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THE GENERAL STATUTES OF NORTH CAROLINA

Constitutions and Appendix

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers

Under the Direction of

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Volume 4A

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Scope of Volume

Constitutions:

The Constitution of North Carolina, with amendments through 1954.
The Constitution of the United States.

Statutes:

Federal statutes relating to authentication of records, nationality and naturalization, and removal of causes.
Tables of State statutes.


Rules:

Rules of practice in the Supreme Court and Superior Courts of North Carolina; Federal Rules of Civil Procedure relating to authentication of records and removal of causes; rules relating to extradition requisitions; rules, etc., of The North Carolina State Bar; rules governing admission to the practice of law.

Annotations:

Sources of the annotations to the North Carolina Constitution and to the rules of practice in the State courts:

North Carolina Reports volumes 1-236.
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-202.
Federal Supplement volumes 1-110.
United States Reports volumes 1-345 (p. 246).
Supreme Court Reporter volumes 1-73 (p. 655).
North Carolina Law Review volumes 1-31 (p. 373).



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Preface

Volume 4 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 4A and 4B. Volume 4B contains the index, while the other parts of original volume 4 appear in volume 4A. In addition, the Constitution of North Carolina and the Constitution of the United States, appearing under Division I in original volume 1, have been transferred to Division XIX-A in recompiled volume 4A. As will be noted, this transfer is not shown in the Table of Contents appearing in volumes 2A through 3C. The annotations in volume 4A comprise those which appeared in original volume 4 and the 1953 Cumulative Supplement thereto.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMULLAN,
Attorney General.

January 12, 1955

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Constitution of North Carolina

Adopted April 24, 1868, with Amendments through 1954

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PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution:

ARTICLE I

DECLARATION OF RIGHTS

That the great, general and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and Government of the United States, and those of the people of this State to the rest of the American people, may be defined and affirmed, we do declare:

§ 1. **The equality and rights of persons.**—That we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment

of the fruits of their own labor, and the pursuit of happiness. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note. — This section was amended by vote of the people at the general election of 1946. The amendment substituted the word "persons" for "men."

Meaning of "Liberty." — The term "liberty," as used in this section and § 17 of this article, does not consist simply of the right to be free from arbitrary physical restraint or servitude, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. It includes the right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out these purposes to a successful conclusion. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731 (1949).

"Liberty" Qualified by Common-Law Doctrines. — It is a recognized principle that a personal liberty is a constitutional right, and any act of Assembly which violates this right is not the law of the land and would be void by Art. I, § 17, of the Constitution. However, the meaning of general expressions such as "liberty" is qualified by the doctrines of the common law, and which as modified to suit our institutions, have been held a part of the law of this State. *London v. Headen*, 76 N. C. 72 (1877).

Same—Penalty for Refusing to Accept Office.—It is a doctrine of the common law that every citizen in peace, as well as in war, owes his services to the State when they are demanded, and a legislative enactment prescribing a penalty of \$25 against any person who is duly elected or appointed town constable and who refuses to qualify is not violative of Art. I, § 17, which is a protective provision of the personal liberty referred to in this section. *London v. Headen*, 76 N. C. 72 (1877).

Occupational Qualifications.—While the legislature, in the exercise of the State police power, may protect the public against incapacity, fraud and oppression by establishing standards of personal fitness and requiring the examination and licensing of those desiring to engage in

the learned professions and occupations requiring scientific or technical knowledge or skill, or which involve a trust relationship with the public, it may not impose such restrictions upon those wishing to engage in the ordinary trades or occupations which are harmless in themselves, since the right to choose and pursue a means of livelihood is a property right and a personal liberty guaranteed by the Constitution, which right may be interfered with only when necessary to the protection of the public safety or welfare. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Exercise of Police Power Not Unlimited.—Compulsory vaccination is a valid exercise of governmental police power for the public welfare, health and safety, but if there are exceptional cases, where owing to the peculiar state of the health or system, vaccination would be dangerous, then the legislature cannot validly compel the person to submit to such protective measure, since this would be in violation of the rights recognized by this section as pre-existing and inherent in the individual. *State v. Hay*, 126 N. C. 999, 35 S. E. 459 (1900).

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

Statute providing for the licensing and supervision of photographers is violative of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731 (1949), overruling *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938).

Cited in *State v. Mobley*, 234 N. C. 55, 66 S. E. (2d) 12 (1951).

§ 2. Political power and government.—That all political power is vested in, and derived from, the people; all government of right originates from the

people, is founded upon their will only, and is instituted solely for the good of the whole. (Const. 1868.)

In General.—In construing the provisions of the Constitution in regard to elections (see Art. VI, § 1) it should be kept in mind that this is a government of the people in which the will of the people—the majority—legally expressed, must govern and that these provisions should be liberally construed, that tend to promote a fair election, or expression of this popular will. *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638 (1897).

Repeal of Laws.—It is axiomatic that since all political power is derived from the people and all government originates from them, the sovereign power of the people, expressed through their chosen representatives in the General Assembly,

is supreme, and a law by them enacted may not be set aside by the courts unless it contravenes some prohibition or mandate of the Constitution by which the people of the State have elected to be limited and restrained, or unless it violates some provision of the granted powers of federal government contained in the Constitution of the United States. *State v. Warren*, 211 N. C. 75, 189 S. E. 108 (1937).

Cited in *State v. Pasley*, 180 N. C. 695, 104 S. E. 533 (1920); *State v. Hickey*, 198 N. C. 45, 150 S. E. 615 (1929); *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939) (dis. op.); *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930 (1945).

§ 3. Internal government of the State.—That the people of this State have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States. (Const. 1868.)

Duty to Follow Decisions of Supreme Court.—It is the duty of the Supreme Court of the State to follow the decisions of the Supreme Court of the United States, upon questions involved in interstate commerce where Congress has assumed control of the matter relating thereto, and involved in the litigation. But in intrastate cases, the decisions of the State Supreme Court are binding and will be followed in

the U. S. Supreme Court though they appear "absurd and illogical." *Norris v. Telegraph Co.*, 174 N. C. 92, 93 S. E. 465 (1917).

Regulation of Criminal Practice.—The legislature has power to shape the criminal procedure of the State to provide remedies required by the exigencies of the present time. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906).

§ 4. That there is no right to secede.—That this State shall ever remain a member of the American Union; that the people thereof are a part of the American nation; that there is no right on the part of this State to secede, and that all attempts, from whatever source or upon whatever pretext, to dissolve said Union or to sever said nation, ought to be resisted with the whole power of the State. (Const. 1868.)

§ 5. Of allegiance to the United States Government.—That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force. (Const. 1868.)

§ 6. Public debt; bonds issued under ordinance of Convention of 1868, '68-'69, '69-'70, declared invalid; exception.—The State shall never assume or pay, or authorize the collection of any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; nor shall the General Assembly assume or pay, or authorize the collection of any tax to pay, either directly or indirectly, expressed or implied, any debt or bond incurred, or issued, by authority of the Convention of the year one thousand eight hundred and sixty-eight, nor any debt or bond incurred or issued by the Legislature of the year one thousand eight hundred and sixty-eight, either at its special session of the year one thousand eight hundred and sixty-eight, or at its regular sessions of the

years one thousand eight hundred and sixty-eight and one thousand eight hundred and sixty-nine, and one thousand eight hundred and sixty-nine and one thousand eight hundred and seventy, except the bonds issued to fund the interest on the old debt of the State, unless the proposing to pay the same shall have first been submitted to the people and by them ratified by the vote of a majority of all the qualified voters of the State, at a regular election held for that purpose. (Const. 1868; 1872-3, c. 85; 1879, c. 268.)

Editor's Note.—In the Constitution of 1868, this section read as follows: "Sec. 6. To maintain the honor and good faith of the State untarnished, the public debt, regularly contracted before and since the Rebellion shall be regarded as inviolable and never be questioned; but the State shall never assume or pay, or authorize the collection of, any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave." Pursuant to c. 85, Public Laws of 1872-73, this section was amended by striking out the first clause down to and including the word "but". The clause beginning with "nor" and ending with "purpose" was added pursuant

to c. 268, Public Laws of 1879.

Proceedings to settle and adjudge the legal validity of claims against the State were dismissed in *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153 (1889), for the reason that the General Assembly was expressly forbidden by this section to pay the claim presented therein, the Supreme Court of North Carolina saying that "it would be idle, futile and ridiculous for this court to declare and adjudge the validity of a claim, against the State, and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim." *Calkins Dredging Co. v. State*, 191 N. C. 243, 131 S. E. 665 (1926).

§ 7. Exclusive emoluments, etc.—No person or set of persons are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services. (Const. 1868; 1945, c. 634, s. 1.)

Cross Reference.—See § 45-21.34 and the note thereto.

Editor's Note.—This section was amended by vote of the people at the general election of 1946. The amendment substituted the words "person or set of persons" for "man or set of men."

The majority of the cases wherein the litigating parties have relied on this section as the chief factor in the case which they make out, involve the determination of the question whether the particular grant or privilege given to a certain body can be construed as a valid exercise of the police power, and if so then the case is taken beyond the operative force of this section, since its provisions are not applicable to those powers and privileges, the exercise of which is for the benefit and good of the public.

Purpose.—In summarizing the purpose of this section the court in *Simonton v. Lanier*, 71 N. C. 498 (1874), speaking through Justice Bynum, says: "The wisdom and foresight of our ancestors is nowhere more clearly shown than in providing these fundamental safeguards against partial and class legislation, the insidious and ever-working foes of free and equal government."

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." New-

man v. *Watkins*, 208 N. C. 675, 182 S. E. 453 (1935) (dis. op.).

Any law which, purporting to operate on a particular class, places upon those engaged in the business in a portion of the State a burden for the privilege which is exercised freely and without additional charge by those engaged in the business in other parts of the State is arbitrary in classification because it discriminates within the class originally selected and extends to the latter a privilege and immunity not accorded to those who must, under the law, pay the additional exaction or quit the business. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Motivation of Legislation.—The constitutional limitation contained in this section, has been frequently invoked by the Supreme Court to strike down legislation conferring special privileges not in consideration of public service, but where the motivation is for a public purpose and in the public interest, and does not confer exclusive privilege, legislation has been upheld. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930 (1945).

This section does not preclude the legislature from making classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Bar-*

ber Examiners, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

The State cannot authorize city to donate property, or to grant privileges to one class of citizens not enjoyed by all, except in consideration of public services. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930 (1945), citing *Brown v. Board of Com'rs*, 223 N. C. 744, 28 S. E. (2d) 104 (1943).

An expenditure by a municipality for special training of a police officer does not grant an exclusive emolument or privilege to the officer contrary to this section. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500.

Services in the armed forces during war are "public services" within the meaning of this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947); *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930 (1945).

Statute making certain war veterans eligible for license to practice barbering without being examined does not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947)

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and therefore such payments do not offend this section of the State Constitution. *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

Public Service Corporations.—The grant of a special charter to a railroad or other like corporation is not in conflict with this section of the Constitution, the decision in this State being to the effect that the charters of public service corporations come directly within the exception contained in this provision. *Reid v. Norfolk Sou. R. Co.*, 162 N. C. 355, 78 S. E. 306 (1913). This principle will be applied in behalf of municipal corporations, an agency of the State, created for the benefit of the public. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920).

Private Corporations.—A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract, attempts to confer exclusive privileges and is therefore unconstitutional under this section. *Motley v. Warehouse Co.*, 122 N. C. 347, 30 S. E. 3 (1898); *Motley v. Finishing Co.*, 124 N. C. 232, 32 S. E. 555 (1899).

A provision in a bank's charter allowing it to charge more than the legal rate of

interest is void under this section of the Constitution, where no public services are rendered in consideration of the grant. *Simonton v. Lanier*, 71 N. C. 498 (1874).

Exempting corporations chartered prior to a certain date from the proscription against emptying into streams substances inimical to fish violates this section. *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860 (1948). See § 113-172.

A local public law which provides that the provisions of § 44-14, should be read into private construction bonds, is in contravention of this section and § 31 of our State Constitution, the statute failing to operate uniformly and equally in giving special privilege to the residents of the particular county and imposing heavier burdens on certain sureties. *Plott Co. v. Ferguson Co.*, 202 N. C. 446, 163 S. E. 688 (1932).

Public-Local Law as to Sale of Claims against Closed Banks Held Invalid.—Public-Local Laws and § 53-19, providing that depositors of certain closed banks might sell their claims for deposits to persons indebted to the banks at the date of their closing, and that the liquidation agents of such banks should accept such purchased claims at their face value in payment of the purchasers' debts to the banks, were held unconstitutional and void, being in violation of this section, in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481 (1934).

Regulation as to Maintenance of Market House.—It is within the power of a city or town to provide, by contract with its citizens, a market house and exclude with certain reasonable exceptions, the sale of fish at other places, it appearing that, under the contract, the market house was to remain under the full control of the municipal authorities, and that reasonable accommodation had been provided for the vendors, with reasonable charges for the stalls. *State v. Perry*, 151 N. C. 661, 65 S. E. 915 (1909).

Regulation as to the Practice of Medicine.—An act prohibiting the practice of medicine without registration is not brought within the inhibition of this section of the Constitution because it contains a proviso to the effect that the act shall not apply to midwives nor to non-resident consulting physicians, as this does not constitute an exclusive privilege within the meaning of the section. *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32 (1891). See also, *State v. Biggs*, 133 N. C. 729, 46 S. E. 401 (1903).

Regulation as to Pilots.—The selection by a commission of persons qualified to

act as pilots is not violative of this section. *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908).

Regulation of Vehicles for Hire.—A municipal ordinance requiring all operators of passenger motor vehicles for hire within the city to deposit with the treasurer of the city policies of liability insurance in responsible companies authorized to do business in the State in a stipulated amount for each car operated, or cash or securities in the sum required, is in contravention of this section and § 31, in that the ordinance fails to provide that the security required might be furnished by one or more solvent individual sureties. *State v. Sasseen*, 206 N. C. 644, 175 S. E. 142 (1934). See 13 N. C. Law Rev. 222, for a note on this case.

Exemption from Jury Service.—In *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820 (1906), Mr. Justice Walker in a dissenting opinion says that exemption from jury service by virtue of services in a fire department for five years is within the meaning of the word "privilege" as used in the Constitution, which may be conferred in consideration of public services, and is not subject to revocation by the legislature.

Contract to Relieve Railway of Expense of Removing Tracks Held Valid.—The State Highway Commission agreed to appropriate a sum of money for the improvement of a city street upon condition that tracks and facilities of a street railway company be removed therefrom. The railway company was operating under a franchise having twenty more years to run, which provided that the railway company should save the city harmless from any damage resulting from the construction of its tracks. The city entered into a contract with the railway company providing that in consideration of abandonment of its franchise along said street the city would acquire for it an alternate right of way and would remove the tracks from the street. The court held that the promise by the city to remove the tracks did not constitute a special emolument not in consideration of public service. *Boyce v. Gastonia*, 227 N. C. 139, 41 S. E. (2d) 355 (1947).

Statute including deputy sheriffs within

§ 3. The legislative, executive, and judicial powers distinct.—The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other. (Const. 1868.)

Cross Reference.—See § 1-97 and notes.

Generally.—Each of these coordinate departments has its appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional

term "employee" as used in *Workmen's Compensation Act*. (G. S. § 97-2) held consonant with the provisions of this section. *Towe v. Yancey County*, 224 N. C. 579, 31 S. E. (2d) 754 (1944).

Statute conferring special privilege upon firemen held violation of this section. See note to § 97-53.

Gratuity to Individual for Adjusting Claim is Unauthorized.—This section constitutes a specific constitutional prohibition against gifts of public money, and the legislature has no power to compel or even to authorize a municipal corporation to pay a gratuity to an individual to adjust a claim which the municipality is under no legal obligation to pay. *Brown v. Board of Com'rs*, 223 N. C. 744, 28 S. E. (2d) 104 (1943).

Applied in *Blevins v. Northwest Carolina Utilities*, 209 N. C. 683, 184 S. E. 517 (1936) (dis. op.); *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936), holding § 45-34 constitutional and valid; *Allen v. Carr*, 210 N. C. 513, 187 S. E. 809 (1936), holding valid § 90-38, requiring a second examination of former licensed dentists returning to the State; *Cowan v. Security Life, etc., Co.*, 211 N. C. 18, 188 S. E. 812 (1936), holding § 58-32 does not authorize insurance companies to charge more than six per cent interest; *State v. Warren*, 211 N. C. 75, 189 S. E. 108 (1937), holding invalid c. 241, Public-Local Laws 1927, requiring real estate brokers and salesmen to be licensed by a special commission in designated counties.

Quoted in *Dalton v. Brown & Co.*, 159 N. C. 175, 75 S. E. 40, 42 L. R. A. (N. S.) 506 (1912); *Little v. Miles*, 204 N. C. 646, 169 S. E. 220 (1933); *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 537 (1934); *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936); *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938) (dis. op.); *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939) (dis. op.); *State v. Mitchell*, 217 N. C. 244, 7 S. E. (2d) 567 (1940); *Raleigh v. Jordan*, 218 N. C. 55, 9 S. E. (2d) 507 (1940) (dis. op.).

Cited in *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937).

power and duty. *State v. Holden*, 64 N. C. 829 (1870); *Person v. Tax Com'rs*, 184 N. C. 499, 115 S. E. 336 (1922).

This section has been said to embody succinctly the judgment of the people of

North Carolina in regard to "the great principle of the separation of the powers." *Long v. Watts*, 183 N. C. 99, 110 S. E. 765, 22 A. L. R. 277 (1922).

From this unique political division results our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; and the judiciary—the department of trial and judgment—of all others, without hesitation or turning, should hold fast to the basic principle upon which this government is founded. The courts are vested with judicial powers only, and it is no part of their function to change or to amend the criminal statutes enacted by the legislature. *State v. Bell*, 184 N. C. 701, 115 S. E. 190 (1922) (dis. op.).

The propriety of ordering sales of lands upon petition of the owner is purely a judicial duty and any private act of the General Assembly attempting to regulate the same is void under this section. *Miller v. Alexander*, 122 N. C. 718, 30 S. E. 125 (1898).

Where Office Created by Legislature.—It is competent for the legislature in creating an office, other than purely judicial, to reserve to itself the right to remove, or to the Governor to suspend, the incumbent of the office. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897).

Creation of Board with Quasi-Judicial Functions.—The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this provision. *Cox v. Kinston*, 217 N. C. 391, 8 S. E. (2d) 252 (1940).

Court Practice Regulated by Judicial Department.—Under the present Constitution, the supreme judicial power being independent of the other departments, the legislature cannot prescribe rules of practice for the Supreme Court; nevertheless, the courts have copied, almost verbatim, the provisions of the Code. *Herndon v. Insurance Co.*, 111 N. C. 384, 16 S. E. 465 (1892); *Bird v. Gilliam*, 125 N. C. 76, 34 S. E. 196 (1899). And where there is conflict, the rules made by the court will be observed, *Cooper v. Com'rs*, 184 N. C. 615, 113 S. E. 569 (1922). However, Art. 4, § 12 of the Constitution gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court." *Horton v. Green*, 104 N. C. 400, 10 S. E. 470 (1889).

The independence of the Supreme Court

only (and not of the entire judicial department) is provided for by this section. But there is nothing which gives the Supreme Court supervisory control over the legislature. *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

The Supreme Court has the sole right to prescribe rules of practice and procedure therein. *Lee v. Baird*, 146 N. C. 361, 59 S. E. 876 (1907).

The rules prescribed by the Supreme Court to regulate its own procedure, including the rule as to dismissing an appeal thereto if not docketed, or a recordari prayed for in apt time, will be strictly enforced. Being under the exclusive authority therein given to the Supreme Court by the Constitution, Art. I, § 8, as distinguished from procedure applying to courts inferior thereto, Art. IV, § 2, a statute in conflict therewith will not be observed. *State v. Ward*, 184 N. C. 618, 113 S. E. 775 (1922).

Judicial Power as Aid to Legislative Act.—The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. *State v. Robinson*, 81 N. C. 409 (1879).

Power of County to Apply Formula for Ascertaining Taxable Property.—Plaintiff county ascertained the amount of personal property of defendant nonresident corporation having a "business situs" in this State, and liable for taxation as solvent credits by the county by ascertaining the total assets of the defendant and the percentage of such assets found in the county, and allowing the same per cent of its total liabilities to be deducted therefrom. Defendant complained that defendant county had made its own rule in ascertaining the solvent credits in the county subject to taxation in violation of this section, but since defendant failed to list its solvent credits for taxation as required by law, it was not prejudiced by the assessment of its personal property for taxation as determined by the county. *Mecklenburg County v. Sterchi Bros. Stores*, 210 N. C. 79, 185 S. E. 454 (1936).

The creation of the Mattamuskeet Drainage District by the legislature is not violative of our Constitution. *O'Neal v. Mann*, 193 N. C. 153, 136 S. E. 379 (1927).

The creation by the legislature of a board or municipal corporation and the conferring upon such board or municipal corporation quasi-judicial and administrative functions does not violate this section. *Cox v. Kinston*, 217 N. C. 391, 8 S. E. (2d) 252 (1940).

Statute authorizing the Industrial Com-

mission to award compensation for bodily disfigurement is not unconstitutional as a void delegation of legislature power in contravention of this section. *Baxter v. Arthur Co.*, 216 N. C. 276, 4 S. E. (2d) 621 (1939).

Cited in *In re Applicants for License*, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288 (1906); *Bladen County Com'rs v. Boring*, 175 N. C. 105, 95 S. E. 43 (1918) (con. op.); *Jacobi Hardware Co. v. Jones Cotten Co.*, 188 N. C. 442, 124 S. E. 756 (1924); *Lacy v. State*, 195 N. C. 284,

141 S. E. 886 (1928); *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931) (dis. op.); *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739 (1937); *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938); *Warrenton v. Warren County*, 215 N. C. 342, 2 S. E. (2d) 463 (1939) (dis. op.); *Humphreys v. Churchill*, 217 N. C. 530, 8 S. E. (2d) 810 (1940) (dis. op.); *Myers v. United States*, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926) (dis. op.).

§ 9. Of the power of suspending laws.—All power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people, is injurious to their rights, and ought not to be exercised. (Const. 1868.)

§ 10. Elections free.—All elections ought to be free. (Const. 1868.)

Quoted in *Swaringen v. Poplin*, 211 N. C. 700, 191 S. E. 746 (1937).

Cited in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481 (1934).

§ 11. In criminal prosecutions.—In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty. (Const. 1868; 1945, c. 634, s. 1.)

Cross Reference.—As to counsel, see § 15-4 and notes.

Editor's Note. — This section was amended by vote of the people at the general election of 1946. The amendment substituted the word "person" for "man" and made other changes of phraseology.

For comment on right of confrontation, see 28 N. C. Law Rev. 205.

For article discussing the limits to confrontation, see 15 N. C. Law Rev., No. 3, p. 229.

Information as to Accusation. — This section of the Constitution does not require that the accused be informed of the charge against him in any special form or particular words, except it must be by presentment or indictment. *State v. Gibson*, 169 N. C. 318, 85 S. E. 7 (1915); *State v. Carpenter*, 173 N. C. 767, 92 S. E. 373 (1917). As to necessity for indictment, see N. C. Const., Art. I, § 12, and notes thereto.

Where a defendant convicted of a criminal offense has had sentence suspended upon condition that he appear at certain times in court and show good behavior, it is required that a judgment rendered at a later time find the facts upon which a sentence has been imposed and specify the findings of a certain criminal offense the defendant is found to have committed, in order to show that the defendant had

been informed of the offense before sentence. *State v. Gooding*, 194 N. C. 271, 139 S. E. 436 (1927).

A charge to the jury which virtually puts the defendant upon trial for an additional offense to that named in the bill, in this case, conspiring with others than those alleged, violates the provisions of this section that "in all criminal prosecutions every man has the right to be informed of the accusation against him." *State v. Mickey*, 207 N. C. 648, 178 S. E. 220 (1935).

Defendants have a constitutional right of confrontation, which cannot lawfully be taken from them, and this includes the right of a fair opportunity to face "the accusers and witnesses with other testimony." *State v. Garner*, 203 N. C. 361, 166 S. E. 180 (1932).

While this section gives to the accused the right to confront his accusers, such does not apply when the facts, from their very nature, can only be proved by a duly authenticated copy of a record. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907).

The right guaranteed by this section does not mean that never under any circumstances shall a criminal charge be prosecuted except by the presence of living witnesses. *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (1907).

Statute which establishes a form for a bill of indictment for perjury, and enacts in express terms that this form shall be sufficient, was sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. *State v. Harris*, 145 N. C. 456, 59 S. E. 115 (1907).

An indictment which failed to show the causal relation between the alleged false pretense and the deceit, was held not to inform defendant of the crime charged against him. It is his constitutional right to be so informed. *State v. Whedbee*, 152 N. C. 770, 67 S. E. 60, 27 L. R. A. (N. S.) 363 (1910).

In *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924), it was said: "In all criminal prosecutions the defendant is clothed with a constitutional right of confrontation, and this may not be taken away any more by denying him the right to cross-examine the state's witnesses than by refusing him the right to confront his accusers and witnesses with other testimony. Constitution, Art. I, § 11 [this section]. 'We take it that the word confront does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face'—*Pearson, C. J.*, in *State v. Thomas*, 64 N. C. 74 (1870). And this, of course, includes the right of cross-examination." *State v. Moss*, 47 N. C. 66 (1854); *State v. Harris*, 181 N. C. 600, 107 S. E. 466 (1921); *State v. Maynard*, 184 N. C. 653, 113 S. E. 682 (1922); *State v. Snipes*, 185 N. C. 743, 117 S. E. 500 (1923); *State v. Hartsfield*, 188 N. C. 357, 124 S. E. 629 (1924).

The principle upon which dying declarations may be received in evidence in criminal cases is not in violation of the defendant's constitutional right to confront his accusers, as they have been admitted from necessity. *State v. Williams*, 185 N. C. 643, 116 S. E. 570 (1923).

Confrontation—Definition.—In *State v. Thomas*, 64 N. C. 74 (1870), it is said that the word "confront" as used in this section does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmation of the common-law rule that in trials by jury the witness must be present before the jury and the accused, so that he may be confronted, that is put face to face. It extends also to the right to require the witnesses to be placed under oath, subject to the test of a competent cross-examination. *State v.*

Dixon, 185 N. C. 727, 119 S. E. 170 (1923). See also *State v. Breece*, 206 N. C. 92, 173 S. E. 9 (1934).

Under this construction it is held that entries in the course of business, upon the books of a railroad company by one at the time an agent of the company, and still living, but absent from the State, are not competent evidence of the facts therein set forth, upon the trial of a third person for crime. *State v. Thomas*, 64 N. C. 74 (1870).

By construing this section, which gives the accused the right to be confronted by witnesses, with the right to be present at the trial, the conclusion reached in this State is that the prisoner does not have to accompany the jury when it views the scene of the crime. Apparently the right to accompany the jury has never been raised in this State. 12 N. C. Law Rev. 268.

