool, 86—708.

Sec. 1118. Telegraph or telephone poles or wires, injury to, a misdemeanor. 1881, c. 4. 1883, c. 103.

Any person who shall wilfully injure, or destroy, or pull down any telegraph or telephone pole, wire, insulator, or any other fixture or apparatus attached to a telegraph or telephone line, shall be guilty of a misdemeanor, and may be fined and imprisoned, at the discretion of the court.

Sec. 1119. Treasurer of the state, fraudulent entries and statements by, a misdemeanor. R. C., c. 34, s. 68.

If the treasurer of the state shall wittingly or falsely make, or cause to be made, any false entry or charge in any book kept by him as treasurer, or shall wittingly or falsely form, or procure to be formed, any statement of the treasury, to be by him laid before the governor, the general assembly, or any committee thereof, or to be by him used in any settlement which he is required to make with the auditor, with intent, in any of said instances, to defraud the state or any person, such treasurer shall be guilty of a misdemeanor, and fined at the discretion of the court, not exceeding three thousand dollars, and imprisoned not exceeding three years.

Sec. 1120. Trespass on land without a license, after being forbidden, a misdemeanor. 1866, c. 60.

If any person, after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days: *Provided*, that if any person shall make a written affidavit before a justice of the peace of the county, that any of his cattle or other live stock (which shall be specially described and set forth in such affidavit) have strayed away, and he has good reason to believe that they are on the lands of another person, then such justice may, in his discretion, allow such person to enter on said premises with one or more servants, without fire-arms, in the day time (Sunday excepted), between the hours of sunrise and sunset, and make search for his estray for such limited time as

to said justice shall appear reasonable; but the only effect of such license shall be to protect the persons entering from indictment therefor, and then only, provided the license shall have been made *bona fide*, and without any damage except such as were necessary to conduct the search.

State v. Hanks, 66—612; State v. Ellen, 68—281; State v. Whitehurst, 70—85; State v. Yarborough, 70—250; State v. Hause, 71—518; State v. Presley, 72—204; State v. Bullard, 72—445; State v. Batchelor, 72—468; State v. Edney, 80—360; State v. Crosset, 81—579; State v. Bryson, 81—595; State v. Dudley, 83—660; State v. Whitaker, 85—566.

Sec. 1121. Trespass on public lands, penalty therefor. R. C., c. 34, s. 42. 1823, c. 1190. 1842, c. 36, s. 4.

If any person shall erect a building on any public lands, before the same shall have been sold or granted by the state, or on any lands belonging to the state board of education before the same shall have been sold and conveyed by them, or cultivate, or remove timber from, any of said lands, such person shall be guilty of a misdemeanor; and, when any person shall be in possession of any part of said land, it shall be the duty of the sheriff of the county in which the land is situated, and he is hereby required, to give notice in writing to such person, commanding him to depart therefrom forthwith; and if the person in possession, upon being so notified, shall not, within two weeks after the time of notice, remove therefrom, the sheriff is required to remove him immediately, and if necessary, shall summon the power of the county to assist him in so doing.

Sec. 1122. Trout, unlawful to catch mountain trout with seine at all times; the taking by shooting or otherwise between the fifteenth day of October and the thirtieth day of December, a misdemeanor. 1869-'70, c. 142.

It shall be unlawful to catch mountain trout by seining at all times. And there shall be no taking of said fish by shooting, or otherwise, between the fifteenth day of October and the thirtieth day of December. Any person violating this section shall be guilty of a misdemeanor. One half of the fine shall be paid over to the informant, and the other to the county treasurer for the use of the free public schools therein.

Sec. 1123. Water courses, obstruction of, penalty. 1872-'3, c. 107, ss. 1, 2.

If any person shall wilfully fell any tree, or wilfully

put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars, or imprisoned not to exceed thirty days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two-thirds of the width of any stream where erected, but if extending over more than two-thirds of the width of any stream, the said penalties shall attach.

State v. Pool, 74—402; State v. Tomlinson, 77—528.

CHAPTER TWENTY-SIX.

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Sec. 1124. Persons present at breaches of the peace to arrest offenders. 1868-'9, c. 178, sub chap. 1, s. 1.

Every person present at any riot, rout, affray or other breach of the peace, shall endeavor to suppress and prevent the same, and if necessary for that purpose, shall arrest the offenders.

State v. Belk, 76—10.

Sec. 1125. Persons summoned by officer must assist in the arrest. 1868-'9, c. 178, sub chap. 1, s. 2.

Every person summoned by a judge, justice, mayor, intendant, chief officer of any incorporated town, sheriff, coroner or constable, to aid in suppressing any riot, rout, unlawful assembly, affray or other breach of the peace, or to arrest the persons engaged in the commission of such offences, or to prevent the commission of any felony or larceny which may be threatened or begun, shall do so.

State v. Belk, 76—10.

Sec. 1126. Peace officers shall arrest without warrant in certain cases. 1868-'9, c. 178, sub chap. 1, s. 3.

Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony or larceny has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest.

State v. Belk, 76—10.

Sec. 1127. Houses may be broken open to prevent a felony therein. 1868-'9, c. 178, sub chap. 1, s. 4.

All persons are authorized to break open and enter a house to prevent a felony about to be committed therein.

Sec. 1128. Officers may break open doors to arrest persons charged with high crimes. 1868-'9, c. 178, sub chap. 1, s. 5.

If a felony or other infamous crime has been committed, or a dangerous wound has been given, and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief.

Sec. 1129. Persons in whose presence an infamous crime is committed, may arrest the offender. 1868-'9, c. 178, sub chap. 1, s. 6.

Every person in whose presence a felony or other infamous crime has been committed may arrest the person whom he knows or has reasonable ground to believe to be guilty of such offence, and it shall be the duty of every sheriff, coroner, constable or officer of police, upon information, to assist in such arrest.

Sec. 1130. Persons arrested without warrant entitled to have an immediate hearing. 1868-'9, c. 178, sub chap. 1, s. 7.

Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law.

Sec. 1131. Felons fleeing from justice, outlawed. 1866, c. 62. 1868-'9, c. 178, sub chap. 1, s. 8.

In all cases where any two justices of the peace, or any judge of the supreme, superior or criminal courts, shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest, and service of the usual process of the law, the said judge, or the said two justices, being justices of the county wherein such person is supposed to lurk or conceal himself, are hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also, when issued by

any judge, empowering and requiring the sheriff of any county in the state in which said fugitive shall be, and when issued by two justices empowering and requiring the sheriff of the county of said justices, to take such power with him as he shall think fit and necessary for going in search and pursuit of, and effectually apprehending such fugitive from justice, which proclamation shall be published at the door of the court house of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the judge or justices shall direct; and if any person against whom proclamation hath been thus issued, continue to stay out, lurk and conceal himself, and do not immediately surrender himself, any citizen of the state may capture, arrest and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation or impeachment of any crime.

Sec. 1132. Who may issue criminal process. 1868-'9, c. 178, sub chap. 3, s. 1.

The following persons respectively shall have power to issue process for the apprehension of persons charged with any offence, and to execute the powers and duties conferred in this chapter, namely: the chief justice and the associate justices of the supreme court, the judges of the superior court, judges of criminal courts, presiding officers of inferior courts, justices of the peace, mayors of cities, or other chief officers of incorporated towns.

State v. James, 80—370.

Sec. 1133. Duty of magistrate on complaint being made to him of the commission of a crime. 1868-'9, c. 178, sub chap. 3, s. 2.

Whenever complaint shall be made to any such magistrate, that a criminal offence has been committed within this state, or without this state and within the United States, and that a person charged therewith is in this state, it shall be the duty of such magistrate to examine on oath the complainant and any witnesses who may be produced by him.

State v. James, 80—370; State v. Bryson, 84—780.

Sec. 1134. Duty of magistrate to issue his warrant for the arrest of the accused. 1868-'9, c. 178, sub chap. 3, s. 3.

If it shall appear from such examination that any

criminal offence has been committed, the magistrate shall issue a proper warrant under his hand, with or without seal, reciting the accusation, and commanding the officer, to whom it shall be directed, forthwith to take the person accused of having committed such offence, and to bring him before a magistrate, to be dealt with according to law.

State v. James, 78—455; State v. Bryson, 84—780.

Sec. 1135. Where warrant to run. 1868-'9, c. 178, sub chap. 3, s. 4.

Warrants issued by any justice of the supreme court, or by any judge of the superior court, or of a criminal court, may be executed in any part of this state; warrants issued by a justice of the peace, or by the chief officer of any city or incorporated town, may be executed in any part of the county of such justice, or in which such city or town is situated, and on any river, bay or sound forming the boundary between that and some other county, and not elsewhere, unless indorsed as prescribed in the section following.

Sec. 1136. How warrants may be indorsed. 1868-'9, c. 178, sub chap. 3, s. 5.

If the person against whom any warrant granted by any such justice of the peace or chief officer of a city or town shall be issued, shall escape, or be in any other county out of the jurisdiction of such justice or chief officer, it shall be the duty of any justice of the peace, or any other magistrate named in this chapter within the county where such offender shall be, or shall be suspected to be, upon proof of the handwriting of the magistrate issuing the warrant, to indorse his name on the same, and thereupon the person, or officer to whom the warrant was directed, or any officer of the county in which it was indorsed, to whom it may be delivered, may arrest the offender in that county.

State v. James, 80—370.

Sec. 1137. Magistrate not liable to indictment or action for improperly indorsing warrant. 1868-'9, c. 178, sub chap. 3, s. 6.

No magistrate shall be liable to any indictment, action for trespass or other action for having indorsed any warrant pursuant to the provisions of the last section, although it should afterward appear that such warrant was illegally or improperly issued.

State v. Bailey, 73—70.

Sec. 1138. Person arrested to be taken before some magistrate of the county where offence was committed. 1868-'9, c. 178, sub chap. 3, s. 7.

It shall be the duty of the officer making the arrest to take the person charged with the offence before some magistrate of the county in which the offence is charged to have been committed, or before any judge of the supreme, superior or criminal court.

Sec. 1139. Magistrate shall take bail, if the offence be not a capital one. 1868-'9, c. 178, sub chap. 3, s. 8. 1871-'2, c. 37, s. 1.

If the offence charged in the warrant be not punishable with death, such magistrate may take from the person so arrested a recoguizance with sufficient sureties for his appearance at the next term of the court having jurisdiction, to be held in the county where the offence shall be alleged to have been committed.

Sec. 1140. Duty of magistrate granting bail. 1868-'9, c. 178, sub chap. 3, s. 9.

Such magistrate shall certify on the warrant the fact of his having let the defendant to bail, and shall deliver the same, together with the recognizance taken by him, to the officer or other person having charge of the prisoner, who shall deliver the same without unnecessary delay to the clerk of the court in which such prisoner shall have been recognized to appear.

State v. Bailey, 73—70.

Sec. 1141. If bail is not allowed, or is not given, the accused to be taken before a magistrate of the county where the warrant was issued. 1868-'9, c. 178, sub chap. 3, s. 10.

If such magistrate refuse to bail the person so arrested, or if such person fail to give bail as above provided, the officer or person having him in charge shall take him before a magistrate of the county in which the warrant was originally issued as hereinafter provided.

Sec. 1142. In capital cases the prisoner must be brought before a magistrate of the county where the warrant was issued or before some judge of the supreme or superior court. 1868-'9, c. 178, sub chap. 3, s. 11.

If the offence charged in the warrant be punishable with death, the officer making the arrest shall convey the prisoner to the county where the warrant was originally

issued, before some magistrate thereof, or before a judge of the supreme or superior court.

Sec. 1143. Before what magistrate warrant to be returnable. 1868-'9, c. 178, sub chap. 3, s. 12.

Persons arrested under any warrant issued for any offence, where no provision is otherwise made, shall be brought before the magistrate who issued the warrant; or, if he be absent, or from any cause unable to try the case, before the nearest magistrate in the same county; and the warrant, by virtue of which the arrest shall have been made, with a proper return indorsed thereon and signed by the officer or person making the arrest, shall be delivered to such magistrate.

State v. James, 78—455.

Sec. 1144. Duty of the examining magistrate. 1868-'9, c. 178, sub chap. 3, s. 13.

The magistrate, before whom any such person shall be brought, shall proceed, as soon as may be, to examine the complainant, and the witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offence charged, and in regard to any other matters connected with such charge, which such magistrate may deem pertinent.

State v. James, 78—455; State v. Bridges, 87—562.

Sec. 1145. The examination; prisoner to be allowed time to advise with counsel and to cross-examine witness against him. 1868-'9, c. 178, sub chap. 3, s. 14.

The magistrate shall then proceed to examine the prisoner in relation to the offence charged. Such examination shall not be on oath; and before it is commenced, the prisoner shall be informed of the charge made against him, and shall be allowed a reasonable time to send for and advise with counsel. If desired by the person arrested, his counsel shall be present during the examination of the complainant and the witnesses on the part of the prosecution, and during the examination of the prisoner; and the prisoner or his counsel shall be allowed to cross-examine the complainant and the witnesses for the prosecution.

State v. Needham, 78—474; State v. James, 78—455.

SEC. 1146. Prisoner shall be informed that he may refuse to answer any questions. 1868-'9, c. 178, sub chap. 3, s. 15.

At the commencement of the examination, the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice in any stage of the proceedings.

State v. Matthews, 66—106; State v. Roric, 74—148; State v. Needham, 78—474; State v. Spier, 86—600.

SEC. 1147. Answer of prisoner shall be reduced to writing. 1868-'9, c. 178, sub chap. 3, s. 16.

The answer of the prisoner to the several interrogatories shall be reduced to writing by the magistrate, or under his direction: they shall be read to the prisoner who may correct or add to them; and when made conformable to what he declares is the truth, shall be certified and signed by the magistrate.

State v. Bridgers, 87—562.

SEC. 1148. Prisoner may examine witnesses and have the assistance of counsel. 1868-'9, c. 178, sub chap. 3, s. 17.

After the examination of the prisoner is complete, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.

SEC. 1149. The prisoner shall not be examined in the presence of witnesses; witnesses may be examined separately. 1868-'9, c. 178, sub chap. 3, s. 18.

The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner; and while any witness is under examination the magistrate may exclude from the place in which such examination is had all witnesses who have not been examined, and may cause the witnesses to be kept separate and prevented from conversing with each other until they shall have been examined.

SEC. 1150. The testimony of witnesses to be reduced to writing. 1868-'9, c. 178, sub chap. 3, s. 19.

The evidence given by the several witnesses examined shall be reduced to writing by the magistrate or under his direction, and shall be signed by the witnesses respectively.

State v. Valentine, 7 Ired., 225.

Sec. 1151. When prisoner shall be discharged. 1868-'9, c. 178, sub chap. 3, s. 20.

If, upon examination of the whole matter, it shall appear to the magistrate either that no offence has been committed by any person or that there is no probable cause for charging the prisoner therewith, he shall discharge such prisoner.

Sec. 1152. When prisoner shall be bound over. 1868-'9, c. 178, sub chap. 3, s. 21.

If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty thereof, the magistrate shall bind by recognizances the prosecutor and all the material witnesses against such prisoner to appear and testify at the next term of the court having jurisdiction for the county in which the offence is alleged to have been committed.

Sec. 1153. Magistrate need not take the examination of a prisoner charged with a misdemeanor. 1868-'9, c. 178, sub chap. 3, s. 22.

Nothing contained in the preceding sections of this chapter shall be construed to require any magistrate, before whom a prisoner charged with a misdemeanor shall be brought, to take the examination of such prisoner, except where such magistrate shall deem it material so to do, or where such examination shall be required by the prisoner.

Sec. 1154. Witnesses may be required to give security for their appearance. 1868-'9, c. 178, sub chap. 3, s. 23.

Whenever such magistrate shall be satisfied by the proof that there is good reason to believe that any such witness will not fulfill the conditions of such recognizance unless security be required, he may order such witness to enter into a recognizance with such sureties as he shall deem meet for his appearance at such court.

Sec. 1155. Witness not giving the security required may be committed to prison. 1868-'9, c. 178, sub chap. 3, s. 24.

If any witness so required to enter into a recognizance, either with or without sureties, shall refuse to comply with such order, it shall be the duty of such magistrate to commit him to prison until he shall comply with such order, or be otherwise discharged according to law.

Sec. 1156. When bail shall be allowed. 1868-'9, c. 178, sub chap. 3, s. 25.

If the offence with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, such bail shall be taken and the prisoner discharged; if no bail be offered, or the offence be not bailable, the prisoner shall be committed to prison.

Sec. 1157. Examinations and recognizances to be certified to the court by the committing magistrate. 1868-'9, c. 178, sub chap. 3, s. 26.

All examinations and recognizances taken pursuant to the provisions of this chapter shall be certified by the magistrate taking the same to the court at which the witnesses are bound to appear, on the first day of the sitting thereof; and the examinations taken and subscribed as herein prescribed, may be used as evidence before the grand jury, and on the trial of the accused, provided he was present at the taking thereof and had an opportunity to hear the same and to cross-examine the deposing witness, if such witness be dead or so ill as not to be able to travel, or by procurement or connivance of the defendant, hath removed from the state or is of unsound mind.

State v. Grady, 83—643; State v. King, 86—600; State v. Bridgers, 87—562.

Sec. 1158. Penalty on magistrate failing to make the required return. 1868-'9, c. 178, sub chap. 3, s. 27.

If any magistrate shall refuse or neglect to return to the proper court any such examination or recognizance by him taken, he may be compelled by rule of court forthwith to return the same, and in case of disobedience of such rule, may be proceeded against by attachment as for contempt of court as provided by law.

Sec. 1159. The magistrate may associate with himself another. 1868-'9, c. 178, sub chap. 3, s. 28.

It shall be lawful for any magistrate, to whom any complaint may be made, or before whom any prisoner may be brought, as hereinbefore provided, to associate with himself any other magistrate of the same county; and the powers and duties herein mentioned may be executed by such two magistrates so associated.

Sec. 1160. Who may bail persons charged with crime but not imprisoned. 1868-'9, c. 178, sub chap. 3, s. 29. 1871-'2, c. 37.

Officers before whom persons charged with crime, but who have not been committed to prison by an authorized magistrate, shall be brought, shall have power to take bail as follows:

(1) Any justice of the supreme court, or a judge of a superior court, or of a criminal court, in all cases.

(2) Any justice of the peace or chief magistrate of any incorporated city or town, in all cases of misdemeanor, and in all cases of felony not capital.

Sec. 1161. Who may let to bail persons charged with crime and in prison. 1868-'9, c. 178, sub chap. 3, s. 30.

Any justice of the supreme court or any judge of a superior court or of a criminal court, shall have power to bail persons committed to prison charged with crime in all cases; any justice of the peace or chief magistrate of any incorporated city or town shall have the same power, in all cases where the punishment is not capital.

Sec. 1162. When a prisoner is bailed, the recognizance taken by the officer shall be filed with the clerk of the court. 1868-'9, c. 178, sub chap. 3, s. 31.

Whenever any prisoner shall be bailed by any officer under the preceding section, such officer shall immediately cause the recognizance taken by him to be filed with the clerk of the court of the county to which the prisoner is recognized.

Sec. 1163. What every commitment shall state. 1868-'9, c. 178, sub chap. 3, s. 32.

Every commitment to prison of a person charged with crime shall state:

(1) The name of the person charged;

(2) The character of the offence with which he is charged;

(3) The name and office of the magistrate committing him;

(4) The manner in which he may be discharged; if upon giving recognizance or bail, the amount of said recognizance, the condition on the performance of which it shall be discharged, and the persons or magistrate before whom the bail may justify;

(5) The court before which the prisoner shall be sent for trial.

State v. James, 78—455.

Sec. 1164. To what jail prisoner shall be committed. 1868-'9, c. 178, sub chap. 2, s. 33.

All persons committed to prison before conviction shall be committed to the jail of the county in which the examination is had, or to that of the county in which the offence is charged to have been committed: *Provided*, if the jails of these counties are unsafe, or injurious to the health of prisoners, the committing magistrate may commit to the jail of any other convenient county. And every sheriff or jailer to whose jail any person shall be committed by any court or magistrate of competent jurisdiction, shall receive such prisoner and give a receipt for him, and be bound for his safe-keeping as prescribed by law.

Sec. 1165. Fugitives from justice, who may arrest. 1868-'9, c. 178, sub chap. 3, s. 34.

Any justice of the supreme court, or any judge of the superior court or of any criminal court, or any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, on satisfactory information laid before him that any fugitive in the state has committed, out of the state and within the United States, any offence which, by law of the state in which the offence was committed, is punishable either capitally or by imprisonment for one year or upwards in any state prison, shall have full power and authority, and is hereby required to issue a warrant for said fugitive and commit him to any jail within the state for the space of six months, unless sooner demanded by the public authorities of the state wherein the offence may have been committed, pursuant to the act of congress in that case made and provided: if no demand be made within that time the said fugitive shall be liberated, unless sufficient cause be shown to the contrary.

Price v. Graham, 3 Jon., 546; *In re.* Hughes, Phil., 57; State v. Shelton, 79—605.

Sec. 1166. Magistrate to keep record of the proceedings and transmit copy to the governor. 1868-'9, c. 178, sub chap. 3, s. 35.

Every magistrate committing any person under the preceding section, shall keep a record of the whole pro-

ceedings before him, and immediately transmit a copy thereof to the governor for such action as he may deem fit therein under the law.

Sec. 1167. Duty of the governor. 1868-'9, c. 178, sub chap. 3, s. 36.

The governor shall immediately inform the governor of the state or territory in which the crime is alleged to have been committed, or the president of the United States, if it be alleged to have been committed within the District of Columbia, of the proceedings had in such case.

Sec. 1168. Every sheriff or jailer shall surrender the fugitive upon the order of the governor. 1868-'9, c. 178, sub chap. 3, s. 37.

Every sheriff or jailer, in whose custody any person so committed shall be, upon the order of the governor, shall surrender him to the person named in such order.

Sec. 1169. Governor may employ agent or offer reward for the apprehension of fugitives charged with felony. R. C., c. 35, s. 4. 1800, c. 561. 1866, c. 28. 1868-'9, c. 52. 1870-'1, c. 15. 1871-'2, c. 29.

The governor, on information made to him of any person having committed a felony or other infamous crime within the state, and of having fled out of the jurisdiction thereof, or who conceals himself within the state to avoid arrest, or who having been convicted has escaped and cannot otherwise be apprehended, may either employ a special agent, with a sufficient escort, to pursue and apprehend such fugitive, or issue his proclamation, and therein offer a reward, not exceeding four hundred dollars, according to the nature of the case, as in his opinion may be sufficient for the purpose, to be paid to him who shall apprehend and deliver the fugitive to such person and at such place as in the proclamation shall be directed; and he may from time to time issue his warrants on the state treasurer for sufficient sums of money for such purpose.

Sec. 1170. Governor may draw on the state treasurer for money necessary to pay expenses of arresting fugitives from justice. 1870-'1, c. 82.

In all cases where the governor of the state has made a requisition on the governor of another state for any fugitive from justice and has sent an agent to receive said fugitive, it shall be lawful for the governor to issue a

warrant on the state treasurer for the amount of money necessary to pay the expenses of said agent and other costs in the arresting of said fugitive from justice, to be paid by the treasurer of the state.

Sec. 1171. Of search warrants. 1868-'9, c. 178, sub chap. 3, s. 38.

If any credible witness shall prove, upon oath, before any justice of the peace, or mayor of any city, or chief magistrate of any incorporated town, that there is a reasonable cause to suspect that any person has in his possession, or on his premises, any property stolen, or any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any current coin of the United States, or of any other state, province or country, or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of any such coin; or any false and counterfeit notes, bills or bonds of the United States, or of the state of North Carolina, or of any other state or country, or of any county, city or incorporated town; or any instrument, tool or engine whatsoever, adapted or intended for the counterfeiting of such note, bill or bond, it shall be lawful for such justice, mayor or chief magistrate of any incorporated town, to grant a warrant, to be executed within the limits of his county or of the county in which such city or incorporated town is situated, to any proper officer, authorizing him to search for such property, and to seize the same, and to arrest the person having in possession, or on whose premises may be found, such stolen property, counterfeit coin, counterfeit notes, bills or bonds, or the instruments, tools or engines for making the same, and to bring them before any magistrate of competent jurisdiction, to be dealt with according to law.

Sec. 1172. Search warrant, its form and the proceedings thereon. 1868-'9, c. 178, sub chap. 3, s. 39.

Such search warrant shall describe the article to be searched for with reasonable certainty, and by whom the complaint is made, and in whose possession the article to be searched for is supposed to be; it shall be made returnable as other criminal process is by law required to be, and the proceedings thereupon shall be as is required in other cases of criminal complaint.

Sec. 1173. Of costs in proceedings before judges and magistrates. 1868-'9, c. 178, sub chap. 2, s. 40.

In all cases of criminal complaints before justices of the supreme court, judges of the superior and criminal courts, justices of the peace and other magistrates having jurisdiction of such complaints, the officers entitled by law to receive fees for issuing or executing process, shall not be entitled to demand them in advance. Such officers shall indorse the amounts of their respective fees on every process issued or executed by them, and return the same to the court to which it is returnable.

State v. Colbert, 75—368.

Sec. 1174. Persons to be imprisoned in county jail; exception as to a sheriff. R. C., c. 35, s. 3. 5 Hen. IV, c. 10.

No person shall be imprisoned by any judge, court, justice of the peace, or other peace officer, except in the common jail of the county: *Provided*, that whenever the sheriff of any county shall be imprisoned, he may be imprisoned in the jail of any adjoining county.

Sec. 1175. No person to be arrested on a presentment, nor tried, except on indictment. R. C., c. 35, s. 6. 1797, c. 474, s. 3. 1879, c. 12.

No person shall be arrested on a presentment of the grand jury, or put on trial before any court, but on indictment found by the grand jury.

State v. Cain, 1 Hawks, 352; State v. Roberts, 2 D. & B., 540; State v. Allen, 83—680; State v. Hines, 84—810; State v. Watson, 86—624; State v. Powell, 86—640.

Sec. 1176. Names of witnesses and grand jurors to be indorsed on presentment. R. C., c. 35, s. 7. 1797, c. 474, s. 2.

When a presentment shall be made of any offence by a grand jury, upon the knowledge of any of their body, or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon.

State v. Allen, 83—680.

Sec. 1177. Indictments for misdemeanors to be commenced in two years, exceptions thereto. R. C., c. 35, s. 8. 1826, c. 11.

All misdemeanors, except the offences of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offence of being accessory

after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards: *Provided*, that in case any of the said misdemeanors, hereby required to be prosecuted within two years, shall have been committed in a secret manner, the same may be prosecuted within two years after the discovery of the offender: *Provided, further*, that if any indictment found within that time shall be defective, so that no judgment can be given thereon, another prosecution may be instituted for the same offence, within one year after the first shall have been abandoned by the state.

State v. Tomlinson, 3 Ired., 32; State v. Cox, 6 Ired., 440; State v. Watts, 10 Ired., 369; State v. Christianbury, Busb., 46; State v. Hailey 6 Jon., 42.

Sec. 1178. Criminal proceedings to issue and be returnable at any time; proceedings as heretofore. R. C., c. 35, s. 9. 1777, c. 115, s. 15.

All process, warrants and precepts, issued by any judge or justice of the peace, or clerk of any court, on any criminal prosecution, may issue at any time, and be made returnable to any day of the term of the court, to which such warrant, process, or precept is returnable.

Sec. 1179. Sheriff to indorse on process and subpœnas day of receipt and execution. R. C., c. 35, s. 10. 1850, c. 57.

Every sheriff shall indorse on all process and subpœnas issuing in criminal cases, whether for the state or defendant, the day when such process and subpœnas came to hand, and also the day of their execution; and on failure of any sheriff to perform either of said duties, he shall forfeit and pay the sum of ten dollars for every case of neglect, to be recovered for the use of the state, in the same manner as forfeitures are recovered against sheriffs by parties in civil suits, for failure to make due return of process delivered to them.

Sec. 1180. Sheriff to take bail in bailable offences; not to become bail himself. R. C., c. 35, s. 11. 1797, c. 474, s. 4.

When any sheriff or his deputy shall arrest the body of any person, in consequence of the writ of *capias* issued to him by the clerk of a court of record on an indictment found, the said sheriff or deputy, if the crime is bailable, shall recognize the offender, and take

sufficient bail in the nature of a recognizance for his appearing at the next succeeding court of the county where he ought to answer, which recognizance shall be returned with the *capias;* and the sheriff shall in no case become bail himself.

Sec. 1181. Court to allow bail pending appeal. R. C., c. 35, s. 12. 1850, c. 2.

When any person convicted of a misdemeanor, and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal.

Sec. 1182. The accused allowed counsel. R. C., c. 35, s. 13. 1777, c. 115, s. 85.

Every person, accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defence.

State v. Collins, 70—241; State v. Sykes, 79—618.

Sec. 1183. Formal objections or stay of judgment shall not quash indictments, informations and impeachments. R. C., c. 35, s. 14. 37 Hen. VIII, c. 8. 1784, c. 210, s. 2. 1811, c. 809.

Every criminal proceeding by warrant, indictment, information, or impeachment, shall be sufficient in form for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

State v. Carter, Conf. R., 210; State v. Newmans, 2 C. L. Repos., 74 (171); State v. Cherry, 3 Mur., 7; State v. Sexton, 3 Hawks, 184; State v. Brown, 1 Dev., 137; State v. Pool, 2 Dev., 202; State v. Moses, 2 Dev., 452; State v. Fore, 1 Ired., 378; State v. Gallion, 2 Ired., 372; State v. Lane, 4 Ired., 113; State v. Tribalt, 10 Ired., 151; State v. Noblett, 2 Jon., 418; State v. Boon, 4 Jon., 463; State v. Perry, 5 Jon., 252; State v. Morgan, Winst., 248; State v. Beatty, Phil., 52; State v. Smith, 63—234; State v. Bell, 65—313; State v. Phelps, 65—450; State v. Parker, 65—453; State v. Sprinkle, 65—463; State v. Wise, 66—120; State v. Staton, 66—640; State v. Johnson, 67—55; State v. Wise, 67—281; State v. Purdie, 67—326; State v. Wilson, 67—456; State v. Henderson, 68—348; State v. Evans, 69—40; State v. Davis, 69—495; State v. Simons, 70—336; State v. Rinehart, 75—58; State v. Underwood, 77—502; State v. Davis, 80—384; State v. Reel, 80—442; State v. Joyner, 81—534; State v. Williamson, 81—540; State v. Davis, 84—787; State v. Davis, 87—514; State v. Walker, 87—541.

Sec. 1184. Substance of proceedings to be set forth in indictments, &c. R. C., c. 35, s. 15.

In every indictment, information, or impeachment in which, by the common law, it may be necessary to set forth at length the judicial proceedings had in any case then or formerly pending in any court, civil or military, or before any justice of the peace, it shall be sufficient to set forth the substance only of said proceedings, or the substance of such part thereof as make, or help to make, the offence prosecuted.

State v. Haney, 67—467; State v. Evans, 69—40; State v. Davis, 69—495; State v. Simons, 70—336.

Sec. 1185. Indictment for perjury; what to set forth. R. C., c. 35, s. 16. 1842, c. 49, s. 1.

In every indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath was taken, (averring such court or person to have competent authority to administer the same,) together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceedings, either in law or equity, other than aforesaid, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

State v. Bryson, 1 C. L. Repos., 503; State v. Ammons, 3 Mur., 125; State v. Gallimore, 2 Ired., 372; State v. Bell, 3 Ired., 506; State v. Hoyle, 6 Ired., 1; State v. Harvell, 4 Jon., 55; State v. Davis, 69—495; State v. Quick, 72—241; State v. Davis, 84—787; State v. Knight, 84—789; State v. Collins, 85—511.

Sec. 1186. Indictment for subornation of perjury; what to set forth. R. C., c. 35, s. 17. 1842, c. 49, s. 2.

In every indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceedings, and without setting forth the commission or authority of the court or person before whom the perjury was committed or was agreed or promised to be committed.

Sec. 1187. Indictment for second offence; how first conviction to be stated. R. C., c. 35, s. 18.

In any indictment for an offence which, on the second conviction thereof, is punished with other or greater punishment than on the first conviction, it shall be sufficient to state that the offender was, at a certain time and place, convicted thereof, without otherwise describing the previous offence; and a transcript of the record of the first conviction, duly certified, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction.

Sec. 1188. Indictment; how stated, when ownership of property is held in common. R. C., c. 35, s. 19.

In any indictment wherein it shall be necessary to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any such indictment, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall extend to all joint stock companies and trustees.

State v. Harper, 64—129; State v. Patterson, 68—292; State v. Capps, 71—93; State v. Hill, 79—656; State v. Edwards, 86—666.

Sec. 1189. Indictment, certain defects of, not to vitiate. R. C., c. 35, s. 20.

No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed, or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statutes" instead of the words "against the form of the statute," or *vice versa;* nor for omission of the words "against the form of the statute" or "against the form of the statutes." nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to

the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper and perfect venue, when the court shall appear by the indictment to have had jurisdiction of the offence.

State v. Roach, 2 Hay., 352; State v. Shepherd, 8 Ired., 195; State v. Abernathy, Busb., 428; State v. Noblett, 2 Jon., 418; State v. Storkey, 63—7; State v. Caudle, 63—30; State v. Smith, 63—234; State v. Wise, 66—120; State v. Purdie, 67—326; State v. Haney, 67—467; State v. Simons, 70—336; State v. Davis, 80—384; State v. Jones, 80—415; State v. Parker, 81—531; State v. Joyner, 81—534; State v. Taylor, 83—601; State v. Lowder, 85—564; State v. Morgan, 85—581.

Sec. 1190. In indictments for larceny of money, treasury notes or bank notes, sufficient to describe such money or notes simply as money without specifying the kind. 1876-'7, c. 68.

In every indictment in which it shall be necessary to make any averment as to the larceny of any money, or United States treasury note, or any note of any bank whatsoever, it shall be sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or treasury note, or bank note, although the particular species of coin, of which such amount was composed, or the particular nature of the treasury note, or bank note, shall not be proven.

State v. Collins, 72—144; State v. Reese, 83—637; State v. Reynolds, 87—544.

Sec. 1191. Intent to defraud, what statement and proof sufficient; in same indictment, defendant may be charged with counts for receiving stolen goods and with larceny. R. C., c. 35, ss. 21, 23. 1852, c. 87, s. 2. 1874-'5, c. 62.

In any case, where an intent to defraud is required to constitute the offence of forgery, or any other offence whatever, it shall be sufficient to allege, in the indictment, an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city, town, or parish, or body corporate, or any public officer, in his official capacity, or any co-partnership or member thereof, or any particular per-

son. The defendant may be charged in the same indictment in several counts with the separate offences of receiving stolen goods, knowing them to be stolen, and larceny.

State v. Ives, 13 Ired., 339; State v. Beatty, Phil., 52; State v. Tisdale, Phil., 220; State v. Bailey, 73—70; State v. Leak, 80—403; State v. Lawrence, 81—522; State v. Morrison, 85—561; State v. Hastings, 86—596.

Sec. 1192. Party whose name is forged a competent witness. R. C., c. 35, s. 22.

No person shall be deemed to be an incompetent witness by reason of any interest which such person may have, or be supposed to have in respect to any deed, writing, instrument, or other matter whatsoever, in support of any prosecution, wherein shall be questioned the fact of forging such deed, writing, instrument, or other matter whatsoever, or the fact of uttering, showing forth in evidence, or disposing thereof, knowing the same to be forged.

Sec. 1193. Crimes committed on waters dividing counties, where tried. R. C., c. 35, s. 24.

When any offence shall be committed on any water, or watercourse, whether at high or low water, which said water or watercourse, or the sides or shores thereof, shall divide counties, such offence may be dealt with, inquired of, tried and determined, and punished at the discretion of the court, in either of the two counties which may be nearest to the place where the offence was committed.

Sec. 1194. Improper *venue* to be taken advantage of by plea in abatement; on issue joined, what judgment rendered in misdemeanors, what in felonies. R. C., c. 35, s. 25.

And because the boundaries of many counties are either undetermined, or unknown, by reason whereof high offences go unpunished; therefore, for the more effectual prosecution of offences committed on land, near the boundaries of counties, in the prosecution of all offences, it shall be deemed and taken as true, that the offence was committed in the county, in which by the indictment it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement, the truth whereof shall be duly verified on oath, or otherwise, both as to substance and fact, wherein shall be set forth the proper county in which the supposed offence, if any, was committed: whereupon the court may, on

motion of the state, commit the defendant, who may enter into recognizance, as in other cases, to answer the offence in the county averred by his plea to be the proper county; and, on his prosecution in that county, it shall be deemed, conclusively, to be the proper county. But if the state, upon the plea aforesaid, will join issue, and the matter be found for the defendant, he shall be required to enter into recognizance as in other cases to answer the offence in the county averred by his plea to be the proper county, provided the offence be bailable; and, if not bailable, he shall be committed for trial in the county; and, if it be found for the state, the court in all offences or misdemeanors shall proceed to pronounce judgment against the defendant, as upon conviction; and, in all cases of felony, the defendant shall be at liberty to plead to the indictment, and be tried on his plea of not guilty.

State v. Adams, Mar., 30 (21); State v. Outerbridge, 82—617; State v. Mitchell, 83—674.

Sec. 1195. In indictment for libel, defendant may give the truth in evidence. R. C., c. 35, s. 26. 1803, c. 632.

Every defendant who shall be charged by indictment with the publication of a libel may prove on the trial for the same the truth of the facts alleged in the indictment; and if it shall appear to the satisfaction of the jury that the facts are true, the defendant shall be acquitted of the charge.

Sec. 1196. In cases where an assault followed by death in another county, indictment to be found in the county where assault was made. R. C., c. 35, s. 27. 1831, c. 22, s. 1.

In all cases of felonious homicide, when the assault shall have been made in one county within the state, and the person assaulted shall die in any other county thereof, the offender shall be indicted and punished for the crime in the county wherein the assault was made.

Sec. 1197. Assault in this state and death out of it, trial to be held in this state. R. C., c. 35, s. 28. 1831, c. 22, s. 2.

In all cases of felonious homicide, when the assault shall have been made within this state, and the person assaulted shall die without the limits thereof, the offender shall be indicted and punished for the crime in the county where the assault was made, in the same manner, to all

intents and purposes as if the person assaulted had died within the limits of this state.

State v. Fisher, 3 Ired., 111; State v. Dunkley, 3 Ired., 116.

Sec. 1198. Plea of "not guilty" entered for defendant who stands mute. R. C., c. 35, s. 29. R. S., c. 35, s. 16.

If any person, being arraigned upon or charged in any indictment for any crime, shall stand mute of malice or will not answer directly to the indictment, the court shall order the plea of "not guilty" to be entered on behalf of such person; and the plea so entered shall have the same force and effect as if such person had pleaded the same.

State v. Harris, 8 Jon., 136; State v. Pollard, 83—598.

Sec. 1199. In capital cases, defendants may challenge twenty-three jurors, in other cases four; allowed aid of counsel. R. C., c. 35, s. 32. 1871-'2, c. 39. R. S., c. 35, ss. 19, 21. 1777, c. 115, s. 85. 1812, c. 833. 1801, c. 592, s. 1; 1826, c. 9. 22 Hen. VIII, c. 14.

Every person on joint or several trial for his life, may make a peremptory challenge of twenty-three jurors and no more; and in all joint or several trials for crimes and misdemeanors, other than capital, every person on trial shall have the right of challenging peremptorily, and without showing cause, four jurors and no more. And to enable defendants to exercise this right, the clerk in all such trials shall read over the names of the jurors on the panel, in the presence and hearing of the defendants and their counsel before the jury shall be impaneled to try the issue; and in all trials whether for capital or inferior offences, the defendants may have the aid and assistance of counsel in making challenges to the jury, and the judge or other presiding officer of the court shall decide all questions as to the competency of jurors.

State v. Benton, 2 D. & B., 196; State v. Morgan, 2 D. & B., 348; State v. Smith, 2 Ired., 402; State v. Creasman, 10 Ired., 395; State v. Dove, 10 Ired., 469; State v. Cadwell, 1 Jon., 289; State v. Patrick, 3 Jon., 443; State v. Davis, 80—384.

Sec. 1200. In capital cases state may challenge four jurors, in others two. R. C., c. 35, s. 33. 33 Edw. I, stat. 4. 1827, c. 10.

In all capital cases, the prosecuting officer on behalf of the state shall have the right of challenging peremptorily four jurors: *Provided*, said challenge is made before the juror is tendered to the prisoner; and if he will challenge

more than four jurors he shall assign for his challenge a cause certain; and in all other cases of a criminal nature, a challenge of two jurors shall be allowed in behalf of the state, and challenges also for a cause certain; and in all cases of challenge for cause certain, the same shall be inquired of according to the custom of the court.

Sec. 1201. On conviction for robbing or stealing, the person robbed is entitled to the restitution of his property. R. C., c. 35, s. 34. 21 Hen. VIII, c. 11.

Upon the conviction of any felon for robbing or stealing any money, goods, chattels, or other estate of any description whatever, the person from whom such goods, money, chattels or other estate were robbed or stolen, shall be entitled to restitution thereof; and the court may award restitution of the articles so robbed or stolen, and make all such orders and issue such writs of restitution or otherwise, as may be necessary for that purpose.

Sec. 1202. New trial to defendants. R. C., c. 35, s. 35. 1815, c. 895, amended.

The courts may grant new trials in criminal cases when the defendant is found guilty, under the same rules and regulations as in civil cases.

State v. Mooney, 74—98; State v. Grady, 86—643; State v. Bridgers, 87—562.

Sec. 1203. Superior and inferior courts to set a day for the trial of crimes; witnesses not to attend till such day. R. C., c. 35, s. 36. 1822, c. 1133, ss. 2, 3, 4. C. C. P., s. 229.

The courts shall appoint a special day in their respective terms, on which the business of the state shall be taken up, and the court may proceed therewith till the whole is finished; and no witness recognized or summoned to attend on indictment found shall be entitled to compensation for attending previous to the day so appointed: *Provided*, that in capital cases witnesses and other persons may be required on the day preceding the day appointed as aforesaid; and the clerk of the court in which a day is thus appointed shall give notice thereof at the court house door and at three or more public places in the county, and shall issue subpœnas and take recognizances for attendance on such day.

Lewis v. Com'rs, 74—194.

Sec. 1204. Pay of witnesses in state cases; court to direct the prosecutor to pay costs in certain cases. R. C., c. 35, s. 37. 1800, c. 558, s. 1. 1879, c. 49; c. 92, s. 3; 1881, c. 176.

All witnesses summoned or recognized in behalf of the state shall be allowed the same pay for their daily attendance, ferriage and mileage as is allowed to witnesses attending in civil suits; and such fees for attendance shall be paid by the defendant, only upon conviction, confession or submission; and if the defendant be acquitted on any charge of an inferior nature, or a *nolle prosequi* be entered thereto, the court shall order the prosecutor to pay the costs, if such prosecution shall appear to have been frivolous or malicious; but if the court shall be of opinion that such prosecution was neither frivolous nor malicious, and a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, nevertheless, order the prosecutor to pay the attendance of such unnecessary witnesses, if it appear that they were summoned at his special request.

State v. Stewart, 1 C. L. Repos., 524; State v. Lumbrick, 1 C.L.Repos., 543; Office v. Gray, 2 C.L. Repos., 424; State v. Cockerham, 1 Ired., 381; State v. Lupton, 63—483; State v. Darr, 63—516; Lewis v. Com'rs, 74—194; Bunting v. Com'rs, 74—633; Pegram v. Com'rs, 75—120; State v. Spencer, 85—519; State v. Crosset, 81—579; State v. Hughes, 83—665; State v. Norwood, 84—794; State v. Owens, 87—565.

Sec. 1205. Judges may lessen or remit recognizances at any time. R. C., c. 35, s. 38. 1788, c. 292, s. 1.

The judges of the superior, criminal and the presiding officers of the inferior courts may hear and determine the petition of all persons, who shall conceive they merit relief on their recognizances forfeited; and may lessen, or absolutely remit the same, and do all and anything therein, as they shall deem just and right and consistent with the welfare of the state and the persons praying such relief, as well before, as after final judgment entered and execution awarded.

State v. Moody, 74—73.

Sec. 1206. Clerk to refund remitted forfeitures paid into office. R. C., c. 35, s. 39. 1795, c. 442, s. 1.

The clerk of the superior, criminal or inferior courts, on the remission of any forfeited recognizance which has been paid into his office, shall refund the same, or so much thereof as shall be remitted.

Moore v. Com'rs, 70—340; State v. Moody, 74—73.

Sec. 1207. County treasurer to refund, when paid to him. R. C., c. 35, s. 40. 1795, c. 442, s. 2.

If the money has been paid to the county treasurer, he shall refund it to the person entitled, on his producing an attested copy of the record from the clerk of the court, certifying that such recognizance hath been remitted or lessened, signed with his own proper name, with the seal of the court affixed thereto.

State v. Moody, 74—73.

Sec. 1208. Execution not to issue until the issuing of the notice. R. C., c. 35, s. 43. 1777, c. 115, s. 48.

No execution shall issue upon a forfeited recognizance, or to collect a fine imposed *nisi*, until a notice has issued against the person and his sureties, who has forfeited his recognizance or upon whom the fine has been imposed.

State v. Mills, 2 D. & B., 552.

Sec. 1209. Joint notice to issue on forfeited recognizances. R. C., c. 35, s. 44. 1812, c. 836, s. 1.

When any recognizance, acknowledged by a principal and sureties, shall be forfeited by two or more of the recognizors, the notice issued thereon shall be jointly against them all, designating which of them are principals and which sureties, and when they are bound in different sums, stating the amount forfeited by each one: and the clerk shall have no greater fee on such notice than is due when it is issued against one defendant.

Sec. 1210. How notices executed. R. C., c. 35, s. 45. 1812, c. 836, s. 2.

All notices issuing upon forfeited recognizances shall be executed by leaving a copy with each of the defendants, or at his present place of abode. And in case he cannot be found, and has no known place of abode, and the matter be returned, then a notice shall issue, and on the like return, the same shall be deemed duly served.

Sec. 1211. Convicted person must pay the costs. R. C., c. 35, s. 46.

Every person convicted of an offence, or confessing himself guilty, or submitting to the court, shall pay the costs of prosecution.

State v. Mooney, 74—98; Lewis v. Com'rs, 74—194; Neal v. Com'rs, 85—420.

Sec. 1212. Penalties not specially given may be recovered by any person who may sue for same. R. C., c. 35, s. 47.

Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use.

Norman v. Dunbar, 8 Jon., 319; Duncan v. Philpot, 64—479.

Sec. 1213. Suits on penalties, unless otherwise provided, may be brought in name of the state. R. C., c. 35, s. 48.

Whenever any penalty shall be given by statute, and it is not prescribed in whose name suit therefor may be commenced, the same shall be brought in the name of the state.

Caroon v. Rogers, 6 Jon., 246; Norman v. Dunbar, 8 Jon., 319; Duncan v. Philpot, 64—479.

Sec. 1214. Prosecuting attorneys to direct *post mortem* examinations. R. C., c. 35, s. 49.

In all cases of homicide, any officer prosecuting for the state may, at any time, direct a *post mortem* examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant, the same shall be paid by the county.

Sec. 1215. Persons participating in unlawful gaming compelled to testify of the gaming; not to be prosecuted therefor. R. C., c. 35, s. 50.

No person shall be excused, on any prosecution, from testifying touching any unlawful gaming done by himself or others; but no discovery, made by the witness upon such examination, shall be used against him, in any penal or criminal prosecution, and he shall be altogether pardoned of the offence so done, or participated in by him.

State v. Gailor, 71—88.

Sec. 1216. Officers who are authorized to keep the peace. 1868-'9, c. 178, sub chap. 2, s. 1.

The following magistrates shall have power to cause to be kept all the laws made for the preservation of the

public peace, and in execution of that power to require persons to give security to keep the peace, in the manner provided in this chapter, namely: The chief justice and associate justices of the supreme court, the judges of the superior and criminal courts, and of any special courts which may be hereafter created, the justices of the peace, the mayors or other chief officers of all cities and towns.

Sec. 1217. Duty of magistrate on complaint being made. 1868-'9, c. 178, sub chap. 2, s. 2.

Whenever complaint shall be made in writing, and upon oath to any such magistrate that any person has threatened to commit any offence against the person or property of another, it shall be the duty of such magistrate to examine such complainant and any witnesses who may be produced, on oath, to reduce such examination to writing, and to cause the same to be subscribed by the parties so examined.

Sec. 1218. When warrant to issue. 1868-'9, c. 178, sub chap. 2, s. 3.

If it shall appear from such examination that there is just reason to fear the commission of any such offence by the person complained of, it shall be the duty of the magistrate to issue a warrant under his hand, with or without a seal, reciting the complaint, and commanding the officer to whom it is directed forthwith to apprehend the person so complained of, and bring him before such magistrate or some other magistrate authorized to issue such warrant.

Sec. 1219. To whom the warrant shall be directed. 1868-'9, c. 178, sub chap. 2, s. 4.

The warrant shall be directed to the sheriff, coroner or any constable, each of whom shall have power to execute the same within his county; and if no sheriff, coroner or constable can conveniently be found, the warrant may be directed to any person whatever, who shall have power to execute the same within the county in which it is issued. No justice of the peace, or mayor, or other chief officer of any city or town shall direct his warrant to any officer outside of the county of said justice or chief officer.

Sec. 1220. Duty of magistrate on return of warrant. 1868-'9, c. 178, sub chap. 2, s. 5.

Upon the person complained of being brought before the magistrate, he may be required to enter into a recognizance, payable to the state of North Carolina, in such sum not exceeding one thousand dollars, as such magistrate shall direct, with one or more sufficient sureties, to appear at the next term of the court having jurisdiction in the county in which the offence is charged to have been committed, and not to depart the same without leave, and in the meanwhile to keep the peace and be of good behaviour towards all the people of this state, and particularly towards the person requiring such security.

Sec. 1221. When party complained of discharged and when imprisoned. 1868-'9, c. 178, sub chap. 2, s. 6.

If such recognizance shall be given, the party complained of shall be discharged; if such person shall fail to find such security, it shall be the duty of the magistrate to commit him to prison until he shall find the same, specifying in the *mittimus* the cause of commitment and the sum in which such security was required.

Sec. 1222. How discharged subsequently. 1868-'9, c. 178, sub chap. 2, s. 7.

Any person committed for not finding sureties of the peace as above provided, may be discharged by any magistrate upon giving such security as was originally required of such person, or by a justice of the supreme court, or judge of the superior or criminal court, by giving such other security as may seem sufficient.

Sec. 1223. Recognizance to be returned to next term of court. 1868-'9, c. 178, sub chap. 2, s. 8.

Every recognizance taken pursuant to the foregoing provisions shall be transmitted by the magistrate taking the same to the next term of the superior, criminal or inferior court for the county in which the offence is charged to have been committed.

Sec. 1224. Persons committing breach of the peace in presence of the court may be required to give security, or be imprisoned. 1868-'9, c. 178, sub chap. 2, s. 9.

Every person who, in the presence of any magistrate

above specified, or in the presence of any court of record, shall make any affray, or threaten to kill or beat another, or to commit any offence against his person or property; and all persons who, in the presence of such magistrate or court, shall contend with hot and angry words, may be ordered by such magistrate or court, without any other proof, to give such security as above specified, and in case of failure so to do, may be committed as above provided.

Sec. 1225. Proceedings on recognizances. 1868-'9, c. 178, sub chap. 2, s. 10.

Every person who shall have entered into a recognizance to keep the peace shall appear according to the obligation thereof; and if he fail to appear, the court shall forfeit his recognizance and order it to be prosecuted, unless reasonable excuse for his default be given.

Sec. 1226. If complainant does not appear, the accused shall be discharged, otherwise court to hear the proofs and decide accordingly. 1868-'9, c. 178, sub chap. 2, s. 11.

If the complainant does not appear, the party recognized shall be discharged, unless good cause be shown to the contrary. If the respective parties appear, the court shall hear their allegations and proofs, and may either discharge the recognizance taken, or they may require a new recognizance, as the circumstances of the case may require, for such time as may appear necessary, not exceeding one year.

Sec. 1227. Recognizance, when deemed broken. 1868-'9, c. 178, sub chap. 2, s. 12.

No recognizance taken under this chapter shall be deemed to be broken except in the case provided for in the next two preceding sections, unless the principal in such recognizance be convicted of some offence amounting in judgment of law to a breach of such recognizance.

Sec. 1228. Where there is evidence of breach, court shall order recognizance prosecuted. 1868-'9, c. 178, sub chap. 2, s. 13.

Whenever evidence of such conviction shall be produced in the court in which the recognizance is filed, it shall be the duty of such court to order the recognizance to be prosecuted, and the solicitor shall cause the proper proceedings to be thereupon taken.

Sec. 1229. Term of court expiring during progress of trial, court shall continue it. C. C. P., s. 397. R. C., c. 31, s. 16. 1830, c. 22.

In case the term of a court shall expire while a trial for felony, or for any offence punishable by imprisonment in a penitentiary, or by any greater punishment, shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion, it shall be necessary for the purposes of the case.

State v. Bullock, 63—570; State v. Adair, 66—298; State v. Jefferson, 66—309; State v. Honeycutt, 74—391; State v. Taylor, 76—64; State v. Monroe, 80—373; State v. McGimsey, 80—377; State v. Howard, 82—623; State v. Locke, 86—647.

Sec. 1230. Bail may arrest and surrender principal before final judgment; bail not thereby discharged after recognizance forfeited. R. C., c. 11, s. 5. 1777, c. 115, s. 20. 1848, c. 7.

The bail shall have liberty, at any time before execution awarded against him, to surrender to the court from which the process issued, or to the sheriff having such process to return, during the session, or in the recess of such court, the principal, in discharge of himself; and such bail shall, at any time before such execution awarded, have full power and authority to arrest the body of his principal, and secure him, until he shall have an opportunity to surrender him to the sheriff or court as aforesaid; and the sheriff is hereby required to receive such surrender, and hold the body of the defendant in custody, as if bail had never been given: *Provided*, that, in criminal proceedings, the surrender by the bail, after the recognizance forfeited, shall not have the effect to discharge the bail, but the forfeiture may be remitted in the manner provided for.

Sec. 1231. Persons surrendered may give other bail; sheriff allowing a release liable to be amerced and indicted. R. C., c. 11, s. 6. 1827, c. 40.

Any person surrendered in the manner specified in the preceding section, shall have liberty, at any time, before final judgment against him, to give bail; and in case of such surrender, the sheriff shall take the bail-bond or recognizance to the succeeding court; and in case the sheriff shall release such person without bail, or the bail returned be held insufficient, on exception taken the same term to which such bail-bond shall be returned, and allowed by the court, the sheriff, having due notice

thereof in criminal cases, shall forfeit to the state the sum of one hundred dollars, to be recovered on motion in like manner as forfeitures for not returning process, and be subject to be indicted for misdemeanor in office; and it shall be the duty of the prosecuting officer to collect the forfeiture; and, in case of a release, the sheriff shall be liable for an escape, and may be prosecuted and punished as provided for in the chapter entitled "crimes and punishments."

Sec. 1232. Sheriff or other officer having prisoner in custody may take bail. R. C., c. 11, s. 8.

If any person for want of bail shall be lawfully committed to jail at any time before final judgment, the sheriff, or other officer having him in custody, may take sufficient justified bail and discharge him; and the bail-bond shall be regarded, in every respect, as other bail-bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken.

Sec. 1233. Matter of defence which is good for principal is good for bail. R. C., c. 11, s. 9.

Every matter which would entitle the principal to be discharged from arrest, may be pleaded by the bail in exoneration of his liability.

Sec. 1234. Appeals by defendant to supreme court. R. C., c. 4, s. 21. 1818, c. 962, s. 4.

In all cases of conviction in the superior or criminal courts for any criminal offence, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions.

State v. Dixon, 71—204; State v. Swepson, 82—541; State v. Ham, 83—590; State v. Respass, 85—534; State v. Gaylord, 85—551; State v. Locke, 86—647.

Sec. 1235. Convicted persons may appeal without giving security for costs. 1869-'70, c. 196, s. 1.

In all such cases of conviction in the said courts, the defendant shall have the right to appeal without giving security for costs, upon filing an affidavit that he is wholly unable to give security for the costs, and is advised

by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith.

State v. Divine, 69—390; State v. Dixon, 71—204; State v. Hawkins, 72—180; State v. Patrick, 72—217; State v. Morgan, 77—510; State v. Spurlin, 80—362; Stell v. Barham, 85—88; State v. Gaylord, 85—551.

SEC. 1236. Judge to grant appeal and require defendant to give security for his appearance. 1869-'70, c. 196, s. 2.

It shall be the duty of the judge on filing the affidavit required in the preceding section, to grant the appeal without security for costs, and for any bailable offence shall require the defendant to enter into recognizance in a reasonable sum to make his appearance at the first term of the superior or criminal court to be held in the county and to further answer the charge preferred.

State v. Spurlin, 80—362; State v. Hinson, 82—540; State v. Swepson, 83—584; State v. Moore, 84—724; State v. Gaylord, 85—551.

SEC. 1237. Appeal by state; in what cases recognized.

An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant—

(1) Upon a special verdict;

(2) Upon a demurrer;

(3) Upon a motion to quash;

(4) Upon arrest of judgment.

State v. Bobbitt, 70—81; State v. Lane, 78—547; State v. Swepson, 83—584; State v. Moore, 84—724; State v. Scanlan, 85—601; State v. Powell, 86—640.

SEC. 1238. What the commitment shall set forth. 1868-'9, c. 178, sub chap. 4, s. 17.

The commitment to the county prison shall set forth—

(1) The name of the guilty person;

(2) The nature of the offence of which he is convicted and the date of the trial;

(3) The period of his imprisonment;

(4) It shall be directed to the sheriff of the county, or to the keeper of the county jail, and shall direct him to keep the prisoner for the time stated, or until discharged by law;

(5) The name of the constable or other officer required to execute it;

(6) It shall be signed by the justice and be dated.

Sec. 1239. Duty of solicitors to prosecute certain criminal cases in the United States courts. 1874-'5, c. 164, s. 1.

It shall be the duty of the solicitors of this state, in whose jurisdiction the circuit and district courts of the United States are held, having first obtained the permission of the judges of said courts, to prosecute, or assist in the prosecution of, all criminal cases in said courts, where the defendants are charged with violations of the laws of this state, and have moved their cases from the state to the federal courts under the provisions of the various acts of congress on such subjects.

Sec. 1240. Compensation of solicitors in such cases. 1874-'5, c. 164, s. 2.

For every such case in which the solicitor shall appear and prosecute, or assist in prosecuting, he shall be allowed twenty dollars; and if he cannot appear himself, by reason of a conflict of the time of holding his courts, or other good cause, he may appoint some one to act in his stead, who shall receive like compensation, and the prosecuting attorney shall be paid said fee by the treasurer of the state, upon the warrant of the auditor.

Sec. 1241. Concurrent jurisdiction of inferior and superior courts in certain criminal cases, with a view to a speedy trial of criminals. 1879, c. 302, s. 1.

Wherever in any county, inferior courts have been or shall hereafter be established, the said inferior court and the superior court for such county shall have equal power and jurisdiction to inquire of, try, hear and determine all criminal cases of which jurisdiction is given to said inferior courts, or of which jurisdiction may hereafter be given to them, whether such cases have been returned to the said superior court or to the said inferior court.

Sec. 1242. Pending cases remaining untried to be transferred to succeeding court whether inferior or superior. 1879, c. 302, s. 3.

All such cases pending in either the inferior or the superior court of any county which shall not have been tried and determined at any term of said inferior or superior court shall be transferred by the clerk of such court to the next succeeding court whether the same be an inferior or superior court, and shall be proceeded in the same manner and with like power and jurisdiction to said court (to which they are transferred) to hear, try and determine as if the bill of indictment therein had

been originally found by the grand jury of the same: *Provided*, that this section shall apply only to those cases in which the defendants or accused are confined in jail: *Provided further*, that in such cases the handing over of the papers by the clerk of one court to the clerk of the other court where the trial is to take place, and the docketing of the cases, with the receipt of the latter on the docket of the former, shall be deemed and held a sufficient transfer of any such case from one court to another.

State v. Mott, 86—621.

Sec. 1243. The execution of capital offenders to be private, unless the county commissioners shall otherwise order. 1868, c. 21, ss. 1, 2. 1879, c. 221.

As the ends of justice, public morals and the preservation of order, demand that the execution of all capital offenders should be made private and invested with the solemnity appropriate to the final act of penal law, any sheriff on whom shall devolve the execution of a sentence of death on a public offender, shall be required to provide for the execution of such criminal within the jail yard inclosure, and as much removed from public view as the means within his control will allow: *Provided*, that, for reasons which may be deemed good and sufficient, the board of county commissioners may otherwise order.

Sec. 1244. Sheriff may admit to witness the execution two physicians and necessary assistants. 1868, c. 21, s. 3.

The sheriff, after having provided for the private execution of the criminal, may admit by ticket, in addition to the required guard, two physicians and necessary assistants, not more than thirty-six nor less than eighteen respectable citizens, to witness for the state, the due observance of the law.

CHAPTER TWENTY-SEVEN.

DEEDS AND CONVEYANCES.

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Sec. 1245. Deeds proved and registered in county where land lies within two years, good without livery. 29 Ch. II., c. 10, s. 2. R. C., c. 37, s. 1. 1715, c. 7, s. 1. 1756, c. 58, s. 3. 1777, c. 115, s. 2. 1818, c. 963, s. 2.

No conveyance of land nor contract to convey, nor lease of land for more than three years, shall be good and available in law unless the same shall be acknowledged by the grantor or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land without livery of seizin, attornment or other ceremony whatever.

Morris v. Ford, 2 Dev. Eq., 412; Walker v. Coltraine, 6 Ired. Eq., 79; Doak v. State Bank, 6 Ired., 309; Osborne v. Ballew, 7 Ired., 415; Walston v. Brasswell, 1 Jon. Eq., 137; Freeman v. Hatley, 3 Jon., 115; Williams v. Griffin, 4 Jon., 31; Johnson v. Pendergrass, 4 Jon., 479; Latham v. Bowen, 7 Jon., 337; Salms v. Martin, 63—608; Linker v. Long, 64—296; Levy v. Griffis, 65—236; Hogan v. Strayhorn, 65—279; Ivey v. Granberry, 66—223; Isler v. Foy, 66—547; Paul v. Carpenter, 70—502; Starke v. Etheridge, 71—240; Holmes v. Marshal, 72—37; Wilson v. Sparks, 72—208; Triplett v. Witherspoon, 74—475; McMillan v. Edwards, 75—81; Buie v. Carver, 75—559; Hare v. Jernigan, 76—471; Mayo v. Jones, 78—402; Riggan v. Green, 80—236; King v. Portis, 81—382; Henley v. Wil-

son, 81—405; Mauney v. Crowell, 84—314; Davis v. Inscoe, 84—396; Mosely v. Mosely, 87—69; Love's Ex'rs v. Harbin, 87—249.

Sec. 1246. Deeds, how proved. R. C., c. 37, s. 8. C. C. P., s. 429. 1866, c. 30, s. 1. 1868-'9, c. 277, s. 15. 1876-'7, c. 161. 1879, c. 22. 1879, c. 77. 1879, c. 128. 1881, c. 334. 1881, c. 341.

All deeds conveying lands, letters of attorney or other instruments requiring registration must be offered for probate or a certified copy thereof must be exhibited before the clerk of the superior court of any county in the manner following:

Johnson v. Pendergrass, 4 Jon., 479.

(1) WHERE GRANTOR, &C., RESIDE IN THE COUNTY WHERE LAND IS SITUATE.

When the grantor or maker, or subscribing witness, resides in the county wherein the land lies, the deed, letter of attorney or other instrument requiring registration must be acknowledged by such grantor or maker, or proved by the oath of such subscribing witness, before the clerk of the superior or of the inferior court, or before a notary public or justice of the peace of such county, who shall enter his certificate thereon; and such deed, letter of attorney or other instrument with the certificate thereon, on exhibition to the clerk of the superior court of said county, shall, if in due form, be admitted by him to probate and ordered to be registered with the certificates thereto attached.

Starke v. Etheredge, 71—240; Holmes v. Marshall, 72—37; Rollins v. Henry, 78—342; Mayo v. Jones, 78—402; Black v. Justice, 86—504.

(2) WHERE GRANTOR, &C., RESIDE IN THE STATE, BUT NOT IN THE COUNTY WHERE THE LAND IS SITUATE.

When the grantor, maker or subscribing witness resides in the state, but not in the county wherein the land lies, such deed, letter of attorney or other instrument requiring registration must be acknowledged by such grantor or maker, or proved by the oath of such subscribing witness before a judge of the supreme or of the superior court, or before the clerk of the superior court, or the inferior court, or a notary public or justice of the peace of the county wherein the grantor, maker or subscribing witness resides; and if such acknowledgment or proof shall be had before a justice of the peace, the clerk of the superior court of the county of such justice shall

certify upon such deed, letter of attorney or instrument the fact of such acknowledgment or proof, and the further fact that such justice was at the time of taking such acknowledgment or proof an acting justice of said county. And the clerk of the superior court of the county wherein the land lies, upon the exhibition to him of such deed, letter of attorney or other instrument, together with the said certificates, or with the certificate of a judge of the supreme or of the superior court, or notary, shall adjudge the said deed, letter of attorney or other instrument to be duly acknowledged or proved in the same manner as if taken or made before him, and order the same, with his certificate and the other certificates attached, to be registered.

Holmes v. Marshall, 72—87.

(3) WHEN THE GRANTOR, MAKER OR SUBSCRIBING WITNESS RESIDES OUTSIDE THE STATE, BUT WITHIN THE UNITED STATES.

Where the grantor, maker or subscribing witness resides outside of the state, the deed, letter of attorney or other instrument requiring registration in the state may be acknowledged or proved by the grantor, maker or subscribing witness before a judge, clerk of a court of record, notary public having notarial seal, mayor of a city having a seal, or justice of the peace of the state in which said grantor, maker or subscribing witness resides; and the certificate of said judge, clerk of a court of record under the seal of said court, mayor of a city or notary public under their respective seals, touching the acknowledgment or proof of such persons shall, if adjudged to be in due form by the clerk of the superior court of the county in which the land is situate, or the letter of attorney or other instrument is required to be registered, be ordered by said clerk to be registered as deeds made by grantors and makers residing within the state are required by law to be registered. If the acknowledgment or proof of the execution of said deed, letter of attorney, or other instrument requiring registration, be had before a justice of the peace of another state, then the clerk of the court of record of the county in which said justice resides shall certify under the seal of his court that said justice was at the time of taking the said acknowledgment or proof, an acting justice of the peace of said county and state, and that the signature of said justice was in his own proper handwriting; and if said certificate

shall be adjudged to be in due form by the clerk of the superior court of the county in which the land is situate, or letter of attorney, or other instrument, is required to be registered, then the said clerk of said superior court shall order the same to be registered, as deeds made by grantors or makers residing within this state are required to be registered.

Whitsett v. Forehand, 79—230; Todd v. Outlaw, 79—235.

(4) WHERE GRANTOR AND WITNESS LIVE OUT OF THE UNITED STATES.

Where the grantor or maker and the subscribing witness reside beyond the limits of the United States, the deed or other instrument may be personally acknowledged by such grantor or maker, or proved on the oath of such subscribing witness, before the chief magistrate of any city in the country where the grantor or witness is resident; or before any ambassador, minister, consul, or commercial agent of the United States, and where such proof, or acknowledgement is certified under the corporate seal of such chief magistrate, or under the official seal of such ambassador, minister, consul, or commercial agent, and where such certificate is affixed to the deed or other instrument, and the same is exhibited before the clerk of the superior court having jurisdiction, he shall adjudge that such deed, or other instrument, is duly proved or acknowledged, and order it, with his certificates and the accompanying certificates, to be registered.

Paul v. Carpenter, 70—502; Starkie v. Etheridge, 71—240.

(5) PRIVY EXAMINATION OF MARRIED WOMEN, BY WHOM TAKEN AND HOW CERTIFIED.

When the privy examination of any married woman is necessary to be taken, the persons authorized to take the acknowledgment of any grantor or maker or proof of the execution of any deed, letter of attorney or other instrument requiring registration, are hereby empowered to take the privy examination of any married woman touching her free assent to such deed, letter of attorney or other instrument to which her assent is or may be necessary, and to certify the fact of such privy examination in the same manner as they are authorized to take and certify the acknowledgment of any grantor or maker

of such deed, letter of attorney or other instrument. And the clerk of the superior court of the county in which the land is situate or of the county where the deed, letter of attorney or other instrument is required to be registered, upon the exhibition of said letter of attorney or other instrument, with the certificates, to him, if he shall adjudge the same to be in due form, shall admit the said deed, letter of attorney or other instrument to probate and order it with his certificate and the accompanying certificates to be registered.

Wright v. Player, 72—94; Clayton v. Rose, 87—106.

(6) PRIVATE EXAMINATION TO BE REQUIRED IF MARRIED WOMAN BE A PARTY.

When the proof or acknowledgment of a conveyance, power of attorney or other instrument concerning the interest of a married woman in lands, is taken as in this chapter directed, no clerk of the superior court shall adjudge such conveyance or other instrument to be duly proved or acknowledged unless the private examination of such married woman is taken according to the laws of this state and a certificate thereof attached to the deed or other instrument.

(7) FORM OF THE CERTIFICATE.

For the purposes of this chapter the certificates of probate or acknowledgment shall be substantially as follows:

STATE OF....., }
.....County. }

I, A. B., (here give name of officer, as the case may be,) do hereby certify that (here give name of grantor, and if acknowledged by wife, her name, and add *his wife*) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) deed of conveyance (or other instrument) and (if the wife is a signer) the said (here give wife's name) being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, doth state that she signed the same, freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto. Witness my hand and seal (private or official, as the case may be) this (day of month) A. D. (year).

Signature of officer, [seal].

And when such proof or acknowledgment has been had or taken by a justice of the peace, the clerk of the court of record shall use substantially the following form of certificate:

STATE OF....., }
....County. }

The foregoing (or annexed) certificate of A. B., a justice of the peace of ..... county, is adjudged to be correct. Let the deed (or other instrument), with the certificates, be registered.

Signature of the clerk. [SEAL.]
(of the court.)

If the acknowledgment, or proof, of privy examination be taken out of the county where the land is situate, or the instrument is required to be registered or beyond the limits of the state, then in addition to the first certificate before mentioned, the clerk of the superior court of the county, or the clerk of the court of record in the county and state in which the person taking the examination, acknowledgment or proof, resides, shall certify substantially as follows:

STATE OF....., }
..... County. }

I hereby certify that A. B. (insert the name of the officer taking the proofs, &c.) was, at the time of signing the foregoiug certificate, a (justice of the peace) in and for the county of ..... and state of....., and that his signature thereto is in his own proper handwriting. In witness whereof I hereunto set my hand and seal of office this ..... day of ....., 18...

(Signature of clerk.)

(Seal of office.)

(8) WHEN GRANTOR OR WITNESS OUT OF THE STATE.

Whenever the subscribing witness to any instrument required or allowed to be registered, shall be a non-resident or shall be dead, and the maker shall also be a non-resident or dead, the proof of the handwriting of such witness or that of the maker before the clerk of the superior court of the county where the instrument is sought to be registered, shall be sufficient evidence of the execution thereof to admit the same to registration, and in case such maker shall have subscribed with a mark only, the proof of the signature of such witness shall be sufficient.

Black v. Justice, 86—504; Love's Ex'rs v. Harbin, 87—249.

(9) WHEN NO WITNESS AND THE MAKER NON-RESIDENT OR DEAD.

Whenever any such instrument shall not have a witness, and the maker thereof shall be non-resident or dead,

proof of his handwriting shall be sufficient to admit the same to registration.

Rollins v. Henry, 78—342; Miller v. Hahn, 84—226; Black v. Justice, 86—504; Love's Ex'rs v. Harbin, 87—249.

(10) WHERE WITNESS IS DEAD.

In all cases of the probate of any deed or other instrument required or allowed to be registered, having a subscribing witness who may be dead, satisfactory proof of his handwriting or of the handwriting of the grantor or maker when there is no subscribing witness shall be deemed sufficient proof for the purpose of allowing the registration thereof.

Rollins v. Henry, 78—342; Black v. Justice, 86—504; Love's Ex'rs v. Harbin, 87—249.

Sec. 1247. Seal of court not put to process or probates, when. R. C., c. 31, s. 120.

Where the clerk of the superior court issues precepts or process to the county of which he is clerk, or takes the proof or acknowledgment of deeds or other instruments authorizing the registration thereof or orders the registration of such deed or instrument in such county, he shall not annex the seal of the court thereto.

Sec. 1248. How proved when land lies in two or more counties. C. C. P., s. 430.

Where real estate is situate in two or more counties, probate of the deed or other instrument conveying or concerning the same, made before the clerk of the superior court of either of said counties, is sufficient.

Sec. 1249. Powers of attorney, how proved in the state, how proved out of the state. R. C., c. 37, s. 14. 1798, c. 514, ss. 3, 4. 1846, c. 68, ss. 2, 3.

Every power of attorney, wherever made or concerning whatsoever matter, may be registered on acknowledgment or probate of the same in the county wherein the property or estate may be situate, if it concern the conveyance thereof; and if the same do not concern the conveyance of any estate or property, then in the county where the attorney may reside or the business is to be transacted. And such powers of attorney as do not concern the conveyance of land by a *feme covert*, whereof it may be necessary to take the acknowledgment or probate

out of the state, may, besides the other modes provided in this chapter, be acknowledged or proved before any mayor or presiding magistrate of any city or a clerk of a court of record; and such acknowledgment or probate being duly taken and certified under the seal of office of such officer shall, on the same being produced before the clerk of the superior court of the proper county, be ordered by him to be registered, and shall be registered.

Freeman v. Hatley, 3 Jon., 115.

Sec. 1250. Deed to be proved before commissioners of affidavits in other states. C. C. P., s. 429. 1879, c. 77.

Where the acknowledgment or proof of any deed or other instrument is taken or made in the manner directed by the laws of this state, before any commissioner of affidavits for the state of North Carolina, appointed by the governor thereof, in any of the states or territories of the United States or in the District of Columbia; and where such acknowledgment or proof is certified by such commissioner, the clerk of the superior court having jurisdiction, upon the same being exhibited to him, shall adjudge such deed or other instrument to be duly acknowledged or proved in the same manner as if made or taken before him. Every clerk of a court of record in any other state shall have as full power as a commissioner of affidavits and deeds as is vested in regularly appointed commissioners of affidavits and deeds of the state.

Starke v. Etheridge, 71—240; Todd v. Outlaw, 79—235; Love's Ex'rs v. Harbin, 87—249.

Sec. 1251. Copies of registered deeds evidence unless original required. R. C., c. 37, s. 16. 1846, c. 68, s. 1.

The registry or duly certified copy of the record of any deed, power of attorney or other instrument required or allowed to be registered or recorded, may be given in evidence in any court, and shall be held to be full and sufficient evidence of such deed, power of attorney or other instrument, although the party offering the same shall be entitled to the possession of the original, and shall not account for the non-production thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court.

Bohanan v. Shelton, 1 Jon., 370; Latham v. Bowen, 7 Jon., 337; Short v. Currie, 8 Jon., 42; Hughes v. Debnam, 8 Jon., 127; Gudger v. Hensley, 82—481; Mauney v. Crowell, 84—314; Moore v. Hill, 85—218; Love's Ex'rs v. Harbin, 87—249.