Same—Does Not Apply to Civil Actions.—The right accorded defendant in a criminal prosecution to confront the witnesses against him does not apply to civil actions. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943).

Same—Deposition.—Depositions taken in the absence of a criminal cannot be read against him. *State v. Webb*, 2 N. C. 103 (1794).

Same—Waiver of Right.—The accused has the right to insist upon the production of his accusers but this is a right which may be and is waived by a failure to assert it in proper time. The right must be insisted upon in express terms and a general objection to the evidence is not sufficient. *State v. Mitchell*, 119 N. C. 784, 25 S. E. 783, 1020 (1896).

Same—Not Denied by Refusing Motion to Continue.—There is no denial of prisoner's right to confrontation by the refusal of a motion to continue, on the ground of the absence of a material, expert, fingerprint witness, it appearing that the State's solicitor agreed that he would not, and did not offer evidence as to fingerprints. *State v. Rising*, 223 N. C. 747, 28 S. E. (2d) 321 (1943).

The denial of a continuance is not prejudicial error where the record fails to show that it would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

The right of a defendant to confront his accusers includes the right to cross-examine them on any subject touched on in their examination-in-chief, and a witness testifying to facts incriminating defendant

on his examination-in-chief may not deprive defendant of his right to cross-examine him on the ground that answers to questions asked on cross-examination might tend to incriminate the witness. *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936).

The constitutional right to be represented by counsel is further implemented by § 15-4. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

A defendant has the constitutional right to be represented by counsel whom he has selected and employed, and in prosecutions for capital felonies the court has an inescapable duty to assign counsel to a person unable to employ one. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

Depends upon Nature of Offense. — In capital felonies the provision relative to counsel is regarded as not merely permissive but mandatory. This is indicated by § 15-5 and by numerous decisions of the Supreme Court. But in cases of misdemeanors and felonies less than capital it has been the uniform practice in this jurisdiction to regard these provisions as guaranteeing the right of persons accused to be represented by counsel, and the right to have counsel assigned if requested and the circumstances are such, for financial or other reasons, as to show the apparent necessity of counsel for the protection of the defendant's rights. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

In cases less than capital the propriety of providing counsel depends upon the circumstances of the individual case, within the sound discretion of the trial judge. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

And defendant's ignorance and unfamiliarity with legal matters are not alone sufficient to render appointment of counsel mandatory in a prosecution for less than a capital offense. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

Self-Incrimination—Scope of Protection.—The fair interpretation of the clause that the defendant "shall not be compelled to give evidence against himself" seems to be to secure one who is or may be accused of crime from making any compulsory revelations which may be given in evidence against him on his trial for the offense. *LaFontaine v. Southern Underwriter's*, 83 N. C. 133 (1880).

The constitutional inhibition against self-incrimination is directed against compulsion, and not against voluntary admissions, confessions, or testimony freely given on the trial. Such statements,

and testimony voluntarily given on a former trial are received against the accused as his admissions. *State v. Farrell*, 223 N. C. 804, 28 S. E. (2d) 560 (1944).

This immunity extends, not only to one who actually testifies as a witness, but to the defendant in the trial, even though he decline to testify as a witness in his own behalf. *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667 (1926).

Whenever the defendant in a criminal action voluntarily testifies in his own defense he assumes the position of a witness and subjects himself to all the disadvantages of that position. In doing so he acknowledges the right of the prosecution to test his credibility and he waives his constitutional privilege not to answer questions which tend to incriminate him or to prove the specific offense with which he is charged. *State v. O'Neal*, 187 N. C. 22, 120 S. E. 817 (1924).

In *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196 (1895), it was held that the true intent and meaning of this article is that a witness shall not be compelled to answer any question, the answer to which would disclose a fact which forms an essential link in the chain of testimony which would be sufficient to convict him of a crime. And Chief Justice Faircloth, delivering the opinion, said: "We think the provision of our Constitution ought to be liberally construed to preserve personal rights and protect the citizen against self-incriminating evidence." *State v. Medley*, 178 N. C. 710, 100 S. E. 591 (1919).

Testimony that defendant was placed for identification in the relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing defendant to give evidence against himself in denial of his constitutional rights. *State v. Neville*, 175 N. C. 731, 95 S. E. 55 (1918).

As to witness testifying to any unlawful gaming done by himself or others, see § 8-55 and note thereto.

Same—Truth or Falsity of Statements.—The constitutional privilege against self-incrimination, however, bars the introduction of all statements falling within its scope without regard for their truth or falsity. *State v. Rogers*, 233 N. C. 390, 64 S. E. (2d) 572 (1951).

Same — Evidential Circumstances on Accused's Body, etc.—The scope of the privilege against self-incrimination includes only the process of testifying by word of mouth or in writing. It has no application to such physical, evidential

circumstances as may exist on the accused's body or about his person. *State v. Rogers*, 233 N. C. 390, 64 S. E. (2d) 572 (1951).

Upon the trial of the defendant for violating the prohibition law the introduction in evidence of testimony of the officer making the arrest that he found a half-gallon jar of liquor on the person of the defendant is competent, and is not in violation of the constitutional provision that a defendant may not be compelled to give evidence against himself, the provision not applying to physical facts or conditions. *State v. Hickey*, 198 N. C. 45, 150 S. E. 615 (1929).

The constitutional guarantee that a defendant shall not be compelled to testify against himself, as provided by this section, does not preclude testimony by a witness as to marks on defendant's body tending to identify him as the perpetrator of the crime. *State v. Riddle*, 205 N. C. 591, 172 S. E. 400 (1934).

The admission of incriminating testimony of defendant's physical condition by witnesses who examined her without objection does not violate defendant's constitutional right not to be compelled to give evidence against herself, as provided in this section. *State v. Eccles*, 205 N. C. 825, 172 S. E. 415 (1934).

Same—Examination of Blood of Accused.—Where defendant pleaded insanity at the time of the homicide due to the continued use of liquor and opiates, and the record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to ascertain the presence or absence of alcohol or morphine in his system, it was held that defendant's contention that the obtaining of the specimens compelled him to give evidence against himself, in violation of this section, was untenable. *State v. Cash*, 219 N. C. 818, 15 S. E. (2d) 277 (1941).

Same—Chemical Tests.—For note on self-incrimination and the use of chemical tests to determine intoxication, see 30 N. C. Law Rev. 302.

Same—Evidence of Footprints. — The constitutional privilege against self-incrimination is not violated by the introduction of evidence of footprints to identify the accused, even where these are obtained by coercion. *State v. Rogers*, 233 N. C. 390, 64 S. E. (2d) 572 (1951).

Same—Demonstration of Act of Killing.—Upon trial for murder in the first degree when there is other circumstantial evidence of the prisoner's guilt, it is not duress to require the prisoner to place

himself in such position as to show he could have fired the fatal shot from a window and killed the deceased, as this is not considered as making a person furnish evidence against himself, it being dependent upon physical facts and conditions and not upon confessions or statements of the prisoner. *State v. Thompson*, 161 N. C. 238, 76 S. E. 249 (1912).

Same—Forced Production of Incriminating Documents Not Allowed. — The protection afforded to defendants in criminal action by this section is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial. *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667 (1926).

The introduction in evidence of incriminating papers taken from the defendant at the time of the arrest does not infringe the constitutional guarantee against self-incrimination, under this section, and when he takes the stand in his own behalf he waives his constitutional right against self-incrimination. *State v. Shoup*, 226 N. C. 69, 36 S. E. (2d) 697 (1946), distinguishing *State v. Hollingsworth*, 191 N. C. 595, 132 S. E. 667 (1926).

Same—Waiver of Privilege. — The defendant waives his constitutional privilege not to answer questions tending to incriminate himself when he voluntarily testifies in his own behalf. *State v. Allen*, 107 N. C. 805, 11 S. E. 1016 (1890).

Same—Defendant Voluntarily Taking Stand.—See § 8-54 and notes thereto.

As to compelling accused to speak so that witness may identify his voice, see note, 27 N. C. Law Rev. 262.

Accomplice Can Not Refuse to Answer on Cross-Examination after Incriminating Defendant.—An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. *State v. Perry*, 210 N. C. 796, 188 S. E. 639 (1936).

Must Have Opportunity to Prepare and Present Defense.—The constitutional right of a defendant in a criminal prosecution to confront his accusers and adverse wit-

nesses with other testimony, as provided by this section, includes the right to a fair opportunity to prepare and present his defenses, which right must be accorded him not only in form, but in substance as well. *State v. Whitfield*, 206 N. C. 696, 175 S. E. 93 (1934); *State v. Utley*, 223 N. C. 39, 25 S. E. (2d) 195 (1943); *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948), discussed in 27 N. C. Law Rev. 544; *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294 (1949).

After the convening of the term the trial court ordered a special venire from another county to try a negro charged with rape. Counsel for defendant challenged the array on the ground that persons of defendant's race had been excluded from the jury list solely because of their race, and the court refused the request of counsel for time to investigate and secure evidence in support of such challenge to the array, but counsel obtained evidence from members of the special venire and bystanders of the courtroom tending to sustain the challenge. It was held that as it appeared that defendant was prejudiced by denial of reasonable opportunity to procure evidence in support of his challenge to the array, a new trial was awarded for the denial of defendant's constitutional right to be properly represented by counsel. *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294 (1949).

Arrest and Search of Person Suspected of Carrying Intoxicants. — Where an officer sees a person leave his automobile with his appearance indicating that he had something concealed on his person and reasonably giving the impression that the person was carrying intoxicating liquor, the officer may immediately arrest and

search such person, and where a half-gallon of liquor is found on the person of the defendant the action of the officer does not violate the provisions of this section. *State v. Hickey*, 198 N. C. 45, 150 S. E. 615 (1929).

Payment of Witnesses' Fees Not Placed on Public.—This provision, exempting an acquitted defendant from payment of necessary witness fees of the defense, does not require that they shall be paid by the public; the section operates only to deprive the witnesses of their common-law right to look to the defendant for payment. *State v. Hicks*, 124 N. C. 829, 32 S. E. 957 (1899).

Private Counsel May Assist Solicitor in Trial of Case.—The trial court has discretionary power to allow private counsel to assist the solicitor in the trial of a case, it being the duty of the court to permit only such assistance as fairness and justice may require, and such power does not impinge the provisions of this section of the Constitution. *State v. Carden*, 209 N. C. 404, 183 S. E. 898 (1936).

When Motion for Continuance Presents Question of Law. — When a motion for continuance, in a criminal case, is based on a right guaranteed by the federal and State Constitutions, 14th Amend. U. S. Constitution, Art. I, § 17 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N. C. 321, 26 S. E. (2d) 322 (1943).

Cited in *State v. Wadford*, 194 N. C. 336, 139 S. E. 608 (1927); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934); *State v. White*, 225 N. C. 351, 34 S. E. (2d) 139 (1945).

§ 12. Answers to criminal charges.—No person shall be put to answer any criminal charge except as hereinafter allowed, but by indictment, presentment, or impeachment, but any person, when represented by counsel, may, under such regulations as the Legislature shall prescribe, waive indictment in all except capital cases. (Const. 1868; 1949, c. 579.)

Editor's Note. — This section was amended by vote at the general election of November 7, 1950. The amendment added the provision as to waiver of indictment.

For the history of section, see *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Generally. — The words "except as hereinafter allowed" have reference to the last clause of § 13, and are intended to harmonize the two sections and let both operate. *State v. Crook*, 91 N. C. 536 (1884). See *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

These principles are dear to every free man; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be the rights of the citizens of North Carolina and ought to be vigilantly guarded. *State v. Moss*, 47 N. C. 66 (1854); *State v. Snipes*, 185 N. C. 743, 117 S. E. 500 (1923).

A justice of the peace has no jurisdiction of an assault with a deadly weapon except to bind the defendant over, and by the provisions of this section, the superior court may proceed to trial only upon indictment duly found and returned, the

words in this section "except as hereinafter allowed" referring to the latter clause of § 13 relating to trial of petty misdemeanors and not to an assault with a deadly weapon. *State v. Myrick*, 202 N. C. 688, 163 S. E. 803 (1932). See *State v. Clegg*, 214 N. C. 675, 200 S. E. 371 (1939).

Scope.—This section means action by the grand jury according to the practice at common law, and does not permit open hearings before the grand jury, and where the court sends for the grand jury and permits the solicitor to examine a State's witness in open court before the grand jury, after the grand jury had returned two identical bills of indictment against the defendant, submitted on successive days, "not a true bill," and thereafter the solicitor submits another identical bill to the grand jury which is returned "a true bill": Held, the defendant's verified plea in abatement and motion to quash, made before pleading, should have been allowed, and upon appeal from the court's denial of the motion the judgment will be reversed, with leave to the solicitor to send another bill before a different grand jury, if so advised. *State v. Ledford*, 203 N. C. 724, 166 S. E. 917 (1932).

The word "indictment" means indictment by a grand jury as defined by the common law. *State v. Mitchell*, 202 N. C. 439, 163 S. E. 581 (1932).

The term "indictment" is used in this section to signify a written accusation of a crime drawn up by the public prosecuting attorney and submitted to the grand jury, and by them found and presented on oath or affirmation as a true bill. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Presentments.—The term "presentment" is used in this constitutional provision to denote an accusation made, *ex mero motu*, by a grand jury of an offense upon their own knowledge or observation, or upon information from others, without any bill of indictment having been submitted to them by the public prosecuting attorney. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Since the enactment of G. S. 15-137 trials upon presentment have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

This section sufficiently explains the function of the grand jury as a part of the court. It is competent to send to the grand jury as many bills of indictment as

may be necessary to get before them necessary witnesses and evidence from which they may decide the propriety of submitting the accused to trial. *State v. Lewis*, 226 N. C. 249, 37 S. E. (2d) 691 (1946).

Necessity for Order for Grand Jury During Special Term.—Where defendant is tried at a special term of criminal court upon an indictment returned by a grand jury drawn for the special term, but there is no order by the Governor that a grand jury be drawn for such term, as provided by § 7-78, defendant's motion in arrest of judgment, made the first time in the Supreme Court upon appeal, must be allowed, pursuant to this section. *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935). See *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

Capital Felonies. — A person charged with a capital felony can be prosecuted only on an indictment found by a grand jury. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Noncapital Felonies and Misdemeanors. —A person charged with a noncapital felony or with a misdemeanor may be tried initially in the superior court only upon an indictment, except when represented by counsel he may be tried upon information signed by the solicitor when written waiver of indictment by defendant and his counsel appears on the face of the information as provided in G. S. 15-140 and 15-140.1. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

The provisions of this and the following section, when read together, empower the legislature to provide means other than indictments by grand juries for the trial of petty misdemeanors, with the right of appeal. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Effect of Invalid Indictment. — When the indictment charging defendant with the commission of crime is invalid, defendant's motion to dismiss the action for want of jurisdiction should be allowed. *State v. Beasley*, 208 N. C. 318, 180 S. E. 598 (1935).

Indictment on Appeal. — See *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922). See also, *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913).

Trial in Superior Court upon Original Accusation.—Where the General Assembly declares an offense below the grade of felony to be a petty misdemeanor and provides for prosecution of such offense in an inferior court upon accusation other than indictment, and confers upon such inferior court final jurisdiction of such prosecutions subject to the right of appeal to the

superior court, the defendant on appeal from conviction in the inferior court may be tried in the superior court upon the original accusation without an indictment; but when there has been no trial in the inferior court and the prosecution has been merely transferred to the superior court upon defendant's demand for jury trial, trial in the superior court upon the original warrant is a nullity, and a statute

providing for such trial is unconstitutional. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Applied in *State v. Rawls*, 203 N. C. 436, 166 S. E. 332 (1932); *State v. Watson*, 209 N. C. 229, 183 S. E. 286 (1936).

Stated in *State v. Johnson*, 220 N. C. 773, 18 S. E. (2d) 358 (1942) (dis. op.); *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447 (1942).

§ 13. Right of jury.—No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court. The Legislature may, however, provide other means of trial, for petty misdemeanors, with the right of appeal. (Const. 1868; 1945, c. 634, s. 1.)

Cross Reference. — For general provisions as to jurors, see § 9-1 et seq.

Editor's Note. — This section was amended by vote of the people at the general election of 1946. The amendment substituted the words "lawful persons" for "lawful men."

The essential attributes of trial by jury guaranteed by this section, are the number of jurors, their impartiality and a unanimous verdict, and § 9-21, providing that the court may order the selection of an alternate juror in those cases which seem likely to be protracted, does not infringe upon this constitutional provision. *State v. Dalton*, 206 N. C. 507, 174 S. E. 422 (1934).

The word "jury" as here used formerly signified a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. A jury of ten men and two women did not suffice as a jury of "good and lawful men" within the meaning of this section as it formerly read. *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

Unanimous Verdict Required. — A verdict of guilty rendered by a less number than twelve is unconstitutional. *State v. Berry*, 190 N. C. 363, 130 S. E. 12 (1925). The verdict must be rendered in open court before the presiding judge. *State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927).

The defendant is entitled as a matter of right to know whether each juror assented to the verdict, announced by the juror who undertook to answer for the jury, and to that end he had the right to insist that a specific question be addressed to and answered by each juror in open court, as to whether he assented to said verdict. *State v. Boger*, 202 N. C. 702, 163 S. E. 877 (1932).

Poll of Jury.—The predominant purpose of the poll is to ascertain if the verdict as tendered by the jury is the "unanimous verdict of a jury of good and lawful men [now lawful persons] in open court," as

prescribed by this section. *Lipscomb v. Cox*, 195 N. C. 502, 142 S. E. 779 (1928). See Art. I, § 19.

See notes to § 1-201.

Jury Trial Preserved on Appeal.—The right of a trial by jury in a criminal action is preserved to the accused by the statutory requirement of a trial de novo in the superior court on appeal from a court of subordinate jurisdiction, and conviction in the superior court cannot be had unless upon the verdict of the jury, in accordance with the provisions of this section of our Constitution. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922).

Jury Trial Not Waivable.—A jury trial cannot be waived in a criminal action; hence where the facts were agreed upon by the State and the accused and submitted to the judge for his decision, it was held, that such a procedure is not warranted by the law. *State v. Holt*, 90 N. C. 749 (1884). The only exception being for the trial of petty misdemeanors. *State v. Stewart*, 89 N. C. 563 (1833). As to waiver in civil cases, see § 1-184 and notes thereto.

Jury Trial Can Not Be Waived after Plea of Not Guilty. — A defendant in a criminal prosecution for a felony or a misdemeanor may not waive his constitutional right to trial by jury in the superior court after entering a plea of "not guilty", without changing his plea, nor may the General Assembly permit him to do so by statute, and where the court, after a plea of "not guilty," finds the defendant guilty without a jury trial, the judgment will be stricken out and the cause remanded. *State v. Hill*, 209 N. C. 53, 182 S. E. 716 (1935). See also, *State v. Muse*, 219 N. C. 226, 13 S. E. (2d) 229 (1941).

When a defendant in a criminal prosecution in the superior court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, and the determinative facts cannot be referred to the decision of

the court even by consent, but must be found by the jury. *State v. Muse*, 219 N. C. 226, 13 S. E. (2d) 229 (1941).

Failure of defendant in a criminal prosecution to exhaust his peremptory challenges does not affect his right to attack an illegally constituted jury. *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

Miscellaneous Cases.—The North Carolina Workmen's Compensation Act was held not to be unconstitutional for that it impaired the right of trial by jury, guaranteed by this section. *Hanks v. Southern Public Utilities Co.*, 204 N. C. 155, 167 S. E. 560 (1933).

For case of emergency, such as illness of juror, see *State v. Wheeler*, 185 N. C. 670, 116 S. E. 413 (1923); denial of partnership, see *Woodland & Co. v. Southgate Packing Co.*, 186 N. C. 116, 118 S. E. 898 (1923).

Assault and battery is not a petty misdemeanor within the proviso to this section. *State v. Stewart*, 89 N. C. 563 (1883); *Schick v. United States*, 195 U. S. 65, 24 S. Ct. 826, 49 L. Ed. 99 (1904).

The recorders' courts are not in violation of the right of trial by jury guaranteed by this section. *Jones v. Brinkley*, 174 N. C. 23, 93 S. E. 372 (1917), citing *State v. Shine*, 149 N. C. 480, 62 S. E. 1080 (1908); *State v. Doster*, 157 N. C. 634, 73 S. E. 111 (1911); *State v. Dunlap*, 159 N. C. 491, 74 S. E. 626 (1912). See also, *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 6 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867 (1913).

Separate Provisions for Petty Misdemeanors.—The very purpose of conferring on the legislature power to provide means of trial other than by jury in the ordinary way, as to petty misdemeanors, is to avoid the inconvenience, expense and delay attendant upon indictment by the grand jury, the trial by the jury where the parties choose to waive it, in the ordinary course of criminal procedure. *State v. Crook*, 91 N. C. 536 (1884). See *State v. Boykin*, 211 N. C. 407, 191 S. E. 18 (1937).

The legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide means of trial for the offense other than by indictment and trial by jury. *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447 (1942).

Under this section indictment by grand jury is dispensed with in the trial of petty misdemeanors. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

The provisions of this section empower the legislature to provide means other

than petit juries for the trial of petty misdemeanors, with the right of appeal. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Same—Right of Appeal.—The right of appeal mentioned in the last clause of this section must be with the right in the party to appeal to the Supreme Court, and with power and jurisdiction in that court to review the decision of the court below in matters of law. *State v. Ham*, 83 N. C. 590 (1880).

The constitutional guaranty of a jury trial is met by the right of appeal which is given from the police court, in all cases, to the superior court. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905). And this is true where the appeal is from a recorder's court. *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913).

In disbarment proceedings respondent's exception on the ground that the proceedings deprived him of his right to trial by jury is untenable when the matters in issue are determined by a jury upon his appeal to the superior court. In *re West*, 212 N. C. 189, 193 S. E. 134 (1937). As to right on appeal from criminal case charging misdemeanor, see *State v. Wheeler*, 185 N. C. 670, 116 S. E. 413 (1923).

Upon defendant's appeal from judgment and sentence by the court after defendant had entered a conditional plea of guilty the case will be remanded in order that a jury may pass upon defendant's guilt or innocence in accordance with defendant's constitutional right. *State v. Ellis*, 210 N. C. 170, 185 S. E. 662 (1936).

Where a defendant enters a plea of "not guilty" in the superior court, he may not thereafter, without being permitted to change his plea, waive his constitutional right of trial by jury. *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867 (1913). And this applies to misdemeanors as well as to the more serious offenses. *State v. Pulliam*, 184 N. C. 681, 114 S. E. 394 (1922). The reason for such holding is to be found in the language of this section. *State v. Hartsfield*, 188 N. C. 357, 124 S. E. 629 (1924).

Same—Waiver of Right.—A person on trial for a misdemeanor in a municipal court with right of appeal to the superior court, may waive his constitutional right to a trial by jury by consenting to the judgment therein entered, or by not appealing therefrom, and his afterwards employing an attorney and moving for the appeal within the time allowed by the statute applicable will not affect the fact that he had personally acquiesced in the

judgment entered. *State v. Pasley*, 180 N. C. 695, 104 S. E. 533 (1920); *State v. Lakey*, 191 N. C. 571, 132 S. E. 570 (1926).

It is permissible under this section for the General Assembly to provide for the trial of petty misdemeanors in inferior courts with the right of appeal to the superior court. *State v. Camby*, 209 N. C. 50, 182 S. E. 715 (1935), citing *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905); *State v. Brittain*, 143 N. C. 668, 57 S. E. 352 (1907); *State v. Hyman*, 164 N. C. 411, 79 S. E. 284 (1913); *State v. Tate*, 169 N. C. 373, 85 S. E. 383 (1915); *State v. Pasley*, 180 N. C. 695, 104 S. E. 533 (1920).

Statutes purporting to authorize the transfer of untried misdemeanor cases from an inferior court to the superior court and the initial trial of such transferred cases in the superior court upon the

warrant of the inferior court are repugnant to the declaration plainly inherent in the second sentence of this section that a person charged with the commission of a misdemeanor cannot be put on trial in the superior court upon the warrant of an inferior court unless he has been tried upon such warrant in the inferior court and has appealed from that court to the superior court. *State v. Thomas*, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

Applied in *State v. Watson*, 209 N. C. 229, 183 S. E. 286 (1936).

Cited in *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (1943) (con. op.); *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861 (1945) (dis. op.); *State v. White*, 225 N. C. 351, 34 S. E. (2d) 139 (1945).

§ 14. **Excessive bail.**—Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. (Const. 1868.)

Cross References.—See annotations under § 14-3.

For general provisions as to bail, see § 15-102 et seq.

For article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

In General.—This section restricts the judiciary from imposing excessive punishments where the legislature has not prescribed a fixed maximum, and does not apply to the legislative power to impose the penalty for acts made an offense by them. *State v. Blake*, 157 N. C. 608, 72 S. E. 1080 (1911).

Bail—Test as to Reasonableness.—There are two things which have been looked upon as very good guides in determining the reasonableness of punishment; (1) what has formerly been expressly done in like cases, and (2) for the want of such particular discretion then to consider that which comes nearest to it. *State v. Driver*, 78 N. C. 423 (1878).

It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be interfered with, except when the abuse is palpable. *State v. Driver*, 78 N. C. 423 (1878), approved in *State v. Reid*, 106 N. C. 714, 11 S. E. 315 (1890).

It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *State v. Farrington*, 141 N. C. 844, 53 S. E. 954 (1906), citing *State v. Driver*, 78 N. C. 423 (1878); *State v. Miller*, 94 N. C. 904 (1886).

Cruel and Unusual Punishment.—This section has been considered by the Su-

preme Court as an admonition to the judiciary in imposing sentence left to an extent within its discretion by the statutes, however, there is a decided intimation that in extraordinary and exceptional cases it may be held to affect legislative enactments as well. *State v. Smith*, 174 N. C. 804, 93 S. E. 910 (1917).

Where the question of punishment is left to the sound discretion of the court, the court is limited only by the prohibition against cruel or unusual punishment in this section. *State v. Richardson*, 221 N. C. 209, 19 S. E. (2d) 863 (1942).

A punishment which is within the limits authorized by statute cannot be held cruel or unusual in the constitutional sense. *State v. Welch*, 232 N. C. 77, 59 S. E. (2d) 199 (1950).

A sentence which finds complete sanction in a valid legislative enactment cannot be deemed violative of this constitutional provision forbidding the infliction of cruel or unusual punishments. *State v. Stansbury*, 230 N. C. 589, 55 S. E. (2d) 185 (1949).

It is well settled that when no time is fixed by statute, this court will not hold imprisonment for two years cruel and unusual. *State v. Moschoures*, 214 N. C. 321, 199 S. E. 92 (1938); *State v. Crandall*, 225 N. C. 148, 33 S. E. (2d) 861 (1945).

A sentence to 18 months labor on the roads entered upon defendant's plea of guilty to a charge of drawing and uttering a worthless check was held not to be "cruel and unusual" in a constitutional sense. *State v. White*, 230 N. C. 513, 53 S. E. (2d) 436 (1949).

Defendant's contention that he was sub-

jected to cruel and unusual punishment in that the trial court sentenced him to the maximum prison term permitted by statute for the offense of seduction of which he was convicted, and in addition dictated a letter to the parole commissioner in which he requested that no clemency be extended defendant, and also directed the solicitor to institute prosecution against defendant for failure to support his illegitimate child, is untenable, since the letter to the parole commissioner and the instructions to the solicitor are not parts of the sentence imposed. *State v. Brackett*, 218 N. C. 369, 11 S. E. (2d) 146 (1940).

Same—Punishment for Two Offenses.—Where there is a conviction of the violation of two separate criminal statutes consolidated and tried as two counts under one bill of indictment, a sentence for each offense—the one to begin upon the expiration of the other term—confining the punishment as to each within that prescribed in the statute relating to it, cannot be considered under the facts of the case as cruel and unusual within the inhibition of this section. *State v. Malpass*, 189 N. C. 349, 127 S. E. 248 (1925).

Miscellaneous Cases.—A sentence of not less than twenty-five nor more than thirty years in the State's prison, upon a plea of guilty of possession of weapons and implements for house breaking, *State v. Cain*,

§ 15. **General warrants.**—General warrants, whereby any officer or messenger may be commanded to search suspected places, without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted. (Const. 1868.)

Cross Reference.—See § 15-26.

Editor's Note.—For a discussion of the statute enacted pursuant to this provision, see 15 N. C. Law Rev., No. 2, p. 101. As to limitations on investigating officers, see 15 N. C. Law Rev., No. 3, p. 229.

This provision is a limitation on State and local officers. 15 N. C. Law Rev., No. 3, p. 232.

Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the federal Constitution, Amendment IV, and by this section. *Brewer v. Wynne*, 163 N. C. 319, 79 S. E. 629, Ann. Cas. 1915B, 319 (1913).

§ 16. **Imprisonment for debt.**—There shall be no imprisonment for debt in this State, except in cases of fraud. (Const. 1868.)

Cross Reference. — See § 1-410 and the notes thereto.

What Constitutes Debt.—A fine or pen-

209 N. C. 275, 183 S. E. 300 (1936). Sentence of hard labor for thirty years upon conviction of a male person for carnally knowing a female child thirteen years of age, *State v. Swindell*, 189 N. C. 151, 126 S. E. 417 (1925).

Upon conviction of manslaughter, punishment for nine years in the penitentiary, *State v. Lance*, 149 N. C. 551, 63 S. E. 198 (1908).

The punishment for vagrancy cannot exceed thirty days under our statute. In re *Watson*, 157 N. C. 340, 72 S. E. 1049 (1911). Fine or imprisonment for the owners of bird dogs to permit them to run at large during the closed season for quail, *State v. Blake*, 157 N. C. 608, 72 S. E. 1080 (1911). Punishment of thirty days confinement in jail for carrying concealed weapons, *State v. Woodlief*, 172 N. C. 885, 90 S. E. 137 (1916). See also, *State v. Mangum*, 187 N. C. 477, 121 S. E. 765 (1924).

Cruel and Unusual Punishment—Violation of Prohibition Law.—A sentence prescribed by statute for the violation of prohibition law is held not to be cruel or unusual within the meaning of this section. *State v. Daniels*, 197 N. C. 285, 148 S. E. 244 (1929).

Cited in *State v. Parker*, 220 N. C. 416, 17 S. E. (2d) 475 (1941).

Ordinarily even the strong arm of the law may not invade one's dwelling except under authority of a proper search warrant. In re *Walters*, 229 N. C. 111, 47 S. E. (2d) 709 (1948).

A warrant must sufficiently identify the person accused. *Carson v. Doggett*, 231 N. C. 629, 53 S. E. (2d) 609 (1950).

The provisions of the *Turlington Act*, Public Laws of 1923, did not contravene the provisions of this section. *State v. Godette*, 188 N. C. 497, 125 S. E. 24 (1924).

Cited in *State v. Fowler*, 172 N. C. 905, 90 S. E. 408 (1916); *State v. Campbell*, 182 N. C. 911, 110 S. E. 86 (1921); *Rhodes v. Collins*, 198 N. C. 23, 150 S. E. 492 (1929).

alty imposed by a municipal ordinance is treated as a debt and, under this section of the Constitution, a person from whom it is

attempted to be collected is exempt from arrest. *State v. Earnhardt*, 107 N. C. 789, 12 S. E. 426 (1890). A judgment on a note is likewise a debt and the defendant cannot be arrested therefor. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18 (1897).

But costs of prosecution against a prosecutor (upon acquittal of the accused or *nolle prosequi* entered), or against the accused upon a verdict of guilty, or a fine imposed, does not constitute a debt within the meaning of this section of the Constitution, and hence the defendant may be imprisoned for non-payment of the same. *State v. Wallin*, 89 N. C. 578 (1883). See section 6-45. Nor is the duty of maintaining a bastard child imposed upon the father such a debt as is contemplated by this section. *State v. Palin*, 63 N. C. 472 (1869), approved in *State v. Beasley*, 75 N. C. 211 (1876).

No Imprisonment Except Where There Is Fraud. — "This section clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, unless it has been adjudged, upon an allegation duly made in the complaint and a corresponding issue found by a jury, that there has been fraud. . . ." *East Coast Fertilizer Co. v. Hardee*, 211 N. C. 653, 191 S. E. 725 (1937), quoting from *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362 (1906).

The words "except in cases of fraud," in this section of the Constitution, comprehend not only fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other

fraudulent devices, but embraces also fraud in making the contract — false representations for instance, and fraud in incurring the liability; for instance, when an administrator commits a fraud by applying the funds of the estate to his own use, paying his own debts, and the like. *Melvin v. Melvin*, 72 N. C. 384 (1875). See further for arrests in cases of fraud, section 1-410, par. 4, and notes thereto.

Imprisonment for failure to pay a sum of money is prohibited except to enforce an appropriate judicial order which has been willfully disobeyed so as to constitute contempt of court. *Stanley v. Stanley*, 226 N. C. 129, 37 S. E. (2d) 118 (1946).

Not Applicable to Tort Actions. — The provision of this section of the Constitution has no application to actions for tort; it is confined to causes of action arising ex contractu. *Long v. McLean*, 88 N. C. 3 (1883). See *Ledford v. Smith*, 212 N. C. 447, 193 S. E. 722 (1937). As to arrest for damages arising from tort, see § 1-410, par. 1 and the notes thereto.

The Worthless Check Law is a valid exercise by the State of its police powers. *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927).

Section 14-110 Constitutional. — Section 14-110 does not contravene this section of the Constitution. See the notes to § 14-110.

Section 14-358 Unconstitutional. — Section 14-358 is unconstitutional because it contravenes this section of the Constitution. See the annotations under § 14-358.

Quoted in *State v. Williams*, 150 N. C. 802, 63 S. E. 949 (1909); *Moose v. Barrett*, 223 N. C. 524, 27 S. E. (2d) 532 (1943).

§ 17. No person taken, etc., but by law of land.—No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land. (Const. 1868.)

Cross References. — As to validity of statute prohibiting discharge of deleterious matter into streams, see note to § 113-172. As to meaning of term "liberty," see § 1 of this article.

As to qualification of term "liberty" see note of *London v. Headen*, under Art. I, § 1.

What Constitutes "Law of the Land."—It is said by Mr. Webster in *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 519, 4 L. Ed. 629 (1819): "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, un-

der the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897); *Parish v. East Coast Cedar Co.*, 133 N. C. 478, 45 S. E. 768, 98 Am. St. Rep. 718 (1903); *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915).

The term "law of the land" means the general law, the law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. It means the regular course of the administration of justice through the courts of competent jurisdiction, after the manner of such courts. Procedure must be consistent

with the fundamental principles of liberty and justice. *State v. Chesson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947). See *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

The "law of the land" is equivalent to "due process of law." *State v. Collins*, 169 N. C. 323, 84 S. E. 1049 (1915); *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731 (1949). See *National Surety Corp. v. Sharpe*, 232 N. C. 98, 59 S. E. (2d) 593 (1950); *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

In *Hoke v. Henderson*, 15 N. C. 1, (1833), Chief Justice Ruffin said: "The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes." *State v. Cutshell*, 110 N. C. 538, 15 S. E. 261 (1892).

Restraints upon Police Power.—"Law of the land" under this section in relation to the exercise of the State police power, imposes flexible restraints which are satisfied if the act in question is not unreasonable, arbitrary or capricious and the means selected have a real and substantial relation to the objects sought to be attained. *State v. Whitaker*, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Notice and Opportunity to Be Heard Required.—The essential elements of the "law of the land" are notice and opportunity to be heard or defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accord with established rules which do not violate fundamental rights. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

Under "the law of the land" clause of this section a judgment cannot bind a person unless he is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his right. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

An adjudication affecting the marital status and finally determining personal and property obligations must be preceded by notice and an opportunity to be heard. *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138 (1951).

The intent and purpose of the statutes in

regard to service of summons is to give notice and an opportunity to be heard, and where service is had upon a statutory process agent who is not in fact an agent or officer of defendant corporation, the imputation of the negligence of such process agent to the corporation so as to preclude it from moving to set aside a default judgment against it for surprise and excusable neglect would be a denial of due process of law. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1950).

Legislature may limit time for assertion of property right provided it affords those vested with the right a reasonable time to assert same after the enactment of the statute, since there is no vested right in procedure. *Sheets v. Walsh*, 217 N. C. 32, 6 S. E. (2d) 817 (1940).

Under this section no person can be deprived of his property except by his own consent or the law of the land. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

The legislature may make classifications and distinctions in the application of laws provided they are reasonable and just and not arbitrary. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Legislative bodies may make classifications for the application of regulations provided the classifications are practicable and apply equally to all persons within a class, since the constitutional mandate prescribing discrimination requires only that there be no inequality among those within a particular group or class. *State v. Trantham*, 230 N. C. 641, 55 S. E. (2d) 198 (1949).

Right of Appeal.—The question whether the right of appeal is essential to the "due process" clauses of the State or federal Constitutions is discussed in *Gunter v. Sanford*, 186 N. C. 452, 120 S. E. 41 (1923).

Revival of Barred Claims.—A State statute purporting to revive claim barred by statute of limitations violates due process clauses of State and federal Constitutions, whether such claim affects vested property right or arises under contract. *Valleytown Tp. v. Women's Catholic Order, etc.*, 115 F. (2d) 459 (1940), reversing 32 F. Supp. 894.

Additional Liability Imposed by Amending Act Must Be Prospective.—Acts 1925, c. 117, amending § 53-42 and imposing personal liability on stockholders could not be given retroactive effect. *Bank of Pinehurst v. Derby*, 218 N. C. 653, 12 S. E. (2d) 260 (1940).

Double Jeopardy.—A person cannot be tried twice for the same offense under this

section. *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934).

The obligation of a contract, within the meaning of the constitutional prohibition against impairment, includes all the means and assurances available for the enforcement of the contract at the time of its execution. *Bateman v. Sterrett*, 201 N. C. 59, 159 S. E. 14 (1931).

Section prohibits enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Booth v. Hairston*, 193 N. C. 278, 136 S. E. 879, 57 A. L. R. 1186 (1927) citing *Lowe v. Harris*, 112 N. C. 472, 17 S. E. 539, 22 L. R. A. 379 (1893).

An Office as Vested Property.—Whether or not an officer appointed for a definite time to a legislative office has a vested property therein or contract right thereto has given rise to conflicting views and inharmonious decisions. In the early case of *Hoke v. Henderson*, 15 N. C. 1 (1833), it is held that an office is property and is the subject of protection like any other property under the provisions of this section of the Constitution. The reasoning used by the court in this case, which is to the effect that a public office exists by contracts between the State and the holder, has been the foundation for the decisions of the courts adhering to this view. See *Cotten v. Ellis*, 52 N. C. 545 (1860); *King v. Hunter*, 65 N. C. 603 (1871); *Bailey v. Caldwell*, 68 N. C. 472 (1873); *State v. Gales*, 77 N. C. 283 (1877); *Wood v. Bellamy*, 120 N. C. 212, 27 S. E. 113 (1897). The general trend of American authority appears to have always maintained the opposite view. See *Butler v. Pennsylvania*, 10 How. (51 U. S.) 402, 13 L. Ed. 472 (1850); *Taylor v. Beckham*, 178 U. S. 548, 44 L. Ed. 1187, 20 S. Ct. 890 (1900), the North Carolina doctrine being criticized in many of the cases. However, North Carolina has now gotten away from the view to which it adhered over a long period of time and is now in line with the general current of American authority, *Hoke v. Henderson* being expressly overruled in *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961 (1903). See historical treatment of this question contained in the Editor's Note to § 128-1.—Ed. Note.

Minimum Retail Prices on Trade-Marked Goods.—The North Carolina Fair Trade Act, permitting the establishment of minimum retail prices on trade-marked goods by agreement, does not deprive a retailer not a party to a contract with the manufacturer or distributor of any property right in pre-

venting such retailer from selling the trade-marked article at a price less than that stipulated by contract, since such retailer acquires title with knowledge and subject to the stipulations relative to the minimum retail price permitted by the law in protecting the property right of the manufacturer or distributor in his trade-mark and good will, which property right subsists while the goods bear his trade-mark, even after he has parted with title of commodity itself. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

Vested Right in Dedicated Property.—Lots in a subdivision were sold with reference to a plat showing the street in question to be 99 feet in width. At the time the charter was granted to a municipality embracing the lands, the only plat recorded was a revised one showing the street as 80 feet wide. The granting of the charter cannot be construed as having the effect of limiting the width of the street to 80 feet so as to defeat the vested right of purchasers of lots with reference to the original plat to compel the owner to abide by its dedication of the street for the full width as shown by the plat. *Home Real Estate Loan, etc., Co. v. Carolina Beach*, 216 N. C. 778, 7 S. E. (2d) 13 (1940).

Infringement of Rights of Litigating Party.—The discretion of the trial judge given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party. *State v. Sauls*, 190 N. C. 810, 130 S. E. 848 (1925).

The question as to whether the defendant in a criminal action has sufficient time to prepare his defense before trial, and has thereby been deprived of his rights under the provisions of Article I, § 17, of our State Constitution, is one addressed to the sound discretion of the trial judge, which will not be reviewed on appeal when it is not made to appear that this discretionary power has been abused by him. *State v. Burnett*, 184 N. C. 783, 115 S. E. 57 (1922).

Right of Cross-Examination.—The right of the defendant in a criminal action to cross-examine expert witnesses who have testified their opinion against him is a material one, guaranteed by this section of the Constitution and a denial thereof may not be held as merely a technicality and harmless; nor is this error cured by the fact that he has an opportunity to cross-examine one of these witnesses in refutation of the correctness of the facts upon which his conclusion was based, especially when the other

witness is to be regarded as the most important one. *State v. Hightower*, 187 N. C. 300, 121 S. E. 616 (1924).

License of Attorney Protected. — This section constitutes the basis of the decision in those cases holding that an attorney who has been duly licensed to practice law cannot be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court. See *Ex Parte Schenck*, 65 N. C. 353 (1871), and cases there cited.

A contingent remainderman in lands acquires his interest therein subject to the payment of testator's debts, and in that respect can acquire no vested interest therein, and a sale thereof in good faith and at a fair price by the executrix, for the payment of decedent's debts, as authorized by statute, when by proper proceedings the land could have been sold for the purpose, though the executrix has mistaken therein the authority given her under the will, cannot be held as contrary to the provision of this section. *Charlotte Consolidated Constr. Co. v. Brockenbrough*, 187 N. C. 65, 121 S. E. 7 (1924).

Classification for Tax Purposes. — The legislature may levy a sales tax or a tax on the business of selling tangible personal property, levied as a license or privilege tax, and classify trades, callings, and occupations for the imposition of a tax, and classify articles sold as the basis for computing the tax, exempting certain classes of articles and providing a graduated tax as to other classes of articles, or differentiate in the method of collecting the tax as to some of the classes, provided the levy applies equally and uniformly to all who fall within each particular classification, and provided the classifications are reasonable and based upon some real distinction. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316 (1939). See also, *Caldwell Land, etc., Co. v. Smith*, 146 N. C. 199, 59 S. E. 653 (1907).

Taxation Exemptions.—The provision of Art. V, Schedule E, of the Revenue Act of 1937, making a distinction between wholesale and retail merchants, and exempting sales of ice, medicines on a prescription, fish and farm products when sold in the original or unmanufactured state, commercial fertilizer, agricultural lime and plaster, public school books, sale of used or repossessed articles, and sales to the government or governmental agencies, etc., constitute classifications based upon reasonable and real distinctions, and an allegation that the act is void as imposing arbitrary discriminations in making such classifications is

untenable. *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316 (1939).

Irregular Taxation.—“In *Commissioners v. Lacy*, 174 N. C. 141, 93 S. E. 482 (1917), the court said: ‘It is a fundamental principle in the law of taxation that taxes may only be levied for public purposes and for the benefit of the public on whom they are imposed, and to lay these burdens upon one district for benefits appertaining solely to another is in clear violation of established principles of right and contrary to the express provisions of our Constitution, Art. I, § 17, which forbids that any person shall be disseized of his freehold liberties and privileges or in any manner deprived of his life, liberty or property but by the law of the land.’ ” Approved in *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669 (1927); *Board v. Hanchett Bond Co.*, 194 N. C. 137, 138 S. E. 614 (1927).

Tax Statute Not Providing for Notice and Hearing. — An act which permits the governing board of a town to list, value and revalue all property within its limits separately and independently of § 105-333 without providing for notice and hearing as to such valuations, and without setting up precise standards for evaluation, contravenes due process of law and is unconstitutional. *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

Inheritance Tax upon Nonresident Distributees Held Valid.—*Rhode Island Hospital Trust Co. v. Doughton*, 187 N. C. 263, 121 S. E. 741 (1924).

Act Licensing the Hauling of Lumber Held Valid. — *State v. Bullock*, 161 N. C. 223, 75 S. E. 942 (1912). See also, *Dalton v. Brown & Co.*, 159 N. C. 175, 75 S. E. 40, 42 L. R. A. (N. S.) 506 (1912); *Southeastern Exp. Co. v. Charlotte*, 186 N. C. 668, 120 S. E. 475 (1923).

Employment Security Tax. — Imposition of the employment security tax does not deprive an individual who operates three places of business, employing in the aggregate more than 8 employees, of property without due process of law or deny him of the equal protection of the laws. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Eminent Domain by Park Commission. —The exercise of the power of eminent domain by the North Carolina National Park Commission under Public Laws 1927, c. 48, is not contrary to the “due process” clause of the State Constitution. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563 (1928). See also, *Suncrest Lbr. Co. v. North Carolina Park Comm.*, 30 F. (2d) 121 (1929).

Only those whose interests in the particular lands sought to be taken for the national park contemplated by c. 48, Public Laws, of 1927, § 27, may sue in equity for injunctive relief on the ground that their lands are about to be taken contrary to the provisions of the Fourteenth Amendment to the federal Constitution and of this section. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563 (1928).

Eminent Domain by County Commission.—See *Hill v. Board of Com'rs*, 190 N. C. 123, 129 S. E. 154 (1925).

Just Compensation Required if Private Property Is Taken.—The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. *Yancey v. North Carolina State Highway, etc., Comm.*, 222 N. C. 106, 22 S. E. (2d) 256 (1942).

Private property may not be taken even for a public use without compensation. *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. (2d) 107 (1950).

The exercise of the power of eminent domain by a corporation authorized by its charter to generate and sell electricity, and given power of eminent domain to acquire the necessary rights of way and lands for its dams cannot be said to be exercising this power in a private capacity in contravention of this section. *Whiting Mfg. Co. v. Carolina Aluminum Co.*, 207 N. C. 52, 175 S. E. 698 (1934).

Drainage Laws.—See generally, *Lang v. Carolina Land, etc., Co.*, 169 N. C. 662, 86 S. E. 599 (1915).

Approval of Law Authorizing Issue of Bonds.—Where a valid act authorizing a county to issue bonds has been passed in accordance with the provisions of the State Constitution, Art. II, § 14, leaving out the requirement that the question must first be submitted to the qualified voters, and another act ratified a few days later makes this requirement, the two acts will be construed in *pari materia*, and the later as not having a retroactive effect, and the county does not acquire a vested right under the first ratified act. *Graham County v. Terry*, 194 N. C. 22, 138 S. E. 443 (1927).

Sale of Land for Taxes.—For a valid sale of land for taxes, the tax list and notice of sale must contain a sufficiently definite description of the land to allow the land to be identified, and to be notice to those persons whose interest is to be affected, and if the description is not so definite, a sale thereunder will be void as not complying with the statute, and as taking property

without giving notice and as not affording those whose property is sold an opportunity to be heard. *Bryson v. McCoy*, 194 N. C. 91, 138 S. E. 420 (1927).

Sale of Property at Foreclosure.—This section is not violated by § 45-21.34, regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 587 (1934).

The State may proceed directly or by authorization to others to sell lands for taxes upon proceedings to enforce a lien for the taxes thereon, and a publication of notice to all interested in the lands to appear and defend their rights is not a taking of property inhibited by this section. *Orange County v. Jenkins*, 200 N. C. 202, 156 S. E. 774 (1931).

Forfeiture of property and vesting its title in another for tax delinquency by mere legislative declaration is the taking of property without due process of law. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

The statute, authorizing the State Highway Commission to enter upon and take possession of lands before bringing condemnation proceedings and before making compensation, is not an infringement of constitutional rights and does not deprive an owner of notice and opportunity to be heard. *North Carolina State Highway Comm. v. Young*, 200 N. C. 603, 158 S. E. 925 (1931).

Statute Providing Service of Summons by Publication on Taxpayers Is Valid.—The statute (§ 159-52 et seq.), conferring jurisdiction upon the superior courts of the counties over citizens and owners of taxable property within the county without requiring each such owner or citizen to be named as a party in the complaint or summons and providing for service of summons by publication, is not a violation of this section. *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739 (1937).

Freedom to contract is both a liberty and a property right within the protection of the due process clauses of the federal Constitution and this section of the State Constitution. See *Morris v. Holshouser*, 220 N. C. 293, 17 S. E. (2d) 115, 137 A. L. R. 733 (1941), discussing law pertaining to employee's right to assign future wages.

Section 45-21.36 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end

that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

The 1933 amendment to § 1-512 is constitutional, since it does not impair the obligations of a contract under this section, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339 (1935).

Defendants Are Not Twice Put in Jeopardy by Second Arraignment.—Where each defendant has been separately arraigned and has pleaded to the bill of indictment, following which the cases are continued to the next term of court, defendants are not twice put in jeopardy by a second arraignment when the cases are called for trial the following term. *State v. Watson*, 209 N. C. 229, 183 S. E. 286 (1936).

Waiver of Rights of Defendant in Criminal Case.—*State v. Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927).

Search and Seizure.—See *State v. Fowler*, 172 N. C. 905, 90 S. E. 408 (1916).

Assessments without Notice, etc., Are Void.—Street assessments made under charter provisions failing to provide notice and an opportunity to be heard to those assessed are void as violating due process of law, and may not be validated by curative acts of the legislature. *Lexington v. Lopp*, 210 N. C. 196, 185 S. E. 766 (1936).

Right to Pursue Occupation.—Historically and fundamentally the constitutional guaranties of individual liberty protect the individual in the selection and pursuit of the ordinary occupations against the unwarranted invocation of the police power. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Statute providing for licensing and supervision of photographers held violative of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731 (1949), overruling *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366 (1938).

Section 19-1 et seq., providing for the abatement of public nuisances by temporary order without bond, and the sale of the personalty and the closing of the property for one year upon the finding of the jury, is constitutional, and does not impinge on this section of the Constitution, or Art. XIV, § 1, of the federal Constitution. *Car-*

penter v. Boyles, 213 N. C. 432, 196 S. E. 850 (1938).

Exclusion of Women from Grand Jury.—The male defendant moved to quash the bill of indictment on the ground that it was returned by a grand jury composed entirely of men and that women had been unlawfully excluded therefrom. Held: There had been no discrimination against the class or sex to which defendant belongs, and he could not have been prejudiced by the alleged discrimination, and therefore he may not raise the question of the qualification of women to serve as jurors or maintain that the proceeding constituted a violation of the equal protection guaranteed by the Fourteenth Amendment of the federal Constitution and by this section. *State v. Sims*, 213 N. C. 590, 197 S. E. 176 (1938).

Exclusion of Negroes from Grand Jury.—The evidence disclosed that the names of negroes were printed in red and the names of white persons were printed in black in preparing names for the jury box, and that in drawing the names from the box the names of negroes were without exception rejected. It was held that the motion of defendant, a negro, to quash the indictment found by a grand jury so selected, should have been allowed, since such systematic and arbitrary exclusion of negroes from the grand jury deprived him of his constitutional rights. *State v. Speller*, 229 N. C. 67, 47 S. E. (2d) 537 (1948).

Zoning Regulations.—The fact that a lot would be more valuable if devoted to a nonconforming use does not deprive the owner of property without due process of law when the zoning regulations are uniform in their application to all within the respective districts, and the differentiation of the uses of property within the respective districts is in accordance with a comprehensive plan in the interest of the health, safety, morals or general welfare of the entire community. *Kinney v. Sutton*, 230 N. C. 404, 53 S. E. (2d) 306 (1949).

Statutes declaring that the right to work shall not be dependent upon membership or non-membership in a labor union, and prohibiting certain agreements between employers and labor organizations (§§ 95-78 through 95-84), do not violate this section. *State v. Whitaker*, 228 N. C. 352, 45 S. E. (2d) 860 (1947), affirmed in 335 U. S. 525, 69 S. Ct. 251, 93 L. Ed. 201.

Statute making certain war veterans eligible for license to practice barbering without standing an examination did not violate this section. *Motley v. State Board of Barber Examiners*, 228 N. C. 337, 45 S. E. (2d) 550, 175 A. L. R. 253 (1947).

Statute Regulating Practice of Optometry.—A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

The fact that a justices' compensation is fixed upon a fee basis, which he will receive only in the event of conviction, does not result in depriving the defendant of trial under due process of law. *Ex parte Steele*, 220 N. C. 685, 18 S. E. (2d) 132 (1942).

New Trial for Error upon Second Appeal.—Where defendant has been granted a new trial for error in the charge appearing of record and upon appeal from a second conviction the record discloses a kindred error in the charge upon the second trial, a new trial must nevertheless be awarded upon the second appeal, since no person may be deprived of life or liberty except by the law of the land. *State v. Starnes*, 220 N. C. 384, 17 S. E. (2d) 346 (1941).

When Motion for Continuance Presents Question of Law.—Ordinarily, whether a cause shall be continued is a matter which rests in the sound discretion of the trial court and, in the absence of gross abuse, is not subject to review on appeal, but when the motion is based on a right guaranteed by the federal and State Constitutions, 14th Amend., U. S. Const., Art. I, § 11 and this section, the question presented is one of law and not of discretion, and the decision of the court below is reviewable. *State v. Farrell*, 223 N. C. 321, 26 S. E. (2d) 322 (1943).