SEC. 1252. Deeds of gift to be proved and registered. R. C., c. 37, s. 18. 1789, c. 315, s. 2.

All deeds of gift of any estate of whatever nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void.

SEC. 1253. Deeds, &c., proved and registered in wrong county, copy may be registered in proper county. 1858 -'9, c. 18, s. 2.

A duly certified copy of any deed or writing required or allowed to be registered, may be registered in any county; and the registry or duly certified copy of any deed or writing when registered in the county where the land is situate may be given in evidence in any court of the state.

SEC. 1254. Mortgages and trust deeds good against creditors only from registration. R. C., c. 37, s. 22. 1829, c. 20, s. 1.

No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth; or in case of personal estate where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor shall reside out of the state, then in the county where the said personal estate, or some part of the same, is situate; or in case of choses in action, where the donee, bargainee or mortgagee resides.

Smith v. Washington, 1 Dev. Eq., 318; Skinner v. Cox, 4 Dev., 59; Moore v. Collins, 4 Dev., 384; McKinnon v. McLean, 2 D. & B., 79; Metts v. Bright, 4 D. & B., 173; Norwood v. Marrow, 4 D. & B., 442; Saunders v. Ferrell, 1 Ired., 97; Halcombe v. Ray, 1 Ired., 340; Dewey v. Littlejohn, 2 Ired. Eq., 495; Doak v. State Bank, 6 Ired., 309; DeCourcey, Lafourcade & Co. v. Barr, Busb. Eq., 181; Leggett v. Bullock, Busb., 283; Barnett v. Barnett, 1 Jon. Eq., 221; Simpson v. Morris, 3 Jon., 411; Barrett v. Cole, 4 Jon., 40; Green v. Kornegay, 4 Jon., 66; Dukes v. Jones, 6 Jon., 14; Newell v. Taylor, 3 Jon., 374; Johnson v. Malcolm, 6 Jon. Eq., 120; Parker v. Scott, 64—118; McCoy v. Wood, 70—125; Robinson v. Willoughby, 70—358; Edwards v. Thompson, 71—177; Starke v. Etheridge, 71

—240; Moore v. Ragland, 74—343; Blevins v. Barker, 75—436; Beaman v. Simmons, 76—43; King v. Portis, 77—25; Capehart v. Biggs, 77—261; Purnell v. Vaughan, 77—268; Todd v. Outlaw, 79—235; Harris v. Jones, 83—317; Moring v. Dickerson, 85—466.

Sec. 1255. Property of corporations not exempt from certain liabilities on account of mortgages. 1879, c. 101.

Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in courts of the state against such incorporation for labor performed nor for material furnished such incorporation, nor for *torts* committed by such incorporation, its agent or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding.

Sec. 1256. Deeds by husband and wife, how executed, proved and registered. C. C. P., s. 429, sub s. 6. 1868-'9, c. 277, s. 15.

Every conveyance, power of attorney or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments, must be executed by such married woman and her husband; and due proof or acknowledgment thereof must be made as to the husband and as to the wife; and the privy examination of the wife touching her voluntary assent to such conveyance, power of attorney, or other instrument requiring registration, shall be taken separate and apart from her husband, and such acknowledgment or proof and privy examination shall be taken and certified as hereinbefore provided in this chapter. And such conveyance, power of attorney, or other instrument, shall be valid in law to pass the estate, right and title of the wife to all such lands, tenements or hereditaments so conveyed or to be conveyed.

Green v. Branton, 1 Dev. Eq., 500; Askew v. Daniel, 5 Ired. Eq., 321; Keerns v. Peeler, 4 Jon., 226; Woodburn v. Gorrell, 66—82; Harris v. Jenkins, 72—186; Rountree v. Gay, 74—447; Towles v. Fisher, 77—438; Johnes v. Cohen, 82—75; Hollingsworth v. Herman, 83—153; Scott v. Battle, 85—184; Holmes v. Holmes, 86—205; Clayton v. Rose, 87—106.

Sec. 1257. Conveyance under power of attorney from husband and wife to pass lands. R. C., c. 37, s. 11. 1798, c. 510.

All conveyances which may be made by any person under a power of attorney from any *feme covert* by her freely executed with her husband, shall be valid to all intents and purposes to pass the estate, right and title which said *feme covert* may have in such lands, tenements, and hereditaments as are mentioned or included in such power of attorney.

Sec. 1258. The clerk may issue commissions for taking probate in another state. 1869-'70, c. 185, s. 1.

Whenever it shall appear to the clerk of the superior court of any county that any person non-resident of this state is desirous of acknowledging a power of attorney, deed or other conveyance touching any real estate situated in the county of said clerk, he shall issue a commission to a commissioner for receiving such acknowledgment, or taking such proof, and said commissioner may likewise take the acknowledgment and privy examination of a married woman separate and apart from her husband, touching her assent to any power of attorney, deeds or other conveyances, touching real estate in said county. The commissioner shall make certificate of the acknowledgments or proof and privy examination made by him, and shall return the same to the clerk of the superior court, whereupon he shall adjudge that such conveyance, power of attorney or other instrument is duly acknowledged or proved, and that such examination is in due form, and shall order the same to be registered.

Sec. 1259. Certain probates and registrations validated. 1869-'70, c. 185, s. 2.

All probates, examinations and registrations heretofore had in accordance with the two preceding sections are declared valid and sufficient.

Sec. 1260. Certain probates and registrations validated. 1871-'2, c. 200, s. 1.

Wherever the judges of the supreme or the superior court, or the deputy clerks of the superior court, mistaking their powers, have essayed previously to the twelfth day of February, one thousand eight hundred and seventy-two, to take the probate of deeds and the privy examination of *femes covert*, whose names are signed to such deeds, and have ordered said deeds to

registration, and the same have been registered, all such probates, privy examinations and registrations so taken and had, shall be as valid and binding to all intents and purposes as if the same had been taken before or ordered by the clerk of the superior court, or other proper officer having jurisdiction thereof.

Sec. 1261. Applicable to all conveyances. 1869-'70, c. 185.

The two preceding sections shall apply to all conveyances of whatever kind required or allowed to be registered.

Holmes v. Marshall, 72—37.

Sec. 1262. Registration of deeds heretofore proven before notary or clerk of superior court of another state validated. 1883, c. 129, s. 1.

All deeds and conveyances made for lands in this state, which have previous to February fifteenth, one thousand eight hundred and eighty-three, been proven before a notary public or clerk of the superior court of any other state, and such proof having been duly certified by such notary or clerk taking the proof as aforesaid, under the official seal of such notary public or superior court, and such deed or conveyance so proven and certified, with the certificate of having been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of the registration of such deed or conveyance, shall be sufficient registration of the same, and such proof and registration shall be adjudged good and valid in law.

Sec. 1263. Evidence under preceding section. 1883, c. 129, s. 2.

All deeds and conveyances proven, certified and registered as aforesaid, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any of the courts of this state where title to the lands shall come in controversy, and further registration of such deeds and conveyances so proven and registered shall not be necessary.

Sec. 1264. Contract to sell land and leases required to be in writing, must be registered. R. C., c. 37, s. 26.

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases required to be put in writing upon due

proof or acknowledgment thereof in the manner in this chapter provided for the conveyance of lands, shall be registered in the proper county within two years from the date of such contracts or leases.

Teague v. Downs, 69—280; Edwards v. Thompson, 71—177; Green v. Railroad Co., 73—524; Todd v. Outlaw, 79—235; Mauney v. Crowell, 84—314.

Sec. 1265. Infant trustees, how to convey. R. C., c. 37, s. 27. 1821, c. 1116, ss. 1, 2.

Whenever any infant shall be seized or possessed of any estate whatever in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be so seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age.

Sec. 1266. Errors in registration of deeds, &c., corrected on petition; appeal allowed. R. C., c. 37, s. 28. 1790, c. 326, ss. 2, 3, 4.

Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk, it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original: *Provided*, that such petitioner shall have notified his grantor and every person claiming title to, or having lands adjoining those mentioned in the petition, thirty days previous to preferring the same: *Provided further*, that any person dissatisfied with the judgment may appeal to the judge of the superior court as in other cases.

Jones v. Physioc, 1 D. & B., 173; Oldham v. Bank, 85—240.

Sec. 1267. Deeds, how made when sheriff who sells dies or removes from the state. R. C., c. 37, s. 30. 1838, c. 37.

Whenever any sheriff or coroner in virtue of his office

shall have sold any real or personal estate, and shall go out of office before executing a proper conveyance therefor, he may execute the same after his term of office shall have expired; and whenever such officer shall die or remove from the state before executing the same, his successor in office shall execute such conveyance, and all conveyances thus executed shall be as valid as if made by the sheriff or coroner who may have made the sale: *Provided*, that nothing herein contained shall be construed to apply to the execution of conveyances of lands sold for taxes.

Harris v. Irwin, 7 Ired., 432; Isler v. Andrews, 66—552; Taylor v. Allen, 67—346; Millsaps v. McCormick, 71—531; Edwards v. Tipton, 77—222.

Sec. 1268. Witnesses to deeds may be summoned to prove them. R. C., c. 37, s. 31. 1756, c. 58, s. 4.

The grantee in any deed, bill of sale, mortgage or other instrument requiring or allowing of registration may, at his own expense, on motion before the clerk of the superior court of the county where the same is required to be registered, obtain a summons for any one of the subscribing witnesses to such conveyance, signed by the said clerk and directed to the sheriff, commanding him to summon such witness to appear at a certain time therein named, and give evidence concerning the execution of the conveyance or other writing, under the penalty of forty dollars; and the sheriff shall execute the same at least five days before the time to which it is returnable, and make due return thereof; and if any witness so summoned shall fail to appear, the clerk shall give judgment and award execution against him for the penalty aforesaid, for the use of the party summoning him, in the like manner and under the same rules as are prescribed in the cases of other witnesses defaulting.

Sec. 1269. Marriage settlements registered, otherwise void as to creditors. R. C., c. 37, s. 24. 1785, c. 238, s. 1.

All marriage settlements and other marriage contracts, whereby any money or other estate shall be secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, within six months after the making thereof, otherwise they shall be void against creditors.

Johnson v. Malcolm, 6 Jon. Eq., 120; Latham v. Bowen, 7 Jon., 337; Hughes v. Debnam, 8 Jon., 127; Charles v. Kennedy, 64—442; Teague v. Downs, 69—280.

Sec. 1270. What marriage settlements good against creditors; how deficiency in property settled, made up. R. C., c. 37, s. 25. 1785, c. 238, s. 2.

No marriage settlement or marriage contract shall be good against creditors where a greater value is secured to the intended wife and children of the marriage, or either of them, than the portion actually received with the wife in marriage, and such estate as the husband at the time of his marriage shall be possessed of, after deducting the just debts by him then due and owing; and in case of a suit upon any such marriage contract, where a creditor shall be a party, the burden of the proof shall lie upon the person claiming under such marriage contract: *Provided*, that if any legacy shall be given to the wife in general words, and not in trust, or a distributive share of any intestate's estate shall fall to her during her coverture, and he shall become entitled thereto, such legacy and distributive share (in case the estate of the husband and wife shall not at the time of the marriage be of sufficient value to make good the marriage contract) shall be held, deemed and taken as part of the portion received with the wife, and shall be secured to those claiming under such marriage contract.

Smith v. Garey, 2 D. & B. Eq., 42; Teague v. Downs, 69—280.

Sec. 1271. Deeds of trust and mortgages, how discharged and released. 1870-'1, c. 217, s. 1.

Any deed of trust or mortgage which hath been or which hereafter may be registered in the manner required by this and the preceding sections, may be discharged and released in the following manner, to wit: the trustee or mortgagee or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee or legal representative may, in the presence of the register of deeds, acknowledge the satisfaction of the provisions of such trust or mortgage, whereupon it shall be the duty of the register forthwith to make upon the margin of the record of such trust or mortgage an entry of such acknowledgment of satisfaction, which shall be signed by the said trustee, mortgagee, legal representative or attorney, and witnessed by the register, who shall also affix his name thereto, and every such entry thus acknowledged and witnessed shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee or representative in such deed or mortgage, as if a deed of release or

re-conveyance thereof had been duly executed and recorded.

Hare v. Jernigan, 76—471.

Sec. 1272. Mortgages to secure purchase money need not be executed by wife. 1868-'9, c. 204, s. 1.

The purchaser of real estate who does not pay the whole of the purchase money at the time when he takes a deed for title, may make a mortgage for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his wife as well as himself, without requiring her to join in the execution of such mortgage deed.

Etheridge v. Vernoy, 71—184.

Sec. 1273. Form of chattel mortgage. 1870-'1, c. 277, s. 1.

Any person indebted to another in a sum to be secured, not exceeding at the time of executing the deed herein provided for, the sum of three hundred dollars, may execute a deed of trust in form substantially that which follows:

I, ..., of the county of ..... in the state of North Carolina, am indebted to ....., of ..... county, in said state, in the sum of ..... dollars for which he holds my note to be due the .... day of ....., A. D. 18.., and to secure the payment of the same, I do hereby convey to him these articles of personal property, to wit: .... but on this special trust, that if I fail to pay said debt and interest on or before the .... day of ....., A. D. 18.., then he may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me. Given under my hand and seal, this .... day of ....., A. D. 18..

[Seal.]

Provided, that no sale under any chattel mortgage shall be made without giving at least twenty days' notice of time sale.

Cotton v. Willoughby, 83—75; Harris v. Jones, 83—317.

Sec. 1274. Deed of trust under next preceding section good when registered. 1870-'1, c. 277, s. 2.

Such deed of trust shall be good to all intents and purposes when the same shall be duly registered according to law: *Provided*, the probate fee of the clerk of the superior court in such cases shall be only ten cents, and the fee of the register shall be twenty cents, and no other fee or tax shall be due on account of the same.

SEC. 1275. Conditional sales of personal property to be in writing and registered. 1883, c. 342.

All conditional sales of personal property in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages.

SEC. 1276. In what cases clerks of the superior court to appoint trustee. 1869-'70, c. 188, s. 1. 1873-'4, c. 126, s. 1.

When any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, the clerk of the superior court of the county wherein the said deed of trust was executed is authorized and empowered, upon proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the said deed of trust according to its true intent and meaning, and as fully as if appointed by the parties to the deed: *Provided*, that in all actions or proceedings had under this section prior to February fourteenth, one thousand eight hundred and seventy-four, before the clerks of the superior court in which any trustee was appointed to execute a deed in trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the state, or in any way become incompetent to execute the said trust, whether such appointment of such trustees by order or decree, or otherwise, was made upon the application or petition of any person or persons *ex parte*, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings.

Guion v. Melvin, 69—242.

SEC. 1277. Consolidation of surveys; proviso; common surveys may be recorded. 1869-'70, c. 34, ss. 1, 2.

Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said

land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: *Provided*, that nothing in this section shall be construed to affect the right or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner.

Sec. 1278. Donations to persons while in slavery. 1869-'70, c. 77, s. 1.

Whenever it is made to appear that any gift or conveyance has been made to any person, while a slave, of any lands or tenements, whether the same shall have been conveyed by deed or parol, and the bargainee or donee has been placed into actual possession of the same, then and in that case such gift or conveyance shall have the force and effect of transferring the legal title to the said lands and tenements to such bargainee or donee: *Provided*, such possession shall have continued for the term of ten years prior to the ninth day of March, one thousand eight hundred and seventy: *Provided further*, that any absence from the premises from the first day of May, one thousand eight hundred and sixty-one, to the first day of January, one thousand eight hundred and sixty six, shall not be held as an abandonment or discontinuance of the possession: *Provided also*, that this section shall not affect the interest of a *bona fide* purchaser for value from the grantor or bargainor of the lands or tenements in dispute.

Buie v. Carver, 75—559.

Sec. 1279. Time extended for registering grants of land and other instruments. 1870-'1, c. 180, s. 1.

All grants of land in the state, all deeds of conveyance of the same, all powers of attorney, and every other instrument in writing, which is required by law to be registered within or by a given time, and has not been proved and registered within or by such time, may be proved and registered within two years after the passage of this code, under the same rules and regulations as heretofore required by law; and when so proved and registered, shall be as good and valid to every intent and purpose as if they had been duly proved and registered: *Provided*, that nothing herein contained shall be so con-

strued as to extend to mortgages and deeds in trust and to marriage settlements.

Sec. 1280. All conveyances of real estate to be construed to be in fee unless otherwise expressly set forth. 1879, c. 148.

When real estate shall be conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heirs" shall be used or not, unless such conveyance shall, in plain and express words, show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity.

Stell v. Barham, 87—62.

CHAPTER TWENTY-EIGHT.

DESCENTS.

SECTION.
1281. Inheritances shall descend as follows:
RULE.
1. Lineal descent.
2. Females to inherit with males, younger with older children, children advanced to account for the same.
3. Lineal descendants to represent ancestor.
4. Collateral descent of inheritance, when derived from an ancestor.
5. When not derived from an ancestor or his blood extinct.
6. Half blood to inherit with whole; parent to inherit from child.
7. None to inherit unless alive or born within ten months.
8. When widow taken as heir.
9. Illegitimate children to inherit from mother.
10. Illegitimate children to inherit from each other; legitimate may inherit from them; dying without issue mother to be heir.
11. Estates for life not devised, to be inheritances.
12. Seizin defined.
13. Issue of certain colored persons to inherit.

Sec. 1281. Inheritances shall descend as follows. R. C., c. 38, s. 1.

When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules:

Rule 1. Lineal descent. R. C., c. 38, s. 1, Rule 1. 1808, c. 739.

Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as hereinafter provided.

McKay v. Hendon, 3 Mur., 209; Jones v. Edwards, 8 Jon., 336; Sears v. McBride, 70—152.

Rule 2. Females to inherit with males, younger with older children; children advanced in real or personal estate to account for advancements. R. C., c. 38, s. 1, Rule 2. 1784, c. 204, s. 2. 1808, c. 739. 1844, c. 51, ss. 1, 2.

Females shall inherit equally with males, and younger with older children: *Provided*, that whenever a parent shall die intestate, having in his or her lifetime settled upon or advanced to any of his or her children, any real or personal estate, such child so advanced in real estate shall be utterly excluded from any share in the real estate descended from such parent, except so much thereof as will, when added to the real estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And any child so advanced in personal estate shall be utterly excluded from any share in the personal estate of which the parent died possessed, except so much thereof as will, when added to the personal estate advanced, make the share of him who is advanced equal to the share of those who may not have been advanced, or not equally advanced. And in case any one of the children shall have been advanced in real estate of greater value than an equal share thereof which may come to the other children, he or his legal representatives shall be charged in the distribution of the personal estate of such deceased parent, with the excess in value of such real estate so advanced as aforesaid, over and above an equal share as aforesaid. And in case any of the children shall have been advanced in personal estate of greater value than an equal share thereof which come to the other children, he or his legal representatives shall be charged in the division of the real estate, if there be any, with the excess in value, which he may have received as aforesaid, over and above an equal distributive share of the personal estate.

Johnston v. Johnston, 4 Ired. Eq., 9; Donnell v. Mateer, 5 Ired. Eq., 7; Lamb v. Carroll, 6 Ired., 4; Headen v. Headen, 7 Ired. Eq., 159; Bridgers

v. Hutchins, 11 Ired., 68; Meadows v. Meadows, 11 Ired., 148; Hardy v. Simpson, Busb., 325; Jenkins v. Mitchell, 4 Jon. Eq., 207; Dickson v. Coward, 4 Jon. Eq., 354; Banks v. Shannonhouse, Phil., 284. McBride v. Patterson, 73—478; Melvin v. Bullard, 82—33.

Rule 3. Lineal descendants to represent ancestor. R. C., c. 38, Rule 3. 1808, c. 739.

The lineal descendants of any person deceased shall represent their ancestor, and stand in the same place as the person himself would have done had he been living.

Clement v. Cauble, 2 Jon. Eq., 82; Haynes v. Johnson, 5 Jon. Eq., 124; Johnson v. Chesson, 6 Jon. Eq., 146; Harman v. Ferrell, 64—474; Dozier v. Grandy, 66—484; Crump v. Faucette, 70—345.

Rule 4. Collateral descent of inheritance when derived from an ancestor. R. C., c. 38, Rule 4. 1808, c. 739.

On failure of lineal descendants, and where the inheritance has been transmitted by descent from an ancestor, or has been derived by gift, devise, or settlement from an ancestor, to whom the person thus advanced would in the event of such ancestor's death, have been the heir or one of the heirs, the inheritance shall descend to the next collateral relations, capable of inheriting, of the person last seized, who were of the blood of such ancestor, subject to the two preceding rules.

Bell v. Dozier, 1 Dev., 333; Felton v. Billups, 2 D. & B., 308; Wilkerson v. Bracken, 2 Ired., 315; Clement v. Cauble, 2 Jon. Eq., 82; Osborne v. Widenhouse, 3 Jon. Eq., 238; McMichael v. Moore, 3 Jon. Eq., 471; Cromartie v. Kemp, 66—382.

Rule 5. When not derived from an ancestor or his blood extinct. R. C., c. 38, Rule 5. 1808, c. 739.

On failure of lineal descendants, and where the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or where, if so transmitted or derived, the blood of such ancestor is extinct, the inheritance shall descend to the next collateral relation, capable of inheriting, of the person last seized, whether of the paternal or maternal line, subject to the second and third rules.

University v. Brown, 1 Ired., 387; Gillespie v. Foy, 5 Ired. Eq., 280.

Rule 6. Half blood to inherit with whole; parent to inherit from child. R. C., c. 38, Rule 6. 1808, c. 739.

Collateral relations of the half blood shall inherit equally with those of the whole blood, and the degrees of relationship shall be computed according to the rules

which prevail in descents at common law: *Provided*, that in all cases where the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor issue of such, the inheritance shall vest in the father if living, and if not, then in the mother if living.

Lawrence v. Pitt, 1 Jon., 344; McMichael v. Moore, 3 Jon. Eq., 471; Little v. Buie, 5 Jon. Eq., 10; Murphy v. Jackson, 5 Jon. Eq., 11; Dozier v. Grandy, 66—484.

Rule 7. None to inherit unless alive or born within ten months. R. C., c. 38, Rule 7. 1823, c. 1210.

No inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten lunar months after the death of the person last seized.

Britton v. Miller, 63—268.

Rule 8. When widow taken as heir. R. C., c. 38, Rule 8. 1801, c. 575, s. 1.

When any person shall die, leaving none who can claim as heir to him, his widow shall be deemed his heir, and as such shall inherit his estate.

Powers v. Kite, 83—156.

Rule 9. Illegitimate children to inherit from their mother. R. C., c. 38, Rule 10. 1799, c. 522.

When there shall be no legitimate issue, every illegitimate child of the mother, and the descendant of any such child deceased, shall be considered an heir, and as such shall inherit her estate; but such child or descendant shall not be allowed to claim, as representing such mother, any part of the estate of her kindred, either lineal or collateral.

Flintham v. Holder, 1 Dev. Eq., 345; Campbell v. Campbell, 5 Jon. Eq., 246; Harman v. Ferrell, 64—474.

Rule 10. Illegitimate children to inherit from each other; legitimate may inherit from them; dying without issue mother to be heir. R. C., c. 38, Rule 11.

Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: *Provided*, that when any illegitimate child shall die with-

out issue, his inheritance shall vest in the mother in the same manner as is provided in rule six of this chapter.

Sawyer v. Sawyer, 6 Ired., 407; Ehringhaus v. Coatwright, 8 Ired., 39; Ivey v. Granberry, 66—223; McBryde v. Patterson, 78—412; Powers v. Kite, 83—156.

Rule 11. Estates for life not devised, to be inheritances. R. C., c. 38, Rule 12.

Every estate for the life of another, not devised, shall be deemed an inheritance of the deceased owner, within the meaning and operation of this chapter.

McBryde v. Patterson, 78—412.

Rule 12. Seizin defined. R. C., c. 38, Rule 13.

Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title or interest in the inheritance.

Rule 13. Issue of certain colored persons to inherit. 1879, c. 73.

The children of colored parents born at any time before the first day of January, one thousand eight hundred and sixty-eight, of persons living together as man and wife, are hereby declared legitimate children of such parents or either one of them, with all the rights of heirs-at-law and next of kin, with respect to the estate or estates of any such parents, or either one of them.

Sears v. McBride, 70—152.

CHAPTER TWENTY-NINE.

DIVORCE AND ALIMONY.

SECTION.
1282. Superior court to have jurisdiction.
1283. What marriages may be declared void on application of the parties.
1284. What to be declared void at all times.
1285. For what causes marriages may be dissolved.
1286. What causes sufficient for divorce from bed and board.
1287. Affidavits to be filed with complaint; provisos.
1288. Material facts to be tried by a jury; provided if for divorce on ground of pregnancy of wife before marriage, either party may testify.
1289. Venue in proceedings for divorce.
1290. Alimony on divorce from bed and board.
1291. Alimony *pendente lite*.
1292. When wife not suing for divorce is entitled to alimony.
1293. Court, power to issue writ where real estate assigned.
1294. Security for costs on application for divorce or alimony.
1295. Consequences of a divorce *a vinculo*, on the personal relations of parties.
1296. Consequences of divorce upon the right to the custody of the children.

Sec. 1282. Superior court to have jurisdiction. 1868-'9. c. 93, c. 45.

The superior court shall have jurisdiction on complaints for divorce and alimony, or either.

Irby v. Wilson, 1 D. & B. Eq., 568; Williamson v. Williams, 3 Jon. Eq., 446; Gilmore v. Gilmore, 5 Jon. Eq., 284; Smith v. Morehead, 6 Jon. Eq., 360; Webber v. Webber, 83—280; King v. King, 84—32.

Sec. 1283. What marriages may be declared void on application of the parties. 1871-'2, c. 193, s. 33.

The superior court in term time, on application made as by law provided, by either party to a marriage contracted contrary to the prohibitions contained in chapter forty-two, or declared void by said chapter, may declare such marriage void from the beginning, subject, nevertheless, to the proviso contained in said chapter.

Sec. 1284. What to be declared void at all times. 1871-'2, c. 193, s. 34.

All marriages between a white person and a negro or Indian, or between a white person and a person of negro

or Indian descent, to the third generation inclusive, shall be absolutely void to all intents and purposes, and shall be so held and declared by every court at all times, whether during the lives or after the deaths of the parties thereto; and it shall not be lawful for the issue of any such marriage to be legitimated to the supposed father.

White v. White, 84—340.

Sec. 1285. For what causes marriages may be dissolved. 1871-'2, c. 193, s. 35. 1879, c. 132.

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

(1) If either party shall separate from the other and live in adultery.

(2) If the wife shall commit adultery.

(3) If either party at the time of the marriage was and still is naturally impotent.

(4) If the wife at the time of the marriage be pregnant, and the husband be ignorant of the fact of such pregnancy and be not the father of the child with which the wife was pregnant at the time of the marriage.

Long v. Long, 2 Hawks, 189; Collier v. Collier, 1 Dev. Eq., 352; Scroggins v. Scroggins, 3 Dev., 535; Moss v. Moss, 2 Ired., 55; Johnson v. Kincade, 2 Ired. Eq., 470; Crump v. Morgan, 3 Ired. Eq., 91; Wood v. Wood, 5 Ired., 674; Foy v. Foy, 13 Ired., 90; Smith v. Morehead, 6 Jon. Eq., 360; Edwards v. Edwards, Phil., 334; Barringer v. Barringer, 69—179; Horne v. Horne, 72—530; *Ibid*, 72—101; Morris v. Morris, 75—168; Long v. Long, 77—304; Manning v. Manning, 79—293; Jones v. Jones, 80—246; Tew v. Tew, 80—316.

Sec. 1286. What causes sufficient for divorce from bed and board. 1871-'2, c. 193, s. 36.

The superior court may grant divorces from bed and board on application of the party injured, made as by law provided, in the following cases:

(1) If either party shall abandon his or her family; or,

(2) Shall maliciously turn the other out of doors; or,

(3) Shall by cruel or barbarous treatment endanger the life of the other; or,

(4) Shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome; or,

(5) Shall become an habitual drunkard.

McKinnon v. McDonald, 4 Jon. Eq., 1; Little v. Little, 63—22; Davis

v. Davis, 68—180; Smith v. Smith, 72—139; Taylor v. Taylor, 76—433; Miller v. Miller, 78—102; Pain v. Pain, 80—322; McQueen v. McQueen, 82—471; Muse v. Muse, 84—35; White v. White, 84—340; Scoggins v. Scoggins, 85—347.

Sec. 1287. Affidavit to be filed with complaint; provisos. 1868-'9, c. 93, s. 46. 1869-'70, c. 184.

The plaintiff in a complaint seeking either divorce or alimony, or both, shall file with his or her complaint an affidavit that the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint; and the plaintiff shall also set forth in such affidavit, either that the facts set forth in the complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint; and that complainant has been a resident of the state for two years next preceding the filing of the complaint; or, if the wife be the plaintiff, that the husband is removing, or about to remove his property and effects from the state, whereby she may be disappointed in her alimony. *Provided*, if any wife shall file in the office of the superior court clerk of the county where she resides an affidavit, setting forth the fact that she intends to file a petition or bring an action for divorce against her husband, and that she has not had knowledge of the facts upon which said petition or action will be based for six months, then and in that case it shall be lawful for such wife to reside separate and apart from her said husband, and to secure for her own use the wages of her own labor during the time she shall so remain separate and apart from her said husband: *Provided further*, that if such wife shall fail to file her petition or bring her action for divorce within thirty days after the six months shall have expired since her knowledge of the facts upon which she intends to file her said petition or bring her said action, then she shall not be entitled any longer to the benefit of this section.

Anonymous, 1 Hay., 347; Spiller v. Spiller, 1 Hay., 482; Whittington v. Whittington, 2 D. & B., 64; Wilson v. Wilson, 2 D. & B., 377; Foy v. Foy, 13 Ired., 90; Schonwald v. Schonwald, 2 Jon. Eq., 367; Gaylord v. Gaylord, 4 Jon. Eq., 74; Everton v. Everton, 5 Jon., 202; Edwards v. Edwards, Phil., 534; State v. Lytle, 64—255; Scroggins v. Scroggins, 80—318; Pain

v. Pain, 80—332; McQueen v. McQueen, 82—471; Scoggins v. Scoggins, 85—347.

SEC. 1288. Material facts to be tried by a jury; proviso, if for divorce on grounds of pregnancy, either party may testify. 1868-'9, c. 93, s. 47. 1879, c. 132.

The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband or wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. *Provided*, that on the trial of any action for divorce on the ground of the pregnancy of the wife at the time of the marriage, either party may testify as to any facts material to such issue.

Taylor v. Taylor, 76—433; Long v. Long, 77—304; White v. White, 84—340.

SEC. 1289. Venue in proceedings for divorce. 1871-'2, c. 193, s. 40.

In all proceedings for divorce, the summons shall be returnable to the court of the county in which the applicant resides.

Schonwald v. Schonwald, 2 Jon. Eq., 367; Smith v. Morehead, 6 Jon. Eq., 360.

SEC. 1290. Alimony on divorce from bed and board. 1871-'2, c. 193, s. 37.

When any court shall adjudge any two married persons divorced from bed and board, it may also decree to the party upon whose application such judgment was rendered, such alimony as the circumstances of the several parties may render necessary; which, however, shall not in any case exceed the one third part of the net annual income from the estate, occupation or labor of the party against whom the judgment shall be rendered.

Rogers v. Vines, 6 Ired., 293; Simmons v. Simmons, Phil. Eq., 63; Schonwald v. Schonwald, Phil. Eq., 215; Wood v. Wood, Phil., 538; Little v. Little, 63—22; Sparks v. Sparks, 69—319; Hodges v. Hodges, 82—122.

SEC. 1291. Alimony *pendente lite*. 1871-'2, c. 193, s. 38. 1883, c. 67.

If any married woman shall apply to a court for a divorce from the bonds of matrimony, or from bed and

board with her husband, and shall set forth in her complaint such facts, which upon application for alimony shall be found by the judge to be true and to entitle her to the relief demanded in the complaint, and it shall appear to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, the judge may order the husband to pay her such alimony during the pendency of the suit as shall appear to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of any one interested: *Provided*, that no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony *pendente lite* under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint. *Provided further*, that if the husband shall have abandoned his wife and left the state, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary.

Earp v. Earp, 1 Jon. Eq., 118; Gaylord v. Gaylord, 4 Jon. Eq., 74; Everton v. Everton, 5 Jon., 202; Shearin v. Shearin, 5 Jon. Eq., 233; Lynch v. Lynch, Phil. Eq., 46; Simmons v. Simmons, Phil. Eq., 63; Schonwald v. Schonwald, Phil. Eq., 215; Wood v. Wood, Phil., 538; Little v. Little, 63—22; Sparks v. Sparks, 69—319; Miller v. Miller, 75—70; Webber v. Webber, 79—572; Scroggins v. Scroggins, 80—318; Pain v. Pain, 80—322; Hodges v. Hodges, 82—122; Reeves v. Reeves, 82—348; Muse v. Muse, 84—35.

Sec. 1292. When wife not suing for divorce is entitled to alimony. 1871-'2, c. 193, s. 39.

If any husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the superior court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his condition and circumstances, for the benefit of his said wife and

children, having regard also to the separate estate of the wife.

Joyner v. Joyner, 6 Jon., 322; Hodges v. Hodges, 82—122; Reeves v. Reeves, 82—348.

Sec. 1293. Court, power to issue writ where real estate is assigned. 1868-'9, c. 123, s. 1.

In all cases in which the court shall grant alimony by the assignment of real estate, the court shall have power to issue a writ of possession when necessary in the judgment of the court to do so.

Sec. 1294. Security for costs on application for divorce or alimony. 1871-'2, c. 193, s. 41.

It shall not be necessary for either party to a proceeding for divorce or alimony to give any undertaking to the other party to secure such costs as such other party may recover. The judge of the court in which any such proceeding is pending, both before and after judgment therein, may at any time in his discretion, make any order respecting the payment of such costs as may be incurred by the wife, either by the husband or by her from her separate estate.

Sec. 1295. Consequences of a divorce *a vinculo* on the personal relations of the parties. 1871-'2, c. 193, s. 43.

After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again: *Provided*, that no judgment of divorce shall render illegitimate any children *in esse*, or begotten of the body of the wife during coverture.

Sec. 1296. Consequences of divorce upon the right to the custody of the children. 1871-'2, c. 193, s. 46.

After the filing of a complaint in any proceeding for divorce, whether from the bonds of matrimony, or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court, in which such application is or was pending, to make such orders respecting the care, custody, tuition and maintenance of the children of the marriage as may be proper, and from time to time to modify or vacate such orders: *Provided*, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children

has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

CHAPTER THIRTY.

DRAINING AND DAMMING LOWLANDS.

SECTION.

1297. Mode of proceeding, by petition for draining or damming lowlands; court to appoint three commissioners.
1298. Duty of commsisioners.
1299. Shall report to court on payment of damages and costs; easement to vest in fee; no canal, ditch or dam made through yard, &c., or to injure mill, or to create nuisance by stagnant water, &c.
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Sec. 1297. Mode of proceeding, by petition for draining or damming lowlands; court to appoint three commissioners. R. C., c. 40, s. 1. 1795, c. 436, s. 1. 1852, c. 57, ss. 1, 2.

Any person owing pocosin, swamp or flat lands, or owning lowlands subject to inundation, which cannot be conveniently drained or embanked so as to drain off or dam out the water from such lands, except by cutting a canal or ditch, or erecting a dam through or upon the lands of other persons, may by petition apply to the superior court of the county, in which the lands sought to be drained or embanked, or some part of such lands lie, setting forth the particular circumstances of the case, the situation of the land to be drained or embanked, to what outlet and through whose land he desires to drain, or on what lands he would erect his dam, and who are the proprietors of said lands; whereupon a summons shall be served on each of the proprietors, and, on the hearing of the petition, the court shall appoint three persons as commissioners, who shall be duly sworn to do justice between the parties.

Collins v. Haughton, 4 Ired., 420; Stanly v. Watson, 11 Ired., 124; Skinner v. Nixon, 7 Jon., 342; Shaw v. Burfoot, 8 Jon., 344; Brooks v. Tucker, Phil., 309; Norfleet v. Cromwell, 70—634; Brown v. Keener, 74—714; Gamble v. McCrady, 75—509; Pool v. Trexler, 76—297; Durden v. Simmons, 84—555.

Sec. 1298. Duty of commissioners. R. C., c. 40, s. 2. 1795, c. 436, s. 1. 1852, c. 57, ss. 1, 2.

The commissioners, or a majority of them, on a day of which each proprietor of land aforesaid is to be notified at least five days, shall meet on the premises and view the lands to be drained or embanked, and the lands through or on which the drain is to pass or the embankment to be erected, and shall determine and report whether the lands of the petitioner can be conveniently drained or embanked except through or on the lands of the defendants or some of them; and if they are of opinion that the same cannot be conveniently done except through or on such lands, they shall decide and determine the route of the canal, ditch or embankment, the width thereof and the depth or height, as the case may be, and the manner in which the same shall be cut or thrown up, considering all the circumstances of the case, and providing as far as possible for the effectual drainage or embankment of the water from the petitioner's land, and also securing the defendant's lands

from inundation, and every other injury to which the same may be probably subjected by such canal, ditch or embankment; and they shall assess, for each of the defendants, such damage as in their judgment will fully indemnify him for the use of his land in the mode proposed; but in assessing such damages, the benefit shall be deducted.

Brooks v. Tucker, Phil., 309; Durden v. Simmons, 84—555.

Sec. 1299. Shall report to court on payment of damages and costs; easement to vest in fee; no canal, ditch or dam made through yard, &c., or to injure mill, or to create nuisance by stagnant water, &c. R. C., c. 40, s. 3. 1795, c. 436, s. 2. 1835, c. 7. 1852, c. 57, ss. 1, 2.

The commissioners shall report in writing, under their hands, the whole matter to the court, which shall confirm the same, unless good cause be shown to the contrary; and on payment of the damages and costs of the proceedings, the court shall order and decree that the petitioner may cut the canal or ditch, or raise the embankment in the manner reported and determined by the commissioners; and thereupon the petitioner shall be seized in fee simple of the easement aforesaid: *Provided*, that, without the consent of the proprietor, such canal, ditch or embankment shall not be cut or raised through or on his yard or curtilage, nor be allowed when the same shall injure any mill, by cutting off or stopping the water flowing thereto; nor shall said dam be allowed so as to create a nuisance by stagnant water, or cut off the flow of useful springs or necessary streams of water, or stop any ditches of such proprietor when there is no freshet.

Collins v. Haughton, 4 Ired, 420; Skinner v. Nixon, 7 Jon., 342; Brooks v. Tucker, Phil., 309; Norfleet v. Cromwell, 64—1; Norfleet v. Cromwell, 70—634.

Sec. 1300. Fences or paths across canal, ditch or embankment, made by proprietor, when. R. C., c. 40, s. 4. 1795, c. 436, s. 2. 1835, c. 7. 1852, c. 57, ss. 1, 2.

Any proprietor, through or on whose land such canal or ditch may be cut or embankment raised, may put a fence or make paths across the same, provided the usefulness thereof be not impaired; and the owner of the canal, ditch or dam, his heirs and assigns, shall at all times have free access to the same, for the purpose of

making and repairing them; doing thereby no unnecessary damage to the lands of the proprietors.

Sec. 1301. Earth for dam, how taken; owner of land may adjoin his own dam, when. R. C., c. 40, s. 5.

The earth necessary for the erection of a dam may be taken from either side of it, or wherever else the commissioners may designate and allow. And such dam may be removed by the proprietor of the land, his heirs or assigns, to any other part of his lands, and he may adjoin any dam of his own thereto, if allowed by the court on a petition, and such proceedings therein as are provided in this chapter, as far as the same may apply to his case: *Provided, always*, that the usefulness of the dam will not be thereby impaired or endangered.

Sec. 1302. Commissioners to designate width of land for use of canal, &c.; width of dam not to exceed five times its base. R. C., c. 40, s. 6.

The commissioners, when they may deem it necessary, shall designate the width of the land to be left on each side of the canal, ditch or dam, to be used for the protection and reparation thereof, which land shall be altogether under the control and dominion of the owner of the canal, ditch or dam, except as aforesaid: *Provided*, that in no case shall a greater width of land on both sides, inclusive of a dam, be taken than five times the base of such dam.

Sec. 1303. Earth excavated for canal, removed or leveled. R. C., c. 40, s. 7.

The earth excavated from the canal or ditch shall be removed away or leveled as nearly as may be with the surface of the adjacent land, unless the commissioners shall otherwise specially allow.

Sec. 1304. Proprietor of land not to open drain within thirty feet of canal. R. C., c. 40, s. 8.

The proprietor of any swamp or flat lands, through which a canal or ditch passes shall not have a right to open or cut any drain within thirty feet thereof, but by the consent of the owner. Such proprietor, however, and other persons may cut into such canal or ditch in the manner hereinafter provided.

Brooks v. Tucker, Phil., 309.

Sec. 1305. Mode of proceeding to drain into a canal, &c. R. C., c. 40, s. 9.

Any person desirous of draining into the canal or ditch of another person as an outlet, may do so in the manner hereinbefore provided, and in addition to the persons directed to be made parties, all others shall be parties through whose lands, canals or ditches the water to be drained may pass till it shall have reached the furthest artificial outlet. And the privilege of cutting into such canal or ditch may be granted under the same rules and upon the same conditions and restrictions as are provided in respect to cutting the first canal or ditch: *Provided*, that no canal or ditch shall be allowed to be cut into another, if thereby the safety or utility of the latter shall be impaired or endangered: *Provided further*, that if such impairing and danger can be avoided by imposing on the petitioner duties or labor in the enlarging or deepening such canal or ditch, or otherwise, the same may be done; but no absolute decree for cutting such second canal or ditch shall pass till the said duties or work so imposed shall be performed and the effect thereof is seen, so as to enable the commissioners to determine the matter whether such second canal or ditch ought to be allowed or not.

Brooks v. Tucker, Phil., 309.

Sec. 1306. Commissioners to assess and apportion labor for repairing canals, &c.; report, when confirmed, to stand as a judgment against the parties, &c. R. C., c. 40, s. 10.

Besides the damages which the commissioners may assess against the petitioner for the privilege of cutting into such canal or ditch, they shall assess and apportion the labor which the petitioner and defendants shall severally contribute towards repairing the canal or ditch into or through which the petitioner drains the water from his lands, and report the same to court; which, when confirmed, shall stand as a judgment of the court against each of the parties, his executors and administrators, heirs and assigns.

Brooks v. Tucker, Phil., 309.

Sec. 1307. Mode of proceeding for joint repairs of canals. R. C., c. 40, s. 11.

Whenever the canals or ditches for the reparation of which more than one person shall be bound under the provisions of the preceding section, shall need to be re-

paired, any of the persons so bound may notify the others thereof, and of the time he proposes to repair the same; and thereupon each of the persons shall jointly work on the same and contribute his proportion of labor, till the same be repaired or the work cease by consent.

SEC. 1308. Persons failing to work, how recovered against. R. C., c. 40, s. 12.

In case the person so notified shall make default, any of the others may perform his share of labor and recover against him the value thereof, on a notice to be issued for such default; in which shall be stated on oath made before the clerk the value of such labor; and unless good cause to the contrary be shown on the return of the notice, the court shall render judgment for the same with interest and costs.

SEC. 1309. Assignees, &c., bound to repair as original owners. R. C., c. 40, s. 13.

All persons to whom may descend, or who may otherwise own or occupy lands drained by any canal or ditch, for the privilege of cutting which any labor for repairing is assessed, shall contribute the same, and shall be bound therefor to all intents and purposes, and in the same manner and by the same judgment, as the original party himself would be if he occupied the land.

SEC. 1310. All persons interested to contribute to repair dams, &c.; mode of proceeding. R. C., c. 40, s. 14.

Whenever there shall be a dam, canal, or ditch, in the repairing and keeping up of which, two or more persons shall be interested and receive actual benefit therefrom, and the duties and proportion of labor which each one ought to do and perform therefor shall not be fixed by agreement or by the mode already in this chapter provided for assessing and apportioning such labor, any of the parties may have the same assessed and apportioned by petition to the superior court of the county in which such duties and labor, or some part thereof, are to be performed, and the proceedings therein shall be by commissioners, in the manner in this chapter already provided.

SEC. 1311. In addition to the foregoing sections, and to provide for drainage on a larger scale, canals, &c., may be cut. 1868-'9, c. 164, s. 2.

Any proprietor in fee of swamp lands, which cannot be

drained except by cutting a canal through the lands of another, or other proprietor in fee, situated at a lower level and which would also be materially benefited by the cutting of such canal, who desires that said canal be cut on the terms on which it is hereinafter allowed, may apply by petition, setting forth the facts to the superior court of the county in which any of the lands through which the canal will pass, may lie.

Shaw v. Burfoot, 8 Jon., 344; Canal Co. v. McAlister, 74—159; Brown v. Keener, 74—714; Gamble v. McCrady, 75—509; Pool v. Trexler, 76—297; Bunting v. Stancill, 79—180; Durden v. Simmons, 84—555.

Sec. 1312. Court shall appoint commissioners to examine and report. 1868-'9, c. 164, s. 3.

On the establishment by the petitioner of his allegations, the court shall appoint three persons as commissioners who, having been duly sworn, shall examine the premises and inquire and report:

(1) Whether the lands of the petitioner can be conveniently drained, otherwise than through those of some other person;

(2) Through the lands of what other persons a canal to drain the lands of the petitioner should properly pass, considering the interests of all concerned;

(3) A description of the several pieces of lands through which the canal would pass; and the present values of such portions of said pieces of lands as would be benefited by it; and the reasons for arriving at the conclusion as to the benefit;

(4) The route and plan of the canal, including its breadth, depth and slope, as nearly as they can be calculated, with all other particulars necessary for calculating its cost;

(5) The probable cost of the canal and of a road on its bank, and of such other works, if any, as may be necessary for its profitable use;

(6) The proportion of the benefit, (after a deduction of all damages,) which each proprietor would receive by the proposed canal and a road on its bank if deemed necessary, and in which each ought, in equity and justice, to pay toward their construction and permanent support.

(7) With their report they shall return a map explaining, as accurately as may be, the various matters required to be stated in their report.

SEC. 1313. Commissioners may appoint surveyor. 1868-'9, c. 164, s. 4.

The said commissioners may employ a surveyor to prepare the map required to accompany their report.

SEC. 1314. When court to confirm report of commissioners. 1868-'9, c. 164, s. 5.

If it appear that the lands on the lower level will be increased in value twenty-five per cent. or upwards by the proposed improvement, within one year after the completion thereof, and that the cost of making such improvement will not exceed three-fourths of the present estimated value of the land to be benefited, and that the proprietors of at least one-half in value of the land to be affected, consent to the improvement, the court may confirm such report, either in full, or with such modifications therein as shall be just and equitable.

SEC. 1315. Proprietors declared a corporation. 1868-'9, c. 164, s. 6.

Upon a final adjudication, confirming the report, the proprietors of the several pieces of land adjudged to be benefited by the improvement, shall be declared a corporation, of which the capital stock shall be double the estimated cost of the improvements, and in which the several owners of the land adjudged to be benefited, shall be corporators, holding shares of stock in the proportions in which they are adjudged liable for the expense of making and keeping up the improvement.

SEC. 1316. Corporate name and officers. 1868-'9, c. 164, s. 7.

The person assessed to pay the highest sum shall be president of the company, until another shall be elected; he shall, or in case of his refusal or an unreasonable delay, any other stockholder, may call a meeting of the corporators. The corporators shall choose a corporate name, elect a president and such other officers as may be necessary, and make all by-laws and regulations not contrary to law, which may be necessary or proper for effecting the purposes of the corporation; they shall fix the number of shares of stock, and assign to each proprietor his proper number; they shall assess the same which shall be payable by each proprietor, and to ascertain the time and mode of payment, in every meeting each proprietor shall vote once for each share owned by him.

Sec. 1317. Owners and shares. 1868-'9, c. 164, s. 8.

The ownership of the shares of stock is indissolubly annexed to the ownership of the pieces of land adjudged to be benefited by the improvement; and such shares, or a part thereof proportionate to the area of such land that may descend or be conveyed, for any longer time than three years, shall, upon such descent or conveyance, descend and pass with the land, even although such shares be not mentioned in the deed of conveyance, and although their transfer be forbidden by such deed so that every owner of said land in possession, except tenant for a term of years, not exceeding three, and every owner in reversion or remainder after a term not exceeding three years, shall, during his ownership, be entitled to all the rights and privileges and be subject to all the obligations and burdens of a corporator. Every attempted sale of shares otherwise than as annexed to the land shall be void.

Sec. 1318. Obedience to laws, &c.; proviso. 1868-'9, c. 164, s. 9.

Every corporator shall be bound to obey the lawful by-laws of the company, and pay all dues lawfully assessed on him: *Provided*, he shall in no case pay more than his proportion of the expenses as fixed by this chapter; and such dues may be collected in the corporate name in any court having jurisdiction; and every assessment duly docketed in the county where the land to be affected lies, shall be a lien on the lands of the debtor which are connected with the corporation from the date of such docketing.

Sec. 1319. Payment of dues, &c. 1868-'9, c. 164, s. 10.

Every corporator, paying his dues legally assessed without regard to the number of his shares, shall be entitled to the full and free use of said canal for drainage and navigation, and of the road for passage and transportation. By-laws may be made to regulate these rights, but not so as to produce an inequality.

Sec. 1320. Privileges of infants. 1868-'9, c. 164, s. 11.

If any proprietor whose lands are adjudged to be benefited by a canal shall be an infant, no process shall be issued against him during his minority, or within twelve months thereafter, to enforce payment of any assessment, and he may, at any time within such twelve months, apply to have any order, judgment or decree

made against him, set aside as to him. If the infant or his guardian shall, during his minority, and the twelve months next thereafter, pay the dues assessed on him, he shall have all the rights and privileges of a corporator to be exercised through his guardian. If the infant shall fail to pay he shall not have any such rights, but if no action to set aside the judgment of the court creating the corporation shall have been brought by him as aforesaid, or upon the decision of such action against him, he shall be entitled to receive his proper share of stock and to possess all the rights and be bound by all the liabilities of a corporator, including a liability for assessments made during his minority, but not for interest on such, nor for any penalty for their prior non-payment.

Sec. 1321. Damage to lands. 1868-'9, c. 164, s. 12.

If any proprietor of lands shall be damaged by any improvement proposed, the commissioners shall so report, and he shall be entitled to be compensated as may be just by the proprietor whose lands are benefited in proportion to the benefit to them respectively; but in estimating such damage the benefit shall be deducted, and such proprietor shall be entitled to all the rights and privileges of a corporation as respects the use of the improvement, but shall not be entitled to a vote, or be bound for the assessment.

Sec. 1322. Court may dissolve corporation. 1868-'9, c. 164, s. 13.

If, from any cause, the canal or other improvement shall become, or shall prove to be valueless, any corporator may apply as is provided in other cases of special proceedings, and the court may dissolve the corporation created in connection with it.

Sec. 1323. Court to regulate costs. 1868-'9, c. 164, s. 14.

In all proceedings under this chapter, the costs, including one dollar and fifty cents *per diem* to each commissioner, shall be in the discretion of the court, unless otherwise herein provided.

Sec. 1324. Proceeding, a special proceeding.

The proceeding under this chapter shall be the same as prescribed in other cases of special proceeding.

CHAPTER THIRTY-ONE.

ESTATES.

SECTION.
1325. Estates in tail converted into fee simple.
1326. In joint tenancy, the share of deceased co-tenant not to vest in survivor; proviso as to partners in trade.
1327. Certain contingent limitations in deeds or wills, how construed, if made since the fifteenth of January, one thousand eight hundred and twenty eight.
1328. Infant unborn may take by deed, &c.
1329. Limitation to the heirs of a living person to be to his children.
SECTION.
1330. In conveyance to uses, possession transferred to use without livery.
1331. Grantees of reversions to have such rights against tenants for life or years, as grantors had.
1332. Such tenants to have same rights against grantees of reversions, as against the grantors.
1333. Buying and selling pretended rights or titles prohibited.
1334. Collateral and certain other warranties made void; to stand as covenants only.
1335. Property held in trust; so held not liable for debts; proviso.

SEC. 1325. Estates in tail converted into fee simple. R. C., c. 43, s. 1. 1784, c. 204, s. 5.

Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple; and all sales and conveyances, made *bona fide* and for valuable consideration, since the first day of January, in the year of our Lord one thousand seven hundred and seventy-seven, by any tenant in tail in actual possession of any real estate where such estate hath been conveyed in fee simple, shall be good and effectual in law to bar any tenant in tail and in remainder, of and from all claim, action and right of entry whatsoever, of, in, and to such entailed estate, against any purchaser, his heirs, or assigns, now in actual possession of such estate, in the same manner as if such tenant in tail had possessed the same in fee simple.

Lane v. Davis, 1 Hay., 277 (319); Minge v. Gilmour, 1 Hay., 279 (322); Moore v. Bradley, 2 Hay., 142; Wells v. Newbold, Tay., 166—(Ed., 1802).

SEC. 1326. In joint-tenancy, the share of deceased co-tenant not to vest in survivor; proviso as to partners in trade. R. C., c. 43, s. 2. 1784, c. 204, s. 6.

In all estates, real or personal, held in joint tenancy,

the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, or assigns respectively of the tenant so dying, in the same manner as estates held by tenancy in common: *Provided*, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the said joint business; but as soon as the same shall be effected, the survivor shall account with, and pay, and deliver to the heirs, executors, administrators and assigns respectively of such deceased partner, all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners.

Waugh v. Mitchell, 1 D. & B. Eq., 510; Baird v. Baird, 1 D. & B. Eq., 524; Motley v. Whitemore, 2 D. & B., 537; Ellison v. Andrews, 12 Ired., 188; Todd v. Zachary, Busb. Eq., 286; Vass v. Freeman, 3 Jon. Eq., 221; Bond v. Hilton, 6 Jon., 180; Patton v. Patton, Winst. Eq., 20; Summey v. Patton, Winst. Eq., 52: Stroud v. Stroud, Phil., 525; Powell v. Allen, 75—450; Ross v. Henderson, 77—170; McCaskill v. Lancashire, 83—393; Blair v. Osborne, 84—417; Powell v. Morris, 84—421; Mendenhall v. Benbow, 84—646; Long v. Barnes, 87—329.

Sec. 1327. Certain contingent limitations in deeds or wills, how construed, if made since the fifteenth of January, one thousand eight hundred and twenty-eight. R. C., c. 43, s. 3. 1827, c. 7.

Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect, when such person shall die, not having such heir, or issue, or child, or offspring, or descendant or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided*, that the rule of

construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, one thousand eight hundred and twenty-eight.

Zollicoffer v. Zollicoffer, 4 D. & B., 438; Thompson v. Floyd, 4 D. & B., 478; Tillman v. Sinclair, 1 Ired., 183; Moore v. Barrow, 2 Ired., 436; Brown v. Brown, 3 Ired., 134; Swain v. Roscoe, 3 Ired., 200; Robards v. Jones, 4 Ired., 53; State v. Skinner, 4 Ired., 57; Garland v. Watt, 4 Ired., 287; Brantley v. Whitaker, 5 Ired., 225; Cox v. Marks, 5 Ired., 361; Hollowell v. Kornegay, 7 Ired., 261; Weatherly v. Armfield, 8 Ired., 25; Folk v. Whitley, 8 Ired., 133; Sanderlin v. Deford, 2 Jon., 74; Gibson v. Gibson, 4 Jon., 427; Miller v. Churchill, 78—372; Hathaway v. Harris, 84—96; King v. Utley, 85—59.

Sec. 1328. Infant unborn may take by deed, &c. R. C., c. 43, s. 4. 10, 11 W. IV, c. 16.

An infant unborn, but in *esse*, shall be deemed a person capable of taking by deed or other writing, any estate whatever in the same manner as if he were born.

Sec. 1329. Limitation to the heirs of a living person to be to his children. R. C., c. 43, s. 5.

Any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will.

Miller v. Churchill, 78—372; King v. Utley, 85—59; Patrick v. Morehead, 85—62.

Sec. 1330. In conveyance to uses, possession transferred to use without livery. R. C., c. 43, s. 6. 27 Hen. VIII, c. 10.

By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenantor shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land, intended to be conveyed by such deed or covenant.

Hogan v. Strayhorn, 65—279; Ivey v. Granberry, 66—223; Bruce v. Faucett, 4 Jon., 391; Wilder v. Ireland, 8 Jon., 85.

Sec. 1331. Grantees of reversions to have such rights against tenants for life or years as grantors had. R. C., c. 43, s. 7. 32 Hen. VIII, c. 34, s. 1. 1868-'9, c. 156, s. 18.

Whenever a conveyance shall be made by any person, of any reversion in lands, rents, tenements, or hereditaments, which at the time of such conveyance, shall be held by any other person for a term of life or years, such grantee, his heirs, executors, administrators, and assigns, shall have the like advantages against the tenant for life, and against the tenant for years, his executors, administrators, and assigns, by entry for non-payment of rent and for doing of waste, and the same benefit and advantage and remedies by action for the not performing of other conditions, covenants, or agreements, contained and expressed in the indentures or other agreement, by which such tenant for life or years hold the same lands, tenements, rents or hereditaments against said tenant for life or for years, his executors, administrators and assigns, as the grantor or lessor himself or his heirs might have.

Sec. 1332. Such tenants to have same rights against grantees of reversions as against the grantors. R. C., c. 43, s. 8. 32 Hen. VIII, c. 34, s. 2.

Lessees and grantees of lands, rents, tenements and hereditaments for term of years or life, their executors, administrators and assigns, shall have like action, advantage and remedy against every person, his heirs and assigns, who shall have any conveyance from any person of the reversion of the same lands, rents, tenements and hereditaments, so let or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indenture of their leases, as the same lessees, or any of them, might and should have had against the said lessor and grantor, and his heirs.

Sec. 1333. Buying and selling pretended rights or titles prohibited. R. C., c. 43, s. 9. 32 Hen. VIII, c. 9, ss. 2, 4.

No person shall buy, sell or obtain any pretended right or title, or take a promise or covenant to have any right or title of any person, in or to any lands or tenements, (except such person as shall sell, covenant or promise the same, or they by whom they claim, have been in possession of the same or of the reversion or remainder thereof, or taken the rents and profits thereof one

year next before the bargain made,) upon pain that both he that shall make any such sale, promise or covenant, and the buyer, knowing the same, shall forfeit the value of the said lands—the one-half to the use of the county where the lands are situated, the other half to the person suing for the same: *Provided*, that any person being in the lawful possession, by taking the rents and profits of any tenements, may buy the pretended right of any other person to such tenements.

Sec. 1334. Collateral and certain other warranties made void; to stand as covenants only. R. C., c. 43, s. 10. 4 Anne, c. 16, s. 21. 1852, c. 16.

All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenantor in like manner as other obligations.

Johnson v. Bradley, 9 Ired., 362; Moore v. Parker, 12 Ired., 123; Myers v. Craig, Busb., 169; Southerland v. Stout, 68—446.

Sec. 1335. Property held in trust; so held not liable for debts; proviso. 1871-'2, c. 204, s. 1.

It shall and may be lawful for any person by deed or will to convey any property to any other person in trust to receive and pay the profits annually or oftener for the support and maintenance of any child, grandchild or other relation of the grantor, for the life of such child, grandchild or other relation, with remainder as the grantor shall provide; and the property so conveyed shall not be liable for or subject to be seized or taken in any manner for the debts of such child, grandchild or other relations, whether the same be contracted or incurred before or after the grant: *Provided*, that this section shall apply only to grants or conveyances where the property conveyed does not yield at the time of the conveyance a clear annual income exceeding five hundred dollars.

CHAPTER THIRTY-TWO.

EVIDENCE, DEPOSITIONS, WITNESSES.

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Sec. 1336. Evidence necessary to support title under H. E. McCulloch. R. C., c. 44, s. 1. 1819, c. 1021.

In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney, by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made.

Sec. 1337. Grant or copy from proprietor, sufficient evidence of title under him. R. C., c. 44, s. 2. 1807, c. 724.

In all trials where the titles of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts number one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases, the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence.

Sec. 1338. Evidence of the laws of other states, territories and countries. R. C., c. 44, s. 3. 1823, c. 1193, ss. 1, 3. C. C. P., s. 360.

A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten, or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof. And either party may also exhibit a copy of the law of such state, territory, or foreign country, duly certified by the secretary of state of this state as having been copied from a printed volume of the laws of such state, territory or country, on file in the state library, or in the offices of the governor or secretary of state.

State v. Twitty, 2 Hawks, 441; State v. Welsh, 3 Hawks, 403; State v. Jackson, 2 Dev., 563; State v. Patterson, 2 Ired., 346; McDougald v. Smith, 11 Ired., 576.

Sec. 1339. Statutes, how proved. R. C., c. 44, s. 4.

All statutes, or joint resolutions, passed by the general assembly, may be read in evidence from the printed statute book.

Sec. 1340. Other evidence of some acts. R. C., c. 44, s. 5, 1826, c. 7, s. 2.

Any private act published by Francis X. Martin, in his collection of private acts, or a copy of any act of the general assembly certified by the secretary of state, shall be received in evidence in every court.

Sec. 1341. Copy of survey from office of secretary of state good evidence. R. C., c. 44, s. 6. 1822, c. 1154.

Copies of the plots and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the secretary of state, certified by him as true copies, shall be as good evidence, in any court, as the original.

Tolson v. Mainor, 85—235.

Sec. 1342. Copies of official writings competent evidence. R. C., c. 44, s. 8. 1871-'2, c. 91, s. 1. 1792, c. 368, s. 11.

Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the governor, treasurer, auditor, secretary of state, attorney general or adjutant general, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office, when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original.

Governor v. McAfee, 2 Dev., 15; Clark v. Diggs, 6 Ired., 159; McLean v. Buchanan, 8 Jon., 444.

Sec. 1343. Records of administration, or letters testamentary in other states, how certified. R. C., c. 44, s. 7. 1834, c. 4. R. S. (U. S.), ss. 905, 906.

When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of congress or by the proper officer of the said state or territory, shall be allowed as evidence.

Sec. 1344. Wills or deeds in other states proved by certified copies. R. C., c. 44, s. 9. 1802, c. 623.

In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this state, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed, (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same,) being properly certified, either according to the act of congress, or by the proper officer of the said state or territory, shall be read as evidence.

Knight v. Wall, 2 D. & B., 125; Miazza v. Calloway, 74—31.

Sec. 1345. In suits on bonds of officers or trustees, evidence against principal admissible against sureties. R. C., c. 44, s. 10. 1881, c. 8. 1844, c. 38, s. 1.

In actions brought upon the official bonds of clerks of courts, sheriffs, coroners, constables, or other public officers, and also upon the bonds of executors, administrators, collectors or guardians, when it may be necessary for the plaintiff to prove any default of the principal obligors, any receipt or acknowledgment of such obligors, or any other matter or thing which, by law would be admissible and competent for or toward proving the same as against him, shall in like manner be admissible and competent as presumptive evidence only, against all or any of his sureties who may be defendants with or without him in said actions.

State v. Woodside, 8 Ired., 104; State v. Cauble, 70—62; State v. Pike, 74—531; Lewis v. Fort, 75—251; Badger v. Daniel, 79—372.

Sec. 1346. Evidence in land suits in Haywood and Henderson counties. R. C., c. 44, s. 11. 1842, c. 60.

In all legal controversies touching lands in the counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be *prima facie* evidence of the truth of each and every of the matters so recited.

Sec. 1347. Variance between execution and judgment not to affect title of purchaser. R. C., c. 44, s. 13. 1848, c. 53.

Whenever property may have been sold by an officer by virtue of any execution or other process commanding the sale thereof, no variance between the execution and the judgment whereon the same was issued, in the sum due, in the manner in which it is due, or in the time when it is due, shall invalidate or affect the title of the purchaser of such property.

Lyerly v. Wheeler, 11 Ired., 288; Green v. Cole, 13 Ired., 425.

Sec. 1348. Deeds registered and lost, and the registry also destroyed, presumed to have been in due form. R. C., c. 44, s. 14. 1854, c. 17.

Whenever it shall be shown in any judicial proceeding,

that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee-simple, if the grantor was entitled to such an estate at the time of conveyance; and that it was made upon sufficient consideration.

Sec. 1349. Evidence of counsel in cases of fraud where the state is concerned. 1874-'5, c. 213.

In cases where fraud upon the state is charged it shall not be a sufficient cause to excuse any one from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: *Provided*, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same.

Sec. 1350. No witness incapacitated by interest or crime. 1866, c. 43, ss. 1, 4. 1869-'70, c. 177. 1871-'2, c. 4.

No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills.

State v. Rose & Vaughan, Phil., 406; Rice v. Keith, 63—319; State v. Adair, 68—68; State v. Phipps, 76—203.

SEC. 1351. Evidence of parties admissible. 1866, c. 43, ss. 2, 3.

On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as hereinafter provided, be competent and compellable to give evidence, either *viva voce*, or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

Hansley v. Hansley, 10 Ired., 506; State v. Ludwick, Phil., 404; State v. Rose & Vaughan, Phil., 406; State v. Prince, 63—529; Boykin v. Boykin, 70—262; Isler v. Dewey, 71—14; State v. Phipps, 76—203.

SEC. 1352. Mortuary tables evidence. 1883, c. 225.

In all civil actions, special proceedings or other modes of litigation, whenever it shall be necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age.	Expectation.	Completed Age.	Expectation.
10	43.7	23	40.2
11	43.1	24	39.5
12	47.4	25	38.8
13	46.8	26	38.1
14	46.2	27	37.4
15	45.5	28	36.7
16	44.9	29	36.0
17	44.2	30	35.3
18	43.5	31	34.6
19	42.9	32	33.9
20	42.2	33	33.2
21	41.5	34	32.5
22	40.9	35	31.8

Completed Age.	Expectation.	Completed Age.	Expectation.
36	31.1	66	10 5
37	30.4	67	10.0
38	29.6	68	9 5
39	28.9	69	9.0
40	28.2	70	8.5
41	27.5	71	8.0
42	26.7	72	7.6
43	26.0	73	7.1
44	25.3	74	6.7
45	24.5	75	6.3
46	23.8	76	5.9
47	23.1	77	5.5
48	22.4	78	5.1
49	21.6	79	4.8
50	20.9	80	4.4
51	20.2	81	4.1
52	19.5	82	3.7
53	18.8	83	3.4
54	18.1	84	3 1
55	17.4	85	2.8
56	16.7	86	2.5
57	16.1	87	2.2
58	15.4	88	1.9
59	14.7	89	1.7
60	14.1	90	1.4
61	13.5	91	1.2
62	12.9	92	1.0
63	12.3	93	.8
64	11.7	94	.6
65	11.1	95	.5

Sec. 1353. Defendants in criminal proceedings competent in their own behalf at their own request; husband or wife of defendant competent for defendant. 1881, c. 89, s. 3. 1881, c. 110, ss. 2, 3.

In the trial of all indictments, complaints or other proceedings against persons charged with the commission of crimes, offences and misdemeanors, the person so charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him. The husband, or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant; but the failure of such witness to be examined shall not be used to the prejudice of the defence. But every

such person examined as a witness shall be subject to be cross-examined as other witnesses.

State v. Efler, 85—585; State v. Spier, 86—600; State v. Smith, 86—705.

SEC. 1354. Incompetent evidence, what. 1856-'7, c. 23. 1866, c. 43, s. 3. 1868-'9, c. 209, s. 4.

Nothing in this chapter, except as provided in the preceding section, shall render any person, who in any criminal proceeding is charged with the commission of a criminal offence competent, or compellable, to give evidence against himself, nor shall render any person compellable to answer any question tending to criminate himself, nor shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, nor any wife competent or compellable to give evidence against her husband: *Provided*, that in all criminal prosecutions of a husband for an assault and battery upon the person of his wife, or for abandoning his wife, or for neglecting to provide for her support, it shall be lawful to examine the wife in behalf of the state against the said husband.

State v. Ludwick, Phil., 401; State v. Rose, Phil., 406; State v. Mooney, 64—54; State v. Davidson, 77—522; State v. Parrott, 79—615; Tabor v. Ward, 83—291; State v. Gardner, 84—732; State v. Hamlett, 85—520; State v. Smith, 86—705.

SEC. 1355. Rules for summoning witnesses; subpœna, how issued and served. R. C., c. 31, s. 59. 1777, c. 115, s. 36.

In obtaining the testimony of witnesses in causes depending in the superior, criminal and inferior courts, the following rules shall be observed in practice, to-wit:

In suits where witnesses are to appear at any court, the clerk at the instance of the party shall issue a subpœna, directed to the sheriff or other officer of the county where such witnesses reside, mentioning the time and place for their appearance, the names of the parties to the suit wherein the testimony is to be given, and the party at whose instance they are summoned.

Every subpœna made returnable immediately, shall be issued only in term time, and shall be personally served on the witness therein named.

A copy of every subpœna issued by the clerk in vacation, in case any witness therein named is not to be found, may be left at his usual place of residence; and such copy, certified by the sheriff or other officer, and left as aforesaid, shall be deemed a legal summons, and the person

therein named shall be bound to appear in the same manner as if personally summoned.

Sec. 1356. Witnesses to attend from term to term till discharged; penalty for non-attendance; entitled to pay until discharged; no execution to issue against defaulting witness until after notice. R. C., c. 31, ss. 60, 61, 62. 1777, c. 115, ss. 37, 38, 43. 1799, c. 528. 1801, c. 591.

Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and continue to attend from term to term until discharged; when summoned in a civil suit, by the court or the party at whose instance such witness shall be summoned; or when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil cases, to the party at whose instance the subpœna issued, the sum of forty dollars, to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars for the use of the state, or the party summoning him.

Provided, that if the civil suit shall, in the vacation, be accommodated and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge, he shall attend at the next term, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party, at whose instance he was summoned, the allowance which is given to witnesses for their attendance, with costs.

Provided, further, that no execution shall issue against any defaulting witness for the forfeiture aforesaid, but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness.

Eller v. Roberts, 3 Ired., 11; Kinzey v. King, 6 Ired., 76; Icehour v. Mar-

tin, Busb., 478; Ward v. Bell, 7 Jon., 79; Fite v. Lander, 7 Jon., 247; State v. Gwyn, Phil., 445.

SEC. 1357. Depositions, how taken. R. C., c. 31, s. 63. 1881, c. 279.

Any party in a civil action or special proceeding may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States. Written notice of the time and place of taking a deposition, specifying the name of the witness, must be served by the party at whose instance it is taken upon the adverse party or his attorney. The time for serving such notice shall be as follows: three entire days when the party notified resides within ten miles of the place where the deposition is to be taken; in other cases, where the party notified resides in the state, one day more for every additional twenty miles, except where the deposition is to be taken within ten miles of a railway in running operation in the state, when one day only shall be given for every hundred miles of railway to the place where the deposition is to be taken. When a deposition is to be taken beyond the state, ten days' notice of the taking thereof shall be given, when the party whose deposition is to be taken resides within ten miles of a railway connecting with a line of railway within twenty miles of the place where the person notified resides. In other cases, where there are no railways running as above specified, twenty days' notice shall be given. When objection is taken to the reading of any such deposition, upon the ground that there are no railways or connecting railways to and from the points specified in this section, or that the notice given had otherwise been actually insufficient, it shall devolve upon the party objecting to satisfy the court of the truth of his allegation. Depositions shall be taken on commission, issuing from the court and under the seal thereof, by one or more commissioners, who shall be of kin to neither party, and shall be appointed by the clerk. Depositions shall be subscribed and sealed up by the commissioners, and returned to the court, the clerk whereof shall open and pass upon the same, after having first given the parties or their attorneys not less than one day's notice; and all such depositions, when passed upon and allowed by the clerk, without appeal, or by the judge upon appeal from the clerk's order, shall be deemed legal evidence, if the witness be competent.

Harris v. Peterson, 2 C. L. Repos., 471; State v. Webb, 1 Hay., 104; English v. Camp, 1 Hay., 358; Ridge's Orphans v. Lewis, Conf., 483; Ward v. Ely, 1 Dev., 372; Bedell v. State Bank, 1 Dev., 483; Harris v. Yarborough, 4 Dev., 166; Barton v. Morphis, 4 Dev., 240; Duncan v. Hill, 2 D. & B., 291; Sloan v. Williford, 3 Ired., 307; Beasley v. Downy, 10 Ired., 284; McDougald v. Smith, 11 Ired., 576; Alexander v. Walker, 13 Ired., 13; Kea v. Robinson, 4 Ired. Eq., 427; Sehorn v. Williams, 6 Jon., 575; Hix v. Fisher, 2 Winst., 84; Hill v. Bell, Phil., 132; State *ex rel.* Tidline v. Hickerson, 72—421; Macay, *ex parte*, 84—63; Barnhardt v. Smith, 86—473.

Sec. 1358. What depositions may be read on the trial. R. C., c. 31, s. 63. 1777, c. 115, ss. 39, 40, 41. 1803, c. 633. 1828, c. 24, ss. 1, 2. 1836, c. 30. 1850, c. 189. 1869-'70, c. 227, s. 11. 1881, c. 279, ss. 1, 3.

Every deposition taken and returned as prescribed in the preceding section, may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(1) If the witness is dead, or has become insane since the deposition was taken;

(2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial;

(3) If the witness is confined in a prison outside the county in which the trial takes place.

(4) If the witness is so old, sick or infirm as to be unable to attend court.

(5) If the witness is the president of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

(6) If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state.

(7) If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court.

(8) If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member.

(9) If the witness has been duly summoned, and at the time of the trial, is out of the state, or is more than

seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

Barnhardt v. Smith, 86—473.

Sec. 1359. Depositions in civil actions before a justice of the peace. 1872-'3, c. 33.

Any party in a civil action before a justice of the peace may take the depositions of all persons whose evidence he may desire to use in the action; and to do so, he may apply to the clerk of the superior court for a commission to take the same, and shall proceed in all things in taking such depositions as if such action was pending in the superior court. When any such depositions are returned to the clerk, they shall be opened and passed upon by the clerk, and delivered to the justice of the peace, before whom the trial is to be had; and the reading and using of said depositions shall conform to the rules of the superior court.

Sec. 1360. Depositions not to be quashed after a trial has begun. 1869-'70, c. 227, s. 12.

No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection.

Carson v. Mills, 69—32; Katzenstein v. R. R. Co., 78—286.

Sec. 1361. The objection must be made before trial. 1869-'70, c. 227, ss. 13, 17.

At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing.

Street v. Bryan, 65—619; Hicks v. Fisher, 2 Winst., 84; Carson v. Mills, 69—32; Kerchner v. Reilly, 72—171; Katzenstein v. R. R. Co., 78—286; Wasson v. Linster, 83—575; Barnhardt v. Smith, 86—473.

SEC. 1362. Powers of commissioners. R. C., c. 31, s. 64. 1777, c. 15, s. 42. 1805, c. 685, ss. 1, 2. 1848, c. 66. 1850, c. 188.

Commissioners to take depositions, appointed by the courts of this state, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this state, are hereby empowered, they or the clerks of the courts respectively in this state, to which such commission shall be returnable, to issue subpœnas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness, appearing before any of the said persons, and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto, shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testsmony of such witness, and the refusal of the witness to give it.

SEC. 1363. Attendance before commissioner, how enforced. R. C., c. 31, s. 65. 1848, c. 66, s. 2. 1850, c. 188, ss. 1, 2.

The sheriff of the county where the witness may be, shall execute all such subpœnas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be summoned five days before the time of his required attendance, and shall fail to appear according to the precept and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the state, the defaulting witness shall forfeit and pay to the party at whose instance he may be summoned fifty dollars, and on the trial for such penalty, the summons issued by the commissioner, or other person as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the summons, shall be *prima facie* evidence of the forfeiture, and sufficient to entitle the plaintiff to

judgment for the same, unless the witness may show his incapacity to have attended.

SEC. 1364. Default of witness before commissioner. R. C., c. 31, s. 66. 1850, c. 188, s. 2.

But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this state, then the same shall be certified under his hand, and returned with the subpœna to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned, the sum of forty dollars; but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof.

SEC. 1365. Witnesses appearing before a jury of view, or commissioner, paid as for attending court. R. C., c. 31, s. 67. 1805, c. 685, ss. 1, 2. 1848, c. 66, s. 1. 1850, c. 188, s. 3.

Witnesses summoned to appear at any survey, or before any jury of view, or before any commissioner, arbitrator, referee, or other person authorized to require their attendance, shall be entitled to the same fees as for similar attendance at the court of the county, and may prove, by their own oath, their attendance, mileage, and ferriage before such person, who is hereby authorized to administer the oath: and when they shall attend on any commission issuing from without the state, they may recover the fees for attendance against the party summoning them, or his agent or attorney directing them to be summoned; and when they shall attend under a commission or authority from any court in this state, the fees for attendance shall be proved as aforesaid, and be certified to the proper court and taxed as if the witness had attended the court, among the costs of the cause; but nevertheless, such fees may be immediately recovered against the party summoning.

Moore v. Com'rs, 70—340.

SEC. 1366. Subpœnas to be issued by clerk in cases not provided for. R. C., c. 31, s. 68. 1805, c. 685, ss. 1, 2.

In all cases not otherwise provided for, when witnesses are required to attend any court, commission, referees,

order of survey, or jury of view, a summons shall be issued by the clerk of the court, at the request of either party, expressing the day and place when and where they are to appear, the names of the parties to the suit, and in whose behalf summoned.

Sec. 1367. Witnesses, while attending court, exempt from arrest in civil cases. R. C., c. 31, s. 70. 1777, c. 115, s. 44.

Every witness shall be exempt from arrest in civil cases during his attendance at any court, or before a commissioner, arbitrator, referee or other person authorized to command the attendance of such witness; and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence.

Hammerskold v. Rose, 7 Jon., 629; Fentriss v. Brown, Phil., 373.

Sec. 1368. Witnesses not entitled to their fees in advance. 1868-'9, c. 279, sub chap. 11, ss. 3, 4.

Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the state or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned, shall, after one day's attendance on request and presentation of a certificate, fail or refuse to pay what then may be due, for traveling to the place of examination, and for the number of days of attendance.

Moore v. Com'rs, 70—340; Lewis v. Com'rs, 74—194; Bushee v. Surles, 85—90.

Sec. 1369. Witness to prove attendance at each court; may recover pay for attendance. R. C., c. 31, s. 73. 1777, c. 115, s. 46. 1796, c. 458, s. 1. 1868-'9, c. 279, s. c. 11, s. 21.

Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned, (witnesses for the state and municipal corporations excepted.) to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover

the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt: *Provided*, that where recovery may be had before a justice of the peace on a witness ticket, the justice shall deface it by writing the word judgment, and deliver the same to the person of whom it is recovered.

Moore v. Isler, Mar., 78; Thompson v. Hodges, 3 Hawks, 318; Carter v. Wood, 11 Ired., 22; Deaver v. Com'rs, 80—116; Belden v. Snead, 84—243.

Sec. 1370. Tickets to be filed with clerk, and taxed as costs; only two witnesses allowed to prove same fact. R. C., c. 31, s. 74. 1783, c. 189, s. 3. 1796, c. 458, s. 2.

At the court, where the cause shall be finally determined, the party recovering judgment shall file in the clerk's office the witness tickets; the amount whereof shall be taxed in the bill of costs, to be levied and recovered for the benefit of said party: *Provided*, that the party cast shall not be obliged to pay for more than two witnesses to prove a single fact.

Holmes v. Johnson, 11 Ired., 55; Woolly v. Robinson, 7 Jon., 30; Loftin v. Baxter, 66—340; Porter v. Durham, 79—596; Belden v. Snead, 84—243.

Sec. 1371. After removal of cause, subpœnas and commissions to take depositions may issue from either court. R. C., c. 31, s. 72. 1810, c. 787. 1832, c. 8.

When any cause shall be removed from the superior court of one county to that of another, after the order of removal, depositions may be taken in the case, and subpœnas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the case had been originally commenced in the court from which the subpœnas or commissions issued.

Com'rs v. Lemly, 85—341.

Sec. 1372. When a subpœna *duces tecum* may issue. R. C., c. 31, s. 81. 1797, c. 476.

In all causes depending in any court, in which the production of an original paper, lodged in any of the public offices of the state, or in any office of any court, shall become necessary, the court may issue the process of subpœna *duces tecum*, requiring such persons who hold said offices to attend the court with such original paper, in like manner and under the same penalties as witnesses are required in cases of subpœna to testify.

SEC. 1373. Courts may order parties to produce books or papers; plaintiff failing, non-suited; defendant failing, judgment rendered against him. R. C., c. 31, s. 82. 1821, c. 1095. 1828, c. 7.

The courts shall have full power, on motion and due notice thereof given, to require the parties to produce books or writings in their possession or control which contain evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion, may give the like judgment for the defendant, as in cases of non-suit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default.

Graham v. Hamilton, 3 Ired., 381; McGibboney v. Mills, 13 Ired., 162; Branson v. Fentress, 13 Ired., 165; Fuller v. McMillan, Busb., 206; Ward v. Simmons, 1 Jon., 404; Murchison v. McLeod, 2 Jon., 239; Maxwell v. McDowell, 5 Jon., 391; Justice v. Bank, 83—8; McLeod v. Bullard, 84—515; Com'rs v. Lemly, 85—341.

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Sec. 1374. When clerk of the superior court has jurisdiction of the estate. C. C. P., s. 433.

The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and in cases of intestacy, in the following cases:

(1) Where the decedent at, or immediately previous to, his death was domiciled in the county of such clerk, in whatever place such death may have happened;

(2) Where the decedent at his death had his fixed place of domicile in more than one county the clerk of any such county has jurisdiction;

(3) Where the decedent, not being domiciled in this state, died out of the state, leaving assets in the county of such clerk, or assets of such decedent thereafter come into the county of such clerk;

(4) Where the decedent, not being domiciled in this state, died in the county of such clerk, leaving assets in the state, or assets of such decedent thereafter come into the state.

Leake v. Gilchrist, 2 Dev., 73; Smith v. Munroe, 1 Ired., 345; Johnson v. Corpening, 4 Ired. Eq., 216; Suttle v. Turner, 8 Jon., 403; Wallis v. Wallis, 1 Winst., 78; Ballard v. Kilpatrick, 71—281.

Sec. 1375. Clerk first acquiring jurisdiction to have exclusive jurisdiction. C. C. P., s. 434.

The clerk who first gains and exercises jurisdiction under this chapter thereby acquires sole and exclusive jurisdiction over the decedent's estate.

Sec. 1376. Letters of administration, to whom granted. C. C. P., s. 456.

Letters of administration, in case of intestacy, shall be granted to the persons entitled thereto and applying for the same, in the following order:

(1) To the husband or widow, except as hereinafter provided;

(2) To the next of kin in the order of their degree, where they are of different degrees; if of equal degree, to one or more of them, at the discretion of the clerk;

(3) To the most competent creditor who resides within the state, and proves his debt on oath before the clerk;

(4) To any other person legally competent.

Hughes v. Pipkin, 1 Phil., 4; Pearce v. Castrix, 8 Jon., 71; Armstrong v. Stowe, 77—360.

Sec. 1377. Disqualifications. C. C. P., s. 457.

The clerk shall not issue letters of administration to any person who, at the time of appearing to qualify, is

(1) Under the age of twenty-one years;

(2) An alien, who is a non-resident of this state;

(3) A person who has been convicted of an infamous crime;

(4) Who, on proof, is adjudged by the clerk incompetent to execute the duties of such trust, by reason of drunkenness, improvidence or want of understanding;

(5) Who fails to take the oath or give the bond required by law.

Wallis v. Wallis, 1 Winst., 78.

Sec. 1378. Renunciation of persons having prior right. C. C. P., s. 459.

When any person applies for administration, and any other person has prior right thereto, a written renunciation of the person or persons, having such prior right, must be produced and filed with the clerk.

Smith v. Munroe, 1 Ired., 345; Hill v. Alspaugh, 72—402.

Sec. 1379. Persons having prior right, disqualified or absent. C. C. P., s. 460.

When any person having such prior right to administration is under the disqualification of age, or is temporarily absent from the state, such person is entitled to six months, after the disability of age is removed or his return to the state, in which to renounce his right or apply for letters of administration.

Hill v. Alspaugh, 72—402.

Sec. 1380. When person entitled to administration deemed to have renounced. C. C. P., s. 460 (*a*). 1868-'9, c. 203.

If any person, entitled to letters of administration, fails or refuses to apply for such letters within thirty days after the death of the intestate, the clerk, on application of any party interested, shall issue a citation to such person to show cause, within twenty days after service of the citation, why he should not be deemed to have renounced. If, within the time named in the citation, he neglects to answer or to show cause, he shall be deemed to have renounced his right to administer, and the clerk must enter an order accordingly, and proceed to grant letters to some other person.

Hill v. Alspaugh, 72—402.

Sec. 1381. What must be shown on application. C. C. P., s. 461.

On application for letters of administration, the clerk must ascertain by affidavit of the applicant or otherwise:

(1) The death of the decedent and his intestacy;

(2) That the applicant is the proper person entitled to administration, or that he applies after the renunciation of the person or persons so entitled;

(3) The value and nature of the intestate's property, the names and residence of all parties entitled as heirs or distributees of the estate, if known, or that the same cannot, on diligent inquiry, be procured; which of said parties are minors, and whether with or without guardians, and the names and residence of such guardians, if known.

Such affidavit or other proof must be recorded and filed by the clerk.

Sec. 1382. Contested administration. C. C. P., s. 462.

Any person interested in the estate may, on complaint filed and notice to the applicant, contest the right of such applicant for letters of administration, and on any issue of fact joined, or matter of law arising on the pleadings, the cause may be transferred to the superior court for trial, or an appeal be taken, as in other cases provided in this chapter.

Sec. 1383. Letters of collection, when to issue and to whom. C. C. P., s. 463.

Whenever, for any reason, a delay is necessarily produced in the admission of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent.

Lee v. Lee, 74—70; Syme v. Broughton, 86—153.

Sec. 1384. Qualifications, &c. C. C. P., s. 464.

Every collector shall have the qualifications and give the bond prescribed by law for an administrator.

Sec. 1385. Authority, &c. C. C. P., s. 465.

Every collector has authority to collect the personal property, preserve and secure the same, and collect the debts and credits of the decedent; and for these purposes he may commence and maintain or defend suits, and he may sell, under the direction and order of the clerk, any

personal property for the preservation and benefit of the estate. He may be sued for debts due by the decedent; and he may pay funeral expenses and other debts.

Lee v. Lee, 74—70; Syme v. Broughton, 86—153.

Sec. 1386. Authority, when to cease, &c. C. C. P., s. 466.

When letters testamentary, letters of administration or letters of administration with the will annexed are granted, the powers of such collector shall cease, but any suit brought by the collector may be continued by his successor, the executor or the administrator in his own name. Such collector must, on demand, deliver to the executor or administrator all the property, rights and credits of the decedent under his control, and render an account, on oath, to the clerk of all his proceedings. Such delivery and account may be enforced by citation, order or attachment.

Sec. 1387. Oaths, &c., to be taken. C. C. P., s. 467.

Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection are issued to any person, he must take and subscribe an oath or affirmation before the clerk that he will faithfully and honestly discharge the duties of his trust, which oath must be filed in the office of the clerk.

Armstrong v. Stowe, 77—360.

Sec. 1388. Administrators, &c., to give bond; proviso. 1870-'71, c. 93. C. C. P., s. 468.

Every executor from whom a bond is required by law, and every administrator and collector, before letters are issued, must give a bond payable to the state, with two or more sufficient sureties, to be justified before and approved by the clerk, conditioned that such executor, administrator or collector shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other court touching the administration of the estate committed to him. The penalty of such bond must be at least double the value of all the personal property of the deceased; such value to be ascertained by the clerk by examination on oath of the applicant or of some other competent person: *Provided*, that if the personal property of any decedent shall be insufficient to pay his debts and the charges of administration, and it shall become necessary for his executor or administrator to apply for the sale of real estate for assets, and the bond previously

given is not double the value of both the real and personal estate of the deceased, such executor (if bond is required of him by law) or administrator shall, before or at the time of filing his petition for such sale, give another bond payable and conditioned as the one above prescribed and with like security, in double the value of the real estate for the sale of which application shall be made.

Sec. 1389. Public administrator, how appointed. 1868-'9, c. 113, s. 1.

There may be a public administrator in every county, appointed by the clerk of the superior court for the term of eight years.

Sec. 1390. His bond. 1868-'9, c. 113, s. 2.

The public administrator shall enter into bond, with three or more sureties, approved by the clerk, in the penal sum of eight thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office, and obey all lawful orders of the clerk or other court touching the administration of the several estates that may come into his hands.

In re. Brinson, 73—278.

Sec. 1391. When bond to be enlarged. 1868-'9, c. 113, s. 3.

Whenever the aggregate value of the real and personal property belonging to the several estates in the hands of the public administrator shall exceed the one-half of his bond, the clerk shall require him to enlarge his bond in amount so as to cover, at all times, at least the double of such aggregate.

Sec. 1392. Bond, when to be renewed. 1868-'9, c. 113, s. 4.

The public administrator shall renew his bond every two years.

In re. Brinson, 73—278.

Sec. 1393. Oath of public administrator. 1868-'9, c. 113, s. 5.

The public administrator shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties of his trust; and the oath so taken and subscribed must be filed in the office of the clerk of the superior court.

Sec. 1394. When public administrator to obtain letters. 1868-'9, c. 113, s. 6.

The public administrator shall apply for and obtain letters on the estates of deceased persons in the following cases:

(1) When the period of six months has elapsed from the death of any decedent, and no letters testamentary, or letters of administration or collection, have been applied for and issued to any person;

(2) When any stranger, or person without known heirs, shall die intestate in any county;

(3) When any person entitled to administration shall request, in writing, the clerk to issue the letters to the public administrator.

Sec. 1395. Powers and duties; proviso; penalty. 1868-'9, c. 113, s. 7. 1876-'7, c. 239.

The public administrator shall have, in respect to the several estates in his hands, all the rights and powers, and be subject to all the duties and liabilities of other administrators. On the expiration of the term of office of a public administrator or his resignation, he may continue to manage the several estates committed to him prior thereto until he shall have fully administered the same: *Provided*, that this section shall not apply to such administrator until he shall enter into bond payable to the state of North Carolina with two or more sufficient sureties to be justified before and approved by the clerk or other authority having jurisdiction thereof, conditioned that he shall faithfully execute the trust reposed in him and obey all lawful orders of the clerk or other lawful authority touching the administration of the several estates so committed to him. The penalty of such bond shall be double the value of the personal property unadministered of the said several estates, and also of the real estate and he shall be authorized to sue for assets.

Sec. 1396. Inventory to be returned, when. R. C., c. 46, s. 16. 1868-'9, c. 113, s. 8.

Every executor, administrator and collector, within three months after his qualification, shall return to the clerk, on oath, a just, true and perfect inventory of all the real estate, goods and chattels of the deceased, which have come to his hands, or to the hands of any person for him, which inventory shall be signed by him and be recorded by the clerk.

He shall also return to the clerk, on oath, within three months after each sale made by him, a full and itemized account thereof, which shall be signed by him and recorded by the clerk.

Ochiltree v. Wright; 1 D. & B. Eq., 338; Graham v. Davidson, 2 D. & B. Eq., 155; Nichols v. Dunn, 2 D. & B. Eq., 287; Kerr v. Kirkpatrick, 8 Ired. Eq., 137; Cox v. Cox, 84—138.

Sec. 1397. Compelling inventory. 1868-'9, c. 113, s. 9.

If the inventory and account of sale specified in the preceding section are not returned as therein prescribed, the clerk must issue an order requiring the executor, administrator or collector to file the same within the time specified in the order, which shall not be less than twenty days, or to show cause why an attachment should not be issued against him. If, after due service of the order, the executor, administrator or collector does not, on the return day of the order, file such inventory or account of sale, or obtain further time to file the same, the clerk shall have power to vacate the office of administrator, executor or collector, and such executor, administrator or collector shall be subject to prosecution for a misdemeanor, and fined and imprisoned at the discretion of the court.

Taylor v. Biddle, 71—1; Pearce v. Lovinier, 71—248; Armstrong v. Stowe, 77—360; Neighbors v. Hamlin, 78—42; Barnes v. Brown, 79—401; McFadgen v. Council, 81—195.

Sec. 1398. New assets. 1868-'9, c. 113, s. 10.

Whenever further property of any kind, not included in any previous return, shall come to the hands or knowledge of any executor, administrator or collector, he must cause the same to be returned, as hereinbefore prescribed, within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as in the case of the first inventory.

Sec. 1399. Annual accounts. C. C. P., s. 478. 1871-'2, c. 46.

Every executor, administrator and collector shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment,

and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed *prima facie* evidence of correctness. Each clerk must annex or attach a copy of this section to all letters issued by him.

Heilig v. Foard, 64—710; McFadgen v. Council, 81—195; Gregory v. Ellis, 82—225.

Sec. 1400. Failure to account. C. C. P., s. 479.

If any executor, administrator or collector omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such executor, administrator or collector to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such executor, administrator or collector fail to appear or refuse to exhibit such account, the clerk may issue an attachment against him for a contempt and commit him till he exhibit such account, and may likewise remove him from office.

Sec. 1401. Vouchers. C. C. P., s. 480.

Vouchers are presumptive evidence of disbursement, without other proof, unless impeached. If lost, the accounting party must, if required, make oath to that fact, setting forth the manner of loss, and state the contents and purport of the voucher. And this section shall apply to guardians, collectors, trustees and to all other persons acting in a fiduciary character.

Drake v. Drake, 82—443; McNeill v. Hodges, 83—504; Robertson v. Wall, 85—283.

Sec. 1402. Final accounts. C. C. P., s. 481.

An executor, or administrator, may be required to file his final account for settlement in the office of the clerk of the superior court by a citation directed to him, at any time after two years from his qualification, at the instance of any person interested in the estate; but such account may be filed voluntarily at any time; and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk.

Rowland v. Thompson, 64—714; Rowland v. Thompson, 65—110; Hodges v. Council, 86—181; Vaughan v. Hines, 87—445.

SEC. 1403. Trust estate in personalty deemed personal assets. 1868-'9, c. 113, s. 11.

If any trustee, or any person interested in any trust estate, shall die leaving any equitable interest in personal estate which shall come to his executor, administrator or collector, the same estate shall be deemed personal assets.

Martin v. Meredith, 71—214.

SEC. 1404. What proceeds of sale of real property deemed personal assets. 1868-'9, c. 113, s. 12.

All proceeds arising from the sale of real property, for the payment of debts, as hereinafter provided, shall be deemed personal assets in the hands of the executor, administrator or collector, and applied as though the same were the proceeds of personal estate; and bonds and other obligations in which the ancestor has bound his heirs shall not be put in suit against the heirs or devisees of the deceased, but shall be paid as other debts of the same class in the manner provided in this chapter.

SEC. 1405. What proceeds deemed real assets. 1868-'9, c. 113, s. 13.

All proceeds from the sale of real estate, as hereinafter provided, which may not be necessary to pay debts and charges of administration, shall, notwithstanding, be considered real assets, and as such shall be paid by the executor, administrator or collector, to such persons as would have been entitled to the land had it not been sold.

Smith v. Fortescue, Busb. Eq., 127; Latta v. Russ, 8 Jon., 111; Allison v. Robinson, 78—222.

SEC. 1406. The distinction between legal and equitable assets abolished. 1868-'9, c. 113, s. 14.

The distinction between legal and equitable assets is abolished, and all assets shall be applied in the discharge of debts in the manner prescribed by this chapter.

SEC. 1407. Crops ungathered at decease deemed personal assets. 1868-'9, c. 113, s. 15.

The crops of every deceased person, remaining ungathered at his death, shall, in all cases, belong to the executor, administrator or collector, as part of the personal assets, and shall not pass to the widow with the land assigned as dower, nor to the devisee by virtue of any devise of the land, unless such intent be manifest and specified in the will.

Flint v. Conrad, Phil., 190; Thomas v. Lines, 83—191.

Sec. 1408. Power of executor or administrator to sell personal property. 1868-'9, c. 113, s. 16.

Every executor and administrator shall have power in his discretion and without any order, except as hereinafter provided, to sell, as soon after his qualification as practicable, all the personal estate of his decedent.

Sec. 1409. Same as to collector. 1868-'9, c. 113, s. 17.

All sales of personal property by collectors shall be made only upon order obtained, by motion, from the clerk of the superior court, who shall specify in his order a descriptive list of the property to be sold.

Sec. 1410. Sales, how to be made. 1868-'9, c. 113, s. 18.

All sales of personal estate by an executor, administrator or collector, shall be publicly made, on a credit of six months or for cash, after twenty days' notification posted at the court house and four other public places in the county.

Worth v. McAden, 1 D. & B. Eq., 199; Wynns v. Alexander, 2 D. & B. Eq., 58; McKay v. Flower, Busb., 213; Polk v. Robinson, 7 Ired. Eq., 235.

Sec. 1411. To sell for cash, when. 1868-'9, c. 113, s. 19.

To sell for cash, executors, administrators and collectors must obtain an order from the clerk, for reasons to be filed in the office of the court. When any person interested either as creditor or legatee on the day of sale, objects to the completion of such cash sale, on account of the insufficiency of the amount bid, before passing title to property so disposed of, the clerk, at his discretion, shall confirm the sale.

Sec. 1412. Sale of evidences of debt. 1868-'9, c. 113, s. 20.

Every executor, administrator and collector, at any time after one year from the grant of letters, shall be authorized to sell at public auction, in the manner prescribed in this chapter, all bills, bonds, notes, accounts, or other evidences of debt belonging to the decedent, which he has been unable to collect or which may be deemed insolvent. Before offering such evidences of debt at public sale he shall file with the clerk a descriptive list thereof, and obtain an order of sale therefor from the clerk, and shall make return of the proceeds of such sale as in other cases of assets.

Gray v. Armistead, 6 Ired. Eq., 74, and cases there cited.

Sec. 1413. Proceeds of sale, how secured. 1868-'9, c. 113, s. 21.

The proceeds of all sales of personal estate and rentings of real property by public auction, shall be secured by bond and good personal security; and such proceeds shall be collected as soon as practicable, otherwise the executor, administrator or collector shall be answerable for the same.

Lee v. Lee, 74—70.

Sec. 1414. Hours of sale. 1868-'9, c. 113, s. 22.

All sales or rentings provided for in the preceding section, shall be between the hours of ten o'clock, a. m., and four o'clock p. m., of the day on which the sale or renting is to be made; and every executor, administrator or collector, who otherwise makes any sale or renting, shall forfeit and pay two hundred dollars to any person suing for the same.

McDaniel v. Johns, 8 Jon., 414.

Sec. 1415. Powers under wills. 1868-'9, c. 113, s. 23.

Nothing in this chapter shall be construed to affect the discretionary powers, trusts and authorities of an executor or other trustee acting under a will: *Provided*, creditors be not delayed thereby, nor the order changed in which by law they are entitled to be paid.

Murchinson v. Williams, 71—135.

Sec. 1416. Order of payment. 1868-'9, c. 113, s. 24.

The debts of the decedent must be paid in the following order:

FIRST CLASS.—Debts which by law have a specific lien on property to an amount not exceeding the value of such property.

SECOND CLASS.—Funeral expenses.

Ward v. Jones, Busb., 127; Barbee v. Green, 86—158.

THIRD CLASS.—Taxes assessed on the estate of the deceased previous to his death.

FOURTH CLASS.—Dues to the United States and to the state of North Carolina.

FIFTH CLASS.—Judgments of any court of competent jurisdiction within this state, docketed and in force, to the extent to which they are a lien on the property of the deceased at his death.

Galloway v. Bradfield, 86—163; Mauney v. Holmes, 87—428; Daniel v. Laughlin, 87—433.

SIXTH CLASS.—Wages due to any domestic servant or mechanical or agricultural laborer employed by the deceased, which claim for wages shall not extend to a period of more than one year next preceding the death; or if such servant or laborer was employed for the year current at the decease, then from the time of such employment; for medical services within the twelve months preceding the decease.

SEVENTH CLASS.—All other debts and demands.

Jerkins v. Carter, 70—500; Murchison v. Williams, 71—135; Lee v. Eure, 82—428; Galloway v. Bradfield, 86—163; Mauney v. Holmes, 87—428; Daniel v. Laughlin, 87—433.

Sec. 1417. Rate of payment. 1868-'9, c. 113, s. 25.

Every debt must be paid *pro rata*, equally in its class.

Sec. 1418. No prefcrence allowed. 1868-'9, c. 113, s. 26.

No executor, administrator or collector shall give to any debt any preference whatever, either by paying it out of its class or by paying thereon an undue proportion in its class.

Sec. 1419. Debts not due. 1868-'9, c. 113, s. 27.

Debts not due may be paid on a rebate of interest thereon for the time unexpired.

Sec. 1420. Debts due executor, &c. 1868-'9, c. 113, s. 28.

No property or assets of the decedent shall be retained by the executor, administrator or collector in satisfaction of his own debt, in preference to others of the same class; but such debt must be established upon the same proof and paid in like manner and order as required by law in case of other debts.

Sec. 1421. Advertising for claims; notice for six weeks. 1868-'9, c. 113, s. 29. 1881, c. 278, s. 2.

Every executor, administrator and collector, within twenty days after the granting of letters, shall notify all persons having claims against the decedent, to exhibit the same to such executor, administrator or collector, at or before a day to be named in such notice; which day must be twelve months from the day of the first publication of such notice. The notice shall be published once a week, for six weeks in a newspaper (if any there be)

published in the county: *Provided*, that the cost thereof shall in no case exceed two dollars and fifty cents.

Lee v. Patrick, 9 Ired., 135; Gilliam v. Willey, 1 Jon. Eq., 128; Flemming v. Flemming, 85—127.

Sec. 1422. If no paper in county, advertisement to be made at court house, &c.

If there shall be no newspaper published in the county, then the notice required in the preceding section shall be posted at the court house, and four other public places in the county.

Sec. 1423. How advertisements to be proved. 1868-'9, c. 113, s. 31.

A copy of the advertisement, directed to be posted or published in pursuance of the preceding sections with an affidavit, taken before some person authorized to administer oaths, of the proprietor, editor or foreman of the newspaper wherein the same appeared, to the effect that such notice was published for six weeks in said newspaper, or an affidavit, stating that such notices posted, were filed in the office of the clerk by the executor, administrator or collector. The copy so verified or affidavit shall be deemed a record of the court and a copy thereof, duly certified by the clerk, shall be received as conclusive evidence of the fact of publication in all the courts of this state.

Flemming v. Flemming, 85—127.

Sec. 1424. Notice may be served personally. 1868-'9, c. 113, s. 32.

The executor, administrator or collector may cause the said notice to be personally served on any creditor; who shall, thereupon, within six months after personal service thereof, exhibit his claim, or be forever barred from maintaining any action thereon.

Flemming v. Flemming, 85—127.

Sec. 1425. Affidavits may be required. 1868-'9, c. 113, s. 33.

Upon any claim being presented against the estate, the executor, administrator or collector may require the affidavit of the claimant or other satisfactory evidence that such claim is justly due, that no payments have been made thereon, and that there are no off-sets against the same, to the knowledge of the claimant; or if any pay-

ments have been made, or any off-sets, exist, their nature and amount must be stated in such affidavit.

Flemming v. Flemming, 85—127.

Sec. 1426. Referring claim. 1868-'9, c. 113, s. 34. 1872-'3, c. 141.

If the executor, administrator or collector doubt the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable nature, to one or more disinterested persons, not exceeding three; whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative: the same may be impeached in any proceeding against the personal representative, for fraud therein: *Provided*, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it.

Graham v. Tate, 77—120; Flemming v. Flemming, 85—127; Kay v. Patton, 86—386.

Sec. 1427. Limitations of action on disputed claims. 1868-'9, c. 113, s. 35.

If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in the preceding section, the claimant must, within six months after due notice of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon.

Graham v. Tate, 77—120; Flemming v. Flemming, 85—127.

Sec. 1428. Omission to present claim within twelve months. 1868-'9, c. 113, s. 37.

In an action brought on a claim which was not presented within twelve months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares, before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector.

Sec. 1429. Costs against executors, &c., when allowed. 1868-'9, c. 113, s. 38.

No costs shall be recovered in any action against an executor, administrator or collector, unless it appears that payment was unreasonably delayed or neglected, or that the defendant refused to refer the matter in controversy, in which cases the court may award such costs against the defendant personally, or against the estate, as may be just.

May v. Darden, 83—237; Flemming v. Flemming, 85—127.

Sec. 1430. Undevised real estate first chargeable with debts. 1868-'9, c. 113, s. 39.

When any part of the real estate of the testator descends to his heirs by reason of its not being devised or disposed of by the will, such undevised real estate shall be first chargeable with payment of debts, in exoneration, as far as it will go, of the real estate that is devised, unless from the will it appears otherwise to be the wish of the testator.

Sec. 1431. Debtor named executor, not discharged. 1868-'9, c. 113, s. 40.

The appointing of any person executor shall not be a discharge of any debt or demand due from such person to the testator.

Ferebee v. Doxey, 6 Ired., 448; Moore v. Miller, Phil. Eq., 359.

Sec. 1432. No lien created by commencement of suit. 1868-'9, c. 113, s. 41.

No lien shall be created by the commencement of a suit against an executor, administrator or collector.

Sec. 1433. To what estates applicable; proviso. 1869-'70, c. 58, s. 1.

This chapter shall apply to the estates of such deceased persons only whereof original administration has been granted subsequent to the first day of July, one thousand eight hundred and sixty-nine, and all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine, shall be dealt with, administered and settled according to the law as it existed just prior to the said date, and it is hereby declared that such is the true intent and meaning of this chapter: *Provided*, that nothing herein shall be construed to prevent the application of this chapter so far as it relates only to the courts having jurisdiction of any

action or proceeding for the settlement of an administration or to the practice and procedure therein.

Badham v. Cox, 11 Ired., 456; Giles v. Palmer, 4 Jon., 386; Moore v. Byers, 65—240; Taylor v. Biddle, 71—1; Brandon v. Phelps, 77—44; Johnson v. Futrell, 86—122; Ray v. Patton, 86—386; Murchison v. Whitted, 87—465.

Sec. 1434. In case of *bona fide* administration prior to July, 1869. 1869-'70, c. 58, s. 2.

If any person shall have *bona fide* administered any estate or any part of the estate of any deceased person whereof original administration was granted prior to said first day of July, under the said act of one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, he shall not be deemed guilty of a *devastavit*.

Sec. 1435. Administrators may sell certain evidences of debt. 1869-'70, c. 58, s. 3.

Executors and administrators who qualified and entered upon the administration of their estates before the first day of July, one thousand eight hundred and sixty-nine, may sell such evidences of debt as are mentioned and provided in this chapter.

Sec. 1436. Application to sell real property. 1868-'69, c. 113, s. 42.

When the personal estate of a decedent is insufficient to pay all his debts, including the charges of administration, the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated by petition to sell the real property for the payment of the debts of such decedent.

Rhem v. Tull, 13 Ired., 57; Knight v. Knight, 6 Jon. Eq., 134; Thompson v. Cox, 8 Jon., 311; Wiley v. Wiley, Phil., 131; Evans v. Singletary, 63—205; Wadsworth v. Davis, 63—251; Finger v. Finger, 64—183; Pike v. Green, 64—665; Hardee v. Williams, 65—56; Hyman v. Jarnigan, 65—96; Vaughn v. Deloatch, 65—378; Bland v. Harstoe, 65—204; Pelletier v. Saunders, 67—261; Hinton v. Whitehurst, 68—316; Latham v. Bell, 69—135; Humphrey v. Wade, 70—280; Carlton v. Byers, 70—691; Ballard v. Kilpatrick, 71—281; Stafford v. Harris, 72—198; Haywood v. Haywood, 79—42; Alison v. Robinson, 78—222; Shields v. McDowell, 82—137; Peterson v. Vann, 83—118; Williams v. Williams, 85—313; Johnson v. Futrell, 86—122.

Sec. 1437. Contents of the petition. 1868-'9, c. 113, s. 43.

The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained—

(1) The amount of debts outstanding against the estate;

(2) The value of the personal estate, and the application thereof;

(3) A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots;

(4) The names, ages and residences, if known, of the devisees and heirs at law of the decedent.

Thompson v. Cox, 8 Jon., 311; Hinton v. Whitehurst, 68—316; Haywood v. Haywood, 79—42; Shields v. McDowell, 82—137; Stradley v. King, 84—635.

Sec. 1438. Heirs and devisees to be parties. 1868-'9, c. 113, s. 44.

No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as prescribed in the chapter entitled Code of Civil Procedure.

Thompson v. Cox, 8 Jon., 311; Williams v. Williams, 85—313.

Sec. 1439. Infant defendants. 1868-'9, c. 113, s. 45.

Infant defendants must appear by guardian, either general or special, who shall file an answer to the petition, either admitting or denying the allegations thereof, and where such answer is filed by a guardian *ad litem*, the costs and expenses thereof, if any, may be directed to be paid, if the court thinks proper, out of the proceeds of the sale, in case one is ordered.

Stradley v. King, 84—635.

Sec. 1440. When issue joined. 1868-'9, c. 113, s. 46.

When an issue of law or fact is joined between the parties, the course of the procedure shall be as prescribed in such cases for other special proceedings.

McBryde v. Patterson, 73—478; Jones v. Hemphill, 77—42.

Sec. 1441. Issue as to title. 1868-'9, c. 113, s. 47.

Whenever the land, which is sought to be sold, is claimed by another person under any pretence whatsoever, such claimant shall be admitted to be heard as a party to the proceeding, upon affidavit of his claim, and

if the issue be found for the petitioner he shall have his writ of possession and order of sale accordingly.

Sec. 1442. Conveyance by heir or devisee void, when. 1868-'9, c. 113, s. 105.

All conveyances of real property of any decedent made by any devisee or heir at law, within two years from the grant of letters, shall be void as to the creditors, executors, administrators and collectors of such decedent; but such conveyances to *bona fide* purchasers for value and without notice, if made after two years from the grant of letters, shall be valid even as against creditors.

Thompson v. Cox, 8 Jon., 311; Badger v. Jones, 66—305; Donoho v. Patterson, 70—649; Hinton v. Whitehurst, 71—66; Brandon v. Phelps, 77—44; Badger v. Daniel, 79—372; Winfield v. Burton, 79—388; Renan v Banks, 83—483; Murchison v. Whitted, 87—465.

Sec. 1443. Power of clerk. 1868-'9, c. 113, s. 48.

As soon as all proper parties are made to the proceeding, the clerk of the superior court before whom it is instituted, if the allegations in the petition are not denied or controverted, shall have power to hear the same summarily, and to decree a sale.

Thompson v. Cox, 8 Jon., 311.

Sec. 1444. Order of sale, what to contain. 1868-'9, c. 113, s. 49.

The court may decree a sale of the whole or any specified parcel of the premises, in such a manner as to size of lots, place of sale, terms of credit, and security for payment of purchase money, as may be most advantageous to the estate, and upon the coming in of the report of the sale and the confirmation thereof, title shall be made by such person, and at such time as the court may prescribe, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.

Thompson v. Cox, 8 Jon., 311; Floyd v. Herring, 64—409; Hyman v. Jernigan, 65—96; Shearin v. Hunter, 72—493; McLean v. Patterson, 84—427; Fouchee v. Durham, 84—56.

Sec. 1445. Notice of sale. 1868-'9, c. 113, s. 50.

Notice of sale under this proceeding shall be the same as for the sale of real estate by sheriffs on execution.

Sec. 1446. What real estate subject to sale. 1868-'9, c. 113, s. 51.

The real estate subject to sale under this chapter shall

include all the deceased may have conveyed with intent to defraud his creditors, and all rights of entry and rights of action and all other rights and interests in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs: *Provided*, that lands so fraudulently conveyed shall not be taken from any one who purchased them for a valuable consideration and without a knowledge of the fraud.

Waugh v. Blevins, 63—167; Paschal v. Harris, 74—335; Mannix v. Ihrie, 76—299; Heck v. Williams, 79—437.

Sec. 1447. Judgment in case of fraudulent conveyance. 1868-'9, c. 113, s. 52.

Whenever an executor, administrator or collector shall file his petition to sell land, which may have been fraudulently conveyed, and of which there may have been a subsequent *bona fide* sale, whereby he cannot have a decree of sale of the land, the court may give judgment in favor of such executor, administrator or collector for the value of the land, against all persons who may have fraudulently purchased the same; and if the whole recovery shall not be necessary to pay the debts and charges, the residue shall be restored to the person of whom the recovery was made

Sec. 1448. Creditors may bring a special proceeding. 1871-'2, c. 213, s. 1. 1876-'7, c. 241, s. 6.

Any creditor of a deceased person may, within the times prescribed by law, prosecute a special proceeding or a civil action before the judge in his own name and in behalf of himself and all other creditors of the deceased without naming them, against the personal representative of the deceased, to compel him to an account of his administration, and to pay the creditors what may be payable to them respectively.

Wadsworth v. Davis, 63—251; Ransom v. McClees, 64—17; Herring v. Outlaw, 70—334; Jerkins v. Carter, 70—500; Overman v. Grier, 70—693; Ballard v. Kilpatrick, 71—281; Patterson v. Miller, 72—516; Wadsworth v. Davis, 75—159; Isler v. Murphy, 76—52; Graham v. Tate, 77—120; Haywood v. Haywood, 79—42; Bratton v. Davidson, 79—423; Shields v Payne, 80—291; Southall v. Shields, 81—28; McFadgen v. Council, 81—195; Pegram v. Armstrong, 82—326; Oates v. Lilly, 84—643; Bacon v. Berry, 85—124; Flemming v. Flemming, 85—127; Long v. Bank, 85—355; Mauney v. Holmes, 87—428; Daniel v. Laughlin, 87—433.

Sec. 1449. By what rules governed. 1871-'2, c. 213, s. 2.

The said special proceeding shall be governed by the

rules of practice prescribed for special proceedings, except so far as the same are modified by this chapter.

Sec. 1450. Summons, when and where returnable. 1871-'2, c. 213, s. 3.

The summons in said special proceeding shall be returnable before the clerk of the superior court of the county in which letters testamentary or administration were granted, and on a day not less than forty nor more than one hundred days from the issuing thereof, and not less than twenty days after the service thereof.

Sec. 1451. On issuing of summons, clerk to advertise. 1871-'2, c. 213, s. 4.

On issuing of the summons, the clerk shall advertise for all creditors of the deceased to appear before him on or before the return day and file the evidences of their claims.

Sec. 1452. Where published, and for what time. 1871-'2, c. 213, s. 5.

The advertisement shall be published at least once a week for not less than six weeks in some newspaper which may be thought by the clerk the most likely to inform all the creditors, and shall also be posted at the court house door for not less than thirty days. If, however, the estate does not exceed three thousand dollars in value, and the creditors are supposed by the clerk all to reside within the county or to be known, publication in a newspaper may be omitted, and in lieu thereof the advertisement shall be posted at four public places in the county; besides the court house door. Proof of personal service on a creditor or that a copy of the advertisement was sent to him by mail at his usual address, shall be as to him equivalent to publication.

Sec. 1453. Creditors to name an agent to receive notices, &c. 1871-'2, c. 213, s. 6.

The creditors of the deceased on or before the required day shall file with the clerk the evidences of their demands, and every creditor on filing such claim shall indorse thereon or otherwise name some person or place within the town in which the court is held, upon whom or where notices in the cause may be served or left, otherwise he shall be deemed to have notice of all motions, orders and proceedings in the cause filed or made in the clerk's office.

Sec. 1454. How demands filed shall be evidence. 1871-'2, c. 213, s. 7.

If the evidence of the demand be other than a judgment, or some writing signed by the deceased, it shall be accompanied by the oath of the creditor, or if he be non-resident or infirm or absent, or in any other proper case, of some witness of the transaction, or of some agent of the creditor, that to the best of his knowledge and belief the claim is just, and that all due credits have been given.

Isler v. Murphy, 76—52; Long v. Bank, 85—354.

Sec. 1455. Representative to file list of demands made on him. 1871-'2, c. 213, s. 8.

On the day of his appearance the personal representative shall on oath give to the clerk a list of all claims against the deceased of which he has received notice or has any knowledge, with the names and residences of the claimants to the best of his knowledge and belief; and if any person so named shall have failed to file evidence of his claim, the clerk shall immediately cause a notice requiring him to do so to be served on him, which may be done by posting the same directed to him at his usual address.

Flemming v. Flemming, 85—127.

Sec. 1456. Clerk to exhibit list of demands, &c., to representative. 1871-'2, c. 213, s. 9.

On the day fixed for the appearance of the personal representative, the clerk shall exhibit to him a list of all the claims filed in his office with the evidences thereof.

Flemming v. Flemming, 85—127.

Sec. 1457. Representative to admit or deny demands within five days. 1871-'2, c. 213, s. 10.

Within five days thereafter the defendant shall state in writing on said list, or on a separate paper, which of said claims he disputes in whole or in part. The clerk shall then notify the creditor, as above provided, that his claim is disputed, and the creditor shall thereupon file in the office of the clerk a complaint founded on his said claim, and the pleadings shall be as in other cases.

Wadsworth v. Davis, 75—159; Graham v. Tate, 77—120; Oates v. Lilly, 84—643; Flemming v. Flemming, 85—127.

Sec. 1458. What clerk to do when issues joined. 1871-'2, c. 213, s. 11.

If the issues joined be of law, the clerk shall send the papers to the judge of the superior court for trial, as is provided for by the Code of Civil Procedure in like cases. If the issues shall be of fact, the clerk shall send so much of the record as may be necessary to the next term of the superior court for trial.

Wadsworth v. Davis, 75—159; Graham v. Tate, 77—120; Oates v. Lilly, 84—643.

Sec. 1459. Who shall pay costs of issues. 1871-'2, c. 213, s. 12.

If any personal representative shall deny the liability of his deceased upon any claim evidenced as is provided in this chapter, and the issue shall finally be decided against him, the costs of the trial shall be paid by him personally, and not allowed out of the estate, unless it shall appear that he had reasonable cause to contest the claim and did so *bona fide*.

Sec. 1460. Failure of representative to appear, what may be done. 1871'-2, c. 213, s. 13.

If the personal representative shall fail to appear on the return day, the clerk or judge of the superior court may permit him afterward to appear and plead on such terms as may be just.

Sec. 1461. Clerk to proceed to state account. 1871-'2, c. 213, s. 14.

Immediately after the return day the clerk or judge shall proceed to hear such evidence as shall be brought before him, and to state an account of the dealings of the personal representative with the estate of his deceased according to the course of his court.

Sec. 1462. Clerk to prepare and sign final report. 1871-'2, c. 213, s. 15.

After the clerk shall have stated the account and prepared his report, he shall notify all the parties to examine and except to the same. Any party may then except to the same in whole or in part. The clerk shall then pass on the exceptions and prepare and sign his final report and judgment, of which the parties shall have notice.

Sec. 1463. Times of notice, &c., may be enlarged by clerk or judge. 1871-'2, c. 213, s. 16.

If no length of notice, or no time for the doing of an act, is stated in this chapter, the time shall be reasonable, and in any case it may be enlarged by the clerk from time to time, or by the judge of the superior court, on application to him or on appeal to him from the clerk.

Sec. 1464. Of appeals to superior court, what required. 1871-'2, c. 213, s. 17.

Any party may appeal from a final judgment of the clerk to the judge of the superior court in term time, on giving an undertaking with surety, or making a deposit, to pay all costs which shall be recovered against him. If any creditor shall appeal and give such security, his appeal shall be deemed an appeal by all who are damaged by the judgment, and no other creditor shall be required to give any undertaking.

Sec. 1465. Clerk to file papers on appeal. 1871-'2, c. 213, s. 18.

On an appeal the clerk shall file his report and judgment and all the papers in his office as clerk of the superior court, and enter the case on his trial docket for the next term.

Sec. 1466. Creditors in prior classes may docket their judgments, &c. 1871-'2, c. 213, s. 19.

If the exceptions and questions, from the decision on which the appeal is taken, affect only the creditors in one or more classes, the creditors in the prior classes by the leave of the clerk, or of the judge of the superior court, may docket their judgments and issue execution thereon.

Sec. 1467. If assets sufficient to pay any class of debts. 1871-'2, c. 213, s. 20.

If upon taking the account it shall be admitted, or be found without appeal, that the defendant has assets sufficient, after the deduction of all proper costs and charges, to pay all the claims which have been presented of any one or more of the classes, the clerk shall give judgment in favor of the creditors whose debts of such classes have been admitted, or adjudged by any competent court; and if any claim in any preferred class be in litigation, the amount of such claim, with the probable costs of the litigation, shall be left in the hands of the personal repre-

sentative, and not carried to the credit of any subsequent class until the litigation is ended.

Sec. 1468. If assets insufficient to pay all claims in any class of debts. 1871-'2, c. 213, s. 21.

If the assets be insufficient to pay in full all the claims of any class, the amounts thereof having been found or admitted as aforesaid, the clerk may adjudge payment of a certain part of such claims, proportionate to the assets applicable to debts of that class.

Sec. 1469. What judgments to declare. 1871-'2, c. 213, s. 22.

All judgments given by a judge or clerk of the superior court against a personal representative for any claim against his deceased shall declare:

(1) The certain amount of the creditor's demand;

(2) The amount of assets which the personal representative has applicable to such demand. Execution may issue only for this last sum with interest and costs.

Sec. 1470. No judgments to fix assets unless, &c. 1871-'2, c. 213, s. 23.

No judgment of any court against a personal representative shall fix him with assets, except a judgment of the judge or clerk, rendered as aforesaid, or the judgment of some appellate court rendered upon an appeal from such judgment. All other judgments shall be held merely to ascertain the debt, unless the personal representative by pleading expressly admit assets.

Vaughn v. Stephenson, 69—212; Ballard v. Kilpatrick, 71—281; Dunn v. Barnes, 73—273; Holmes v. Foster, 78—35; Flemming v. Flemming, 85—127.

Sec. 1471. Form and effect of execution. 1871-'2, c. 213, s. 24.

All executions issued upon the order or judgment of the judge or clerk or of any appellate court against any personal representative, rendered as aforesaid, shall run against the goods and chattels of the deceased, and if none, then against the goods and chattels, lands and tenements of the representative. And all such judgments docketed in any county shall be a lien on the property for which execution is adjudged as fully as if it were against him personally.

Williams v. Green, 80—76.

SEC. 1472. Report, evidence of assets only on day to which it relates. 1871-'2, c. 213, s. 25.

The account and report and adjudication by the judge, clerk or any appellate court shall not be evidence as to the assets except on the day to which such adjudication relates.

SEC. 1473. Affidavit of assets afterwards come to hand, proceedings on. 1871-'2, c. 213, s. 26.

Any creditor may afterwards, on filing an affidavit by himself or his agent, that he believes that assets have come to the hands of the personal representative since that day, and on giving an undertaking, with surety, or making a deposit for the costs of the personal representative, may sue out a summons against him alleging subsequent assets, and the proceedings thereon shall be as hereinbefore prescribed, so far as the same may be necessary.

SEC. 1474. If personal assets insufficient, may proceed against land. 1871-'2, c. 213, s. 27.

If it shall appear at any time during, or upon, or after the taking of the account of a personal representative that his personal assets are insufficient to pay the debts of the deceased in full, and that he died seized of real property, it shall be the duty of the judge or clerk, at the instance of any party, to issue a summons in the name of the personal representative or of the creditors generally, to the heirs, devisees and others in possession of the lands of the deceased, to appear and show cause why said lands should not be sold for assets.

Wood v. Skinner, 79—92.

SEC. 1475. Proceedings on return of summons. 1871-'2, c. 213, s. 28.

Upon the return of the summons the proceeding shall be as is directed in other like cases.

SEC. 1476. Chapter not to apply to probates, &c., before July, 1869. 1871-'2, c. 213, s. 29. 1872-'3, c. 179.

This chapter shall apply only to cases where the grant of letters of collection or of probate or of administration shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine, except in case of administrations *de bonis non* upon estates where the former letters of administration or letters testamentary were granted prior to the first of July, one thousand

eight hundred and sixty-nine, in all which cases estates shall be administered, closed up and settled according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine.

Latham v. Bell, 69—135; Carlton v. Byers, 70—691; Brandon v. Phelps, 77—44; King v. Little, 77—138.

Sec. 1477. Proceedings on probates, &c., before July 1st, 1869. 1871-'2, c. 213, s. 30.

In all cases where an action has been or shall be brought against a personal representative to recover a claim against his deceased; if in the superior court, that court shall proceed according to its course; if before a justice of the peace, and the representative has pleaded or shall plead that he has fully administered, the justice shall find the debt and return the papers to the next term of the superior court in order that the issue in respect to the assets may be there tried and determined according to the course of the court.

Hooks v. Moses, 8 Ired., 88; Anderson v. Young, Busb., 408; Hare v. Parham, 4 Jones, 412.

Sec. 1478. Intestate's estates, how distributed. 1868-'9, c. 113, s. 53.

The surplus of the estate, in case of intestacy, shall be distributed in the following manner, except as hereinafter provided:

(1) If there are not more than two children, one-third part to the widow of the intestate, and all the residue by equal portions to and among the children of the intestate and such persons as legally represent such children as may then be dead;

(2) If there are more than two children, then the widow shall share equally with all the children and be entitled to a child's part;

(3) If there be no child nor legal representative of a deceased child, then one-half the estate shall be allotted to the widow, and the residue be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them;

(4) If there be no widow, the estate shall be distributed, by equal portions, among all the children, and such persons as legally represent such children as may be dead;

(5) If there be neither widow nor children, nor any legal representative of the children, the estate shall be distributed equally to every of the next of kin of the in-

testate, who are in equal degree, and those who legally represent them;

(6) But if, after the death of the father and in the lifetime of the mother, any of his children shall die intestate, without wife or childreu, every brother or sister, and the representatives of them, shall have an equal share with the mother of the deceased child.

Williamson v. Smart, Conf. Rep., 268 (146); Grant v. Bustin, 1 D. & B. Eq., 77; Gillespie v. Foy, 5 Ired. Eq., 280; Headen v. Headen, 7 Ired. Eq., 159; Hunter v. Husted, Busb. Eq., 97; Credle v. Credle, Busb., 225; Alvany v. Powell, 1 Jon. Eq., 35; Skinner v. Wynne, 2 Jon. Eq., 41; Worth v. McNeill, 4 Jon. Eq., 272; Johnston v. Chesson, 6 Jon. Eq., 146; Nelson v. Blue, 63—659; Arrington v. Dortch, 77—367.

Sec. 1479. Husband to administer on the estate of a wife who dies intestate. 1871-'2, c. 193, s. 32.

If any married woman shall die wholly or partially intestate, the surviving husband shall be entitled to administer on her personal estate, and shall hold the same, subject to the claims of her creditors and others having rightful demands against her, to his own use, except as hereinafter provided. If the husband shall die after his wife, but before administering, his executor or administrator or assignee shall receive the personal property of the said wife, as a part of the estate of the husband, subject as aforesaid, and except as hereinafter provided.

Sec. 1480. Right of administration lost upon a dissolution of the marriage, &c. 1871-'2, c. 193, s. 42.

When a marriage shall be dissolved *a vinculo*, the parties respectively shall thereby lose all his or her right to administer on the estate of the other, and to a distributive share in the personal property of the other, and every right and estate in the personal estate of the other.

Sec. 1481. Elopement and adultery of wife forfeits her right to administer on husband's estate, &c. 1871-'2, c. 193, s. 44.

If any married woman shall elope with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to a distributive share in the personal property of her husband, and all right to administer on his estate.

SEC. 1482. Husband's right to administer, &c., upon wife's estate, when and how lost. 1871-'2, c. 193, s. 45.

If any husband shall separate himself from his wife, and be living in adultery at her death, or if she shall have obtained a divorce *a mensa et thoro*, and shall not be living with her husband at her death, or if the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and shall not be living with her at her death, he shall thereby lose all his right and estate of whatever character in and to her personal property, and all right to administer on her estate.

SEC. 1483. Advancements to be accounted for. 1868-'9, c. 113, s. 54.

Children who shall have any estate by the settlement of the intestate, or shall be advanced by him or her in his or her lifetime, shall account with each other for the same in the distribution of the estate in the manner as provided by the second rule in the chapter entitled "Descents," and shall also account for the same to the widow of the intestate in ascertaining her child's part of the estate.

Donnell v. Mateer, 5 Ired. Eq., 7; Webb v. Lyon, 5 Ired. Eq., 67; Henderson v. Womack, 6 Ired. Eq., 437: Hicks v. Forest, 6 Ired. Eq., 528; Walton v. Walton, 7 Ired. Eq., 138; Hanner v. Winburn, 7 Ired. Eq., 142; Headen v. Headen, 7 Ired. Eq., 159; Bridgers v. Hutchins, 11 Ired., 68; Tayloe v. Bond, Busb. Eq., 5; Hunter v. Husted, Busb. Eq., 97; Credle v. Credle, Busb., 225; Davis v. Haywood, 1 Jon. Eq., 253; Skinner v. Wynne, 2 Jon. Eq., 41; Shiver v. Brock, 2 Jon. Eq., 137; Worth v. McNeil, 4 Jon. Eq., 272; Hollister v. Attmore, 5 Jon. Eq., 373; Banks v. Shannonhouse, Phil., 284; Hagler v. McCombs, 66—345; Bason v. Harden, 72—281; James v. James, 76—331; Bradsher v. Cannady, 76—445; Arrington v. Dortch, 77—367; Melvin v. Bullard, 82—33.

SEC. 1484. Children advanced to render schedule. 1868-'9, c. 113, s. 55.

Where any parent shall die intestate, who had in his or her lifetime given to, or put in the actual possession of, any of his or her children, any personal property of what nature or kind soever, such child shall cause to be given to the administrator or collector of the estate an inventory, on oath, setting forth therein the particulars by him or her received of the intestate in his or her lifetime.

Bradsher v. Cannady, 76—445.

Sec. 1485. Children refusing to account not entitled. 1868-'9, c. 113, s. 56.

In case any child who had, in the lifetime of the intestate, received a part of said intestate, shall refuse to give such inventory, he shall be considered to have had and received his full share of the deceased's estate, and shall not be entitled to receive any further part or share.

Bradsher v. Cannady, 76—445.

Sec. 1486. Illegitimate children next of kin to their mother, when. 1868-'9, c. 113, s. 57.

Every illegitimate child of the mother dying intestate, or the issue of such illegitimate child deceased, shall be considered among her next of kin, and as such shall be entitled to a share of her personal estate as prescribed in this chapter.

Kimborough v. Davis, 1 Dev. Eq., 71.

Sec. 1487. Illegitimate children next of kin to each other. 1868-'9, c. 113, s. 58.

Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin, if all such children had been born in lawful wedlock.

Kimborough v. Davis, 1 Dev. Eq., 71; Coor v. Starling, 1 Jon. Eq., 248.

Sec. 1488. Executors, &c., to pay over at the end of two years. 1868-'9, c. 113, s. 59.

No executor, administrator or collector, after two years from his qualification, shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements and such debts as he shall legally pay; but all such estate so remaining shall, immediately after the expiration of two years, be divided and be delivered and paid to such person to whom the same may be due by law or the will of the deceased.

Whitted v. Webb, 2 D. & B. Eq., 442; McKinder v. Littlejohn, 1 Ired., 66; Hobbs v. Craige, 1 Ired., 332; State v. McAleer, 5 Ired., 632; Allen v. Smitherman, 6 Ired. Eq., 341; Turnage v. Turnage, 7 Ired. Eq., 127.

Sec. 1489. Sums to be reserved. 1868-'9, c. 113, s. 60.

But if, on a final accounting before the judge or clerk, it appears that any claim exists against the estate which is not due or on which suit is pending, the judge or clerk shall allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained in the hands of the executor, administrator or collector, for the purpose of being applied to the payment when due or when recovered, with the expense of contesting the same. The order allowing such sum to be retained must specify the amount and nature of the claim.

Jackson v. Shields, 87—437.

Sec. 1490. Rights of action survive to and against personal representative. 1868-'9, c. 113, s. 63.

Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.

Rippey v. Miller, 11 Ired., 247; Butner v. Keelhn, 6 Jon., 60; Collier v. Arrington, Phil., 356; Peebles v. N. C. Railroad Co., 63—238; Shuler v. Millsaps, 71—297; Shields v. Lawrence, 72—43; Sledge v. Reid, 73—440; Price v. Cox, 83—261; Allen v. Baker, 86—91; Hannah v. R. R. Co., 87—351.

Sec. 1491. Exceptions; rights which die with the person. 1868-'9, c. 113, s. 64.

The following rights in action do not survive:

(1) Causes of action for libel and for slander, except slander of title;

(2) Causes of action for false imprisonment, assault and battery, or other injuries to the person, where such injury does not cause the death of the injured party;

Hannah v. R. R. Co., 87—351.

(3) Causes of action accruing against a husband by reason of his marriage, for the debts of the wife contracted by her before marriage;

(4) Cases where the relief sought could not be enjoyed, or granting it would be nugatory after death.

Rippey v. Miller, 11 Ired., 247; Butner v. Keelhn, 6 Jon., 60; Collier v. Arrington, Phil., 356; Peebles v. N. C. Railroad Co., 63—238; Shuler v. Millsaps, 71—297; Shields v. Lawrence, 72—43; Sledge v. Reid, 73—440; Price v. Cox, 83—261.

Sec. 1492. Deeds may be made by executor, &c., in certain cases. 1868-'9, c. 113, s. 65. 1874-'5, c. 251.

When any deceased person shall have *bona fide* sold any lands, and shall have given a bond or other written contract to the purchaser to convey the same, and the bond or other written contract hath been duly proved and registered in the county where the lands are situated, if within the state, or, if not in the state, shall be proved before the clerk of the superior court and registered in the county where the obligee lives or obligor died, his executor, administrator or collector may execute a deed to the purchaser conveying such estate as shall be specified in the bond or other written contract; and such deed shall convey the title as fully as if it had been executed by the deceased obligor: *Provided*, that no deed shall be made but upon payment of the price, if that be the condition of the bond or other written contract.

Hodges v. Hodges, 2 D. & B. Eq., 72; Lindsay v. Coble, 2 Ired. Eq., 602; McCraw v. Gwin, 7 Ired. Eq., 55; Osborne v. McMillan, 5 Jon., 109; White v. Hooper, 6 Jon. Eq., 152.

Sec. 1493. Land devised to be sold by executors, who may sell. 1868-'9, c. 113, s. 66.

When any of the executors of a person making a will of lands, to be sold by his executors, die or refuse to take upon them the administration; or, when all the executors die, or refuse to take upon them the administration; or, when there is no executor named in a will devising lands to be sold; in every such case, such executors as qualify, or having qualified, do survive, or the administrator with the will annexed, may sell such lands; and all conveyances, made by such executors or administrators, shall be effectual to convey the title to the purchaser of the estate so devised to be sold.

Hester v. Hester, 2 Ired. Eq., 330.

Sec. 1494. Who chargeable as executor *de son tort*. 1868-'9, c. 113, s. 67.

Every person who shall receive goods or debts of any person dying intestate, or any release of a debt due the intestate, upon a fraudulent intent, or without such valuable consideration as shall amount to the value or thereabout, (except it be in the satisfaction of some debt of the value of the same goods or debts to him owing by the intestate at the time of his decease,) shall be chargeable as executor of his own wrong, so far as such debts and goods, coming to his hands, or whereof he is released,

will satisfy, deducting all just debts owing to him by the intestate, and all other payments made by him.

Norfleet v. Riddick, 3 Dev., 221; McMorine v. Storey, 4 D. & B., 189 Bailey v. Miller, 5 Ired., 444; Sturdivant v. Davis, 9 Ired., 365; Francis v. Welch, 11 Ired., 215; Bridgers v. Moye, Busb. Eq., 170; Israel v. King, 69—373; Winchester v. Grady, 72—115.

Sec. 1495. Devastavit by executors or administrators of executors, &c. 1868-'9, c. 113, s. 68.

The executors and administrators of persons, who, as rightful executors or as executors in their own wrong, or as administrators, shall waste or convert to their own use any estate or assets of any person deceased, shall be chargeable in the same manner as their testator or intestate might have been.

Sec. 1496. Payments of executors, &c., deemed valid, when. 1869-'70, c. 150, s. 1.

Where any executor or administrator has paid any debt of his testator or intestate before all the debts of higher dignity have been paid and satisfied, and the estate of such testator or intestate was at the time of such payment solvent, but has since been rendered insolvent by the emancipation of the slaves, or the insolvency of the debtors of the estate, or other cause, without any fault or want of diligence on the part of the executor or administrator, or when any creditor has refused to accept payment of his debt in Confederate currency, and such currency was afterwards used by the executor or administrator in payment of debts of the estate, or it became of no value by the termination of the war, in all such cases payments thus made shall be deemed and held valid in law, and shall be allowed to such executor or administrator in all suits by creditors of the estate seeking to charge such executor or administrator with assets of the estate or with *devastavit* thereof without regard to the dignity of the debt thus paid, or on which such suit may be brought.

Sec. 1497. Right of action to survive to executor of executor, &c. 1868-'9, c. 113, s. 69.

Executors and administrators, and executors of executors, shall have actions in like manner as the first testator or intestate might have had against any person, his executors and administrators, in all cases, except where such actions, being commenced, are not allowed by statute to be revived on the death of any party.

Thompson v. Badham, 70—141; Hannah v. R. R. Co., 87—351

Sec. 1498. Action for wrongful act or neglect causing death. 1868-'9, c. 113, s. 70.

Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony.

Kesler v. Smith, 66—154; Burton v. Railroad Co., 82—504; Hannah v. R. R. Co., 87—351.

Sec. 1499. Measure of damages. 1868-'9, c. 113, s. 71.

The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

Collier v. Arrington, Phil., 356; Kesler v. Smith, 66—154; Burton v. Railroad Co., 82—504; Burton v. Railroad Co., 84—192.

Sec. 1500. How recovery to be applied. 1868-'9, c. 113, s. 72.

The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

Kesler v. Smith, 66—154.

Sec. 1501. Recovery of assets and possession of real property, &c. 1868-'9, c. 113, s. 73.

Executors, administrators or collectors may maintain any appropriate action or proceeding to recover assets, and to recover possession of the real property of which executors are authorized to take possession by will; and to recover for any injury done to such assets or real property at any time subsequent to the death of the decedent.

Sec. 1502. Executors, &c., to hold in joint tenancy. 1868-'9, c. 113, s. 74.

Every estate vested in executors, administrators or collectors, as such, shall be held by them in joint tenancy.

Sec. 1503. Sales of real property under wills. 1868-'9, c. 113, s. 75.

Sales of real property made pursuant to authority given by will, unless the will otherwise directs, may be public or private, and on such terms as, in the opinion of the executor, are most advantageous to those interested therein.

Worth v. McAden, 1 D. & B. Eq., 199.

Sec. 1504. When property paid to the University. 1868-'9, c. 113, s. 76.

All sums of money, or other estate of whatever kind, which shall remain in the hands of any executor, administrator or collector for five years after his qualification, unrecovered or unreclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator or collector to the trustees of the University of North Carolina; and the said trustees are authorized to demand, sue for, recover and collect such moneys or other estate of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto; and if no such claim shall be preferred within ten years after such money or other estate be received by the said trustees, then the same shall be held by them absolutely.

Oliveira v. University, Phil. Eq., 69.

Sec. 1505. Bidding in real property. 1868-'9, c. 113, s. 77.

At any auction sale of real property belonging to the estate, the executor, administrator or collector may bid in the property and take a conveyance to himself as executor, administrator or collector for the benefit of the estate, when, in his opinion, this is necessary to prevent a loss to the estate.

State v. Hanner, 64—668.

Sec. 1506. Promises to charge executor, &c., personally, to be in writing. 1868-'9, c. 113, s. 78.

No action shall be brought whereby to charge an executor, administrator or collector upon a special promise to answer damages, or to pay the decedent's debts out of his own estate, unless the agreement upon which such action is brought, or some memorandum or note thereof, shall be in writing and signed by such executor, adminis-

trator or collector, or by some other person thereunto by him lawfully authorized.

Sleighter v. Harrington, 2 Mur., 332; Williams v. Chaffin, 2 Dev., 333; Smithwick v. Shepherd, 4 Jon., 196; Norton v. Edwards, 66—367.

Sec. 1507. All actions to be in representative capacity. 1868-'9, c. 113, s. 79.

All actions and proceedings brought by or against executors, administrators or collectors, upon any cause of action or right to which the estate is the real party in interest, must be brought by or against them in their representative capacity.

Rogers v. Gooch, 87—442.

Sec. 1508. Appearance by one of several executors, &c. 1868-'9, c. 113, s. 81.

In actions against several executors, administrators or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all.

Sec. 1509. Actions against executors, &c., by a creditor. 1868-'9, c. 113, s. 82.

An action may be brought by a creditor against an executor, administrator or collector on a demand at any time after it is due, but no execution shall issue against the executor, administrator or collector on a judgment therein against him without leave of the court, upon notice of twenty days and upon proof that the defendant has refused to pay such judgment its rateable part, and such judgment shall be a lien on the property of the defendant only from the time of such leave granted.

Heilig v. Foard, 64—710; Vaughn v. Stephenson, 69—212; Grayham v. Tate, 77—120; Shields v. Payne, 80—291; Hoover v. Berryhill, 84—132; Greer v. Cagle, 84—385; Long v. Bank, 85—354; Ray v. Patton, 86—386.

Sec. 1510. Legacies and distributive shares, how recovable. 1868-'9, c. 113, s. 83.

Legacies and distributive shares may be recovered from an executor, administrator or collector by petition preferred in the superior court, at any time after the lapse of two years from his qualification, unless the executor, administrator or collector shall sooner file his final account for settlement. The suit shall be commenced and the

proceedings therein conducted as prescribed in other cases of special proceedings.

Williams v. Williams, 71—427; Hendrick v. Mayfield, 74—626; Ham v. Kornegay, 85—119.

Sec. 1511. Actions against executors, administrators, &c. 1876-'7, c. 241, s. 6.

In addition to the remedy by special proceeding, actions against executors, administrators and collectors may be brought originally to the superior court at term time; and in all such cases it shall be competent for the court in which said actions shall be pending to order an account to be taken by such person or persons as said court may designate, and to adjudge the application or distribution of the fund ascertained, or to grant other relief, as the nature of the case may require.

Hunt v. Sneed, 64—176; Heilig v. Foard, 64—710; Miller v. Barnes, 65—67; Williams v. Williams, 70—665; Williams v. Williams, 71—427; Hendrick v. Mayfield, 74—626; Haywood v. Haywood, 79—42; Bratton v. Davidson, 79—423; Devereux v. Devereux, 81—12; Pegram v. Armstrong, 82—326.

Sec. 1512. Judge or court to have power to adjudge payment of legacies and distributive shares.

It shall be in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court shall deem proper, when there shall be no necessity for retaining the fund.

Hobbs v. Craige, 1 Ired., 332; Turnage v. Turnage, 7 Ired. Eq., 127.

Sec. 1513. Right of succeeding executor, &c., to issue execution. 1868-'9, c. 113, s. 84.

Any executor, administrator or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

Durham v. Bostwick, 72—353.

Sec. 1514. Actions continued in case of revocation of letters. 1868-'9, c. 113, s. 85.

In case the letters of an executor, administrator or col-

lector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the executor, administrator or collector in the administration of the estate, in the same manner as in case of death.

Sec. 1515. When executor to give bond. 1868-'9, c. 113, s. 86.

Executors shall give bond as prescribed by law, in the following cases:

(1) Where the executor resides out of the state, and no foreign executor has any authority to intermeddle with the estate until he shall have entered into bond, which must be done within the space of one year after the death of the testator, and not afterwards;

(2) When a man marries a woman who is an executrix, and if the husband in such case fail to give bond, the clerk, on application of any creditor or other party interested in the estate, shall revoke the letters issued to the wife and grant administration with the will annexed to some other person;

(3) Where an executor, other than such as may have already given bond, obtains an order to sell any portion of the real estate for the payment of debts, as hereinbefore provided; and the court or clerk to whom application is made shall require, before granting any order of sale, such executor to enter into bond.

Barnes v. Brown, 79—401.

Sec. 1516. Remedy on bond. 1868-'9, c. 113, s. 87.

Every person injured by the breach of any bond given by an executor, administrator or collector may put the same in suit and recover such damages as he may have sustained.

Williams v. Hicks, 1 Mur., 437; Mayo v. Mayo, 2 Hawks, 329; Carrington v. Carrington, 3 Dev., 529; State v. McKay, 6 Ired., 397; Smith v. Fortescue, Busb. Eq., 127; Latta v. Russ, 8 Jon., 111; Neal v. Becknell, 85—299.

Sec. 1517. Bond to be prosecuted on revocation of letters. 1868-'9, c. 113, s. 88.

Whenever the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the

estate, and a recovery may be had thereon to the full extent of any damage not exceeding the penalty of the bond sustained by the estate of the decedent by the acts or omissions of such executor, administrator or collector, and to the full value of any property received and not duly administered. Moneys so recovered shall be assets in the hands of the person recovering them.

Latham v. Bell, 69—135; Carlton v. Byers, 70—691.

Sec. 1518. Requiring new bonds or new sureties. 1868-'9, c. 113, s. 89.

If complaint be made on affidavit to the clerk of the superior court that the surety in any bond of an executor, administrator or collector is insufficient, or that one or more of such sureties is or is about to become a non-resident of this state, or that the bond is inadequate in amount, the clerk must issue an order requiring the principal in the bond to show cause why he should not give a new bond, or further surety, as the case may be. On the return of the order duly executed, if the objections in the complaint are found valid, the clerk shall make an order requiring the party to give further surety or a new bond in a larger amount, within a reasonable time.

Sec. 1519. Surety in danger of loss, &c., entitled to relief. 1868-'9, c. 113, s. 90.

Any surety on the bond of an executor, administrator or collector, who is in danger of sustaining loss by his suretyship, may exhibit his petition on oath to the clerk of the superior court wherein the bond was given, setting forth particularly the circumstances of his case, and asking that such executor, administrator or collector be removed from office, or that he give security to indemnify the petitioner against apprehended loss, or that the petitioner be released from responsibility on account of any future breach of the bond. The clerk shall issue a citation to the principal in the bond, requiring him, within ten days after service thereof, to answer the petition. If, upon the hearing of the case, the clerk deem the surety entitled to relief, he may grant the same in such manner and to such extent as may be just. And if the principal in the bond gives new or additional security, to the satisfaction of the clerk, within such reasonable time as may be required, the clerk may make an order releas-

ing the surety from liability on the bond for any subsequent act, default or misconduct of the principal.

Governor v. Gowan, 3 Ired., 342; Hunt v. Sneed, 64—176; Hunt v. Sneed, 64—180; Neighbors v. Hamlin, 78—42; Barnes v. Brown, 79—401.

Sec. 1520. Revocation of letters for failure to comply. 1868-'9, c. 113, s. 91.

If any person required to give a new bond, or further security, or security to indemnify, under the two preceding sections, fails to do so within the time specified in any such order, the clerk must forthwith revoke the letters issued to such person, whose right and authority, respecting the estate, shall thereupon cease.

Sec. 1521. Appointment of successor; interlocutory order. 1868-'9, c. 113, s. 92.

In all cases of the revocation of letters, the clerk must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties respecting such revocation, the clerk is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate.

Taylor v. Biddle, 71—1; *In re.* Brinson, 73—278.

Sec. 1522. Administering before letters granted; penalty. 1868'-9, c. 113, s. 93.

No person shall enter upon the administration of any decedent's estate until he has obtained letters therefor, under the penalty of one hundred dollars, one-half to the use of the informer and the other half to the state; but nothing herein contained shall prevent the family of the deceased from using so much of the crop, stock and provisions on hand as may be necessary, until the widow's year's support is assigned therefrom, as prescribed by law.

Israel v. King, 69—373.

Sec. 1523. Service on absent executor, how made. 1868-'9, c. 113, s. 94.

Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in the chapter entitled Code of Civil Procedure.

Sec. 1524. Commissions allowed executor; proviso. 1868-'9, c. 113, s. 95. 1869-'70, c. 189.

The clerks of the superior court are authorized and directed to allow commissions to executors, administrators and collectors on filing their final accounts for settlement, not exceeding five per cent. upon the amount of receipts and expenditures, which shall appear to be fairly made in the course of administration; and such allowance may be retained out of the assets against creditors and all other persons claiming an interest in the estate. And the clerk, in making such allowance, shall consider the trouble and time expended in the management of the business: *Provided*, that in sales of land, for payment of debts, commissions shall not be allowed on any larger amount of the proceeds than the sum actually applied in payment of debts: *Provided further*, that nothing in this section contained shall prevent any executor, administrator or collector from retaining for necessary charges and disbursements in the management of the estate. And any judge of the superior court or any commissioner appointed by said court, to take and state an account of the assets of any deceased person in the hands of an executor, administrator or collector, upon any plea of fully administered, shall have power and be authorized and directed to allow such executor, administrator or collector not exceeding five per cent. upon the amount of receipts and expenditures which shall appear upon the trial of said cause or taking of such account to have been fairly made in the course of administration.

Finch v. Ragland, 2 Dev. Eq., 137; Peyton v. Smith, 2 D. & B. Eq., 325; Walton v. Avery, 2 D. & B. Eq., 405; Whitted v. Webb, 2 D. & B. Eq., 442; Lynch v. Johnson, 11 Ired., 224; Morris v. Morris, 1 Jon. Eq., 326.

Sec. 1525. Executors, &c., may file petition for settlement. 1868-'9, c. 113, s. 96.

An executor, administrator or collector, who has filed his final account for settlement may, at any time thereafter, file his petition against the parties interested in the due administration of the estate, in the superior court of the county in which he qualified, or before the judge in term time, setting forth the facts, and praying for an account and settlement of the estate commited to his charge. The petition shall be proceeded on in the manner prescribed by law; and, at the fnal hearing thereof, the judge or clerk may make such order or decree in the premises as shall seem to be just and right.

Bumpass v. Chambers, 77—357; Houston v. Howie, 84—349.

Sec. 1526. Payment of legacy or distributive share due absentee or minor. 1868-'9, c. 113, s. 97.

When any balance of money or other estate, which is due an absent defendant or infant without guardian, is found in the hands of an executor, administrator or collector who has preferred his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such absent person or infant.

Sec. 1527. Liability and compensation of clerk. 1868-'9, c. 113, s. 98.