Proceeding by clerk on application for letters of administration held violative of this section. See note to subdivision 4 of § 28-8.

Heir Not Bound by Judgment against Administrator.—See note to § 28-98.

To permit an operating receiver to hazard the property rights of lienholders without their consent in a perilous private enterprise merely because the court may entertain the uncertain hope that some pecuniary advantage might thereby be ob-

tained for the general creditors or some other third persons would transgress the basic concept enshrined in this section that no person can be deprived of his property except by his own consent or the law of the land. *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Applied in *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936), holding ch. 342, Public-Local Laws 1935 valid; *Raleigh v. Edwards*, 235 N. C. 671, 71 S. E. (2d) 396 (1952), commented on in 31 N. C. Law Rev. 125.

Quoted in *Armstrong v. Polakavetz*, 191 N. C. 731, 133 S. E. 16 (1926); *State v. Emery*, 224 N. C. 581, 31 S. E. (2d) 858 (1944).

Stated in *Parker v. Board of Com'rs*, 178 N. C. 92, 100 S. E. 244 (1919) (dis. op.).

Cited in *Hicks v. Kearney*, 189 N. C. 316, 127 S. E. 205 (1925); *State v. Hardy*, 189 N. C. 799, 128 S. E. 152 (1925); *State v. Sauls*, 190 N. C. 810, 130 S. E. 848 (1925); *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928) (con. op.); *Kenilworth v. Hyder*, 197 N. C. 85, 147 S. E. 736 (1929); *Allen v. Carr*, 210 N. C. 513, 187 S. E. 809 (1936); *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938); *Ward v. Howard*, 217 N. C. 201, 7 S. E. (2d) 625 (1940); *State v. Mitchell*, 217 N. C. 244, 7 S. E. (2d) 567 (1940); *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940) (dis. op.); *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897 (1943); *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944); *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945); *State v. Glidden Co.*, 228 N. C. 664, 46 S. E. (2d) 860 (1948); *Worley v. Pipes*, 229 N. C. 465, 50 S. E. (2d) 504 (1948); *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F. (2d) 555 (1934); *State v. Mobley*, 234 N. C. 55, 66 S. E. (2d) 12 (1951); *In re Housing Authority*, 235 N. C. 463, 70 S. E. (2d) 500 (1952) (con. op.); *State v. Fleming*, 235 N. C. 660, 71 S. E. (2d) 41 (1952); *Garrett v. Rose*, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

§ 18. **Persons restrained of liberty.**—Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same, if unlawful; and such remedy ought not to be denied or delayed. (Const. 1868.)

Stated in *In re Schenck*, 74 N. C. 607 12 S. E. 268 (1890); *Harkins v. Cathy*, 119 (1876); *State v. Herndon*, 107 N. C. 934, N. C. 649, 26 S. E. 136 (1896).

§ 19. **Controversies at law respecting property.**—In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

No person shall be excluded from jury service on account of sex. (Const. 1868; 1945, c. 634, s. 1.)

Cross Reference.—As to waiver of jury trial see § 1-184 and note thereto.

Editor's Note. — This section was amended by vote of the people at the general election of 1946. The amendment added the second sentence.

As to less than unanimous jury verdicts in civil cases, see 27 N. C. Law Rev. 539.

In General.—The ancient mode of trial by jury has been preserved in our present Constitution. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943).

This section guaranteeing the right of trial by jury in "controversies at law regarding property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. *Commissioners v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

Every litigant has the constitutional right of trial by jury unless he voluntarily waives it, and, in case of a compulsory reference made to facilitate the trial of a cause, he can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for issues. *State v. Featherstone*, 120 N. C. 446, 27 S. E. 124 (1897).

The rules of law as to the burden of proof between the parties to litigation respecting damages to property resulting from negligence is one of substantial right guaranteed by the federal Constitution, and more emphatically by this section of the State Constitution. *McDowell v. Norfolk Southern R. Co.*, 186 N. C. 571, 120 S. E. 205, 42 A. L. R. 857 (1923).

Where the parties to a civil action do not waive trial by jury nor consent that the judge find the facts, it is error for the judge to enter judgment without the aid of the jury on the controverted issues of fact raised by the pleadings. *Icenhour v. Bowman*, 233 N. C. 43, 64 S. E. (2d) 428 (1951).

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356 (1950).

The word "jury" is to be given the signification which it had when the Constitu-

tion was adopted, i. e., a body of twelve men in a court of justice duly selected and impaneled in the case to be tried. *State v. Emery*, 224 N. C. 531, 31 S. E. (2d) 859 (1944), decided prior to the 1945 amendment.—Ed. Note.

Where there is more than a scintilla of evidence to sustain the allegations of the complaint, the case must be submitted to the jury, its sufficiency to warrant a verdict for plaintiff being for the determination of the jury, subject only to the discretionary power of the trial court to set the verdict aside in proper cases, and a strict adherence to this rule is necessary to preserve the right of trial by jury guaranteed under this section. *Fox v. Asheville Army Store*, 215 N. C. 187, 1 S. E. (2d) 550 (1939).

Right to a jury trial is guaranteed by this section, and where the parties do not consent to trial by the court, it may not determine, prior to the introduction of evidence, an issue of fact joined by the pleadings. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265 (1934).

The policy for the preservation of the right to a trial by jury provided for by this section of the Constitution is ordinarily for the legislature to declare. *Board v. Forrest*, 193 N. C. 519, 137 S. E. 431 (1927).

But the right to trial by jury guaranteed by this section, does not apply to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

Right Not Unqualified. — This section does not confer the right to demand the intervention of a jury absolutely and unqualifiedly, but only in cases involving issues of fact. *McQueen v. People's Nat. Bank*, 111 N. C. 509, 16 S. E. 270 (1892).

The right to trial by jury applies exclusively to actions in which legal rights are involved. *State v. Great Southern Trucking Co.*, 223 N. C. 687, 28 S. E. (2d) 201 (1943) (con. op.).

This constitutional provision applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted. *Chowan & Southern R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328 (1890); *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921); *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897 (1943).

In *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921), it was held that the right to a trial by jury as provided in this section applies only to cases in which the prerogative existed at common law or was procured by statute at the time the Constitution was adopted, and not to those in which the right and the remedy are thereafter created by statute. The section cannot be invoked to deprive a public official of the discretion with which he is clothed by legislative enactment. *McInnish v. Board of Education*, 187 N. C. 494, 122 S. E. 182 (1924).

The "right of trial by jury" is guaranteed without any exceptions wherever a recovery is sought which will transfer money or property of one person to another by order of a court, and the amount thus sought to be recovered depends upon issues of fact, as in this case, the value of the services rendered, which is denied by the defendant guardian. In *re Stone*, 176 N. C. 336, 97 S. E. 216 (1918) (dis. op.).

Under *Workmen's Compensation Act* trial by jury is not a constitutional right. *Hagler v. Mecklenburg Highway Comm.*, 200 N. C. 733, 158 S. E. 383 (1931).

"Trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in this section does not necessarily signify that every legal controversy is to be determined by a jury. *Com'rs v. George*, 182 N. C. 414, 109 S. E. 77 (1921).

Compulsory Reference Not Violative of Section.—See note to § 1-189.

Controversies between Board of Education and County Commissioners. — See *Board of Education v. Board of Com'rs*, 182 N. C. 571, 109 S. E. 630 (1921), citing *Board of Education v. Board of Com'rs*, 174 N. C. 469, 93 S. E. 1001 (1917).

Criminal Cases. — The right to trial by jury is beyond controversy, both in civil and criminal cases. *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914A, 867 (1913) (dis. op.).

Proceedings before the judge to remove a prosecuting attorney from office "for willful misconduct or maladministration in office," do not require an issue to be submitted to the jury, such office is not a property right under the provisions of this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

Miscellaneous Cases. — In an action for damages for negligently setting fire to plaintiff's woods by sparks from defendant's engine, it was held that this section guaranteed, as a "sacred and inviolable" right, that the plaintiff might have the case submitted to the jury. *Williams v. Atlantic*

Coast Line R. Co., 140 N. C. 623, 53 S. E. 448 (1906).

In proceedings before the corporation commission there is no jury trial provided, and hence if no appeal lies therefrom by the plaintiff he is deprived of this sacred and inviolable right as guaranteed by this section. *Walls v. Strickland*, 174 N. C. 298, 93 S. E. 857 (1917) (dis. op.).

When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or the husband is a drunkard or spendthrift (§ 50-16), the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918).

Polling Jury in Civil Actions. — Under this section the losing party in a civil action may demand a polling of the jury upon the return of the verdict, as a matter of right. *Culbreth v. Mfg. Co.*, 189 N. C. 208, 126 S. E. 419 (1925).

Upon the coming in of the verdict in a civil action, either party to the action has the constitutional right to have the jury polled before accepting the verdict as a unanimous one. In *re Will of Sugg*, 194 N. C. 638, 140 S. E. 604 (1927). See note under Art. I, § 13.

Effect of Fourteenth Amendment of Federal Constitution.—A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge, and the requirements of the federal Constitution that no person shall be deprived of his property without due process of law does not imply that all trials in the State courts affecting property must be by jury, but it is met if the trial be had according to the settled course of judicial proceedings. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897).

Subsistence Pendente Lite. — Provisions of § 50-16 empowering the court to allow subsistence and counsel fees pendente lite to plaintiff in an action for alimony without divorce do not violate this section. *Peele v. Peele*, 216 N. C. 298, 4 S. E. (2d) 616 (1939).

This section does not require court review of the valuation of land for taxation, or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose. *Belk's*

Dept. Store v. Guilford County, 222 N. C. 441, 23 S. E. (2d) 897 (1943).

Quoted in *Silvey v. Seaboard Air Line R. Co.*, 172 N. C. 110, 90 S. E. 4 (1916) (dis. op.); *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242 (1922); *Green*

Sea Lbr. Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119 (1924); *Shuford v. Scruggs*, 201 N. C. 685, 161 S. E. 315 (1931).

Cited in *In re Parker*, 209 N. C. 693, 184 S. E. 532 (1936); *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

§ 20. **Freedom of the press.**—The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but every individual shall be held responsible for the abuse of the same. (Const. 1868.)

Contract Prohibiting Entering into Business.—A contract upon the sale of a newspaper that the seller shall not for a period of ten years be connected with any newspaper in the state without obtaining the consent of the purchaser is not void under this section. *Cowan v. Fairbrother*, 118 N. C. 406, 24 S. E. 212 (1896).

This decision is placed on the ground

that the framers of the Constitution did not intend to restrict the power of any person to dispose of anything of value which, as the creature of his own mental or physical exertions, has become his property.—Ed. Note.

Applied in *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811 (1904); *Pentuff v. Park*, 194 N. C. 146, 138 S. E. 616 (1927).

§ 21. **Habeas corpus.**—The privilege of the writ of habeas corpus shall not be suspended. (Const. 1868.)

Cross Reference.—See § 17-3 and notes thereto.

Stated in *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

§ 22. **Property qualification.**—As political rights and privileges are not dependent upon, or modified by, property, therefore no property qualification ought to affect the right to vote or hold office. (Const. 1868.)

§ 23. **Representation and taxation.**—The people of this State ought not to be taxed, or made subject to the payment of any impost or duty, without the consent of themselves, or their representatives in General Assembly, freely given. (Const. 1868.)

§ 24. **Militia and the right to bear arms.**—A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice. (Const. 1868; Convention 1875)

Editor's Note.—The last sentence of this section was added by the Convention of 1875.

Generally. — This provision of the Constitution plainly observes the distinction between the "right to keep and bear arms," and "the practice of carrying concealed weapons." The first, it is declared, shall not be infringed, while the latter may be prohibited. Even without this constitutional provision, the legislature may by law regulate the right to bear arms in a manner conducive to the public peace. *State v.*

Speller, 86 N. C. 697 (1882), approved in *State v. Reams*, 121 N. C. 556, 27 S. E. 1004 (1897). As to code provision regulating concealed weapons, see § 14-269 and notes thereto.

Power of Legislature Limited.—The last clause of this provision, constitutes an exception to the first and indicates the extent to which the right of the people to bear arms can be restricted; that is, the legislature can prohibit the carrying of concealed weapons, but no further. *State v. Kerner*, 181 N. C. 574, 107 S. E. 222 (1921).

§ 25. **Right of the people to assemble together.**—The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the Legislature for redress of grievances. But secret

political societies are dangerous to the liberties of a free people, and should not be tolerated. (Const. 1868; Convention 1875.)

Editor's Note.—The last sentence of this section was added by the Convention of 1875.

Cited in *State v. Lea*, 203 N. C. 316, 166 S. E. 292 (1932) (con. op.).

§ 26. **Religious liberty.**—All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience. (Const. 1868; 1945, c. 634, s. 1.)

Editor's Note.—This section was amended by vote of the people at the general election of 1946. The amendment substituted the word "persons" for "men".

A municipal ordinance prohibiting the handling of venomous and poisonous reptiles in such a manner as to endanger the public health, safety and welfare, will not be held invalid upon defendants' contention

that the ordinance interferes with the exercise of their religious practices. *State v. Massey*, 229 N. C. 734, 51 S. E. (2d) 179 (1949).

Applied in *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19 (1904); *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669 (1927).

Quoted in *State v. Beal*, 199 N. C. 278, 154 S. E. 604 (1930).

§ 27. **Education.**—The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right. (Const. 1868.)

Applied in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654 (1936).

Stated in *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 558 (1899); *Collie v. Com-*

missioners, 145 N. C. 170, 59 S. E. 44 (1907).

Cited in *Lowery v. Board of Graded School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905).

§ 28. **Elections should be frequent.**—For redress of grievances, and for amending and strengthening the laws, elections should be often held. (Const. 1868.)

Stated in *State v. Yarboro*, 194 N. C. 498, 140 S. E. 216 (1927) (con. op.).

Cited in *McLean v. Durham County*

Board of Elections, 222 N. C. 6, 21 S. E. (2d) 842 (1942).

§ 29. **Recurrence to fundamental principles.**—A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty. (Const. 1868.)

Liberal Construction.—The Constitution must be construed in the light of its history, and must be liberally construed in aid of progress, but a liberal construction is especially required in interpreting those provisions safeguarding individual liberty. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Applied in *State v. Hardy*, 189 N. C. 799, 128 S. E. 152 (1925), as to conviction, in a criminal action, of defendant except by the law of the land or under a unanimous verdict of guilty by the jury, and as to presumption of innocence upon denial of guilt, with the statutory right to request to go on the stand as a witness in his own behalf, in not exercising which no prejudice shall

be created against him, and as to the further right to have counsel for his defense who may argue the matters of law as well as of fact to the jury; and as to defendant's right to have the trial judge in his instructions to the jury not give his opinion whether a fact is fully or sufficiently proven.

Quoted in *Clinton v. Standard Oil Co.*, 193 N. C. 432, 137 S. E. 183, 55 A. L. R. 252 (1927); *Brewer v. Valk*, 204 N. C. 186, 167 S. E. 638, 87 A. L. R. 237 (1933); *State v. Sassee*, 206 N. C. 644, 175 S. E. 142 (1934).

Cited in *Beaufort v. Mayo*, 207 N. C. 211, 176 S. E. 753 (1934); *State v. Lawrence*, 213 N. C. 674, 197 S. E. 586 (1938).

§ 30. **Hereditary emoluments, etc.**—No hereditary emoluments, privileges, or honors ought to be granted or conferred in this State. (Const. 1868.)

Editor's Note.—This provision is usually construed in connection with § 31 of this article.

§ 31. **Perpetuities, etc.** — Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed. (Const. 1868.)

Cross Reference. — See Art. I, § 7 and note thereto.

Early Vesting of Estates Favored. — Where, by a correct interpretation of the will, it will reasonably be allowed, the law will favor the early vesting of estates against the interests of a contingent remainderman. *Walker v. Trollinger*, 192 N. C. 744, 135 S. E. 871 (1926).

This section is a fundamental democratic principle of "equal rights and opportunities to all, special privileges to none." *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935) (dis. op.).

The common law rule against perpetuities is recognized and enforced in this State. The rule is not one of construction but a positive mandate of law to be obeyed irrespective of the question of intention. Its primary purpose is to restrict the permissible creation of future interests and prevent undue restraint upon or suspension of the right of alienation. Whenever the future interest takes effect, or the right of alienation is suspended beyond the period stipulated in the rule, it is violative thereof. *Mercer v. Mercer*, 230 N. C. 101, 52 S. E. (2d) 229 (1949).

As against Private Trusts. — The rule against perpetuities applies to private trusts. And when a private trust violates the rule the court will not limit the duration of the trust but will declare the whole trust invalid. *Mercer v. Mercer*, 230 N. C. 101, 52 S. E. (2d) 229 (1949), holding devise of property in trust void because violative of rule.

Failure to Provide for Successors to Office.—The General Assembly having failed to appoint or provide for the election of successors to the highway and sinking fund commissioners of Madison County, who were appointed for a four or six-year term by c. 341, Public-Local Laws of 1931, the General Assembly is presumed to acquiesce in their continuance in office, and the General Assembly having power to terminate, change or continue the appointments, it will not be held that it intended to create perpetuities or exclusive emoluments in violation of any of the provisions of this article, and said commissioners continue to hold office with power to discharge the duties thereof. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354 (1940).

Prohibitive Regulations upon Engaging in Business.—See *State v. Harris*, 216 N.

C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Miscellaneous Cases. — Selection by a commission of persons qualified to act as pilots, *St. George v. Hardie*, 147 N. C. 88, 60 S. E. 920 (1908); ordinance granting the exclusive privilege to construct and maintain water-works within the corporate limits of the town, *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611 (1924); in *Standard Oil Co. v. United States*, 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), and *United States v. American Tobacco Co.*, 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911), stipulations in partial restraint of trade were held not to be obnoxious to the law unless they were unreasonable and likely to become monopolies, which are obnoxious to this section, *Tobacco Growers' Cooperative Ass'n v. Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231 (1923); *North Carolina Fair Trade Act, Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939); police power to regulate those engaged in the business of operating cleaning and pressing plants, *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

Statute Requiring Examination of Former Dentists Returning to State Is Valid. — Section 90-38 providing that a licensed dentist who retires or removes from the State must pass an examination upon returning to the State does not confer exclusive emoluments and privileges on continuously practicing dentists contrary to the provisions of this and the preceding section. *Allen v. Carr*, 210 N. C. 513, 187 S. E. 89 (1936).

Statute Regulating Practice of Optometry. — A portion of § 90-115, relating to the practice of optometry, was held violative of this section. *Palmer v. Smith*, 229 N. C. 612, 51 S. E. (2d) 8 (1948).

Statute relating to licensing and supervision of photographers tends to create a monopoly in violation of this section. *State v. Ballance*, 229 N. C. 764, 51 S. E. (2d) 731 (1949).

Applied in State v. Warren, 211 N. C. 75, 189 S. E. 108 (1937), holding c. 241, Public-Local Laws 1927 unconstitutional; *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937). Applied to right to operate a public ferry in *Robinson v. Lamb*, 126 N. C. 492, 36 S. E. 29 (1900); and to right to operate filling station in certain designated districts, in *Clinton v. Standard Oil*

Co., 193 N. C. 432, 137 S. E. 183 (1927); and to right to tax a bakery in *Hilton v. Harris*, 207 N. C. 465, 177 S. E. 411 (1934).

Quoted in *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820, 8 L. R. A. (N. S.) 498 (1906) (dis. op.); *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920) (dis. op.); *Security Nat. Bank v. Sternberger*, 207 N. C. 811, 178 S. E. 595 (1935); *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

§ 32. **Ex post facto laws.**—Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore no ex post facto law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done, ought to be passed. (Const. 1868.)

Cross Reference.—See annotations to § 49-2.

Definition.—An ex post facto law is one which either makes that a crime which was not a crime when the offense was committed or which imposes a heavier sentence than that which was prescribed by law at that time. *State v. Broadway*, 157 N. C. 598, 72 S. E. 987 (1911). But a retrospective statute is not necessarily void. *Tabor v. Ward*, 83 N. C. 291 (1880).

The general rule, subject, however, to some exceptions, is that the legislature may validate retrospectively any proceeding which might have been authorized in advance, even though its act may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise not have incurred. *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272 (1906).

Applies Only to Criminal Statutes.—An ex post facto statute prohibited by this section relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingent determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by § 39-6, is not objection-

able as falling within the constitutional inhibition. *Stanback v. Citizens Nat. Bank*, 197 N. C. 292, 148 S. E. 313 (1929).

Whenever a retrospective statute applies to crimes and penalties, it is an ex post facto law. *State v. Bond*, 49 N. C. 9 (1856); *State v. Bell*, 61 N. C. 76 (1867).

Miscellaneous Cases.—Validation of proceedings for the improvement of streets and sidewalks which were begun and which have been concluded without an initial petition, is proper and such act cannot be successfully attacked because it is retroactive or retrospective. *Holton v. Mocksville*, 189 N. C. 144, 126 S. E. 326 (1925); *Unemployment Compensation Comm. v. Wachovia Bank, etc., Co.*, 215 N. C. 491, 2 S. E. (2d) 592 (1939); prosecution for wilful failure to support illegitimate child born after the passage of the act although the child was begotten before the effective date of the statute, *State v. Mansfield*, 207 N. C. 233, 176 S. E. 761 (1934).

Unemployment Compensation Taxes.—Taxes levied for the year 1936 under the Unemployment Compensation Act, section 96-1 et seq., are void as violating this section. *Unemployment Compensation Comm. v. Wachovia Bank, etc., Co.*, 215 N. C. 491, 2 S. E. (2d) 592 (1939).

Cited in *State v. Hester*, 209 N. C. 99, 182 S. E. 738 (1935).

§ 33. **Slavery prohibited.**—Slavery and involuntary servitude, otherwise than for crime, whereof the parties shall have been duly convicted, shall be, and are hereby forever prohibited within this State. (Const. 1868.)

§ 34. **State boundaries.**—The limits and boundaries of the State shall be and remain as they now are. (Const. 1868.)

§ 35. **Courts shall be open.**—All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. (Const. 1868.)

Editor's Note.—For comment on unborn child being a person within the meaning

of this section, see 28 N. C. Law Rev. 245.

Scope and Effect.—See *Pentuff v. Park*,

194 N. C. 146, 138 S. E. 616, 53 A. L. R. 626 (1927), quoting *Osborn v. Leach*, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648 (1904).

The salutary principle set forth in this section does not justify the use of the courts, by the assertion of fanciful rights or by complaints based upon imaginary wrongs to hinder or delay others in the enjoyment of rights founded upon the law and in accord with justice and fair dealing among men. *Carson v. Fleming*, 188 N. C. 600, 125 S. E. 259 (1924).

Delay Caused by Irregular Pleading. — Under the provisions of this section an adversary party ought not to be delayed in the final adjudication of the controversy by the fact that the exceptions taken by the opposite party are so drawn as to take two chances, first of a favorable decision by the court, and then of a finding in his favor by the jury. *Driller Co. v. Worth*, 118 N. C. 746, 24 S. E. 517 (1896). Nor ought he to be delayed because the demand for a jury trial fails to point out the precise issue as to which testimony must be offered. *Id.* So also, the rights of the appellee will be protected when the appellant failed to print the record as required, and motion to reinstate the case, after dismissal, came too late. *Cowan v. Layburn*, 116 N. C. 526, 20 S. E. 965 (1895).

Disregarding Attempted Appeal from Nonappealable Order. — In order to promote the principle set forth in this section, courts may disregard an attempted appeal from a nonappealable interlocutory order and proceed with trial to avoid delay. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

The denial of a motion for judgment on the pleadings is not immediately appealable, since otherwise a litigant could delay the administration of justice in contravention of this section. *Garrett v. Rose*, 236 N. C. 299, 72 S. E. (2d) 843 (1952).

A motion for a continuance is addressed to the discretion of the trial judge to be determined by him upon the facts in the exercise of his duty to administer right and

justice without sale, denial, or delay. *State v. Godwin*, 216 N. C. 49, 3 S. E. (2d) 347 (1939).

The creation of inferior courts by the legislature has been useful in having justice administered without "delay" in accordance with this section. *Albertson v. Albertson*, 207 N. C. 547, 178 S. E. 352 (1935).

Foreclosure of Mortgages.—This section is not violated by §§ 45-21.34 and 45-21.35 regulating the sale of real property upon the foreclosure of mortgages or deeds of trust. *Woltz v. Asheville Safe Deposit Co.*, 206 N. C. 239, 173 S. E. 537 (1934).

The establishment of a cartway involves the taking of private property by eminent domain, and land therefor may not be taken without giving the owner notice and an opportunity to be heard, with right of appeal according to the due course of law. *Waldroup v. Ferguson*, 213 N. C. 198, 195 S. E. 615 (1938).

Section 45-21.36 is constitutional and valid, since it recognizes the obligation of the debtor to pay his debt and the right of the creditor to enforce payment by action in accordance with the terms of the agreement, but provides merely for judicial supervision of sales under power to the end that the price bid at the sale shall not be conclusive as to the value of the property, and that the creditor may not recover any deficiency after applying the purchase price to the notes without first accounting for the fair value of the property in accordance with well settled principles of equity. *Richmond Mtg., etc., Corp. v. Wachovia Bank, etc., Co.*, 210 N. C. 29, 185 S. E. 482 (1936).

Applied in *Myers v. Barnhardt*, 202 N. C. 49, 161 S. E. 715 (1932).

Quoted in *Jacobi Hardware Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756 (1924); *Lucas v. Midgette*, 208 N. C. 699, 182 S. E. 328 (1935) (dis. op.); *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330 (1950).

Cited in *McKinney v. Deneen*, 231 N. C. 540, 58 S. E. (2d) 107 (1950).

§ 36. **Soldiers in time of peace.**—No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner prescribed by law. (Const. 1868.)

§ 37. **Other rights of the people.**—This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people. (Const. 1868.)

Stated in *Nichols v. McKee*, 68 N. C. 429 (1873); *State v. Lewis*, 142 N. C. 626, 55 S. E. 600 (1906); *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299 (1908).

Cited in *State v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517 (1915); *Best & Co. v. Maxwell*, 216 N. C. 114, 3 S. E. (2d) 292 (1939).

ARTICLE II

LEGISLATIVE DEPARTMENT

§ 1. **Two branches.**—The legislative authority shall be vested in two distinct branches, both dependent on the people, to-wit: a Senate and a House of Representatives. (Const 1868.)

Editor's Note.—For note on delegation of legislative authority to individuals, see 31 N. C. Law Rev. 308.

Legislative function cannot be delegated. Cox v. Kinston, 217 N. C. 391, 8 S. E. (2d) 252 (1940).

But Legislature May Delegate Power to Determine Facts. — The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. State v. Curtis, 230 N. C. 169, 52 S. E. (2d) 364 (1949).