Every clerk of the superior court who may be intrusted with money or other estate in such case shall be liable on his official bond for the faithful discharge of the duties enjoined upon him by the judge in relation to said estate, and he may receive such compensation for his services as the judge may allow.

Sec. 1528. Heirs, &c., jointly liable for debts, &c. 1868-'9, c. 113, s. 99.

All persons succeeding to the real or personal property of a decedent, by inheritance, devise, bequest or distribution, shall be liable jointly, and not separately, for the debt of such decedent.

Sec. 1529. Limit of liability. 1868-'9, c. 113, s. 100.

No person shall be liable, under the preceding section, beyond the value of the property so acquired by him, or for any part of a debt that might by action or other due proceeding have been collected from the executor, administrator or collector of the decedent, and it is incumbent on the creditor to show the matters herein required to render such person liable.

Brandon v. Phelps, 77—45; Badger v. Daniel, 79—373.

Sec. 1530. Apportionment of recovery; costs. 1868-'9, c. 113, s. 101.

In any such action the recovery must be apportioned in proportion to the assets or property received by each defendant, and judgment against each must be entered accordingly. Costs in such actions must be apportioned among the several defendants, in proportion to the amount of the recovery against each of them.

Sec. 1531. Priority of debts. 1868-'9, c. 113, s. 102.

Every person who is liable for the debts of a decedent must observe the same preferences in the payment thereof as are established in this chapter; nor shall the commencement of an action by a creditor give his debt any preference over others.

Sec. 1532. Defence; other debts of equality or priority. 1868-'9, c. 113, s. 103.

The defendants in such action may show that there are unsatisfied debt of a prior class or of the same class with that in suit. If it appears that the value of the property acquired by them does not exceed the debts of a prior class, judgment must be rendered in their favor. If it appears that the value of the property acquired by them exceeds the amount of debts which are entitled to a preference over the debt in suit, the whole amount which the plaintiff shall recover is only such a portion of the excess as is a just proportion to the other debts of the same class with that in suit.

Heilig v. Foard, 64—710.

Sec. 1533. Debts paid, estimated as if unpaid, when. 1868-'9, c. 113, s. 104.

If any debts of a prior class to that in which the suit is brought, or of the same class, has been paid by any defendant, the amount of the debts so paid shall be estimated, in ascertaining the amount to be recovered, in the same manner as if such debts were outstanding and unpaid, as prescribed in the preceding section.

Brandon v. Phelps, 77—45; Badger v. Daniel, 79—373.

Sec. 1534. How to compel contributions among devisees and legatees. 1868-'9, c. 113, s. 106.

The remedy to compel contribution shall be by petition or action in the superior court or before the judge in term time against the personal representatives, devisees, legatees and heirs also of the decedent, if any part of the real estate be undevised, within two years after probate of the will, and setting forth the facts which entitle the party to relief; and the costs shall be within the discretion of the court.

Houston v. Howie, 84—349.

Sec. 1535. Specific devisee, when entitled to contribution. 1868-'9, c. 113, s. 107.

If, upon the hearing of any petition for the sale of real

estate to pay debts, under this chapter, the court decree a sale of any part that may have been specifically devised, the devisee shall be entitled to contribution from other devisees, according to the principles of equity in respect to contribution among legatees. And the children and issue provided for in this chapter, shall be regarded as specific devisees in such contribution.

Sec. 1536. Of what lands an after-born child's share to be allotted. 1868-'9, c. 113, s. 108.

The share of an after-born child in real estate shall be allotted to him out of any lands not devised, if there be enough for that purpose; and if there be none undevised, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up of the lands devised; and so much thereof shall be taken from the several devisees according to their respective values, as near as may be convenient, as will make the proper share of such child.

Johnson v. Chapman, Busb. Eq., 213; Johnson v. Chapman, 1 Jon. Eq., 130.

Sec. 1537. Of what personalty such child's share to be allotted. 1868-'9, c. 113, s. 109.

The share of an after-born child in the personal estate shall be paid and delivered to him out of any such estate not bequeathed, if there be enough for that purpose; and if there be none undisposed of, or not enough, then the whole share, or the deficiency, as the case may be, shall be made up from the estate bequeathed; and so much shall be taken from the several legacies, according to their respective values, as will make the proper share of such child.

Johnson v. Chapman, Busb. Eq., 213; Johnson v. Chapman, 1 Jon. Eq., 130.

Sec. 1538. Intestate estate to be applied in exoneration of estate devised or bequeathed. 1868-'9, c. 113, s. 110.

If, after satisfaction of the child's share of real estate out of undevised lands, there be a surplus of such lands, and there be no personal estate undisposed of, or not enough to make up his share of such estate, then the surplus of undevised land, or as much as may be necessary, shall be sold and the proceeds applied to making up his share of personal estate. And if, after satisfaction of the child's share of personal estate out of prop-

erty undisposed of by the will, there be a surplus of such property, then the surplus thereof shall be applied, as far as it will go, in exoneration of land, both devised and descended; and the same shall be set apart and secured as real estate to such child, if an infant, *non compos* or *feme covert*.

Sec. 1539. Decree of contribution. 1868-'9, c. 113, s. 111.

Upon the allotment to such child of any real estate in the manner aforesaid, he shall thenceforth be seized thereof in fee simple; and the court shall give judgment severally, in favor of such of the devisees and legatees, of whose lands and legacies more has been taken away than in proportion to the respective values of said lands and legacies, against such of said devisees and legatees, of whose lands and legacies a just proportion has not been taken away, for such sums as will make the contribution on the part of each and every of them equitable, and in the ratio of the values of the several devises and legacies.

Sec. 1540. After-born child, when deemed devisee and legatee. 1868-'9, c. 113, s. 112.

An after-born child after such decrees shall be considered and deemed in law a legatee and devisee as to his portion, shall be styled as such in all legal proceedings, and shall be liable to all the obligations and duties by law imposed on such: *Provided*, that all judgments or decrees, *bona fide*, obtained against the devisees and legatees previously to the preferring of any petition, and which were binding upon or ought to operate upon, the lands and chattels devised or bequeathed, shall be carried into execution and effect notwithstanding, and the petitioner shall take his portion completely subject thereto: *Provided further*, that any suit instituted against the devisees and legatees previously to such petition shall not be abated or abateable thereby, nor by the decree thereon, but shall go on as instituted, and the judgment and decree, unless obtained by collusion, be carried into execution; but on the filing of the petition, during the pendency of such suit, the petitioner, by guardian, if an infant, may become a defendant in the suit.

Sec. 1541. How executor to proceed if no petition be filed. 1868-'9, c. 113, s. 113.

In case no petition shall be filed within two years, as

herein prescribed, the executor or administrator with the will annexed, before he shall pay or deliver the legacies in the will given, or before paying to the next of kin of the testator any residue undisposed of by the will, shall call upon the legatees, devisees, heirs and next of kin, and the said after-born child, by petition in the superior court, to litigate their respective claims, and shall pray the court to ascertain the share to which said child shall be entitled, and to apportion the shares and sums to which the legatees, devisees, heirs or next of kin shall severally contribute toward the share to be allotted to said child, and the court shall adjudge and decree accordingly.

Johnson v. Chapman, Busb. Eq., 213; Johnson v. Chapman, 1 Jon. Eq., 130; Kesler v. Smith, 66—154.

Sec. 1542. Cases of sale of real estate, &c.; final orders not made before the present constitution may be transferred to superior court. 1871-'2, c. 161.

All cases for the sale of real estate for assets heretofore in the county courts, in which final orders for collection and application or distribution of purchase money and making titles were not made before the adoption of the present constitution, may, at the instance of any person interested, be transferred, as other cases, to the superior court of the county where such proceeding was pending, and such court shall have full authority to make all necessary orders to complete the same.

Sec. 1543. Executor or administrator authorized, after twelve months from qualification, to pay into clerk's office moneys belonging to legatees or distributees of estate. 1881, c. 305, s. 1.

It shall be competent for any executor, administrator or collector, at any time after twelve months from the date of letters testamentary or of administration, to pay into the office of clerk of the superior court of the county where such letters were granted, any moneys belonging to the legatees or distributees of the estate of his testator or intestate, and such payment shall have the effect to discharge such executor, administrator or collector and his sureties on his official bond to the extent of the amount so paid.

Sec. 1544. Clerk to receive moneys and give receipt. 1881, c. 305, s. 3.

It shall be the duty of the clerk, in the cases provided for in the preceding section, to receive such money from

any executor, administrator or collector, and to execute a receipt for the same under the seal of his office.

CHAPTER THIRTY-FOUR.

FRAUDS AND FRAUDULENT CONVEYANCES.

SECTION.

1545. Conveyances of lands or goods made to defraud creditors, void.
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Sec. 1545. Conveyances of lands or goods made to defraud creditors void. R. C., c. 50, s. 1. 50 Edw. III, c. 6. 13 Eliz., c. 5, s. 2. 1715, c. 7, s. 4.

For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors,

administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed or defrauded,) to be utterly void and of no effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

Sherman v. Russell, 1 Car. L. Rep., 467; Blount v. Blount, 2 Car. L. Rep., 587; Hoke v. Henderson, 3 Dev., 12; Leadman v. Harris, 3 Dev., 144; O'Daniel v. Crawford, 4 Dev., 197; Purcell v. McCallum, 1 D. & B., 231; Jones v. Young, 1 D. & B., 352; Shober v. Hauser, 4 D. & B., 91; Newsom v. Roles, 1 Ired., 179; Hafner v. Irwin, 1 Ired., 490; Gowing v. Rich, 1 Ired., 553; Worth v. Northam, 4 Ired., 102; Hafner v. Irwin, 4 Ired., 529; Mebane v. Mebane, 4 Ired. Eq., 131; Hawkins v. Alston, 4 Ired. Eq., 137; Rich v. Marsh, 4 Ired. Eq., 396; Markham v. Shannonhouse, 4 Ired. Eq., 411; Springs v. Hanks, 5 Ired., 30; Buie v. Kelly, 5 Ired., 169; Thomas v. Orrell, 5 Ired., 569; Toole v. Darden, 6 Ired. Eq., 394; Jones v. Gorman, 7 Ired. Eq., 21; Flynn v. Williams, 7 Ired., 32; Smith v. Reavis, 7 Ired., 341; Lee v. Flannagan, 7 Ired., 471; Jackson v. Hampton, 8 Ired., 457; Hardy v. Skinner, 9 Ired., 191; Sturdivant v. Davis, 9 Ired., 365; Brannock v. Brannock, 10 Ired., 428; Harris v. DeGraffenreid, 11 Ired., 89; Foster v. Woodfin, 11 Ired., 339; Young v. Booe, 11 Ired., 347; Rhem v. Tull, 13 Ired., 57; Hardy v. Simpson, 13 Ired., 132; Satterwhite v. Hicks, Busb., 105; Bridges v. Moye, Busb. Eq., 170; Britain v. Quiet, 1 Jon. Eq., 328; Jenkins v. Peace, 1 Jon., 413; Gilmer v. Earnhardt, 1 Jon., 559; McGill v. Harman, 2 Jon. Eq., 179; McCorkle v. Hammond, 2 Jon., 444; Grimsley v. Hooker, 3 Jon. Eq., 4; Garrison v. Brice, 3 Jon., 85; Jessup v. Johnston, 3 Jon., 335; Potts v. Blackwell, 3 Jon. Eq., 449; Potts v. Blackwell, 4 Jon. Eq., 58; Green v. Kornegay, 4 Jon. Eq., 66; Black v. Caldwell, 4 Jon., 150; Felton v. White, 4 Jon , 301; Palmer v. Giles, 5 Jon. Eq., 75; Newlin v. Osborne, 6 Jon., 128: Stone v. Marshall, 7 Jon., 300; London v. Parsley, 7 Jon., 313; Bank of Fayetteville v. Spurling, 7 Jon., 398; Winchester v. Reid, 8 Jon., 377; Powell v Inman, 8 Jon., 436; Johnson v. Murchison, 1 Winst., 292; Rose v. Coble, Phil., 517; Devries v. Phillips, 63—53; Powell v. Howell, 63—283; Carr v. Fearington, 63—560; Salms v. Martin, 63—608; Houston v. Potts, 64—33; Carter v. Cocke, 64—239; Lassiter v. Davis, 64—498; Hogan v. Strayhorn, 65—279; McNeill v. Riddle, 66—290; Isler v. Foy, 66—547; Young v. Lathrop, 67—63; Reiger v. Davis, 67—185; Humphrey v. Wade, 70—280; N. C. Endowment Fund v. Satchwell, 71—111; McCanless v. Reynolds, 74—301; Sharpe v. Williams, 76—87; Cheatham v. Hawkins, 76—335; Cansler v. Cobb, 77—30; Holmes v. Marshall, 78—262; Morris v. Pearson, 79—253; (overrules 7 Jon., 300, above cited); Cheatham v. Hawkins, 80—161; York v. Merritt, 80—285; Hilliard v. Phillips, 81—99; Sutherland v. Harper, 83—200; Boone v. Hardie, 83—470; Rollins v. Henry, 84—569; Buxton v. Farinhalt, 86—260; Rencher v. Wynne, 86—268; Bynum v. Miller, 86—559.

Sec. 1546. Conveyances of lands, &c., to defraud purchasers, void. R. C., c. 50, s. 2. 27 Eliz., c. 4, s. 2. 1840, c. 28, ss. 1, 2.

Every conveyance, charge, lease or incumbrance of any lands or hereditaments, goods and chattels, if the same be made with the actual intent in fact to defraud such person as hath purchased or shall purchase in fee simple or for lives or years the same lands or hereditaments, goods and chattels, or to defraud such as shall purchase any rent or profit out of the same, shall be deemed utterly void against such person and others claiming under him who shall purchase for the full value thereof the same lands or hereditaments, goods and chattels, or rents or profits out of the same, without notice before and at the time of his purchase of the conveyance, charge, lease or incumbrance, by him alleged to have been made with intent to defraud; and possession taken or held by or for the person claiming under such alleged fraudulent conveyance, charge, lease or incumbrance shall be always deemed and taken as notice in law of the same.

Ingles v. Donaldson, 2 Hay., 57; Bell v. Blaney, 2 Mur., 171; McCree v. Houston, 3 Mur., 429; Fullenwider v. Roberts, 4 D. & B., 278; Hiatt v. Wade, 8 Ired., 340; Garrison v. Brice, 3 Jon., 85; Long v. Wright, 3 Jon., 290; Barwick v. Wood, 3 Jon., 306; Potts v. Blackwell, 3 Jon. Eq., 449; Green v. Kornegay, 4 Jon., 66; Potts v. Blackwell, 4 Jon. Eq., 58; Jones v. Hall, 5 Jon. Eq., 26; Dukes v. Jones, 6 Jon., 14; Salms v. Martin, 63—608; Young v. Lathrop, 67—63; Triplett v. Witherspoon, 70—589; Ward v. Wooten, 75—413, Gulley v. Macy, 84—434; Southerland v. Harper, 83—200; Bynum v. Miller, 86—559; Bost v. Setzer, 87—187.

Sec. 1547. Voluntary conveyances not deemed fraudulent as to creditors, merely because of indebtedness of donors; indebtedness evidence only of fraud to be left to the jury. R. C., c. 50, s. 3. 1840, c. 28, ss. 3, 4.

No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law, as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial at

law, shall, as such, be submitted by the court to the jury, with such observations as may be right and proper.

Houston v. Bogle, 10 Ired., 496; Thacker v. Saunders, Busb. Eq., 145; Black v. Sanders, 1 Jon., 67; Creedle v. Carrawan, 64—422; Pullen v. Hutchins, 67—428.

Sec. 1548. *Bona fide* conveyances upon good consideration valid. R. C., c. 50, s. 4. 13 Eliz., c. 5, s. 6. 1715, c. 7, s. 6.

Nothing contained in the preceding sections shall be construed to impeach or make void any conveyance, interest, limitation of use or uses, of or in any lands or tenements, goods or chattels, *bona fide* made, upon and for good consideration, to any person not having notice of such fraud.

Wall v. White, 3 Dev., 105; Martin v. Cowles, 1 D. & B., 29; Dobson v. Erwin, 4 D. & B., 201; Latta v. Morrison, 1 Ired., 149; Freeman v. Lewis, 5 Ired., 91; Hiatt v. Wade, 8 Ired., 340; Wade v. Hiatt, 10 Ired., 302; Harris v. DeGraffenreid, 11 Ired., 89; White v. White, 13 Ired., 265; Uzzle v. Wood, 1 Jon. Eq., 226; Potts v. Blackwell, 3 Jon. Eq., 449; Young v. Lathrop, 67—63; Reiger v. Davis, 67—185; Glenn v. Bank, 70—191; Triplett v. Witherspoon, 70—589; London v. Headen, 76—72; Worthy v. Caddell, 76—82; Sharpe v. Williams, 76—87; Cansler v. Cobb, 77—80.

Sec. 1549. *Bona fide* purchasers without notice, under deeds made on illegal consideration, valid. R. C., c. 50, s. 5. 1840, c. 70.

No conveyance or mortgage, made to secure the payment of any debt or the performance of any contract or agreement, shall be deemed void as against any purchaser for valuable or other good consideration of the estate or property conveyed, sold, mortgaged or assigned, by reason that the consideration of such debt, contract or agreement shall be forbidden by law, if such purchaser, at the time of his purchase, shall not have had notice of the unlawful consideration of such debt, contract or agreement.

Hiatt v. Wade, 8 Ired., 340; McCorkle v. Earnhardt, Phil., 300; Coor v. Spicer, 65—401; McNeill v. Riddle, 66—290; Triplett v. Witherspoon, 70—589.

Sec. 1550. Purchasers of estates fraudulently conveyed to have relief. R. C., c. 50, s. 6.

Purchasers of estates previously conveyed in fraud of creditors or purchasers shall have like remedy and relief as creditors might have had before the sale and purchase.

Morrison v. McNeill, 6 Jon., 450; Morrison v. McNeill, 8 Jon., 45

Sec. 1551. Persons removing debtors to hinder, delay or defraud creditors, liable for their debts. R. C., c. 50, s. 14. 1820, c. 1063.

If any person shall remove or shall aid and assist in removing any debtor out of any county in which he shall have resided for the space of six months or more, with the intent, by such removing, aiding or assisting to delay, hinder or defraud the creditors or any of them of such debtor, the person so removing, aiding or assisting therein, and his executors or administrators, shall be liable to pay all the debts which the debtor removed may justly owe in the county from which he was so removed; and the same may be recovered by the creditors, their executors or administrators by a civil action.

Gardiner v. Sherrod, 2 Hawks, 173; Barker v. Munroe, 4 Dev., 412; Erwin v. Greenlee, 1 D. & B., 39; Godsey v. Bason, 8 Ired., 260; March v. Wilson, Busb., 143; Booe v. Wilson, 1 Jon., 182; Wiley v. McRee, 2 Jon., 349; Moore v. Rogers, 3 Jon., 90; Moss v. Peoples, 6 Jon., 140; Moore v. Rogers, 6 Jon., 297; Moffitt v. Burgess, 8 Jon., 342; Baker v. Harris, 1 Winst., 277.

Sec. 1552. Contracts charging executors, &c., personally, or any person with the debt, &c., of another, to be in writing. R. C., c. 50, s. 15. 1826, c. 10.

No action shall be brought whereby to charge an executor or administrator upon a special promise to answer damages out of his own estate or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Sleighter v. Harrington, 2 Mur., 332; Mosby v. Chaffin, 2 Dev., 333; Cooper v. Chambers, 4 Dev., 261; Miller v. Irvine, 1 D. & B., 103; Adcock v. Fleming, 2 D. & B., 225; Hall v. Robinson, 8 Ired., 56; Draughan v. Bunting, 9 Ired., 10; Hill v. Doughty, 11 Ired., 195; Rice v. Carter, 11 Ired., 298; Stanly v. Hendricks, 13 Ired., 86; Waldo v. Jolly, 4 Jon., 174; Smithwick v. Shepherd, 4 Jon., 196; Rowland v. O'Rorke, 4 Jon., 337; Hockaday v. Parker, 8 Jon., 16; Hicks v. Critcher, Phil., 353; Combs v. Harshaw, 63—198; Norton v. Edwards, 66—367; Threadgill v. McLendon, 76—24; Fickey v. Merrimon, 79—585; Morrison v. Baker, 81—76; Rowland v. Bares, 81—234; Mason v. Wilson, 84—51.

Sec. 1553. Contracts with Cherokee Indians to be in writing, subscribed by two witnesses. R. C., c. 50, s. 16.

All contracts and agreements of every description made after the eighteenth day of May, one thousand eight hun-

dred and thirty eight, with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be void, unless some note or memorandum thereof be made in writing and signed by such Indian or person of Indian blood, or some other person by him authorized, in the presence of two witnesses, who shall also subscribe the same.

Lovingood v. Smith, 7 Jon., 601; State v. Ta-cha-na-tah, 64—614; Rollins v. Cherokees, 87—229.

Sec. 1554. Contracts for the sale of land void unless in writing. R. C., c. 50, s. 11; 29 Ch. II, c. 3, s. 2. 1819, c. 1016. 1844, c. 44. 1868-'9, c. 156, s. 33.

All contracts to sell or convey any lands, tenements or hereditaments or any interest in or concerning them shall be void and of no effect, unless such contract or some memorandum or note thereof shall be put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized.

Graves v. Carter, 2 Hawks, 576; Smith v. Executor of Amis, 3 Hawks, 469; Ellis v. Ellis, 1 Dev. Eq., 180; Ellis v. Ellis, 1 Dev. Eq., 341; Choat v. Wright, 2 Dev., 289; Anders v. Anders, 2 Dev., 529; Tate v. Greenlee, 4 Dev., 149; Miller v. Irvine, 1 D. & B., 103; Oliver v. Dix, 1 D. & B. Eq,, 158; Baker v. Carson, 1 D. & B. Eq., 381; Neely v. Torian, 1 D. & B., 410; Trice v. Pratt, 1 D. & B. Eq., 626; Albea v. Griffin, 2 D. & B. Eq., 9; Turner v. King, 2 Ired. Eq., 132; Allen v. Chambers, 4 Ired. Eq., 125; Vannoy v. Martin, 6 Ired. Eq., 169; Reed v. Cox, 6 Ired. Eq., 511; Ingram v. Dowdle, 8 Ired., 455; Rice v. Carter, 11 Ired., 298; Osborne v. Horner, 11 Ired., 359; Simms v. Killian, 12 Ired., 252; Ledford v. Ferrell's Adm'r, 12 Ired., 285; Clement v. Clement, 1 Jon. Eq., 184; Briggs v. Morris, 1 Jon. Eq., 193; Barnes v. Teague, 1 Jon. Eq., 277; Love v. Neilson, 1 Jon. Eq., 339; Lea v. McKenzie, 3 Jon. Eq., 232; Gwynn v. Setzer, 3 Jon., 382; Johnson v. Sikes, 4 Jon., 70; Mizell v. Burnett, 4 Jon., 249; Capps v. Holt, 5 Jon. Eq., 153; Blackwall v. Parish, 6 Jon. Eq., 70; Riggs v. Swann, 6 Jon., 118; Richardson v. Thornton, 7 Jon., 458; Edwards v. Kelly, 8 Jon., 69; Smith v. Smith, 2 Winst., 30; Cherry v. Long, Phil., 466; Brown v. Com'rs, 63—514; Ferguson v. Haas, 64—772; Pope v. Whitehead, 68—191; Farmer v. Willard, 71—284; Barnes v. Brown, 71—507; Faw v. Whittington, 72—321; Gwathney, v. Carson, 74—5; Wetherel v. Gorman, 74—603; Medlin v. Steele, 75—154; Daniel v. Crumpler, 75—184; Hinsdale v. Thornton, 75—381; Mayer v. Adrian, 77—83; Green v. R. R. Co., 77—95; Wade v. New Berne, 77—460; McKee v. Vail, 79—194; Bonham v. Craig, 80—224; Morrison v. Baker, 81—76; Young v. Young, 81—91; Brown v. Morris, 83—251; Winberry v. Koonce, 83—351; Davis v. Inscoe, 84—396; Gulley v. Macy, 84—434; Young v. Griffith, 84—715.

Sec. 1555. Ordinary keeper or retailer not to credit for liquors over ten dollars. R. C., c. 79, s. 4. 1798, c. 501, s. 6.

No keeper of an inn, tavern or ordinary, or retailer of liquors by the small measure shall sell to any person, on credit, liquors to a greater amount than ten dollars, unless the person credited sign a book or note, in the presence of a witness, in acknowledgment of the debt, under the penalty of losing the money so credited; and in any action brought for recovery of such debt the matter of defence allowed by this section may be set up in the answer and given in evidence.

Kizer v. Randleman, 5 Jon., 428.

CHAPTER THIRTY-FIVE.

GUARDIAN AND WARD.

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Sec. 1556. Public guardian may be appointed in every county. 1874-'5, c. 221, s. 1.

There may be in every county in the state a public guardian to be appointed by the clerk of the superior court for a term of eight years.

Sec. 1557. Bond of public guardian. 1874-'5, c. 221, s. 2.

The public guardian shall enter into bond with three or more securities, approved by the clerk of the superior court, in the penal sum of six thousand dollars, payable to the state of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands.

Sec. 1558. Bond to be enlarged. 1874-'5, c. 221, s. 3.

Whenever the aggregate value of the real and personal estate belonging to his several wards shall exceed one-half the bond herein required the clerk of the superior court shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian.

Sec. 1559. Bond to be renewed every two years. 1874-'5, c. 221, s. 4.

The public guardian as aforesaid shall renew his official bond every two years.

Sec. 1560. Oath to be taken and subscribed. 1874-'5, c. 221, s. 5.

The public guardian shall take and subscribe an oath (or affirmation) faithfully and honestly to discharge the duties imposed upon him; the oath so taken and subscribed shall be filed in the office of the clerk of the superior court.

Sec. 1561. Public guardian to apply for letters; when letters to be revoked on application; powers and duties of public guardians. 1874-'5, c. 221, ss. 6, 7.

The public guardian shall apply for and obtain letters of guardianship in the following cases:

(1) When the period of six months has elapsed from the discovery of any property belonging to any minor, idiot, lunatic, insane person or inebriate, without guardian;

(2) When any person entitled to letters of guardianship shall request in writing the clerk of the superior court to issue letters to the public guardian: *Provided*, it shall be lawful and the duty of the clerk of the superior court to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person

entitled to qualify as guardian, setting forth a sufficient cause for such revocation. The powers and duties of said public guardian shall be the same as other guardians, and shall be subject to the same duties and liabilities as other guardians under the existing laws; said guardian shall receive such compensation as other guardians.

Sec. 1562. Father may appoint guardian by deed or will; or if father be dead, mother may appoint. R. C., c. 54, s. 1. 1762, c. 69, s. 2. 1868-'9, c. 201, s. 1. 1881, c. 64.

Any father, though he be a minor, may, by deed executed in his lifetime or by his last will and testament in writing, dispose of the custody and tuition of any of his infant children, being unmarried and whether born at his death or *in ventre sa mere*, for such time as the children may remain under twenty-one years of age, or for any less time.

Or in case such father shall be dead and shall not have exercised his said right of appointment, then the mother, whether of full age or a minor, may do so; and whenever any such mother may have heretofore made such appointment by will and died leaving minor children who have not since had a guardian appointed by law, then such appointment by will shall be as valid and binding as if this section had been in existence at the time of her decease.

Long v. Rhymes, 2 Mur., 122; Peyton v. Smith, 2 D. & B. Eq., 325; Williamson v. Jordan, Busb. Eq., 46; Armfield v. Brown, 70—27; Harris v. Harrison, 78—202.

Sec. 1563. Effect of such appointment. R. C., c. 54, s. 1. 1762, c. 69, s. 2. 1868-'9, c. 201, s. 2.

Every such appointment shall be good and effectual against any person claiming the custody and tuition of such child or children.

Sec. 1564. Powers and liabilities of guardians by deed or will. R. C., c. 54, s. 1. 1762, c. 69, s. 2. 1868-'9, c. 201, s. 3.

Every guardian by deed or will shall have the same powers and rights and be subject to the same liabilities and regulations as other guardians.

Sec. 1565. Mother to be natural guardian of child, if father dead. 1883, c. 364.

In case of the death of the father of an infant, the

mother of such child surviving such father shall immediately become the natural guardian of such child to the same extent and in the same manner, plight and condition as the father would be if living; and the mother in such case shall have all the powers, rights and privileges, and be subject to all the duties and obligations of a natural guardian: *Provided*, that this section shall not be construed as abridging the powers of the courts over minors and their estates and to the appointment of guardians.

Sec. 1566. Jurisdiction of clerks of the superior court. R. C., c. 54, s. 2. 1762, c. 69, ss. 5, 7. 1868-'9, c. 201, s. 4.

The clerks of the superior court within their respective counties shall have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics and inebriates, except where otherwise prescribed by law.

Mills v. McAllister, 1 Hay., 303; Grant v. Whittaker, 1 Mur., 231; Long v. Rhymes, 2 Mur., 122; West v. Kittrell, 1 Hawks, 493; Harris v. Richardson, 4 Dev., 279; Bath v. Vick, 4 Dev., 294: Davis v. Summerville, 4 Dev., 382; Cooke v. Beale, 11 Ired., 35; Moore v. Askew, 85—199.

Sec. 1567. May appoint tutor of person and guardian of estate. R. C., c. 54, s. 3. 1840, c. 31, ss. 1, 2. 1868-'9, c. 201, s. 5.

Instead of granting general guardianship to one person, the clerk of the superior court may commit the tuition and custody of the person to one and the charge of his estate to another, whenever and at any time during minority, inebriety, idiocy or lunacy, it appears most conducive to the proper care of the orphan's, inebriate's, idiot's or lunatic's estate, and to his suitable maintenance, nurture and education.

Sec. 1568. May allow yearly sums for support and education. R. C., c. 54, s. 3. 1840, c. 31, ss. 1, 2. 1868-'9, c. 201, s. 6.

In such cases the clerk must order what yearly sums of money or other provisions shall be allowed for the support and education of the orphan, or for the maintenance of the idiot, lunatic or inebriate, and must prescribe the time and manner of paying the same; but such allowance may, upon application and satisfactory proof made, be reduced or enlarged, or otherwise modified, as the

ward's condition in life and the kind and value of his estate may require.

SEC. 1569. What disbursements and commissions allowed. R. C., c. 54, s. 3. 1840, c. 31, ss. 1, 2. 1868-'9, c. 201, s. 7.

All payments made by the guardian of the estate to the tutor of the person, according to any such order, shall be deemed just disbursements and be allowed in the settlement of his accounts; but for the payment thereof by the one and the receipt thereof by the other merely, no commissions shall be allowed to either, though commissions may be allowed to the tutor of the person on his disbursements only.

Burke v. Turner, 85—500.

SEC. 1570. In cases of divorce, who to have custody of children. R. C., c. 54, s. 4. 1838, c. 16, ss. 1, 2. 1868-'9, c. 201, s. 8.

When parents, divorced from the bonds of matrimony, or from bed and board, have any child under twenty-one years, the court granting the divorce may commit his custody and tuition to the father or mother as may be thought best; or the court may commit the custody and tuition of such infant child, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately.

SEC. 1571. In cases of divorce, how guardian of estate appointed. R. C., c. 54, s. 4. 1838, c. 16, ss. 1, 2. 1868-'9, c. 201, s. 9.

In cases provided for by the preceding section, where such child is entitled to any estate, the court granting the divorce must certify that fact to the superior court, to the end that the clerk thereof may appoint a fit and proper person to take the care and management of such estate, whose powers and duties shall be the same in all respects as other guardians, except that a guardian so appointed shall not have any authority over the person of such child, unless the guardian be the father or mother.

SECTION 1572. Guardian of estate, when father is alive. R. C., c. 54, ss. 4, 7. 1806, c. 707, s. 1. 1838, c. 16, ss. 1, 2. 1868-'9, c. 201, s. 10.

The clerk of the superior court may appoint a guardian of the estate of any minor, although the father of such minor be living. And the guardian so appointed shall

be governed in all respects by the laws relative to guardians of the estate in other cases, but shall have no authority over the person of such minor.

Sec. 1573. Guardian not to receive property until security given. C. C. P., s. 355.

No guardian appointed for an infant, idiot, lunatic, insane person, or inebriate, shall be permitted to receive property of the infant, idiot, lunatic, insane person or inebriate until he shall have given sufficient security, approved by a judge, or the court to account for and apply the same under the direction of the court.

Sec. 1574. Bond to be given by guardian; to be increased on sale of property. R. C., c. 54, s. 5. 1762, c. 69, s. 7. 1825, c. 1285, s. 2. 1833, c. 17. 1868-'9, c. 201, s. 11. 1874-'5, c. 214.

Every guardian of the estate, before letters of appointment are issued to him, must give a bond payable to the state, with two or more sufficient sureties, to be acknowledged before and approved by the clerk of the superior court, and to be jointly and severally bound. The penalty in such bond must be double, at least, the value of all personal property, and the rents and profits issuing from the real estate of the infant; which value is to be ascertained by the clerk of the superior court by the examination, on oath, of the applicant for guardianship, or of any other person. The bond must be conditioned that such guardian shall faithfully execute the trust reposed in him as such, and obey all lawful orders of the clerk or judge, touching the guardianship of the estate committed to him: *Provided*, if on application by the guardian by petition the court or judge shall decree a sale for any of the causes set forth in section sixteen hundred and two, the property of such infant, idiot, lunatic or insane person, before such sale be confirmed, the guardian shall be required to file a bond as now required in double the amount of the real property so sold.

Barrett v. Munroe, 4 D. & B., 194; Shutt v. Carloss, 1 Ired. Eq., 232; Horton v. Horton, 4 Ired. Eq., 54; Boyett v Hurst, 1 Jon. Eq., 166; Matthews v. Downs, 1 Jon. Eq., 331; State v. Brown, 67—475: Moore v. Askew, 85—199.

Sec. 1575. Action on bond. R. C., c. 54, s. 5. 1762, c. 69, s. 7. 1825, c. 1285, s. 2. 1833, c. 17. 1868-'9, c. 201, s. 12.

The bond so taken shall be recorded in the office of the

clerk of the superior court appointing the guardian; and any person injured by a breach of the condition thereof, may prosecute a suit thereon, as in other actions.

McKinnon v. McKinnon, 81—201, and cases under preceding section.

Sec. 1576. When wards have property in common, one bond. R. C., c. 54, s. 8. 1822, c. 1161, ss. 1, 2. 1868-'9, c. 201, s. 13.

When the same person is appointed guardian to two or more minors, idiots, lunatics or insane persons possessed of one estate in common, the clerk of the superior court may take one bond only in such case, upon which each of the minors, or persons for whose benefit the bond is given, or their heirs or personal representatives, may have a separate action.

Sec. 1577. Return within three months. R. C., c. 54, s. 11. 1762, c. 69, s. 9. C. C. P., s. 477. 1868-'9, c. 201, s. 14.

Every guardian, within three months after his appointment, shall exhibit an account, upon oath, of the estate of his ward, to the clerk of the superior court; but such time may be extended by the clerk of the superior court, on good cause shown, not exceeding six months.

Saunderson v. Saunderson, 79—369.

Sec. 1578. Compelling return. R. C., c. 54, s. 12. 1762, c. 69, s. 15. 1816, c. 905, ss. 1, 2. 1868-'9, c. 201, s. 15.

In cases of default to exhibit the return required by the preceding section, the clerk of the superior court must issue an order requiring the guardian to file such return forthwith, or to show cause why an attachment should not issue against him. If, after due service of the order, the guardian does not, on the return day of the order, file such return, or obtain further time to file the same, the clerk of the superior court shall issue an attachment against him, and commit him to the common jail of the county, till he files such return.

Branch v. Arrington, 2 Car. L. Rep., 252; Harrison v. Ward, 3 Dev., 417; Harris v. Harrison, 78—202; Saunderson v. Saunderson, 79—369.

Sec. 1579. Return to be made of new assets. 1868-'9, c. 201, s. 16.

Whenever further property of any kind, not included in any previous return, comes to the hands or knowledge of any guardian, he must cause the same to be returned

within three months after the possession or discovery thereof; and the making of such return of new assets, from time to time, may be enforced in the same manner as prescribed in the preceding section.

Sec. 1580. Annual account. R. C., c. 54, s. 11. 1762, c. 69, s. 9. 1868-'9, c. 201, s. 17.

Every guardian shall annually exhibit his account to the clerk of the superior court, as hereinafter prescribed.

Moore v. Askew, 85—190.

Sec. 1581. Bond to be renewed. R. C., c. 54, s. 10. 1820, c. 1039, ss. 1, 2. 1824, c. 1246. 1868-'9, c. 201, s. 18.

Every guardian shall renew his bond before the clerk of the superior court every three years, during the continuance of the guardianship.

Jones v. Hayes, 3 Ired. Eq., 502; Butler v. Durham, 3 Ired. Eq., 589; Jones v. Blanton, 6 Ired. Eq., 115; Jones v. Biggs, 1 Jon., 364; State v. Lowe, 64—500.

Sec. 1582. Guardian failing to renew bond, duty of clerk. R. C., c. 54, s. 12. 1762, c. 69, s. 15. 1816, c. 905, ss. 1, 2. 1868-'9, c. 201, s. 19. 1869-'70, c. 144.

The clerk of the superior court shall issue a citation against every guardian failing to renew his bond, as directed in the preceding section, requiring such guardian to renew his bond within twenty days after service of the citation; and on return of the citation duly served and failure of the guardian to comply therewith, the clerk shall remove him and appoint a successor.

Jones v. Biggs, 1 Jon., 364; Harris v. Harrison, 78—202.

Sec. 1583. Power and duty of clerks over guardians abusing their trust. R. C., c. 54, ss. 2, 13. 1762, c. 69, ss. 4, 5, 6, 9, 16. 1868-'9, c. 201, s. 20. C. C. P., s. 457.

The clerks of the superior court shall have power, on information or complaint made, at all times to remove guardians and appoint successors, to make and establish rules for the better ordering, managing and securing infants' estates, and for the better education and maintenance of wards; and it shall be their duty to do so in the following cases:

(1) Where the guardian wastes or converts the money or estate of the ward to his own use;

(2) Where the guardian in any manner mismanages the estate.

(3) Where the guardian is about or intends to marry any ward in disparagement.

(4) Where the guardian neglects to educate or maintain the ward in a manner suitable to his or her degree.

(5) Where the guardian is legally disqualified to act as a person would be to be appointed administrator under the chapter concerning executors and administrators.

(6) Where the guardian or his sureties are likely to become insolvent or non-residents of the state.

Bray v. Brumsey, 1 Mur., 227; Cook v. Beale, 11 Ired., 36; Link v. Brooks, Phil., 499; State v. Harrison, 75—432; Moore v. Askew, 85—199.

Sec. 1584. Action to be brought by solicitor, when. R. C., c. 54, s. 14. 1844, c. 41, s. 1. 1868-'9, c. 201, s. 21.

Whenever any guardian is removed, and no person is appointed to succeed in the guardianship, the clerk of the superior court shall certify the name of such guardian and his sureties to the solicitor of the judicial district, who shall forthwith institute an action on the bond of the guardian in the superior court, for securing the estate of the ward.

Becton v. Becton, 3 Jon. Eq., 422; State v. Harrison, 75—432; Harris v. Harrison, 78—202; Kerr v. Brandon, 84—128.

Sec. 1585. Receiver to be appointed, when. R. C., s. 54, s. 15. 1844, c. 41, s. 2. 1868-'9, c. 201, s. 22.

The judge of the superior court, before whom such action is brought, shall have power to appoint the clerk of the superior court or some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due to him, to secure, loan, invest or apply the same for the benefit and advantage of the ward, under the direction and subject to such rules and orders in every respect as the said judge may from time to time make in regard thereto; and the accounts of such receiver shall be returned, audited and settled as the judge may direct. The receiver shall be allowed such amounts for his time, trouble and responsibility as seem to the judge reasonable and proper; and such receivership may be continued until a suitable person can be procured to take the guardianship.

State v. Harrison, 75—432; Kerr v. Brandon, 84—128; Timberlake v. Green, 84—658; Rogers v. Odom, 86—432.

Sec. 1586. Compensation of solicitor. R. C., c. 54, s. 16. 1846, c. 41, s. 3. 1868-'9, c. 201, s. 23.

The solicitor shall prosecute the action and take all necessary orders therein, and for his services shall be allowed such reasonable compensation as may be just.

Harris v. Harrison, 78—202; Timberlake v. Green, 84—658.

Sec. 1587. Property, how obtained from receiver when guardian appointed. R. C., c. 54, s. 17. 1846, c. 44, s. 4. 1868-'9, c. 201, s. 24.

When another guardian is appointed, he may apply by motion, on notice, to the judge of the superior court for an order upon the receiver to pay over all the money, estate and effects of the ward; and if no such guardian is appointed, then the ward, on coming of age, or in case of his death, his executor, administrator or collector, and the heir or personal representative of the idiot, lunatic or insane person, shall have the like remedy against the receiver.

Timberlake v. Green, 84—658.

Sec. 1588. Guardian to take charge of ward's estate. R. C., c. 54, s. 21. 1762, c. 69, s. 3. 1868-'9, c. 201, s. 25.

Every guardian shall take possession, for the use of the ward, of all his estate, and may bring all necessary actions therefor.

Sec. 1589. Guardian to sell goods and chattels of ward, liable to perish, &c. R. C., c. 54, s. 22. 1762, c. 69, s. 10. 1793, c. 391, s. 1. 1816, c. 925. 1868-'9, c. 201, s. 26.

Every guardian shall sell, by order of the clerk of the superior court, all such goods and chattels of his ward as may be liable to perish or be the worse for keeping. Every such order shall be entered in the order record of the superior court and must contain a descriptive list of the property to be sold, with the terms of sale.

Sec. 1590. Sale and rentings, how made. R. C., c. 54, s. 26. 1794, c. 413, ss. 1, 2. 1868-'9, c. 201, s. 27.

All sales and rentings shall be made and conducted by guardians in the same manner, upon like terms and notice, and under the same rules and regulations and the same penalties as prescribed for sales made by executors, administrators and collectors.

Norman v. Dunbar, 8 Jon., 317.

Sec. 1591. Guardian may lease lands, when. R. C., c. 54, s. 25. 1762, c. 69, s. 13, amended.

The guardian may lease the lands of an infant for a term not exceeding the end of the current year in which the infant shall come of age, or die in non-age. But no guardian without leave of the clerk of the superior court, shall lease any land of his ward without impeachment of waste, or for a term of more than three years, unless at a rent not less than three per centum on the assessed taxable value of the land.

Melton v. McKesson, 13 Ired., 475.

Sec. 1592. Notes taken by guardian to bear compound interest. R. C., c. 54, s. 23. 1762, c. 69, s. 10. 1793, c. 391, s. 1. 1816, c. 925. 1868-'9, c. 201, s. 29.

When the profits of any ward's estate is more than sufficient to maintain and educate him the guardian shall lend the surplus upon bond with sufficient security, to be repaid with interest annually, and all the bonds, notes or other obligations which he shall take as guardian, shall bear compound interest, for which he must account, and he may assign the same to the ward on settlement with him.

Dowell v. Vannoy, 3 Dev., 43; Powell v. Jones, 1 Ired. Eq., 337; Fox v. Alexander, 1 Ired. Eq., 340; Lockhart v. Phillips, 1 Ired. Eq., 342; State v. Arrington, 3 Ired., 99; Gary v. Cannon, 3 Ired. Eq., 64; Christmas v. Wright, 3 Ired. Eq., 549; Exum v. Bowden, 4 Ired. Eq., 281; Newsom v. Newsom, 5 Ired. Eq., 122; Goodson v. Goodson, 6 Ired. Eq., 238; Ford v. Vandyke, 11 Ired., 227; Williamson v. Williams, 6 Jon. Eq., 62; Hurdle v. Leath, 63—597; Smith v. Gilmer, 64—546; State v. Foy, 65—265; Little v. Anderson, 71—190; Rowland v. Thompson, 73—504.

Sec. 1593. Liability of guardian for debts. R. C., c. 54, s. 23. 1762, c. 69, s. 10. 1793, c. 391, s. 1. 1816, c. 925. 1868-'9, c. 201, s. 30.

Every guardian shall diligently endeavor to collect, by all lawful means, all bonds, notes, obligations or moneys due his ward when any debtor or his sureties are likely to become insolvent, on pain of being liable for the same.

Sec. 1594. How guardians may invest. 1870-'71, c. 197, s. 1.

Guardians, trustees and others acting in a fiduciary capacity, having surplus funds of their wards and *cestui que trusts* to loan, may invest in United States bonds, or any securities whereof the United States are responsible,

and in all settlements by guardians, trustees and others, acting in a fiduciary capacity, such bonds or other security of the United States shall be deemed cash, including the premium, if any paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Sec. 1595. Guardian liable for lands forfeited for taxes. R. C., c. 54, s. 27. 1762, c. 69, s. 14. 1868-'9, c. 201, s. 32.

If any guardian suffer his ward's lands to lapse or become forfeited or be sold for non-payment of taxes or other dues, he shall be liable to answer for the full value thereof to his ward.

Sec. 1596. When guardian may sell timber. R. C., c. 54, s. 27. 1762, c. 69, s. 14. 1868-'9, c. 201, s. 33.

In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk of the superior court, may annually dispose of, or use so much of the light wood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other dues thereon and no more.

Evans v. Williamson, 79—86.

Sec. 1597. Plate to be kept. 1868-'9, c. 201, s. 34.

All plate shall be preserved and delivered to the ward at age, in kind, according to weight and quantity.

Sec. 1598. Foreign guardian may have ward's estate removed, how. R. C., c. 54, s. 29. 1820, c. 1044, s. 1. 1842, c. 38, ss. 1, 2. 1868-'9, c. 201, s. 35. 1873-'4, c. 168.

Where any ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, is entitled to any personal estate in this state, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this state, or of any executor, administrator or other person holding for the ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian of the ward, idiot, lunatic or insane person, duly appointed at the place where such

ward, idiot, lunatic or insane person resides, may apply to have such estate removed to the residence of the ward, idiot, lunatic or insane person by petition filed in the superior court of the county in which the property or some portion thereof is situated.

Pugh v. Mordecai, 6 Ired. Eq., 61; McNeely v. Jamieson, 2 Jon. Eq., 186; Douglas v. Caldwell, 6 Jon. Eq., 20.

Sec. 1599. What petition must show. R. C., c. 54, s. 30. 1820, c. 1044, s. 2. 1842, c. 38, s. 2. 1868-'9. c. 201, s. 36.

The petitioner must show to the court a copy of his appointment as guardian and bond duly authenticated, and must prove to the court that the bond is sufficient as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the ward wherever situated.

Sec. 1600. Who may be made defendants. R. C., c. 54, s. 30. 1820, c. 1044, s. 2. 1842, c. 38, s. 2. 1868-'9, c. 201, s. 37.

Any person may be made a party defendant to the proceeding who is specified in section one hundred and eighty-four.

Sec. 1601. Petition to be proceeded with as in other cases of special proceedings. 1868-'9, c. 201, s. 38.

The petition shall be proceeded on as prescribed in other cases of special proceedings, and every necessary decree made, to the end that the guardian may obtain possession of all the estate of the ward in case the judge shall order such removal.

Sec. 1602. Estates of ward, how and when sold. R. C., c. 54, ss. 32, 33. 1827, c. 33, ss. 1, 2. 1868-'9, c. 201, s. 39.

On application of the guardian by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale of any part of his estate, real or personal, the proceeding shall be conducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale shall be made until approved by the judge of the court, nor shall

the same be valid, nor any conveyance of title made, unless confirmed and directed by the judge, and the proceeds of the sale shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

Harrison v. Bradley, 5 Ired. Eq., 136; Troy v. Troy, Busb. Eq., 85; Douglas v. Caldwell, 6 Jon. Eq., 20; Houston v. Houston, Phil. Eq., 95; *ex parte* Dodd, Phil. Eq., 97; Rowland v. Thompson, 73—504; George v. High, 85—113; Sutton v. Schonwald, 86—198.

Sec. 1603. Property substituted for that sold to remain of the same character as that sold. R. C., c. 54, s. 33. 1827, c. 33, s. 2. 1868-'9, c. 201, s. 40.

Whenever, in consequence of any sale under the preceding section, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all such cases of sale, whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been, had it not been sold, until it be re-converted from the character thus impressed upon it by some act of the owner, and restored to its character proper.

Sec. 1604. When ward is indebted; how property sold. R. C., c. 54, s. 34. 1789, c. 311, s. 5. 1868-'9, c. 201, s. 41.

When a guardian has notice of a debt or demand against the estate of his ward, he may apply by petition, setting forth the facts to the superior court wherein the guardianship was granted, for an order to sell so much of the personal or real estate as may be sufficient to discharge such debt or demand; and the order of the court shall particularly specify what property is to be sold and the terms of sale; but no real estate shall be sold under this section, in any case, without the revision and confirmation of the order therefor by the judge of the superior court.

Leary v. Fletcher, 1 Ired., 259; Marchant v. Sanderlin, 3 Ired., 501; Ducket v. Skinner, 11 Ired., 431; Spruill v. Davenport, 3 Jon., 42; Cofield v. McLean, 4 Jon., 15.

Sec. 1605. Proceeds to be assets in guardian's hands for payment of creditors. R. C., c. 54, s. 34. 1789, c. 311, s. 5. 1868-'9, c. 201, s. 42.

The proceeds of sale under the preceding section shall be considered as assets in the hands of the guardian for the benefit of the creditors, in like manner as assets in the hands of a personal representative; and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

Sec. 1606. Sureties of guardian in danger of loss, how relieved. R. C., c. 54, s. 35. 1762, c. 69, ss. 21, 22. 1868-'9, c. 201, s. 43.

Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file his complaint in the superior court where the guardianship was granted, setting forth the circumstances of his case and demanding relief; and thereupon the guardian shall be required to answer the complaint within twenty days after service of the summons. If, upon the hearing, the clerk of the superior court deem the surety entitled to relief, the same may be granted by compelling the guardian to give a new bond, or to indemnify the surety against apprehended loss, or by the removal of the guardian from his trust; and in case the guardian fail to give a new bond or security to indemnify, when required to do so within reasonable time, the clerk of the superior court must enter a peremptory order for his removal, and his authority as guardian shall thereupon cease.

Justices v. Bell, 1 D. & B., 475; Bell v. Jasper, 2 Ired. Eq., 597.

Sec. 1607. Interlocutory order, pending controversy. 1868-'9, c. 201, s. 44.

In all cases where the letters of a guardian are revoked, the clerk of the superior court may, from time to time, pending any controversy in respect to such removal, make such interlocutory orders and decrees as will tend to the better securing the estate of the ward, or other party seeking relief by such revocation.

Sec. 1608. Guardian may resign, when. 1868-'9, c. 201, s. 45.

Any guardian wishing to resign his trust may apply in writing to the superior court, setting forth the circumstances of his case. If, at the time of making the application, he also exhibits his final account for settle-

ment, and if the clerk of the superior court is satisfied that the guardian has been faithful and has truly accounted, and if a competent person can be procured to succeed in the guardianship, the clerk of the superior court may accept the resignation of the guardian and discharge him from the trust. But the guardian so discharged and his sureties are still liable in relation to all matters connected with the trust before the resignation.

Ellis v. Scott, 75—108; Luton v. Wilcox, 83—20.

Sec. 1609. Duty of grand jury regarding orphans without guardians. R. C., c. 54, s. 18. 1762, c. 69, s. 17. 1868-'9, c. 201, s. 46.

The grand jury of every county is charged with, and shall present to the superior court the names of all orphan children that have no guardians or are not bound out to some trade or employment. They shall further inquire of all abuses, mismanagement and neglect of all such guardians as are appointed by the clerk of the superior court. The clerk of the superior court shall, at each term of the superior court, lay before the grand jury a list of all the guardians acting in his county or appointed by him.

Sec. 1610. Estates of orphans without guardians, how secured. R. C., c. 54, s. 19. 1846, c. 48. 1868-'9, c. 201, s. 47.

Whenever an orphan, having any estate, is presented by a grand jury, for whom no suitable person will become guardian, the clerk of the superior court must give notice thereof forthwith to the solicitor of the state for the judicial district, who shall apply in behalf of the orphan to the judge of the superior court of the county where such presentment was made, to the end that the estate of such orphan may be secured and managed as directed in section fifteen hundred and eighty-five.

Rogers v. Odom, 86—432.

Sec. 1611. Fees and costs in certain cases, by whom paid. 1868-'9, c. 201, s. 48.

All fees and costs of the superior court for issuing orders, citations, summons or other process against guardians for their supposed defaults, shall be paid by the party found in default.

Sec. 1612. Guardian allowed disbursements and expenses. R. C., c. 54, s. 28. 1762, c. 69, ss. 18, 19. 1799, c. 536, s. 2. 1868-'9, c. 201, s. 49.

Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he hath really and *bona fide* disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward.

Ryan v. Blount, 1 Dev. Eq., 382; Hodge v. Hawkins, 1 D. & B. Eq., 564; Graham v. Davidson, 2 D. & B. Eq., 155; Walker v. Crowder, 2 Ired; Eq., 478; Harrison v. Bradley, 5 Ired. Eq., 136; Goodson v. Goodson, 6 Ired. Eq., 238; State v. Cordon, 8 Ired., 179; Hussey v. Roundtree, Busb., 110; Ledford v. Vandyke, Busb., 480; Boyett v. Hurst, 1 Jon. Eq., 166; Burke v. Turner, 85—500.

Sec. 1613. Commissions allowed. R. C., c. 54, s. 28. 1762, c. 69, ss. 18, 19. 1799, c. 536, s. 2. 1868-'9, c. 201, s. 50.

The superior court shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors.

Walton v. Erwin, 1 Ired. Eq., 136; Long v. Norcom, 2 Ired. Eq., 354. Burke v. Turner, 85—500.

Sec. 1614. Liability of clerk taking insufficient security. R. C., c. 54, s. 2. 1762, c. 69, ss. 5, 6. 1868-'9, c. 201, s. 51.

If any clerk of the superior court shall commit the estate of an infant, idiot, lunatic, insane person or inebriate to the charge or guardianship of any person without taking good and sufficient security for the same as directed by law, such clerk shall be liable, on his official bond, at the suit of the party aggrieved, for all loss and damages sustained for want of security being taken; but if the sureties were good at the time of their being accepted, the clerk of the superior court shall not be liable.

Mills v. McAllister, 1 Hay., 303; Davis v. Somerville, 4 Dev., 382; Jones v. Biggs, 1 Jon., 364.

SEC. 1615. Liability of clerk for other defaults. 1868-'9, c. 201, s. 52.

If any clerk of the superior court shall wilfully or negligently do, or omit to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, he shall be liable therefor as in the preceding section directed.

SEC. 1616. Guardians heretofore appointed. 1868-'9, c. 201, s. 54.

All guardians heretofore appointed by the late county or superior courts, or courts of equity, and now acting, shall be deemed as fully within the provisions of this chapter, as if they had been appointed by the clerks of the superior court as in this chapter provided.

SEC. 1617. Annual accounts. R. C., c. 54, ss. 11, 12. 1762, c. 69, ss. 9, 15. 1816, c. 903, ss. 1, 2. C. C. P., s. 478. 1871-'2, c. 46.

Every guardian shall, within twelve months from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed *prima facie* evidence of correctness.

Sanderson v. Sanderson, 79—369; Gregory v. Ellis, 82—225; Moore v. Askew, 85—199.

SEC. 1618. Failing to account, clerk to order an account, and may issue an attachment. C. C. P., s. 479.

If any guardian omits to account, as directed in the preceding section, or renders an insufficient and unsatisfactory account, the clerk of the superior court shall forthwith order such guardian to render a full and satisfactory account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such guardian fail to appear or refuse to ex-

hibit such account, the clerk of the superior court may issue an attachment against him for contempt and commit him till he exhibits such account, and may likewise remove him from office.

Sanderson v. Sanderson, 79—369.

Sec. 1619. When guardian may be required to file final account. C. C. P., s. 481.

A guardian may be required to file such account at any time after six months from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court.

Rowland v. Thompson, 64—715; Rowland v. Thompson, 65—110.

Sec. 1620. Proceedings on application for guardianship. C. C. P., s. 474.

On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate or lunatic, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant or of any other person; and if none of the relatives of the infant, idiot, inebriate or lunatic are present at such application, the clerk must assign, or, for any other good cause, he may assign a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate or lunatic, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person as he may think best for the interest of the infant, idiot, inebriate, or lunatic.

Sec. 1621. Letters of guardianship to issue. C. C. P., s. 475.

The clerk of the superior court must issue to every guardian appointed by him a letter of appointment, which shall be signed by him and sealed with the seal of his office.

Sec. 1622. Executor or administrator of deceased guardian authorized to pay into office of clerk moneys, &c., belonging to wards. 1881, c. 305, s. 2.

In all cases where a guardian of any minor children or

of an idiot, lunatic, inebriate or insane person shall die, it shall be competent for the executor or administrator of such deceased guardian, at any time after the grant of letters testamentary or of administration, to pay into the office of the clerk of the superior court of the county where such deceased guardian was appointed, any moneys belonging to any such minor child, idiot, lunatic, insane person or inebriate, and any such payment shall have the effect to discharge the estate of said deceased guardian and his sureties upon his guardian bond to the extent of the amount so paid.

CHAPTER THIRTY-SIX.

HABEAS CORPUS.

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Sec. 1623. In what cases application may be made. 1868-'9, c. 116, s. 1.

Every person imprisoned or restrained of his liberty within this state, for any criminal or supposed criminal matter, or on any pretence whatsoever, except in cases specified in the succeeding section, may prosecute a writ of *habeas corpus*, according to the provisions of this chapter, to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom.

Ex parte Summers, 5 Ired., 149; Mustgrove v. Kornegay, 7 Jon., 71; in the matter of J. C. Bryan and others, 1 Winst., 1—76; in the matter of Huie and others, 1 Winst., 165—197; Walton v. Gatlin, 1 Winst., 318; in the matter of Walton, 1 Winst., 425; in the matter of Roseman and others, 1 Winst., 443; Cox v. Gee, 2 Winst., 131; in the matter of Cain and others, 2 Winst., 141; in the matter of Hughes, Phil., 57; in the matter of Harriet and Eliza Ambrose, Phil., 91; *ex parte* Moore and others, 64 N. C., 802—834; *ex parte* Moore and others, 65 N. C., 349—368; Thompson v. Thompson, 72—32.

Sec. 1624. When the application may be denied. 1868-'9, c. 116, s. 2.

Application to prosecute the writ shall be denied in the following cases:

(1) Where the persons are committed or detained by virtue of process issued by a court of the United States, or a judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or shall have acquired exclusive jurisdiction by the commencement of suits in such courts;

(2) Where persons are committed or detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution, issued upon such final order, judgment or decree;

(3) Where any person has wilfully neglected, for the

space of two whole terms after his imprisonment, to apply for the writ to the superior court of the county in which he may be imprisoned, such person shall not have a *habeas corpus* in vacation time for his enlargement;

(4) Where no probable ground for relief is shown in the application.

Ex parte Summers, 5 Ired., 149; *in re* Schenck, 74—607.

Sec. 1625. By whom application may be made. 1868-'9, c. 116, s. 3.

Application for the writ may be made either by the party for whose relief it is intended, or by any person in his behalf.

Sec. 1626. Mode of making the application. 1868-'9, c. 116, s. 4.

Application for the writ shall be made in writing, signed by the applicant:

(1) To any one of the justices of the supreme court;

(2) To any one of the superior court judges, either at term time or in vacation.

Sec. 1627. What application must contain. 1868-'9, c. 116, s. 5.

The application must state in substance, as follows:

(1) That the party, in whose behalf the writ is applied for, is imprisoned or restrained of his liberty, the place where, and the officer or person by whom he is imprisoned or restrained, naming both parties, if their names are known, or describing them if they are not known;

(2) The cause or pretence of such imprisonment or restraint, according to the knowledge or belief of the applicant;

(3) If the imprisonment is by virtue of any warrant or other process, a copy thereof shall be annexed, or it shall be made to appear that a copy thereof has been demanded and refused, or that for some sufficient reason a demand for such copy could not be made;

(4) If the imprisonment or restraint be alleged to be illegal, the application must state in what the alleged illegality consists; and that the legality of the imprisonment or restraint has not been already adjudged, upon a prior writ of *habeas corpus*, to the knowledge or belief of the applicant;

(5) The facts set forth in the application must be verified by the oath of the applicant, or by that of some

other credible witness, which oath may be administered by any person authorized by law to take affidavits.

In re Schenck, 74—607.

Sec. 1628. When the writ must be granted. 1868-'9, c. 116, s. 6.

Any court or judge empowered to grant the writ, to whom such applications may be presented, shall grant the writ without delay, unless it appear from the application itself or from the documents annexed that the person applying or for whose benefit it is intended is, by this chapter, prohibited from prosecuting the writ.

Sec. 1629. Defect of form. 1868-'9, c. 116, s. 7.

No writ of *habeas corpus* shall be disobeyed on account of any defect of form.

Sec. 1630. When the writ sufficient. 1868-'9, c. 116, s. 8.

It shall be sufficient:

(1) If the person having the custody of the party imprisoned or restrained be designated either by his name of office, if he have any, or by his own name, or if both such names be unknown or uncertain, he may be described by an assumed appellation, and any one who may be served with the writ shall be deemed the person to whom it is directed, although it may be directed to him by a wrong name, or description, or to another person;

(2) If the person who is directed to be produced be designated by name, or if his name be uncertain or unknown, he may be described by an assumed appellation or in any other way, so as to designate the person intended.

Sec. 1631. Penalty for refusal to grant the writ. 1868-'9, c. 116, s. 9.

If any judge authorized by this chapter to grant writs of *habeas corpus* shall refuse to grant such writ when legally applied for, every such judge shall forfeit to the party aggrieved two thousand five hundred dollars.

Sec. 1632. Writ may issue without application, when. 1868-'9, c. 116, s. 10.

Whenever the supreme or superior court, or any judge of either, shall have evidence from any judicial proceeding before such court or judge, that any person within this state is illegally imprisoned or restrained of his lib-

erty, it shall be the duty of said court or judge to issue a writ of *habeas corpus* for his relief, although no application be made for such writ.

In re Schenck, 74—607; State v. Applewhite, 75—229.

Sec. 1633. The return, and what to contain. 1868-'9, c. 116, s. 11.

The person or officer on whom the writ is served, must make a return thereto in writing, and, except where such person shall be a sworn public officer, and shall make his return in his official capacity, it must be verified by his oath. The return must state plainly and unequivocally—

(1) Whether he have or have not the party in his custody or under his power or restraint;

(2) If he have the party in his custody or power, or under his restraint, the authority and the cause of such imprisonment or restraint, setting forth the same at large;

(3) If the party be detained by virtue of any writ, warrant, or other written authority, a copy thereof shall be annexed to the return; and the original shall be produced and exhibited on the return of the writ to the court or judge, before whom the same is returnable;

(4) If the person or officer upon whom such writ is served, shall have had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ, but has transferred such custody or restraint to another, the return shall state particularly to whom, at what time, for what cause and by what authority such transfer took place.

Sec. 1634. Notice to parties interested. 1868-'9, c. 116, s. 12. 1870-'1, c. 221, s. 1.

When it appears from the return to the writ that the party named therein is in custody on any process, or by reason of any claim of right, under which any other person has an interest in continuing his imprisonment or restraint, no order shall be made for his discharge, until it shall appear that the person so interested or his attorney, if he have one, shall have had reasonable notice of the time and place at which such writ is returnable.

Sec. 1635. Notice to district solicitor. 1868-'9, c. 116, s. 13.

When it appears from the return that such party is detained upon any criminal accusation, the court or judge may, if he thinks proper, make no order for the discharge

of such party until sufficient notice of the time and place at which the writ shall have been returned, or shall be made returnable, be given to the district solicitor of the county in which the person prosecuting the writ is detained.

Sec. 1636. Production of the body. 1868-'9, c. 116, s. 14.

If the writ require it, the officer or person on whom the same has been served shall also produce the body of the party in his custody or power, according to the command of the writ, except in the case of the sickness of such party, as hereinafter provided.

Sec. 1637. Attachment on failure to obey the writ. 1868-'9, c. 116, s. 15.

If the person or officer on whom any writ of *habeas corpus* shall have been duly served shall refuse or neglect to obey the same, by producing the body of the party named or described therein, and by making a full and explicit return thereto, within the time required, and no sufficient excuse be shown for such refusal or neglect, it shall be the duty of the court or judge before whom the writ shall have been made returnable, upon due proof of the service thereof, forthwith to issue an attachment against such person or officer, directed to the sheriff of any county within this state, and commanding him forthwith to apprehend such person or officer and bring him immediately before such court or judge, and on being so brought such person or officer shall be committed to close custody in the jail of the county where such court or judge may be, without being allowed the liberties thereof, until such person or officer make return to such writ and comply with any order that may be made by such court or judge in relation to the party for whose relief the writ shall have been issued.

Sec. 1638. Penalty for refusing attachment. 1870-'1, c. 221, s. 2.

If any judge shall wilfully refuse to grant the writ of attachment, as provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 1639. Where a sheriff fails to return. 1868-'9, c. 116, s. 16.

If a sheriff shall have neglected to return the writ

agreeably to the command thereof, the attachment against him may be directed to the coroner or to any other person to be designated therein, who shall have power to execute the same, and such sheriff, upon being brought up, may be committed to the jail of any county other than his own.

Sec. 1640. Precept to bring up party detained. 1868-'9, c. 116, s. 17.

The court or judge, by whom any such attachment may be issued, may also at the same time, or afterwards, direct a precept to any sheriff, coroner, or other person to be designated therein, commanding him to bring forthwith, before such court or judge, the party, wherever to be found, for whose benefit the writ of *habeas corpus* has been granted.

Sec. 1641. Penalty for refusing to grant the precept. 1870-'1, c. 221, s. 3.

If any judge shall refuse to grant the precept provided for in the preceding section, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 1642. Penalty for conniving, &c., at any insufficient return, &c. 1870-'1, c. 221, s. 4.

If any judge shall grant the attachment, or the precept, and shall give the officer or other person charged with the execution of the same verbal or written instructions not to execute the same, or to make any evasive or insufficient return, or any return other than that provided by law; or shall connive at the failing to make any return or any evasive or insufficient return, or any return other than that provided by law, he shall be liable to impeachment, and moreover shall forfeit to the party aggrieved twenty-five hundred dollars.

Sec. 1643. Power of the county. 1868-'9, c. 116, s. 18.

In the execution of any such attachment, precept or writ, the sheriff, coroner, or other person to whom it may be directed, may call to his aid the power of the county, as in other cases.

Sec. 1644. Proceedings on the return of the writ. 1868-'9, c. 116, s. 19.

The court or judge before whom the party is brought on a writ of *habeas corpus*, shall, immediately after the

return thereof, examine into the facts contained in such return, and into the cause of the confinement or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not; and if issue be taken upon the material facts in the return, or other facts are alleged to show that the imprisonment or detention is illegal, or that the party imprisoned is entitled to his discharge, the court or judge shall proceed, in a summary way, to hear the allegations and proofs on both sides, and to do what to justice shall appertain in delivering, bailing or remanding such party.

Sec. 1645. Party to be discharged, when. 1868-'9, c. 116, s. 20.

If no legal cause be shown for such imprisonment or restraint, or for the continuance thereof, the court or judge shall discharge the party from the custody or restraint under which he is held. But if it appear on the return to the writ, that the party is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, such party can be discharged only in one of the following cases:

(1) Where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person;

(2) Where, though the original imprisonment was lawful, yet by some act, omission or event, which has taken place afterwards, the party has become entitled to be discharged;

(3) Where the process is defective in some matter of substance required by law, rendering such process void;

(4) Where the process, though in proper form, has been issued in a case not allowed by law;

(5) Where the person, having the custody of the party under such process, is not the person empowered by law to detain him;

(6) Where the process is not authorized by any judgment, order or decree by any court, nor by any provision of law.

Sec. 1646. Party to be remanded, when. 1868-'9, c. 116, s. 21.

It shall be the duty of the court or judge forthwith to remand the party, if it appear that he is detained in custody, either,

(1) By virtue of process issued by any court or judge of

the United States, in a case where such court or judge has exclusive jurisdiction;

(2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree;

(3) For any contempt specially and plainly charged in the commitment by some court, officer or body, having authority to commit for the contempt so charged;

(4) That the time during which such party may be legally detained has not expired.

In re Schenck, 74—607.

Sec. 1647. Party to be bailed or remanded, when. 1868-'9, c. 116, s. 22.

If it appear that the party has been legally committed for any criminal offence, or if it appear by the testimony offered with the return of the writ, or upon the hearing thereof, that the party is guilty of such an offence, although the commitment be irregular, the court or judge shall proceed to let such party to bail, if the case be bailable and good bail be offered; if not, the court or judge shall forthwith remand such party to the custody or place him under the restraint from which he was taken: *Provided*, the person or officer, under whose custody or restraint he was, be legally entitled thereto; if not so entitled the court or judge shall commit such party to the custody of the officer or person legally entitled thereto.

Sec. 1648. Proceedings in case of sickness of the party. 1868-'9, c. 116, s. 23.

Whenever, from the illness or infirmity of the person directed to be produced by a writ of *habeas corpus*, such person cannot, without danger, be brought before the court or judge, where the writ is made returnable, the party in whose custody he is may state the fact in his return to the writ; and if the court or judge be satisfied of the truth of the allegation and the return be otherwise sufficient the court or judge shall proceed to decide on such return and to dispose of the matter in the same manner as if the body had been produced.

Sec. 1649. Penalty for disobedience to order of discharge. 1868-'9, c. 116, s. 24.

Obedience to a judgment or order for the discharge of a prisoner or person restrained of his liberty, pursuant to the provisions of this chapter, may be enforced by the court or judge by attachment in the same manner and

with the same effect as for a neglect to make return to a writ of *habeas corpus;* and the person found guilty of such disobedience shall forfeit to the party aggrieved two thousand five hundred dollars, besides any special damages which such party may have sustained.

Sec. 1650. Officer not liable civilly for obedience. 1868-'9, c. 116, s. 25.

No officer or other person shall be liable to any civil action for obeying such judgment or order of discharge.

Sec. 1651. Penalty for committing for same cause. 1868-'9, c. 116, s. 26.

No person who has been set at large upon any writ of *habeas corpus* shall be again imprisoned or detained for the same cause by any person whatsoever other than by the legal order or process of the court wherein he shall be bound by recognizance to appear or of any other court having jurisdiction in the case, under the penalty of two thousand five hundred dollars to the party aggrieved thereby; and every officer or other person who shall knowingly offend against this section shall be guilty of a misdemeanor.

Sec. 1652. Penalty for neglecting to obey the writ, or for refusing copy of process. 1868-'9, c. 116, s. 27.

If any person, to whom a writ of *habeas corpus* is directed, shall neglect or refuse to make due return thereto, or to bring the body of the party detained according to the command of the writ without delay; or shall not, within six hours after demand made therefor, deliver a copy of the commitment or cause of detainer, such person shall, upon conviction by indictment, be fined one thousand dollars, or imprisoned not exceeding twelve months, and if such person be an officer, shall moreover be removed from office.

Sec. 1653. False return a misdemeanor. 1868-'9, c. 116, s. 28.

Every person making a false return to a writ of *habeas corpus,* shall be guilty of a misdemeanor.

Sec. 1654. Penalty for concealing party. 1868-'9, c. 116, s. 29.

Any one having in his custody, or under his power, any party, who, by this chapter, would be entitled to a writ of *habeas corpus,* or for whose relief such writ shall

have been issued, who shall, with intent to elude the service of such writ or to avoid the effect thereof, transfer the party to the custody, or put him under the power or control of another, or shall conceal or change the place of his confinement, shall be guilty of a misdemeanor.

Sec. 1655. Aiders and abettors. 1868-'9, c. 116, s. 30.

Every person who shall knowingly aid or abet in the violation of the preceding section, shall be guilty of a misdemeanor.

Sec. 1656. Writs returnable, when. 1868-'9, c. 116, s. 31.

Writs of *habeas corpus* may be made returnable at a certain time, or forthwith, as the case may require. If the writ be returnable at a certain time, such return shall be made and the party shall be produced at the time and place specified therein.

Sec. 1657. By whom served, and manner of service. 1868-'9, c. 116, s. 32.

The writ of *habeas corpus* may be served by any qualified elector of this state, thereto authorized by the court or judge allowing the same. It may be served by delivering the writ, or a copy thereof, to the person to whom it is directed; or, if such person cannot be found, by leaving it, or a copy, at the jail, or other place in which the party for whose relief it is intended is confined, with some under officer or other person of proper age; or, if none such can be found,or if the person attempting to serve the writ be refused admittance, by affixing a copy thereof in some conspicuous place on the outside, either of the dwelling house of the party to whom the writ is directed, or of the place where the party is confined for whose relief it is sued out.

Sec. 1658. Persons committed for capital offences, when to be tried or discharged. 1868-'9, c. 116, s. 33.

When any person who has been committed for treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer in open court to be brought to his trial, shall not be indicted some time in the next term of the superior or criminal court ensuing such commitment, the judge of the court, upon notice in open court on the last day of the term, shall set at liberty such prisoner upon bail, unless it appear upon oath that the witnesses for the state could not be produced at the

same term; and if such prisoner, upon his prayer as aforesaid, shall not be indicted and tried at the second term of the court, he shall be discharged from his imprisonment.

Sec. 1659. Subpœnas for witnesses. 1868-'9, c. 116, s. 34.

Any party to a proceeding on a writ of *habeas corpus* may procure the attendance of witnesses at the hearing, by subpœna, to be issued by the clerk of any superior court, under the same rules, regulations and penalties prescribed by law in other cases.

Sec. 1660. Costs. 1868-'9, c. 116, s. 35.

The costs on a writ of *habeas corpus* may be awarded at the discretion of the court or judge who shall hear the same; and he may direct what officer shall tax such costs; and execution may issue therefor as in other cases.

Sec. 1661. Custody and disposition of infants in certain cases. 1858-'9, c. 53. 1868-'9, c. 116, s. 36.

When a contest shall arise on a writ of *habeas corpus* between any husband and wife, who are living in a state of separation, without being divorced, in respect of the custody of their children, the court or judge, on the return of such writ, may award the charge or custody of the child or children so brought before it either to the husband or to the wife, for such time, under such regulations and restrictions, and with such provisions and directions as will, in the opinion of such court or judge, best promote the interest and welfare of the children. At any time after the making of such orders the court or judge may, on good cause shown, annul, vary or modify the same.

Thompson v. Thompson, 72—32.

Sec. 1662. When custody of children contested, either party may appeal. 1858-'9, c. 53, s. 2.

In all cases of *habeas corpus*, where a contest shall arise in respect to the custody of minor children, either party may appeal to the supreme court from the final judgment.

Musgrove v. Kornegay, 7 Jon., 71.

Sec. 1663. *Habeas corpus ad testificandum*. 1868-'9, c. 116, s. 37.

Every court of record shall have power, upon the ap-

plication of any party to any suit or proceeding, civil or criminal, pending in such court, to issue a writ of *habeas corpus*, for the purpose of bringing before the said court any prisoner, who may be detained in any jail or prison within the state, for any cause, except such prisoner be under sentence for a felony, to be examined as a witness in such suit or proceeding, in behalf of the party making the application.

State v. Adair, 68—68; Harris, *ex parte*, 73—65.

Sec. 1664. Justices of the peace and superior court clerks. 1868-'9, c. 116, s. 38.

Such writ of *habeas corpus* may be issued by any justice of the peace or clerk of the superior court upon application as provided in the preceding section, to bring any person confined in the jail or prison of the same county where such justice or clerk may reside, to be examined as a witness before such justice or clerk. And in cases where the testimony of any prisoner is needed in a proceeding before a justice of the peace, or a clerk, and such person be confined in a county in which such justice or clerk does not reside, application for *habeas corpus* to testify may be made to any judge of the supreme or superior court.

Sec. 1665. Application, what to contain. 1868-'9, c. 116, s. 39.

The application for the writ shall be made by the party to the suit or proceeding in which the writ is required, or by his agent or attorney. It must be verified by the applicant, and shall state:

(1) The title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired;

(2) That the testimony of such prisoner is material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes.

Sec. 1666. Writ, how and by whom served. 1868-'9, c. 116, s. 40.

The writ of *habeas corpus* to testify shall be served by the same person, and in like manner in all respects, and enforced by the court or officer issuing the same as prescribed in this chapter for the service and enforcement of the writ of *habeas corpus cum causa*.

Sec. 1667. Fees and bond on service. 1868-'9, c. 116, s. 41.

The service of the writ shall not be complete, however, unless the applicant for the same shall tender to the person in whose custody the prisoner may be, if such person be a sheriff, coroner, constable or marshal, the fees and expenses allowed by law for bringing such prisoner, nor unless he shall also give bond, with sufficient security, to such sheriff, coroner, constable or marshal, as the case may be, conditioned that such applicant will pay the charges of carrying back such prisoner.

Sec. 1668. Duty of officers. 1868-'9, c. 116, s. 42.

It shall be the duty of the officer to whom the writ is delivered or upon whom it is served, whether such writ be directed to him or not, upon payment or tender of the charges allowed by law, and the delivery or tender of the bond herein prescribed, to obey and return such writ according to the exigency thereof upon pain, on refusal or neglect, to forfeit to the party on whose application the same shall have been issued the sum of five hundred dollars.

Sec. 1669. Prisoner to be remanded. 1868-'9, c. 116, s. 43.

After having testified the prisoner shall be remanded to the prison from which he was taken.

CHAPTER THIRTY-SEVEN.

IDIOTS, LUNATICS AND INEBRIATES.

SECTION.
1670. Inquisition of lunacy.
1671. Who deemed an inebriate.
1672. Property of inebriate to be restored him upon his reformation.
1673. How to proceed in case of persons confined in lunatic asylum.
1674. Sale of their estates.
1675. How and for what purpose clerks may order a sale of their estates; heirs and next of kin to be parties; proceeds, how applied and secured; how descend, &c.
1676. Estates without guardian, managed by clerk of superior court.

SECTION.
1677. Surplus income of insane persons may be advanced in certain cases to next of kin.
1678. Purposes for which such advancements may be made; to whom paid.
1679. All persons interested made parties.
1680. Rule to be observed by the clerk.
1681. Clerk may select the persons to be advanced.
1682. Advancements secured against waste.
1683. Appeal and removal to superior court allowed.
1684. Of what kind of insane persons advancements to be made of their estates.
1685. Decrees for advancements suspended on restoration to sanity.
1686. What may be done when lunatic *feme covert* is abandoned by her husband.
1687. Real estate belonging to the wife of a lunatic, how sold.

Sec. 1670. Inquisition of lunacy. C. C. P., s. 473.

Any person, in behalf of one who is deemed an idiot, inebriate, or lunatic, or incompetent from want of understanding to manage his own affairs by reason of the excessive use of intoxicating drinks, or other cause, may file a petition before the clerk of the superior court of the county where such supposed idiot, inebriate or lunatic resides, setting forth the facts, duly verified by the oath of the petitioner; whereupon such clerk shall issue an order, upon notice to the supposed idiot, inebriate or lunatic, to the sheriff of the county, commanding him to summon a jury of twelve men to inquire into the state of such supposed idiot, inebriate or lunatic. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be an idiot, inebriate or lunatic, by inquisition of a jury, as in cases of orphans.

Armstrong v. Arrington, 1 Hawks, 11; Spack v. Long, 1 Ired. Eq., 426; Bethea v. McLennon, 1 Ired., 523; Brooks v. Brooks, 3 Ired., 389; Christmas v. Mitchell, 3 Ired. Eq., 535; Rippy v. Gant, 4 Ired. Eq., 443; Patton v. Thompson, 2 Jon. Eq., 411; Parker v. Davis, 8 Jon., 460.

Sec. 1671. Who deemed an inebriate. 1879, c. 329, s. 1.

Any person who habitually, whether continuously or periodically, indulges in the use of intoxicating liquors to such an extent as to stupefy his mind and to render him incompetent to transact ordinary business with safety to his estate, shall be deemed an inebriate within the meaning of this chapter: *Provided*, the habit of so indulging in such use shall have been at the time of inquisition of at least one year's standing.

Sec. 1672. Property of inebriate to be restored him upon his reformation. 1879, c. 329, s. 4.

Whenever an inebriate for whom a guardian shall have been appointed shall become a sober person, and capable of managing his own affairs, the clerk who appointed such guardian is authorized to remove him and restore to said inebriate all his property, to manage and control in as full and ample a manner as he held the same prior to his having been adjudicated an inebriate.

Sec. 1673. How to proceed in case of person confined in lunatic asylum. 1860-'1, c. 22.

If any person be confined in any asylum for lunatics and insane persons, the certificate of the superintendent of such asylum declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the superior court of the county in which such asylum is situated, and certified under the seal of court shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or person of insane memory.

Sec. 1674. Sale of their estate. R. C., c. 57, s. 4. 1801, c. 589.

Whenever it shall appear to any clerk of the superior court by report of the guardian of any idiot, inebriate or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the county, the clerk may make an order for the sale or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the court; and all sales and rentings made under this section, shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such person as the clerk may appoint on confirming the sale; or the clerk may direct the guardian to file his petition for such purpose.

Sec. 1675. How and for what purpose clerks may order a sale of their estates; heirs and next of kin to be parties; proceeds, how applied and secured; how descend, &c. R. C., c. 57, s. 5. 1773, c. 100, s. 3. 1809, c. 766. 1816, c. 907.

Whenever it shall appear to the clerk, upon the peti-

tion of the guardian of any idiot, inebriate or lunatic, that a sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance; or, whenever the clerk shall be satisfied that the interest of the idiot, inebriate or lunatic would be materially and essentially promoted by the sale of any part of such estate; or whenever any part of his real estate is required for public purposes, the clerk may order a sale thereof to be made by such person, in such way and on such terms as he shall adjudge: *Provided*, that the clerk, if it be deemed proper, may direct to be made parties to such petition the next of kin or presumptive heirs of such non-sane person or inebriate. And if on the hearing the clerk shall order such sale, the same shall be made and the proceeds applied and secured, and shall descend and be distributed in like manner as is provided for the sale of infants' estates decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled "Guardian and Ward."

Allison v. Campbell, 1 D. & B. Eq., 152; Latham v. Wiswall, 3 Ired. Eq., 294; In the matter of Latham, 4 Ired. Eq., 231; Latham *ex parte*, 6 Ired. Eq., 406; Howard v. Thompson, 8 Ired., 367; Blake v. Respass, 77—193; Smith v. Pipkin, 79—569; Riggan v. Green, 80—126; Adams v. Thomas, 81—296; Adams v. Thomas, 83—521.

Sec. 1676. Estates without guardian managed by clerk of the superior court. R. C., c. 57, s. 6. 1846, c. 43, s. 1.

Whenever any person is declared to be of nonsane mind or inebriate, and for whom no suitable person will act as guardian, the clerk shall secure the estate of such person according to the law relating to orphans whose guardians have been removed.

Sec. 1677. Surplus income of insane persons may be advanced in certain cases to next of kin. R. C., c. 57, s. 9.

Whenever any nonsane person, of full age, and not having made a valid will, shall have children or grandchildren, (such grandchildren being the issue of a deceased child,) and shall be possessed of an estate, real or personal, whose annual income shall be more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it may be lawful for the clerk of the superior court for the county in which such person shall have his residence to order from time to time, and so often as may be judged

expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person.

Sec. 1678. Purposes for which such advancements may be made; to whom paid. R. C., c. 57, s. 10.

Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of twenty-one years and unmarried; and in all cases, the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement: *Provided*, that, in case the child, or grandchild, be a *feme covert*, the sum advanced shall be paid or secured to her, for her sole and separate use.

Sec. 1679. All persons interested made parties. R. C., c. 57, s. 11.

In every application for such advancements, the guardian of the nonsane person, and all such other persons shall be parties, as would at that time be entitled to a distributive share of his estate, if he were then dead.

Sec. 1680. Rule to be observed by the clerk. R. C., c. 57, s. 12.

The clerk in ordering such advancements shall as far as practicable so order the same, as that, on the death of the nonsane person, his estate shall be distributed among his distributees in the same equal manner, as if the advancements had been made by the person himself; and on his death, every sum advanced to a child, or grandchild, shall be an advancement, and shall bear interest from the time it may be received.

Sec. 1681. Clerk may select the persons to be advanced. R. C., c. 57, s. 13.

When the surplus aforesaid shall not be sufficient to make distribution among all the parties, the clerk may select and decree advancements to such of them as may most need the same, and may apportion the sum decreed in such amounts as shall be expedient and proper.

Sec. 1682. Advancements secured against waste. R. C., c. 57, s. 14.

It shall be the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same when they may have families, that it may be applied to their support and comfort, but any sum so advanced shall be regarded as an advancement to such persons.

Sec. 1683. Appeal and removal to superior court allowed. R. C., c. 57, s. 15.

Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court.

Sec. 1684. Of what kind of insane persons advancements to be made of their estates. R. C., c. 57, s. 16.

No such application shall be made under this chapter but in cases of such permanent and continued insanity, as that the nonsane person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion.

Sec. 1685. Decrees for advancements suspended on restoration to sanity. R. C., c. 57, s. 17.

Upon such insane person being restored to sanity, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same.

Sec. 1686. What may be done when lunatic *feme covert* is abandoned by her husband. 1858-'9, c. 52, s. 1.

Whenever any *feme covert* lunatic shall be abandoned by her husband, she may, by her guardian, or next friend in case there be no guardian, apply to the clerk of the superior court for support and maintenance, which the clerk may decree as in cases of alimony, out of any property or estate of her husband.

Sec. 1687. Real Estate belonging to the wife of a lunatic, how sold. 1881, c. 361.

Where the wife of a lunatic owns in her own right real estate, the sale of which will promote her interest, a sale of the same may be made upon the order of the clerk of the superior court of the county where the land lies, upon the petition by the wife of said lunatic and the

guardian of the lunatic husband, and the proceeds of said sale shall be paid to the wife of said lunatic.

CHAPTER THIRTY-EIGHT.

INTERNAL IMPROVEMENTS.

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Sec. 1688. Board of internal improvements, who; corporate name. R. C., c. 61, s. 1. 1819, c. 989, s. 3. 1836, c. 22, s. 2. 1874-'5, cc. 83, 202.

The president and directors of the board of internal improvements shall consist of the governor of the state, who shall, *ex officio*, be president thereof, and of two commissioners to be appointed biennially by the governor, with the advice of the senate; any two of whom shall constitute a board for the transaction of business; and in case of vacancies occurring in the board, the same shall be filled by the other members. The governor and said members shall be a corporate body, under the name and style of "the president and directors of the board of internal improvements," and shall have all the rights, powers, and privileges of a corporation which may be necessary to enable it to discharge the duties imposed on it and no more.

Sec. 1689. Sessions of board, and pay of members and secretary. R. C., c. 61, s. 2. 1819, c. 989, s. 7. 1836, c. 22, s. 4. 1874-'5, cc. 83, 202.

The board may hold their sessions whenever and wherever the governor may direct; may appoint a secretary to record their proceedings, who shall receive three dollars for each day the board shall be in session; and the members shall receive, each, three dollars per day, and their traveling expenses, for the time they may be employed in the public service.

Sec. 1690. Board may make rules and by-laws. R. C., c. 61, s. 3. 1819, c. 989, s. 9. 1874-'5, cc. 83, 202.

The board may make such rules for the regulation of their proceedings, and all necessary by-laws, rules, and

regulations for the better ordering of the conduct of their officers, agents, and servants, as to them shall seem expedient, not inconsistent with the laws of the state.

Sec. 1691. Board to have charge of state's interest in railroads, canals, &c. 1868-'9, c. 270. s. 97. 1774-'5, c. 83.

The board shall have charge of all the state's interest in all railroads, canals and other works of internal improvement, and also, all public buildings, which are the property of the state.

Sec. 1692. To keep record of all proceedings, and report to the general assembly, (1) condition of buildings; (2) condition of railroads, canals, &c.; (3) character of state's interest; (4) financial condition of railroads, &c.; (5) extent, capacity and business; (6) names of all persons failing to report. R. C., c. 61, s. 4. 1819, c. 989, s. 12. 1868-'9, c. 270, s. 98. 1874-'5, cc. 83, 202, s. 3.

The board shall keep a fair and true record of all their proceedings, which shall, at all times, be open to the inspection of the members of the general assembly and others interested therein.

(1) The condition of all public buildings in their charge, repairs which have been made since the last report, the repairs or modifications which they deem necessary, with their estimates for the same, and the expenditure on each during the year past.

(2) The condition of all railroads, canals, or other works of internal improvement, owned or operated exclusively by the state, and they shall at the same time suggest such improvement, enlargement or extension of such work as they shall deem proper, and such new works of similar nature as shall seem to them to be demanded by the growth of trade or the general prosperity of the state.

(3) The amount, condition and character of the state's interest in other roads, canals or other works of internal improvement in which the state has taken stock, to which she has loaned money, or whose bonds she holds as security.

(4) The condition of such roads or other corporate bodies, as are referred to in the previous section, in detail, giving their entire financial condition, the amount and market value of the stock, receipts and disbursements for the previous year or since the last report. The

amount of real and personal property of such corporations, its estimated value, and such suggestions with regard to the state's interest in the same as may to them seem warranted by the status of the corporation.

(5) The condition, extent, capacity and business of all other railroads in this state in tabular form, as provided in the succeeding section. To recommend such legislation as they may deem expedient in regard to any or all of the above matters.

(6) And also the names of all persons, failing or refusing to report, as required by the succeeding section; and this report the governor shall transmit to the general assembly with his message.

Sec. 1693. President of railroads, &c., to report to board; report, what to contain, penalty. 1868-'9, c. 270, s. 100. 1874-'5, c. 202, s. 2.

Every president or other chief officer of every railroad, canal or other public work of internal improvement in which the state owns an interest shall, on or before the first day of October in each year, make or cause to be made to the board of internal improvements a written report of his company for that year, showing

(1) Number of shares of stock owned by the state.

(2) Number of shares of stock owned otherwise.

(3) Face value of each of said shares.

(4) Market value of each of said shares.

(5) Amount of "bonded" debt and for what purpose contracted.

(6) Amount of other debt and how incurred.

(7) Has interest on bonded debt been punctually paid as agreed; if not, how much is in arrears.

(8) Amount of "gross receipts" for past year and from what sources derived.

(9) An itemized account of expenditures for past year.

(10) Any lease of property of said company, or any part thereof, to whom made, for what consideration, and for what length of time.

(11) Suits at law pending against his company concerning its bonded debt, or in which title to whole or any part of said road or canal is concerned.

(12) Any sales of stock owned by the state, by whose order made, and disposition of the proceeds.

Any person failing to report as required by this section shall be guilty of a misdemeanor, and on conviction before any judge of the superior or criminal court of this state, be fined not less than one nor more than five thou-

sand dollars, and imprisoned not less than one nor more than five years at hard labor in the penitentiary; and it shall be the duty of the attorney general to bring suit against all persons so failing to report in the superior court of Wake county on application of board of internal improvements.

SEC. 1694. Funds of board deposited in banks. R. C., c. 61, s. 5. 1836, c. 22, s. 5. 1874-'5, c. 83.

All the moneys which may be appropriated to the fund for internal improvement, unless otherwise ordered, shall be deposited in the banks of the state, to the credit of the treasurer, subject to the orders of the board, certified by the secretary, and countersigned by the president.

SEC. 1695. State treasurer to keep account of bonds; board to examine them yearly; clerk to aid treasurer; his compensation. R. C., c. 61, s. 6. 1819, c. 989, s. 10. 1836, c. 22, s. 4. 1874-'5, c. 83.

The treasurer shall keep an account of all disbursements, and shall render an account thereof to the general assembly when he makes his biennial report of the ordinary revenue. Once in every year the board shall appoint a committee of their body to examine the accounts of disbursements made during the year, and compare the same with the treasurer's books and the certificates authorizing the payment of money. And the treasurer may employ a clerk at three dollars per day for the time he may be engaged in making such accounts: *Provided*, that his compensation shall not exceed five hundred dollars a year.

SEC. 1696. Duty of board in making contracts. R. C., c. 61, s. 7. 1825, c. 1296. 1874-'5, c. 83.

Whenever the general assembly shall direct any public improvement, the board shall let the same out by contract, and take from the contractor a bond with sufficient security, payable to the state of North Carolina in double the sum paid or contracted to be paid, with the condition that he will faithfully perform his contract according to the plans or specifications agreed on.

SEC. 1697. State to be stockholder in companies to the amount advanced. R. C., c. 61, s. 8. 1819, c. 989, s. 12. 1874-'5, c. 83.

Whenever an appropriation shall be made by the state

to any work of internal improvement, conducted by a corporation, the state shall be considered, unless otherwise directed, a stockholder in such corporation, and shall have as many shares as may correspond with the amount of money appropriated; and the acceptance of such money shall be deemed to be a consent of the corporation to the terms herein expressed.

SEC. 1698. Railroad and other companies may enter on lands to build their works, &c. R. C., c. 61, s. 9. 1852, c. 92, s. 1. 1874-'5, c. 83.

Every railroad, plank-road, tram-road, turnpike, and canal company, for the purpose of constructing their road or canal, may at any time enter upon the lands through which they may desire to conduct their road or canal, and lay out the same as they may desire; and they may also enter on such contiguous land along the route as may be necessary for depots, ware-houses, engine-sheds, work-shops, water-stations, toll-houses, and other buildings necessary for the accommodation of their officers, servants, and agents, horses, mules, and other cattle, and for the protection of their property; and shall pay to the proprietors of the land, so entered on, such sum as may be agreed on between them.

SEC. 1699. If cannot agree, proceedings to assess damages. R. C., c. 61, s. 10. 1874-'5, c. 83.

If such corporation cannot agree with the owner of the land which is entered on, or is desired by the corporation for the purposes aforesaid, in the price to be paid for the same, then either the company or the owner may proceed to have the same condemned and damages assessed as is provided in the chapter entitled, "Railroad and Telegraph Companies."

Holloway v. R. R. Co., 85—452.

SEC. 1700. Report of their proceedings made and subscribed; form of report. R. C., c. 61, s. 17. 1874-'5, c. 83.

When the commissioners shall have assessed the damages, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

We,....., commissioners, appointed by the court to assess the damages that have been and will be sustained by ....., the owner of certain land lying in the county of ... ., which the ..... company propose to condemn for its use, do hereby certify that we met on..... (or the day to which we were regularly adjourned), and having first been

duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the land aforesaid, the additional fencing likely to be occasioned by the works of the company, and all other inconveniences likely to result to the owner, we have estimated and do assess the damages aforesaid at the sum of ..... Given under our hands, the ..... day of ....., A. D. ....

SEC. 1701. Dwelling-houses, &c., not to be condemned. R. C., c. 61, s. 21. 1852, c. 92, s. 1. 1874-'5, c. 83.

No such corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden or burial ground.

SEC. 1702. Company may take material from adjacent ground. R. C., c. 61, s. 22. 1874-'5, c. 83.

For the purpose of constructing its works and necessary appurtenances thereto, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the company may, at any time, enter on any adjacent lands, and cut, dig, and take therefrom any wood, stone, gravel or earth, which may be deemed necessary: *Provided*, that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees.

SEC. 1703. Who to assess value. R. C., c. 61, s. 23. 1874-'5, c. 83.

If for the value of the damages done to the owner by reason of the acts in the preceding section mentioned, the parties may be unable to agree, the same shall be valued by any three freeholders of the county.

SEC. 1704. Proceedings to value. R. C., c. 61, s. 24. 1874-'5, c. 83.

Either party, for that purpose, may apply to the clerk of the superior court of the county wherein the damage is done, who shall thereupon appoint said freeholders, and they, being duly sworn to impartially and truly assess the damage, shall, after hearing such proper evidence as may be laid before them, report the value thereof to the said clerk. And on the return to him of the report he shall render judgment for the damages and costs against the company, and issue execution therefor.

SEC. 1705. Justice may administer oaths to freeholders, &c. R. C., c. 61, s. 25. 1874-'5, c. 83.

Any justice may administer all proper oaths to the freeholders and witnesses.

Sec. 1706. Appeal allowed. R. C., c. 61, s. 26. 1874-'5, c. 83.

Either party may appeal from such judgment as in other cases, and under the same rules.

Sec. 1707. Width of land condemned for railroads. R. C., c. 61, s. 27. 1874-'5, c. 83.

The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be of greater width.

Sec. 1708. Width of land for plank-roads, canals and turnpikes. R. C., c. 61, s. 28. 1852, c. 92. 1874-'5, c. 83.

No greater width of land than sixty feet shall be condemned for the use of any plank-road, tram-road, canal or turnpike.

Sec. 1709. Quantity condemned for station or depot. R. C., c. 61, s. 29. 1874-'5, c. 83.

No greater quantity of land than two acres, contiguous to any railroad, plank-road, tram-road, turnpike or canal, shall be condemned at one place for a depot or station.

Sec. 1710. Railroads, &c., crossing other roads, not to obstruct them. R. C., c. 61, s. 30. 1874-'5, c. 83.

Whenever, in their construction, the works of any of said corporations shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same.

Sec. 1711. Company may turn road, &c. R. C., c. 61, s. 31. 1874-'5, c. 83.

In order to prevent the frequent crossing of such roads or ways, or in cases where it may be necessary to occupy the same, the corporation may change the roads and ways so as to avoid such crossing and occupation, and to such points as may be deemed expedient.

Sec. 1712. Damages allowed owners on whose land roads are turned. R. C., c. 61, s. 32. 1874-'5, c. 83.

For any injury done to the lands of persons by taking them under the preceding section, the value thereof shall be assessed in like manner as is provided for assessing

damages to real estate as is provided in the chapter entitled "Railroad and Telegraph Companies."

SEC. 1713. New roads made good as former one. R. C., c. 61, s. 33. 1874-'5, c. 83.

Before any part of an established road or way shall be impeded by any of said corporations, the new road or way shall be prepared and made equally good with the portion proposed to be discontinued; and then the same shall be deemed a part of the original road or way, and shall be kept up and repaired as before the change.

SEC. 1714. Incorporated companies to furnish board with maps, &c., of improvements. R. C., c. 61, s. 34. 1850, Resolution. 1852, c. 92, s. 6. 1874-'5, c. 83.

Every company, incorporated for the purpose of improving the internal condition of the state, by railroad, plank-road, tram-road, turnpike, canal, or other means, shall furnish to the board a correct map or profile of the contemplated improvements, drawn to a uniform horizontal scale of four hundred feet to one inch. And all such charts and documents of a like character, as may be furnished to the state, shall be deposited for safe keeping in said bureau, under charge of the state librarian, or state engineer, in case there be such an officer.

SEC. 1715. Railroad and other companies to keep account of produce carried; to report to governor. R. C., c. 61, s. 35. 1854, Resolution. 1874-'5, c. 83.

The president and directors of canal, railroad, plank-road and turnpike companies, whether wholly or partly in this state, are required to keep an account of all the products of this state intended for sale abroad, by them transported out of the state, or to any shipping port therein; and report the same to the governor at each session of the general assembly.

SEC. 1716. Commissioners and freeholders paid; costs paid by company, except in certain cases. R. C., c. 61, s. 36. 1852, c. 92, ss. 3, 5. 1874-'5, c. 83.

Each commissioner and freeholder attending for the purpose of assessing damages to the owner of land for purposes of repairs shall be entitled to one dollar a day while engaged in the business; and the same, with all other costs of the case, shall be paid by the corporation, unless when the petition of the owner shall be dismissed, when he shall pay the costs; or unless in case of excep-

tion taken to the report, or of appeal, when the court may adjudge by whom, and in what proportion, the costs shall be paid.

Sec. 1717. No railroad, plank-road, &c., to be established, but by law; penalty and misdemeanor therefor. R. C., c. 61, s. 37. 1874-'5, c. 83.

If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tram-road, railroad or plank-road, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation; or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported; and shall, moreover, be guilty of a misdemeanor, they and all persons aiding therein, and shall be indicted therefor in the superior or criminal court.

Sec. 1718. Board to appoint state proxies. R. C., c. 61, s. 38. 1874-'5, c. 83.

The president and directors of the board of internal improvements shall appoint, on behalf of the state, all such officers or agents, as, by any act incorporating a company for the purpose of internal improvement, are allowed to represent the stock or other interests which the state may have in such company; and such person or persons shall cast the vote to which the state may be entitled in all the meetings of the stockholders of such company.

Sec. 1719. Governor authorized to have affairs of railroads in which the state has an interest investigated by member of board of internal improvements. 1879, c. 281, s. 1.

The governor is authorized and empowered, whenever he may think the public service requires it, to have the affairs of any railroad in which the state has an interest investigated by a member of the board of internal improvements, and to take such action concerning any matter reported upon as the said board may deem to the interest of the state.

Sec. 1720. Authority to administer oaths, &c. 1879, c. 281, s. 2.

The member of the board appointed for the investigation mentioned in the preceding section, shall have power to administer oaths, send for persons and papers, and all powers granted to a committee of investigation appointed by the general assembly.

Sec. 1721. Sheriff to execute writs issued by board; penalty for failure or refusal to obey summons or answer questions. 1879, c. 281, s. 3.

Sheriffs shall execute writs of such member of the board of internal improvements as they would for a judicial officer of the state, and shall be allowed the same compensation therefor. Any person failing or refusing to obey any summons of, or to answer questions when required so to do, by such member of the said board, shall be guilty of a misdemeanor.

CHAPTER THIRTY-NINE.

JURORS.

SECTION.	
1722.	Jurors shall be selected.
1723.	List of names to be made out.
1724.	Commissioners to insert names in jury list.
1725.	Commissioners to examine jury list, and may examine any person on oath.
1726.	Names to be put in box.
1727.	How jury shall be drawn.
1728.	Jurors who have suits pending.
1729.	Case of death or removal from the county.
1730.	How drawing of jury to continue.
1731.	In case of a special term.
1732.	When commissioners fail to draw a jury.
1733.	Jurors to be summoned, and to attend until discharged by court; tales jurors, how summoned and qualifications.
1734.	Jurors not attending fined twenty dollars; to have until next term to make excuse; tales jurors fined two dollars.
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1739.	Special venire, how drawn and summoned.
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1741.	Exceptions to jurors, when to be taken.
1742.	Foreman of grand jury to administer oaths.

SEC. 1722. Jurors shall be selected. 1868, c. 9, s. 1.

The commissioners for the several counties at their regular meeting on the first Monday of September in each year shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of such persons only as have paid tax for the preceding year and are of good moral character and of sufficient intelligence.

Lee v. Lee, 71—139; State v. Haywood, 73—437; State v. Griffice, 74—316; State v. Wincroft, 76—38; State v. Heaton, 77—505; State v. Boone, 80—461; State v. Martin, 82—672; State v. Cooper, 83—671; State v. Edens, 85—552; State v. Watson, 86—624.

SEC. 1723. List of names to be made out. 1868, c. 9, s. 2.

A list of the names thus selected shall be made out by the clerk of the board of commissioners, and shall constitute the jury list: *Provided*, that no practicing physician, regular minister of the gospel, keepers of public grist mills, or regularly licensed pilots, members of fire companies and of the state guard, shall be required to serve as jurors.

SEC. 1724. Commissioners to insert names in jury lists. 1868, c. 9, s. 3.

If the list so made out does not contain the names of all the inhabitants who are qualified as provided to serve as jurors, the commissioners shall insert the names of such inhabitants in the jury list.

SEC. 1725. Commissioners to examine jury list, and may examine any person on oath. 1868, c. 9, s. 4.

At each regular meeting on the first Monday in September, in each year, the commissioners shall carefully examine the jury lists as already made out, compare the same with the tax returns, and diligently inquire whether any persons qualified to be jurors as provided are omitted, and whether any persons not qualified to be jurors, as therein provided, have been inserted, and if any have been inserted not possessing the requisite qualifications, they shall strike such names from the jury lists, and in order to obtain full information on the subject the commissioners may examine on oath any person they think proper.

SEC. 1726. Names to be put in box. 1868, c. 9, s. 5.

The commissioners shall cause the names on their jury

list to be written on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked Nos. 1 and 2, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

State v. Davis, 2 Ired., 153; State v. Heaton, 77—505.

Sec. 1727. How jury shall be drawn. 1868, c. 9, s. 6. 1868-'9, c. 175.

At least twenty days before the regular fall and spring term of the superior court in each year, the commissioners shall cause to be drawn from the jury box out of the partition marked No. 1 by a child not more than ten years of age, thirty-six scrolls, and the persons whose names are inscribed on said scrolls shall serve as jurors at the fall and spring terms of the superior court to be held for the county respectively ensuing such drawing, and the scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service; and the trial jury which has served during the first week, shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

State v. Haywood, 73—437; State v. Griffice, 74—316; State v. Heaton, 77—505; State v. Cooper, 83—671.

Sec. 1728. Jurors having suits pending. 1868, c. 9, s. 7.

If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

State v. Liles, 77—496; State v. Smith, 80—410; State v. Edens, 85—523; State v. Watson, 86—624.

Sec. 1729. Case of death or removal from the county. 1868, c. 9, s. 8.

If any of the persons drawn to serve as jurors be dead or removed out of the county, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

Sec. 1730. How drawing of jury to continue. 1868, c. 9, s. 9.

The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2, shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

State v. Martin, 82—672.

Sec. 1731. In case of a special term. 1868, c. 9, s. 10.

Whenever a special term of the superior court is ordered for the county, the commissioners, fifteen days before the holding of such special term, shall draw eighteen jurors to attend said court as herein provided for drawing jurors of the regular terms thereof.

Sec. 1732. When commissioners fail to draw a jury. 1868, c. 9, s. 11.

If the commissioners for any cause fail to draw a jury for any term of the superior court, regular or special, the sheriff of the county and the clerk of the commissioners in the presence of, and assisted by two justices of the peace of the county, shall draw such jury in the manner above prescribed ; and if a special term shall continue for more than two weeks, then for the weeks exceeding two, a jury or juries may be drawn as in this section provided.

Sec. 1733. Jurors to be summoned, and to attend until discharged by court; tales jurors, how summoned, and qualifications. R. C., c. 31, s. 29. 1779, c. 156, ss. 6, 9. 1806, c. 694, s. 1. 1830, c. 42. 1868, c. 9, s. 12. 1879, c. 200. 1881, c. 226.

The clerk of the board of county commissioners shall, within five days from the drawing, deliver the list of the jurors drawn for the superior court to the sheriff of the county, who shall summon the persons therein named to attend as jurors at such court, which summons shall be served, personally, or by leaving a copy thereof at the house of the juror, at least five days before the sitting of the court to which he may be summoned; and jurors shall appear and give their attendance until duly discharged; and, that there may not be a defect of jurors, the sheriff shall by order of court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, to serve on the petit jury, and on any day the court may discharge

those who have served the preceding day: *Provided*, that it shall be a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such terms of the court.

Lee v. Lee, 71—139; State v. Ragland, 75—12; State v. Wincroft, 76—38; State v. Willard, 79—660; State v. Thorne, 81—555; State v. Outerbridge, 82—617; State v. Howard, 82—623; State v. Cooper, 83—671.

Sec. 1734. Jurors not attending fined twenty dollars; to have until next term to make excuse; tales jurors fined two dollars. R. C., c. 31, s. 30. 1779, c. 157, ss. 4, 9. 1783, c. 189, ss. 2, 4. 1804, c. 664.

Every person on the original *venire* summoned to appear as a juror, who shall fail to give his attendance until duly discharged, shall forfeit and pay for the use of the county the sum of twenty dollars, to be imposed by the court: *Provided*, that each delinquent juryman shall have until the next succeeding term to make his excuse for his non attendance, and, if he shall render an excuse deemed sufficient by the court, he shall be discharged without costs. And every person summoned of the bystanders, who shall not appear and serve during the day as a juror, shall be fined in the sum of two dollars, unless he can show sufficient cause to the court; and the clerk shall forthwith issue an execution against the estate of the delinquent tales juror for such amercement and costs.

State v. Jones, 67—385.

Sec. 1735. Exempt from service of process. R. C., c. 31, s. 31. 1779, c. 157, s. 10.

No sheriff or other officer shall arrest under civil process any juror during his attendance on or going to and returning from any court of record. All such service shall be void, and the defendant on motion shall be discharged.

Sec. 1736. Jury in charge of officer to be furnished with accommodation as court may order. 1876-'7, c. 173.

When any jury, impaneled to try any cause, shall fail to agree upon a verdict, and shall be put in charge of an officer of the court, the said officer shall furnish said jurors with such accommodation as the court may order, and the same shall be paid for by the party cast or by the county, under the order and in the discretion of the judge of said court.

Young v. Com'rs, 76—316.

Sec. 1737. Pay of tales jurors in capital cases. 1866-'7, c. 65.

In all indictments for capital felonies, the tales jurors who may be summoned to try and who do try such actions shall receive the same pay as the regular panel of jurors receive for their services.

Sec. 1738. In capital cases judge may issue a special venire. R. C., c. 35, s. 30. 1830, c. 27, s. 1.

Whenever a judge of the superior court shall deem it necessary to a fair and impartial trial of any person charged with a capital offence, he may issue to the sheriff of the county in which the trial may be, a special writ of *venire facias*, commanding him to summon such number of the freeholders of said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when the same shall be returnable, with the names of the jurors summoned.

State v. Perry, Busb., 330; State v. Murph, Winst., 129; State v. Bullock, 63—570.

Sec. 1739. Special *venire*, how drawn and summoned.

Whenever a judge shall deem a special *venire* necessary, he may at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box No. 1, by a child under ten years of age. And the names so drawn (being freeholders) shall constitute the special *venire*, and the clerk of the superior court shall insert their names in the writ of *venire*, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the said sheriff. If the special *venire* is exhausted before the jury is chosen, the judge in his discretion may order another special *venire* to be drawn and summoned in like manner as the first, until the jury has been chosen. The scrolls, containing the names of the persons drawn as jurors from box No. 1 shall, after the jury is chosen, be placed in box No. 2; and if box No. 1 is exhausted before the jury is chosen, the drawing shall be completed from box No. 2, after the same shall have been well shaken.

SEC. 1740. Penalty on sheriff not executing writ, and on jurors not attending. R. C., c. 35, s. 31. 1830, c. 27, s. 2.

If any sheriff shall fail duly to execute and return such writ of *venire facias*, he shall be fined by the court not exceeding one hundred dollars; and all jurors so summoned shall attend until discharged by the court, under the same rules and penalties as are prescribed for other jurors.

SEC. 1741. Exceptions to jurors, when to be taken.

All exceptions to grand jurors for and on account of their disqualifications shall be taken before the jury is sworn and impaneled to try the issue, by motion to quash the indictment, and if not so taken the same shall be deemed to have been waived.

Passim, State v. Boon, 80—461; State v. Cooper, 83—671; State v. Watson, 86—624.

SEC. 1742. Foreman of grand jury to administer oaths. 1879, c. 12.

The foreman of every grand jury duly sworn and impaneled in any of the courts shall have power to administer oaths and affirmations to persons to be examined before it as witnesses: *Provided*, that the said foreman shall not administer such oath or affirmation to any persons except those whose names are endorsed on the bill of indictment by the officer prosecuting in behalf of the state, or by direction of the court: *Provided further*, that the foreman of the grand jury shall mark on the bill the names of the witnesses sworn and examined before the jury.

State v. Allen, 83—680; State v. Hines, 84—810.

CHAPTER FORTY.

LANDLORD AND TENANT.

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SECTION.
1746. Right to recover for use and occupation, when.
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Sec. 1743. When lease shall be in writing. 1868-'9, c. 156, s. 2.

All leases and contracts for leasing land for the purpose

of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands, exceeding in duration three years from the making thereof, shall be void unless put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Wade v. New Berne, 77—460; Krider v. Ramsay, 79—354.

Sec. 1744. Lessors not partners with lessees unless they so contract. 1868-'9, c. 156, s. 3.

No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee.

Reynolds v. Pool, 84—37; Curtis v. Cash, 84—41.

Sec. 1745. Formal demand of rent not necessary to create a forfeiture, when there is a proviso for re-entry. 1868-'9, c. 156, s. 4.

Whenever any half year's rent or more shall be in arrear from any tenant to his landlord, and the landlord has a subsisting right to re-enter for the non-payment of such rent, he may bring an action for the recovery of the demised premises, and the service of the summons therein shall be deemed equivalent to a demand of the rent in arrear and a re-entry on the demised premises, and if, on the trial of the cause, it shall appear that the landlord had a right to re-enter, the plaintiff shall have judgment to recover the demised premises and his costs.

Sec. 1746. Right to recover for use and occupation, when. 1868-'9, c. 156, s. 5.

Whenever any person shall occupy land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation.

Sec. 1747. Rents apportioned, when the estate of the lessor terminates. 2 G. II., c. 19, s. 15. 1868-'9, c. 156, s. 6.

If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, be

determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security shall have been given for such rent it shall be apportioned in like manner.

Sec. 1748. When person entitled to rents, &c., limited in succession dies, to whom payment made. 1868-'9, c. 156, s. 7.

In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right shall so terminate during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event.

Sec. 1749. Where lease of farming land determines during a current year, tenant to hold to end of year in lieu of emblements. 1868-'9, c. 156, s. 8.

Where any lease for years of any land let for farming on which a rent is reserved shall determine during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor, to the giving up such possession, and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession.

Sec. 1750. What length of notice required to terminate a tenancy. 1868-'9, c. 156, s. 9.

A tenancy from year to year may be terminated by a

notice to quit given three months or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of fourteen days; a tenancy from week to week, of two days.

Vincent v. Corbin, 85—108; McAdoo v. Callum, 86—419.

Sec. 1751. Tenant not liable for damage for accidental fire. 1868-'9, c. 156, s. 10.

A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part; unless he so contract.

Sec. 1752. Agreement to repair, how construed. 1868-'9, c. 156, s. 11.

An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one-half its value, by accidental fire not occurring from the want of ordinary diligence on his part.

Sec. 1753. In case of accidental damage, lessee may surrender his estate. 1868-'9, c. 156, s. 12.

If a demised house, or other building, be destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage occur without negligence on the part of the lessee or his agents or servants, and there be in the lease no agreement respecting repairs, or providing for such a case, and the use of the house damaged was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within ten days from the damage, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage, proportionate to the time between the last period of payment and the occurrence of the damage, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease.

Harrison v. Ricks, 71—7.

SEC. 1754. Possession of crops deemed vested in lessors; preference of lessor's lien. 1876-'7, c. 283, s. 1.

When lands shall be rented or leased by agreement, written or oral, for agricultural purposes, or shall be cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands shall be paid and until all the stipulations contained in the lease or agreement shall be performed, or damages in lieu thereof, shall be paid to the lessor or his assigns, and until said party or his assigns shall be paid for all advancements made and expenses incurred in making and saving said crops. This lien shall be preferred to all other liens, and the lessor or his assigns shall be entitled against the lessee or cropper or the assigns of either who shall remove the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

State v. Burwell, 63—661; McCombs v. Wallace, 66—587; Alsbrook v. Shields, 67—333; Harrison v. Ricks, 71—7; Varner v. Spencer, 72—281; Huggins v. Wood, 72—256; Haywood v. Rogers, 73—320; Neal v. Bellamy, 73—384; State v. Surles, 74—330; Threadgill v. McLendon, 76—24; Foster v. Penry, 76—131; Avera v. McNeill, 77—50; State v. Long, 78—571; Durham v. Speek, 82—87; Slaughter v. Winfrey, 85—159; State v. Copeland, 86—691.

SEC. 1755. Rights of lessee. 1876-'7, c. 251. 1876-'7, c. 283, s. 2.

Whenever the lessor or his assigns shall get the actual possession of the crop or any part thereof otherwise than by the mode prescribed in the preceding section, and said lessor or his assigns shall refuse or neglect, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either shall be entitled against the lessor or his assigns to the remedies given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed

by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action.

State v. Sears, 71—295; Farmer v. Pickens, 83—549; Wilson v. Respass, 86—112; State v. Copeland, 86—691; Palston v. Rose, 87—279; State v. Webb, 87—558.

Sec. 1756. How to proceed in case of any controversy between the parties; undertaking to be given by lessee. 1876-'7, c. 283, s. 3.

Where any controversy shall arise between the parties, and neither party avails himself of the provisions of this chapter, it shall be competent for either party to proceed at once to have the matter determined in the court of a justice of the peace, if the amount claimed be two hundred dollars or less, and in the superior court of the county where the property is situate if the amount so claimed shall be more than two hundred dollars. But in case there shall be a continuance or an appeal from the justice's decision to the superior court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the justice of the peace or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action.

Wilson v. Respass, 86—112; State v. Copeland, 86—691.

Sec. 1757. Lessee failing to give said undertaking, possession of the property passes to lessor upon his giving an undertaking. 1876-'7, c. 283, s. 4.

In case the lessee or cropper, or the assigns of either, shall, at the time of the appeal or continuance mentioned in the preceding section, fail to give the undertaking therein required, then the constable or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in the preceding section, conditioned for the forthcoming of such property, or the value thereof, in case judgment shall be pronounced against him.

SEC. 1758. Provision in case neither party gives the undertaking. 1876-'7, c. 283, s. 5.

If neither party gives the undertaking described in the two preceding sections, it shall be the duty of the justice of the peace or the clerk of the superior court, to issue an order to the constable or sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as shall be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties.

Slaughter v. Winfrey, 85—159.

SEC. 1759. Removal of crop by lessee without notice, a misdemeanor; unlawful seizure by landlord, a misdemeanor. 1876-'7, c. 283, s. 6. 1883, c. 83.

Any lessee or cropper, or the assigns of either, or any other person, who shall remove said crop, or any part thereof, from such land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, shall be guilty of a misdemeanor, and if any landlord shall unlawfully, wilfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a misdemeanor.

State v. Sears, 71—295; Varner v. Spencer, 72—381; State v. Long, 78—571; State v. Pender, 83—651; State v. Webb, 87—558.

SEC. 1760. Misdemeanor for tenant or lessee to surrender possession to other person than landlord. 1883, c. 138.

Any tenant or lessee of lands who shall wilfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a misdemeanor, and fined or imprisoned, or both, at the discretion of the court.

SEC. 1761. Unlawful for tenant to injure house, fruit trees, &c., of landlord. 1883, c. 224.

Any tenant who shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, de-

face, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and wilfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall wilfully and unlawfully cut down or destroy any fruit, shade or ornamental tree belonging to said landlord, shall be guilty of a misdemeanor, and fined or imprisoned or both, at the discretion of the court.

SEC. 1762. This chapter to apply to lease of turpentine trees. 1876-'7, c. 283, s. 7.

This chapter shall apply to all leases or contracts to lease turpentine trees, and the parties thereto shall be fully subject to the provisions and penalities of this chapter.

SEC. 1763. Lessors for mining and for getting timber entitled to the remedies given in this chapter. 1868-'9, c. 156, s. 16.

If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent shall be reserved, and if it shall be agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this chapter.

SEC. 1764. On conveyance of the reversion, &c., no attornment necessary. 4 & 5 Ann., c. 16, s. 9. 1868-'9, c. 156, s. 17.

Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: *Provided*, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance.

SEC. 1765. Rights of grantees of reversions, and of tenants of particular estates. 32 H. VIII., c. 34, 1868-'9, c. 156, s. 18.

The grantee in every conveyance of reversion in lands, tenements or hereditaments, shall have the like advan-

tages and remedies by action or entry, against the holders of particular estates in such real property, and their assigns, for non-payment of rent, and for the non-performance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, shall have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessor or his heirs.

Sec. 1766. Tenants who hold over may be dispossessed, when. 1868-'9, c. 156, s. 19.

Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who shall hold over and continue in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases:

(1) Whenever a tenant in possession of real estate holds over after his term has expired;

(2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

Creedle v. Gibbs, 65—192; Calloway v. Hamby, 65—631; Turner v. Lowe, 66—413; McCombs v. Wallace, 66—481; McMillan v. Love, 72—18; Abbott v. Cromartie, 72—292; Greer v. Wilbar, 72—592; Forsythe v. Bullock, 74—135; Garrett v. Com'rs of Edenton, 74—388; Medlin v. Steele, 75—154; Riley v. Jordan, 75—180; Heyer v. Beatty, 76—28; Green v. N. C. Railroad Co., 77—95; Foster v. Penry, 77—160; Sanders v. Ellington, 77—255; Wilson v. James, 79—349; Meroney v. Wright, 81—390; Johnson v. Hauser, 82—375; Davis v. Davis, 83—71; Scott v. Elkins, 83—424; Parker v. Allen, 84—466; Hughes v. Mason, 84—472; Cottingham v. McKay, 86—241; McAdoo v. Callum, 86—419; Hahn v. Latham, 87—172.

Sec. 1767. When summons shall issue; oath of lessor. 1868-'9, c. 156, s. 20. 1869-'70, c. 212.

When the lessor or his assigns, or his or their agent or attorney, shall make oath in writing, before any justice of the peace of the county in which the demised premises are situated, stating such facts as constitute one of the cases above described, and describing the premises, and

asking to be put in possession thereof, the justice shall issue a summons reciting the substance of the oath, and requiring the defendant to appear before him or some other justice of the county, at a certain place and time, (not to exceed five days from the issuing of the summons, without the consent of the plaintiff or his agent or attorney) to answer the complaint. The plaintiff or his agent or attorney may in his oath claim rent in arrear, and damage for the occupation of the premises since the cessation of the estate of the lessee: *Provided*, the sum claimed shall not exceed two hundred dollars; but if he shall omit to make such claim, he shall not be thereby prejudiced in any other action for their recovery.

Medlin v. Steele, 75—154; Nesbitt v. Turrentine, 83—535; Cottingham v. McKay, 86—241; McAdoo v. Callum, 86—419.

Sec. 1768. Officer to serve summons, how. 1868-'9, c. 156, s. 21.

The officer receiving such summons shall immediately serve it by the delivery of a copy to the defendant or by leaving a copy at his usual or last place of residence, with some adult person, if any such be found there; or, if the defendant have no usual place of residence in the county and cannot be found therein, by fixing a copy on some conspicuous part of the premises claimed.

Sec. 1769. What justice to do if defendant fail to appear or admit allegation. 1868-'9, c. 156, s. 22.

The summons shall be returned according to its tenor, and if on its return it shall appear to have been duly served, and if the defendant shall fail to appear or shall admit the allegations of the complaint, the justice shall give judgment that the defendant be removed from, and the plaintiff be put in, possession of the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding two hundred dollars, be claimed in the oath of the plaintiff as due and unpaid, the justice shall inquire thereof, and give judgment as he may find the fact to be.

Sec. 1770. What to be done if both parties require a jury trial. 1868-'9, c. 156, s. 23.

If the defendant by his answer shall deny any material allegation in the oath of the plaintiff, the justice shall hear the evidence and give judgment as he shall find the facts to be. If either party shall demand a trial by jury, and

shall deposit with the justice a sum of money equal to the costs of such jury, the justice shall immediately cause to be summoned twelve lawful jurors, from whom a jury of six shall be obtained and impaneled as is prescribed in other cases of trial by jury before a justice, who shall decide upon the issues of fact joined between the parties, and if rent or damages be claimed as aforesaid shall assess the same. The justice shall record the verdict and render judgment accordingly; and if the jury shall find that the allegation in the plaintiff's oath, which entitles him to be put in possession, is true, the justice shall give judgment that the defendant be removed from, and the plaintiff put in possession of the demised premises, and also for such rent and damages as shall have been assessed by the jury and for costs; and shall issue his execution to carry the judgment into effect.

Smith v. Stewart, 83—406.

Sec. 1771. Powers of justices the same as on other trials. 1868-'9, c. 156, s. 24.

On trials under this chapter the justice shall have the powers given him in other cases of trials before him, and be subject to like duties.

Heyer v. Beatty, 76—28.

Sec. 1772. Either party may appeal; the undertaking, increase of undertaking on appeal. 1868-'9, c. 156, s. 25. 1883, c. 316.

Either party may appeal from the judgment of the justice, as is prescribed in other cases of appeal from the judgment of a justice; but no execution commanding the removal of a defendant from the possession of the demised premises, shall be suspended until the defendant shall have given an undertaking in an amount not less than one year's rent of the premises, with sufficient surety, who shall justify and be approved by the justice, to be void if the defendant shall pay any judgment which in that or any other action the plaintiff may recover for rent, and for damages for the detention of the land.

At any term of the superior court of the county in which such appeal is docketed after the lapse of one year from the date of the filing of the undertaking above mentioned, the tenant, after legal notice to that end has been duly executed on him, may be required to show cause why said undertaking should not be increased to an amount sufficient to cover rents and damages for such period as to the court may seem proper, and if such ten-

ant shall fail to show proper cause and shall not file such bond for rents and damages as the court may direct, or make affidavit that he is unable so to do and show merits, his appeal shall be dismissed and the judgment of the justice of the peace shall be affirmed.

Steadman v. Jones, 65—388; Critcher v. Hodges, 68—22; Heyer v. Beatty, 76—28; Rollins v. Henry, 76—269; Rollins v. Henry, 77—467; Lane v. Morton, 78—7.

Sec. 1773. What done if defendant tenders rent in arrear and costs. 4 Geo. II., c. 28, s. 2. 1868-'9, c. 156, s. 26.

If, in any action brought to recover the possession of demised premises upon a forfeiture for the non-payment of rent, the tenant, before judgment given in such action, shall pay or tender the rent due and the costs of the action, all further proceedings in such action shall cease; or if the plaintiff shall further prosecute his action, and the defendant shall pay into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Sec. 1774. If proceedings quashed, judgment of restitution. 1868-'9, c. 156, s. 27.

If the proceedings before the justice shall be brought before a superior court and quashed, or judgment be given against the plaintiff, the superior or other court in which final judgment shall be given, shall, if necessary, restore the defendant to the possession, and issue such writs as shall be proper for that purpose.

Perry v. Tupper, 70—538; Perry v. Tupper, 71—385; Meroney v. Wright, 81—390; Meroney v. Wright, 84—336.

Sec. 1775. Damages may be recovered for occupation to time of trial. 1868-'9, c. 156, s. 28.

On appeal to the superior court, the jury trying the issue joined, shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal.

Nesbitt v. Turrentine, 83—535.

SEC. 1776. Defendant may recover damages for his removal from possession. 1868-'9, c. 156, s. 30.

If, by order of the justice, the plaintiff shall be put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal.

SEC. 1777. Remedy given to the lessor, when the tenant deserts premises. 1868-'9, c. 156, s. 32.

If any tenant or lessee of lands or tenements, being in arrear for rent, or having agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who shall have given to the lessor a lien on such crop as a security for the rent, shall desert the demised premises, and leave them unoccupied and uncultivated, the lessor shall have the like remedies to be put in possession, as are given to lessors against tenants who hold over.

Steadman v. Jones, 65—388.

SEC. 1778. Costs to successful party. 1868-'9, c. 156, s. 29.

In cases under this chapter, the successful party shall recover costs.

SEC. 1779. What forms sufficient. 1868-'9, c. 156, s. 33.

The following forms, or any substantially similar, shall be sufficient in proceedings for the summary ejectment of tenants holding over, and others, under this chapter.

SEC. 1780. Forms of proceeding before a justice of the peace for the summary ejectment of a tenant holding over. 1868-'9, c. 156, s. 34. 1869-'70, c. 212.

[No. 1.]

FORM OF THE OATH OF PLAINTIFF.

NORTH CAROLINA,.....County.

A. B., Plaintiff,
against
C. D., Defendant. } Summary proceedings in ejectment.

The plaintiff (his agent or attorney) maketh oath that the defendant entered into the possession of a piece of land in said county, (describe the land,) as a lessee of the plaintiff, (or as lessee of E. F., who, after the making of the lease, assigned his estate to the plaintiff, or otherwise, as the fact may be,) that the term of the defendant expired on the....day of.....

18.... (or that his estate has ceased by non-payment of rent, or otherwise, as the fact may be,) that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiffs is still subsisting, and the plaintiff asks to be put in possession of the premises.

The plaintiff claims.....dollars for rent of the premises from the.... day of....., 18...., to the....day of....., 18....; and also, ... dollars for the occupation of the premises since the.....day of....., 18...., to the date hereof.

A. B., Plaintiff.

Subscribed and sworn to before me, this ....day of....., 18....
J. K., *J. P.*

[No. 2.]

FORM OF SUMMONS TO BE ISSUED BY THE JUSTICE.

NORTH CAROLINA, ... County.

A. B., Plaintiff, *against* C. D., Defendant. } Summary proceedings in ejectment.

A. B. (his agent or attorney,) having made and subscribed before me the oath, a copy of which is annexed, you are required to appear before me, or some other justice of the peace of said county, on the....day of ....., 18...., at....., then and there to answer the complaint; otherwise judgment will be given that you be removed from the possession of the premises.

Witness my hand and seal this....day of....., 18....
J. K., *J. P.*, [SEAL.]

To C. D., defendant.

The justice attaches the oath of the plaintiff to the summons and delivers them, and a copy of both of them, to the officer, and makes the following entry on his docket, or varied according to the facts.

[No. 3.]

FORM OF ENTRY MADE BY JUSTICE.

A. B., Plaintiff, *against* C. D., Defendant. } Summary proceedings in ejectment for (*describe the premises*).

Oath of plaintiff (his agent or attorney) filed on the....day of. ....., 18....

Plaintiff claims.....dollars for rent, from.....to....., and..... dolars for occupation from.....to.....

Summons issued the.....day of....., 18...., to... ...., constable (*or* sheriff, as the case may be).

The officer serves the summons and returns it to the justice with the oath of the plaintiff, and with his return indorsed.

[No. 4.]

FORM OF RETURN OF OFFICER.

On this day I served the within summons on the defendant, C. D., by delivering him a copy thereof, and of the oath of A. B., annexed, (or by leaving a copy thereof and the oath of A. B. at the usual place of residence of the defendant C. D., with an adult found there,) (or the said C. D. not being found in my county, and having no usual or last place of residence therein,) (or no adult person being found at his usual or last place of residence,) by posting a copy of the summons and of the oath of A. B., annexed, on a conspicuous part of the premises claimed.

N. M., Constable.

The....day of....., 18....

[No. 5.]

FORM OF RECORD TO BE ENTERED BY JUSTICE ON HIS DOCKET.

A. B., Plaintiff,
against
C. D., Defendant. } Summary proceedings in ejectment.

It appearing that the summons, with a copy of the oath of the plaintiff (his agent or attorney) was duly served on defendant*, and whereas, the defendant fails to appear (or admits the allegations of the plaintiff), I adjudge that the defendant be removed from, and the plaintiff put in possession of, the premises described in the oath of the plaintiff. I also adjudge that the plaintiff recover of defendant .....dollars, for rent, from the .....day of ....., 18...., to the ....day of ....., 18...., and .....dollars for damages for occupation of the premises from the ....day of ....., 18...., to this day, and .....dollars for his costs; the ....day of ....., 18....

If the defendant admit part of the allegations of plaintiff, but not all, the judgment must be varied accordingly; for example: follow the foregoing to the *, and then proceed:

[No. 6.]

And whereas, the defendant appears and admits the first and second allegations of the plaintiff, and denies the residue; and whereas, both parties waived a trial by jury, I heard evidence upon the matters in issue, and find (here state the finding on the matters in issue separately).

[Supposing the findings are for the plaintiff, the record would proceed:] I therefore adjudge that the defendant (and so on from *).

[No. 7.]

If either party shall demand a jury the record will proceed from *, as follows: And whereas, the plaintiff (or defendant, as the case may be) demand a trial of the issues joined by a jury, I caused a jury to be

summoned, to wit: (here give the names of the jurors summoned,) from whom the following jury was duly impaneled, to wit: (here state the names of the six jurors impaneled.) who find (here state the verdict of jury; if they find all the issues for the plaintiff, say so; if any particular issues, say so; also state the sums assessed by them for rent and for occupation to trial). Therefore, I adjudge, &c., as in form No. 5, from *.

If either party appeals, the justice will enter on his docket as follows, altering the entry according to the facts.

[No. 8.]

FORM OF RECORD WHEN AN APPEAL IS PRAYED.

From the foregoing judgment the plaintiff (or defendant, as the case may be) prayed an appeal to the next superior court of said county, which is allowed.

[No. 9.]

FORM OF BOND TO BE GIVEN BY DEFENDANT TO SUSPEND EXECUTION.

We, the undersigned, ... and ...., acknowledge ourselves indebted to ..... in the sum of .....dollars: Witness our hands and seals, this the .....day of ....., A. D. 18....

Whereas on the .....day of ...., A. D. 18...., before ....., a justice of the peace for .....county, A. B. recovered a judgment against C. D. for ..... and for .....dollars damages for the detention of said real estate from the .....day of ....., A. D. 18.... to the ....day of ....., A. D. 18....; and whereas, the said..... ha.... prayed an appeal to the superior court from said judgment, and also asks that execution on said judgment shall be suspended: now, therefore, if the said ..... shall pay any judgment, which, in this or in any other action, the said ..... may recover for the rent of said premises, and for damages for detention thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

.....[SEAL.]
.....[SEAL.]
.....[SEAL.]

[No. 10.]

FORM OF EXECUTION ON A JUDGMENT FOR THE PLAINTIFF.

A. B., Plaintiff,
against
C. D., Defendant. } .....County.

The State of North Carolina, to any lawful officer of said county, GREETING:

You are hereby commanded to remove C. D. from, and put A. B. in, the possession of a certain piece of land (here describe it as in the oath of

plaintiff). You shall also make out of the goods and chattels, lands and tenements, of said defendant,.....dollars, with interest from the .... day of ....., 18...., to the day of payment, which the plaintiff lately recovered of the defendant as rent and damages, and the further sum of .....dollars as costs, in said action. Return this writ, with a statement of your proceedings thereon, before me. (State when and where according to general law respecting justices' executions).

Witness, my hand and seal, this .... day of ....., 18....

.....[SEAL.]

[No. 11.]

FORM OF SUPERSEDEAS OF EXECUTION.

The State of North Carolina, to any officer having an execution in favor of A. B., plaintiff, *v.* C. D., defendant, in a summary proceeding in ejectment, signed by.... ....., a justice of the peace.

The defendant having given bond to me, as required by law, on his appeal to the superior court of..... county, in the above case, you will stay further proceedings upon said execution and immediately return the same to me, with a statement of your action under it.

Witness my hand and seal this....day of....., 18....

....., *J. P.* [SEAL.]

[No. 12.]

FORM OF CERTIFICATE OF JUSTICE ON RETURN OF THE APPEAL TO THE SUPERIOR COURT.

The annexed are the original oath, summons and other papers, and a copy of the record of the proceedings in the case of a summary proceeding in ejectment, A. B., plaintiff, *v.* C. D., defendant.

....., *J. P.*

COSTS IN THE CAUSE.

(Here state all the costs, to whom paid or due, and by whom).

All the papers must be attached.

CHAPTER FORTY-ONE.

LIENS.

SECTION.
1781. Liens on buildings.
1782. Liens on crops.
1783. Personal property subject to lien.
1784. Claims, where filed.
1785. To be brought before justice of the peace in case of disagreement.
1786. What rights not affected.
1787. Costs allowed to either party.
1788. Defendant entitled to set-off.
1789. When notice of the lien shall be filed; clerk to keep book of liens; clerk's fee.
1790. Proceedings to enforce lien; in what courts and in what time.
1791. Executions to issue as upon other judgments.
1792. Order in which liens are to be paid.
1793. How liens discharged.
1794. No execution issued by justice of the peace against real estate.
1795. When remedy by attachment.
1796. Laborer's share of crop not liable to execution against employer.
1797. Owners of stud horses, &c., to have a lien on colts.
1798. Colt not exempt from execution.
1799. Liens on crops in favor of those making advances.
1800. Warrant to sheriff to seize the crops on affidavit that the lien is about to be defeated.
1801. Lien given to sub-contractors, laborers, and persons furnishing material for improvements upon real estate; proviso.
1802. Notice to be given to owner; liability of owner.
1803. Lien; how enforced.
1804. Liens on vessels for labor in loading and discharging cargo, &c.
1805. Liens, how filed; notice to master, &c.
1806. Lien, how enforced.
1807. Judgment against contractor, &c., to be judgment against the master, &c.
1808. Liens due sub-contractors, &c., not to exceed amount due contractor, &c.

Sec. 1781. Liens on buildings. 1869-'70, c. 206, s. 1.

Every building built, rebuilt, repaired or improved, together with the necessary lots on which said building may be situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished.

Wilkie v. Bray, 71—205; Gray v. Nash, 78—100; Lanier v. Bell, 81—337; Whitaker v. Smith, 81—340; Reynolds v. Pool, 84—37; Cumming v. Bloodworth, 87—83.

SEC. 1782. Liens on crops. 1869-'70, c. 206, s. 2.

The lien for work on crops or farms or materials given by this chapter shall be preferred to every other lien or incumbrance, which attached upon the property subsequent to the time at which the work was commenced or the materials were furnished.

Warren v. Woodard, 70—382; Reynolds v. Pool, 84—37; Curtis v. Cash, 84—41; Cumming v. Bloodworth, 87—83.

SEC. 1783. Personal property subject to lien. 1869-'70, c. 206, s. 3.

Any mechanic or artisan who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property, shall have a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges shall be paid; and if not paid for within the space of thirty days, provided it does not exceed fifty dollars, if over fifty dollars, ninety days, after the work shall have been done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, by giving two weeks' public notice of such sale by advertising in some newspaper in the county in which the work may have been done, or if there be no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work may have been done, and the proceeds of the said sale shall be applied first to the discharge of the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

SEC. 1784. Claims where filed. 1869-'70, c. 206, s. 4. 1876-'7, c. 53, s. 1.

All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the superior court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably

to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished.

Boyle v. Roberts, 71—130; Chadbourn v. Williams, 71—444; Wray v. Harris, 77—77; Lanier v. Bell, 81—337.

Sec. 1785. To be brought before justice of the peace in case of disagreement. 1869-'70, c. 206, s. 5.

In case of any disagreement between the parties interested in any such contract it may be brought before the nearest justice of the peace by the plaintiff or defendant for arbitration or otherwise, as the said justice may decide, provided the amount claimed does not exceed two hundred dollars; if over that amount, all claims must be filed with the clerk of the superior court and entered on the calendar, so as to be brought before the court at the first term after the filing of any claims. The judges of the superior court may appoint referees to ascertain the proper value of any labor performed on any building or farm or any material furnished or specified in the application at the time of plaintiff or defendant filing his petition.

Sec. 1786. What rights not affected. 1869-'70, c. 206, s. 6.

Nothing in this chapter shall be construed to affect the rights of any person to whom any debt may be due for any work done for which priority of claim is filed with the proper officer.

Sec. 1787. Costs allowed to either party. 1869-'70, c. 206, s. 7.

Costs are allowed to either party upon the rules established by law in actions arising on contracts, made under this code.

Sec. 1788. Defendant entitled to set-off. 1869-'70, c. 206, s. 8.

The defendant in any suit to enforce the lien shall be entitled to any set-off or claim arising between the contractors during the performance of the contract.

Sec. 1789. When notice of the lien shall be filed; clerk to keep book of liens; clerk's fee. 1868-'9, c. 117, s. 4. 1876-'7, c. 53, s. 2. 1881, c. 65. 1883, c. 101.

Notice of the lien shall be filed, as hereinbefore provided, at any time within twelve months after the com-

pletion of the labor, or the final furnishing the materials, or the gathering of the crops: *Provided*, that in cases of liens on real estate, or any interest therein, given by this chapter, the notice shall be filed in the office of the superior court clerk within twelve months after the completion of the labor or the final furnishing of the materials. And the clerk of the superior court shall keep a book in which he shall enter all notices of liens filed in his office. He shall provide an index thereto of the names of the claimant and the party against whom it is filed; and for his services, the clerk's fee shall be ten cents in each case.

Boyle v. Roberts, 71—130.

SEC. 1790. Proceedings to enforce lien; in what courts and in what time. 1868-'9, c. 117, s. 7. 1876-'7, c. 250. 1876-'7, c. 251.

Proceedings to enforce the lien created, must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien: *Provided*, that if the debt be not due within six months but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due, and this shall apply to existing liens and proceedings.

Boyle v. Roberts, 71—130; Gay v. Nash, 84—333.

SEC. 1791. Executions to issue as upon other judgments. 1868-'9, c. 117, s. 9.

Upon judgment rendered in favor of the claimant, an execution for the collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon, at the time of filing notice of the lien, before such execution shall extend to the general property of the defendant.

Boyle v. Roberts, 71—130.

SEC. 1792. Order in which liens are to be paid. 1868-'9, c. 117, s. 11.

The liens created and established by this chapter shall be paid and settled according to the priority of the notice of the lien filed with the justice or the clerk.

Sec. 1793. How liens discharged. 1868-'9, c. 117, s. 12.

All liens created by this chapter may be discharged as follows:

(1) By filing with the justice or clerk a receipt or acknowledgment that the lien has been paid or discharged, signed by the claimant.

(2) By depositing with the justice or clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

(3) By an entry in the lien docket that the proceedings on the part of the claimant to enforce the lien have been dismissed, or a judgment rendered against the claimant in such action.

(4) By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed.

Sec. 1794. No execution issued by justice of the peace against real estate. 1868-'9, c. 117, s. 13.

No execution issued by a justice of the peace, under this chapter, shall be enforced against real estate or any interest therein, but justice's judgments may be docketed on judgment docket of superior court for the purpose of selling such estate or any interest therein.

Sec. 1795. When remedy by attachment. 1868-'9, c. 117, s. 14.

In all cases where the owner or employer attempts to remove the crop, houses or appurtenances from the premises, without the permission, or with the intent to defraud the laborer of his lien, the claimant may have a remedy by attachment.

Brogden v. Privett, 67—45.

Sec. 1796. Laborer's share of the crop not liable to execution against employer. 1866-'7, c. 59.

Whenever servants and laborers in agriculture shall by their contracts orally or in writing, already or hereafter made, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated.

Sec. 1797. Owners of stud-horses, &c., to have a lien on colts. 1872-'3, c. 94, s. 1.

In all cases where the owner or any agent for or employee of the owner of any mare or jennet shall turn

the same to a stud-horse or jack for the purpose of raising colts, the price charged for the season of the stud-horse or jack shall be constituted a lien on the colt until the price so charged for the season is paid by the owner of the colt, his agent or employee.

Sec. 1798. Colt not exempt from execution. 1872-'3, c. 94, s. 2. 1879, c. 47.

The colt shall not be exempt from execution for the payment of said season price by reason of the operation of the personal property exemption: *Provided*, that the person claiming such lien on the colt shall close the same within twelve months from the foaling of the colt.

Sec. 1799. Lien on crops in favor of those making advances. 1866-'7, c. 1, s. 1. 1872-'3, c. 133, s. 1.

If any person shall make any advance either in money or supplies, to any person who is engaged in, or about to engage in the cultivation of the soil, the person so making such advance shall be entitled to a lien on the crops which may be made during the year upon the land in the cultivation of which the advances so made have been expended, in preference to all other liens existing or otherwise, to the extent of such advance: *Provided*, an agreement in writing shall be entered into before any such advance is made to this effect, in which shall be specified the amount to be advanced, or in which a limit shall be fixed beyond which the advance, if made from time to time during the year, shall not go; which agreement shall be recorded in the office of the register of the county in which the person to whom the advances are made resides, within thirty days after its date.

Warren v. Woodard, 70—382; Harrison v. Ricks, 71—7; Clarke v. Farrar, 74—686; Thomas v. Campbell, 74—787; Gay v. Nash, 78—100; Womble v. Leach, 83—84; Ray v. Pearce, 84—485; Cottingham v. McKay, 86—241; Patapsco v. Magee, 86—350.

Sec. 1800. Warrant to sheriffs to seize the crops on affidavit that the lien is about to be defeated; proviso. 1866-'7, c. 1, s. 2. 1872-'3, c. 133, s. 2. 1883, c. 88.

If the person making such advances shall make an affidavit before the clerk of the superior court of the county in which such crops are, that the amount secured by said lien for such advances, or any part thereof, is due and unpaid, that the person to whom such advances have been made, or any other person having the said crop in his possession, is about to sell or dispose of his crop, or in

any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due, it shall be lawful for him to issue his warrant. directed to any of the sheriffs of this state, requiring them to seize the said crop, and, after due notice, sell the same for cash and pay over the net proceeds thereof, or so much thereof as may be necessary in the extinguishment of the amount then due: *Provided*, that if the person to whom such advances have been made, shall, within thirty days after such sale has been made, give notice in writing to the sheriff, accompanied with an affidavit to this effect, that the amount claimed is not justly due, then it shall be the duty of the said sheriff to hold the proceeds of such sale subject to the decision of the court, upon an issue which shall be made up and set down for trial at the next succeeding term of the superior court for the county in which the person to whom such advances have been made resides: *Provided further*, that the lien provided in this and the preceding section shall not affect the rights of landlords to their proper share of rents.

Harrison v. Ricks, 71—7; Gay v. Nash, 78—100; Gay v. Nash, 84—333; Cottingham v. McKay, 86—241.

Sec. 1801. Lien given to sub-contractors, laborers and persons furnishing material for improvements upon real estate; proviso. 1880, c. 44, s. 1.

All sub-contractors and laborers who are employed to furnish or who do furnish material for the building, repairing or altering any house or other improvement on real estate, shall have a lien on said house and real estate for the amount of such labor done or material furnished, which lien shall be preferred to the mechanics' lien now provided by law, when notice thereof shall be given as hereinafter provided: *Provided*, that the sum total of all the liens due sub-contractors and material men shall not exceed the amount due the original contractor at the time of notice given.

Sec. 1802. Notice to be given to owner; liability of owner. 1880, c. 44, s. 2.

Any sub-contractor, laborer or material man, who claims a lien as provided in the preceding section, may give notice to the owner or lessee of the real estate who makes the contract for such building or improvement at any time before the settlement with the contractor, and if the said owner or lessee shall refuse or neglect to re-

tain out of the amount due the said contractor under the contract as much as shall be due or claimed by the sub-contractor, laborer or material man, the sub-contractor, laborer or material man may proceed to enforce his lien, and after such notice is given, no payment to the contractor shall be a credit on or discharge of the lien herein provided.

Sec. 1803. Lien, how enforced. 1880, c. 44, s. 3.

The lien given by the two preceding sections may be enforced as provided for other liens in this chapter, except when it is otherwise provided in said sections.

Sec. 1804. Liens on vessels for labor in loading or discharging cargo, &c. 1881, c. 356, s. 1.

Every vessel, her tackle, apparel and furniture shall be subject to a lien for all labor done by contractors or others in loading or discharging the cargo of such vessel, and also for all labor done by any sub-contractor or laborer employed in discharging or loading any such vessel, when such labor is done under contract with a contractor or stevedore who may be employed by the master, agent or owner of such vessel.

Sec. 1805. Liens, how filed; notice to master, &c. 1881, c. 356, s. 2.

The liens provided for in the preceding section shall be filed as is provided for other liens: the sub-contractor or laborer may give notice to the master, agent or owner of such vessel, that the contractor or stevedore is or will become indebted to him, when it shall be the duty of such master, agent or owner of such vessel to retain out of the amount due to such contractor or stevedore under his contract, as much as shall be due or claimed by the person giving the notice, and after such notice is given no payment to the contractor or stevedore shall be a credit on or a discharge of the lien herein provided.

Sec. 1806. Liens, how enforced. 1881, c. 356, s. 3.

The enforcement of such lien shall be by summons against the contractor or stevedore, and also against the master, agent or owner of such vessel, who made the contract with such contractor or stevedore, if over two hundred dollars, to be issued by the clerk of the superior court, and if under two hundred dollars, by a justice of the peace.

SEC. 1807. Judgment against contractor, &c., to be a judgment against the master, &c. 1881, c. 356. s. 4.

The judgment against the contractor or stevedore shall also be a judgment against the master, agent or owner of such vessel, and also against such vessel itself, her tackle, apparel and furniture, which shall be seized, held and sold under execution for the satisfaction of such judgment.

SEC. 1808. Liens due sub-contractors, &c., not to exceed amount due contractor, &c. 1881, c. 356, s. 5.

The sum total of all the liens due to different sub-contractors and laborers, performed for any contractor or stevedore under any contract with any master, agent or owner of any vessel, shall not exceed the amount due to such contractor or stevedore at the time of notice given to such owner, agent or master, or the amount due to such contractor or stevedore at the time of the service of summons upon such master, agent or owner when no notice has been given.

CHAPTER FORTY-TWO.

MARRIAGE AND MARRIAGE SETTLEMENTS, AND THE CONTRACTS OF MARRIED WOMEN.

SECTION.
1809. Who may contract a marriage.
1810. Who may not contract a marriage.
1811. Degree of kinship within which persons may not lawfully marry.
1812. What necessary to a valid marriage.
1813. Ministers not to celebrate marriage unless a license be delivered.
1814. License, when to be issued by register of deeds.
1815. Form of license; particulars of form.
SECTION.
1816. Penalty on register for issuing license unlawfully.
1817. Penalty on minister or officer marrying without a license.
1818. Register of deeds to keep a book of marriages.
1819. Penalty on register for failure to record license and return.
1820. Marriage settlements void as to existing creditors.
1821. Marriage settlements void except from registration.
1822. Husband does not become liable for wife's debts.
1823. The liability of wife continues.

SECTION.
1824. In actions against wife, summons served on husband.
1825. Husband may be ordered to pay costs, or discharged from defence.
1826. Wife not capable of contracting without her husband, unless a free trader.
1827. Married woman may become a free trader, how; written form of the free traders.
1828. A free trader from date of registration.
1829. Copy from register's books, evidence.
1830. How she may cease to be a free trader; public notification given.
1831. Woman living separate from her husband may be a free trader; wives of idiots or lunatics made free traders.
1832. Wife abandoned by her husband, &c., a free trader.
1833. Husband jointly liable with wife for torts, &c., committed by wife.
1834. What leases, &c., by wife valid, and what not, without private examination.
SECTION.
1835. What contract between husband and wife not to be valid unless with sanction of judge, or other officer.
1836. What contracts between husband and wife valid.
1837. Savings from separate estate of wife, her separate property.
1838. Husband tenant by the courtesy, when.
1839. Power of married woman to make a will.
1840. Real estate of wife not to be sold or leased without her consent; husband's interest exempt from execution.
1841. Wife may insure her husband's life for her separate use.
1842. Persons, formerly slaves, when deemed to have been married.
1843. Consequences of a divorce *a vinculo* on the property of the parties.
1844. Consequences of an elopement with an adulterer.
1845. Consequences of a husband separating from his wife and living in adultery.