While the legislature may not delegate its power to make laws, it may delegate to local political subdivisions the power to find facts determinative of whether a particular law should become effective in the locality, and therefore it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, a fortiori it may also delegate to the county commissioners similar authority to abolish a county court established by the legislature. Efir v. Board of Com'rs, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

And Power to Fix Salary of Judge of County Court.—The fixing of the salary of the judge of a county court is essentially a local matter, which the General Assembly may delegate to the commissioners of the county, and therefore subsec. 14 of § 1 c. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth County should have the power to fix the salary of the judge of the county court, is a constitutional delegation of the power of the legislature. Efir v. Board

of Com'rs, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

Standards Must Be Set Up for Administrative Board. — Chapter 30, Public Laws of 1937, as amended by c. 337, Public Laws of 1939, providing for the licensing of those engaged in the business of dry cleaning by the commission set up in the act, is an unconstitutional delegation of legislative authority, in that the act fails to set up the standards or provide reasonable limitations to guide the administrative board in admitting or excluding persons from the business, but leaves such power in unlimited discretion of the administrative board. State v. Harris, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

And Industrial Commission May Award Compensation for Bodily Disfigurement.—Section 97-31 authorizing the Industrial Commission to award compensation for bodily disfigurement is not void as a delegation of legislative authority. Baxter v. Arthur Co., 216 N. C. 276, 4 S. E. (2d) 621 (1939).

The North Carolina Fair Trade Act is not unconstitutional as a delegation of legislative authority, since the act is complete in itself and requires no action on the part of any agency to put it into operation. Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

Cited in Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139 (1899). In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288 (1906); Gunter v. Sanford, 186 N. C. 452, 120 S. E. 41 (1923); Saluda v. Polk County, 207 N. C. 180, 176 S. E. 298 (1934); State v. Brockwell, 209 N. C. 209, 183 S. E. 378 (1936).

§ 2. **Time of assembly.** — The Senate and House of Representatives shall meet biennially on the first Wednesday after the first Monday in January next after their election: and when assembled, shall be denominated the General Assembly. Neither house shall proceed upon public business unless a majority of all the members are actually present. (Const. 1868; 1872-3, c. 82; Convention 1875.)

Editor's Note. — In the Constitution of 1868, the first clause of this section read as follows; "The Senate and House of Representatives shall meet annually on the third Monday in November, and when assembled shall be denominated the General Assem-

bly." The word "annually" was changed to "biennially" in pursuance of c. 82, Public Laws of 1872-73. The Convention of 1875 changed the time of the meeting to the first Wednesday after the first Monday in January next after their election.

§ 3. **Number of senators.**—The Senate shall be composed of fifty senators, biennially chosen by ballot. (Const. 1868.)

§ 4. **Regulations in relation to districting the State for senators.**—The Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration by order of Congress, that each Senate district shall contain, as near as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more senators. (Const. 1868, 1872-3, c. 81.)

Editor's Note.—This was formerly section 5 of the Constitution of 1868 which was as follows: "Sec. 5. An enumeration of the inhabitants of the State shall be taken under the direction of the General Assembly in the year one thousand eight hundred and seventy-five, and at the end of every ten years thereafter; and the said Senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration taken as aforesaid, or by order of Congress, that each Senate district shall contain, as nearly as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and no county shall be divided in the formation of a Senate district, unless such county shall be equitably entitled to two or more Senators." Section 4 of the Constitution of 1868, which divided the State into Senatorial districts pending a division by the first General Assembly after 1871, was omitted by the Convention of 1875. So

was § 8 which made the temporary apportionment for the House of Representatives.

Proposed Amendment.—Session Laws 1953, c. 803 proposed that this section be rewritten to read as follows: "The senate districts shall be so altered by the General Assembly, at the first session after the return of every enumeration by order of Congress, that each senate district shall contain, as near as may be, an equal number of inhabitants, excluding aliens and Indians not taxed, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory; and where any senatorial district consists of one county, such county shall only be entitled to one senator in the General Assembly of North Carolina; provided that in no event shall any one county be entitled to more than one senator at any one time."

This proposed amendment failed of adoption at the general election held November 2, 1954.

Reapportionment is a political question and not a judicial one. Leonard v. Maxwell, 216 N. C. 89, 3 S. E. (2d) 316 (1939).

§ 5. **Regulations in relation to apportionment of representatives.**—The House of Representatives shall be composed of one hundred and twenty representatives, biennially chosen by ballot, to be elected by the counties respectively, according to their population, and each county shall have at least one representative in the House of Representatives, although it may not contain the requisite ratio of representation; this apportionment shall be made by the General Assembly at the respective times and periods when the districts for the Senate are hereinbefore directed to be laid off. (Const. 1868; 1872-3, c. 82.)

Cross Reference. — See note to preceding section.

§ 6. **Ratio of representation.**—In making the apportionment in the House of Representatives the ratio of representation shall be ascertained by dividing the amount of the population of the State, exclusive of that comprehended within those counties which do not severally contain the one hundred and twentieth part of the population of the State, by the number of representatives, less the number assigned to such counties; and in ascertaining the number of the population of the State, aliens and Indians not taxed shall not be included. To each county containing the said ratio and not twice the said ratio there shall be assigned one representative; to each county containing twice but not three times the said ratio there

shall be assigned two representatives, and so on progressively, and then the remaining representatives shall be assigned severally to the counties having the largest fractions. (Const. 1868.)

Changing Dividing Line of Counties.— this section. *Commissioners v. Ballard*, 69 N. C. 18 (1873).
An act which changes the dividing line between two counties is not in conflict with

§ 7. **Qualifications for senators.**—Each member of the Senate shall not be less than twenty-five years of age, shall have resided in the State as a citizen two years, and shall have usually resided in the district for which he was chosen one year immediately preceding his election. (Const. 1868.)

§ 8. **Qualifications for representatives.**—Each member of the House of Representatives shall be a qualified elector of the State, and shall have resided in the county for which he is chosen for one year immediately preceding his election. (Const. 1868.)

§ 9. **Election of officers.**—In the election of all officers, whose appointment shall be conferred upon the General Assembly by the Constitution, the vote shall be *viva voce*. (Const. 1868.)

Presumption of Regularity. — Where a certificate shows that there was a legislative election of an officer and nothing else appearing, the law presumes a quorum and that the election was regular. *Cherry v. Burns*, 124 N. C. 761, 33 S. E. 136 (1899).

§ 10. **Powers in relation to divorce and alimony.**—The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any individual case. (Const. 1868.)

Cross Reference.—For the legislative enactments passed pursuant to this section and the constructions thereof, see §§ 50-1 et seq. and the notes thereto.

Only Limitation on Legislative Power.—

The only limitation on powers in enacting statutes relating to divorce is found in this section. *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178 (1913); *Long v. Long*, 206 N. C. 706, 175 S. E. 85 (1934).

§ 11. **Private laws in relation to names of persons, etc.**—The General Assembly shall not have power to pass any private law to alter the name of any person, or to legitimate any person not born in lawful wedlock, or to restore to the rights of citizenship any person convicted of an infamous crime, but shall have power to pass general laws regulating the same. (Const. 1868.)

§ 12. **Thirty days' notice shall be given anterior to passage of private laws.**—The General Assembly shall not pass any private law, unless it shall be made to appear that thirty days' notice of application to pass such a law shall have been given, under such direction and in such manner as shall be provided by law. (Const. 1868.)

Notice Presumed to Be Given. — The courts will conclusively presume from the ratification of a private act that the notice required by this section has been given. *Gallimore v. Thomasville*, 191 N. C. 648, 132 S. E. 657 (1926); *Matthews v. Blowing Rock*, 207 N. C. 450, 177 S. E. 429 (1934).

In *Cox v. Commissioners of Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253 (1908), is the following: The courts will not go behind the ratification of the act to ascertain whether notice has been given in accordance with this section, but will conclusively presume, from ratification, that the notice has been given.

State v. Holmes, 207 N. C. 293, 176 S. E. 746 (1934).

When Testimony Heard. — Except in case of bills coming within the provisions of § 14, the Supreme Court will not hear testimony for the purpose of showing that the notice required by this section was not given. *Brodnax v. Groom*, 64 N. C. 244 (1870); *Gatlin v. Tarboro*, 78 N. C. 119 (1878); *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903); *Bray v. Williams*, 137 N. C. 387, 49 S. E. 887 (1905).

No Ground for Collateral Impeachment. — Where an act granting a charter to a private corporation has been duly ratified,

it may not be collaterally impeached in an action between it and another on the ground that the notice had not been made as required by this section. *Carolina-Tennessee Power Co. v. Hiawassee River Co.*, 175 N. C. 668, 96 S. E. 99 (1918).

The act creating the *North Carolina National Park Commission* (Laws 1927, c. 48)

is a public act and does not fall within the purview of this section requiring notice that application to the General Assembly for the passage of a private act be made. *Yarborough v. Park Commission*, 196 N. C. 284, 145 S. E. 563 (1928).

Cited in *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539 (1897).

§ 13. **Vacancies.**—If a vacancy shall occur in the General Assembly by death, resignation or otherwise, the said vacancy shall be filled immediately by the Governor appointing the person recommended by the executive committee of the county in which the deceased or resigned member was resident, being the executive committee of the political party with which the deceased or resigned member was affiliated at the time of his election. (Const. 1868; 1951, c. 1003.)

Editor's Note.—This section was amended by vote at the general election of November 4, 1952.

§ 14. **Revenue.**—No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal. (Const. 1868.)

I. Editor's Note.

II. General Consideration.

III. Necessity of Following Section.

IV. The Journal—Speakers' Certificates.

V. Substituted Bills—Amendments.

Cross Reference.

As to subscription to railroad stock by counties, see §§ 60-21, 60-22.

I. EDITOR'S NOTE.

Editor's Note.—The authorities as to the power of county taxation are thus analyzed and summarized in *Tate v. Commissioners*, 122 N. C. 812, 30 S. E. 352 (1898):

A. For necessary expenses, the county commissioners may levy up to the constitutional limitation without a vote of the people or legislative permission.

B. For necessary expenses, the county commissioners may exceed the constitutional limitation by special legislative authority, without a vote of the people.

C. For other purposes than necessary expenses, a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority.

II. GENERAL CONSIDERATION.

Section Mandatory.—This section is mandatory. *Union Bank v. Commission-*

ers, 119 N. C. 214, 25 S. E. 966 (1896); *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539 (1897); and must be strictly complied with. *Smother v. Com.*, 125 N. C. 480, 34 S. E. 554 (1899).

The adoption of this section, annulled all special powers remaining unexecuted, and not granted in strict conformity with its requirements. *Commissioners v. Payne*, 123 N. C. 432, 31 S. E. 711 (1898).

Burden of Proof.—Parties objecting have the burden of showing that acts had not been passed according to the requirements of this section. *Slocumb v. Fayetteville*, 125 N. C. 362, 34 S. E. 436 (1899).

Section Not Retroactive.—See *Board v. Travelers' Ins. Co.*, 128 Fed. 817 (1904).

Applies to Townships.—The restrictions are by necessary implication applicable to townships, as they are but constituent parts of the county organization. *Wittkowsky v. Commissioners*, 150 N. C. 90, 63 S. E. 275 (1908); *Township Road Commission v. Commissioners*, 178 N. C. 61, 100 S. E. 122 (1919).

Not Applicable to Necessary County Expense.—It is not necessary to enter the yeas and nays on an act to raise revenue for a necessary county expense. *Black v. Commissioners*, 129 N. C. 121, 39 S. E. 818 (1901).

Issuing bonds for road purposes is a necessary expense to which the section

does not apply. *Leonard v. Commissioners*, 185 N. C. 527, 117 S. E. 580 (1923). See *Woodall v. Western Wake Commission*, 176 N. C. 377, 97 S. E. 226 (1918).

An act authorizing treasurer to deliver State bonds is not within this section. *Battle v. Lacy*, 150 N. C. 573, 64 S. E. 505 (1909).

A motion to reconsider violates the efficacy of the original passage according to this section; for the act to be valid the final result must comply with this section. *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463 (1921).

A statute for the revaluation of property is not in its strict sense a revenue act within the meaning of this section. *Hart v. Com.*, 192 N. C. 161, 134 S. E. 403 (1926).

The filing fee required by the primary law, §§ 163-120 et seq., is in no sense a tax within the meaning of this section. *McLean v. Durham County Board of Elections*, 222 N. C. 6, 21 S. E. (2d) 842 (1942).

Changing of County Agencies. — The legislature has the power and authority to change the county tax agencies without further observing the requirements of the section. *State v. Jennette*, 190 N. C. 96, 129 S. E. 184 (1925).

Submission to People Not Required. — An act of the legislature authorizing a bond issue for public roads is valid if conforming to this section of the State Constitution, without submitting the proposition to a vote of the people. *Hargrave v. Commissioners*, 168 N. C. 626, 84 S. E. 1044 (1915).

Cited in *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950 (1905); *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669 (1927); *Penland v. Bryson City*, 199 N. C. 140, 154 S. E. 88 (1930); *Nixon v. Asheville*, 199 N. C. 217, 154 S. E. 93 (1930); *Starmount v. Hamilton Lakes*, 205 N. C. 514, 171 S. E. 909 (1933); *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935).

III. NECESSITY OF FOLLOWING SECTION.

No Authority Conferred Unless Section Followed.—An act not having been passed with the formalities required by this section is void, and confers no authority upon a city to create the debt and issue the bonds therein provided for. *Charlotte v. Shepard & Co.*, 122 N. C. 602, 29 S. E. 842 (1898); *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167 (1900); *Cottrell v. Lenoir*, 173 N. C. 138, 91 S. E. 827 (1917).

Valid and Invalid Act on Same Subject.—An act passed according to the requirements of this section cannot be construed

with an act not so passed. *Pritchard v. Com.*, 160 N. C. 476, 76 S. E. 488 (1912).

Where a town charter is not passed in accordance with this section, such town cannot levy any tax under said charter, but it may levy taxes for necessary expense. *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488 (1902).

Effect on Bonds of Failure to Comply with Section.—This section is mandatory; and, not having been complied with in the passage of certain laws authorizing certain counties, to subscribe for stock in a railroad company and issue bonds in payment therefor, bonds issued by a city pursuant thereto were void. *Burlingham v. New Bern*, 213 Fed. 1014 (1914).

A town may not pledge its faith or credit for the issuance of bonds for municipal purposes, unless under statutory authority given in conformity with the requirements of this section, or unless for necessary expenses. *Storm v. Wrightsville Beach*, 189 N. C. 679, 127 S. E. 17 (1925).

Estoppel to Deny Invalidity of Bonds.—Where township bonds are invalid because issued without authority, the township is not estopped from asserting such fact by recitals in the bonds that they are issued in compliance with the Constitution and laws of the State. *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3 (1902).

The payment of interest does not preclude the inquiry as to the validity of the bonds. *Glenn v. Wray*, 126 N. C. 730, 36 S. E. 167 (1900).

Who May Enjoin Bond Issue. — It is competent for a taxpayer to file a complaint on behalf of himself and all other taxpayers in the State, whereby to enjoin the issue of State bonds under an unconstitutional act of Assembly. *Galloway v. Jenkins*, 63 N. C. 147 (1869).

Readings on Same Day. — Where the journal of the State Senate affirmatively shows that the first and second readings of a bill took place on the same day of the act is unconstitutional. *Storm v. Wrightsville Beach*, 189 N. C. 679, 127 S. E. 17 (1925).

IV. THE JOURNAL—SPEAKERS' CERTIFICATES.

See notes under § 23 of this article.

What Journal Must Show.—The journal must show who voted for the bill, and that the requisite number of Senators and members did so, and no other source of evidence can be invoked, and the certificate of the presiding officers that a bill has been read three times does not obviate the necessity of examining the journal.

Burlingham v. New Bern, 213 Fed. 1014 (1914).

Omission of Negative Vote.—Where the journal of the house does not give the names of any members, as voting in the negative on a bill authorizing a township to issue bonds, and it does not affirmatively appear that there were none so voting, the statute is invalid. *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3 (1902).

As this section requires that on the voting of a bill before the legislature the yeas and nays shall be entered on the journals, either the yeas must be on the journal, or it must affirmatively appear that there were none. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43 (1901).

Where the house journal showed that a certain law, authorizing the issuance of county bonds, was passed by the following vote: "Yeas 94, nays ...; total ..."—such record sufficiently showed that there was no negative vote cast, under the presumption that the clerk of the house charged with the recording of the vote performed his duty, and hence such record constituted a sufficient compliance with this section. *Commissioners v. Tollman*, 145 Fed. 753 (1906).

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of this section, by reason of the failure to record on the journal on the second reading in one of the branches of the legislature the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. *Leonard v. Commissioners*, 185 N. C. 527, 117 S. E. 580 (1923), citing *Commissioners v. Trust Co.*, 143 N. C. 110, 55 S. E. 442 (1906).

Journals Conclusive.—The journals of the General Assembly, when competent as evidence, import absolute verity, and cannot be explained or altered by parol evidence. *Wilson v. Markley*, 133 N. C. 616, 45 S. E. 1023 (1903). They are the sole evidence as to whether the yeas and noes on a vote on a bill were entered on such journals. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43 (1901); *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463 (1921); *Com'rs v. Coler*, 96 Fed. 284 (1899). And are conclusive as against not only a printed statute published by authority of law, but also against a duly enrolled act. *Union Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966 (1896); *Com-*

missioners v. Snuggs, 121 N. C. 394, 28 S. E. 539 (1897).

It appears from the journal of each house of the General Assembly that the last paragraph of § 153-152 was enacted in accordance with the requirements of this section. *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777 (1935).

Correction of Journals.—A subsequent special session of the same legislature may correct its journals of the regular session so as to show in point of fact that a bill of this character was properly passed in accordance with these provisions. *Commissioners v. Farmers Bank*, 152 N. C. 387, 67 S. E. 969 (1910).

Certificate of Speakers.—The certificate of the speakers of each house of the legislature is conclusive evidence that a bill was read and passed three several readings in each house. *Commissioners v. De Rosset*, 129 N. C. 275, 40 S. E. 43 (1901).

Effect of Certificate of Ratification.—The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with this section of the Constitution. *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554 (1899).

V. SUBSTITUTED BILLS—AMENDMENTS.

Substituted Bill.—Where a bill, authorizing a levy of taxes for road purposes, has been read, referred to a committee, and the committee has recommended a substitute, resulting in the tabling of the original bill and the passing of the substitute on two separate days in that branch of legislation, and otherwise conforming to the requirements of this section, in both branches of legislation, the substitute is to be regarded, in the contemplation of the Constitution, as an amendment to the original bill introduced, and the act may not successfully be questioned as not having passed on the several separate days required of a bill of this character. *Edwards v. Commissioners*, 183 N. C. 58, 110 S. E. 600 (1922).

Where a valid charter of a municipality authorizing the issuance of its bonds has been subsequently amended with regard thereto, but upon condition that the proposition be submitted to the voters, which was never done, and the legislature attempts to pass a still later law amending the former act but which has not been done in accordance with the requirements of this section, the later acts are of no effect, leaving the charter of the town as to these provisions open, under the terms of which the bonds may yet be issued. *Cot-*

trell v. Lenoir, 173 N. C. 138, 91 S. E. 827 (1917).

Validation by Later Act.—Where a statute, pledging the faith and credit of the State in issuing State bonds, has not been passed in accordance with the provisions of this section is therefore invalid, its invalidity may be cured by a later statute passed as the Constitution requires, referring to the former statute, and supplying the omissions, and the bonds thereunder issued after the question has been submitted to and approved by the voters of the State, as the statute required, are valid. Hinton v. Lacy, 193 N. C. 496, 137 S. E. 669 (1927).

When Amendment Will Affect Constitutionality.—An act passed in accordance with this section is not rendered invalid by an amendment not passed in accordance with the constitutional provision, when it does not affect the taxing or other financial features of the act, or increase either the taxes or impose any additional burden on the taxpayer. Wagstaff v. Central Highway Commission, 174 N. C. 377, 93 S. E. 908 (1917).

No Change Effected.—Where the legislature has passed an act authorizing a county to pledge its faith and credit in the issuance of bonds upon its several readings, upon its aye and no vote in accordance with this section, and by later ratification of an act requiring the question to be submitted to the qualified voters: Held, it is not required that the later ratified act be also passed in accordance with the constitutional requirement, and in the absence of a proper election, the bond issue will be declared invalid. Graham County v. Terry & Co., 194 N. C. 22, 138 S. E. 443 (1927).

Where the legislature has passed an act authorizing a county to issue bonds according to the provisions of this section it is within its power to add a provision that the question be first submitted to the electorate of the county. Graham County v. Terry & Co., 194 N. C. 22, 138 S. E. 443 (1927).

No Presumption of Materiality.—Where the journal does not show the effect of the amendment there is no presumption that it was material. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433 (1927).

Evidence of Materiality.—Slips of paper attached by a rubber band to the cover of the original bill when it was engrossed are not admissible in determining whether an amendment was material. Frazier v. Board of Com'rs, 194 N. C. 49, 138 S. E. 433 (1927).

Material Amendment.—A material amendment made by one branch of the

legislature to a bill passed by the other, allowing a county to pledge its credit in issuing bonds for the improvement of the highways therein, must be concurred in according to the requirements of this section. Glenn v. Wray, 126 N. C. 730, 36 S. E. 167 (1900); Claywell v. Commissioners, 173 N. C. 657, 92 S. E. 481 (1917). This rule applies with greater force, when the amendment is by separate act. Guire v. Com'rs, 177 N. C. 516, 99 S. E. 430 (1919).

An amendment which made a material change in the valid act it proposed to amend is unconstitutional, and the commissioners are without authority to levy the tax specified in the later act. Township Road Commissioners v. Commissioners, 178 N. C. 61, 62, 100 S. E. 122 (1919).

Same—Increasing Interest Rate.—An amendment to an act authorizing a county to issue bonds for road construction, which increases the rate of interest from 5 per cent to 6 per cent, is to effect a material change in the former law. Guire v. Commissioners, 177 N. C. 516, 99 S. E. 430 (1919).

Same—Increasing Tax Rate.—When an act has been passed by the legislature authorizing a graded school district to vote on the question of issuing school bonds in a certain amount, and amended at a subsequent session so as to authorize bonds to a larger amount and to run a longer time, both acts having been passed upon their several readings, with aye and no vote according to this section, an issue of bonds under a still later and similar act for a larger amount and upon a greater rate of taxation is invalid in toto when the later act is not likewise passed in accordance with this section. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021 (1912).

The bonds are invalid even as to the amount authorized to be issued under the valid act, for that amount was only authorized at a less rate of taxation, etc., as to which the voters upon the proposition have not assented. Russell v. Troy, 159 N. C. 366, 74 S. E. 1021 (1912).

Same—Curtailing Territory to Which Applicable.—Where a bill is introduced in one branch of the legislature for the issuance of bonds, and amendments have been made by the other branch, withdrawing certain of the more wealthy and popular townships from the liability for the indebtedness to be created, except under condition requiring the approval of the voters, the amendment is a material one, requiring for the validity of the act that it be passed in accordance with the requirements of this

section. *Claywell v. Commissioners*, 173 N. C. 657, 92 S. E. 481 (1917).

But an act empowering special school districts of the State to issue bonds which followed the requirements of this section except that upon its last reading, by amendment, it was made to apply only to one district in the State, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district. *Gregg v. Commissioners*, 162 N. C. 479, 78 S. E. 301 (1913).

Immaterial Amendment.—When an act has been passed in accordance with this section, an amendment, which does not increase the amount of the bonds or the taxes to be levied or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. *Commissioners v. Stafford*, 138 N. C. 453, 50 S. E. 862 (1905).

An amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill is immaterial. *Gregg v. Commissioners*, 162 N. C. 479, 78 S. E. 301 (1913).

§ 15. **Entails.**—The General Assembly shall regulate entails in such a manner as to prevent perpetuities. (Const. 1868.)

§ 16. **Journals.**—Each house shall keep a journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly. (Const. 1868.)

Cited in *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

§ 17. **Protest.**—Any member of either house may dissent from, and protest against, any act or resolve which he may think injurious to the public, or any individual, and have the reasons of his dissent entered on the journal. (Const. 1868.)

Cited in *Tenney v. Brandhove*, 341 U. S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951).

§ 18. **Officers of the House.**—The House of Representatives shall choose their own speaker and other officers. (Const. 1868.)

This is the only express grant of appointing power to the House of Representatives. *People v. McKee*, 68 N. C. 429 (1873).

§ 19. **President of the Senate.**—The Lieutenant-Governor shall preside in the Senate, but shall have no vote unless it may be equally divided. (Const. 1868.)

§ 20. **Other senatorial officers.**—The Senate shall choose its other officers and also a speaker (pro tempore) in the absence of the Lieutenant-Governor, or when he shall exercise the office of Governor. (Const. 1868.)

This is the only express grant of appointing power to the Senate. *People v. McKee*, 68 N. C. 429 (1873).

§ 21. **Style of the acts.**—The style of the acts shall be. "The General Assembly of North Carolina do enact." (Const. 1868.)

It is only when a material amendment is affected that a rereading is necessary. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

Same—Substituting Name of Commissioner.—An amendment in the second branch of the legislature substituting the name of a commissioner does not broaden the scope of the act or affect its financial feature, and the failure in the first branch to comply with this section will not alone affect its validity. *Brown v. Commissioners*, 173 N. C. 598, 92 S. E. 502 (1917).

Same—Change in Caption.—A slightly different caption retaining the number of the original bill is an immaterial amendment. *Brown v. Commissioners*, 173 N. C. 598, 92 S. E. 502 (1917).

Materiality a Judicial Question.—Whether an amendment is material and required to be passed in accordance with this section is a question of law for the court, under the facts, and not controlled by an agreement between the parties. *Wagstaff v. Central Highway Commission*, 174 N. C. 377, 93 S. E. 908 (1917).

§ 22. **Powers of the General Assembly.**—Each house shall be judge of the qualifications and election of its own members, shall sit upon its own adjournment from day to day, prepare bills to be passed into laws, and the two houses may also jointly adjourn to any future day, or other place. (Const. 1868.)

Effect of Section. — This section withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly.

State v. Pharr, 179 N. C. 699, 103 S. E. 8 (1920); *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507 (1929).

§ 23. **Bills and resolutions to be read three times, etc.**—All bills and resolutions of a legislative nature shall be read three times in each house before they pass into laws, and shall be signed by the presiding officers of both houses. (Const. 1868.)

Necessity of Signature.—The signatures of the presiding officers, by the Constitution, must be affixed to an act of legislation during the session of the General Assembly, and are necessary to its completeness and efficacy. *Scarborough v. Robinson*, 81 N. C. 409 (1879).

Where an office was created by an act of the General Assembly which was not signed by the presiding officers until three days later, an election in the interim to fill such office was void. *State v. Meares*, 116 N. C. 582, 21 S. E. 973 (1895).

The judicial power can not be exercised in aid of an unfinished and inoperative act, so left upon the final adjournment, any more than in obstructing legislative action. *Scarborough v. Robinson*, 81 N. C. 409 (1879).

In the absence of the signature journals are not competent to prove compliance with this section. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

Effect of Signature.—When an act is certified to by the speakers as having been ratified, it is conclusive of the fact that it was read three several times in each house

and ratified. *Union Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966 (1896).