Sec. 1809. Who may contract a marriage. 1871-'2, c. 193, s. 1.

All unmarried male persons of sixteen years, or upwards, of age, and all unmarried females of fourteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden.

Sec. 1810. Who may not contract a marriage. 1871-'2, c. 193, s. 2.

All marriages between a white person and a negro or Indian, or between a white person and a person of negro or Indian descent, to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under fourteen years of age and any male, or between persons either of

whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: *Provided*, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation inclusive, and for bigamy.

Brinegar v. Chaffin, 3 Dev., 108; Irby v. Wilson, 1 D. & B. Eq., 568; Johnson v. Kincade, 2 Ired. Eq., 470; State v. Watters, 3 Ired., 455; State v. Hooper, 5 Ired., 201; Gathings v. Williams, 5 Ired., 487; Koonce v. Wallace, 7 Jon., 195; State v. Hairston, 63—451; State v. Ross, 76—242; State v. Kennedy, 76—251.

Sec. 1811. Degree of kinship within which persons may not lawfully marry. 1879, c. 78.

Whenever the degree of kinship shall be estimated with the view to ascertain the right of kinspeople to marry, the half-blood shall be counted as the whole-blood; *Provided*, that nothing herein contained shall be so construed as to invalidate any marriage heretofore contracted in case where by counting the half-blood as the whole blood the persons contracting such marriage would be nearer of kin than first cousins; but in every such case the kinship shall be ascertained by counting relations of the half-blood as being only half so near kin as those of the same degree of the whole blood.

Sec. 1812. What necessary to a valid marriage. 1871-'2, c. 193, s. 3.

The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife, shall be a valid and sufficient marriage; *Provided*, that the right of marriages among the Society of Friends, according to a form and custom peculiar to themselves shall not be interfered with by the provisions of this or any other section of this chapter.

Weaver v. Cryer, 1 Dev., 337; State v. Patterson, 2 Ired., 346; State v. Robbins, 6 Ired., 23; State v. Bray, 13 Ired., 289; Cunninggim v. Mallett, 1

Winst., 467; Cooke v. Cooke, Phil., 583; State v. Ta-cha-na-tah, 64—614; Jones v. Reddick, 79—290.

Sec. 1813. Ministers not to celebrate marriage unless a license be delivered. 1871-'2, c. 193, s. 4.

No minister or officer mentioned in the preceding section shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there shall be delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy.

Drake v. McMinn, 5 Ired., 639.

Sec. 1814. License, when to be issued by register of deeds. 1871-'2, c. 193, s. 5.

Every register of deeds shall, upon application, issue a license for the marriage of any two persons: *Provided*, it shall appear to him probable that there is no legal impediment to such marriage: *Provided, further*, that where either party to the proposed marriage shall be under eighteen years of age, and shall reside with the father, or mother, or uncle, or aunt, or brother, or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, shall be delivered to him, and such written consent shall be filed and preserved by the register.

State v. Snuggs, 85—541.

Sec. 1815. Form of license; particulars of form. 1871-'2, c. 193, s. 6.

License shall be in the following or some equivalent form:

"To any ordained minister of any religious denomination, or to any justice of the peace for ..... county. A. B. having applied to me for a license for the marriage of C. D., (the name of the man to be written in full) of (here state his residence,) aged .... years, (color, as the case may be,) the son of (here state the father and mother, if known, state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state,) and E. F., (write the name of the woman in full) of (here state her residence,) aged (here state the number of) years, color (as the case may be,) the daughter of (here state the names and residence of the parents, if known, as is required above with respect to the man.) (If either of the parties shall be under eighteen years of age, the license shall here

contain the following:) And the written consent of G. H., father (or mother, &c., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within one year from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required within two months after you shall have celebrated such marriage, to return this license to me, at my office, with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same. Issued this .... day of ....., 18....

L. M.,

Register of Deeds of ..... county."

Certificate to be filled up and signed by the minister or officer celebrating the marriage, and also to be signed by one or more witnesses present at the marriage, who shall add to their names their places of residence:

"I, N. O., an ordained minister of (here state to what religious denomination, or justice of the peace, as the case may be,) united in matrimony (here name the parties,) the parties licensed above, on the .... day of ....., 18...., at the house of P. R., in (here name the town, if any, the township and county,) according to law.

N. O.

Witnesses present at the marriage:
S. T., of" (here give the residence.)

Sec. 1816. Penalty on register for issuing license unlawfully. 1871-'2, c. 193, s. 7.

Every register of deeds who shall knowingly or without reasonable inquiry issue a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by section eighteen hundred and fourteen, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

Holt v. McLean, 75—347; State v. Snuggs, 85—541; Norman v. Dunbar, 8 Jon., 317.

Sec. 1817. Penalty on minister or officer marrying without a license. 1871-'2, c. 193, s. 8.

Every minister or officer mentioned in section eighteen hundred and twelve, who shall marry any couple without a license being first delivered to him, as required by this chapter, or after the expiration of such license, or who shall fail to return such license to the register of deeds within two months after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and

pay two hundred dollars to any person who shall sue therefor, and shall also be guilty of a misdemeanor.

Norman v. Dunbar, 8 Jon., 317.

Sec. 1818. Register of deeds to keep a book of marriages. 1871-'2, c. 193, s. 9.

Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

"Record of marriage licenses and of returns thereto, for the county of ....., from the ..... day of ....., 18..., to the ..... day of ....., 18..., both inclusive."

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third his age; in the fourth, his color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least three of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved.

Sec. 1819. Penalty on register for failure to record license and return. 1871-'2, c. 193, s. 10.

Any register of deeds who shall fail to record, in the manner above prescribed, the substance of any marriage license issued by him, or who shall fail to record, in the manner above prescribed, the substance of any return made thereon, within ten days after such return made, shall forfeit and pay two hundred dollars to any person who shall sue for the same.

Norman v. Dunbar, 8 Jon., 317.

Sec. 1820. Marriage settlements void as to existing creditors. 1871-'2, c. 193, s. 11.

Every contract and settlement of property made by

any man and woman in consideration of a marriage between them, for the benefit of such man or woman, or of their issue, whether the same be made before or after marriage, shall be void as against creditors of the parties making the same respectively, existing at the time of such marriage, if the same is ante-nuptial, or at the time of making such contract or settlement, if the same is post-nuptial.

Hardy v. Holly, 84—661,

Sec. 1821. Marriage settlements void except from registration. 1871-'2, c. 193, s. 12.

Every such contract and settlement of property shall be void as against the creditors of or purchasers from the husband and wife respectively, as to any lands, tenements, or hereditaments, and chattels real, conveyed or agreed to be conveyed thereby, except from the registration thereof in the county in which such lands, tenements, hereditaments or chattels real lie, and as to any personal property conveyed or agreed to be conveyed thereby, except from the registration in the county in which such husband and wife at the marriage, or at the making thereof if after the marriage, shall reside.

Sec. 1822. Husband does not become liable for wife's debt. 1871-'2, c. 193, s. 13.

No man by marriage shall incur any liability for any debts owing, or contracts made, or for wrongs done by his wife before the marriage.

Sec. 1823. The liability of wife continues. 1871-'2, c. 193, s. 14.

The liability of a *feme sole* for any debts owing, or contracts made or damages incurred by her before her marriage, shall not be impaired or altered by such marriage.

Sec. 1824. In actions against wife, summons to be served on husband. 1871-'2, c. 193, s. 15.

In all actions brought against a married woman, who is not a free trader, (as hereinafter provided for,) the summons shall be served upon the husband also, and on motion to the court in which the action is pending, he may be allowed, with her consent, to defend the same in her name and behalf, but no judgment shall be given against him, upon any liability claimed against her aris-

ing before the marriage or upon any contract made by her alone after her marriage.

Rowland v. Perry, 64—578; Vick v. Pope, 81—22; Gulley v. Macy, 81—356; Nicholson v. Cox, 83—44; Nicholson v. Cox, 83—48; Hollingsworth v. Harman, 83—153; Roberts v. Lisenbee, 86—136.

Sec. 1825. Husband may be ordered to pay costs or discharged from defence. 1871-'2, c. 193, s. 16.

Whenever any husband shall be allowed to defend for his wife, he may be ordered to pay costs for any misconduct, and may be discharged from the conduct of her defence, if it shall appear to the court that his defence is not *bona fide* in her interest.

Sec. 1826. Wife not capable of contracting without the husband unless a free-trader. 1871-'2, c. 193, s. 17.

No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed.

Sutton v. Askew, 66—172; Harris v. Jenkins, 72—183; Baker v. Jordan, 73—145; Pippin v. Wesson, 74—437; Rountree v. Gay, 74—447; Atkinson v. Richardson, 74—455; Cooper v. Landis, 75—526; Huntly v. Whitner, 77—392; Kirkman v. Greensboro Bank, 77—394; Holliday v. McMillan, 79—315; Vick v. Pope, 81—22; Hall v. Short, 81—273; O'Connor v. Harris, 81—279; Fisher v. Webb, 84—44; Johnston v. Cochrane, 84—447; Hardy v. Holly, 84—661; George v. High, 85—99; Roberts v. Lisenbee, 86—136; Smith v. Gooch, 86—276; Mebane v. Layton, 86—571; Clayton v. Rose, 87—106.

Sec. 1827. Married woman may become a free trader, how; written form of free traders. 1871-'2, c. 193, ss. 18, 19.

Every married woman of the age of twenty-one years or upwards, with the consent of her husband, may become a free trader in the manner following:

(1) By ante-nuptial contract, proved and registered, as hereinafter required; or,

(2) She and her husband shall sign a writing in the following or some equivalent form:

"A. B., of the age of twenty-one years or upwards, wife of C. D., of.... county, with his consent, testified by his signature hereto, enters herself as a free trader from the date of the registration hereof.

(Signed) A. B.
C. D.

Witness: E. F.
Registered this....day of....., 18...."

The said writing may be proved by the subscribing witness or acknowledged by the parties before any officer authorized to take the probate of deeds, and shall be filed and registered in the office of the register of deeds for the county in which the woman proposes to have her principal or only place of business.

Manning v. Manning, 79—300.

Sec. 1828. A free trader from date of registration. 1871-'2, c. 193, s. 20.

From the time of the registration of the writing mentioned in the preceding section, the married woman therein mentioned shall be a free trader, and authorized to contract and deal as if she were a *feme sole*.

Manning v. Manning, 79—300.

Sec. 1829. Copy from register's books evidence. 1871-'2, c. 193, s. 21.

A copy of such writing, duly proved and registered, and certified by the register of the county in which the same is registered, shall be admissible in evidence as certified copies of registered deeds are, or may be allowed to be.

Manning v. Manning, 79—300.

Sec. 1830. How she may cease to be a free trader; public notification given. 1871-'2, c. 193, s. 22.

The right of a married woman to act as a free trader may be ended at any time by an entry by her, or by her attorney, in the margin of the registration of the writing above mentioned, to the effect that from the date of such marginal entry, she ceases so to act, and by publication to that effect weekly for three weeks in some newspaper published in the county in which she had her principal or only place of business, or if there shall be none so published, then in any other convenient newspaper. But such entry and publication shall not impair any liabilities incurred previously thereto, nor prevent such married woman from becoming liable afterwards to any person whom she may fraudulently induce to deal with her as a free trader.

SEC. 1831. Woman living separate from her husband may be a free trader; wives of idiots or lunatics made free traders. 1871-'2, c. 193, s. 23. 1880, c. 35.

Every woman who shall be living separate from her husband, either under a judgment of divorce by a competent court, or under a deed of separation, executed by said husband and wife, and registered in the county in which she resides, or whose husband shall have been declared an idiot or a lunatic, shall be deemed and held, from the docketing of such judgment, or from the registration of such deed, or from the date of such idiocy or lunacy and during its continuance, a free trader, and shall have power to convey her personal estate and her real estate without the assent of her husband.

Rountree v. Gay, 74—447.

SEC. 1832. Wife abandoned by her husband, &c., a free trader. 1871-'2, c. 193, s. 24.

Every woman whose husband shall abandon her, or shall maliciously turn her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired, and she shall have power to convey her personal estate and her real estate without the assent of her husband.

Rountree v. Gay, 74—447.

SEC. 1833. Husband liable jointly with wife for torts, &c., committed by wife. 1871-'2, c. 193, s. 25.

Every husband living with his wife shall be jointly liable with her for all damages accruing from any tort committed by her and for all costs and fines incurred in any criminal proceeding against her.

Roberts v. Lisenbee, 86—136.

SEC. 1834. What leases, &c., by wife valid, and what not, without private examination. 1871-'2, c. 193, s. 26.

No lease or agreement for a lease or sub-lease or assignment by any married woman, not a free trader, of her lands or tenements, or chattels real, to run for more than three years, or to begin in possession more than six months after its execution, or any conveyance of any freehold estate in her real property, shall be valid, unless the same be executed by her and her husband, and proved or acknowledged by them, and her free consent thereto, appear on her examination separate from her

husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*.

Pippin v. Wesson, 74—437; Towles v. Fisher, 77—437; Manning v. Mann ng, 79—293; Jeffries v. Green, 79—330.

Sec. 1835. What contract between husband and wife not to be valid, unless with sanction of judge, or other officer. 1871-'2, c. 193, s. 27.

No contract between a husband and wife made during coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, unless such contract shall be in writing, and be duly proved as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable or injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated: *Provided*, that the same may be impeached for fraud as other judgments may be.

Banks v. Green, 78—247; Hollingsworth v. Harman, 83—153; George v. High, 85—99; Warlick v. White, 86—139.

Sec. 1836. What contracts between husband and wife valid. 1871-'2, c. 193, s. 28.

Contracts between husband and wife not forbidden by the preceding section and not inconsistent with public policy are valid, and any persons of full age about to be married, and subject to the preceding section, any married persons may release and quit claim dower, tenancy by the courtesy, and all other rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released.

Hollingsworth v. Harman, 83—153; George v. High, 85—99.

Sec. 1837. Savings from separate estate of wife, her separate property. 1871-'2, c. 193, s. 29.

The savings from the income of the separate estate of

the wife, are her separate property. But no husband who, during the coverture (the wife not being a free trader under this chapter), has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt, for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next preceding her death.

Baker v. Jordan, 73—145; State v. Matthews, 76—41; State v. Wincroft, 76--38; Manning v. Manning, 79—300; Shinn v. Smith, 79—310; Holliday v. McMillan, 79—315; Cecil v. Smith, 81—285; George v. High, 85—99.

Sec. 1838. Husband tenant by the courtesy, when. 1871-'2, c. 193, s. 30.

Every man who hath married, or shall marry a woman, and by her have issue born alive, shall after her death, he surviving, be entitled to an estate as tenant by the courtesy during his life, in all the lands, tenements and hereditaments, whereof his said wife was beneficially seized in deed during the coverture, wherein the said issue was capable of inheriting, whether the said seizin was of a legal or of an equitable estate; except that when the wife shall have obtained a divorce *a mensa et thoro*, and shall not be living with her husband at her death, or when the husband shall have abandoned his wife, or shall have maliciously turned her out of doors, and they shall not be living together at her death; or if the husband shall have separated himself from his wife, and be living in adultery at her death, he shall not be tenant by the courtesy of her lands, tenements and hereditaments.

Long v. Graeber, 64—431; Teague v. Downs, 69—280; Hunt v. Satterwhite, 85—73.

Sec. 1839. Power of married woman to make a will. 1871-'2, c. 193, s. 31.

Every married woman shall have power to devise and bequeath her real and personal estate as if she were a *feme sole;* and her will shall be proved as is required of other wills: *Provided*, that no will made by any married woman shall be held to deprive her husband, surviving, of his estate in her real property, as tenant by the courtesy, as defined in the preceding section, except in the cases therein excepted.

Sec. 1840. Real estate of wife not to be sold or leased without her consent; husband's interest exempt from execution. R. C., c. 56, s. 1. 1848, c. 41.

No real estate belonging at the time of marriage to females, married since the third Monday of November, one thousand eight hundred and forty-eight, nor any real estate by them subsequently acquired, nor any real estate acquired on and since the first day of March, one thousand eight hundred and forty-nine, by *femes covert*, who were such on the said third Monday of November, one thousand eight hundred and forty-eight, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by and with the consent of his wife, first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules required by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him; and every such sale is hereby declared null and void.

Adams v. Gillespie, 2 Jon. Eq., 244; Hamlet v. Taylor, 5 Jon., 36; Houston v. Brown, 7 Jon., 161; Long v. Graeber, 64—431; Rowland v. Perry, 64—578; Teague v. Downs, 69—280; Wilson v. Arentz, 70—670; Lyon v. Akin, 78—258; Manning v. Manning, 79—293; Cecil v. Smith, 81—285; Young v. Greenlee, 82—346.

Sec. 1841. Wife may insure her husband's life for her separate use. R. C., c. 56, s. 2. 1850, c. 90.

Any *feme covert*, in her own name or in the name of a trustee with his assent, may cause to be insured for any definite time the life of her husband, for her sole and separate use, and she may dispose of the interest in the same by will, notwithstanding her coverture.

Conigland v. Smith, 79—303; Burton v. Farinholt, 86—260.

Sec. 1842. Persons formerly slaves, when deemed to have been married. 1866, c. 40, s. 5.

Persons, both or one of whom were formerly slaves, who have complied with the provisions of section five, chapter forty, of the act of the general assembly, ratified March tenth, one thousand eight hundred and sixty-six, shall be deemed to have been lawfully married.

State v. Samuel, 2 D. & B., 177; Cooke v. Cooke, Phil., 583; State v. Harris, 63—1; State v. Adams, 65—537; State v. Whitford, 86—636; Long v. Barnes, 87—329.

SEC. 1843. Consequences of a divorce *a vinculo* on the property of the parties. 1871-'2, c. 193, s. 42.

When a marriage shall be dissolved *a vinculo*, the parties respectively, shall thereby lose all his or her right to an estate by the courtesy, or dower, and all right to any year's provisions or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which by settlement before or after marriage, was settled upon such party in consideration of the marriage only.

SEC. 1844. Consequences of an elopement with an adulterer. 1871-'2, c. 193, s. 44.

If any married woman shall elope with an adulterer, and shall not be living with her husband at his death, she shall thereby lose all right to dower in the lands and tenements of her husband, and also all right to a year's provision, and to a distributive share from the personal property of her husband, and all right to administration on his estate, and also all right and estate in the property of her husband, settled upon her upon the sole consideration of the marriage, before or after marriage; and such elopement may be pleaded in bar of any action, or proceeding, for the recovery of such rights and estates.

Cook v. Sexton, 79—305; Warlick v. White, 86—139.

SEC. 1845. Consequences of a husband separating from his wife and living in adultery. 1871-'2, c. 193, s. 45.

If any husband shall separate himself from his wife and live in adultery he shall lose all right and estate of whatever character, in and to her personal property, as administrator, or otherwise; and also any right and estate in the property of his wife, which may have been settled upon him solely in consideration of the marriage, by any settlement before or after marriage; and such separation, and living in adultery, may be pleaded in bar of any action or proceeding for the recovery of such right or estates.

CHAPTER FORTY-THREE.

MILLS.

SECTION.

1846. What shall be public mills.
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Sec. 1846. What shall be public mills. R. C., c. 71, s. 1. 1777, c. 122, s. 1.

Every water grist-mill, steam mill, or wind mill, that shall grind for toll, shall be a public mill.

Eason v. Perkins, 2 Dev. Eq., 38; Benbow v. Robbins, 71—338; Hyatt v. Myers, 73—232; State v. Jaynes, 78—504.

Sec. 1847. Millers to grind according to turn. R. C., c. 71, s. 6. 1777, c. 122, s. 10. 1793, c. 402.

All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offence, forfeit and pay five dollars to the party injured: *Provided*, that the owner may grind his own grain at any time.

Hyatt v. Myers, 73—232.

Sec. 1848. Measures to be kept. R. C., c. 71, s. 7. 1777, c. 122, s. 11.

All millers shall keep in their mills the following measures, namely, a half-bushel and peck of full measure, and also proper toll-dishes for each measure; and every owner, by himself or servant, keeping any mill, who shall keep any false toll-dishes, contrary to the true intent and meaning of this chapter, shall be guilty of a misdemeanor.

State v. Perry, 5 Jon., 252; State v. Nixon, 5 Jon., 257; Hyatt v. Myers, 73—232.

Sec. 1849. How persons wishing to build a water-mill to proceed. 1868-'9, c. 158, s. 1.

Any person wishing to build a water-mill, who hath land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy; and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this chapter.

Sumner v. Miller, 64—688; Benbow v. Robbins, 71—338; Burnett v. Nicholson, 72—334; Burnett v. Nicholson, 86—99.

Sec. 1850. Court to appoint three commissioners. 1868-'9, c. 158, s. 2.

If no just cause should be shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants shall refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party; these commissioners may be changed from time to time by permission of the court for just cause shown.

Sec. 1851. The third commissioner to notify meeting and preside. 1868-'9, c. 158, s. 3.

The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings; they may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner; any commissioner named by or for either of the parties, who, without just cause, shall fail

to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars; and if the president shall, in like manner, unreasonably delay to notify of a meeting, or fail to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars, and to the defendant a like sum.

Sec. 1852. Duty of commissioners. 1868-'9, c. 158, s. 4.

The commissioners shall be sworn by some officer qualified to administer an oath, to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal area of the land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding sixty days.

Burnett v. Nicholson, 86—99.

Sec. 1853. What their report to contain. 1868-'9, c. 158, s. 5.

The report of the commissioners shall set forth:

(1) The location, quantities and value of the several areas laid off by them;

(2) Whether either of them includes houses, garden, orchards or other immediate conveniences;

(3) Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood;

(4) Any other matter upon which they shall have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties.

Austin v. Helms, 65—560; Burnett v. Nicholson, 72—334.

Sec. 1854. When mill shall not be allowed. 1868-'9, c. 158, s. 6.

If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built.

Burgess v. Clark, 13 Ired., 109.

Sec. 1855. Power of court on return of report. 1868-'9, c. 158, s. 7.

If the report be in favor of building the proposed mill, and is confirmed, then the court may, in its discretion,

allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave shall be granted; and upon such payment, the party to whom such leave shall be granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto.

Sec. 1856. Duty of persons to whom leave is granted. 1868-'9, c. 158, s. 8.

The person to whom leave shall be granted shall, within one year, begin to build such water-mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of such as shall be customers to it: otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged.

Sec. 1857. Time to build or repair water-mill. 1868-'9, c. 158, s. 9.

If any water-mill belonging to any person, not being of age, a married woman, or of unsound mind, or imprisoned, falls, burns, or is otherwise destroyed, such person and his heirs shall have three years to rebuild and repair the same, and any person under any disability aforesaid, shall have three years from the removal of the disability.

Sec. 1858. Injury done by the erection of mills. 1876 '7, c. 197, s. 1.

Any person conceiving himself injured by the erection of any grist-mill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the endamaged land, or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions.

Fellow v. Fulgham, 3 Mur., 254; Wilson v. Myers, 4 Hawks, 73; Purcell v. McCallum, 1 D. & B., 222; Gilbert v. Jones, 1 D. & B., 339; Bridgers v. Purcell, 1 D, & B., 492; Pugh v. Wheeler, 2 D. & B., 50; Bridgers v. Purcell,

1 Ired., 232; Waddy v. Johnson, 5 Ired., 333; Cochran v. Wood, 6 Ired., 194; Howcott v. Warren, 7 Ired., 20; Howcott v. Coffield, 7 Ired., 24; Pace v. Freeman, 10 Ired., 103; Beatty v. Connor, 12 Ired., 341; Kimel v. Kimel, 4 Jon., 121; Wright v. Stowe, 4 Jon., 516; Shaw v. Etheridge, 7 Jon., 225; Griffin v. Foster, 8 Jon., 337; Little v Stanback, 63—285; Powell v. Lash, 64—456; Sumner v. Miller, 64—688; Austin v. Helms, 65—560; Jenkins v. Conley, 70—353; Benbow v. Robbins, 71—338; Henly v. Wilson, 77—216; Hester v. Broach, 84—251; Daughtry v. Warren, 85—136; Burnett v. Nicholson, 86—99.

Sec. 1859. Dams, when abated as nuisances. 1876-'7, c. 197, s. 3.

When damages shall be recovered in final judgment in such civil actions and execution shall issue and be returned unsatisfied, and the plaintiff is not able to collect the same either from the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose.

Jones v. Clarke, 7 Jon., 418; Daughtry v. Warren, 85—136.

Sec. 1860. When judgment for plaintiff of an annual sum for damages, said sum binding for five years. 1868-'9, c. 158, s. 12.

A judgment giving to the plaintiff an annual sum by way of damages, shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages shall be increased by raising the water or otherwise.

Gillet v. Jones, 1 D. & B., 339; Pugh v. Wheeler, 2 D. & B., 50; Bridgers v. Purcell, 1 Ired., 232; Cochran v. Wood, 6 Ired., 194; Burnett v. Nicholson, 72—334; Hester v. Broach, 84—251; Burnett v. Nicholson, 86—99.

Sec. 1861. When yearly damages as high as twenty dollars. 1868-'9, c. 158, s. 14.

In all cases where the final judgment of the court shall assess the yearly damage of the plaintiff as high as twenty dollars, nothing in this chapter contained shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case, the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons.

Gilliam v. Cannady, 11 Ired., 106; Hester v. Broach, 84—251; Burnett v. Nicholson, 86—99.

Sec. 1862. When judgment against plaintiff, when not. 1868-'9, c. 158, s. 15.

If the final judgment of the court shall be that the plaintiff hath sustained no damage, he shall pay the costs of his proceeding; but if the final judgment shall be in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: *Provided*, that if the damage adjudged do not amount to five dollars, the plaintiff shall recover no more costs than damages. And if the defendant do not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for the amount of the last year's damage, or any part thereof which may remain unpaid.

Kimel v. Kimel, 4 Jon., 121; Wright v. Stowe, 4 Jon., 516; Hester v. Broach, 84—251.

Sec. 1863. Pay of commissioners. 1868-'9, c. 158, s. 16.

Each commissioner appointed under this chapter shall be entitled to two dollars per day to be paid and taxed as the other costs provided in this chapter.

CHAPTER FORTY-FOUR.

MONEY REMAINING IN HANDS OF CLERKS AND OTHERS.

SECTION.

1864. Clerks, &c., of all courts to make statement of moneys remaining in hand three years, unless detained by order of court, and publish the same at court-house door; to whom statement sent.

1865. Moneys to be paid to certain public officers.

1866. Clerks failing to render accounts, &c., to be sued; penalty $100; where suit brought.

1867. Clerks, &c., admitting money in hand, and failing to pay, how proceeded against.

1868. Sheriff to account for such moneys in like manner as clerks.

1869. Moneys may be used by the public till called for by owners.

SEC. 1864. Clerks, &c., of all courts to make statement of moneys remaining in hand three years, unless detained by order of court, and publish the same at court-house door; to whom statement sent. R. C., c. 73, s. 1. 1823, c. 1186, s. 1. 1831, c. 3, ss. 1, 3.

Every clerk of the superior court, inferior court, criminal court and clerk of the supreme court, at the first session of the court of which he is clerk, which shall be after the first day of August in every year, shall produce to said court a statement, on oath, of all moneys remaining in his hands, which may have been paid into his office three years or more previous thereto, and shall have come into his hands either directly from parties, or from his predecessor in office, and is not detained in his custody by special order of the court, specifying therein the amount of each claim, and the name of the person to whom the same is payable, a copy of which statement he shall forthwith post up in his office, and at the court-house door; and if there be no such moneys in his hands, he shall make affidavit of the same, which statement or affidavit, if made by a clerk of the supreme court, the court shall cause to be transmitted to the state treasurer and auditor; if made by a clerk of the superior, inferior or criminal court, the judge or presiding justice of the court before whom it is made shall cause the same to be transmitted to the officer appointed to receive and disburse the county funds on or before the first day of January in the next year.

Summey v. Johnston, Winst., 98.

SEC. 1865. Moneys to be paid to certain public officers. R. C., c. 73, s. 2. 1823, c. 1186, s. 2. 1831, c. 3, ss. 1, 3.

The said officers shall, on or before the first day of January in every year after the foregoing statements are made, account with and pay to the persons entitled to receive the same, all such balances reported as aforesaid to be in their hands; that is, the clerk of the supreme court shall pay to the state treasurer, and the other clerks shall pay to the receivers of the county funds of their respective counties.

SEC. 1866. Clerks failing to render account, &c., to be sued; penalty $100; where suit brought. R. C., c. 73, s. 3. 1823, c. 1186, s. 3. 1831, c. 3, s. 2.

If any clerk shall fail to comply with the duties herein enjoined, he shall be liable to be sued for the moneys in

his hands, and, moreover, shall forfeit and pay for every offence one hundred dollars, to be recovered in the name of the state and for the use of the county, by the receiver of the county funds; except that in the case of the default of the clerk of the supreme court, suit shall be brought by the state treasurer in the superior court of Wake county, and the recovery shall go to the state treasury.

SEC. 1867. Clerks, &c., admitting money in hand, and failing to pay, how proceeded against. R. C., c. 73, s. 4. 1823, c. 1186, s. 4. 1831, c. 3, s. 2.

If any of the said officers shall fail to pay any such money, by him admitted to be due, on or before the first day of January in every year as aforesaid, such officer shall be proceeded against by the state treasurer in any court of record in the state; or by the proper county officer, in the courts of his own county, in the like manner as against defaulting revenue officers.

SEC. 1868. Sheriff to account for such moneys in like manner as clerks. R. C., c. 73, s. 5. 1823, c. 1186, s. 6. 1831, c. 3, ss. 1, 2.

Every sheriff, at the same time and in like manner as is required of clerks, shall render and publish an account of moneys which may have been in his hands for the period of one year, and account for and pay the same to the receiver of county funds, under the same penalties for default, and recoverable in like manner, as are provided in respect of said clerks.

SEC. 1869. Moneys may be used by the public until called for by owners. R. C., c. 73, s. 6. 1828, c. 41, s. 1.

The money aforesaid, while held by the clerks and sheriffs, shall be paid on application, to the persons entitled thereto; and after it shall cease to be so held, it may be used as other revenue, subject, however, to the claim of the rightful owner.

CHAPTER FORTY-FIVE.

OFFICES.

SECTION.
1870. No person to hold office contrary to the constitution.
1871. Contracts for the purchase or sale of an office, void.
1872. Persons holding office to be deemed as doing so lawfully, and shall hold until their successors have qualified.
1873. All officers to take the oaths before acting; penalty five hundred dollars and ejection from office.

Sec. 1870. No person to hold office contrary to the constitution. R. C., c. 77, s. 1. R. S., c. 80, s. 1. 1790, c. 319. 1792, c. 366. 1793, c. 393. 1796, c. 450. 1811, c. 811.

If any person shall presume to hold any office, or place of trust or profit, or be elected to a seat in either house of the general assembly, contrary to the seventh section of the fourteenth article of the constitution of the state, he shall forfeit and pay two hundred dollars to any person who will sue for the same.

Worthy v. Barrett, 63—199.

Sec. 1871. Contracts for the purchase or sale of office void. R. C., c. 77, s. 2. 5 and 6 Edw. VI., c. 16, s. 3.

All bargains, bonds, and assurances, made or given for the purchase or sale of any office whatsoever, the sale of which is contrary to law, shall be void.

Sec. 1872. Persons holding office to be deemed as doing so lawfully, and shall hold until their successors have qualified. R. C., c. 77, s. 3. 1844, c. 38, s. 2. 1848, c. 64, s. 1. Const., Art. IV, s. 25.

Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office, until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void; and all officers shall continue in their respective offices, until their successors shall have been elected or appointed, and shall have been duly qualified.

Threadgill v. R. R. Co., 73—178; State v. Long, 76—254; Worley v. Smith, 81—304; King v. McLure, 84—153.

Sec. 1873. All officers to take the oath before acting; penalty $500, and ejection from office. R. C., c. 77, s. 4.

Every officer and other person who may be required to take an oath of office, or an oath for the faithful discharge of any duty imposed on him, and also for the oath appointed for such as hold any office of trust or profit in the state, shall take all said oaths, before entering on the duties of the office, or the duties imposed on such person, on pain of forfeiting five hundred dollars to the use of the poor of the county, in or for which the office is to be used, and of being ejected from his office or place by proper proceedings for that purpose.

Worthy v. Barrett, 63—199; Moore v. Bondinot, 64—191; State v. Cansler, 75—442.

CHAPTER FORTY-SIX.

OFFICIAL BONDS.

SECTION.
1874. Official bonds to be renewed annually.
1875. Vacancy on failure to renew bonds.
1876. Surety on official bonds to justify.
1877. Approval, execution and custody of official bonds.
1878. Clerk to record yeas and nays of commissioners voting on approval of official bonds.
1879. Commissioners liable as surety, when.
1880. Commissioners also liable to indictment.
1881. Record of the board conclusive evidence of the facts stated therein.
1882. Penalty on officers acting without giving bond.
1883. Suits on official bonds.
1884. Complaint must show in whose behalf suit brought.
SECTION.
1885. When official bond insufficient; judge may require a good one to be given.
1886. Appointee to give bond.
1887. When vacancy declared, judge shall file statement of his proceeding with clerk of board of commissioners; commissioners not to be surety on official bonds.
1888. Sheriff, or other officer, liable for whole debt, in case of negligence.
1889. Summary remedy on official bond in superior court.
1890. Damages of twelve per cent. against officers on money unlawfully detained.
1891. Irregularity in taking, or in the form of bonds, not to invalidate them.

Sec. 1874. Official bonds to be renewed annually. 1869-'70, c. 169, s. 1. 1876-'7, c. 276, s. 5.

Every clerk, treasurer, sheriff, coroner, register of deeds, surveyor, and every other officer of the several counties who is required by law to give a bond for the faithful performance of the duties of his office, shall regularly renew his official bond before the board of commissioners of the county who shall approve the same, on the first Monday of December of each year; but nothing herein shall be deemed to modify or repeal any provision of law whereby the commisioners are empowered at any time to require the sheriff, county treasurer, or other officer, to renew or justify his bonds.

Fagan v. Williamson, 8 Jon., 433; Fell v. Porter, 69—140; Worley v Smith, 81—304; Kilburn v. Latham, 81—312.

Sec. 1875. Vacancy on failure to renew bond. 1869-'70, c. 169, s. 2.

Upon the failure of any such officer to make such regular annual renewal of his bond, it is the duty of the board of commissioners, by an order to be entered of record to declare his office vacant, and to proceed forthwith to appoint a successor; if the power of filling the vacancy in the particular case be vested in the board of commissioners; but if otherwise, the said board shall immediately inform the proper person having the power of appointment of the fact of such vacancy.

63—255; Vann v. Pipkin, 77—408; Worley v. Smith, 81—304.

Sec. 1876. Surety on official bonds to justify. 1869-'70, c. 169, s. 3. 1879, c. 207, s. 1.

Every surety on an official bond required by law to be taken or renewed and approved by the board of commissioners, shall take and subscribe an oath before the chairman of the board or before the clerk of the superior court, that he is worth a certain sum (which shall be not less than one thousand dollars) over and above all his debts and liabilities and his homestead and personal property exemptions, and the sum thus sworn to shall in no case be less in the aggregate than the penalty of the bond.

Sec. 1877. Approval, execution and custody of official bonds. 1869-'70, c. 169, s. 4. 1879, c. 207, s. 2.

The approval of all official bonds taken or renewed by the board of commissioners shall be recorded by their clerk. Every such bond shall be acknowledged by the

parties thereto or proved by a subscribing witness, before the chairman of the board of commissioners, or before the clerk of the superior court, registered in the register's office in a separate book to be kept for the registration of official bonds, and the original bond, with the approval of the commissioners indorsed thereon and certified by their chairman, shall be deposited with the clerk of the superior court, except the bond of said clerk, which shall be deposited with the register of deeds for safe keeping.

Cox v. Blair, 76—78.

Sec. 1878. Clerk to record yeas and nays of commissioners voting on approval of official bonds. 1869-'70, c. 169, s. 5. R. C., c. 78, s. 7. 1790, c. 327. 1809, c. 777.

It is the duty of the clerk of the board of commissioners to record in the proceedings of the board the names of those commissioners who are present at the time of the approval of any official bond, and who shall vote for such approval, and every clerk neglecting to make such record is guilty of a misdemeanor and beside other punishment shall forfeit his office.

Sec. 1879. Commissioner's liability as surety, when. 1869-'70, c. 169, s. 6.

Every commissioner who approves an official bond, which he knows or believes to be insufficient in the penal sum, or in the security thereof, shall be liable as if he were a surety thereto, and may be sued accordingly by any person having a cause of action on said bond.

Sec. 1880. Commissioner also liable to indictment. 1869-'70, c. 169, s. 7.

Every commissioner liable as in the last section prescribed shall be moreover liable to a criminal action, and, on conviction, shall be removed from office and forever disqualified from holding or enjoying any office of honor, trust or profit under the state.

Sec. 1881. Record of the board conclusive evidence of the facts stated therein. 1869-'70, c. 169, s. 8.

In all actions under the two preceding sections, a copy of the proceedings of the board of commissioners in the particular case, certified by their clerk under his hand and seal of the county, shall be conclusive evidence of the facts in such record alleged and set forth, but any commissioner may cause his written dissent to be entered on the records of the board.

Sec. 1882. Penalty on officers acting without giving bond. 1869-'70, c. 169, s. 9. R. C., c. 78, s. 8.

Every person or officer of whom an official bond is required, who shall presume to discharge any duty of his office before executing such bond in the manner prescribed by law, is liable to a forfeiture of five hundred dollars to the use of the state for each attempt so to exercise his office, and is moreover liable to a criminal action, and upon conviction shall be ejected from office and be forever disqualified from holding or enjoying any office of honor, trust or profit under this state.

State v. McEntyre, 3 Ired., 171; Burke v. Elliott, 4 Ired., 355; Gilliam v. Reddick, 4 Ired., 368; Mabry v. Turrentine, 8 Ired., 201; Hoell v. Cobb, 4 Jon., 258.

Sec. 1883. Suits on official bonds. R. C., c. 78, s. 1. 1793, c. 384, s. 1. 1833, c. 17. 1825, c. 1226. 1869-'70, c. 169, s. 10.

Every person injured by the neglect, misconduct, misbehavior in office of any clerk of the superior court, register, entry-taker, surveyor, sheriff, coroner, constable, county treasurer, or other officer may institute a suit or suits against said officer or any of them and their sureties upon their respective bonds for the due performance of their duties in office in the name of the state, without any assignment thereof; and no such bond shall become void upon the first recovery, or if judgment shall be given for the defendant, but may be put in suit and prosecuted from time to time until the whole penalty shall be recovered, and every such officer, and the sureties on his official bond, shall be liable to the person injured for all acts done by said officer by virtue or under color of his office.

Guess v. Barbee, 6 Ired., 279; Robeson County v. McAlpin, 6 Ired., 347; Miller v. Davis, 7 Ired., 198; Pool v. Cox, 9 Ired., 69; Boger v. Bradshaw, 10 Ired., 229; Fagan v. Williams, 8 Jon., 433; Fell v. Porter, 69—140; 75—347; Havens v. Lathene, 75—505; Cox v. Blair, 76—78; Vann v. Pipkin, 77—408; 78—174, 181; City of Wilmington v. Nutt, 80—265

Sec. 1884. Complaint must show in whose behalf suit brought. R. C., c. 78, s. 2. 1793, c. 384, ss. 2, 3. 1869-'70, c. 169, s. 11.

Any person who may bring suit in manner aforesaid shall state in his complaint on whose relation and in whose behalf the suit is brought, and he shall be entitled to receive to his own use the money recovered, but nothing herein contained shall prevent such person from bringing

at his election an action against the officer to recover special damages for his injury.

Fagan v. Williams, 8 Jon., 433.

Sec. 1885. When official bond insufficient, judge may require a good one to be given. 1874-'5, c. 120, s. 1.

Whenever oath shall be made before any judge of the superior court by five respectable citizens of any county within his district that after diligent inquiry made they verily believe that the bond of any officer of such county, which has been accepted by the board of commissioners, is insufficient either in the amount of the penalty or in the ability of the sureties, it shall be the duty of such judge to cause a notice to be served upon such officer requiring him to appear at some stated time and place and justify his bond by evidence other than that of himself or his sureties. And if this evidence so produced shall fail to satisfy the judge that the bond is sufficient, both in amount and the ability of the sureties, he shall give time to the officer, not exceeding twenty days, to give another bond, the judge fixing the amount of the new bond, when there is a deficiency in that particular. And upon failure to give a good bond to the satisfaction of the judge within the twenty days, he shall declare the office vacant, and if the appointment be with himself, he shall immediately proceed to fill the vacancy; and if not, he shall notify the persons having the appointing power, that they may proceed as aforesaid.

Mitchell v. Kilburn, 74—483; Mitchell v. Hubbs, 74—484; Mitchell v. West, 74—485.

Sec. 1886. Appointee to give bond. 1874-'5, c. 120, s. 2.

The person so appointed shall give bond before the judge, and the bond so given shall in all respects be subject to the requirements of the law in relation to official bonds; and all official bonds shall be considered debts and liabilities.

Sec. 1887. When vacancy declared, judge shall file statement of his proceeding with clerk of commissioners; commissioner not to be surety on official bond. 1874-'5, c. 120, s. 3.

Whenever a vacancy shall be declared by the judge, he shall file a written statement of all his proceedings with the clerk of the board of commissioners, to be recorded by him. No member of the board of commissioners, or any other person authorized to take official bonds

of any county, shall sign as surety on any official bond, upon the sufficiency of which the board, of which he is a member, may have to pass.

Sec. 1888. Sheriff, or other officer, liable for whole debt, in case of negligence. R. C., c. 78, s. 3. 1844, c. 64. 1869-'70, c. 169, s. 12.

When a claim shall be placed in the hands of any sheriff, coroner or constable for collection, and he shall not use due diligence in collecting the same, he shall be liable for the full amount of the claim notwithstanding the debtor may have been at all times and is then able to pay the amount thereof.

Williams v. Williamson, 6 Ired., 281; Hubbard v. Wall, 9 Ired., 20; Nixon v. Bagby, 7 Jon., 5; McLaurin v. Buchanan, Winst. L., 93; Lipscomb v. Cheek, Phil., 333.

Sec. 1889. Summary remedy on official bond in superior court. R. C., c. 78, s. 5. 1819, c. 1002, s. 1. 1869-'70, c. 169, s. 14. 1876-'7, c. 41, s. 2.

Whenever a sheriff, coroner, constable, clerk, county or town treasurer, or other officer, shall have collected or received any money by virtue or under color of his office, and on demand shall fail to pay the same to the person entitled to require the payment thereof, the person thereby aggrieved may move for judgment in the superior court against such officer and his sureties for any sum demanded; and the court shall try the same and render judgment at the term when the motion shall be made, but ten days' notice in writing of the motion must have been previously given.

State Bank v. Davenport, 2 D. & B., 45; Guess v. Barbee, 6 Ired., 279; Martin v. Long, 8 Ired., 415; Ellis v. Long, 8 Ired., 513; Butts v. Brown, 11 Ired., 141; O'Leary v. Harrison, 6 Jon., 338; Broughton v. Haywood. Phil., 380; Fell v. Porter, 69—140; State *ex rel.* Bryan v. Rousseau & Brown, 71—194; Cooper v. Williams, 75—94; Smith v. Moore, 79—82; Curtis' Heirs, *ex parte*, 82—435; Wall v. Covington, 83—144; Kerr v. Brandon, 84—128.

Sec. 1890. Damages of twelve per cent. against officers on money unlawfully detained. R. C., c. 78, s. 9. 1819, c. 1002, s. 2. 1869-'70, c. 169, s. 15.

Whenever money received as aforesaid shall be unlawfully detained by any of said officers, and the same shall be sued for in any mode whatever, the plaintiff shall be entitled to recover, besides the sum detained, damages at the rate of twelve per centum per annum from the time of detention until payment.

Broughton v. Haywood, Phil., 380.

Sec. 1891. Irregularity in taking or in the form of bonds, not to invalidate them. R. C., c. 78, s. 9. 1842, c. 61. 1869-'70, c. 169, s. 2.

Whenever any instrument shall be taken by or received under the sanction of the board of county commissioners, or by any person or persons acting under or in virtue of any public authority, purporting to be a bond executed to the state for the performance of any duty belonging to any office or appointment, such instrument, notwithstanding any irregularity or invalidity in the conferring of the office or making of the appointment, or any variance in the penalty or condition of the instrument from the provision prescribed by law, shall be valid and may be put in suit in the name of the state for the benefit of the person injured by a breach of the condition thereof, in the same manner as if the office had been duly conferred or the appointment duly made, and as if the penalty and condition of the instrument had conformed to the provisions of law: *Provided*, that no action shall be sustained thereon because of a breach of any condition thereof or any part of the condition thereof which is contrary to law.

Jordan v. Pool, 5 Ired., 105; Merrill v. McMinn, 7 Ired., 344; Murray v. Jones, 7 Ired., 359; Hoell v. Cobb, 4 Jon., 258; Hunter v. Routledge, 6 Jon., 216; Grier v. Hill, 6 Jon., 572; Shipman v. McMinn, Winst. L., 122; Barnes v. Lewis, 73—138; Prairie v. Jenkins, 75—545; Greensboro' v. Scott, 84—184; Com'rs v. Magnin, 86—285.

CHAPTER FORTY-SEVEN.

PARTITION.

SECTION.

1892. Appointment of commissioners.
1893. Oath of commissioners.
1894. Duty of commissioners.
1895. May employ a surveyor.
1896. Report of commissioners.
1897. Decree of confirmation, effect of.
1898. Where land lies in several counties.
1899. Sums to bear interest.
1900. Sums charged on minors, when payable.
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1903. Sale of real estate; application, how made.
1904. When sale to be ordered, and terms.

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1905. Notice of sale.
1906. Who authorized to sell.
1907. Lands required to be sold for public purposes; procedure.
1908. Proceeds to be secured to certain persons.
1909. Dower may be apportioned.
1910. Compensation of person appointed to sell.
1911. Proceedings when lands lie partly in this state and partly in another.
1912. Court may decree partition.
1913. Commissioners to be appointed, their duty; final decree; court shall compel parties to execute and deliver deeds; when court to declare decree conclusive.
SECTION.
1914. Decree for partition in another state, when enforced in this.
1915. Judge to decide in reference to law passed by another state.
1916. Pay of commissioners.
1917. Partition of personal property, how made.
1918. Confirmation of report.
1919. When sale ordered.
1920. Notice of sale, &c.
1921. Confirmation and effect of deed.
1922. Compensation of commissioners.
1923. Procedure as in special proceedings.

Sec. 1892. Appointment of commissioners. 1868-'9, c. 122, s. 1.

The superior courts on petition of one or more persons claiming real estate as tenants in common, shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common.

Maxwell v. Maxwell, 8 Ired. Eq., 25; Holmes v. Holmes, 2 Jon. Eq., 334; Watson v. Watson, 3 Jon. Eq., 400; Purvis v. Purvis, 5 Jon., 22; Hinton v. Whitehurst, 68—316; Gregory v. Gregory, 69—522; Hinton v. Whitehurst, 71—66; Collins *ex parte*, 71—236; Keener v. Den, 73—132; Covington v. Covington, 73—168; Hinton v. Whitehurst, 73—157; McBryde v. Patterson, 73—478; Williams v. Hassell, 74—434; Medlin v. Steele, 75—154; Hinton v. Whitehurst, 75—178; McEachern v. Gilchrist, 75—196; Parks v. Siler, 76—191; Justice v. Guion, 76—442; Neely v. Neely, 79—478; Bell v. Adams, 81—118; Wahab v. Smith, 82—229; Pope v. Matthis, 83—169; Simpson v. Wallace, 83—477; Kelly v. McCallum, 83—563; Finch v. Baskerville, 85—205; Capps v. Capps, 85—408; R. C., c. 82, cases there cited.

Sec. 1893. Oath of commissioners. 1868-'9, c. 122, s. 2.

The commissioners shall be sworn by a justice of the peace, or other person authorized to administer oaths, to do justice among the tenants in common, in respect to such partition, according to their best skill and ability.

SEC. 1894. Duty of commissioners. 1868-'9, c. 122, s. 3.

The commissioners, who shall be summoned by the sheriff, or any constable, must meet on the premises and partition the same among the tenants in common, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to sub-divide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition.

Wynne v. Tunstall, 1 Dev. Eq., 23; Samuel v. Zachery, 4 Ired., 377; Twitty v. Camp, Phil. Eq., 61; Pope v. Whitehead, 68—191; Pullen v. Heron Mining Co., 71—563; Collett v. Henderson, 80—337; Waring v. Wadsworth, 80—345; Simmons v. Foscue, 81—86; Halso v. Cole, 82—161.

SEC. 1895. May employ a surveyor. 1868-'9, c. 122, s. 4.

The commissioners are authorized to employ the county surveyor, or in his absence, or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners.

SEC. 1896. Report of commissioners. 1868-'9, c. 122, s. 5.

The commissioners, within a reasonable time, not exceeding sixty days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk, and if no exception thereto be filed within twenty days, the same shall be confirmed: *Provided*, that any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: *Provided, further*, that innocent purchasers for full value and without notice shall not be affected thereby.

Nicolar v. Barbrick, 1 D. & B., 257; Ashbee v. Cowell, Busb. Eq., 158; Bost *ex parte*, 3 Jon. Eq., 482; Archibald v. Davis, 4 Jon., 133; In the matter of Yates, 6 Jon. Eq., 306; Baird v. Baird, Phil. Eq., 317; Wood v.

Parker, 63—379; Ruffin v. Cox, 71—253; University v. N. C. Railroad, 76—103; Blue v. Blue, 79—69; Pritchard v. Askew, 80—86; Waring v. Wadsworth, 80—345; Simmons v. Foscue, 81—86; White *ex parte*, 82—377; Alexander v. Robinson, 85—275; Thompson v. Peebles, 85—418; Turpin v. Kelly, 85—399.

Sec. 1897. Decree of confirmation, effect of. 1868-'9, c. 122, s. 6.

Such report when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register, and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns.

Mills v. Witherington, 2 D. & B., 433; Stewart v. Mizell, 8 Ired. Eq., 242; Wright v. McCormick, 69—14; Wright v. McCormick, 77—158; Latta v. Vickers, 82—501; Cheatham v. Crews, 83—313; Ivey v. McKinnon, 84—651.

Sec. 1898. Where land lies in several counties. 1868-'9, c. 122, s. 7.

In cases where the real estate lies in several counties, the petition may be exhibited in the superior court of any one of such counties, in which a part thereof is situated.

Sec. 1899. Sums to bear interest. 1868-'9, c. 122, s. 8.

The sums of money due from the more valuable dividends shall bear interest until paid.

Turpin v. Kelly, 85—399.

Sec. 1900. Sums charged on minors, when payable. 1868-'9, c. 122, s. 9.

When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum the money shall not be payable until such minor arrives at the age of twenty-one years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian shall have assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure.

Jones v. Cameron, 81—154; Turpin v. Kelly, 85—399.

Sec. 1901. Compensation of commissioners; penalty. 1868-'9, c. 122, s. 10.

The commissioners shall be allowed, each of them, the sum of one dollar *per diem* for their services, and if, after

accepting the trust, they or any of them unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable to the penalty of fifty dollars, to be recovered by action by the petitioners.

Sec. 1902. Costs, how paid. 1868-'9, c. 122, s. 11.

The compensation of the commissioners, allowances to parties, the expenses incurred for surveying, and all fees and costs of the proceeding shall be paid as the court may direct.

Sec. 1903. Sale of real estate, application, how made. 1868-'9, c. 122, s. 12.

Application for the sale of real estate held in common may be made by petition preferred in the superior court of the county where such real estate or some part thereof lies, by one or more of the parties interested therein.

Holmes v. Holmes, 2 Jon. Eq., 334; Gregory v. Gregory, 69—522; Kecner v. Dun, 73—132; Allen v. Chappell, 78—238; Trull v. Rice, 85—327: Capps v. Capps, 85—408.

Sec. 1904. When sale to be ordered, and terms. 1868-'9, c. 122, s. 13.

Whenever it appears by satisfactory proof that an actual partition of the lands cannot be made without injury to some or all of the parties interested, the court shall order a sale of the property described in the petition, or any part thereof, on such terms as to size of lots, place or manner of sale, time of credit and security for payment of purchase money, as may be most advantageous to the parties concerned, and, on the coming in of the report of sale and confirmation thereof, and payment of the purchase money, the title shall be made to the purchaser or purchasers at such time and by such person as the court may direct, and in all cases where the persons in possession have been made parties to the proceeding, the court may grant an order for possession.

Stewart v. Mizell, 8 Ired. Eq., 242; Long v. Holt, 68—53; Gregory v. Gregory, 69—522; McBryde v. Patterson, 73—478; Williams v. Hassell, 74—434; Parks v. Siler, 76—191; Jones v. Hemphill, 77—42; Brandon v. Phelps, 77—44; Lord v. Beard, 79—5; Lord v. Meroney, 79—14; Hoff v. Crafton, 79—592; Burgin v. Burgin, 82—196; Macay *ex parte*, 84—59; Trull v. Rice, 85—327; Kemp v. Kemp, 85—491.

Sec. 1905. Notice of sale. 1868-'9, c. 122, s. 14.

The notice of sale, under this proceeding, shall be the same as required by law on sales of real estate by sheriffs on execution.

Sec. 1906. Who authorized to sell. 1868-'9, c. 122, s. 15.

The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding. Such officer or person shall file his report of sale, giving full particulars thereof, within ten days after the sale in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed: *Provided*, that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: *Provided, further*, that innocent purchasers for full value and without notice shall not be affected thereby.

The Judges v. Deans, 2 Hawks, 93; McNeil v. Morrison, 63—508; Havens v. Lathene, 75—505; Cox v. Blair, 76—78; Kerr v. Brandon, 84—128; McLean v. Patterson, 84—427.

Sec. 1907. Lands required to be sold for public purposes; procedure. 1868-'9, c. 122, s. 16.

When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands, or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof; whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary, in the manner and on the terms it deems expedient. And the expenses, fees and costs of this proceeding shall be paid in the discretion of the court.

Sec. 1908. Proceeds to be secured to certain persons. R. C., c. 82, s. 7. 1868-'9, c. 122, s. 17.

When a sale is made under this chapter, and any party to the proceedings be an infant, a married woman, *non compos mentis*, imprisoned, or beyond the limits of the state, it shall be the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative.

Scull v. Jernigan, 2 D. & B. Eq., 144; Gillespie v. Foy, 5 Ired. Eq., 280; Dudley v. Winfield, Busb. Eq., 91; Bateman v. Latham, 3 Jon. Eq., 35; Jones v. Edwards, 8 Jon., 336; Allison v. Robinson, 78—222; Hall v. Short, 81—273; Burgin v. Burgin, 82—196.

Sec. 1909. Dower may be apportioned. 1868-'9, c. 122, s. 18.

When there is dower or right of dower on any land, petitioned to be sold under this chapter, the woman entitled to dower or right of dower therein, may join in the petition; and on a decree of sale, the interest of one-third of the proceeds shall be secured and paid to her annually; or in lieu of such annual interest, the value of an annuity of six per cent. on such third, during her probable life, shall be ascertained and paid out of the proceeds to her absolutely.

Sec. 1910. Compensation of person appointed to sell. 1868-'9, c. 122, s. 19.

In sales of real estate under this chapter, the allowance for services, in making sale and title, to the officer or person appointed to sell, shall be as follows: For sales of five hundred dollars or less, not more than ten dollars; for sales of two thousand and not less than five hundred dollars, not more than two per centum; and, when the allowance shall amount to forty dollars, any additional compensation shall not exceed the rate of one per centum.

Sec. 1911. Proceedings, when lands lie partly in this state and partly in another. 1868-'9, c. 122, s. 20.

Whenever on the death of any person, his lands in this state, and in another state, shall descend or be devised to several persons, who, by the law of this and the other state, shall hold, in the lands, undivided estates as tenants in common, or by any other undivided tenancy, and such heirs or devisees cannot, without suit, have partition for want of consent, or because of inability in any of the co-tenants, then, if such deceased person shall have been at the time of his death, a resident of the state, or not then a resident of any of the states, in which his lands lie, and in the last case the most valuable part of such lands shall lie in this state, such heir or devisee, or any person claiming under him, may file a petition in the superior court for the county where the deceased resided at his death, or where any part of the land lies in this state, setting forth all the lands in which the plaintiff has an undivided estate, without and within the state, described by their names and boundaries, or by the adjoining tracts, and also the estate the deceased had in them, and the supposed value of the lands in each state, and the share, in severalty, to which the plaintiff and each

of his co-tenants is entitled under the laws of the several states, and praying for partition to be made of all the tracts, according to their respective interests, and the material facts set forth in the petition shall be verified by the affidavit of the plaintiff or his guardian, or other person, at the discretion of the court; and all persons concerned in interest in the lands shall be made parties, according to the practice of the superior court in this state.

Sec. 1912. Court may decree partition. 1868-'9, c. 122, s. 21.

On the hearing of the petition, the court may decree a partition; and shall allot in severalty to each tenant his just share of the lands, according to the value of his interest in the same, by the laws of the several states, in which they are situated.

Sec. 1913. Commissioners to be appointed, their duty; final decree; court shall compel parties to execute and deliver deeds; when court to declare decree conclusive. 1868-'9, c. 122, s. 22.

The court making such decree shall issue a commission to three respectable freeholders in this or any state where any part of the land may lie, unconnected by blood or interest with the parties, directing them or a majority of them, to make partition between the co-tenants, plaintiffs and defendants in said petition, and to assign each his respective share in the value, in severalty, in any tract or tracts, in any or all the states; and before making the allotment the commissioners shall make a valuation of all the lands held by the co-tenants in all the said states; and where they cannot, without injury to the value of some shares, make an exact division of the lands, they shall charge the more valuable dividends with money to be paid to the tenants of a less valuable dividend to make equality of partition, and they shall report their proceedings as they may be directed, and the report shall contain a valuation of all the estate in this and the other states, and the division among the co-tenants according to such valuation; and the court may confirm such report, or on sufficient cause shown, may correct and alter, or set it aside and order a new commission; and where any sum is charged upon a more valuable dividend, the court may direct, if the tenant taking such a dividend be an infant, that the sum charged shall not be paid till a future day, and the same shall bear interest at a rate not greater than allowed in this state: *Pro-*

vided, that the tenant of the larger dividend may discharge himself from accruing interest by paying the whole amount due at any time; and the sum due from the greater dividend shall be a charge on the land into whose hands soever it may come, although it may be taken without notice; and the court shall, upon the confirmation of any report of the commissioners, make a final decree. And where all the parties are within the jurisdiction of this court the court shall, by the usual proceedings, direct and compel the parties to execute and deliver deeds and assurances, sufficient, by the laws of this state and the other states, to give the partition full force and validity in all the states; and in case any of the parties are under such disabilities that they cannot execute such assurances, or are without the jurisdiction of the court, then the court, upon receiving evidence from the plaintiff, that, by a law of the other state in which lie the parts of the lands described in the petition to be without this state, the decree can have effect thereon, shall direct the decree to be enrolled, and a copy of it shall be registered in the register's office of all the counties within this state, where any of the lands lie; and a copy shall also be furnished to the plaintiff or other party interested, duly certified, to the end that, as to the lands without this state, it may be carried into effect in the state in which the said lands may be, in such manner as said state may direct; and on satisfactory evidence being made to the court in this state that the decree may have full effect by the law of such other state, the court in this state shall by its decree declare the partition in the land in this state to be final and conclusive; and the decree shall be firm and irreversible, as hereinafter provided; and shall, on registration as aforesaid, pass to the tenants the title in severalty to the lands in this state, in the same manner as if all the lands mentioned in the decree were situate within this state.

Sec. 1914. Decree for partition in another state when enforced in this state. 1868-'9, c. 122, s. 23.

Where real estate may be partly in this state and partly in another state, and the deceased person from whom it was derived by descent or devise, was, at the time of his death, a resident of some other state, or was a resident of none of the states in which he held lands, and in this last case, the lands of which he was seized in this state were of less value than the lands of which he was seized in any other state, the courts of the state in which such

deceased person had his residence at his death, or in which he held lands of greater value than those he held in this state shall have full power and authority, under any law passed by the legislature of such state, substantially in accordance with the provisions herein made on this subject, to decree partition of the lands in this state, together with those within such other state, in the same manner as if the whole real estate were within the jurisdiction of such court, and in the same manner as the courts in this state are directed and authorized to do by the preceding section, as to the lands of deceased persons resident here at their death, or having lands of greater value here than in any other state; and in case any person having an interest in the final decree, made as aforesaid in another state, as to lands in this state, shall, within twelve months after the same may be entered up in the courts of said state, produce the records and proceedings of such courts of record duly certified to a superior court of any county in this state, where any of the lands of this state lie, the court, on petition *ex parte* in such case, shall order such proceedings to be entered of record in the court of this state, and order that the said decree shall be of the same force and validity as if it had been a decree of the court in this state in which the petition is filed, upon a petition and regular proceedings had thereon, and the decree of the court of such other state, and the proceedings on it by petition in the superior court in this state confirming it and giving it validity, being enrolled in the said court of this state and registered in all the counties where the lands lie in this state, shall pass the lands in this state according to the decree, and shall vest estates in severalty therein declared, as to said lands, in the same manner and with the same effect in law, as if the lands in this state had been so allotted on a petition for partition, according to the provisions of the former sections of this chapter.

Sec. 1915. Judge to decide in reference to law passed by another state. 1868-'9, c. 122, s. 24.

Where a copy of a decree and proceedings of a suit in any other state shall be produced, as in the preceding section, and also when it is necessary for a superior court to be certified that its decree of a partition of lands without this state and within the territory of another state, can have effect therein, it shall be competent for the judge of the superior court before which the existence of a law in such other state is to be proved, to decide

whether any act of the legislature of such state has been passed.

Sec. 1916. Pay of commissioners. 1868-'9, c. 122, s. 26.

The commissioners appointed to divide lands lying in this and another state, shall be entitled to three dollars per day for their services; which, with all fees, expenses and costs, shall be paid as the court may direct.

Sec. 1917. Partition of personal property, how made. 1868-'9, c, 122, s. 27.

When any persons entitled as tenants in common of personal property, desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within twenty days after notice of their appointment, to divide such property as nearly equal as possible among the tenants in common.

Powell v. Hill, 64—169; Grim v. Wicker, 80—343.

Sec. 1918. Confirmation of report. 1868-'9, c. 122, s. 28.

The commissioners shall report their proceedings under the hands of any two of them, and file their report in the office of the clerk of the superior court within five days after the partition was made, and if no exception thereto be filed within twenty days, the same shall be confirmed: *Provided*, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: *Provided, further*, that innocent purchasers for full value and without notice shall not be affected thereby

Sec. 1919. When sale ordered. 1868-'9, c. 122, s. 29.

If a division of such personal property cannot be had without injury to some of the parties interested, and a sale thereof be deemed necessary, the court shall order a sale to be made by some officer of the court or other competent person; who shall file his report of sale in the office of the clerk of the court within ten days after sale, and if no exception thereto be filed within twenty days, the same shall be confirmed: *Provided*, that any party, after confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: *Provided, further*, that innocent purchasers

for full value and without notice shall not be affected thereby.

Power v. Hill, 64—169; Miller v. Feezor, 82—192; Kerr v. Brandon, 84—128.

Sec. 1920. Notice of sale, &c. 1868-'9, c. 122, s. 30.

The sale shall be made after twenty days' notice, by advertisement in three or more public places in the county, and shall be on such terms as the court may direct.

Sec. 1921. Confirmation and effect of deed. 1868-'9, c. 122, s. 31.

Upon confirmation of the report, the court shall secure to each tenant in common his ratable share in severalty of the proceeds of sale; and the deed of the officer or person appointed to sell, when such deed is directed to be made, shall convey to the purchaser such title and estate in the property as the tenants in common had.

Sec. 1922. Compensation of commissioners. 1868-'9, c. 122, s. 32.

The commissioners nominated to make a division, and the officer or person appointed to make a sale of personal property held in common, shall receive for their services a sum to be fixed by the court and taxed in the bill of fees and costs, all of which shall be paid by the parties in such manner as the court may decree.

Sec. 1923. Procedure as in special proceedings. 1868-'9, c. 122, s. 33.

The procedure in all cases by petition, under this chapter, shall be the same, in all respects, as prescribed by law in other special proceedings, except as modified by this chapter.

CHAPTER FORTY-EIGHT.

PROCESSIONING.

SECTION.
1924. Processioners of land appointed by board of county commissioners.
1925. Oath and term of office.
1926. Owners to file petition.
1927. Processioner to make report and return it to clerk, &c., to be recorded.
1928. When line disputed, and processioner forbidden to proceed, he shall report to court; five freeholders then appointed with processioner.
1929. Person having land processioned deemed owner; who not bound by processioning.
1930. Appeal allowed.
1931. Surveyors deemed processioners; their powers.

Sec. 1924. Processioners of land appointed by board of county commissioners. R. C., c. 88, s. 1. 1792, c. 365, ss. 1, 2, 4. 1804, c. 670, s. 2. 1869-'70, c. 30.

The board of county commissioners shall appoint one or more persons capable of surveying to act as processioner in their respective counties, and any processioner, when there are several, may act alone.

Sec. 1925. Oath and term of office. R. C., c. 88, s. 2. 1792, c. 365, s. 3.

Every processioner shall take an oath of office, and shall continue in office until he resign or remove from the county, or be displaced by the board of county commissioners.

Sec. 1926. Owners to file petition.

The proprietor of any land, who may desire to have it processioned, shall file his petition in the superior court of the county in which some part of the land may be situated, setting forth the line or lines in dispute, and making defendants all persons whose lands adjoin his; the clerk shall thereupon issue a summons to the defendants as in other cases of special proceeding. Upon return of the summons served, the clerk shall issue an order to a processioner or county surveyor of his county to procession said land according to the provisions of this chapter. Before the processioner shall act, the petitioner shall cause to be served on each defendant a written notice of the time when the processioner will attend to procession

said land, which shall be served five days prior thereto; a copy of said notice, signed by the person serving it, shall be delivered to the processioner.

Robbins v. Windley, 3 Jon. Eq., 286; Robbins v. Jackson, 63—309.

Sec. 1927. Processioner to make report and return it to clerk, &c.; to be recorded by clerk. R. C., c. 88, s. 5. 1792, c. 365, ss. 6, 7, 8.

The processioner shall make a plot of each tract of land processioned, and a report which shall contain the claimant's name, the quantity of acres, the corners, length, and course of each line, and which shall be signed and returned with a copy of the several notices, to the clerk of the superior court of the county for which the processioner is appointed, and unless exception thereto be filed within ten days, the same shall be confirmed; and the same, with the plot, shall be recorded by the clerk in a bound book kept for that purpose, and filed together in his office; and the fees of the processioner and clerk shall be paid by the proprietor of the land.

Willson v. Shufford, 3 Mur., 504; Cansler v. Hoke, 3 Dev., 268; Carpenter v. Whitworth, 3 Ired., 204; Matthews v. Matthews, 4 Ired., 155; Hoyle v. Wilson, 7 Ired., 467.

Sec. 1928. How processioner to proceed in cases of disputed lines. 1874-'5, c. 40.

When a line is disputed and the processioner is forbidden by any person interested in the event of the processioning, to proceed further in running and marking the same, he shall within ten days report the matter, stating truly all the circumstances of the case, with the name of the person who forbade further proceeding, to the superior court of the county, and the said court shall thereupon as well as when exception shall be filed as provided in the preceding section, appoint five respectable freeholders, a majority of whom shall appear with the processioner on the line or lines so disputed and proceed, after being sworn by the processioner or some justice of the peace to do equal right and justice between the contending parties, to establish such disputed line or lines as shall appear to them right, and procession the same and make report of their proceeding within thirty days to the superior court, and unless exception thereto be filed within ten days, the same shall be confirmed and recorded as above directed: *Provided*, that either party may call in any other surveyor to act with the proces-

sioner, and complete such survey, and the party against whom the decision is made shall pay all costs.

Carpenter v. Whitworth, 3 Ired., 204; Miller v. Heart, 4 Ired., 23; Robbins *ex parte*, 63—309; Britt v. Benton, 79—177.

Sec. 1929. Person having land processioned, deemed owner; who not bound by processioning. R. C., c. 88, s. 7. 1723, c. 14, ss. 1, 2.

Every person whose lands shall be procesioned to him, according to the directions of this chapter, shall be deemed and adjudged to be the sole owner thereof; and, upon any suit commenced for such lands, the party in possession may plead, and give the proceedings under this chapter in evidence: *Provided*, that the processioning of the lands of a tenant for life shall not bar or preclude the heir, or other person in reversion or remainder; neither shall any processioning bar or preclude *femes covert*, persons under age, *non compos mentis*, imprisoned, or out of the state; but all such persons may sue for, and dispute the title and bounds of any such lands, if they will commence and prosecute their suit within the time limited by law, after the removal of such disability.

Britt v. Benton, 79—177.

Sec. 1930. Appeal allowed.

Any party shall have the right of appeal as in other cases of special proceedings.

Sec. 1931. Surveyors deemed to be processioners; their powers. 1872-'3, c. 57, ss. 1, 2.

The county surveyors of the several counties shall be processioners in their respective counties, and shall have all the powers, and shall be subject to all the rules, regulations and restrictions of processioners, as provided in this chapter.

CHAPTER FORTY-NINE.

RAILROAD AND TELEGRAPH COMPANIES.

RAILROADS.

SECTION.
1932. Rules for forming railroad companies; name of company; route of railroad; capital stock; names and residences of directors; articles to be filed in the office of secretary of state; when declared a corporation.
1933. Stock must be subscribed before articles are filed; affidavit made by directors, and payment of fifty dollars to secretary of state for common school purposes.
1934. Presumptive evidence of incorporation.
1935. Directors to open books of subscription.
1936. President and directors; term of office; vote by shares; vacancies; qualification of officers; title acquired; when a corporation.
1937. Officers appointed by the president, &c.
1938. Payment by instalments; stock forfeited.
1939. Insufficiency of stock to be increased; meeting of stockholders; time, place and object of meeting to be publicly notified.
1940. Liabilities of stockholders; execution against stockholders.
1941. Stockholders liable for their wards.
1942. Indebtedness of laborers, how collected; time specified for action.

SECTION.
1943. Right to acquire title to real estate.
1944. Petition presented, character of; names and places of residence to be given; copy of petition must be sent to the superior court;
(1) Persons residing in this state must have service personally;
(2) Non-residents having agents, public notice to be given;
(3) Guardians notified for infants;
(4) Respecting idiots;
(5) Parties unknown are publicly notified by papers in the state;
(6) Duty of court to appoint guardian for persons of unsound mind; security required.
(7) Cases not provided for must be directed by superior court.
1945. Allegations made against petition; freeholders appointed to appraise estate.
1946. Commissioners to be qualified; to issue subpœnas, administer oaths, to adjourn, to appraise and report under hands and seals; either side may file exceptions before clerk; may appeal; upon payment of sum appraised, company to enter and take possession during appeal; final judgment; court

SECTION.
to have power to enforce judgment; land to belong to company during its corporate existence; possession of land not condemned to be surrendered to owner, &c.; costs at the discretion of judge or court.
1947. Court may adjudge rights of conflicting claimants.
1948. Attorney appointed by court to protect the rights of parties unknown or non-residents.
1949. Court must take cognizance of all proceedings not provided for in this chapter.
1950. Change of ownership not to affect appraisal.
1951. Defective title, how remedied.
1952. Maps of route to be made; notice given to occupants of land; superior court petitioned, when route is objectionable; no alteration of route allowable, unless, &c.; time of certificate; compensation.
1953. Discretionary with directors to change route of railroad for its improvement; certificate of alteration to be filed in clerk's office; no change made in city, unless sanctioned by majority of corporators; compensation for lands.
1954. Highways, turnpikes, &c., to prove no obstruction to railroads.
1955. Power of secretary of state and town authorities in certain cases to grant land.
1956. Superior court empowered to authorize guardians to sell land of insane persons for corporate purposes; court may appoint special guardian; terms of sale, &c.; report to court.

SECTION.
1957. Corporate pwers:
(1) To cause survey, &c.;
(2) Voluntary grants;
(3) Holding property;
(4) Grade of road;
(5) Obstructions not allowable;
(6) Crossing, intersecting, &c., of railroads;
(7) Right to carry persons and property;
(8) Erection of necessary buildings;
(9) Regulation of time and manner of transportaion;
(10) Manner of raising funds.
1958. Railroad servants to wear a badge.
1959. Annual report to be made, verified and filed in the secretary of state's office; statements to be made.
1960. Penalty for failing to report.
1961. General assembly may reduce profits upon a road.
1962. Passengers violating rules of corporation may be ejected.
1963. Rules for transportation.
1964. Railroads, &c., to receive and forward freights; penalty for refusal.
1965. To keep a list of freight charges posted; not to be increased without notice; penalty.
1966. Discrimination in freight unlawful; penalty; special contracts may be made.
1967. Freight unshipped for five days; penalty.
1968. Pooling freights and rebates forbidden; penalty.
1969. Attorney-general to institute suits in certain cases.
1970. Check and duplicate for baggage; corporation liable for loss of baggage.
1971. How trains to be arranged; penalty.

SECTION.
1972. Engineer intoxicated, a misdemeanor.
1973. Railroad companies prohibited from loading or unloading freight cars on Sunday, and also from running locomotives or cars, except such as shall be run for carrying passengers or the mails.
1974. Injuries to railroad, misdemeanor.
1975. Railroads to construct cattle-guards; failure, misdemeanor.
1976. How actions may be brought.
1977. Chart of railroad to be made and filed.
1978. Injury to passengers not complying with regulations.
1979. Unlawful to enter railroad cars after being forbidden; misdemeanor.
1980. Railroads not completed in specified time, corporate existence ceases.
1981. General assembly may annul any corporation.
1982. Rights and privileges.
1983. Railroads embracing the same location of line.
1984. Location of railroad in an adjoining state.
1985. Unclaimed freight, publication thereof.
1986. Unclaimed freight perishable, what done.
1987. Unclaimed funds to go to the University.
1988. Police force may be established.
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SEC. 1932. Rules for forming railroad companies; name of company; route of railroad; capital stock; names and residences of directors; articles to be filed in the office of secretary of state; when declared a corporation. 1871-'2, c. 138, s. 1.

Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is constructed or maintained and operated, the length of such road as near as may be, and the name of each county in this state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than five thousand dollars for every mile of road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of six directors of the company, who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the succeeding section, such articles of association may be filed in the office of the secretary of state, who shall indorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in

such articles of association, and shall possess the powers and privileges granted to corporations by this chapter.

Sec. 1933. Stock must be subscribed before articles are filed; affidavit made by directors; and payment of fifty dollars to secretary of state for common school purposes. 1871-'2, c. 138, s. 2.

Such articles of association shall not be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, and five per cent. paid thereon in good faith, and in cash, to the directors named in said articles of association; nor until there is indorsed thereon or annexed thereto an affidavit made by at least three of the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed and five per cent. paid in cash thereon as aforesaid, and that it is intended in good faith to construct or to maintain and operate the road mentioned in such articles of association, which affidavit shall be recorded with the articles of association, as aforesaid; nor until said directors shall pay to the secretary of state the sum of fifty dollars, which said sum shall be paid by the secretary of state to the state treasurer, and by him placed to the credit of the public school fund.

Sec. 1934. Presumptive evidence of incorporation. 1871-'2, c. 138, s. 3.

A copy of any articles of association filed and recorded in pursuance of this chapter and of the record thereof with a copy of the affidavit aforesaid indorsed thereon or annexed thereto, and certified to be a copy by the secretary of state, shall be presumptive evidence of the incorporation of such company, and of the facts therein stated.

Sec. 1935. Directors to open books of subscription. 1871-'2, c. 138, s. 4.

When such articles of association and affidavit are filed and recorded in the office of the secretary of state, the directors named in said articles of association may, in case the whole of the capital stock is not before subscribed, open books of subscription to fill up the capital stock of the company in such places and after giving such notice as they may deem expedient, and may continue to receive subscriptions until the whole of the

capital stock is subscribed; at the time of subscribing every subscriber shall pay to the directors five per cent. on the amount subscribed by him in money, and no subscription shall be received or taken without such payment.

SEC. 1936. President and directors, term of office; vote by shares; vacancies; qualification of officers; title acquired; when a corporation. 1871-'2, c. 138, s. 5.

There shall be a board of six directors and a president of every corporation formed under this chapter to manage its affairs; and said directors and president shall be chosen annually by a majority of the votes of the stockholders voting at such election, in such manner as may be prescribed in the by-laws of the corporation, and they may and shall continue in office until others are elected in their places. In the election of directors and president each stockholder shall be entitled to one vote personally or by proxy on every share held by him thirty days previous to any such election, and vacancies in the board of directors shall be filled in such manner as shall be prescribed by the by-laws of the corporation. The inspectors of the first election of directors shall be appointed by the board of directors named in the articles of association. No person shall be a director or president unless he shall be a stockholder owning stock absolutely in his own right and qualified to vote for directors at the election at which he shall be chosen; and at every election of directors the books and papers of such company shall be exhibited to the meeting if a majority of the stockholders present shall require it. And whenever the purchaser or purchasers of real estate, track and fixtures of any railroad corporation which has heretofore been sold or may be hereafter sold by virtue of any mortgage executed by such corporation or execution issued upon any judgment or decree of any court shall acquire title to the same in the manner prescribed by law, such purchaser or purchasers may associate with him and them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and their associates shall thereupon be a new corporation with all the powers, privileges and franchises, and be subject to all the provisions of this chapter.

Eliason v. Coleman, 86—235.

Sec. 1937. Officers appointed by the president, &c. 1871-'2, c. 138, s. 6.

The president and directors shall appoint a treasurer and secretary and such other officers and agents as shall be prescribed by the by-laws.

Sec. 1938. Payment by instalments; stock forfeited. 1871-'2, c. 138, s. 7.

The directors may require the subscribers to the capital stock of the company to pay the amount by them respectively subscribed in such manner and in such instalments as they may deem proper. If any stockholder shall neglect to pay any instalment as required by a resolution of the board of directors, the said board shall be authorized to declare his stock and all previous payments thereon forfeited for the use of the company, but they shall not declare it so forfeited until they shall have caused a notice in writing to be served on him personally, or by depositing the same in the post-office, properly directto him at the post-office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in said notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited for the use of the company, which notice shall be served as aforesaid at least sixty days previous to the day on which payment is required to be made.

Sec. 1939. Insufficiency of stock to be increased; meeting of stockholders; time, place and object of meeting to be publicly notified. 1871-'2, c. 138, s. 9.

In case the capital stock of any railroad company is found to be insufficient for constructing and operating its road, such company may, with the concurrence of two-thirds in amount of all its stockholders, increase its capital stock from time to time to any amount required for the purposes aforesaid. Such increase must be sanctioned by a vote in person or by proxy of two-thirds in amount of all the stockholders of the company, at a meeting of such stockholders called by the directors of the company for that purpose, by a notice in writing to each stockholder, to be served on him personally or by depositing the same, properly folded and directed to him, at the post-office nearest his usual place of residence, in the post-office at least twenty days prior to such meeting. Such notice must state the time and place of the meeting and its object and the amount to which it is proposed to

increase the capital stock. The proceedings of such meeting must be entered on the minutes of the proceedings of the company, and thereupon the capital stock of the company may be increased to the amount sanctioned by a vote of two-thirds in amount of all the stockholders of the company aforesaid.

SEC. 1940. Liabilities of stockholders; execution against stockholders. 1871-'2, c. 138, s. 10.

Each stockholder of any such company shall be individually liable to the creditors of such company to an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company until the whole amount of the capital stock so held by him shall have been paid to the company, and all the stockholders of any such company shall be jointly and severally liable for the debts due or owing to any of its laborers and servants, other than contractors, for personal services for thirty days' service performed for such company, but shall not be liable to an action therefor before an execution shall be returned unsatisfied in whole or in part against the corporation, and the amount due on such executions shall be the amount recoverable with costs against such stockholders; before such laborer or servant shall charge such stockholder for such thirty days' services he shall give him notice in writing within twenty days after the performance of such service that he intends so to hold him liable and shall commence such action therefor within thirty days after the return of such execution unsatisfied as above mentioned; and every such stockholder, against whom any such recovery by such laborer or servant shall have been had, shall have a right to recover the same of the other stockholders in said corporation in ratable proportion to the amount of the stock they shall respectively hold with himself.

SEC. 1941. Stockholders liable for their wards. 1871-'2, c. 138, s. 11.

No person holding stock in any such company as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholders of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estates in the hands of such executor, administrator, guardian or trustee, shall be liable in like manner and to the same extent as the

testator or intestate or the ward or person interested in such trust fund would have been if he had been living and competent to act and hold the same stock in his own name.

Sec. 1942. Indebtedness of laborers, how collected; time specified for action. 1871-'2, c. 138, s. 12.

As often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for thirty or less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided, and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the labor was performed for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer, or his attorney, and shall be served on an engineer, agent or superintendent employed by said company having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided.

Sec. 1943. Right to acquire title to real estate. 1871-'2, c. 138, s. 13.

In case any company formed under this chapter, or by special act of the general assembly, is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this chapter.

Holloway v. R. R. Co., 85—452.

Sec. 1944. Petition presented; character of; names and places of residence to be given; copy of petition must be sent to superior court. 1871-'2, c. 138, s. 14.

For the purpose of acquiring such title the said com-

pany, or the owner of the land sought to be condemned, may present a petition praying for the appointment of commissioners of appraisal to the superior court of the county in which the real estate described in the petition is situated. Such petition shall be signed and verified according to the rules and practice of such court; and if filed by the company, it must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly incorporated, and that it is the intention of the company in good faith to construct and finish a railroad from and to the places named for that purpose in its articles of association, or in its charter; that the whole capital stock of the company has been in good faith subscribed, as required by this chapter, or by the terms of its charter; that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed such certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed; that the land described in the petition is required for the purpose of constructing or operating the proposed road; and that the company has not been able to acquire title thereto, and the reason of such inability. The petition, whether filed by the company or the owner of the land, must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have, estates or interests in the said real estate; and if any such persons are infants, their ages, or as near as may be, must be stated; and if any such persons are idiots or persons of unsound mind or are unknown, that fact must be stated, together with such other allegations and statements of liens or incumbrances on said real estate as the company or the owner may see fit to make. A copy of such petition, with a notice of the time and place, when and where, the same shall be heard by the superior court, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the hearing of the same by the said court.

(1) PERSONS RESIDING IN THIS STATE MUST HAVE SERVICE PERSONALLY.

If the person on whom such service is to be made

resides in this state, and is not an infant, idiot or person of unsound mind, service of a copy of such petition and notice must be made on him or his agent or attorney, authorized to contract for the sale of the real estate described in the petition, personally or by leaving the same at the usual place of residence of the person on whom service must be made as aforesaid, with some person of suitable age;

(2) NON-RESIDENTS HAVING AGENTS, PUBLIC NOTICE TO BE GIVEN.

If the person on whom such service is to be made resides out of the state, and has an agent residing in this state, authorized to contract for the sale of the real estate described in the petition, such service may be made on such agent or on such person personally, out of the state, or it may be made by publishing the notice, stating briefly the object of the application, and giving a description of the land to be taken, in a paper, if there be one, printed in the county, in which the land to be taken is situate, once in each week for one month next previous to the presentation of the petition, and if there be no paper printed in said county, then in some paper published in the city of Raleigh. And if the residence of such person residing out of this state, but in any of the United States or any of the British colonies in North America, is known, or can by reasonable diligence be ascertained, the company must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed to such person at the post-office nearest his place of residence, at least thirty days before presenting such petition to the court, and pay the postage chargeable thereon in the United States;

(3) GUARDIANS NOTIFIED FOR INFANTS.

If any person on whom such service is to be made is under the age of twenty-one years and resides in this state, such service shall be made as aforesaid, on his general guardian; or if he has no such guardian, then on such infant personally, if he is over the age of fourteen years; and if under that age then on the person who has the care of, or with whom such infant resides;

(4) RESPECTING IDIOTS.

If the person on whom such service is to be made is an idiot or of unsound mind, and resides in this state, such service may be made on the committee of his person or estate; or if he has no such committee, then on the person who has the care and charge of such idiot or person of unsound mind;

(5) PARTIES UNKNOWN ARE PUBLICLY NOTIFIED BY PAPERS IN THE STATE.

If the person on whom such service is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court, by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a description of the land to be affected by the proceedings, in a paper, if there be one, printed in the county where the land is situate, once in each week for one month previous to the presentation of such petition, and if there be no paper printed in said county, then in a newspaper printed in the city of Raleigh;

(6) DUTY OF COURT TO APPOINT GUARDIAN FOR PERSONS OF UNSOUND MIND; SECURITY REQUIRED.

In case any party to be affected by the proceedings is an infant, idiot, or of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings, but if a general guardian or committee has been appointed for such person in this state, it shall be the duty of such general guardian or committee to attend to the interests of such infant, idiot, or person of unsound mind, and the court may require such security to be given by such general or special guardian or committee as it may deem necessary to protect the rights of such infant, idiot, or person of unsound mind, and all notices required to be served in the progress of the proceedings may be served on such general or special guardian or committee;

(7) CASES NOT PROVIDED FOR, MUST BE DIRECTED BY SUPERIOR COURT.

In all cases not herein otherwise provided for, services of orders, notices, and other papers in the special proceedings authorized by this chapter may be made as the superior court shall direct.

McIntyre v. R. R. Co., 67—278.

Sec. 1945. Allegations made against petition; freeholders appointed to appraise estate. 1871-'2, c. 138, s. 15.

On presenting such petition to the superior court as aforesaid, with proof of service of a copy thereof, and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings, may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners.

R. R. Co. v. Wicker, 74—220; Holloway v. R. R. Co., 85—452.

Sec. 1946. Commissioners to be qualified to issue subpœnas, administer oaths, to adjourn, to appraise and report under hands and seals; either side may file exceptions before clerk; may appeal; upon payment of sum appraised, company to enter and take possession during appeal; final judgment; court to have power to inforce judgment; land to belong to company during its corporate existence; possession of land not condemned to be surrendered to owner, &c.; costs at the discretion of judge or court. 1871-'2, c. 138, ss. 16, 17, 18.

The commissioners, before entering upon the discharge of their duties shall take and subscribe an oath that they will fairly and impartially appraise the lands mentioned in the petition. Any one of them may issue subpœnas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet except by the appointment of the court or pursuant to adjournment,

they shall cause ten days' notice of such meeting to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them; and in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad. They shall report the same to the court under their hands and seals, and within twenty days after filing the same any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the supreme court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said company, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said company may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeals, and until the final judgment rendered on said appeal or appeals. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings, shall be in favor of the company, and upon the payment, by said company of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event, all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company aforesaid. A certified copy of said judgment under the seal of the court shall be registered in the county where the land is situate, and a copy of the same, or the original certified, may be given in evidence in all actions and proceedings, as deeds for land are now allowed to be read in evidence. All real estate acquired by any company under and pur-

suant to the provisions of this chapter, for the purpose of its incorporation, shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of said company, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to said company. And the company shall have no right to hold said land not condemned, but shall surrender the possession of the same on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. The costs in this proceeding shall be paid by either party as the judge or court in its discretion shall adjudge. The commissioners shall each be entitled to three dollars per day for each day they are engaged in the performance of their duties, and the same shall be taxed in the bill of costs.

Plott v. R. R. Co.,65—74; R. R. Co. v. Wicker, 74—220; R. R. Co. v. Phillips, 78—49; Telegraph Co. v. R. R. Co., 83—420; R. R. Co. v. R. R. Co., 83—498; Holloway v. R. R. Co., 85—452; Com'rs v. Cook, 86—18.

Sec. 1947. Court may adjudge rights of conflicting claimants. 1871-'2, c. 138, s. 19.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made.

Sec. 1948. Attorney appointed by court to protect the rights of parties unknown or non-residents. 1871-'2, c. 138, s. 20.

The court shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services, which shall be taxed in the bill of costs. The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this chapter as may be necessary, or

to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse, neglect to serve or be incapable of serving.

Sec. 1949. Court must take cognizance of all proceedings not provided for in this chapter. 1871-'2, c. 138, s. 21.

In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts.

Sec. 1950. Change of ownership not to affect appraisal. 1871-'2, c. 138, s. 22.

When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or any interest therein or of the subject matter of the appraisal, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made.

Sec. 1951. Defective title, how remedied. 1871-'2, c. 138, s. 23.

If at any time after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency, and until the final conclusion of such new proceedings, and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum or giving security as the court may direct to pay the compensation therefor when finally ascertained, and in every such case the party interested in

such real estate may conduct the proceedings to a conclusion if the company delays or omits to prosecute the same.

Sec. 1952. Maps of route to be made; notice given to occupants of land; superior court petitioned when route is objectionable; no alteration of route allowable, unless, &c.; time of certificate; compensation. 1871-'2, c. 138, s. 24.

Every company, before constructing any part of their road into or through any county named in their articles of association or charter, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company or a majority of the directors and filed in the office of the clerk of each county through which the road is to be made. The company shall give a written notice to all actual occupants of the land over which the route of the road is so designated and which has not been purchased by or given to the company of the route so designated. Any party feeling aggrieved by the proposed location may, within fifteen days after receiving notice as aforesaid, apply to the superior court by petition duly verified, setting forth his objections to the route designated, and the said court may, if it considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and after hearing the parties, to affirm or alter the same as may be consistent with the just rights of all parties and the public, but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall within thirty days after their appointment be made and certified by them and the certificate filed in the office of the county clerk. Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment, and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid.

Sec. 1953. Discretionary with directors to change route of railroad for its improvement; certificate of alteration to be filed in clerk's office; no change made in city, unless sanctioned by majority of corporators thereof; compensation for lands. 1871-'2, c. 138, s. 25.

The directors of every company may by a vote of two-

thirds of their whole number at any time alter or change the route or any part of the route of their road if it shall appear to them that the line can be improved thereby; and they shall make and file in the clerk's office of the proper county a survey, map and certificate of such alteration or change; and shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or village after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the corporate authorities of said city or trustees of said village; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. All the provisions of this chapter relative to the first location and to acquiring title to land shall apply to every such new or altered portion of the route.

N. C. R. R. v. R. R. Co., 83—489.

Sec. 1954. Highways, turnpikes, &c., to prove no obstruction to railroads. 1871-'2, c. 138, s. 26.

Whenever the track of a railroad constructed by a company shall cross a railroad, a highway, turnpike or plankroad, such highway, turnpike or plankroad may be carried under or over the track as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plankroad desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such road, highway, turnpike or plankroad on such new line as may be deemed requisite by the directors. Unless the lands so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in this chapter for acquiring title to real estate, and duly made by said corporation to the owners and persons interested in such land. The same when so taken shall become a part of such intersecting highway, turnpike or plankroad in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plankroad may be held for highway purposes.

Sec. 1955. Power of secretary of state and town authorities in certain cases to grant land. 1871-'2, c. 138, s. 27.

The secretary of state shall have power to grant to any railroad company, any land belonging to the people of this state which may be required for the purposes of their road, on such terms as may be agreed on by them, or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company for such compensation as may be agreed upon.

Sec. 1956. Superior court empowered to authorize guardians to sell land of insane persons for corporate purposes; court may appoint special guardian; terms of sale, &c., reported to court. 1871-'2, c. 138, s. 28.

In case any title or interest in real estate acquired by any company for the purpose of its corporation, shall be vested in any trustee not authorized to sell, release, and convey the same, or in any infant, idiot or person of unsound mind, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, idiot, or person of unsound mind, to sell and convey the same to such company for the purpose of its incorporation, on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath; and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land, having legal power to sell and convey the same.

Sec. 1957. Corporate powers. 1871-'2, c. 138, s. 29.

Every railroad corporation shall have power:

(1) TO CAUSE SURVEY, &C.

To cause such examination and surveys for its proposed railroad to be made as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto;

(2) VOLUNTARY GRANTS.

To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only;

(3) HOLDING PROPERTY.

To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad and the station and other accommodations necessary to accomplish the object of its incorporation;

(4) GRADE OF ROAD.

To lay out its road not exceeding one hundred feet in width, and to construct the same, and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this chapter for lands taken for the use of the company;

(5) OBSTRUCTIONS NOT ALLOWABLE.

To construct their road across, along, or upon any stream of water, watercourse, street, highway, plank road, turnpike or canal which the route of its road shall intersect or touch, but the company shall restore the stream or water-course, street, highway, plank road and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be

construed to authorize the erection of any bridge or any other obstructions across, in, or over any stream or lake navigated by steam or sail-boats, at the place where any bridge, or other obstructions may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon, or across any streets in any city without the assent of the corporation of such city;

(6) CROSSING, INTERSECTING, &C., OF RAILROADS.

To cross, intersect, join and unite its railroad with any other railroad before constructed, at any point on its route, and upon the grounds of such other company, with the nccessary turnouts, sidings and switches and other conveniences in furtherance of the object of its connections. And every company whose railroad is or shall be hereafter intersected by any new railroad shall unite with the owners of such new railroad in forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined by commissioners to be appointed by the court as is provided in this chapter in respect to acquiring title to real estate;

(7) RIGHT TO CARRY PERSONS AND PROPERTY.

To take and convey persons and property on their railroad by the power or force of steam or animals, or by any mechanical power, and to receive compensation therefor;

(8) ERECTION OF NECESSARY BUILDINGS.

To erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freight and business;

(9) REGULATION OF TIME AND MANNER OF TRANSPORTATION.

To regulate the time and manner in which passengers and property shall be transported and the compensation to be paid therefor; and such compensation for any pas-

senger and his ordinary baggage shall not exceed five cents per mile;

(10) MANNER OF RAISING FUNDS.

From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid, and the directors of the company may confer on any holder of any bond issued for money borrowed, as aforesaid, the right to convert the principal due or owing thereon into stock of said company at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

Com'rs v. R. R. Co., 77—289.

Sec. 1958. Railroad servants to wear a badge. 1871-'2, c. 138, s. 30.

Every conductor, baggage master, engineer, brakeman, or other servant of any railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the title of the corporation by which he is employed. No conductor or collector without such badge shall be entitled to demand or receive from any passenger any fare or ticket, or to exercise any of the powers of his office; and no officer or servant without such badge shall have authority to meddle or interfere with any passenger, his baggage or property.

Sec. 1959. Annual report to be made, verified and filed in the secretary of state's office; statements to be made. 1871-'2, c. 138, s. 31.

Every railroad corporation shall make an annual report to the governor of the operations of the year ending on the thirtieth day of September, which report shall be verified by the oaths of the treasurer or president and acting superintendent and be filed in the office of the secretary of state by the fifteenth day of November in each year, and shall state—

(1) The amount of capital as by charter;

(2) The amount of stock subscribed;
(3) The total amount of capital stock paid in;
(4) The total amount of funded debt;
(5) The amount of floating debt;
(6) The average rate per annum of interest on funded debt.

COST OF ROAD AND EQUIPMENT.

(7) The total amount expended for graduation and masonry;
(8) The total amount expended for bridges;
(9) The total amount expended for superstructure, including iron;
(10) The total amount expended for passenger and freight stations, building and fixtures;
(11) The total amount expended for engine and car houses, machine shops, machinery and fixtures;
(12) The total amount expended for land, damages and fences;
(13) The total amount expended for locomotives, fixtures and plows;
(14) The total amount expended for passenger and baggage cars;
(15) The total amount expended for freight cars;
(16) The total amount expended for engineering and agencies;
(17) The total cost of road and equipment.

CHARACTERISTICS OF ROAD.

(18) Length of road and track laid;
(19) Length of branches owned by the company, laid;
(20) Weight of rail by yard, on main track;
(21) The number of engine-houses and shops, of engines and cars, and their character.

DOINGS OF THE YEAR IN TRANSPORTATION AND TOTAL NUMBER OF MILES RUN.

(22) Miles run by passenger and freight trains, exclusively;
(23) The number of miles, rate of fare, and number of miles traveled charged for the respective classes per mile;
(24) Number of tons of freight and miles carried;
(25) Average rate of speed adopted by ordinary passenger trains, including stops;

(26) Average rate of speed adopted by freight trains, including stops;

(27) Average weight in tons, of two thousand pounds, of passenger trains, exclusive of passengers and baggage;

(28) Average weight in tons of freight trains, exclusive of freight;

(29) The amount of freight, specifying the quantity in tons, of the products of the forest, of animals, of vegetable food, other agricultural products, manufactures, merchandise and other articles;

EXPENSES OF MAINTAINING THE ROAD OR REAL ESTATE OF THE CORPORATION.

(30) For repairs of roadbed and railway, excepting cost of iron, which shall be the cost of labor and materials used during the year, also use and cost of engines engaged in ballasting, also the renewal and repairs of gravel and stone cars and all items of cost connected with keeping the road in order;

(31) For depreciation of way;

(32) Length, in feet, of iron used in renewals, with weight and cost;

(33) Repairs of buildings, fences and gates;

(34) Taxes on real estate;

(35) Expenses, repairs and depreciation of machinery and personal property itemized;

(36) Incidental expenses, including fuel, oil, clerks, agents, watchmen and stationery;

(37) Expense of employees;

(38) Loss and damage of goods and baggage;

(39) Damages for injuries to persons and property, including damages by fire and cattle killed;

(40) Contingencies;

(41) Total expenses of operating road;

(42) The above statements are to be made without reference to the sums actually received or paid during the year.

The following statement of the earnings and cash receipts and payments are required:

(43) From passengers, freight and other sources, to be stated without reference to the amount actually collected;

(44) Receipts during the year from freight, passengers and other sources;

(45) Payment for transportation expenses, and for interest;

(46) Dividends on stock, amount and rate per cent.;

(47) Payment to surplus fund and total amount of said fund;

(48) The number of persons injured in life and limb, and the cause of the injury, and whether passengers or persons employed; whether any such accidents have arisen from carelessness or negligence of any person in the employment of the corporation, and whether su h person is retained in the service of the corporation;

(49) It shall be the duty of the proper state officer to arrange the information contained in such reports in a tabular form and compare the same together with the said reports in a single document for printing for the use of the general assembly and report the same to the general assembly on the first day of its session;

(50) All the items under the heads of expenses of maintaining the road or real estate of the corporation; expenses of machinery, of personal property of the corporation; expenses of use of road and machinery or operating the road, shall be carried out under two heads, the one showing the cost of freight transportation, the other the cost of passenger transportation;

(51) The provisions of this section shall apply to all existing railroad corporations, and the report of the said existing railroad corporations, made in pursuance of the provisions of this section, shall be deemed to be a full compliance with any existing law or resolution requiring annual reports to be made by such corporation.

Sec. 1960. Penalty for failing to report. 1871-'2, c. 138, s. 32.

Any such corporation which shall neglect to make the report as is provided in the preceding section shall be liable to a penalty of five hundred dollars, to be sued for in the name of the state of North Carolina in the superior court of Wake county.

Sec. 1961. General assembly may reduce profits upon road. 1871-'2, c. 138, s. 33.

The general assembly may, when any railroad shall be opened for use, from time to time alter or reduce the rate of freight, fare, or other profits upon such road, but the same shall not, without the consent of the corporation, be so reduced as to reduce said profits less than six per cent. per annum on the capital actually expended, nor unless on an examination of the amounts received and expended, to be made by the auditor or other officer charged with the duty, they shall ascertain that the net

income derived by the company from all sources for the year then last past shall have exceeded an annual income of six per cent. upon the capital of the corporation actually expended.

Railroad Co. v. Com'rs, 74—506; Railroad Co. v. Governor, 74—707.

Sec. 1962. Passengers violating rules of corporation may be ejected. 1871-'2, c. 138, s. 34.

If any passenger shall refuse to pay his fare, or violate the rules of the corporation, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train.

Sec. 1963. Rules for transportation. 1871-'2, c. 138, s. 35.

Every railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting and the junction of other railroads and at usual stopping places established for receiving and discharging way passengers and freights for that train, and shall take, transport and discharge such passengers and property at, from and to such places; on the due payment of the freight or fare legally authorized therefor, and shall be liable to the party aggrieved, in an action for damages, for any neglect or refusal in the premises.

Sec. 1964. Railroads, &c., to receive and forward freights; penalty for refusal. 1879, c. 182, s. 1.

Agents or other officers of railroads and other transportation companies whose duties it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of fifty dollars, and each article refused shall constitute a separate offence.

Sec. 1965. To keep a list of freight charges posted; not to be increased without notice; penalty. 1879, c. 182, s. 2.

It shall be the duty of all railroad and other transportation companies to keep posted in a conspicuous place in their depots or places where freight is received for shipment a list of its charges for carrying freight, specifying name of place, class of freight and charge for carrying the same. Such charges shall not be increased without giving fifteen days' notice, and the company represented by any agent refusing to comply with this section shall be liable to a penalty of not less than fifty nor more than one hundred dollars.

Sec. 1966. Discrimination in freight unlawful; penalty; special contracts may be made. 1874-'5, c. 240. 1879, c. 237, s. 1.

It shall be unlawful for any railroad corporation operating in this state to charge for the transportation of any freight of any description over its road a greater amount as toll or compensation than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of same railroad of equal distance, and any railroad company violating this section shall forfeit and pay the sum of two hundred dollars for each and every offence to any person suing for the same. Nothing in this chapter shall be taken in any manner as abridging the right of any railroad company from making special contracts with shippers of large quantities of freight, to be of not less in quantity or bulk than one car load.

Branch v. R. R. Co., 77—347.

Sec. 1967. Freight unshipped for five days; penalty. 1874-'5, c. 240, s. 2.

It shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment to remain unshipped for more than five days unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same.

Branch v. R. R. Co., 77—347; Capehart v. R. R. Co., 81—438; Katzenstein v. R. R. Co., 84—688; Keeter v. R. R. Co., 86—346; Whitehead v. R. R. Co., 87—255.

Sec. 1968. Pooling freights and rebates forbidden; penalty. 1879, c. 237, s. 2.

It shall be unlawful for railroad companies to pool freights or to allow rebates on freights; and all persons whether railroad officials or others, who shall be concerned in pooling freights or who shall directly or indirectly allow or accept rebates on freights shall be guilty of a misdemeanor, and on conviction shall be fined not less than one thousand dollars or imprisoned not less than twelve months.

Sec. 1969. Attorney-general to institute suits in certain cases. 1865-'6, Resolution ratified December 14, 1865.

In the event of any contract having been entered into by any railroad company in this state with any person or company, whereby preferences or exclusive rights of transportation, either in priority or in arrangements, is given to such person or company the attorney-general is hereby instructed to institute proceedings against such railroad company for a forfeiture of its charter.

Sec. 1970. Check and duplicate for baggage; corporation liable for loss of baggage. 1871-'2, c. 138, s. 36.

A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of such corporation, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and if such check be refused on demand the corporation shall pay to such passenger the sum of ten dollars to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the conductor in charge of the train, and on producing said check if his baggage shall not be delivered to him, he may, by an action, recover the value of said trunk or baggage.

Sec. 1971. How trains to be arranged; penalty. 1871-'2, c. 138, s. 37.

In forming a passenger train, baggage, freight, merchandise or lumber cars shall not be placed in rear of the passenger cars; and if they or any of them shall be so placed, the officer or agent who so directed or knowingly suffered such an arrangement, and the conductor of the

train, shall be guilty of a misdemeanor and punished accordingly.

Sec. 1972. Engineer intoxicated a misdemeanor. 1871-'2, c. 138, s. 38.

If any person shall, while in charge of a locomotive engine running upon the railroad of any such corporation or while acting as the conductor of a car or train of cars on any such railroad, be intoxicated, he shall be guilty of a misdemeanor.

Sec. 1973. Railroad companies prohibited from loading or unloading freight cars on Sunday, and also from running locomotives or cars, except such as shall be run for carrying passengers or the mails. 1879, cc. 97, 203.

No railroad company shall permit the loading or unloading of any freight car on Sunday; nor shall permit any car, train of cars, or locomotive to be run on Sunday on any railroad, except such as may be run for the purpose of transporting the United States mails, either with or without passengers, and except such as shall be run for carrying passengers exclusively: *Provided*, that the word Sunday in this section shall be construed to embrace only that portion of the day between sunrise and sunset; and that trains *in transitu*, having started on Saturday, may, in order to reach the terminus or shops, run until nine o'clock a. m. on Sunday, but not later, nor for any other purpose than to reach the terminus or shops. And any railroad company violating this section shall be guilty of a misdemeanor in each county in which such car, train of cars or locomotive shall run, or in which any such freight car shall be loaded or unloaded; and upon conviction shall be fined not less than five hundred dollars for each offence; the fine when collected to be paid to the state treasurer for the use of the public schools.

Keeter v. R. R. Co., 86—346.

Sec. 1974. Injuries to railroad a misdemeanor. 1871-'2, c. 138, s. 39.

If any person or persons shall wilfully do or cause to be done, any act or acts whatever whereby any building, construction, or work of any railroad corporation, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, the person or

persons so offending shall be guilty of a misdemeanor, and shall forfeit and pay to the said corporation treble the amount of damages sustained by means of such offence.

Sec. 1975. Railroad companies to construct and maintain cattle guards, &c.; failure, misdemeanor. 1883, c. 394, ss. 1, 2.

Every incorporated company owning, operating or constructing, or which shall hereafter own, operate or construct, or any company which shall hereafter be incorporated, and shall own, operate or construct any railroad passing through and over the land of any person now enclosed, or which may hereafter become enclosed, shall, at its own expense, construct and constantly maintain in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from said enclosed land, and they shall also make and keep in constant repair crossings to any plantation road thereupon. Every such corporation which shall fail to erect and constantly maintain such cattle guards and crossings shall be guilty of a misdemeanor, and fined in the discretion of the court, and shall be further liable to an action for damages to the party aggrieved.

Sec. 1976. How actions may be brought. 1871-'2, c. 138, s. 40.

All penalties imposed by this chapter may, unless otherwise provided, be sued for in the name of the state; and if such penalty be for a sum not exceeding two hundred dollars, then such suit may be brought before a justice of the peace, and may be commenced by serving a summons on any director of such company.

Sec. 1977. Chart of railroad to be made and filed. 1871-'2, c. 138, s. 41.

Every corporation shall, within a reasonable time after their road shall be constructed, cause to be made a map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office for registering deeds in each county through which such parts of said road shall pass. Every such map shall be drawn on a scale and on paper, to be designated by the secretary of state, and certified and signed by the president or engineer of such corporation.

Sec. 1978. Injury to passengers not complying with regulations. 1871-'2, c. 138, s. 42.

In case any passenger on any railroad shall be injured while on the platform of a car or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, such company shall not be liable for the injury: *Provided*, said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers.

Sec. 1979. Unlawful to enter railroad cars after being forbidden, misdemeanor. 1883, c. 351.

It shall be unlawful for any person to enter into a railroad passenger car, or baggage car, or mail car, or caboose car, or upon the platforms of said cars after being forbidden so to do by the conductor or his assistants, or the baggage master or other person in charge of said cars, unless said persons enter said cars or on said platforms as a passenger or in some official capacity authorized by law, or on business with a passenger or some official or employee of the railroad or other like purpose, and for every violation of this section the person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding ten dollars.

Sec. 1980. Railroads formed under this chapter not completed in specified time, corporate existence ceases. 1871-'2, c. 138, s. 43.

If any corporation shall not within two years after its articles of association are filed and recorded in the office of the secretary of state, or the passage of its charter, begin the construction of its road and expend thereon ten per cent. of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease.

Sec. 1981. General assembly may annul any corporation. 1871-'2, c. 138, s. 44.

The general assembly may at any time annul or dissolve any corporation; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers for any liability which shall have been previously incurred.

R. R. Co. v. R. R. Co., 83—489.

Sec. 1982. Rights and privileges. 1871-'2, c. 138, s. 45.

All existing railroad corporations within this state shall respectively have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions of this chapter not inconsistent with their charters.

R. R. Co. v. R. R. Co., 83—489; R. R. Co. v. Com'rs, 84—504.

Sec. 1983. Railroads embracing the same location of line. 1871-'2, c. 138, s. 46.

Whenever two railroad companies shall, for a portion of their respective lines, embrace the same location of line, they may by agreement provide for the construction of so much of said line as is common to both of them, by one of the companies, and for the manner and terms upon which the business thereon shall be performed. Upon the making of such an agreement, the company that is not to construct the part of the line which is common to both, may terminate its line at the point of intersection, and may reduce its capital to a sum of not less than five thousand dollars for each mile of the road proposed to be constructed.

Sec. 1984. Location of railroad in an adjoining state. 1871-'2, c. 138, s. 47.

Whenever after due examination it shall be ascertained by the directors of any railroad company that a part of the line of railroad proposed to be made between any two points in this state ought to be located and constructed in an adjoining state, it may be so located and constructed by a vote of two-thirds of all the directors, and the sections of said railroad within this state shall be considered a connected line, and the directors may reduce the capital specified to such amount as may be deemed proper, but not less than the amount required by law for the number of miles of railroad to be actually constructed in this state.

Sec. 1985. Unclaimed freight, publication thereof. 1871-'2, c. 138, s. 48.

Every railroad company which shall have had unclaimed freight, not perishable, in its possession for a period of one year at least, may proceed to sell the same at public auction, and out of the proceeds may retain the charges of transportation and storage of such freight and the expenses of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks

from the first publication of notice of such sale in a state paper and also in a newspaper published at or nearest the place at which such freight was directed to be left, and also at the place where such sale is to take place; and said notice shall contain a description of such freight, the place at which and the time when the same was left, as near as may be, together with the name of the owner or person to whom consigned, if known, and expenses incurred for advertising shall be a lien upon such freight in a ratable proportion, according to the value of each article, package or parcel, if more than one.

Sec. 1986. Unclaimed freight perishable, what done. 1871-'2, c. 138, s. 49.

In case such unclaimed freight shall in its nature be perishable, then the same may be sold as soon as it can be on giving the notice required in the preceding section, after its receipt at the place where it was directed to be left.

Sec. 1987. Unclaimed funds to go to the University. 1871-'2, c. 138, s. 50.

Such railroad company shall make an entry of the balance of the proceeds of the sale, if any, of each parcel of freight owned by or consigned to the same person, as near as can be ascertained, and at any time within five years thereafter shall refund any surplus so retained to the owner of such freight, his heirs or assigns, on satisfactory proof of such ownership; if no person shall claim such surplus within five years, said surplus shall be paid to the University.

Sec. 1988. Police force may be established. 1871-'2, c. 138, s. 51.

Any railroad corporation on which road steam is used as the motive power may apply to the governor to commission such persons as the said corporation may designate to act as policemen for said corporation.

Sec. 1989. Governor to appoint police. 1871-'2, c. 138, s. 52.

The governor upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to such person or persons so appointed a commission to act as such policemen.

Sec. 1990. Policemen to take an oath. 1871-'2, c. 138, s. 53.

Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath; such oath with a copy of the commission shall be filed with the secretary of state and a certificate thereof by said secretary be filed with the clerk of each county through or into which the railroad for which such policeman is appointed may run and in which it is intended he shall act, and such policemen shall severally possess within the limits of the county all the powers of policemen in the several towns, cities and villages in which they shall be so authorized to act as aforesaid.

Sec. 1991. Badge of policemen. 1871-'2, c. 138, s. 54.

Such railroad police shall, when on duty, severally wear a metallic shield with the words "Railway Police," and the name of the corporation for which appointed inscribed thereon, and said shield shall always be worn in plain view except when employed as detectives.

Sec. 1992. Compensation. 1871-'2, c. 138, s. 55.

The compensation of such police shall be paid by the companies for which the policemen are respectively appointed as may be agreed on between them.

Sec. 1993. Dismissal of police. 1871-'2, c. 138, s. 56.

Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, they may file a notice to that effect in the several offices in which notice of such appointment was originally filed, and thereupon the power of such officer shall cease and be determined.

Sec. 1994. Transfer of capital stock; certificate to be filed in office of secretary of state. 1871-'2, c. 138, s. 57.

Any railroad corporation or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the direc-

tors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do to be entered on their minutes, become *ex-officio* the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof as provided by law; and whenever the whole of said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the secretary of state under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely and without charge or dimunition as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made in the corporate name of such corporation. But the property, rights, franchises and profits of every corporation so surrendered, transferred or leased, shall hereafter always be liable to taxation, and shall never be exempt therefrom. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected thereby, nor shall existing liabilities or the rights of creditors of the corporation where stock shall have been so surrendered or transferred be in any way affected or impaired by this section.

Sec. 1995. Directors of various railroads authorized to make arrangements to give through freight and travel. 1866-'7, c. 105, s. 1.

The directors representing the stock held in the various railroad corporations are hereby authorized and empowered to enter into such agreements and terms with each other as to secure through freight and travel without the expense of transfer of freight, or breaking the bulk thereof, at different points along the lines, and for this purpose may use the road or roads of said corporations or companies, and rolling stock thereof, on such terms as may be agreed upon by the directors of said corporations or companies.

Sec. 1996. Subscription to stock may be made by board of county commissioners. 1868-'9, c. 171, s. 1.

The boards of commissioners of the several counties shall

have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest.

Hill v. Com'rs, 67—367; Street v. Com'rs, 76—44.

Sec. 1997. Manner in which subscriptions by board to be made; proviso. 1868-'9, c. 171, s. 2.

The board of commissioners of any county proposing to take stock in any railroad company shall meet and agree upon the amount to be subscribed, and if a majority of the board shall vote for the proposition, this shall be entered of record, which shall show the amount proposed to be subscribed, to what company, and whether in bonds, money or other property, and thereupon the board shall order an election, to be held on a notice of not less than thirty days, for the purpose of voting for or against the proposition to subscribe the amount of stock agreed on by the board of county commissioners. And if a majority of the qualified voters of the county shall vote in favor of the proposition, the board of county commissioners, through their chairman, shall have power to subscribe the amount of stock proposed by them, and submitted to the people subject to all the rules, regulations and restrictions of other stockholders in such company or companies: *Provided*, that the counties, in the manner aforesaid, shall subscribe from time to time such amounts, either in bonds or money, as they may think proper.

Caldwell v. Justices, 4 Jon. Eq., 323; Manly v. Raleigh, 4 Jon. Eq., 370; Cain v. Com'rs, 86—8.

Sec. 1998. Elections, how held. 1868-'9, c. 171, s. 3.

All elections ordered under the preceding section shall be held by the sheriff under the laws and regulations provided for the election of members of the general assembly. The votes shall be compared by the boards of county commissioners, who shall make a record of the same.

Simpson v. Com'rs, 84—158; Norment v. Charlotte, 85—378; Cain v. Com'rs, 86—8.

Sec. 1999. Interest on bonds, how paid. 1868-'9, c. 171, s. 4.

In case the county shall subscribe the amount proposed in bonds, the board of commissioners shall have power to fix the rate of interest, not to exceed the rate of eight per cent., when the interest on said bonds shall be pay-

able, and at what place, and shall also fix the time and places of paying the interest, and shall also determine the mode and manner of the same; and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.

Sec. 2000. Taxes, how paid. 1868-'9, c. 171, s. 5.

The taxes authorized by the three preceding sections to be raised for the payment of interest or principal, shall be collected by the sheriff in like manner as other state taxes, and be paid into the hands of the county treasurer, to be used by the chairman of the board of county commissioners as directed by this chapter.

Sec. 2001. Officers of railroads to account to their successors; penalty for failure or refusal. 1870-'71, c. 72, ss. 1, 3.

The president and directors of the several railroads, and all persons acting under them, are hereby required upon demand to account with the president and directors elected or appointed to succeed them, and shall transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, and any one refusing or failing to account for and transfer all the money, books, papers, choses in action, property and effects, as herein required, shall be guilty of a misdemeanor, and shall be punished by imprisonment in the penitentiary for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and punished in like manner.

State v. Jones, 67—210.

Sec. 2002. Governor may make a requisition upon other states. 1870-'71, c. 72, s. 2.

The governor is hereby authorized, at the request of the president, directors, and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with the preceding section.

Sec. 2003. To whom the provisions of preceding sections are applicable. 1870-'71, c. 72, s. 4.

The two preceding sections shall apply to all presidents and directors and their agents who have not settled in

full with their successors in office prior to the fifteenth day of February, one thousand eight hundred and seventy-one.

Sec. 2004. Two hundred and fifty dollars must be paid before bill to incorporate or to amend railroad charter can be introduced.

No bill to incorporate any railroad company, or to alter, amend, change or modify any act of incorporation of any railroad company, other than one in which the state is a stockholder, shall be introduced into either house of the general assembly unless accompanied by the receipt of the state treasurer for two hundred and fifty dollars; and the same shall be placed to the credit of the public school fund by the said treasurer.

Passim Proctor v. R. R. Co., 72—579; State v. R. R. Co., 73—527.

Sec. 2005. Company dissolved, &c.; owner or purchaser to be a new corporation and property, &c., taxed.

When any railroad corporation shall be dissolved, or its property sold and conveyed under any execution, deed of trust, mortgage or other conveyance, the owner or purchaser shall constitute a new corporation, and the property, franchises and profits of said new corporation shall be taxed as other like property, franchises and profits are taxed.

State v. Rives, 5 Ired., 297; Young v. Rollins, 85—485.

Sec. 2006. Conditional sale of railroad property invalid as to subsequent judgment creditors or purchasers unless in writing and registered; property sold, to bear certain marks; not to apply to contracts heretofore made. 1883, c. 416, ss. 1, 2.

Whenever any railroad equipment and rolling stock shall hereafter be sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the instalments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with; such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless:

(1) the same shall be evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.

(2) Such writing shall be registered in the same book as mortgages are registered, in the office of the register of deeds in the county in which is located the principal office or place of business of such vendee, lessee or bailee within the state.

(3) Each locomotive or car so sold, leased or loaned shall have the name of the vendor, lessor or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, one thousand eight hundred and eighty-three.

TELEGRAPHS.

Sec. 2007. Telegraph lines, who may maintain. 1874-'5, c. 203, s. 2.

Any telegraph company chartered or incorporated by this or any other state shall have the right to construct, maintain and operate lines of telegraph along any railroad or other public highway in the state of North Carolina, but such lines of telegraph shall be so constructed and maintained as not to obstruct or hinder the usual travel on such railroad or other highway.

R. R. Co. v. R. R. Co., 83—489.

Sec. 2008. May contract for right of way. 1874-'5, c. 203, s. 3.

Such telegraph company shall have power to contract with any person or corporation, the owner of any lands or of any franchise or easement therein, over which such line of telegraph is proposed to be erected, for the right of way for planting, repairing and preservation of its telegraph poles or other property, and for the erection and occupation of offices at suitable distances for the public accommodation.

Sec. 2009. Entitled to right of way upon just compensation. 1874-'5, c. 203, s. 4.

Such telegraph company shall be entitled to the right of way over the lands, privileges and easements of other persons and corporations, and the right to erect poles and to establish offices, upon making just compensation therefor.

Sec. 2010. Proceedings to be by petition; facts to be stated. 1874-'5, c. 203, s. 5.

Whenever such telegraph company shall fail on application therefor to secure by contract or agreement such right of way for the purposes aforesaid over the lands, privilege or easement of another person or corporation, it shall be lawful for such telegraph company, first giving security for costs, to file its petition before the superior court for the county in which said lands are situate, or into or through which such easement, privilege or franchise extends, setting forth and describing the parcels of land, privilege or easement over which the way, privilege or right of use is claimed, the owners of the land, easement or privilege, and their place of residence, if known, and if not known that fact shall be stated, and such petition shall set forth the use, easement, privilege or other right claimed, and must be sworn to, and if the use or right sought be over or upon an easement or right of way, it shall be sufficient to give jurisdiction if the person or corporation owning the easement or right of way be made a party defendant: *Provided*, that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county into or through which such easement or right of way extends.

Telegraph Co. v. R. R. Co., 83—420.

Sec. 2011. Copy of petition and notice to be served on persons claiming lands, &c. 1874-'5, c. 203, s. 6.

A copy of such petition, with a notice of the time and place the same will be presented to the superior court, must be served on the person or persons whose interests are to be affected by the proceeding at least ten days prior to the presentation of the same to the said court. If the person on whom the service is to be made be a corporation, it shall be sufficient if notice be served on an officer or agent of the corporation found in the county in which the land or easement is situated, or upon any other officer of the corporation.

Sec. 2012. Proceedings for condemnation, appointment of commissioners, their report, exceptions thereto; appeal, final judgment, &c., to be as provided in this chapter in condemning, &c., for railroads.

The proceedings for the condemnation of lands, or any

easement, or interest therein, for the use of telegraph companies, the appraisal of the lands, or interest therein, the duty of the commissioners of appraisal, the right of either party to file exceptions, the report of commissioners, the mode and manner of appeal, the power and authority of the court or judge, the final judgment, and the manner of its entry and enforcement, and the rights of the company pending the appeal, shall be as prescribed in this chapter for condemning lands to the use of railroads.

Sec. 2013. Commissioners may inspect the premises. 1874-'5, c. 203, s. 9.

In considering the question of damages when the interest sought is over an easement, privilege or right of way, the commissioners may inspect the premises or rest their finding on testimony as to them may be satisfactory, and the costs of the proceedings shall be paid by the petitioner, unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

CHAPTER FIFTY.

ROADS, FERRIES AND BRIDGES.

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Sec. 2014. What shall be public roads and ferries; their supervision given to justices of the peace; board of supervisors of public roads and county commissioners to establish and discontinue ferries, roads and bridges. R. C., c. 101, s. 1. 1784, c. 227, s. 1. 1868, c. 20, ss. 11, 16, 17, 18. 1868-'9, c. 185, s. 14. 1879, c. 82, s. 1.

All roads and ferries that have been laid out or appointed by virtue of any act of assembly, or any order of court, are hereby declared to be public roads and ferries; and the justices of the peace in each township shall have the supervision and control of the public roads in their respective townships. They shall, with respect to this work, constitute and be styled the "Board of Supervisors of Public Roads" of such township, and under that name, for the purposes aforesaid, they are hereby incorporated the "Board of Supervisors of Public Roads," and the board of county commissioners, as hereafter in this chapter set forth, shall have full power and authority within their respective counties to appoint and settle ferries; to order the laying out of public roads where necessary; to appoint where bridges shall be made; to discontinue such roads and ferries as shall be found useless; and to alter roads so as to make them more useful.

Carr v. Hairston, 1 C. L. Repos., 249; Beard v. Long, 2 Car. L. Repos., 69; Pipkin v. Wynns, 2 Dev., 402; Woolard v. McCullough, 1 Ired., 432; Baker v. Wilson, 3 Ired., 168; State v. Marble, 4 Ired., 318; State v. Hunter, 5 Ired., 369; State v. Johnson, 11 Ired., 647; State v. Cardwell, Busb., 245; Tarkington v. McRae, 2 Jon., 47; Davis v. Ramsay, 5 Jon., 236; State

v. McDaniel, 8 Jon., 284; Burgwyn v. Lockhart, Winst., 269; Carrow v. Washington Toll Bridge Co., Phil., 118; Barrington v. Neuse River Ferry Co., 69—165; State v. Witherspoon, 75—222; Ashcraft v. Lee, 79—34; Ashcraft v. Lee, 81—135; State v. Selby, 83—617; Kennedy v. Williams, 87—6.

Sec. 2015. Meeting of the board of supervisors; date of election, &c. 1879, c. 82, s. 2. 1880, c. 30, s. 1.

The said board of supervisors shall meet at some place in their respective townships to be agreed upon by themselves, or in the absence of such agreement, to be named by their chairman, on the first Saturday of February and August, for the purpose of consulting on the subject of the condition of the roads in their township. They shall once in each year, during the week of their meeting in August, go over and personally examine all the roads in their township. They shall annually at their meeting in February elect some one of their number chairman: *Provided*, that no supervisor shall receive any compensation for his services as supervisor of public roads.

Sec. 2016. Townships to be divided into sections, and overseers appointed; boundaries to be designated; notice to overseers, &c. 1879, c. 82, ss. 3, 7. 1880, c. 30, s. 1.

The said board of supervisors shall annually at the meeting in February divide the roads of their townships into sections and appoint overseers for said sections at said meeting. They shall at the same time allot the hands to said overseers, and shall also designate the boundaries or points to which each resident shall be liable to work on said section, and shall within five days after such meeting certify to each overseer written notice of his appointment, with a list of the hands assigned to his section: *Provided*, that the board of supervisors may at any time alter the sections or allotment, but shall give notice thereof to the overseer. Such overseer shall serve, and be liable as such for neglect of duty, until he shall be relieved by the board, which shall be done only upon his showing that his road is in good condition as prescribed by law. The overseer may resign after the expiration of twelve months, provided his road shall be in good repair and the board of supervisors shall so find; and any overseer so resigning, and whose resignation has been accepted by the board, shall not without his consent be again appointed overseer until after the expiration of two years from the date of his resignation. When a public road

shall be a dividing line between townships, the board of commissioners of the county shall determine as to how said road shall be divided, with notice as to the working of said road.

Cantrell v. Pinkney, 8 Ired., 436; Calvert v. Whittington, 11 Ired., 278; McBoyle v. Hanks, 1 Jon., 133; Tarkington v. McRea, 2 Jon., 47; State v. Long, 81—563.

Sec. 2017. Who liable to work on roads; time compelled. 1879, c. 82, s. 4. 1880, c. 30, s. 2.

All able-bodied male persons between the ages of eighteen years and forty-five years shall be required under the provisions of this chapter to work on the public roads, except the members of the board of supervisors of public roads, but no person shall be compelled to work more than six days in any one year, except in case of damage resulting from a storm: *Provided*, that ten days instead of six days be the limit as to the counties west of the Blue Ridge.

Sec. 2018. No persons exempt from working but by board of supervisors. R. C., c. 101, s. 12. 1784, c. 227, ss. 8, 9. 1826, c. 26, ss. 1, 2.

No person between the ages prescribed shall be exempted from working upon the public roads, except such as shall be exempted by the general assembly, or by the board of supervisors of the township, on account of personal infirmity; of which the said board shall be the sole judge.

Forbes v. Hunter, 1 Jon., 231; State v. Cauble, 70—62.

Sec. 2019. When overseer to summon hands to work roads; notice; duty of persons summoned; proviso. 1879, c. 82, s. 5. 1880, c. 30, s. 3.

The overseer of the road shall, as often as the road shall require, subject to the limitation in the preceding section, summon the hands of his section to work on the road, but the said hands shall not be required to work continuously for a longer time at any one time than two days, and at least fifteen days shall intervene between workings, except in case of special damage to the road, resulting from a storm. The notice shall be at least three days before the day named for the work, and shall state the hour and the place for the meeting of the hands, and what implement the hand shall bring with him. Every person liable to work on the road who has been so summoned shall appear at the time and place

named, and with the implement directed, and shall work on the road under the direction of the overseer until discharged by him: *Provided*, that no hand shall be required to work for a less time than seven hours nor a longer time than ten hours in any one day. Any person summoned as aforesaid who shall, by twelve o'clock of the day preceding the one appointed for work on the road, pay to the overseer the sum of one dollar shall be relieved from working on the road for one day. The money thus collected by the overseer shall be by him applied on the working and repairing of the road: *Provided, further*, that any person who shall furnish one able-bodied hand as a substitute, with the implement directed, shall be held to have complied with this chapter.

Sec. 2020. Failure to attend and work misdemeanor; fine and costs. R. C., c. 101, s. 11. 1817, c. 935, s. 2. 1825, c. 1287. 1879, c. 82, s. 6.

Any person liable to work on the road who shall fail to attend and work as hereinbefore provided when summoned so to do, unless he shall have paid the one dollar as aforesaid, shall be guilty of a misdemeanor, and fined not less than two dollars nor more than five dollars, or imprisoned not exceeding five days, or both, and if any defendant shall be unable to discharge the judgment and costs that may be recovered against him, the costs shall be paid by the county.

State v. Cauble, 70—62; State v. James, 74—393; State v. Luther, 77—492; State v. Craige, 81—588; State v. Craige, 82—668.

Sec. 2021. Overseers to report to board of supervisors; report to be verified; warrant to issue against road hand failing to perform duty. 1879, c. 82, s. 7. 1880, c. 30, s. 4.

Every overseer shall at each and every meeting of the board of supervisors of his township make report to them of the present condition of his road, of the number of days worked on his section since last meeting, of the number of hands who attended and worked each day, of the number and names of hands who failed to attend and work; whether or not they were legally summoned, and whether or not they paid the one dollar as provided. The said overseer shall before some person authorized to administer an oath make written affidavit that the report is true and correct. Upon this report sworn to as aforesaid, if it shall appear that any of the hands, after being legally summoned, have failed to attend and work on

said road, and that they did not pay the one dollar, then it shall be the duty of the said supervisors, or any one of them, to issue a warrant for the arrest of any such hand, and shall put him upon trial for the offence: *Provided*, that nothing herein contained shall prevent the overseer of the road from prosecuting at any time after the offence has been committed, any hand for failure to work on the road, and such cases of prosecution shall be stated in his report to the board of supervisors, that they may not prefer another prosecution for the same offence.

Sec. 2022. Overseers to report all moneys collected to supervisors; failure to discharge duties, misdemeanor; duty of chairman of board of supervisors. 1879, c. 82, s. 8.

The said overseers shall at the meeting of the supervisors in February make a report of all moneys collected by them from parties excused from work on the road for the preceding year, with a statement as to how the same was expended. If any overseer shall fail to discharge any one of the duties imposed by this chapter he shall be guilty of a misdemeanor, and on conviction shall be fined seven dollars, and in default of payment of fine and cost be imprisoned not exceeding five days. In case of failure of any overseer to make any report to the board of supervisors of public roads of his township, as provided in this chapter, it shall be the duty of the chairman of such board immediately upon such failure to make a sworn statement of the fact before some justice of the peace of an adjoining township, who shall immediately issue his warrant for the arrest of the said overseer, and proceed to try him for the offence.

Sec. 2023. Jurisdiction of supervisors over cartways; jurisdiction of board of county commissioners over roads; proviso; appeal. 1879, c. 82, s. 9.

The board of supervisors shall have the right to lay out and discontinue cartways, and the board of commissioners of the county only shall have the right to lay out and establish and discontinue public roads: *Provided*, that in laying out and establishing roads and cartways, and for the purpose of assessing damage to property by reason of the same, no greater number of jurors than five shall be summoned or be required: *Provided, further*, that either party may appeal from the decision of the board of supervisors to the board of commissioners of the county.

State v. Purify, 86—681.

Sec. 2024. Board of supervisors to report to superior court; clerk to deliver report to foreman of grand jury; misdemeanor; punishment. 1879, c. 82, s. 10.

The board of supervisors shall annually make report to the first term of the superior court of their county after the first Monday in August of the condition of the roads of their township, and if the meetings provided for in this chapter have been held by said board, the judge holding such term of the superior court shall after his charge to the grand jury and before they shall retire to their room call upon the clerk of the court for such reports, and they shall then and there be delivered to the foreman of the grand jury; and if any board of supervisors shall fail to make said report or to discharge any other duty imposed by this chapter, they shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, or both, in the discretion of the court, and the indictment may be either against the board of supervisors, or against the individuals composing it as justices of the peace.

Sec. 2025. Width of roads, causeways, bridges; proviso. R. C., c. 101, s. 14. 1784, c. 227, s. 2. 1880, c. 30, s. 6.

All roads except such as are causewayed or through cuts shall be not less than eighteen feet wide, clear of trees, logs and other obstructions to the passage of ordinary vehicles, and there shall be ten feet in width in the centre of the roadway, clear of stumps and runners. Where, by the overseers, it may be deemed expedient to make or repair causeways on the same, they shall be at least fourteen feet wide; and earth, necessary to raise or cover them, shall be taken from either hand, so as to form a drain on each side of the causeway; and they shall make, of the same width, necessary bridges through swamps and over small streams of water: *Provided*, this section shall not apply to the roads in those counties where there is by law a classification of the widths of the roads.

Small v. Eason, 11 Ired., 94; Collins v. Creecy, 8 Jon., 333.

Sec. 2026. Overseers may apportion road among hands, but still liable for default. R. C., c. 101, s. 13. 1784, c. 227, s. 10.

The overseer, if requested by a majority of the hands on the road assigned him, may, in his discretion, lay off the road in equal portions for the convenience of the

laborers, who shall finish his or their part in a time agreed on between him and each person, and on default of any agreeing party, the overseer shall cause such part to be finished by the labor of other persons, and by warrant may recover the value thereof to his own use: *Provided*, that the time agreed on shall not exceed ten days, and that nothing in this section shall be a defence to the overseer, when prosecuted for default concerning the condition of the road.

Forbes v. Hunter, 1 Jon., 231.

SEC. 2027. Timber and earth taken from adjoining lands. R. C., c. 101, s. 15. 1786, c. 256, s. 1. 1818, c. 976, s. 1.

Overseers may lawfully cut poles and other necessary timber, for repairing and making bridges and causeways. And whenever earth shall be needed on a public road, and it cannot be conveniently procured on either side of the causeway, the overseer may lawfully take the earth from any adjoining land.

Collins v. Creecy, 8 Jon., 333.

SEC. 2028. Owners may petition board of commissioners. R. C., c. 101, s. 16. 1818, c. 976, s. 2.

The owner of the land or timber thus used may file his petition before the board of commissioners of the county wherein the injury is done; and, for damages sustained thereby, the board shall make the petitioner adequate compensation: *Provided*, that this and the preceding section shall not apply to the lands adjoining or contiguous to the causeway, or great road, leading across Eagle's island to Wilmington.

Collins v. Creecy, 8 Jon., 333.

SEC. 2029. Footways and hollow bridges made where supervisors may order; their order presumed after ten years' use. R. C., c. 101, s. 17. 1817, c. 940, ss. 1, 2.

Every overseer of the road, when the township board of supervisors may so direct, shall cause to be made and kept in repair, for the convenience of travelers on foot, good and sufficient footways over all swamps and streams of water that may cross that part of the road allotted to him; and, when the board shall so direct, shall also erect and keep hand-rails on each side of all hollow bridges situate on such part of the road: *Provided*, that, at all places where footways and hand-rails, at hollow bridges or over swamps and streams of water, shall have been

commonly used, for the space of ten years next preceding any period within three years before presentment made or indictment found for want of such footways or hand-rails, the same shall be conclusive evidence of an order theretofore made by the board, that they shall be erected and kept up, subject to be rebutted only by producing an order dispensing with them made within three years next before such presentment.

Smith v. Harkins, 3 Ired. Eq., 613.

Sec. 2030. Sign-posts at forks of roads to be set up by overseers; penalty for neglect. R. C., c. 101, s. 18. 1784, c. 227, s. 11. 1812, c. 846.

Overseers shall cause to be set up, at the forks of their respective roads, a post or posts, with arms pointing the way of each road, with plain and durable directions to the most public places to which they lead, and with the number of miles from that place as near as can be computed; and every overseer who shall, for ten days after notice of his appointment, neglect to do so and to keep the same in repair, shall forfeit and pay for every such neglect ten dollars.

State v. Nicholson, 2 Mur., 135.

Sec. 2031. On persons removing or defacing posts or mile-marks. R. C., c. 101, s. 19. 1784, c. 227, s. 11. 1812, c. 846.

Any person, who shall wantonly remove, knock down, or deface the said posts, arms, or any mile-mark, shall, for every such offence, forfeit and pay to the state ten dollars, and be guilty of a misdemeanor.

Sec. 2032. Overseer to measure and mile-mark roads. R. C., c. 101, s. 20. 1784, c. 227, s. 12.

Every overseer of a road shall cause the same to be exactly measured, where it has not already been done, and at the end of each mile, shall mark in a plain, legible, and durable manner, the number of the miles, beginning, continuing, and marking the numbers in such manner and form as the board of supervisors shall direct; and every overseer shall keep up and repair such marks and numbers of his road. If an overseer shall neglect any of the duties prescribed in this section, for the space of thirty days, after his appointment to office, he shall forfeit and pay four dollars, and the like sum for every thirty days thereafter the said marking may be neglected.

Sec. 2033. Penalty on overseer for general neglect of duty. R. C., c. 101, s. 21. 1784, c. 227, s. 14.

Every overseer who shall neglect to do any other duty, by this chapter directed to be done, or who shall not keep the roads and bridges clear and in repair, or shall let them remain uncleared or out of repair, during the space of ten days, unless hindered by extreme bad weather, shall forfeit for every such offence four dollars, and be liable for such damages as may be sustained: *Provided*, that nothing in this section shall excuse any neglect of duty by an overseer, as the same is prescribed in any other part of this chapter.

Sec. 2034. Board of supervisors, &c., to erect bridges at county expense. R. C., c. 101, s. 22. 1784, c. 227, s. 6.

When a bridge shall be necessary, and the overseer with his assistants cannot conveniently make it, the township board of supervisors, with the concurrence of the board of county commissioners, shall contract for the building, keeping and repairing thereof, provided the cost of the same does not exceed five hundred dollars, and the same shall be a charge on the county; and when bridges shall be necessary over any stream which divides one county from another, the commissioners of each shall join in agreement for building, keeping and repairing the same, provided the cost of the same does not exceed five hundred dollars; and the charge thereof shall be defrayed by both counties, in proportion to the number of taxable polls in each.

State v. Selby, 83—617.

Sec. 2035. Contracts to build bridges binding on county. R. C., c. 101, s. 23. 1784, c. 227, s. 6.

Every contract and order by the boards of township supervisors and county commissioners entered into or made as authorized by this chapter for or concerning the building, keeping or repairing bridges, in such manner as to them may seem most proper, shall be valid against the county.

Sec. 2036. Owners of mills and ditches on and across roads to keep up bridges; provisos. R. C., c. 101, s. 24. 1817, c. 941, s. 1. 1846, c. 95, s. 1. 1881, c. 290.

It shall be the duty of every owner of a water-mill, which is situate on any public road, and also of every person who, for the purpose of draining his lands, or for

any other purpose, shall construct any ditch, drain or canal across a public road, respectively, to keep at his own expense in good and sufficient repair, all bridges that are or may be erected or attached to his mill dam, immediately over which a public road may run; and also to erect and keep in repair all necessary bridges over such ditch, drain or canal on the highway, so long as they may be needed by reason of the continuance of said mill, or mill dam, ditch, drain or canal: *Provided*, that nothing herein shall be construed to extend to any mill which was erected before the laying off such road, unless the road was laid off by the request of the owner of the mill: *Provided further*, that the duty hereby imposed on the owner of the mill, and on the person cutting the drain or canal, shall continue on all subsequent owners of the mill, or other property, for the benefit of which the said ditch, drain or canal was cut: *Provided also*, that when any ditch or drain originally constructed across any public road, and bridged for the convenience and safety of the traveling public, has been or may hereafter be enlarged by the owner of adjacent lands to drain his lands, it shall be the duty of such owner to keep up and in repair all bridges crossing such ditch, drain or canal, and that such charge shall be imposed upon all subsequent owners of the lands so drained, and that any person throwing a bank of dirt in the main road shall be compelled to spread the same.

Mulholland v. Brownrigg, 2 Hawks, 349; State v. Yarrell., 12 Ired., 130; Nobles v. Langly, 66—287; State v. Jones, 74—393.

Sec. 2037. Penalty for neglect. R. C., c. 101, s. 25. 1817, c. 941, s. 2. 1876-'7, c. 90. 1876-'7, c. 211.

Every person, who shall fail to perform the duties imposed upon him by the preceding section, or shall leave out of repair any such bridge, for the space of ten days, unless prevented by unavoidable circumstances, shall be liable for such damages as may be sustained, and moreover shall be guilty of a misdemeanor, and fined not exceeding fifty dollars.

Sec. 2038. Ferries and roads, how established, altered or discontinued. R. C., c. 101, s. 2. 1813, c. 862, s. 1.

The board of county commissioners shall not establish any ferry, or order the laying out of any public road, or discontinue or alter such road or ferry, unless upon petition in writing. And unless it appear to the board that every person, over whose lands the said road may pass,

or whose ferry shall be within two miles of the place at which another ferry is prayed to be established, shall have had twenty days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof be posted during the same period at the court house door; at which meeting the board shall hear the allegations set forth in the petition; and if sufficient reason be shown, the board shall appoint and settle or discontinue the said ferry, or order the laying out, or discontinue or alter the said road, as the case may be.

Carr v. Hairston, 1 C. L. Repos., 249; Harris v. Coltraine, 3 Hawks, 312; Little v. May, 3 Hawks, 599; State v. Spainhour, 2 D. &. B., 547; Woolard v. McCullough, 1 Ired., 443; Piercy v. Morris, 2 Ired., 168; Leath v. Summers, 3 Ired., 108; State v. Shuford, 6 Ired., 162; Welch v. Piercy, 7 Ired., 365; Davis v. Hill, 11 Ired., 9.

Sec. 2039. Board may order how costs shall be paid; appeal; controversies concerning roads, &c., carried by appeal to superior court to be tried before jury. R. C., c. 101, s. 3. 1813, c. 862, s. 1. 1879, c. 258.

In all applications provided for in the preceding section, the board of county commissioners may direct how and by whom the costs shall be paid; and any person may appeal to the superior court at term time, and if any person shall appeal from the board on such petition, he shall give bond to the opposing party as provided in other cases of appeal, and the superior court at term shall hear the whole matter anew; and where any proceeding is instituted to lay out, establish, alter or discontinue public roads or to appoint and settle ferries, and the said proceeding is carried to the superior court in term time by appeal or otherwise, the parties to said proceeding shall be entitled to have every issue of fact joined in said proceeding tried in the superior court in term time by jury, and from the judgment of the superior court either party may appeal to the supreme court as is provided in other cases of appeals in this code.

Ashcraft v. Lee, 79—34.

Sec. 2040. Roads, how laid out. R. C., c. 101, s. 4. 1784, c. 227, s. 13. 1813, c. 862, s. 1. 1879, c. 82, s. 9.

All roads shall be laid out by a jury of five freeholders, to the greatest advantage of the inhabitants, and with as little prejudice as may be to lands and enclosures; which laying out, and such damage as private persons

may sustain, shall be done and ascertained, by the same jury on oath; and all damages by them assessed shall be deemed a county charge.

Ashcraft v. Lee, 79—34.

SEC. 2041. When road changed, how received. R. C., c. 101, s. 5. 1784, c. 227, s. 13. 1813, c. 862, s. 1.

Whenever, upon petition of any person, a road shall be changed and, as a condition thereof, it shall be required by the board, that he put the proposed road in good condition, he may, at any time thereafter, tender the same to the overseer, who shall receive it, if it be in such condition as is required for highways; and if not, shall reject it; and in either case he shall report and certify the fact to said board where the same may be considered; and said board shall hear all persons interested in the matter of receiving or rejecting the road; and the decision of the board shall be conclusive as to the condition of the road; but the old road shall not be closed until it be discontinued by order of the board.

SEC. 2042. How persons may turn roads on their own lands. R. C., c. 101, s. 6. 1834, c. 22.

In addition to the mode prescribed in the preceding section, for turning roads, the following method may be observed by any one who desires to change a road from one part of his land to another part, namely: Such person shall lay out the same, and after putting it in such good condition as highways are directed to be, shall apply to a justice of the peace, who thereupon shall notify the overseer of the road, and summon two freeholders to meet on the premises at a given day; and the said freeholders, being duly sworn, shall, with the justice, view and examine carefully the road which is proposed in place of the other, and all matters and facts tending to show whether the change should be allowed. They shall report in writing subscribed by them, the result of their consideration to the next meeting of the board of supervisors, which may confirm or reject their report: *Provided*, that such justice and freeholders shall be disinterested in the land, and not of kin or affinity to the applicant.

State v. Spainhour, 2 D. & B., 547; Gatling v. Liverman, 1 Ired., 63; Kennedy v. Erwin, Busb., 387; Brodnax v. Groom, 64—244.

Sec. 2043. Board of supervisors in ten days to furnish constable with orders appointing overseers; constable to apply to board for orders, and serve them within twenty days, penalty on board and constable for neglect. R. C., c. 101, s. 8. 1812, c. 845, ss. 1, 2. 1813, c. 859, ss. 1, 2.

The board of supervisors of the township, within ten days after the rise of the board, shall furnish the constable with two copies of each order appointing overseers of roads, that may have been made during the sitting of the board. And the constable shall apply at the office of the board, within ten days after the rise of every meeting of the board for such orders, and, on receiving them, shall, within twenty days, serve each overseer of roads with a copy of the order, or leave the same at his usual habitation; and the other copy shall be returned to the next meeting of the board of supervisors, with the date of its reception by him, and the date of the service, indorsed thereon, or the date when it was left at the residence of the said overseer. And if either the board or constable shall fail to perform any duty enjoined by this section, he shall forfeit ten dollars to the county, to be recovered at any time, by notice to show cause at the instance of the solicitor, who shall prosecute the same in the name of the state.

Hathaway v. Hinton, 1 Jon., 245.

Sec. 2044. Notice, how served. R. C., c. 101, s. 10. 1842, c. 65.

When an overseer shall not be able to personally notify the hands three days before the day appointed for working the road, he shall leave at the house of each hand a written summons, specifying the day on which they are required to attend, the place of the road to be worked, and the kind of tools to be brought or used; and the said written summons, left as aforesaid, shall be deemed sufficient notice to the hands required to be notified; and all penalties recovered by an overseer, for default of working on the road, shall be applied by him to the repair of the road of which he is, or may have been overseer.

State v. Everit, 2 C. L. Repos., 633; Forbes v. Hunter, 1 Jon., 231.

Sec. 2045. Toll-bridges allowed by board of commissioners, when; builders to keep them in repair, or forfeit toll and be indicted. R. C., c. 101, s. 26. 1784, c. 227, s. 7. 1817, c. 939, s. 2. 1817, c. 940, s. 3.

Whenever, from the rapidity or width of any stream,

it may be too burdensome to build and keep up a bridge across the same, at the expense of those who are taxable for that purpose, the board of commissioners of the county, or counties, chargeable therewith, may jointly and severally (as the case may be) contract for the building thereof, by allowing the builder to take tolls, at such rate and for such time, on all persons, horses, carriages, and other things passing over the bridge, as may be agreed on between the board of commissioners and the builder; which tolls shall be common to all persons. And such bridges shall be built in the manner the board or boards may direct, and shall be kept in good repair by the builder, his heirs and assigns, during the time the tolls are to be enjoyed; and in default of complying with the contract, the builder, or others who may succeed to his rights and enjoy the tolls, shall be guilty of a misdemeanor.

Smith v. Harkins, 3 Ired. Eq., 613.

Sec. 2046. Tolls of ferry regulated by board of commissioners; penalty for refusing to keep it up. R. C., c. 101, s. 27. 1779, c. 10, ss. 8, 9. Ired. Rev., c. 160, s. 2, new Rev.

The board of commissioners of each county shall, once a year, or oftener if necessary, at the meeting to be held next after the first day of January, rate the prices of such ferries as shall be kept within their respective counties; and any ferry keeper who shall ask, demand, or receive a greater price for ferriage than shall be rated by the board of commissioners, shall forfeit and pay five dollars for every offence to the party aggrieved. And every person who owns a public ferry, and refuses to keep it up at the rates allowed by the board, shall for every such offence forfeit five dollars.

Smith v. Harkins, 6 Ired. Eq., 613.

Sec. 2047. Owner may build toll-bridge at his ferry; drawbridge, when made. R. C., c. 101, s. 28. 1806, c. 706.

In all cases, where the proprietor of a ferry shall prefer building a good and substantial bridge over any water course instead of keeping a ferry, he may do so; and may claim and hold such bridge under the same rights, and in the same manuer, by which the ferry is claimed and held, and under the same rules, regulations, restrictions and penalties as other toll-bridges: *Provided*, that no more toll shall be demanded for passing any such bridge

than is granted by law for the ferriage, unless by agreement with the board of commissioners: *Provided further*, that, in all such bridges, the proprietor shall erect a draw, where the free navigation of the stream may require it.

Smith v. Harkins, 3 Ired. Eq., 613; Lea v. Johnston, 9 Ired., 15; Davis v. Jerkins, 5 Jon., 290.

Sec. 2048. Bonds of owners of ferries and toll-bridges to be taken by board of commissioners; persons injured may recover damages. R. C., c. 101, s. 29. 1784, c. 227, s. 15.

The board of commissioners of each county shall compel every person that may own a toll-bridge, or keep a public ferry, within the county, to give bond with good surety, in the sum of one thousand dollars, payable to the state of North Carolina, conditioned that he will constantly keep such bridge in good repair, or, as the case may be, provide and keep good and sufficient boats, or other proper craft, always to be well attended, for the passing of travelers or other persons, their horses, carriages and effects; and will indemnify and save harmless every person who may be endamaged, by reason of any default in his undertaking. And if any person shall receive damage, because such ferryman or keeper of a toll-bridge shall not have complied with the conditions of his bond, he may bring suit thereon in the name of the state, and recover his damages. And if any person shall be detained at any public ferry, by reason of the ferryman not having sufficient boats or other proper crafts and hands, or by his neglecting to do his duty in any other respect, he may recover before a justice of the peace, against such ferryman, the sum of ten dollars, as a penalty for every such default or neglect.

Sec. 2049. Penalty for keeping ferry, &c., without authority; proviso for mail carriers. R. C., c. 101, s. 30. 1764, c. 72, s. 1. 1787, c. 273. 1883, c. 381.

If any unauthorized person shall pretend to keep a ferry or to transport for pay any person or his effects, within five miles of any ferry on the same river or water, which theretofore may have been appointed, he shall forfeit and pay two dollars for every such offence, to the nearest ferryman: *Provided*, that any person who may contract for carrying the mail, may keep a boat for the sole purpose of transporting the same, and such passengers as may travel in the coach therewith, across any

ferry; but such contractor shall not transport across such ferry any other passengers than such as travel by the coach.

Taylor v. R. R. Co., 4 Jon., 277; Carrow v. Toll Bridge Co., Phil., 118; Pugh v. R. R. Co., Phil., 359; Barrington v. Ferry Co., 69—165.

Sec. 2050. Fastening vessels to float-bridge; penalty. R. C., c. 101, s. 31. R. S., c. 104. 1858-'9, c. 58, s. 1.

No person shall fasten any decked vessel to a float bridge, on pain of forfeiting fifty dollars; which in the case of a bridge that crosses a county line, may be recovered in either county.

Sec. 2051. Railroad companies to keep draws in bridges. R. C., c. 101, s. 32. 1846, c. 51, ss. 1, 2.

Railroad, plank-road, and turnpike companies, erecting bridges across water courses, shall attach and keep up good and sufficient draws, by which vessels may be allowed conveniently to pass.