The usual certificate of ratification is conclusive only of the fact of ratification, but not of a compliance with Art. II, § 14, of the Constitution. *Smathers v. Commissioners*, 125 N. C. 480, 34 S. E. 554 (1899); *Commissioners v. DeRossett*, 129 N. C. 275, 40 S. E. 43 (1901).

Effect of Certificate.—The certificate is not sufficient to show that the bill was passed in compliance with § 14 of this article. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

But the signature is conclusive of passage according to this section. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

And the journals are not admissible to contradict such signature. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

Cited in *Russell v. Ayer*, 120 N. C. 180, 27 S. E. 133 (1897); *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539 (1897); *State v. Patterson*, 134 N. C. 612, 47 S. E. 808 (1904).

§ 24. **Oath of members.**—Each member of the General Assembly, before taking his seat, shall take an oath or affirmation that he will support the Constitution and laws of the United States, and the Constitution of the State of North Carolina, and will faithfully discharge his duty as a member of the Senate or House of Representatives. (Const. 1868.)

§ 25. **Terms of office.**—The terms of office for senators and members of the house of representatives shall commence at the time of their election. (Const. 1868; Convention 1875.)

Editor's Note.—Section 27 of the Constitution of 1868 was as follows: "The terms of office for Senators and members of the House of Representatives shall commence at the time of their election; and the term of office of those elected at the first election held under this Consti-

tution shall terminate at the same time as if they had been elected at the first ensuing regular election." The Convention of 1875 omitted the last clause, and the remainder became § 25 of the present Constitution.

§ 26. **Yeas and nays.**—Upon motion made and seconded in either house by one-fifth of the members present, the yeas and nays upon any question shall be taken and entered upon the journals. (Const. 1868.)

§ 27. **Election for members of the General Assembly.**—The election for members of the General Assembly shall be held for the respective districts and counties, at the places where they are now held, or may be directed hereafter to be held, in such manner as may be prescribed by law, on the first Thursday in August, in the year one thousand eight hundred and seventy, and every two years thereafter. But the General Assembly may change the time of holding the elections. (Const. 1868; Convention 1875.)

Editor's Note.—See Legislative Term of Office, 64 N. C. 785.

This section constituted the first part of § 29 of the Constitution of 1868. The following additional sentence of § 29 was omitted by the Convention of 1875: "The first election shall be held when the vote shall be taken on the ratification of this Constitution by the voters of the State, and the General Assembly then elected shall meet on the fifteenth day after the

approval thereof by the Congress of the United States, if it fall not on Sunday, but if it shall so fall, then on the next day thereafter; and the members then elected shall hold their seats until their successors are elected at a regular election." Under authority of this section, the General Assembly changed the time of holding the election to Tuesday next after the first Monday in November, c. 275, Public Laws of 1876-77.

§ 28. **Pay of members and presiding officers of the General Assembly.**—The members of the General Assembly for the term for which they have been elected shall receive as a compensation for their services the sum of fifteen dollars per day for each day of their session, for a period not exceeding ninety days; and should they remain longer in session they shall serve without compensation. The compensation of the presiding officers of the two houses shall be twenty dollars per day for a period not exceeding ninety days. Should an extra session of the General Assembly be called, the members and presiding officers shall receive a like rate of compensation for a period not exceeding twenty-five days. (Convention 1875; 1927, c. 203; 1949, c. 1267.)

Editor's Note.—This section, which was added to the Constitution by the Convention of 1875, was amended by vote of the people at the general elections of November 6, 1928, and November 7, 1950. Prior to the first amendment the members and officers of the General Assembly were paid a per diem and given a mileage allowance. The amendment provided for a regular salary and also for per diem compensation in case of an extra session. The second amendment returned the compensation to a per diem basis.

The amendment of this section proposed by Session Laws 1945, c. 1042, failed of adoption at the general election of 1946.

The amendment of this section proposed by Session Laws 1947, c. 361, failed

of adoption at the general election held on November 2, 1948.

Special Committee of Investigation.—Inasmuch as the per diem of members of the General Assembly is allowed only while in session, the members of a legislative committee appointed to investigate certain facts and report to the General Assembly before its adjournment if possible, otherwise to the superior court, are not entitled to per diem for services rendered after adjournment when the resolution appointing them only provided for the necessary expenses of the committee while engaged in the investigation. Commercial, etc., Bank v. Worth, 117 N. C. 147, 23 S. E. 160 (1895).

Cited in Kendall v. Stafford, 178 N. C. 461, 101 S. E. 15 (1919) (dis. op.).

§ 29. **Limitations upon power of General Assembly to enact private or special legislation.**—The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court; relating to the appointment of justices of the peace; relating to health, sanitation, and the abatement of nuisances; changing the names of cities, towns, and townships; authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys; relating to ferries or bridges; relating to nonnavigable streams; relating to cemeteries; relating to the pay of jurors; erecting new townships, or changing township lines, or establishing or changing the lines of school districts; remitting fines, penalties, and forfeitures.

or refunding moneys legally paid into the public treasury; regulating labor, trade, mining, or manufacturing; extending the time for the assessment or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability; giving effect to informal wills and deeds; nor shall the General Assembly enact any such local, private or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it. Any local, private or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section. (1915, c. 99.)

This section is remedial in its nature and was intended not only to free the legislature of petty detail but also to require uniform and coordinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. *Board of Health v. Board of Com'rs*, 220 N. C. 140, 16 S. E. (2d) 677 (1941), holding Pub. Laws 1941, chs. 6 and 193 to be local laws relating to health.

In adopting this section, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void," no matter how praiseworthy or wise such local, private, or special act or resolution may be. *Idol v. Street*, 233 N. C. 730, 65 S. E. (2d) 313 (1951).

What Are Local Laws.—The interpretation of a statute, as to whether it is a local one, prohibited by this section of our Constitution should be largely left to the facts and circumstances of each particular case, giving significance to the rule that legislative acts are presumed to have been rightfully passed from proper motives, and that a classification of this kind, when made by them, should not be disturbed unless it is manifestly arbitrary and invalid. In *re Harris*, 183 N. C. 633, 112 S. E. 425 (1922).

A "local act" is one operating only in a limited territory or specified locality. *Idol v. Street*, 233 N. C. 730, 65 S. E. (2d) 313 (1951).

In no sense is the filing fee required by § 163-120 and § 163-129 a local law as con-

demned by this section. *McLean v. Durham County Board of Elections*, 222 N. C. 6, 21 S. E. (2d) 842 (1942).

Courts Look beyond Form of Statutes.—In determining whether a statute relating to matters enumerated in this section is a "local, private, or special" act inhibited by this section or a "general law" which the General Assembly has the "power to pass," the courts will look beyond the form of the act and ascertain whether the statute, in fact, is generally and usually applicable throughout the area comprising the State. *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939).

Scope of Legislative Power.—See generally *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934).

Establishment of Recorders' Courts.—A general law permitting the establishment of recorders' courts in the State, excepting certain counties to the number of 44, leaving 56 within the provisions of the statute, is not a local law within the intent and meaning of this section nor is a statute amending the former general law taking a certain county and two others out of the excepted class enumerated in the general statutes, unconstitutional as a local or special act as to those counties, the effect of this statute being a re-enactment of the general law including the particular counties. In *re Harris*, 183 N. C. 633, 112 S. E. 425 (1922).

Chapter 286, Public-Local Laws of 1925, providing for the establishment of township recorder's courts in one specified county is unconstitutional and void as being a local act relating to the establishment of courts inferior to the superior court, prohibited by this section. *State v. Williams*, 209 N. C. 57, 182 S. E. 711 (1935).

Court Created Prior to Adoption of Section.—Since this section forbidding the passage of "any local, private, or special act or resolution relating to the establishment of courts inferior to the superior court" did not become a part of the Constitution of North Carolina until it was

adopted by the qualified voters of the State in the general election in 1916, the General Assembly in 1913 acted within constitutional limits in creating the special court of North Wilkesboro by private act. *In re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372 (1950).

Increasing Jurisdiction of Certain Court.—An act which authorizes the county commissioners to increase the jurisdiction of a certain recorder's courts in civil matters is unconstitutional. *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593 (1925).

Same—Courts Already Established.—This section does not apply to increasing the jurisdiction of such courts as are already established. *State v. Horne*, 191 N. C. 375, 131 S. E. 753 (1926).

Same—Effect on Emoluments.—Where the legislature, in contravention of this section of the Constitution of this State, has established a court inferior to the superior court, an incumbent judge thereof, duly elected, may not successfully contend that he was deprived of the emoluments of his office by an unconstitutional statute abolishing the court. *Queen v. Commissioners*, 193 N. C. 821, 138 S. E. 310 (1927).

Erection of Hospital.—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax for its maintenance, upon the approval of the voters, is both a special and local act and void under this section. *Armstrong v. Board*, 185 N. C. 405, 117 S. E. 388 (1923).

National Park Act.—The provisions of the statute (Laws 1927, c. 48) for the acquisition of lands for a national park affects the interest of the people of the State, and though local as to location, is for a public use in contemplation of its acquisition by the State for the purpose outlined in the act. *Yarbrough v. Park Commission*, 196 N. C. 284, 145 S. E. 563 (1928).

Extending Limits of School.—It is true that the boundaries of a "district" may be coterminous with those of a city or town but it does not follow that an act extending the limits of a city or town in which public schools may be maintained is necessarily a special act establishing or changing the lines of school districts in violation of the constitutional provision. *Hailey v. Winston-Salem*, 196 N. C. 17, 144 S. E. 377 (1928).

Sanitary Districts.—An act of the Legislature (Private Laws 1927, c. 229) attempting to create a sanitary district within certain lines within a county for the construction and maintenance of sewer and water systems with certain assess-

ments or taxing powers for the purpose is void, being in violation of the provisions of this section. *Drysdale v. Prudden*, 195 N. C. 722, 143 S. E. 530 (1928).

Building Bridges.—A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river does not necessarily come within the purview and control of this section. *Mills v. Commissioners*, 175 N. C. 215, 95 S. E. 481 (1918).

While authority given by statute to a county or other political agency of a state, to issue bonds for highways in aid to their maintenance or construction is not direct, local or special legislation as is prohibited by this section, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State. *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164 (1926).

Maintenance of Streets within City Limits.—The unlimited power in the General Assembly to provide for the creation and extension of corporate limits of municipal corporations, would seem to include the right to vest in such municipal corporations the authority to levy taxes to lay out and maintain highways and streets within such limits, since they are essential to the existence of such corporations, and such private act would not seem to contravene this section. *Matthews v. Blowing Rock*, 207 N. C. 450, 177 S. E. 429 (1934).

Formation of Sewerage Districts.—A statute authorizing the formation of sanitary sewerage districts within county-wide limits, the boundaries of these to be fixed by certain designated local authorities in a specified manner, and done without previous notice to the voters, the statute is not a "local, private or special act relating to health, sanitation, etc." *Reed v. Howerton Engineering Co.*, 188 N. C. 39, 123 S. E. 479 (1924).

Drainage District.—A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of Art. VII, § 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by this section. *Kenilworth v. Hyder*, 197 N. C. 85, 147 S. E. 736 (1929).

Establishing or Changing Lines of School Districts.—Since the enforcement

of this section, special act of the legislature to establish or change the lines, etc., of a school district, and any proceedings under it, are null and void. *Galloway v. Board*, 184 N. C. 245, 114 S. E. 165 (1922).

A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the provision of this section. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130 (1921).

This section prohibits the legislature from passing any special, private or local act which ex proprio vigore undertakes to establish or change the boundaries of a school district, but this section does not proscribe the legislature from setting up machinery under which a county, as the administrative unit charged with making provisions for necessary capital outlay, may create school districts or special bond tax units within the county to accomplish this purpose, and therefore c. 279, Public-Local Laws of 1937, which provides the machinery under which the county of Buncombe may establish school districts or special bond tax units in the county, is not in contravention of this section. *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606 (1940); *Hinson v. Board of Com'rs*, 218 N. C. 13, 9 S. E. (2d) 614 (1940).

Same—Creation of Public School District. — A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by this section. *Robinson v. Board*, 182 N. C. 590, 109 S. E. 855 (1921).

Same—Incorporation of Existing Districts.—Incorporating existing local school districts for all purposes relating to the issuance or payment of bonds upon the approval of the voters of a district, is valid, and not in contravention to this section. *Board v. Mutual Loan, etc., Co.*, 181 N. C. 306, 107 S. E. 130 (1921); *Paschal v. Johnson*, 183 N. C. 129, 110 S. E. 841 (1922).

Same—Increase of Bonds by Existing District. — Where a school district has been defined as to its boundaries, etc., and created under the provisions of a statute valid before the adoption of the amendment to our State Constitution, this section, and which authorized a bond issue in a certain sum, a statute passed since the adoption of this constitutional amendment authorizing an increase of the bonds to be issued, upon the approval of the voters according to the statutory amendment, does

not contravene the provision of this section. *Roebuck v. Board*, 184 N. C. 144, 113 S. E. 676 (1922).

Same—Recognizing School District in Changed City Limits.—A public-local act that enlarged the city limits and recognized therein the independent existence of a public-school district within the former limits is not contrary to the provisions of our recent amendment to our Constitution, this section, as an attempt to establish a school district, or to change the limits of those already established. *Duffy v. Greensboro*, 186 N. C. 470, 120 S. E. 53 (1923).

Same—Submitting Question of Taxation.—A statute allowing an existing consolidated school district to submit the question of taxation and the issue of bonds for school purposes to the district is not prohibited by this section. *Burney v. Bladen County*, 184 N. C. 274, 114 S. E. 298 (1922).

Providing for Sewer and Water Service for Local School Children.—Chapter 1075, Session Laws 1951, is a local or special act. It relates only to Randolph County, and in Randolph County affects only a single agency, the county board of education. It relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purports to limit the power of the county board of education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply. These things being true, this statute is invalid under the mandatory terms of this section. *Lamb v. Randolph County Board of Ed.*, 235 N. C. 377, 70 S. E. (2d) 201 (1952).

Creating and Naming County Health Board. — Chapter 322, Public-Local Laws of 1931, which undertakes to create and name the members of a county board of health for Madison County alone, which board is charged with the duty to inspect county institutions and see that they are kept in a sanitary condition, and to select a physician to vaccinate against disease, is a local act relating to health and sanitation prohibited by this section. *Sams v. Board of Com'rs*, 217 N. C. 284, 7 S. E. (2d) 540 (1940).

Authorizing Consolidation of City and County Health Departments.—

Chapter 86, Session Laws 1945, which attempts to authorize Forsyth County and Winston-Salem to consolidate their health departments and name a joint city-county board of health and appoint joint city-county health officers, and which expressly

repeals to the extent of any conflict all laws in conflict therewith, is a local act relating to health, and is void for repugnancy to this section. *Idol v. Street*, 233 N. C. 730, 65 S. E. (2d) 313 (1951).

Fair Trade Act.—The North Carolina Fair Trade Act, in limiting its application to commodities bearing a trademark and in exempting from its operation such commodities when sold to particular classes of persons, sets up reasonable classifications and applies uniformly to all persons or things coming therein, and therefore is a general act regulating trade and does not contravene this section. *Lilly & Co. v. Saunders*, 216 N. C. 163, 4 S. E. (2d) 528, 125 A. L. R. 1308 (1939).

Machinery to Effect Void Act.—Where an act to create a public school district is unconstitutional, because it violates this section, the provision for bonds and taxation to carry out the purpose of the act are likewise void. *Sechrist v. Commissioners*, 181 N. C. 511, 107 S. E. 503 (1921).

Poll Tax for School Purposes Unconstitutional.—Since the adoption of this section a special school district may not impose a tax upon the polls for school purposes; and where a poll tax and a property tax have both been favorably voted for at an election held for the purpose, the tax upon the poll will be held unconstitutional and the property tax upheld by the courts. *Board v. Bray*, 184 N. C. 484, 115 S. E. 47 (1922).

Ratifying Ordinance to Issue Bonds.—An act for the purpose of ratifying an ordinance, of county commissioners, to issue bonds and levy taxes for school purposes passed since the adoption of this section of the Constitution, is a local, private, or special act thereby prohibited; and the issuance of such bonds and levy of such taxes, will be permanently enjoined. *Woodsley v. Commissioners*, 182 N. C. 429, 109 S. E. 368 (1921).

Trade, in its broadest sense, includes any employment or business engaged in for gain or profit. *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939).

A statute providing for the licensing and regulations of real estate brokers and salesmen and imposing a license tax on those engaged in the trade in addition to the tax imposed by the Revenue Act for a State-wide license, was held applicable to only a limited territory and specified localities, and the act was therefore a local act regulating trade in contravention of this section. *State v. Dixon*, 215 N. C. 161, 1 S. E. (2d) 521 (1939).

Maintenance of County Highways.—A public-local law applicable to the mainte-

nance of the public highways of a county and authorizing taxation or issuance of bonds for this purpose, with certain specific supervision and control, is not such local or special act as falls within the inhibition of this section, where it does not affect the "laying out, opening, altering, maintaining or discontinuing" the then existing highways, etc. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755 (1923).

Closing Public Roads.—Part of land in a private development was added to the playground of a public school. The General Assembly, by private act (c. 72, Private Laws of 1933), declared that certain roads dedicated in the registered plot of the development were no longer needed, and declared that the roads should be closed and added to the playground space for the school. This act is void as being a private or special act inhibited by this section. *Glenn v. Board of Education*, 210 N. C. 525, 185 S. E. 781 (1936).

Chapter 216, Priv. Laws, 1925, is not a special statute relating to roads inhibited by this section, the act not relating to the laying out, opening, altering, or discontinuance of any particular and designated highway, street, or alley. *Deese v. Lumberton*, 211 N. C. 31, 188 S. E. 857 (1936).

Substitution of Road Control.—A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, does not violate this section of our State Constitution. *Honeycutt v. Commissioners*, 182 N. C. 319, 109 S. E. 4 (1921).

A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of this section. *Hill v. Commissioners*, 190 N. C. 123, 129 S. E. 154 (1925). See *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936).

Issuance of County Road Bonds.—An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Commissioners v. Bank*, 181 N. C. 347, 107 S. E. 245 (1921).

An act of the legislature authorizing the issuance of county bonds for public roads is not in contravention of this section of the Constitution. *Commissioners v. Wachovia Bank & Trust Co.*, 178 N. C. 170, 100 S. E. 421 (1919).

An act of the legislature authorizing the road commissioners of a county to issue bonds, upon the approval of its electors, to obtain moneys for the expenditure upon certain particularly designated objects in respect to its public roads, and which does not contain any provision for the laying out, altering or discontinuing any road or highway, does not contravene this section. *Road Commissioners v. Bank*, 181 N. C. 347, 107 S. E. 245 (1921).

Same—May Provide for Distributor of Fund.—An act of the legislature may prescribe a rule by which the proceeds of the sales of bonds it authorizes a county to issue for road purposes, shall be disbursed and distributed in order to effect the best results, when it is confined to the control and management of the funds, and leaves to the local authorities the power given them by this section over "the laying out, opening, or discontinuance of highways." *Commissioners v. Pruden & Co.*, 178 N. C. 394, 100 S. E. 695 (1919).

Collection of Tax Liens.—An act relat-

ing to establishment and collection of tax liens, which applies to only one county of the State, is void as a violation of this section. *Wake Forest v. Holding*, 207 N. C. 808, 178 S. E. 594 (1935).

Municipal Board of Control is a creature of the General Assembly within the provisions of this section. *Hunsucker v. Winborne*, 223 N. C. 650, 27 S. E. (2d) 817 (1943).

Statute including deputy sheriffs within term "employee" as used in *Workmen's Compensation Act* (G. S. § 97-2) held consonant with the provisions of this section. *Towe v. Yancey County*, 224 N. C. 579, 31 S. E. (2d) 754 (1944).

Applied in *Sprunt v. Hewlett*, 208 N. C. 695, 182 S. E. 655 (1935) (dis. op.).

Cited in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481 (1934); *Albertson v. Albertson*, 207 N. C. 547, 178 S. E. 352 (1935); *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935); *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941); *State v. High*, 222 N. C. 434, 23 S. E. (2d) 343 (1942); *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944); *State v. Mitchell*, 225 N. C. 42, 33 S. E. (2d) 134 (1945); *Roberts v. McDevitt*, 231 N. C. 458, 57 S. E. (2d) 655 (1950).

§ 30. Inviolability of sinking funds.—The General Assembly shall not use nor authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which said sinking fund has been created. (Ex. Sess. 1924, c. 91.)

Sum Erroneously Placed in Sinking Fund.—While sinking funds provided for the retirement of municipal bonds may not be diverted from that purpose to other municipal requirements by a city, a sum erroneously placed on the books of the city in a sinking fund by a clerk without authorization, which sum was actually derived from profits from the municipal electric plant, does not fall within the constitutional or statutory inhibitions, and the city may by ordinance correct the error of the clerk and use the funds for other law-

ful municipal purposes. *Mewborn v. Kinston*, 199 N. C. 72, 154 S. E. 76 (1930).

Expenditure of Surplus Unencumbered Funds.—Although the General Assembly cannot authorize a diversion of a county's sinking funds which are necessary to pay outstanding sinking fund bonds, it can direct the expenditure of surplus unencumbered sinking funds, provided the expenditure is for a public purpose. *Johnson v. Marrow*, 228 N. C. 58, 44 S. E. (2d) 468 (1947).

§ 31. Use of funds of Teachers' and State Employees' Retirement System restricted.—The General Assembly shall not use, or authorize to be used, nor shall any agency of the State, public officer or public employee use or authorize to be used the funds, or any part of the funds, of the Teachers' and State Employees' Retirement System except for Retirement System purposes. The funds of the Teachers' and State Employees' Retirement System shall not be applied, diverted, loaned to or used by the State, any State agency, State officer, public officer or employee except for purposes of Retirement System: Provided, that nothing in this section shall prohibit the use of said funds for the payment of benefits, administrative expenses and refunds as authorized by the Teachers' and State Employees' Retirement Law, nor shall anything in this

provision prohibit the proper investment of said funds as may be authorized by law. (1949, c. 821.)

Editor's Note.—This section was adopted by vote at the general election of November 7, 1950.

ARTICLE III

EXECUTIVE DEPARTMENT

§ 1. **Officers of the executive department; terms of office.**—The executive department shall consist of a Governor, in whom shall be vested the supreme executive power of the State; a Lieutenant-Governor, a Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance, who shall be elected for a term of four years by the qualified electors of the State, at the same time and places and in the same manner as members of the General Assembly are elected. Their term of office shall commence on the first day of January next after their election, and continue until their successors are elected and qualified: Provided, that the officers first elected shall assume the duties of their office ten days after the approval of this Constitution by the Congress of the United States, and shall hold their offices four years from and after the first day of January. (Const. 1868; 1872-73, c. 84; 1943, c. 57.)

Cross Reference. — See Art. 1, § 8 and note thereto.

Editor's Note.—In this section as found in the Constitution of 1868, the words "a Superintendent of Public Works" followed "Treasurer". These words were stricken out and the office of Superintendent of Public Works abolished pursuant to c. 84, Public Laws of 1872-73.

The amendment of this section, adopted by vote at the general election of November 7, 1944, made the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance constitutional officers.

Duty of Governor. — The Governor as the constituted head of the executive department is charged with the duty of seeing that legislative acts are carried into effect. *Winslow v. Morton*, 118 N. C. 487, 24 S. E. 417 (1896).

Stated in *Galloway v. Department of Motor Vehicles*, 231 N. C. 447, 57 S. E. (2d) 799 (1950).

Cited in *People v. McKee*, 65 N. C. 257 (1871); *Pemberton v. McRae*, 75 N. C. 497 (1876); *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899).

§ 2. **Qualifications of Governor and Lieutenant-Governor.** — No person shall be eligible as Governor or Lieutenant-Governor unless he shall have attained the age of thirty years, shall have been a citizen of the United States five years, and shall have been a resident of this State for two years next before the election; nor shall the person elected to either of these two offices be eligible to the same office more than four years in any term of eight years, unless the office shall have been cast upon him as Lieutenant-Governor or President of the Senate. (Const. 1868.)

§ 3. **Returns of elections.**—The return of every election for officers of the executive department shall be sealed up and transmitted to the seat of government by the returning officer, directed to the Secretary of State. The return shall be canvassed and the result declared in such manner as may be prescribed by law. Contested elections shall be determined by a joint ballot of both houses of the General Assembly in such manner as shall be prescribed by law. (Const. 1868; 1925, c. 88.)

Editor's Note.—In the Constitution of 1868, that portion of this section after the word "directed" and before "contested" read as follows: "to the Speaker of the House of Representatives, who shall open

and publish the same in the presence of a majority of the members of both houses of the General Assembly. The persons having the highest number of votes respectively, shall be declared duly elected; but

if two or more be equal and highest in votes for the same office, then one of them shall be chosen by joint-ballot of both Houses of the General Assembly." The section was amended to its present form pursuant to c. 88, Public Laws of 1925. For the laws governing the canvassing of returns, see §§ 163-93 through 163-106; c. 260, Public Laws of 1927.

Where Returns Have Been Acted on.—In a proceeding to compel by mandamus a reassembling of a board of county can-

vassers and a recount of the votes cast in the county for candidates for the House of Representatives, where, since the institution of the action, the board of State Canvassers has acted upon the returns transmitted to them, and issued a commission to the person elected on the face of the return, judicial action in the premises would be wholly unavailing, as the matter has passed beyond the jurisdiction of the court. *O'Hara v. Powell*, 80 N. C. 104 (1879).

§ 4. Oath of office for Governor.—The Governor, before entering upon the duties of his office, shall, in the presence of the members of both branches of the General Assembly, or before any justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States, and of the State of North Carolina, and that he will faithfully perform the duties appertaining to the office of Governor, to which he has been elected. (Const. 1868.)

§ 5. Duties of Governor.—The Governor shall reside at the seat of government of this State, and he shall, from time to time, give the General Assembly information of the affairs of the State, and recommend to their consideration such measures as he shall deem expedient. (Const. 1868.)

Cited in *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502 (1910).

§ 6. Reprieves, commutations, and pardons.—The Governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall biennially communicate to the General Assembly each case of reprieve, commutation, or pardon granted, stating the name of each convict, the crime for which he was convicted, the sentence and its date, the date of commutation, pardon, or reprieve, and the reasons therefor. The terms reprieves, commutations and pardons shall not include paroles. The General Assembly is authorized and empowered to create a Board of Paroles, provide for the appointment of the members thereof, and enact suitable laws defining the duties and authority of such Board to grant, revoke and terminate paroles. The Governor's power of paroles shall continue until July 1, 1955, at which time said power shall cease and shall be vested in such Board of Paroles as may be created by the General Assembly. (Const. 1868; 1872-73, c. 82; 1953, c. 621.)

Editor's Note.—The word "biennially" was substituted for "annually" in this section of the Constitution of 1868, pursuant to c. 82, Public Laws of 1872-73.

The amendment proposed by Session Laws 1953, c. 621, and adopted by vote of the people at the general election held November 2, 1954, added the last three sentences of this section.