Sec. 2052. Owners of steamboats, &c., to notify owners of bridges to construct draws; penalty for neglect. R. C., c. 101, s. 33. 1864, c. 51, ss. 1, 2.

Owners of steamboats or other craft, who may intend to navigate any river or creek over which any person may have a bridge, may give three months' notice thereof in one of the public journals of the state, published nearest the river or creek intended to be navigated, and to the owner of said bridge, to construct a draw of sufficient width to allow the passage of the boat which is to be used; and if the owner of said bridge shall not, within three months from the date of the notice, construct the required draw, he shall forfeit and pay the person so notifying, if he be thereby prevented from navigating the water course, fifty dollars; and shall be further subject to the like penalty, under like circumstances, for every three months' default thereafter.

Sec. 2053. Counties to erect draws where necessary. R. C., c. 101, s. 34.

The county or counties which may erect bridges shall, by their boards of commissioners, provide and keep up draws in all such bridges, where the same may be necessary to allow the convenient passage of vessels.

Sec. 2054. Railroad companies, &c., to keep bridges over county roads; penalty for failure. R. C., c. 101, s. 35. 1838, c. 5, ss. 1, 2, 3, 4.

Railroad, plank-road, and turnpike companies, each, shall keep up, at their own expense, all bridges on or over county, or incorporated roads, which they have severally made it necessary to be built, in establishing their respective roads; and on failure to do so, shall be guilty of a misdemeanor, and fined; and execution may issue for fine and costs; and shall forfeit and pay twenty-five dollars to any person who may sue for the same.

State v. R. R. Co., 74—143.

Sec. 2055. Duty of solicitors to prosecute for injuries to bridges. R. C., c. 101, s. 36. 1846, c. 11, ss. 1, 2.

The solicitors of the superior court are authorized and directed to institute suits in the name of the state, in the counties wherein the injuries may be done, for the recovery of damages, against all persons, who shall wilfully or negligently injure any public bridge belonging to or situate in any county or counties, by forcibly running any decked vessel, boat or raft against the same; by cutting trees or timber in the rivers or creeks above such bridges, or by any other manner or means whatsoever. In case the injury is done to two counties, the action may be brought in either for the entire damage; and the damages which may be recovered shall be for the use of the county or counties injured; and if the plaintiff fail, the costs shall be paid by the county or counties for whose use the suit is brought, and in the same proportion in which the recovery would be divided.

Sec. 2056. Cart-ways, in what cases, and how obtained; proceedings therefor. R. C., c. 101, s. 37. 1798, c. 508, s. 1. 1822, c. 1139, s. 1. 1879, c. 258.

If any person be settled upon or cultivating any land, to which there is leading no public road, and it shall appear necessary, reasonable and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the board of supervisors of the township praying for a cartway to be kept open across such other persons' lands, leading to some public road, ferry, bridge or public landing; and upon his making it appear to the board that the adverse party has had ten days' notice of his intention, the board shall hear the allegations of the petitioner and the objections of the adverse party or parties, and if sufficient

reason be shown, shall order the constable to summon a jury of five freeholders, to view the premises, and lay off a cart-way not less than fourteen feet wide, and assess the damages the owner of such land may sustain thereby; which, with the expense of making the way, shall be paid by the petitioner; and the way shall be kept open for the free passage of all persons, on foot or horseback, carts and wagons: *Provided*, that, if the notice aforesaid shall not have been given, the board shall cause such petition to be filed with their chairman until their next meeting, when they shall proceed to hear and determine the same, and the petitioner or the adverse party may appeal from the order of the supervisors to the board of commissioners of the county, and from the order of the board of commissioners to the superior court at term, when the issues of fact shall be tried by a jury, and from the judgment of the superior court to the supreme court, as in other cases of appeal. And all costs accumulated after the order of the board of supervisors shall be paid by either party, as the court may direct.

Lea v. Johnston, 9 Ired., 15; Caroon v. Doxey, 3 Jon., 23; Jacocks v. Newby, 4 Jon., 266; Burgwyn v. Lockhart, Winst., 269; Link v. Brooks, Phil., 499; Boyden v. Achenbach, 79—139; State v. Purify, 86—681.

Sec. 2057. May be changed or discontinued and gates or bars erected, &c.; penalty for injuring them. R. C., c. 101, s. 38. 1798, c. 508, ss. 1, 2, 3. 1834, c. 16, s. 1.

Cart-ways, laid off according to the provisions of this chapter, may be changed or discontinued upon application by any person concerned, under the same rules of proceeding as they may be first laid off, and upon such terms as to the board of supervisors shall seem equitable and just. And any person through whose land a cart-way may pass, may erect gates or bars across the same; and if any person shall leave open, break down, or otherwise injure such gates or bars, he shall forfeit and pay, for every such offence, ten dollars to the person erecting the same or his assigns of the land; and if the offence shall be maliciously done, he shall be guilty of a misdemeanor.

Lea v. Johnston, 9 Ired., 15; Jacocks v. Newby, 4 Jon., 266; Plimmons v. Frisby, Winst., 201.

Sec. 2058. License to erect gates across highways, how obtained. R. C., c. 101, s. 39. 1834, c. 16, ss. 2, 3, 4.

Any person desiring to erect a gate across a public road

may file his petition before the board of supervisors of the township where the road lies; whereupon publication shall be made at the court house until the next succeeding meeting, of such application, specifying the road, the place for the gate and name of the petitioner; and all persons interested in the convenient traveling or transportation on said road, shall have leave to appear and defend, demur, or plead to said petition; and if, at that meeting, it shall appear that such publication has been made, the supervisors may, at their discretion, authorize the petitioner, at his cost, to erect a gate as prayed for.

Sec. 2059. Who exempt from working on roads. R. C., c. 101, s. 40.

The following persons shall be exempt from working on roads, namely: justices of the peace, constables, ferrymen, keepers of public grist mills, county commissioners, teachers and pupils of schools and lock-keepers on public canals.

State v. Craige, 81—588.

Sec. 2060. Expenses borne by whole people of county, when. 1869-'70, c. 219.

The expense of building and keeping up public bridges in the several counties shall be borne by the whole people of each, and not by the people of the township separately, in which such bridges may be situated; and it shall be the duty of the commissioners to adjust this burden equally among the people of their respective counties, and they shall exercise a due supervision over the action of the respective boards of supervisors of the townships, so as to prevent the board of any township from establishing any unnecessary number of bridges in their respective townships.

State v. Selby, 83—617.

Sec. 2061. Road steamers may run upon public roads. 1870-'71, c. 162.

It shall be lawful for any person to run and use traction engines and road steamers upon the public roads in North Carolina.

Sec. 2062. Boards of supervisors to lay out, &c., church roads. 1872-'3, c. 189, ss. 1, 5.

The board of supervisors in each township is authorized to order the laying out of any and all necessary roads to and from any church or other place of public worship in

their said townships, to discontinue such roads when they may be found useless, and to alter the same so as to make them more useful, and the right of way herein provided for shall terminate whenever the church or place of worship shall cease to be used as such.

Sec. 2063. Petition for the same. 1872-'3, c. 189, s. 2.

The said board of supervisors shall not order the laying out of any such road or discontinue or alter the same except upon petition, in writing, nor shall they hear any such petition, unless it may be made to appear that every person over whose lands the said road may pass shall have had ten days' notice of the intention to file such petition, by personal service of notice in writing, or if the owner be unknown or there be no owner, agent or attorney of such owner resident in this state, then by notice thereof posted up at the court house door of the county in which the township is situate and at two public places in the township for the space of ten days; and upon the hearing of the petition, if sufficient reason be shown, the said board of supervisors shall order the laying out, shall discontinue or alter the said road as the case may be, and from their determination any party dissatisfied may appeal as is provided in this chapter in the section directing the laying off of cart-ways.

Sec. 2064. Manner of laying out roads. 1872-'3, c. 189, s. 3.

All roads provided for in the two preceding sections shall be laid out to the greatest advantage of the inhabitants and with as little prejudice as may be to lands and enclosures within twenty days from the notification of their appointment by five disinterested freeholders, to be appointed by the said board of supervisors; and such damage as any individuals may sustain shall be ascertained by the said freeholders, and a report thereof with the proceedings had by them, shall be made to the said board of supervisors; and all damages so assessed by the freeholders shall be paid by the petitioners, and until paid there shall be no confirmation of the report of the freeholders, and such laying out shall be of no effect.

Sec. 2065. Obstruction of road, &c., a misdemeanor. 1872-'3, c. 189, s. 6. 1883, c. 383.

If any person shall wilfully alter, change or obstruct any highway, cartway, mill road or road leading to and from any church or other place of public worship, whether

the right of way thereto be secured in the manner herein provided for or by purchase, donation or otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both.

Any person who shall hinder or in any manner interfere with the making of any road or cartway laid off according to this chapter shall be guilty of a misdemeanor, and punished by fine or imprisonment, or both, atthe discretion of the court.

State v. Davis, 68—297; Boyden v. Achenbach, 79—539; State v Midgett, 85—538; State v. Purify, 86—681.

CHAPTER FIFTY-ONE.

SHERIFFS.

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SEC. 2066. Board of county commissioners to take bonds. 1868, c. 20, s. 32. 1876-'7, c. 276, s. 5.

The board of county commissioners in every county shall take and approve the official bonds of the sheriffs, which they shall cause to be registered and the originals deposited with the clerk of the superior court for safe keeping. Said bonds shall be taken on the first Monday of December next after the election of sheriffs.

McLean v. Buchanan, 8 Jon., 444; State v. Lowrance, 64—483; State v. Howell, 65—61.

SEC. 2067. Who ineligible to office of sheriff. R. C., c. 105, s. 5. 1829, c. 5, s. 6. 1830, c. 25, s. 3.

No person shall be eligible to the office of sheriff, who is not of the age of twenty-one years, and has not resided in the county in which he is chosen, for one year immediately preceding his election.

Hargrove v. Dunn, 73—595.

SEC. 2068. Sheriff ineligible who fails to settle public dues. R. C., c. 105, s. 6. 1806, c. 699, s. 2. 1830, c. 25, s. 2.

No person shall be eligible to the office of sheriff in any county, who theretofore has been sheriff of such county, and hath failed to settle with and fully pay up to every officer, the taxes which were due from him; nor shall any board permit such former sheriff to give bonds for, or re-enter upon the duties of the office, until he has produced before the board the receipt in full of every officer for such taxes.

State v. Dunn, 73—595; McNeill v. Green, 75—329.

SEC. 2069. Who may not serve as sheriff. R. C., c. 105, s. 7. 1777, c. 118, ss. 2, 4.

No member of the general assembly, nor any practicing attorney, shall hold the office of sheriff.

SEC. 2070. Sheriff shall renew bonds annually; failure, to create vacancy. R. C., c. 105, s. 9. 1829, c. 5, s. 5. 1876-'7, c. 276, s. 5.

The sheriff shall renew his bonds annually on the first

Monday in December, and produce the receipts in full from the state treasurer, county treasurer, and other persons, of all moneys by him collected, or which ought to have been by him collected, for the use of the state and county, and for which he shall have become accountable; and a failure of the sheriff to renew his bonds, or to exhibit the aforesaid receipts, shall create a vacancy.

Vann v. Pipkin, 77—408; Sneed v. Bullock, 80—132; Worley v. Smith, 81—304.

Sec. 2071. Sheriff removed from office; duty of coroner in such case. R. C., c. 105, s. 11. 1829, c. 5, s. 8.

If any sheriff shall be convicted of a misdemeanor in office, the court may at their discretion, as a part of his punishment, remove him from office; and on any vacancy in the office, created by this or any other means, the coroner of the county shall execute all process directed to the sheriff, until the first meeting of the county commissioners next succeeding such vacancy, when the board shall elect a sheriff to supply the vacancy for the residue of the term, who shall possess the same qualifications, enter into the same bonds, and be subject to removal, as the sheriff regularly elected; and should the board fail to fill such vacancy, the coroner shall continue to discharge the duties of sheriff until it shall be filled.

Mitchell v. Ward, 6 Jon. Eq., 66; Worley v. Smith, 81—304.

Sec. 2072. Coroner to give bonds and take oaths when called to act as sheriff. R. C., c. 105, s. 12. 1829, c. 5, s. 9.

Any coroner called to discharge the duties of sheriff shall, before he enters thereon, take the same oaths, and enter into the same bonds that may be required of sheriffs; and the first appointed coroner in each county shall be considered the coroner to discharge the duties of the sheriff, and the proceeding shall be entered on record by the clerk of the board of county commissioners.

Yeargin v. Siler, 83—348.

Sec. 2073. Bonds of sheriff; form of bond for execution of process. R. C., c. 105, s. 13. 1777, c. 118, s. 1. 1823, c. 1223. 1879, c. 109, s. 1.

The sheriff shall execute three several bonds, payable to the state of North Carolina, as follows: one conditioned for the collection, payment and settlement of the county, poor, school and special taxes in a sum double

the amount of said taxes for the previous year; one for the collection, payment and settlement of the public taxes, as required by law, in a sum double the amount of said taxes for the previous year: *Provided*, that the amount of neither of said bonds shall be required to be more than fifty thousand dollars. And the amount of the third bond, for the due execution and return of process, payment of fees and moneys collected, and the faithful execution of his office as sheriff, shall be not less than five thousand dollars nor more than fifteen thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

The condition of the above obligation is such, that whereas the above bounden..... is elected and appointed sheriff of..... county; if, therefore, he shall well and truly execute and due return make of all process and precepts, to him directed, and pay and satisfy all fees and sums of money, by him received or levied by virtue of any process, into the proper office, into which the same, by the tenor thereof, ought to be paid, or to the person or persons to whom the same shall be due, his, her or their executors, administrators, attorneys, or agents, and in all other things well, truly and faithfully execute the said office of sheriff, during his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect.

Patterson v. Murray, 8 Jon., 278; Eaton v. Kelly, 72—110.

Sec. 2074. When board to require a justification of bonds, &c.; notice to sheriff; his failure to appear or justify, &c., board to elect another. 1879, c. 109, s. 2.

It shall be the duty of the board of county commissioners whenever they shall be of opinion that the bonds of the sheriff of their county are insufficient, to notify said sheriff in writing to appear within ten days and give other and better sureties, or justify the sureties on his bonds; and in case such sheriff shall fail to appear on notice, or fail to give sufficient bonds, or to justify his bonds, it shall be the duty of said board to elect forthwith some suitable person in the county as sheriff for the unexpired term, and who shall give proper and lawful bonds and be subject to like obligations and penalties.

State Bank v. Twitty, 2 Hawks, 5; Rhodes v. Vaughan, 2 Hawks, 167; Chambers v. Witherspoon, 3 Hawks, 42; Cameron v. Campbell, 3 Hawks, 285; Crumpler v. Governor, 1 Dev., 52; Governor v. Bart, 1 Dev., 65; Governor v. Eastwood, 1 Dev., 157; Governor v. Matlock, 1 Dev., 214; Governor v. McAffee, 2 Dev., 15; Slade v. Governor, 3 Dev., 365; White v. Miller, 3 D. & B., 55, Jones v. Montfort, 3 D. & B., 73; Governor v. Harrison, 4 D. & B., 461; State v. Roane, 2 Ired., 144; McLin v. Hardie, 3 Ired., 407; State v. McAlpin, 6 Ired., 347; State v. Woodside, 7 Ired., 296; State v. Long, 7 Ired., 379; State v. Woodsides, 8 Ired., 104; State v. Long, 8 Ired., 415; Ellis v. Long, 8 Ired., 513; State v. McIntosh, 9 Ired., 307; State v. Woodside, 9 Ired., 496; State v. Bradhurst, 10 Ired., 229; Lindsay

v. Dozier, Busb., 275; McLean v. Buchanan, 8 Jon., 444; Huggins v. Hinson, Phil., 126; State v. Lowrance, 64—483; State v. Howell, 65—61; State v. Briggs, 65—159; State v. Tapscott, 68—300; Sikes v. Commissioners of Bladen, 72—34; Wood v. Cherry, 73—110; State v. Clarke, 73—255; Brumble v. Brown, 73—476; State v. McNeill, 74—535; People v. Green, 75—329; Prairie v. Jenkins, 75—545; Prince v. McNeill, 77—398; Commissioners of Green v. Taylor, 77—404; Vann v. Pipkin, 77—408; Cherry v. Wilson, 78—164; Cherry v. Wilson, 78—166; Prairie v. Worth, 78—169; Jackson v. Maultsby, 78—174; Dixon v. Commissioners of Beaufort, 80—118; Sneed v. Bullock, 80—132; Gamble v. Rhyne, 80—183; Worley v. Smith, 81—304.

Sec. 2075. Board of commissioners liable for loss. 1868-'9, c. 245, s. 3.

If any board of county commissioners shall fail to comply in good faith with the provisions of this chapter, they shall be liable for all losses sustained in the collection of taxes, on motion to be made by the solicitor of the district, and also be guilty of a misdemeanor in office, and, on conviction, shall be fined not less than five hundred dollars, nor more than one thousand dollars.

Sec. 2076. Sureties liable for fines, &c. R. C., c. 105, s. 14. 1829, c. 33.

The sureties to a sheriff's bond shall be liable for all fines and amercements imposed on him, in the same manner as they are liable for other defaults in his official duty.

Evans v. Blalock, 2 Jon., 377; Siler v. McKee, 2 Jon., 378; Eaton v. Kelly, 72—110; Hughes v. Newsom, 86—424; Ellington v. Wicker, 87—14.

Sec. 2077. May resign office to board. R. C., c. 105, s. 15. 1777, c. 118, s. 1. 1808, c. 752.

Every sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another sheriff.

Sec. 2078. Sheriffs, &c., of Hyde and Carteret may serve process on shipboard between Ocracoke and Portsmouth. R. C., c. 105, s. 16. 1846, c. 67.

The sheriffs, constables, and other officers of Hyde and Carteret counties, shall have power to execute process upon any person, on board any vessel lying in the waters between Ocracoke island in Hyde county, and the island of Portsmouth in Carteret county; and for every process so executed, the sheriff shall receive a fee of three dollars, and the constable, for like service, three dollars.

SEC. 2079. Sheriff to execute all process and writs from courts; penalty for neglect; penalty for false return. R. C., c. 105, s. 17. 1777, c. 218, s. 5. 1821, c. 1110. 1874-'5, c. 33.

Every sheriff, by himself or his lawful deputies, shall execute all writs and other process to him legally issued and directed, within his county, or upon any river, bay, or creek adjoining thereto, or in any other place where he may lawfully execute the same, and make due return thereof, under the penalty of forfeiting one hundred dollars for each neglect, where such process shall be delivered to him twenty days before the sitting of the court to which the same is returnable; to be paid to the party aggrieved by order of the court, upon motion and proof of such delivery, unless such sheriff can show sufficient cause to the court, at the next succeeding term after the order; and for every false return, the sheriff shall forfeit and pay five hundred dollars, one moiety thereof to the party aggrieved, and the other to him that will sue for the same; and moreover be further liable to the action of the party aggrieved, for damages; and every sheriff and his deputies, and every constable shall execute all writs and other process to him legally issued and directed from a justice's court within his county, and make due return thereof, under penalty of forfeiting one hundred dollars for each neglect or refusal, where such process shall be delivered to him ten days before the return day thereof, to be paid to the party aggrieved by order of the said court, upon motion and proof of such delivery, unless such sheriff or constable can show sufficient cause to the court at a day within three months from the date of the entry of the judgment *nisi*, of which the said officer shall be duly notified.

Douglas v. Auld, 1 C. L. Repos., 500 (112); Holding v. Holding, 2 C. L. Repos., 440 (324); Crumpler v. Glisson, N. C. T. R., 79 (516); Davis v. Lancaster, 1 Mur., 255; State v. Armfield, 2 Hawks, 246; Governor v. Mallock, 2 Hawks, 366; Lindsay v. Armfield, 3 Hawks, 548; McKellar v. Bowell, 4 Hawks, 34; Potter v. Sturges, 1 Dev., 79; Governor v. Twitty, 1 Dev., 153; Banner v. McMurray, 1 Dev., 218; Mitchell v. Durham, 2 Dev., 538; Dowell v. Vannoy, 3 Dev., 23; McRae v. Evans, 1 D. & B., 243; Foy v. Williamson, 1 D. & B., 252; Tarkington v. Alexander, 2 D. & B., 87; State v. Benton, 2 D. & B., 196; Farley v. Lea, 4 D. & B., 169; Spruill v. Bateman, 4 D. & B., 489; Governor v. Montford, 1 Ired., 155; Burgin v. Burgin, 1 Ired., 160; Burgin v. Burgin, 1 Ired., 453; McLin v. Hardie, 3 Ired., 407; Satterwhite v. Carson, 3 Ired., 549; Harper v. Miller, 4 Ired., 34; Lyle v. Wilson, 4 Ired., 226; State v. Allen, 5 Ired., 36; Smith v. Law, 5 Ired., 197; State v. Woodside, 7 Ired., 296; Lemit v. Freeman, 7 Ired., 317; Wilson v. Hamp-

ton, 7 Ired., 333; Parks v. Alexander, 7 Ired., 412; Collais v. McLeod, 8 Ired., 221; Halcombe v. Rowland, 8 Ired., 240; Lemit v. Freeman, 8 Ired., 312; Sherrell v. Shuford, 10 Ired., 200; State v. Edwards, 10 Ired., 242; Patterson v. Britt, 11 Ired., 383; Sloan v. Stanly, 11 Ired., 627; Judge v. Houston, 12 Ired., 108; Hampton v. Brown, 13 Ired., 18; Bowen v. Jones, 13 Ired., 25; Patton v. Mann, 13 Ired., 444; Patton v. Marr, Busb., 377; Kea v. Melvin, 3 Jon., 243; Hyatte v. Allison, 3 Jon., 533; McDowell v. Roberson, 3 Jon., 535; Waugh v. Brittain, 4 Jon., 470; Martin v. Martin, 5 Jon., 316; Martin v. Martin, 5 Jon., 349; State v. Latham, 6 Jon., 233; Cockerham v. Baker, 7 Jon., 288; Hassell v. Latham, 7 Jon., 465; McLean v. Buchanan, 8 Jon., 444; Tomlinson v. Long, 8 Jon., 469; Albright v. Tapscott, 8 Jon., 473; McKeithan v. Terry; 64—25; McDowell v. Clarke, 68—118; Bryan v. Hubbs, 69—423; Brumble v. Brown, 71—513; Peebles v. Newsom, 74—473; Edwards v. Tipton, 77—322; Churchill v. Lee, 77—341; Richardson v. Wicker, 80—172; Finley v. Hayes, 81—368; Boggs v. Davis, 82—27; Yeargin v. Wood, 84—326; Smith v. McMillan, 84—593; Franks v. Sutton, 86—78; Person v. Newsom, 87—142.

Sec. 2080. Sheriff to pay over to plaintiff immediately, &c.

In all cases where a sheriff has collected money upon an execution placed in his hands, if there be no *bona fide* contest over the application thereof, he shall immediately pay the same to the plaintiff, or into the office of the clerk of the court from which the execution issued, and upon his failure to make such payment upon demand, he shall be liable to a penalty of one hundred dollars, to be collected as other penalties.

Sec. 2081. To give receipt for process, which shall be evidence, &c. R. C., c. 105, s. 18. 1848, c. 97.

Every sheriff, coroner or constable shall, when requested, give his receipt for all original and mesne process placed in his hands for execution, to the party suing out the same, his agent or attorney; and such receipt shall be admissible as evidence of the facts therein stated, against such officer and his sureties, in any suit between the party taking the receipt and such officer and his sureties.

King v. Hunter, 65—603.

Sec. 2082. To take no obligation of any one in custody, but as payable to himself as sheriff, &c., nor unlawful fees. R. C., c. 105, s. 19. 1777, c. 118, s. 8.

The sheriff, or his deputy, shall take no obligation of or from any person in his custody, for or concerning any matter or thing relating to his office, otherwise payable than to himself as sheriff, and dischargeable upon the prisoner's appearance and rendering himself at the day

and place required in the writ (whereupon he was or shall be taken or arrested), and his sureties discharging themselves therefrom as special bail of such prisoner, or such person keeping within the limits and rules of any prison; and every other obligation taken by any sheriff in any other manner or form, by color of his office, shall be void, except, in any special case, any other obligation shall be, by law, particularly and expressly directed: and no sheriff shall demand, exact, take or receive any greater fee or reward whatsoever, nor shall have any allowance, reward or satisfaction from the public, for any service by him done, other than such sum as the court shall allow for *ex officio* services, and the allowance given and provided by law.

Rhodes v. Vaughan, 2 Hawks, 167; Denson v. Sledge, 2 Dev., 136; Clark v. Walker, 3 Ired., 181; Heilig v. Lemley, 74—250.

Sec. 2083. Permitting escape of one in execution, liable in action for the debt. R. C., c. 105, s. 20. 13 Edw. I., c. 11. 1777, c. 118, ss. 10, 11.

When any sheriff shall take or receive and have in keeping the body of any debtor in execution, or upon attachment for not performing a judgment for the payment of any sum of money, and shall wilfully or negligently suffer such debtor to escape, the person suing out such execution or attachment, his executors, or administrators, shall have and maintain an action for the debt against such sheriff and his sureties on his official bond, and in case of his death, against his executors or administrators, for the recovery of all such sums of money as are mentioned in the said execution or attachment, and damages for detaining the same.

Ellis v. Gee, 1 Mur., 445; Governor v. Matlock, 1 Hawks, 425; Wilkes v. Slaughter, 3 Hawks, 211; Dowd v. Seawell, 3 Dev., 185; Walker v. Vick, 2 D. & B., 99; Smallwood v. Wood, 2 D. & B., 356; Williams v. Floyd, 5 Ired., 649; Lash v. Ziglar, 5 Ired., 705; Jackson v. Hampton, 6 Ired., 34; Wright v. Roberts, 6 Ired., 116; Adams v. Turrentine, 8 Ired., 147; State v. Ellison, 9 Ired., 261; Whicker v. Roberts, 10 Ired., 485; Jackson v. Hampton, 10 Ired., 579; Currie v. Worthy, 2 Jon., 104; State v. McKee, 2 Jon., 379; Currie v. Worthy, 3 Jon., 315; Wiley v. Eure, 8 Jon., 320; Lusk v. Falls, 63—188.

Sec. 2084. Not to farm his office. R. C., c. 105, s. 21. 23 Hen. VI, c. 9.

No sheriff shall let to farm in any manner, his county, or any part of it, under pain of forfeiting five hundred dollars; one-half to the use of the county, and the other half to the person suing for the same.

Sec. 2085. To have custody of jail. R. C., c. 105, s. 22.

The sheriff shall have the care and custody of the jail in his county; and shall be, or appoint, the keeper thereof.

Turrentine v. Faucett, 11 Ired., 652; Bunting v. McIlhenny, Phil., 579.

Sec. 2086. To diligently collect claims. R. C., c. 105, s. 23. 1866, c. 28.

When a claim, within the jurisdiction of a justice of the peace, shall be placed in the hands of any sheriff, or his deputy, for collection, he shall diligently endeavor to collect the same..

State v. Long, 7 Ired., 379.

Sec. 2087. To furnish grand jury with a list of retailers of spirituous liquors; penalty for omission. R. C., c. 105, s. 24. 1825, c. 1272, s. 4. 1850, c. 185.

The sheriff shall lay before the grand jury of his county, at each court, as soon as the grand jury shall be assembled, a list of all persons who may have obtained license to retail spirituous liquors by small measure, within two years previous to said court; which list the foreman of the grand jury, at the close of its session, shall deliver to the clerk for safe keeping; and any sheriff failing to perform the duty aforesaid, shall forfeit and pay to the state ten dollars, to be recovered by the prosecuting officer, in the same manner as the penalties against sheriffs for not returning process.

Sec. 2088. Outgoing sheriff subject to penalty for not executing precepts in certain cases. R. C., c. 105, s. 25.

Any sheriff who shall have received a precept, and shall go out of office before the return day thereof, without having executed the same, shall forfeit and pay to the party at whose instance it was issued, the sum of one hundred dollars, if such precept shall have remained in his hands for such length of time wherein it might have been well executed by him; unless the same shall have been thereafter executed by the successor of such sheriff, and returned at the day and place commanded therein; or unless it shall have been delivered over to the succeeding sheriff time enough to have allowed of its being executed by him; and the penalty aforesaid shall be recoverable by notice against such outgoing sheriff and his sureties.

SEC. 2089. Compensation for bringing convicts to penitentiary. 1874-'5, c. 107, s. 1.

The sheriffs of the several counties shall be allowed two dollars per day and actual necessary expenses for conveying convicts to the penitentiary; also one dollar per day and actual necessary expenses for each guard, not to exceed one guard for every three prisoners, as the sheriff upon affidavit before the clerk of the superior court of his county shall swear to be necessary for the safe conveyance of said convicts.

SEC. 2090. How paid. 1874-'5, c. 107, s. 2.

Upon filing such affidavit with the auditor, together with a fully itemized account, to be sworn to before the auditor, of the number of days requisite for coming and returning, and of the actual expenses for conveying said convicts and of the guard necessary for their safe keeping, the auditor shall be required to audit such verified claims of the sheriff, and the treasurer to pay all such warrants properly drawn upon him out of any moneys in the treasury not otherwise appropriated.

SEC. 2091. Duty of sheriff. 1874-'5, c. 107, s. 3.

The sheriff shall file with the board of commissioners of his county a copy of his affidavit as to necessary guard, together with a copy of his itemized account of expenses, both certified to by the auditor as true copies of those on file in his office, or be guilty of a misdemeanor.

SEC. 2092. Publication of delinquent tax-payers required. 1876-'7, c. 78, ss. 1, 2, 3.

Whenever any sheriff or tax-collector shall be credited on settlement with any tax or taxes, by him returned as insolvent, dead or removed, he shall forthwith make publication at the court house door, and at least one public place in each and every township in his county, of a complete list of the names of such insolvent, dead or removed delinquents, with the amount of the tax due from each, and the sum total so credited. Such list, by order of the board of commissioners, may also be published in any newspaper printed in the county; in which case, the expense of the advertisement, for such time as may be directed, shall be paid by the county. Any sheriff, or tax-collector failing to comply with the provisions of this section, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than ten, nor more than one hundred dollars.

CHAPTER FIFTY-TWO.

SURETY AND PRINCIPAL.

SECTION.
2093. Summary remedy for surety against principal.
2094. Surety may sue co-surety for ratable part of debt paid for principal.
2095. May dissent from stay of execution, then not liable to surety for the stay; officer, how to collect in such case.
2096. Surety, paying debt of deceased principal, to have priority as the creditor had against the estate.
2097. Surety may cause written notice to be given to creditor; proviso.
2098. Negligence to operate as discharge; proviso.
2099. Notice to be in writing.
2100. Defendants may show they are sureties; jury or justice to find the facts.
2101. Property of principal to be first levied on and sold.

Sec. 2093. Summary remedy for surety against principal. R. C., c. 110, s. 1. 1777, c. 487, s. 1.

Any person, who may have paid money for and on account of those for whom he became surety, upon producing to the superior court, or any justice of the peace having jurisdiction of the sum, a receipt, and showing that an execution has issued, and he has satisfied the same, and making it appear by sufficient testimony, that he has laid out and expended any sum of money, as the surety of such person, may move the court or justice of the peace, as the case may be, for judgment against his principal, for the amount which he has actually paid; a citation having previously issued against the principal to show cause why execution should not be awarded; and should not the principal show sufficient cause, the court or justice shall award execution against the estate of the principal.

Shepherd v. Monroe, 2 C. L. Repos., 624 (427); Woodman v. Mooring, 3 Dev., 237; Hodges v. Armstrong, 3 Dev., 253; Sherwood v. Collier, 3 Dev., 380; Sherrod v. Woodard, 4 Dev., 360; State Bank v. Locke, 4 Dev., 529; Eason v. Petway, 1 D. & B., 44; Gray v. Bowls, 1 D. & B., 437; Thompson, v. Sanders, 4 D. & B., 404; Linn v. McLelland, 4 D. & B., 458; Wharton v. Woodburn, 4 D. & B., 507; Shaw v. McFarlane, 1 Ired., 216; Brisendine v. Martin, 1 Ired., 286; Davis v. Sanderlin, 1 Ired., 389; Pipkin v. Bond, 5 Ired. Eq., 91; Forbes v. Smith, 5 Ired. Eq., 369; Hall v. Whitaker, 7 Ired., 353; Ledbetter v. Forney, 11 Ired., 294; Ponder v. Carter, 12 Ired., 242.

Sec. 2094. Surety may sue co-surety for ratable part of debt paid for principal. R. C., c. 110, s. 2. 1807, c. 722.

Where there are two or more sureties for the performance of a contract, and one or more of them may have been compelled to perform and satisfy the same, or any part thereof, and the principal shall be insolvent, or out of the state, such surety may have and maintain an action against every other surety, for a just and ratable proportion of the sum which may have been paid as aforesaid, whether of principal, interest or cost.

Shepherd v. Monroe, 2 C. L. Repos., 624 (427); Moore v. Moore, 4 Hawks, 358; Smith v. Smith, 1 Dev. Eq., 173; Gomez v. Lazarus, 1 Dev., 205; Norfleet v. Cotton, 3 Dev. Eq., 334; Sherrod v. Woodard, 4 Dev., 360; Moore v. Isley, 2 D. & B. Eq., 372; Hutchins v. McCauley, 2 D. & B. Eq., 399; Dawson v. Petway, 4 D. & B., 396; Thompson v. Sanders, 4 D. & B., 404; Osborn v. Cunningham, 4 D. & B., 423; Linn v. McClelland, 4 D. & B., 458; Brisendine v. Martin, 1 Ired., 286; Nowland v. Martin, 1 Ired, 307; Gregory v. Murrell, 2 Ired. Eq., 233; Rainey v. Yarborough, 2 Ired Eq., 249; Bell v. Jasper, 2 Ired. Eq., 597; Foley v. Robards, 3 Ired., 177; Allen v. Wood, 3 Ired. Eq., 386; Jones v. Hays, 3 Ired. Eq., 502; Daniel v. Joyner, 3 Ired. Eq., 513; Long v. Barnett, 3 Ired. Eq., 631; Pool v. Ehringhaus, 4 Ired. Eq., 33; Dobson v. Prather, 6 Ired. Eq., 31; Jones v. Blanton, 6 Ired. Eq., 115; Hall v. Robinson, 8 Ired., 56; Godsey v. Bason, 8 Ired., 260; Pool v. Williams, 8 Ired., 286; Draughan v. Bunting, 9 Ired., 10; Brandon v. Medley, 1 Jon. Eq., 313; Reeves v. Bell, 2 Jon., 254; Leary v. Cheshire, 3 Jon. Eq., 170; Towe v. Newbold, 4 Jon. Eq., 212; Kearney v. Harrell, 5 Jon. Eq., 199; Sikes v. Quick, 7 Jon., 19; Hockaday v. Parker, 8 Jon., 16; Miller v. Miller, Phil. Eq., 85; Derossett v. Bradley, 63—17; Parham v. Green, 64—436; Clark v. Williams, 70—679; Haywood v. Daves, 80—338; Hughes v. Boone, 81—204; Craven v. Freeman, 82—361; Bright v. Lennon, 83—183; Pickens v. Miller, 83—543.

Sec. 2095. May dissent from stay of execution, then not be liable to surety for the stay; officer, how to collect in such cases. R. C., c. 110, s. 3. 1829, c. 6, ss. 1, 2.

Whenever any judgment shall be obtained before a justice, against a principal and his surety, and the principal debtor shall desire to stay the execution thereon, but the surety is unwilling that such stay shall be had, the surety may cause his dissent thereto to be entered by the justice, which shall absolve him from all liability to the surety, who may stay the same. And the constable or other officer, who may have the collection of the debt, shall make the money out of the property of the principal debtor, and that of the surety for the stay of execution, if he can, before he shall sell the property of the surety before judgment.

Sec. 2096. Surety paying debt of deceased principal, to have priority as the creditor had against the estate. R. C., c. 110, s. 4. 1829, c. 23.

Whenever a surety, or his representative, shall pay the debt of his deceased principal, the claim thus accruing shall have such priority in the administration of the assets of the principal, as had the debt before its payment.

Chaffin v. Hanes, 4 Dev., 103; Drake v. Coltrane, Busb., 300; Howell v. Reams, 73—391.

Sec. 2097. Surety may cause written notice to be given to creditor; proviso. 1868-'9, c. 232, s. 1.

In all cases where any surety or indorser on any note, bill, bond, or other written obligation, shall consider himself in danger of loss in consequence of his contingent liability, either from the insolvency or misconduct of the principal, in said note, bill, bond, or other written obligation, or from the negligence of the payee or holder of any such instrument, it shall be lawful for such surety or indorser, at any time after such note, bill, bond, or other written obligation shall have become due and payable, to cause written notice to be given to the payee or holder of any such paper or obligation, requiring him to bring suit on said obligation, and to use all reasonable diligence to save harmless such surety or indorser: *Provided*, nothing herein contained shall apply to official bonds, or bonds given by any person acting in a fiduciary capacity.

Cole v. Fox, 83—463; Goodman v. Litaker, 84—8; Torrence v. Alexander, 85—143.

Sec. 2098. Negligence to operate as a discharge; proviso. 1868-'9, c. 232, s. 2.

Should the payee or holder of any such note, bond, bill, or other written obligation, refuse or fail, within thirty days from the service of said notice, to bring suit in the appropriate court in an effort to save harmless such surety or indorser, such refusal or failure to sue, shall operate as a discharge of such surety or indorser, from all liability whatever, on any such note, bond, bill, or other written obligation: *Provided*, that this notice shall not have the effect to discharge from liability any co-surety who does not join in such notice, or who has not given a separate notice: *Provided further*, that this and the preceding section shall not apply to holders of such note, bond, bill, or obligation, who hold the same as collateral security or in trust.

Cole v. Fox, 83—463; Goodman v. Litaker, 84—8.

Sec. 2099. Notice to be in writing. 1868-'9, c. 232, s. 3.

Such notice shall be served by the sheriff or his deputy, who shall return it to the party for whose benefit the notice was issued, which shall be evidence of the fact in all courts.

Sec. 2100. Defendants may show they are sureties; jury or justice to find the facts. R. C., c. 31, s. 124. 1826, c. 31, s. 1.

In the trial of actions upon contracts, either of the defendants may show in evidence that he is surety, and if it be satisfactorily shown, the jury in their verdict, or the justice of the peace in his judgment, shall distinguish the principal and surety, which shall be indorsed on the execution by the clerk, or justice of the peace issuing it.

Davis v. Sanderlin, 1 Ired., 389; Stewart v. Ray, 4 Ired., 269; Eaton v. Eaton, 8 Ired. Eq., 108; Lowder v. Noding, 8 Ired. Eq., 208.

Sec. 2101. Property of principal to be first levied on and sold. R. C., c. 31, s. 2. 1826, c. 31, s. 2. Note Revised Code, c. 110.

When an execution, indorsed as aforesaid, shall come to the hands of any officer for collection, he shall levy the same on the property of the principal, or so much thereof as shall be necessary to satisfy the execution, and for want of sufficient property of the principal, also on the property of the surety, and make sale thereof: *Provided*, that, in all such levies a sale shall first be had of all the property of the principal levied on, before that of the surety.

Eason v. Petway, 1 D. & B., 44; Shaw v. McFarland, 1 Ired., 216; Davis v. Sanderlin, 1 Ired., 389; Shufford v. Cline, 13 Ired., 463.

CHAPTER FIFTY-THREE.

WIDOWS.

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Sec. 2102. To what dower a widow is entitled; consequences of adultery. 1868-'9, c. 93, s. 32. 1871-'2, c. 193, s. 44.

Widows shall be endowed as at common law as in this chapter defined: *Provided*, if any married woman shall commit adultery, and shall not be living with her hus-

band at his death, she shall thereby lose all right to dower in the lands and tenements of her husband; and any such adultery may be pleaded in bar of any action or proceeding for the recovery of dower.

Walters v. Jordan, 12 Ired., 170, Walters v. Jordan, 13 Ired., 361; Cook v. Sexton, 79—305.

Sec. 2103. Subject to the provision in the preceding section, widow of intestate and widow dissenting from will entitled to a third in value of her husband's estate, including dwelling house, &c. R. C., c. 118, s. 3. R. S., c. 121, s. 3. 1827, c. 46. 1869-'70, c. 176, s. 1. 1883, c. 175.

Subject to the provision in the preceding section every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during the coverture, in which third part shall be included the dwelling house in which her husband usually resided, together with offices, out houses, buildings and improvements thereunto belonging or appertaining; she shall in like manner be entitled to such an estate in all legal rights of redemption and equities of redemption or other equitable estates in lands, tenements and hereditaments whereof her husband was seized in fee at any time during the coverture, subject to all valid incumbrances existing before the coverture or made during it with her free consent lawfully appearing thereto. The jury summoned for the purpose of assigning dower to a widow, shall not be restricted to assign the same in every separate and distinct tract of land; but may allot her dower in one or more tracts, having a due regard to the interest of the heirs as well as to the right of the widow.

Harrison v. Wood, 1 D. & B. Eq., 437; Potter v. Everett, 7 Ired. Eq., 152; Thompson v. Thompson, 1 Jon., 430; Mitchener v. Atkinson, Phil. Eq , 23; Royster v. Royster, Phil., 226; Strond v. Stroud, Phil., 525; Ramsour v. Ramsour, 63—331; Webb v. Boyle, 63—271; Caroon v. Cooper, 63—386; Rose v. Rose, 63—391; Smith v. Gilmer, 64—546; Reitzel v. Eckard, 65—673; Sutton v. Askew, 66—172; Wesson v. Johnson, 66—189; Bunting v. Foy, 66—193; Felton v. Elliott, 66—195; Williams v. Munroe, 67—164; Hughes v. Merritt, 67—386; Creecy v. Pearce, 69—67; Gregory v. Gregory, 69—522; Ruffin v. Cox, 71—253; McAfee v. Bettis, 72—28; State v. Cunningham, 72—469; Gwathmey v. Pearce, 74—398; Holliday v. McMillan, 79—315; Bruce v. Strickland, 81—267; O'Connor v. Harris, 81—279; Askew v. Bynum, 81—350; Jenkins v. Jenkins, 82—208; O'Kelly v. Williams, 84—281; Gregory v. Ellis, 86—579; Burton v. Spiers, 87—87.

Sec. 2104. Dower not liable to be sold under execution. 1868-'9, c. 93, s. 34.

Dower, or right of dower, shall, in no case, be subject to seizure on execution for the payment of any debt of the husband during the term of the life of the wife.

Avery *ex parte*, 64—113.

Sec. 2105. Dower and land in lieu thereof not subject to debts. R. C., c. 118, s. 8. 1791, c. 351, s. 4.

The dower of a widow, and also such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, shall not be subject to the payment of debts due from the estate of her husband, during the term of her life.

Gully v. Holloway, 63—84; Avery *ex parte*, 64—113; Simonton v. Houston, 78—408.

Sec. 2106. Alienation of husband passes only two-thirds. 1868-'9, c. 93, s. 35.

No alienation of the husband alone, with or without covenant of warranty, shall have any other or further effect than to pass his interest in such estate, subject to the dower right of his wife: *Provided*, that a mortgage or trust deed by the husband to secure the purchase money, or any part thereof, of land bought by him, shall, without the wife executing the deed, be effectual to pass the whole interest according to the provisions of the said deed.

Harrison v. Wood, 1 D. v. B. Eq., 437; Potter & Everett, 7 Ired. Eq., 152; Rose v. Rose, 63—391; Avery *ex parte*, 64—113; Sutton v. Askew, 66—172; Felton v. Elliott, 66—195; Williams v. Munroe, 67—164; Hughes v Merritt, 67—386; Holliday v. McMillan, 79—315; Bruce v. Strickland, 81—267; O'Connor v. Harris, 81—279; Askew v. Bynum, 81—350; Jenkins v. Jenkins, 82—208; O'Kelly v. Williams, 84—281.

Sec. 2107. When dower barred. 1868-'9, c. 93, s. 36.

The right to dower under this chapter shall pass and be effectual against any widow or person claiming under her upon the wife joining with her husband in the deed of conveyance and being privately examined as to her consent thereto in the manner prescribed by law.

Gwathmey v. Pearce, 74—398.

Sec. 2108. Widow may dissent from husband's will. 1868-'9, c. 93, s. 37.

Every widow may dissent from her husband's will before the clerk of the superior court of the county in which such will is proved, at any time within six months

after the probate. The dissent may be in person, or by attorney, authorized in writing, executed by the widow and attested by at least one witness and duly proved. The dissent, whether in person or by attorney, shall be filed as a record of court. If the widow be an infant or insane, she may dissent by her guardian.

Hinton v. Hinton, Phil., 410; Simonton v. Houston, 78–408.

Sec. 2109. Effect of dissent. R. C., c. 118, s. 12. 1868-'9, c. 93, s. 38.

Upon such dissent, the widow shall have the same rights and estates in the real and personal property of her husband as if he had died intestate.

Arrington v. Dortch, 77—367.

Sec. 2110. When dower assigned by heir or devisee with consent of widow. 1868-'9, c. 93, s. 39.

If the personal property of a decedent be sufficient to pay his debts and charges of administration, the heir or devisee with the widow may, by deed, agree to an assignment of her dower.

Sec. 2111. How dower may be applied for. 1868-'9, c. 93, s. 40.

If no such agreement be made, a widow may apply for assignment of dower by petition in the superior court as in other cases of special proceedings.

Askew v. Bynum, 81—350.

Sec. 2112. Who must be parties. 1868-'9, c. 93, s. 41.

The heirs, devisees and other persons in possession of, or claiming estates in the lands, shall be parties to such proceeding.

Ramsour v. Ramsour, 63—231; Moore *ex parte*, 64—90; Lowery v. Lowery, 64—110; Avery *ex parte*, 64—113; Corney v. Whitehurst, 64—426; Bunting v. Foy, 66—193; Gregory v. Gregory, 69—522; Askew v. Bynum, 81—350.

Sec. 2113. How dower assigned. 1868-'9, c. 93, s. 42.

If dower be adjudged, it shall be assigned by a jury of three persons qualified to act as jurors, unless one of the parties demand a greater number, not exceeding twelve, who shall be summoned by the sheriff to meet on the premises or some part thereof, and being duly sworn by the sheriff or other person authorized to administer oaths, shall proceed to allot and set apart to the widow her dower in said premises according to law and make

report of their proceedings under their hands within five days to the clerk of the superior court.

Askew v. Bynum, 81—350.

Sec. 2114. Notices to such parties. 1868-'9, c. 93, s. 43.

The parties, or their attorneys, to such proceeding, if within the county, shall be notified of the time and place of meeting of the jury appointed to assign dower, at least five days before the meeting.

Sec. 2115. *Bona fide* conveyances not affected, when. 1869-'70, c. 153.

The act of the general assembly entitled "An act restoring to married women their common law rights of dower," chapter fifty-four, ratified on the second day of March, one thousand eight hundred and sixty-seven, shall not be so construed as to affect the right or title of any person claiming real estate under a conveyance made within thirty days after the passage of the said act, but all such conveyances shall have the like force and effect as if the said act had been enacted to take effect at the end of thirty days after the passage of the same.

Sec. 2116. What widows entitled to a year's support; her year's allowance. 1868-'9, c. 93, s. 8. 1871-'2, c. 193, s. 44. 1880, c. 42.

Every widow of an intestate, or of a testator from whose will she has dissented, shall be entitled, besides her distributive share in her husband's personal estate, to an allowance therefrom, for the support of herself and her family for one year after his decease, and said allowance shall be exempt from any lien, by judgment or execution acquired against the property of her said husband: *Provided*, if any married woman shall commit adultery, and shall not be living with her husband at his death, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery may be pleaded in bar of any action or proceeding for the recovery of such rights and estates.

Walters v. Jordan, 12 Ired., 170; Rogers *ex parte*, 63—110; Dunn *ex parte*, 63—137; Bolin v. Baker, 75—47; James v. James, 76—331; Cook v. Sexton, 79—305; Grant v. Hughes, 82—216; Long v. Long, 85—415.

Sec. 2117. From what assigned. 1868-'9, c. 93, s. 9.

Such allowance shall be assigned from the crop, stock and provisions of the deceased in his possession, at the time of his death, if there be a sufficiency thereof in

value; and if there be a deficiency, it shall be made up by the personal representative from the personal estate of the deceased.

Sec. 2118. Value of the allowance. 1868-'9, c. 93, s. 10.

Except in cases in which a larger allowance is hereinafter provided for, the value of a year's allowance shall be three hundred dollars, and one hundred dollars in addition thereto for every member of the family besides the widow.

Cook v. Sexton, 79—305.

Sec. 2119. Family defined. 1868-'9, c. 93, s. 11.

The family of the deceased, for the purposes of this chapter, shall be deemed to be, besides the widow, every child, either of the deceased or of the widow, and every other person to whom the deceased or widow stood in place of a parent, who was residing with the deceased at his death, and whose age did not then exceed fifteen years.

Sec. 2120. Duty of the administrator, &c., to assign. 1868-'9, c. 93, s. 12.

It shall be the duty of every administrator, collector, or executor of a will, from which the widow of a testator has dissented, on application in writing, signed by the widow of such intestate or testator, at any time within one year after the decease of the husband, to assign to her a year's allowance in the manner prescribed in this chapter, to the value herein prescribed, deducting therefrom the value of any articles consumed by the widow and her family since the death of her husband to the time of the assignment.

Cook v. Sexton, 79—305.

Sec. 2121. How value of articles assigned to be ascertained. 1868-'9, c. 93, s. 13.

The value of stock, crop and provisions assigned to the widow, as well as that of the articles consumed, shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will proved.

Sec. 2122. Upon application of widow, personal representative to apply to justice of the township, &c.; proviso. 1870-'71, c. 260.

Upon the application of the widow, the personal representative of the deceased shall apply to a justice of the peace of the township in which the deceased resided, or

some adjoining township, to summon two persons qualified to act as jurors, who having been sworn by the justice to act impartially, shall, with him, ascertain the number of the family of the deceased according to the definition given in this chapter, and examine his stock, crop and provisions on hand, and assign to the widow so much thereof as will not exceed the value limited in this chapter, subject to the deduction prescribed in this chapter: *Provided*, that in case there shall be no administration upon said estate, or if the widow shall be the personal representative, she may make the application, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative: *Provided, further*, that in all cases, if there be no crop, stock or provisions on hand, or not a sufficient amount, the commissioners may allot to the widow any articles of personal property of the deceased, and also any debt or debts known to be due him, and such allotment shall vest in the widow said property, and the right to collect the debts thus allotted.

Irvin v. Hughes, 82—210.

Sec. 2123. Duty of the commissioners. 1868-'9, c. 93, s. 15.

The commissioners shall make and sign three lists of the articles assigned to the widow, stating the quantity and value of each, the number of the family, and the deficiency to be paid by the personal representative. One of these lists shall be delivered to the widow, one to the personal representative and one returned by the justice, within twenty days after the assignment to the superior court of the county, and the clerk shall file and record the same and enter judgment against the personal representative, to be paid when assets shall come into his hands, for any residue found in favor of the widow.

Irvin v. Hughes, 82—210; Long v. Long, 85—415.

Sec. 2124. Appeal may be taken to superior court. 1868-'9, c. 93, s. 16.

The personal representative, or the widow, or any creditor, legatee or distributee of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and cite the adverse party to appear before such court on a certain day, within ten days from the assignment.

Sec. 2125. Duty of appellant. 1868-'9, c. 93, s. 17.

At or before the day named, the appellant shall file with the clerk a copy of the assignment and a statement of his exceptions thereto, and the issues thereby raised shall be decided as other issues are directed to be; when the issues shall have been decided, judgment shall be entered accordingly, if it may be without injustice, without remitting the proceedings to the commissioners.

Sec. 2126. Sum allowed widow to be credited to executor, &c., unless impeached for fraud. 1868-'9, c. 93, s. 18.

Upon the settlement of the accounts of the personal representative, he shall be credited with the articles assigned, and the value of the deficiency assessed as aforesaid, if the same shall have been paid, unless the allowance be impeached for fraud or gross negligence in him.

Sec. 2127. When above allowance shall be in full. 1868-'9, c. 93, s. 19.

If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars, the allowance for the year's support of his widow and her family shall not, in any case, exceed the value prescribed above; and the allowance made to her as above prescribed, shall preclude her from any further allowance.

Cook v. Sexton, 79—305.

Sec. 2128. When allowance not in full. 1868-'9, c. 93, s. 20.

It shall not, however, be obligatory on a widow to have her support assigned as above prescribed. Without applying to the personal representative of her deceased husband, she may, at any time within one year after the death of her husband, apply to the superior court of the county in which the will was proved, or administration granted, to have a year's support for herself and her family assigned to her.

Cook v. Sexton, 79—305.

Sec. 2129. Application to be made by summons, &c. 1868-'9, c. 93, s. 21.

The application shall be by summons, as is prescribed for special proceedings, in which the personal representative of the deceased if there be one other than the plaintiff, the largest known creditor, or legatee, or some distributee of the deceased, living in the county,

shall be made defendant, and the proceedings shall be as prescribed for special proceedings between parties.

Sec. 2130. What to be set forth in complaint. 1868-'9, c. 93, s. 22.

In her complaint the widow shall set forth, besides the facts entitling her to a year's support and the value thereof, as claimed by her, the further facts, that the estate of the deceased is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not she had an allowance made her, and the nature and value thereof; and if no allowance has been made, the quantities and values of the articles consumed by her and her family since the death of her husband.

Cook v. Sexton, 79—305.

Sec. 2131. What judgment shall be given. 1868-'9, c. 93, s. 23.

If the material allegations of the complaint be found true, the judgment shall be that she is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two indifferent persons qualified to act as jurors of the county, to assign to the plaintiff from the crop, stock, and provisions of the deceased, a sufficiency for the support of herself and her family, for one year from the death of her husband; and if there be a deficiency thereof to assess such deficiency, to be paid by the personal representative from the personal assets of the deceased; deducting, nevertheless, in all cases from such allowance the articles, or the value thereof, consumed by the widow and her family before such assignment, and also any sum previously assigned her.

Sec. 2132. Duty of commissioners; how report returned. 1868-'9, c. 93, s. 24.

The said commissioners shall be sworn by the justice and shall proceed as prescribed in this chapter, except that they may assign to the widow a value sufficient for the support of herself and her family according to the estate and condition of her husband and without regard to the limitation aforesaid in this chapter; but the value allowed shall not in any case exceed the one-half of the annual net income of the deceased for three years next preceding his death. Their report shall be returned by the justice to the court.

Sec. 2133. Party interested may except. 1868-'9, c. 93, s. 25.

The personal representative, or any creditor, distributee or legatee of the deceased, within twenty days after the return of the report, may file exceptions thereto; the plaintiff shall be notified thereof and cited to appear before the court on a certain day, within twenty, and not less than ten days after service of the notice and answer the same, the case shall thereafter be proceeded in, heard, and decided as provided in special proceedings between parties.

Sec. 2134. If the report confirmed, what judgment and execution; costs. 1868-'9, c. 93, s. 26.

If the report shall be confirmed, the court shall so declare, and execution shall issue to enforce the judgment, as in like cases; and in such proceeding the costs shall be in the discretion of the court.

Sec. 2135. Fees of commissioners, sheriff and justice. 1868-'9, c. 93, s. 28.

The fees of the justice, and commissioners, and sheriff, each, shall be one dollar for the assignment; the other fees and costs shall be as prescribed in other cases.

CHAPTER FIFTY-FOUR.

WILLS AND TESTAMENTS.

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Sec. 2136. Wills of real and personal estate, how executed. R. C., c. 119, s. 1. 1784, c. 204, s. 11. 1784, c. 225, s. 5. 1840, c. 62. 1846, c. 54.

No last will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such last will shall have been written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the said estate, except as hereinafter provided. Or, unless such last will and testament be found among the valuable papers and

effects of any deceased person, or shall have been lodged in the hands of any person for safe-keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto, or inserted in some part of such will; and if such handwriting shall be proved, by three credible witnesses, who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate.

Rogers v. Briley, 1 Hay., 256; Eelbeck v. Granberry, 2 Hay., 232; Rhea v. Executors, 2 Hay., 342; Bateman v. Masiner, 1 Mur., 176; Jiggitts v. Maney, 1 Mur., 258; Harrison v. Burgess, 1 Hawks, 384; Martin v. Hough, 2 Hawks, 368; Allison v. Allison, 4 Hawks, 141; Galloway v. Yates, 1 Dev., 266; Thompson v. McDonald, 2 D. & B. Eq., 463; Lunsford v. Alexander, 3 D. & B., 40; Ragland v. Huntington, 1 Ired., 561; St. John's Lodge v. Callender, 4 Ired., 335; Murray v. Olliver, 6 Ired. Eq., 55; Trexler v. Miller, 6 Ired. Eq., 248; Battle v. Speight, 9 Ired., 288; Graham v. Graham, 10 Ired., 219; Bynum v. Bynum, 11 Ired., 632; Love v. Johnstou, 12 Ired., 355; Pridgen v. Pridgen, 13 Ired., 259; Kirby v. Kirby, Busb., 454; Outlaw v. Hurdle, 1 Jon., 150; Cox's Will, 7 Jon., 321; Jones v. Tuck, 3 Jon., 202; Gunter v. Gunter, 3 Jon., 441; Bristol v. Beaver, 3 Jon., 516; Malloy v. McNair, 4 Jon., 297; Gaither v. Ballew, 4 Jon., 488; Little v. Lockman, 4 Jon., 494; Grigg v. Williams, 6 Jon., 518; Sawyer v. Sawyer, 7 Jon., 134; Cornelius v. Coruelius, 1 Jon., 563; Adams v. Clard, 8 Jon., 56; Hill v. Bell, Phil., 122; Wood v. Sawyer, Phil., 251; Smith v. Smith, 63—637; Smithdeal v. Smith, 64—52; Hughes v. Smith, 64—493; Belcher's Will, 66—51; Winstead v. Bowman, 68—170; Donoho v. Patterson, 70—649; Mayo v. Jones, 78—402.

Sec. 2137. Ages of testators and executors. R. C., c. 119, s. 2. 1811, c. 820.

No person shall be capable of disposing of real or personal estate by will, nor be allowed to qualify as executor of a will, until he shall have attained the age of twenty-one years.

Williams v. Baker, 2 C. L. Repos., 599.

Sec. 2138. Wills of married women, how and when proved. R. C., c. 119, s. 3. 1844, c. 88, s. 8.

A married woman owning real or personal property may dispose of the same by will, subject to the husband's right of courtesy.

Newlin v. Freeman, 1 Ired., 514; Whitfield v. Hurst, 3 Ired. Eq., 242; Whitfield v Hurst, 9 Ired., 170; Long v. Barnes, 87—329.

Sec. 2139. Appointments by will executed like wills; valid though other required forms be not observed. R. C., c. 119, s. 4. 1844, c. 88, s. 9.

No appointment, made by will in exercise of any power, shall be valid, unless the same be executed in the manner by law required for the execution of wills; and every will, executed in such manner, shall, so far as respects the execution and attestation thereof be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required, that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Sec. 2140. All property, rights and interests may be disposed of by will. R. C., c. 119, s. 5. 1844, c. 88, s. 1.

Any testator, by his will duly executed, may devise, bequeath, or dispose of all real and personal estate, which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law, or upon his executor or administrator; and the power hereby given shall extend to all contingent, executory, or other future interest in any real or personal estate, whether the testator may or may not be the person or one of the persons, in whom the same may become vested, or whether he may be entitled thereto under the instrument by which the same was created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to, at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Champion *et als. ex parte*, Busb. Eq., 246.

Sec. 2141. Wills to speak as at death of testator. R. C., c. 119, s. 6. 1844, c. 88, s. 3.

Every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Williams v. Davis, 12 Ired., 21; Champion *et als. ex parte*, Busb. Eq., 246;

Robbins v. Windly, 3 Jon. Eq., 286; Nooe v. Vannoy, 6 Jon. Eq., 185; Radford v. Elmore, 84—424.

Sec. 2142. Lapsed and void devises to pass under residuary clause. R. C., c. 119, s. 7. 1844, c. 88, s. 4.

Unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

Sec. 2143. A general gift to include estates which testator has power to appoint. R. C., c. 119, s. 8. 1844, c. 88, s. 5.

A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Sec. 2144. Gifts to issue dying and leaving issue. 1868-'9, c. 113, s. 61.

When any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person as shall be living at the death of the testator, such devise or bequest shall not lapse, but shall take effect and vest a title to such estate in the issue surviving, if there be any, in the same manner, proportions and estates as if the death of such person had happened

immediately after the death of the testator, unless a contrary intention shall appear by the will.

Hester v. Hester, 2 Ired. Eq., 330; Lindsay v. Pleasants, 4 Ired. Eq., 320; Williamson v. Williamson, 4 Jon. Eq., 281; Smith v. Smith, 5 Jon. Eq., 305; Scales v. Scales, 6 Jon. Eq., 163; Lefler v. Rowland, Phil. Eq., 143; Whitehead v. Thompson, 79—450; Gordon v. Pendleton, 84—98.

SEC. 2145. Child born after parent's will executed. 1868-'9, c. 113, s. 62.

Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of said parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter.

Johnson v. Chapman, Busb. Eq., 213; Windley v. Gaylord, 7 Jon., 55.

SEC. 2146. Executor a competent witness. R. C., c. 119, s. 9.

No person, on account of being an executor of a will, shall be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Paunell v. Scoggin, 8 Jon., 408.

SEC. 2147. Devise and bequests to witnesses void. R. C., c. 119, s. 10.

If any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting, shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof.

McLean v. Elliott, 72—70.

SEC. 2148. How wills admitted to probate. C. C. P., s. 435.

Wills and testaments must be admitted to probate only in the following manner:

(1) In case of a written will, with witnesses, on the

oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the state, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane or incompetent, and also of such other circumstances as will satisfy the clerk of the superior court of the genuineness and the due execution of such will.

(2) In case of a holograph will, on the oath of at least three credible witnesses, who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and whose name must be subscribed thereto, or inserted in some part thereof. It must further appear on the oath of some one of said witnesses, or of some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe keeping.

Winstead v. Bowman, 68—170.

(3) In case of a nuncupative will, on the oath of at least two credible witnesses present at the making thereof, who state that they were specially required to bear witness thereto by the testator himself. It must also be proved that such nuncupative will was made in the testator's last sickness, in his own habitation, or where he had been previously resident for at least ten days, unless he died on a journey or from home. No nuncupative will shall be proved by the witnesses after six months from the making thereof, unless it was put in writing within ten days from such making; nor shall it be proved till a citation has been first issued or publication been made for six weeks in some newspaper published in the state, to call in the widow and next of kin to contest such will if they think proper.

Wester v. Wester, 5 Jon., 95; Leatherwood v. Boyd, Winst., 123; Smith v. Smith, 63—637; Smithdeal v. Smith, 64—52; Belcher's Will, 66—51; Syme v. Broughton, 85—367.

Sec. 2149. Proofs and examinations in writing. C. C. P., s. 437.

Every clerk of the superior court shall take in writing the proofs and examinations of the witnesses touching the execution of a will; and he shall embody the substance of such proofs and examinations, in case the will is admitted to probate, in his certificate of the probate thereof, which certificate must be recorded with the will.

The proofs and examinations as taken must be filed in the office.

Etheridge v. Corprew, 3 Jon., 14.

Sec. 2150. Probate, how far conclusive, C. C. P., s. 438.

Such record and probate is conclusive in evidence of the validity of the will, until it is vacated on appeal or declared void by a competent tribunal.

Mayo v. Jones, 78—402; Syme v. Broughton, 85—367.

Sec. 2151. Who may apply for probate. C. C. P., s. 439.

Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate.

Sec. 2152. Who may apply when executor does not. C. C. P., s. 440.

If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or legatee named in the will, or any other person interested in the estate, may make such application, upon ten days' notice thereof to the executor.

Sec. 2153. What to be shown on application. C. C. P., s. 441.

On application to the clerk of the superior court, he must ascertain by affidavit of the applicant:

(1) That such applicant is the executor, devisee or legatee named in the will, or is some other person interested in the estate, and how so interested.

(2) The value and nature of the testator's property, as near as can be ascertained.

(3) The names and residence of all parties entitled to the testator's property, if known, or that the same on diligent inquiry cannot be discovered; which of said parties in interest are minors, and whether with or without guardians, and the names and residence of such guardians, if known. Such affidavit shall be recorded with the will and the certificate of probate thereof, if the same is admitted to probate.

Sec. 2154. Production of will compelled by process. C. C. P., s. 442.

Every clerk of the superior court having jurisdiction, on application by affidavit setting forth the facts, shall, by summons, compel any person in the state, having in

possession the last will of any decedent, to exhibit the same in his court for probate; and whoever being duly summoned, refuses in contempt of the court, to produce such will, or (the same having been parted with by him) refuses to inform the court on oath where such will is, or in what manner he has disposed of it, shall, by order of the clerk of the superior court, be committed to the jail of the county, there to remain without bail till such will be produced or accounted for, and due submission made for the contempt.

Sec. 2155. Will made without the state, how proved. C. C. P., s. 443.

Whenever it is suggested to the clerk of the superior court, by affidavit or otherwise, that a will has been made without the state, disposing of or charging land or other property within the state, the clerk of the superior court of the county where the property is situated may issue a commission to such person as he may select, authorizing the commissioner to take the examination of such witnesses as may be produced, touching the execution thereof, and upon return of such commission, with the examination, he may adjudge the said will to be duly proved or otherwise, as in cases on the oral examination of witnesses before him, and if duly proved, such will shall be recorded.

Sec. 2156. Will of citizen or subject of another country, how allowed and recorded in this state. C. C. P., s. 444. 1883, c. 144.

Whenever any will, made by a citizen or subject of any other state or country, is duly proved and allowed in such state or country, according to the laws thereof, a copy or exemplification of such will, duly certified and authenticated by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original, and not the copy, had been produced, proved and allowed before such clerk. But when any such will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation, unless the will is executed according to the laws of this state; and that fact must appear affirmatively in the certified probate or exemplification of the will; and if it do not so appear, the

clerk before whom the copy is exhibited, shall have power to issue a commission for taking proofs, touching the execution of the will, as prescribed in the preceding section; and the same may be adjudged duly proved, and shall be recorded as therein provided.

Sec. 2157. Will of citizen of this state proved elsewhere; how proved and recorded here. C. C. P., s. 445.

When a will, made by a citizen of this state, is proved and allowed in some other state or country, and the original will cannot be removed from its place of legal deposit in such other state or country, for probate in this state, the clerk of the superior court of the county where the testator had his last usual residence or has any property, upon a duly certified copy or exemplification of such will being exhibited to him for probate, shall take every order and proceeding for proving, allowing and recording said copy as by law might be taken upon the production of the original.

Sec. 2158. Caveat. C. C. P., s. 446.

At the time of application for the probate of any will, or at any time thereafter, as prescribed by law, any person entitled under such will or interested in the estate, may appear in person or by attorney before the clerk of the superior court, and enter a caveat to the probate of such will.

Sec. 2159. Transfer to superior court, when. C. C. P., s. 447.

Upon any caveator giving bond, with sufficient surety to be approved by the clerk, in the sum of two hundred dollars, payable to the propounder of the will, conditioned to pay all costs which may be adjudged against such caveator in the superior court, by reason of his failure to prosecute his suit with effect, the clerk shall transfer the cause to the superior court for trial; and he shall also forthwith issue a citation to all devisees, legatees or other parties in interest within the state, and cause publication to be made, for six weeks, in some newspaper printed in the state, for non-residents to appear at the term of the superior court, to which the proceeding is transferred, and to make themselves proper parties to the said proceeding, if they choose.

King v. Kinsey, 71—407.

Sec. 2160. Order to suspend proceedings. C. C. P., s. 448.

Where a caveat is entered and bond given, as directed in the two preceding sections, the clerk of the superior court shall forthwith issue an order to any personal representative, having the estate in charge, to suspend all further proceedings in relation to the estate, except the preservation of the property and the collection of debts, until a decision of the issue is had.

Syme v. Broughton, 86—153.

Sec. 2161. Costs, how paid. 1861, c. 61.

The costs in all cases of caveated wills and testaments shall be paid as the court may in its discretion direct.

Mayo v. Jones, 78—402.

Sec. 2162. Who is disqualified to serve as executor. C. C. P., s. 449.

The clerk of the superior court shall not issue letters testamentary to any person who, at the time of applying to qualify, is

(1) Under the age of twenty-one years;

(2) A person convicted of an infamous crime;

(3) Who, on proof, is adjudged by the clerk incompetent to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding;

(4) Who fails to take the oath or to give bond in cases where executors are required by law to give bond;

(5) Who has renounced his executorship.

Sec. 2163. Executor may renounce. C. C. P., s. 450.

Any person appointed an executor may renounce the office by a writing signed by him, and on the same being acknowledged or proved to the satisfaction of the clerk of the superior court, it shall be filed.

Sec. 2164. When executor deemed to have renounced. C. C. P., s. 451.

If any person appointed an executor does not qualify or renounce within sixty days after the will is admitted to probate, the clerk of the superior court, on the application of any other executor named in the same will, or any party interested, shall issue a citation to such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must

be entered by the clerk decreeing that such person has renounced his appointment as executor.

Sec. 2165. Executor under disqualification of age or absence. C. C. P., s. 452.

Where an executor named in the will is under the disqualification of non-age, or is temporarily absent from the state, such executor is entitled to six months, after coming of age or after his return to the state, in which to make application to qualify and take letters testamentary.

Sec. 2166. Letters of administration with the will annexed to be granted, when and to whom. C. C. P., s. 453.

If there is no executor appointed in the will, or if, at any time, by reason of death, incompetency adjudged by the clerk of the superior court, renunciation, actual or decreed, or removal by order of the court, or on any other account there is no executor qualified to act, the clerk of the superior court may issue letters of administration, with the will annexed, to some suitable person or persons, in the order prescribed in the chapter entitled "Executors and Administrators."

Sec. 2167. Qualifications, &c., of such administrators. C. C. P., s. 454.

Administrators (in cases prescribed in the preceding section) shall have the same qualifications and give the same bond as other administrators.

Sec. 2168. Will of testator to be observed. C. C. P., s. 455.

In all cases, where letters of administration with the will annexed, are granted, the will of the testator must be observed and performed by the administrator with the will annexed, both in respect to real and personal property, and an administrator with the will annexed has all the rights and powers, and is subject to the same duties as if he had been named executor in the will.

Sec. 2169. Oaths, &c. C. C. P., s. 467.

Before letters testamentary, letters of administration with the will annexed, letters of administration or letters of collection, are issued to any person, he must take and subscribe an oath or affirmation, before the clerk of the superior court, that he will faithfully and honestly dis-

charge the duties of his trust, which oath must be filed in the office of the clerk.

Sec. 2170. Revocation of letters on proof of will, &c. C. C. P., s. 469.

If, after letters of administration are issued, a will is subsequently proved and letters testamentary are issued thereon; or, if after letters testamentary are issued, a revocation of the will, or a subsequent testamentary paper revoking the appointment of executors, is proved and letters are issued thereon, the clerk of the superior court must thereupon revoke the letters first issued, by an order in writing to be served on the person to whom such first letters were issued; and, until service thereof, the acts of such person, done in good faith, are valid.

Sec. 2171. Revocation on ground of disqualification or default. C. C. P., s. 470.

If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that any person to whom they were issued, is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in the due execution of his office, or that the issue of such letters was obtained by false representations made by such person, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease.

Taylor v. Biddle, 71—1; Murrill v. Sanderlin, 86—54.

Sec. 2172. Letters, how issued and tested. C. C. P., s. 471.

All letters must be issued in the name of the state, and tested in the name of the clerk of the superior court, signed by him, and sealed with his seal of office.

Taylor v. Biddle, 71—1.

Sec. 2173. Wills filed in clerk's office. R. C., c. 119, s. 19. 1777, c. 115, s. 59.

All original wills shall remain in the clerk's office, among the records of the court, where the same shall be proved, and to the said wills any person may have access, as to the other records.

Taylor v. Biddle, 71—1.

Sec. 2174. No will effectual without probate; certified copy where recorded; probate conclusive, when. R. C., c. 119, s. 20. 1784, c. 225, s. 6.

No will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the probate court of the proper county, and a duly certified copy thereof shall be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclu sive as to the execution thereof, against the heirs and devisees of the testator, whenever the probate thereof, under the like circumstances, would be conclusive against the next of kin and legatees of the testator.

Sumner v. Roberts, 2 Dev., 527; Moffit v. Witherspoon, 10 Ired., 185; Marshall v. Fisher, 1 Jon., 111; Floyd v. Flemming, 64—409.

Sec. 2175. Copies of, evidence. R. C., c. 119, s. 21. 1784, c. 225, s. 6.

Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence.

Sec. 2176. Written wills, how revoked. R. C., c. 119, s. 22. 1784, c. 204, s. 14. 1819, c. 1004, ss. 1, 2. 1840, c. 62.

No will or testament in writing, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same, by the testator himself, or in his presence and by his direction and consent: but all wills or testaments shall remain and continue in force, until the same be burnt, canceled, torn, or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safekeeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least.

Bethell v. Moore, 2 D. & B., 311; Bennett v. Sherrod, 3 Ired., 303; Hise v. Fincher, 10 Ired., 139; White v. Casten, 1 Jon., 197; *In re* Zollicoffer's Will, 5 Jon., 310; Sawyer v. Sawyer, 7 Jon., 134.

Sec. 2177. Revoked by marriage. R. C., c. 119, s. 23. 1844, c. 88, s. 10.

Every will made by a man or woman, shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate, thereby appointed, would not in default of such appointment, pass to his or her heirs, executor or administrator, or the person entitled as his or her next of kin, under the statute of distributions.

Winslow v. Copeland, Busb., 17; Sawyer v. Sawyer, 7 Jon., 134.

Sec. 2178. Not by altered circumstances. R. C., c. 119, s. 24. 1844, c. 88.

No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

Sec. 2179. Nor by conveyances after will executed. R. C., c. 119, s. 25. 1844, c. 88, s. 2.

No conveyance or other act made or done subsequently to the execution of a will of, or relating to any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of, by will, at the time of his death.

Sawyer v. Sawyer, 7 Jon., 134; Wood v. Cherry, 73—110.

Sec. 2180. Devises construed in fee unless contrary intention appear. R. C., c. 119, s. 26. 1784, c. 204, s. 12.

When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity.

Alexander v. Cunningham, 5 Ired., 430; Riley v. Buchanan, 2 Winst., 90· Gibson v. Gibson, 4 Jon., 425; Williamson v. Williamson, 4 Jon. Eq., 281; Swann v. Myers, 79—101.

Sec. 2181. Copies of wills in the office of secretary of state to be evidence. R. C., c. 44, s. 12. 1852, c. 172. 1856-'7, c. 22.

Copies of wills filed or recorded in the office of the sec-

retary of state, attested by the secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: *Provided*, that no such will may be given in evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon.

Stevens v. French, 3 Jon., 359.

Sec. 2182. Registry of wills recorded in wrong counties, evidence. 1858-'9, c. 18.

WHEREAS, By reason of the uncertainty of the boundary lines of many of the counties of the state, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof:

The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this state.

Sec. 2183. Copy of lost or destroyed wills evidence, when. 1866-'7, c. 127.

When any will which may have been proved and ordered to be recorded, shall have been destroyed during the late war, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied with the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in the chapter entitled "Burnt and Lost Records."

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