For article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

Power to Pass Amnesty Act. — The power, granted by this section, to exercise clemency after conviction in some particular case and in favor of an individual especially charged with the offense, is an executive act of a quasi-judicial kind, and does

not conflict with or exclude the power of the General Assembly to pass an amnesty act in abolition or oblivion of the offense. *State v. Bowman*, 145 N. C. 452, 59 S. E. 74, 122 Am. St. Rep. 464 (1907).

The Governor may grant a pardon upon a condition precedent that the prisoner pay costs of trial; and upon condition subsequent, that he remain of good character, and be sober and industrious. In *re Williams*, 149 N. C. 436, 63 S. E. 108, 22 L. R. A. (N. S.) 238 (1908).

Pardon Pending Appeal. — The term "conviction," in this section denotes a verdict of guilty rendered by a jury: Therefore, when defendant, after verdict and judgment in the court below, appealed to the Supreme Court and, pending such ap-

peal, was pardoned by the Governor, such pardon is authorized by this section and is valid. *State v. Alexander*, 76 N. C. 231 (1877); *State v. Mathis*, 109 N. C. 815, 13 S. E. 917 (1891).

After a defendant has begun the service of his term, or at least when that takes place after the adjournment of the court, it is beyond the jurisdiction of the judge to alter it or interfere with it in any way, as the power of pardon, parole or discharge during the term of imprisonment is by this

section the exclusive prerogative of the Governor. *State v. Lewis*, 226 N. C. 249, 37 S. E. (2d) 691 (1946).

Quoted in *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931) (dis. op.).

Stated in *State v. Yates*, 183 N. C. 753, 111 S. E. 337 (1922).

Cited in *State v. Mooney*, 74 N. C. 98 (1876); *In re McMahon*, 125 N. C. 38, 34 S. E. 193 (1899); *Herring v. Pugh*, 126 N. C. 852, 36 S. E. 287 (1900).

§ 7. Annual reports from officers of executive department and of public institutions.—The officers of the executive department and of the public institutions of the State shall, at least five days previous to each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports, with his message, to the General Assembly; and the Governor may, at any time, require information in writing from the officers in the executive department upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed. (Const. 1868.)

Applied in *Arendell v. Worth*, 125 N. C. 111, 34 S. E. 232 (1899).

Cited in *Nichols v. McKee*, 68 N. C. 429

(1873); *Walker v. Bledsoe*, 68 N. C. 457 (1873).

§ 8. Commander-in-chief.—The Governor shall be Commander-in-chief of the militia of the State, except when they shall be called into the service of the United States. (Const. 1868.)

Supremacy of Governor's Control.—Under this section the Governor's control is supreme, in the absence of legislation, "to provide for the organization," etc., of the

militia, enacted pursuant to Art. XII, § 3 of this Constitution. *Winslow v. Morton*, 118 N. C. 486, 24 S. E. 417 (1896).

§ 9. Extra sessions of General Assembly.—The Governor shall have power on extraordinary occasions, by and with the advice of the Council of State, to convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened. (Const. 1868.)

§ 10. Officers whose appointments are not otherwise provided for.—The Governor shall nominate, and by and with the advice and consent of a majority of the senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for. (Const. 1868; Convention 1875.)

Editor's Note.—In the Constitution of 1868 this section prohibited the General Assembly from appointing or electing such officers, as herein provided for, but in 1875 this section was amended and this express prohibition removed.

Construing this and cognate sections of the Constitution of 1868 in reference to vacancies, etc., it was held in various decisions that the term, "unless otherwise provided for," meant unless otherwise provided for by the Constitution itself, and that, except in specified and restricted instances, the legislature had no power to appoint to office or to fill vacancies therein. *State v. Stanley*, 66 N. C. 60 (1872); *Nichols v. McKee*, 68 N. C. 429 (1873); *Welker v. Bledsoe*, 68 N. C. 457 (1873).

And see *University v. McIver*, 72 N. C. 76 (1875). This article and section of the Constitution, as it then existed, and others of kindred nature, were altered by the Convention of 1875. And it has since been the accepted view that, in all offices created by statute, including the directorates of State institutions, the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. *Salisbury v. Croom*, 167 N. C. 223, 83 S. E. 354 (1914), citing *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138 (1899); *Cherry v. Burns*, 124 N. C. 761, 33 S. E. 136 (1899).

Filling Vacancy and Appointing for Regular Term.—The Governor never nominates to the Senate to fill vacancies.

He does that alone, in all cases. But where officers have to be appointed to fill a regular term, then he nominates to the Senate, unless it be an officer who is elected by the people, and then he never nominates to the Senate, but fills the vacancy or term by his own appointment (unless there is an officer holding over), until the people can elect. *Battle v. McIver*, 68 N. C. 467 (1873), decided prior to 1875 amendment.

Appointment by Governor Limited to Constitutional Officers. — The inherent right of the Governor to appoint is now restricted to constitutional offices and where the Constitution itself so provides. *Salisbury v. Croom*, 167 N. C. 223, 83 S. E. 354 (1914).

Power of Legislature to Fill Offices. — The Convention of 1875 intended to alter the Constitution as interpreted in *Nichols v. McKee*, 68 N. C. 429 (1873), and to confer upon the General Assembly the power to fill offices created by statute. *State Prison v. Day*, 124 N. C. 362, 32 S. E. 748 (1899), citing *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895).

When Legislature Assumes Appointment. — The legislature having assumed to take the appointment of directors for the State of the Western North Carolina Railroad from the Governor, it thereby dispensed with the necessity of his sending nominations of those officers to the Senate and left the Governor to pursue the law as far as he could. *Howerton v. Tate*, 68 N. C. 546 (1873). See *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Creation of New Office. — Where the General Assembly established a court and, provided that the General Assembly should "elect a person to fill the vacancy in said office, which shall be caused by the ratification of this act," the act was ratified, but the election of plaintiff to fill the office of judge was not held until four days later, and the Governor refused the application of the plaintiff for a commission as judge and appointed the defendant to the office between the time of the ratification

of the act and the election of the plaintiff to fill the office, no such vacancy existed as is contemplated in this section. *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895).

Transfer of Duties of Office. — While the General Assembly has the power to abolish an office created by legislative authority, it cannot by mere transfer to others of the duties, connected with an institution, necessary and useful to the public, to be exercised by them, oust the incumbent from an office belonging to him under a contract with the State. *State Prison v. Day*, 124 N. C. 362, 32 S. E. 748 (1899).

Trustee's of University, etc. — The trustees of the University and the directors of the penitentiary and of the lunatic asylum were held public officers. *Welker v. Bledsoe*, 68 N. C. 457 (1873).

Directors of Institution for Deaf, Dumb and Blind. — The directors of the former Institution for the Deaf and Dumb and the Blind were held officers made so by the Constitution. *Nichols v. McKee*, 68 N. C. 429 (1873).

Superintendent of State Prison. — The place of superintendent of the State Prison, with its attendant duties, was held a public office, not created by the Constitution but by a statute. *State Prison v. Day*, 124 N. C. 362, 32 S. E. 748 (1899).

Members of Board of Agriculture. — Members of the Board of Agriculture are not constitutional officers, but being of legislative creation, are within the power of legislative appointment, and are not exclusively, nor of necessity, within the power of executive appointment. *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138 (1899).

Cited in University Railroad Co. v. Holder, 63 N. C. 421 (1869) (con. op.); *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *State v. Baskerville*, 141 N. C. 811, 55 S. E. 742 (1906); *Kendall v. Stafford*, 178 N. C. 461, 101 S. E. 15 (1919).

§ 11. Duties of the Lieutenant-Governor. — The Lieutenant-Governor shall be President of the Senate but shall have no vote unless the Senate be equally divided. He shall receive such compensation as shall be fixed by the General Assembly. (Const. 1868; 1943, c. 497.)

Editor's Note. — The amendment of this section adopted by vote at the general election of November 7, 1944, deleted the former provision that the Lieutenant-Gov-

ernor, while acting as President of the Senate, should receive the same pay allowed to the speaker of the House of Representatives.

§ 12. In case of impeachment of Governor, or vacancy caused by death or resignation. — In case of the impeachment of the Governor, his failure

to qualify, his absence from the State, his inability to discharge the duties of his office, or, in case the office of Governor shall in anywise become vacant, the powers, duties and emoluments of the office shall devolve upon the Lieutenant-Governor until the disabilities shall cease or a new Governor shall be elected and qualified. In every case in which the Lieutenant-Governor shall be unable to preside over the Senate, the senators shall elect one of their own number president of their body; and the powers, duties and emoluments of the office of Governor shall devolve upon him whenever the Lieutenant-Governor shall, for any reason, be prevented from discharging the duties of such office as above provided, and he shall continue as acting Governor until the disabilities be removed, or a new Governor or Lieutenant-Governor shall be elected and qualified. Whenever, during the recess of the General Assembly, it shall become necessary for the President of the Senate to administer the government, the Secretary of State shall convene the Senate, that they may elect such president. (Const. 1868.)

§ 13. **Duties of other executive officers.**—The respective duties of the Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance shall be prescribed by law. If the office of any of said officers shall be vacated by death, resignation, or otherwise, it shall be the duty of the Governor to appoint another until the disability be removed or his successor be elected and qualified. Every such vacancy shall be filled by election at the first general election that occurs more than thirty days after the vacancy has taken place, and the person chosen shall hold the office for the remainder of the unexpired term fixed in the first section of this article: Provided, that when the unexpired term of any of the offices named in this section in which such vacancy has occurred expires on the first day of January succeeding the next general election, the Governor shall appoint to fill said vacancy for the unexpired term of said office. (Const. 1868; 1872-73, c. 84; 1943, c. 57; 1953, c. 1033, s. 1.)

Cross Reference.—See Editor's note to Art. III, § 1.

Editor's Note.—The amendment adopted by vote at the general election of November 7, 1944, made this section applicable to the Commissioner of Agriculture, the Commissioner of Labor and the Commissioner of Insurance.

The amendment proposed by Session Laws 1953, c. 1033, s. 1, and adopted by vote of the people at the general election held November 2, 1954, added the proviso at the end of this section.

Cited in *People v. Watson*, 72 N. C. 155 (1875); *State v. Bullock*, 80 N. C. 132 (1879).

§ 14. **Council of State.**—The Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Commissioner of Agriculture, Commissioner of Labor and Commissioner of Insurance shall constitute, ex officio, the Council of State, who shall advise the Governor in the execution of his office, and three of whom shall constitute a quorum; their advice and proceedings in this capacity shall be entered in a journal, to be kept for this purpose, exclusively, and signed by the members present, from any part of which any member may enter his dissent; and such journal shall be placed before the General Assembly when called for by either house. The Attorney General shall be, ex officio, the legal adviser of the executive department. (Const. 1868; 1872-73, c. 84; 1943, c. 57.)

Editor's Note.—The amendment adopted by vote at the general election of November 7, 1944, made this section applicable to the Commissioner of Agriculture, the

Commissioner of Labor and the Commissioner of Insurance.

Cross Reference.—See Editor's note to Art. III, § 1.

§ 15. **Compensation for executive officers.**—The officers mentioned in this article shall, at stated periods, receive for their services a compensation to be established by law, which shall neither be increased nor diminished during

the time for which they shall have been elected, and the said officers shall receive no other emolument or allowance whatever. (Const. 1868.)

Editor's Note. — The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation may be declared a certain amount less the income tax on that amount. See § 105-141. And see 11 N. C. Law Rev. 256.

§ 16. **Seal of State.**—There shall be a seal of the State, which shall be kept by the Governor, and used by him, as occasion may require and shall be called "The Great Seal of the State of North Carolina." All grants and commissions shall be issued in the name and by the authority of the State of North Carolina, sealed with "The Great Seal of the State," signed by the Governor, and countersigned by the Secretary of State. (Const. 1868.)

Countersign Defined.—The verb "countersign" means "to sign on the opposite side" or in addition to the signature of another, and the noun means "the signature of a secretary or other officer to a writing, or writings, added to that by the principal or superior to attest its authenticity." *Richards v. Ritter Lumber Co.*, 158 N. C. 54, 73 S. E. 485 (1911).

Countersignature Need Not Be in Any Particular Place. — Within the intent and meaning of this section it is not required that the Secretary of State "countersign" grants of lands and commissions in any particular place or position thereon, and when a grant to the land in controversy is put in evidence by one of the parties and in all respects appears to be regular and authentic upon its face, it will not be held to be defective because the countersignature of the Secretary of State appears on the opposite side of the sheet from the signature of the Governor. *Richards v. Ritter Lumber Co.*, 158 N. C. 54, 73 S. E. 485 (1911).

§ 17. **Department of Agriculture, Immigration, and Statistics.**—The General Assembly shall establish a Department of Agriculture, Immigration, and Statistics, under such regulations as may best promote the agricultural interests of the State, and shall enact laws for the adequate protection and encouragement of sheep husbandry. (Const. 1868; Convention 1875.)

Editor's Note.—Section 17 in the Constitution of 1868 was as follows: "There shall be established in the office of Secretary of State, a Bureau of Statistics, Agriculture and Immigration, under such regulations as the General Assembly may provide." The section was changed to its present form in the Convention of 1875.

Section Mandatory.—This section is not self-executing, but is mandatory upon the legislature. *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138 (1899).

Act Enlarging Board of Agriculture. — An act which enlarges the number of the Board of Agriculture, naming the additional members, is not in conflict with this section. *Cunningham v. Sprinkle*, 124 N. C. 638, 33 S. E. 138 (1899).

Cited in *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

§ 18. **Department of Justice.**—The General Assembly is authorized and empowered to create a Department of Justice under the supervision and direction of the Attorney General, and to enact suitable laws defining the authority of the Attorney General and other officers and agencies concerning the prosecution of crime and the administration of the criminal laws of the State. (1937, c. 447.)

Editor's Note.—The amendment adding this section was proposed by Public Laws 1937, c. 447, and ratified at the next general election. See 17 N. C. Law Rev. 375.

ARTICLE IV

JUDICIAL DEPARTMENT

§ 1. **Abolishes the distinctions between actions at law and suits in equity, and feigned issues.**—The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished; and there shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be

denominated a civil action; and every action prosecuted by the people of the State as a party, against a person charged with a public offense for the punishment of the same, shall be termed a criminal action. Feigned issues shall also be abolished, and the facts at issue tried by order of court before a jury. (Const. 1868.)

Effect of Section.— This section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights. *Peebles v. Gay*, 115 N. C. 38, 20 S. E. 173 (1894). See *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935).

Under this section and Art. IV, § 20 the superior courts became the successors of the courts of equity, having their jurisdiction and exercising their equitable powers unless restrained by statute. In *re Smith*, 200 N. C. 272, 156 S. E. 494 (1931).

Legal and equitable rights and remedies are now determined in one and the same action. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475 (1931).

Feigned Issues.— Under the provisions of this section feigned issues are abolished. *Hyatt v. McCoy*, 194 N. C. 25, 138 S. E. 405 (1927).

Distinction between Principles Not Abolished.—Equity is now administered in the same courts as matters of law, but the distinction between equitable and legal principles have not been abolished. *Waters v. Garris*, 188 N. C. 305, 124 S. E. 334 (1924); *Furst v. Merritt*, 190 N. C. 397, 130 S. E. 40 (1925); *Page Trust Co. v. Godwin*, 190 N. C. 512, 130 S. E. 323 (1925).

This section abolishing the distinctions between actions at law and suits in equity, does not imply that the distinctions as between law and equity, are abolished. Principles of law, principles and doctrines of equity, remain the same as they have ever been; the change wrought is in the method of administering them and, in some degree, the extent of the application of them. The abolition does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. *Scales v. Wachovia Bank, etc., Co.*, 195 N. C. 772, 143 S. E. 868 (1928).

Equitable Rights Enforced by Civil Action.—Since the passage of this section the enforcement of an equitable right, as that of subrogation, can only be maintained by a civil action. *Calvert v. Peebles*, 82 N. C. 334 (1880).

Rights of Prior Lienor Not Affected.— This section does not affect the rights of a prior lienor by a registered chattel mort-

gage in favor of a judgment creditor who has sold the personal property by execution under a judgment subsequent to the mortgage lien, or give the creditor a right to levy his execution instead of pursuing the equitable remedy. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13 (1917).

"Criminal Action" and "Indictment" Synonymous.—The term "criminal action" and "indictment" as used in the Constitution, and in the Code are synonymous: Therefore, it would be equally regular to entitle a case upon the records of the court, either as "the People v. A. B.—Criminal action," or the "State v. A. B.—Indictment." *State v. Simons*, 68 N. C. 373 (1873).

Defendant's Right to Know Nature of Demand.— The necessity for drawing pleadings in civil actions according to a prescribed or established precedent, ceased when the form of suits was abolished by this section. But one who is brought into court to answer a demand for damages or for specific property, has the same fundamental right to know the nature of the demand sufficiently well to enable him, with the aid of competent counsel, to prepare his defense, that he has to be informed of the accusation for which he has to answer criminally. *Conley v. Richmond, etc., Ry. Co.*, 109 N. C. 692, 14 S. E. 303 (1891).

Asking for Ancillary Remedy.— There being but one form of action in civil cases, the fact that a plaintiff asks for one of the many remedies ancillary thereto, to which he is not entitled, does not affect the action itself, which will go on if he is entitled to any other of the remedies. *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916 (1895).

Pleadings Amended by Court.—Where a good cause of action is stated for equitable relief, but defective in form, the court may require the pleadings to be made definite and certain by amendment, the distinction between suits in equity and actions at law as to jurisdictional matters being abolished by this section. *Green v. Harshaw*, 187 N. C. 213, 121 S. E. 456 (1924).

Justices of the Peace.—This section does not give to courts of justices of the peace jurisdiction over the equity of correcting an account and settlement stated and had between the parties, so as to surcharge or falsify it for fraud or specified error, nor

will the superior court acquire jurisdiction on appeal. *Morganton v. Miller*, 181 N. C. 364, 107 S. E. 209 (1921).

Enforcement of Contracts.—The remedy for the enforcement of all kinds of contracts is now a civil action. *Boles v. Caudle*, 133 N. C. 528, 45 S. E. 835 (1903).

This section providing that legal and equitable remedies be administered in the same court, does not abolish the recognized distinction in the principles applicable to each; and an action to enforce the provisions of a contract, being one at law, the equity that time is not the essence of the contract has no application. *Makuen v. Elder*, 170 N. C. 510, 87 S. E. 334 (1915).

Action for Seduction.—To give this constitutional provision its common sense construction, it would seem that the "feigned issue" in actions for seduction, of a loss of services and for damages based thereon, was abolished, and the action should and does rest on the true issue of damages for the wrong done. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892).

This fictitious relation denied to a woman the right to maintain an action under the common law for her seduction. In some of the states the right has been conferred by statute; with us it has been recognized by judicial decision on the theory that feigned issues are abolished and that the

woman is the real party in interest. *Hyatt v. McCoy*, 194 N. C. 25, 138 S. E. 405 (1927).

Action for Money Had and Received.—Under this section an exception to a complaint that by its form it is for money had and received, and that the action cannot be maintained unless the money has been actually received, is untenable. *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904).

Action for Claim and Delivery.—There is no such thing as an action for claim and delivery. Under this section there is but one form of action in civil cases. *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916 (1895).

Mandamus.—There is now in this State, but one form of action, and the writ of mandamus is but a process of the court in that action. *Belmont v. Reilly*, 71 N. C. 260 (1874).

Applied in *Wolfe v. Galloway*, 211 N. C. 361, 190 S. E. 213 (1937).

Cited in *Mitchell v. Henderson*, 63 N. C. 643 (1869); *Harkey v. Houston*, 65 N. C. 137 (1871); *Abrams v. Cureton*, 74 N. C. 523 (1876); *Jones v. Mial*, 79 N. C. 164 (1878); *Turner v. McKee*, 137 N. C. 251, 49 S. E. 330 (1904) (dis. op.); *Henrietta Mills v. Rutherford County*, 32 F. (2d) 570 (1929).

§ 2. **Division of judicial powers.**—The judicial power of the State shall be vested in a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law. (Const. 1868; Convention 1875.)

Editor's Note.—Section 4 of the Constitution of 1868 was as follows: "The judicial power of the State shall be vested in a court for the trial of impeachment, a Supreme Court, Superior Court, Court of Justices of the Peace, and special Courts." This was amended to become § 2 of the present Constitution by the Convention of 1875. Sections 2 and 3 of the Constitution of 1868, providing for a commission to report to the General Assembly rules of practice and procedure and a code of North Carolina law, were omitted by the Convention of 1875.

Judicial Power Vested in These Courts.—By this section the judicial power of the State is vested in a court for the trial of impeachments, a Supreme Court, superior court and special courts; the jurisdiction of special courts is defined by § 19 of this Article. *State v. Pender*, 66 N. C. 314 (1872).

General county courts must be ranked among the "other courts" alluded to in this section and Art. 4, § 30. *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

The office of justice of the peace is provided for and vouchsafed in this section of the Constitution. *Ex parte Steele*, 220 N. C. 685, 18 S. E. (2d) 132 (1942).

The Industrial Commission is primarily an administrative agency of the State in the administration of the Compensation Act and its judicial powers are but incidental thereto, and the administration of the powers conferred by the statute is not in contravention of this section and Art. IV, § 12, of the Constitution. *Heavner v. Lincolnton*, 202 N. C. 400, 162 S. E. 909 (1932).

Assembly May Abolish Courts Created by It.—The General Assembly has the power to create county, municipal, and recorders' courts, and a fortiori has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

Assembly Cannot Abolish Superior Courts or Courts of the Justices of Peace.—The superior courts and courts of jus-

tices of the peace were created by the Constitution, and the General Assembly cannot abolish them. *Rhyme v. Lipscombe*, 122 N. C. 650, 29 S. E. 57 (1898).

Legislature Can Establish Criminal Courts.—Under this section, the legislature can establish criminal courts. *State v. Weddington*, 103 N. C. 364, 9 S. E. 577 (1889).

An act of the General Assembly establishing a criminal court for a certain county, is constitutional. *State v. Gales*, 77 N. C. 283 (1877).

Power to Determine Validity of Statute.—The courts of this State have the power and in a proper case it is their duty, in the exercise of the judicial power vested in

them by the Constitution of this State to decide whether or not a statute is valid. *State v. Brockwell*, 209 N. C. 209, 183 S. E. 378 (1936).

Cited in *State v. Davis*, 69 N. C. 495 (1873); *State v. Spurtin*, 80 N. C. 362 (1879); *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895); *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132 (1896); *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *Mott v. Commissioners*, 126 N. C. 866, 36 S. E. 330 (1900); *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742 (1906); *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897 (1943); *In re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372 (1950).

§ 3. Trial court of impeachment.—The court for the trial of impeachments shall be the Senate. A majority of the members shall be necessary to a quorum, and the judgment shall not extend beyond removal from and disqualification to hold office in this State; but the party shall be liable to indictment and punishment according to law. (Const. 1868.)

Cited in *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

§ 4. Impeachment.—The House of Representatives solely shall have the power of impeaching. No person shall be convicted without the concurrence of two-thirds of the senators present. When the Governor is impeached, the Chief Justice shall preside. (Const. 1868.)

Cited in *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *Mott v. Commissioners*, 126 N. C. 866, 36 S. E. 330 (1900) (dis. op.); *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741 (1932).

§ 5. Treason against the State.—Treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture. (Const. 1868.)

§ 6. Supreme Court.—The Supreme Court shall consist of a Chief Justice and four Associate Justices. The General Assembly may increase the number of Associate Justices to not more than six when the work of the Court so requires. The Court shall have power to sit in divisions, when in its judgment this is necessary for the proper dispatch of business, and to make rules for the distribution of business between the divisions and for the hearing of cases by the full Court. No decision of any division shall become the judgment of the Court unless concurred in by a majority of all the Justices; and no case involving a construction of the Constitution of the State or of the United States shall be decided except by the Court en banc. All sessions of the Court shall be held in the city of Raleigh. This amendment made to the Constitution of North Carolina shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled or held by virtue of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof. The General Assembly is vested with authority to provide for the retirement of members of the Supreme Court and for the recall of such retired members to serve on said court in lieu of any active member thereof who

is, for any cause, temporarily incapacitated. (Const. 1868; Convention 1875; 1887, c. 212; 1935, c. 444; 1953, c. 611.)

Editor's Note. — This section as it appeared in the Constitution of 1868 (§ 8) read as follows: "The Supreme Court shall consist of a Chief Justice and four Associate Justices." The number of associate justices was changed to two by the Convention of 1875, and again to four pursuant to c. 212 of the Public Laws of 1887. This

section was adopted in its present form pursuant to c. 444 of the Public Laws of 1935.

The amendment proposed by Session Laws 1953, c. 611, and adopted by vote of the people at the general election held November 2, 1954, added the last sentence of this section.

§ 7. Terms of the Supreme Court.—The terms of the Supreme Court shall be held in the city of Raleigh, as now, until otherwise provided by the General Assembly. (Const. 1868; Convention 1875.)

Editor's Note.—Section 9 in the Constitution of 1868 was as follows: "There shall be two terms of the Supreme Court held at the seat of government of the State in each year, commencing on the first Monday in January, and the first Monday in June, and continuing as long as the public interests may require." This section was changed to the present § 7 by the Conven-

tion of 1875. Subsequently the General Assembly changed the time of holding the two terms to the first Monday in February and the last Monday in August. Chapter 178, Public Laws of 1881; c. 49, Public Laws of 1887; c. 660, Public Laws of 1901; Revisal, 1905, s. 1535.

Cited in *State v. Marsh*, 134 N. C. 184, 47 S. E. 6 (1903) (dis. op.).

§ 8. Jurisdiction of Supreme Court.—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. (Const. 1868; Convention 1875.)

Cross Reference.—For a thorough treatment of the appellate jurisdiction of the Supreme Court, see §§ 1-277 and 7-10 and annotations thereunder.

Editor's Note. — Section 10 of the Constitution of 1868, changed to § 8 of the present Constitution by the Convention of 1875, read as follows: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the Courts below, upon any matter of law or legal inference; but no issue of fact shall be tried before this Court; and the Court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior court."

The Supreme Court is an appellate court. Its function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for the Supreme Court to make specific rulings thereon. *Greene v. Spivey*, 236 N. C. 435, 73 S. E. (2d) 488 (1952).

What Reviewable. — On appeal to the Supreme Court, only error as to the law or legal inferences are reviewable upon the record in the case. *Merchants Nat. Bank v. Howard*, 188 N. C. 543, 125 S. E. 126

(1924). See also, *Barnes v. Teer*, 218 N. C. 122, 10 S. E. (2d) 614 (1940); *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657 (1941).

The Supreme Court on appeal in a criminal action can review only matters of law or legal inference. *State v. Brewer*, 202 N. C. 187, 162 S. E. 363 (1932). See *State v. Anderson*, 208 N. C. 771, 182 S. E. 643 (1935).

The competency, admissibility and sufficiency of the evidence in a criminal action is for the court, the weight, effect and credibility is for the jury, and on appeal the Supreme Court can review only matters of law or legal inference. *State v. Casey*, 201 N. C. 185, 159 S. E. 337 (1931); *Debnam v. Rouse*, 201 N. C. 459, 160 S. E. 471 (1931); *Carter v. Mullinax*, 201 N. C. 783, 161 S. E. 486 (1931); *Woody Brothers Bakery v. Greensboro Life Ins. Co.*, 201 N. C. 816, 161 S. E. 554 (1931); *State v. Harrell*, 203 N. C. 210, 165 S. E. 551 (1932); *State v. Whiteside*, 204 N. C. 710, 169 S. E. 711 (1933).

This section empowers the Supreme Court to review on appeal any decision of the courts below, upon any matter of law or legal inference; and this is to be presented in accordance with the mandatory

rules of the Supreme Court. *State v. Bittings*, 206 N. C. 798, 175 S. E. 299 (1934). See *State v. Jackson*, 211 N. C. 202, 189 S. E. 510 (1937).

Theory of Trial in Lower Court Is Adhered to.—The principle that an appeal will be determined in accordance with the theory of trial in the lower court, is enforced by this court because of its limited jurisdiction as an appellate court under this section. *Apostle v. Acacia Mut. Life Ins. Co.*, 208 N. C. 95, 179 S. E. 444 (1935). See *Ammons v. Fisher*, 208 N. C. 712, 182 S. E. 479 (1935).

"Issues of Fact" Defined.—"Issues of fact" has been defined by the court to mean "such matters of fact as are put in issue by the pleadings, and a decision of which would be final and conclude the parties upon the matters in controversy in the issue." *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384 (1889).

Review of Issues of Fact.—The jurisdiction of the Supreme Court over issues of fact, under this section, will be assumed upon two conditions: 1. If the matter be of such an equitable nature as a court of equity under the former system took exclusive cognizance of. 2. If the proofs are written and documentary and in all respects the same as they were when the judge of the court below passed upon them. *Worthy v. Shields*, 90 N. C. 192 (1884). See *Keener v. Finger*, 70 N. C. 35 (1874).

This prohibition of trials of "issues of fact" by the Supreme Courts extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction. *Heilig v. Stokes*, 63 N. C. 612 (1869).

The Supreme Court cannot consider a paper which, unrelated to the trial, purports upon its face to have raised an issue of facts after the adjournment as to the recitals set forth in the commission given the presiding judge. *State v. Graham*, 194 N. C. 459, 140 S. E. 26 (1927).

Habeas Corpus.—No appeal to the Supreme Court lies upon the refusal of the judge, having jurisdiction, to release the petitioner in habeas corpus proceedings, except in cases concerning the care and custody of children, the remedy being by application for the writ of certiorari which lies in the discretion of the appellate court. *State v. Yates*, 183 N. C. 753, 111 S. E. 337 (1922); *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922); *In re Blake*, 184 N. C. 278, 114 S. E. 294 (1922).

A decree in habeas corpus proceedings to determine the custody of a child as between its divorced parents is not appealable, the sole remedy being by certiorari to invoke the constitutional power of the Supreme Court to supervise and control proceedings of inferior courts. *In re Ogden*, 211 N. C. 100, 189 S. E. 119 (1937).

Remedial Writs Controlling Proceedings of Inferior Courts.—The Supreme Court is vested with authority to issue any remedial writ necessary to give it general supervision and control over the proceedings of inferior courts. *State v. Cochran*, 230 N. C. 523, 53 S. E. (2d) 663 (1949).

Writ of Error Coram Nobis.—The Supreme Court, in its supervisory power, has authority to entertain a petition for permission to apply to the superior court for a writ of error coram nobis. *In re Taylor*, 230 N. C. 566, 53 S. E. (2d) 857 (1949); *State v. Daniels*, 231 N. C. 17, 56 S. E. (2d) 2 (1949). As to allowance of petition where trial court failed to appoint counsel, see note to § 15-4.

Writ of Certiorari.—Where an application for writ of certiorari in the nature of a writ of error is made for the purpose of bringing up an appeal when the right of appeal is lost in the trial court by failure to file statement of case on appeal within the time allowed, applicant must negative laches and show merit. *State v. Moore*, 210 N. C. 686, 188 S. E. 421 (1936).

Where the case is not one in which the alleged error appears on the face of the record proper, which might be corrected in Supreme Court's supervisory power under this section, but it is to review a ruling of the court entered on motion after trial, as well as an application for certiorari, it was held that since the case was one in which the State had no right of appeal, a dismissal must necessarily follow. *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313 (1944).

Caveat to Will.—Under the provisions of this section the Supreme Court on appeal from an issue of devisavit vel non, involved in the trial of a caveat to a will, is confined to a consideration of assignments of error in matters of law and legal inference. *In re Will of Brown*, 194 N. C. 583, 140 S. E. 192 (1927).

Reduction of verdict by the trial court involves a matter of law reviewable by the superior court. *Hyatt v. McCoy*, 194 N. C. 760, 140 S. E. 807 (1927).

Correcting Error in Judgment Where Appeal Subject to Dismissal.—Even though an appeal may be subject of dismissal, if the proceeding is in rem and

the judgment entered in the court below vitally affects the title to real property, the Supreme Court will take jurisdiction for the purpose of correcting an error in the judgment. This can be done in the exercise of its supervisory power. *Ange v. Ange*, 235 N. C. 506, 71 S. E. (2d) 19 (1952).

Applied in *Hardy v. Heath*, 188 N. C. 271, 124 S. E. 564 (1924); *King v. Taylor*, 188 N. C. 450, 124 S. E. 751 (1924); *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 229 (1925); *Newton v. State Highway Commission*, 194 N. C. 303, 139 S. E. 613 (1927); *State v. Leonard*, 195 N. C. 242, 141 S. E. 736 (1928); *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928); *Gross v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928); *State v. Lawrence*, 199 N. C. 481, 154 S. E. 741 (1930); *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 171 S. E. 862 (1933); *Mehaffey v. Provident Life, etc., Ins. Co.*, 205 N. C. 701, 172 S. E. 331 (1934); *Lightner v. Raleigh*, 206 N. C. 496.

§ 9. **Claims against the State.**—The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions 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. (Const. 1868.)

Cross Reference.—See notes under § 7-8.

Purpose of Section.—The original jurisdiction conferred upon the Supreme Court by this section, is for the benefit only of such plaintiffs, and to be used only in such cases, as cannot otherwise obtain a footing in court by reason of the State being a party. *Bain v. State*, 86 N. C. 49 (1882).

It was intended by the provision of this section that persons who asserted that they held legal claims against the sovereign State, should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant, to the end that its liability to the petitioner might be determined by the law. *Cowles v. State*, 115 N. C. 173, 20 S. E. 384 (1894).

Only Way State Can Be Sued.—The State cannot be sued, except as provided in this section. *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443 (1894); *Carpenter v. Atlantic, etc., R. Co.*, 184 N. C. 400, 114 S. E. 693 (1922).

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states unless it has expressly consented to such

174 S. E. 272 (1934); *Alston v. Southern Ry. Co.*, 207 N. C. 114, 176 S. E. 922 (1934).

Stated in *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823 (1946).

Cited in *Bledsoe v. Nixon*, 69 N. C. 82 (1873); *State v. Swepson*, 82 N. C. 541 (1880); *State v. Garrell*, 82 N. C. 581 (1880); *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132 (1896); *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899) (dis. op.); *State v. Freeman*, 197 N. C. 376, 148 S. E. 450 (1929); *Tallassee Power Co. v. Peacock*, 197 N. C. 735, 150 S. E. 510 (1929); *Seaboard Air Line Railway Co. v. Brunswick County*, 198 N. C. 549, 152 S. E. 627 (1930); *Warren v. Pilot Life Ins. Co.*, 217 N. C. 705, 9 S. E. (2d) 479 (1940); *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941); *State v. Biggs*, 224 N. C. 23, 29 S. E. (2d) 121 (1944) (dis. op.); *Fuquay v. Fuquay*, 232 N. C. 692, 62 S. E. (2d) 83 (1950).

suit. *Dredging Company v. State*, 191 N. C. 243, 131 S. E. 665 (1926).

The jurisdiction of the Supreme Court to hear claims against the State is confined to the powers given by this section and is not enlarged by the rules of procedure prescribed by statute, and where the complaint presents only an issue of fact the proceeding will be dismissed. *Cahoon v. State*, 201 N. C. 312, 160 S. E. 183 (1931).

A state cannot be sued in its own courts or elsewhere unless it has consented to such suit, by statutes or in cases authorized by provisions of the organic law, instanced by Art. III, Const. of U. S.; this section, Const. of North Carolina. *Dalton v. State Highway, etc., Comm.*, 223 N. C. 406, 27 S. E. (2d) 1 (1943).

Jurisdiction Recommendatory Only.—

The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this court does not pass upon conflicting evidence to determine the facts at issue. *Dredging Co. v. State*, 191 N. C. 243, 131 S. E. 665 (1926). See also, *Rotan v. State*, 195 N. C. 291, 141 S. E. 733 (1928).

What Examination Confined To.—The jurisdiction conferred upon the Supreme Court by this section to hear claims against the State is confined to an examination of and adjudication of the legal validity of such claims; no power to enforce its judgment is given the court; its decisions are merely recommendatory to the legislature, who may provide for the judgment of the claims, if it sees proper to do so. *Baltzer v. State*, 104 N. C. 265, 10 S. E. 153 (1889).

Kind of Claims Reviewed.—The claim against the State must be such as, against any other defendant, could be reduced to judgment and enforced by execution. *Bain v. State*, 86 N. C. 49 (1882).

Necessity of Question of Law.—The Supreme Court has not original jurisdiction to hear claims against the State in cases in which no question of law is involved. *Bledsoe v. State*, 64 N. C. 392 (1870); *Miller v. State*, 134 N. C. 270, 46 S. E. 514 (1904).

The Supreme Court will not recommend to the legislature the payment of a claim against the State, when no questions of law are involved, or when such questions are resolved against the claimant. *Dredging Company v. State*, 191 N. C. 243, 131 S. E. 665 (1926).

A claimant against the State is not entitled to the recommendatory jurisdiction of the Supreme Court upon petition presented to it under the provisions of this section when no question of law is presented by the facts in the petition. *Warren v. State*, 199 N. C. 211, 153 S. E. 864 (1930).

Repeal of Statute.—The repeal of statute under which a contract has been made between the plaintiff and the State in no way affects the plaintiff's rights under the contract. *Clements v. State*, 76 N. C. 199 (1877).

Matters of Small Value. — This section ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the legislature for relief. *Sinclair v. State*, 69 N. C. 47 (1873).

Suit against Agent of State. — A suit prosecuted against an officer or agent who represented the State in conduct and liability, and wherein the State is the real party whose action will be controlled by the judgment and against which relief is sought, is a suit against the State, and not

against its officer or agent, whose acts are alleged to have caused the injury complained of. *Carpenter v. Atlanta, etc., R. Co.*, 184 N. C. 400, 114 S. E. 695 (1922).

Action by Clerk for Fees. — The Supreme Court has not original jurisdiction of an action against the State by a clerk of the superior court for fees in an action instituted by the State and for which it has been adjudged liable. *Miller v. State*, 134 N. C. 270, 46 S. E. 514 (1904).

Holder of State Bonds.—An owner and holder of a bond of the State and coupons past due thereon has a right to invoke the recommendatory jurisdiction of the Supreme Court to pass upon the validity of the coupons as a claim against the State, under this section. *Horne v. State*, 82 N. C. 382 (1880).

Issues of Fact.—The Supreme Court in the exercise of its recommendatory original jurisdiction to hear claims against the State will dismiss any action brought against the State where the sole issue is one of fact. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928).

A claim against the State Highway Commission for damages arising from an alleged breach of contract in the building of a State highway is a claim against the State, but when the only issues presented therein are ones of fact, the Supreme Court will not exercise its recommendatory original jurisdiction, and the action will be dismissed. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928).

Applied in *Rand v. State*, 65 N. C. 194 (1871); *Newton v. State Highway Commission*, 194 N. C. 303, 139 S. E. 613 (1927).

Stated in *O'Neal v. Wake County*, 196 N. C. 184, 145 S. E. 28 (1928); *Yancey v. North Carolina State Highway, etc., Comm.*, 222 N. C. 106, 22 S. E. (2d) 256 (1942).

Cited in *Battle v. Thompson*, 65 N. C. 406 (1871); *Boner v. Adams*, 65 N. C. 639 (1871); *Baltzer v. State*, 109 N. C. 187, 13 S. E. 724 (1891); *Blount v. Simmons*, 119 N. C. 50, 25 S. E. 789 (1896); *Pate v. Wilmington, etc., R. Co.*, 122 N. C. 877, 29 S. E. 334 (1898); *Atlantic & N. C. R. Co. v. Dortch*, 124 N. C. 663, 33 S. E. 1014 (1899) (dis. op.); *Capital Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160 (1899) (con. op.); *White v. Auditor*, 126 N. C. 570, 36 S. E. 132 (1900) (dis. op.).

§ 10. **Judicial districts for Superior Courts.**—The General Assembly shall divide the State into a number of judicial districts which number may be increased or reduced and shall provide for the election of one or more Superior Court judges for each district. There shall be a Superior Court in each county

at least twice in each year to continue for such time in each county as may be prescribed by law. (Const. 1868; Convention 1875; 1949, c. 393.)

Editor's Note.—The Constitution of 1868 provided for twelve judicial districts, and the Convention of 1875 reduced the number to nine. The amendment adopted by vote at the general election of November 7, 1950, made this section read as set out above. There are now twenty-one judicial districts in the State. G. S. §§ 7-68, et seq.

Stated in Reid v. Reid, 199 N. C. 740, 155 S. E. 719 (1930).

Cited in Adoo v. Banbow, 63 N. C. 461 (1869); State v. Adair, 66 N. C. 298 (1872); State v. Taylor, 76 N. C. 64 (1877); Shepard v. Commissioners, 90 N. C. 115 (1884); Rhyne v. Lipscomb, 122 N. C. 650, 29 S. E. 57 (1898); Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139 (1899) (dis. op.); State v. Stewart, 189 N. C. 340, 127 S. E. 260 (1925).

§ 11. **Judicial districts; rotation; special Superior Court judges; assignment of Superior Court judges by Chief Justice.**—Each judge of the Superior Court shall reside in the district for which he is elected. The General Assembly may divide the State into a number of judicial divisions. The judges shall preside in the courts of the different districts within a division successively; but no judge shall hold all the courts in the same district oftener than once in four years. The General Assembly may provide by general laws for the selection or appointment of special or emergency Superior Court judges not assigned to any judicial district, who may be designated from time to time by the Chief Justice, to hold court in any district or districts within the State; and the General Assembly shall define their jurisdiction and shall provide for their reasonable compensation. The Chief Justice, when in his opinion the public interest so requires, may assign any Superior Court judge to hold one or more terms of Superior Court in any district. (Const. 1868; Convention 1875; 1915, c. 99; 1949, c. 775.)

Cross References.—As to judgment authorized to be entered by the clerk, see section 1-209 and notes thereto.

As to rotation of superior court judges, see leading article in 27 N. C. Law Rev. 181. See also, 26 N. C. Law Rev. 334.

Editor's Note.—Sec. 14 of the Constitution of 1868 was re-written as a part of this section, which was amended by c. 99, Public Laws of 1915, ratified by the people in November, 1916, and effective Jan. 10, 1917. This section was subsequently amended by vote at the general election of November 7, 1950. The last amendment vested the Chief Justice with authority to make assignment of superior court judges.

Proper Interpretation of Section.—The proper interpretation of this section is, that while the Governor is taking a reasonable time for deliberation and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which the successor of the deceased judge will be assigned by the general law immediately upon such successor's qualification. State v. Lewis, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

Creation of Extra Term of Court.—The provisions of this section requiring the judges to preside in the different districts

successively, and prohibiting them from holding the courts in the same district oftener than once in four years, applies to the series of successive courts constituting a circuit or riding, and does not restrict the legislature from creating an extra term of the superior court of a county and designating the resident judge to hold the same. State v. Monroe, 80 N. C. 373 (1879).

An act authorizing the Governor of the State to appoint special terms of the superior courts, is not unconstitutional. State v. Ketchey, 70 N. C. 621 (1874).

Inhibition Does Not Apply to Exchange Judges on Special Terms.—The inhibition contained in this section applies neither to the holding by any judge of the superior court of one or more regular terms of said court by exchange with some other judge, and with the sanction of the Governor nor to the holding of special terms under the order contemplated in said provision. State v. Turner, 119 N. C. 841, 25 S. E. 810 (1896).

The Governor under this section, can require a judge of the superior court to hold a term of the court in a county not within his own district. And when the Governor so authorizes and empowers a judge to hold such court, expressing in the commission that it is done with his consent, and under that authority the judge holds the court, as between the judge and the suit-

ors in the court, the consent and authority granted by the Governor is equivalent to a command. *State v. Watson*, 75 N. C. 136 (1876.)

Appointment upon Death of Judge.—Upon the death of one of the judges of the superior courts, the Governor has the authority under this section to require one of the other judges to hold one or more specified terms of the courts in the district assigned to the deceased judge. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890).

When Regular Judge Able to Hold Court.—Objection by the defendant charged with a capital felony to the authority of the judge assigned by the Governor of the State to hold a special term of the superior court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county within the district, cannot be sustained as repugnant to or unauthorized by this section. *State v. Montague*, 190 N. C. 841, 130 S. E. 838 (1925).

Emergency judges, appointed under the provisions of our statute as to Supreme and superior court judges who have retired from active service in pursuance of the provisions of our Constitution, have no jurisdiction to hear and determine, at chambers, a matter of mandamus, or when not holding a term of court assigned to them. *Dunn v. Taylor*, 186 N. C. 254, 119 S. E. 495 (1923). Const. Art. IV, sec. 11.

Under the system of rotation prescribed by this section, the judge holding the courts of a judicial district has jurisdiction to act in all matters within the jurisdiction of the superior court, and by consent of parties, such judge may, out of term and in or out of the county and out of the district, sign a judgment affecting any matter within such jurisdiction. *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942), and cases cited therein.

While this section provides for the appointment of emergency judges by statute, and our statute confers the power of their appointment upon the Governor under the restrictions of the Constitution that it may be done when the judge assigned thereto, by reason of sickness, disability or other cause, is unable to attend and hold the court, and when no other judge is available, the validity of the trial for a homi-

cide during the designated term may not be maintained by the defendant upon his affidavit filed subsequent to the trial, raising an issue as to whether the resident judge of the district was available at the time of the trial. *State v. Graham*, 194 N. C. 459, 140 S. E. 26 (1927).

The power of special and emergency judges is defined and bounded by the words "in the court which they are so appointed to hold," and if not holding, they are without authority to approve special proceedings. *Ipock v. North Carolina Joint Stock Land Bank*, 206 N. C. 791, 175 S. E. 127 (1934).

Under this section, the power and authority of special and emergency judges is defined and limited by the words "in the courts which they are appointed to hold"; and the General Assembly is without power to grant such judges jurisdiction in excess of this definite limitation. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445 (1943).

This section does not confer or authorize the legislature to confer any "in chambers" or "vacation" jurisdiction upon special judges assigned to hold a designated term of court. *Shepard v. Leonard*, 223 N. C. 110, 25 S. E. (2d) 445 (1943).

Residence Requirement Does not Confer Jurisdiction.—No jurisdiction is conferred upon a resident judge by the requirement of this section that every judge of the superior court shall reside in the district for which he is elected. *Howard v. Queen City Coach Co.*, 211 N. C. 329, 190 S. E. 478 (1937). See also, *Collins v. Wooten*, 212 N. C. 359, 193 S. E. 385 (1937).

Stated in *Greene v. Stadiem*, 197 N. C. 472, 149 S. E. 685 (1929); *Reid v. Reid*, 199 N. C. 740, 155 S. E. 719 (1930).

Cited in *State v. McGimsey*, 80 N. C. 377 (1879); *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167 (1894); *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132 (1896); *Rhyn v. Lipscomb*, 122 N. C. 650, 29 S. E. 57 (1898); *Mott v. Commissioners*, 126 N. C. 866, 36 S. E. 330 (1900); *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502 (1910); *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451 (1927); *In re Advisory Opinion*, 225 N. C. 772, 39 S. E. (2d) 217 (1945); *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948).

§ 12. **Jurisdiction of courts inferior to Supreme Court.**—The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a coordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction which does not pertain to the Supreme

Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution. (Const. 1868; Convention 1875.)

Cross References.—As to jurisdiction of superior courts, see § 7-63 and notes thereto; as to jurisdiction of justices, see §§ 7-121 et seq.; as to criminal jurisdiction of recorder's court, see § 7-190; jurisdiction in municipal court, see § 7-223; civil jurisdiction, see §§ 7-246 et seq.

As to constitutionality of Compensation Act under this section, see Art. IV, § 2 and notes thereto.

Editor's Note.—This section was added by the Convention of 1875, replacing §§ 15, 16 and 17 of the Constitution of 1868 which were as follows:

"Sec. 15. The Superior Courts shall have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction is not given to some other courts; and of all criminal actions in which the punishment may exceed a fine of fifty dollars or imprisonment for one month."

"Sec. 16. The Superior Courts shall have appellate jurisdiction of all issues of law or fact, determined by a Probate Judge or a Justice of the Peace, where the matter in controversy exceeds twenty-five dollars, and of matters of law in all cases."

"Sec. 17. The clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary and of administration, the appointment of guardians, the apprenticing of orphans, to audit the accounts of executors, administrators and guardians, and of such other matters as shall be prescribed by law. All issues of fact joined before them shall be transferred to the Superior Courts for trial, and appeals shall lie to the Superior Courts from their judgment in all matters of law."

For the law distributing this power and jurisdiction to the inferior courts, see G. S., c. 7.

In General.—The Constitution of North Carolina vests the General Assembly with power to allot and distribute in such manner as it may deem best, that portion of the power and jurisdiction of the judicial department, "which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law." *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942).

The General Assembly may create inferior courts to superior court if provision

is made for appeal to the superior court, subject to review by the Supreme Court upon further appeal, there being no conflict with other provisions of the Constitution. *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741 (1932).

Cannot Delegate Power.—The provisions of this section giving the legislature the authority to distribute that portion of the judicial power and jurisdiction of courts not pertaining to the Supreme Court, among other courts is restricted in its exercise to the legislature itself, and may not be delegated by it; and where a recorder's court has been already established, an act which authorizes the county commissioners to increase its jurisdiction in civil matters is unconstitutional. *Durham Provision Co. v. Daves*, 190 N. C. 7, 128 S. E. 593 (1925).

Under the authority of this section, the General Assembly may create courts inferior to the Supreme Court by private act or by general statute which does not delegate its discretion, and provided such inferior courts do not have substantially the same powers as those of the superior courts, and are given a less extensive jurisdiction, with provisions for appeal from such inferior court to the superior courts, so that the constitutional powers and provisions relative to the superior courts are not invaded. *Albertson v. Albertson*, 207 N. C. 547, 178 S. E. 352 (1935).

Acts Must Not Interfere with Vested Rights.—This section provides for the establishment of inferior courts by the legislature; the acts passed for such purpose must not interfere with vested rights, or the constitutional rights of other parties. *State v. Webb*, 125 N. C. 243, 34 S. E. 430 (1899).

Assembly May Abolish Courts Created by It.—The General Assembly has the power to create county, municipal, and recorders' courts, a fortiori has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court. *Efird v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in ac-

cordance with procedure and is subject to appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

The legislature has full authority to provide for appeals to the superior court by licensees whose driving licenses have been suspended or revoked by the discretionary action of the Department of Motor Vehicles. *In re Wright*, 228 N. C. 584, 46 S. E. (2d) 696 (1948). See § 20-25.

Recorder's Court.—The jurisdiction of the recorder's court is bestowed by the legislature under the authority of this section. *Jones v. Brinkley*, 174 N. C. 23, 93 S. E. 372 (1917).

Supreme Court Rules.—The Supreme Court is given, by this section of the Constitution, exclusive power to make its own rules of practice, without legislative authority to interfere, and in case of conflict the rules made by the Court will be observed. *Cooper v. Commissioners*, 184 N. C. 615, 113 S. E. 569 (1922); *State v. Ward*, 184 N. C. 618, 113 S. E. 775 (1922); *Hardy v. Heath*, 188 N. C. 271, 124 S. E. 564 (1924).

The Supreme Court is an organic branch of the State government, and not bound by acts of the legislature undertaking to regulate its rules of practice. *Herndon v. Imperial Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465 (1892).

This section gives to the General Assembly power to regulate proceedings in all the courts "below the Supreme Court."

§ 13. In case of waiver of trial by jury.—In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury. (Const. 1868.)

Cross Reference.—For a thorough treatment of waiver of jury trial, see §§ 1-184 and 1-188 and annotations thereunder.

In Civil Actions.—The right to trial by jury in civil cases may be waived. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943); *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949). As to waiver in reference cases, see note to § 1-189.

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356 (1950).

Waiver of Indictment.—Section 15-140 authorizing the waiver of an indictment in the superior court by the defendant bound over from an inferior court, is constitutional and valid. *State v. Jones*, 181 N.

but confers on the Supreme Court the exclusive power to regulate its own procedure. *Horton v. Green*, 104 N. C. 400, 10 S. E. 470 (1889).

An allotment or division of jurisdiction is within the contemplation of this section. The legislature may therefore allot inferior courts a portion of the jurisdiction of the superior court, providing also for the right of appeal. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936), quoting *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741 (1932).

Cited in *State v. Waldrop*, 63 N. C. 507 (1869); *State v. Jarvis*, 63 N. C. 556 (1869); *Wilmington v. Davis*, 63 N. C. 582 (1869); *Simpson v. Jones*, 82 N. C. 323 (1880); *State v. Moore*, 82 N. C. 660 (1880); *State v. Moore*, 104 N. C. 743, 10 S. E. 183 (1889); *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554 (1897) (dis. op.); *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899) (dis. op.); *In re Gorham*, 129 N. C. 481, 40 S. E. 311 (1901) (con. op.); *Brinkley v. Smith*, 130 N. C. 224, 41 S. E. 106 (1902); *Rockwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905); *Settle v. Settle*, 141 N. C. 553, 54 S. E. 445 (1906); *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742 (1906); *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739 (1937); *Allen v. Allemania Fire Ins. Co.*, 213 N. C. 536, 197 S. E. 200 (1938); *In re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372 (1950).

C. 543, 106 S. E. 827 (1921).

Waiver by Agreement.—Where the case on appeal recites that the parties agreed that the court might render judgment out of term and out of the district, and the judgment recites the same, appellant's contention that trial by the court had not been agreed upon cannot be sustained, since trial by jury would be impossible under the agreement that judgment might be rendered out of term and out of the district. *Odom v. Palmer*, 209 N. C. 93, 182 S. E. 741 (1935).

Manner of Waiver Controlled by Statute.—*Holmes Elec. Co. v. Carolina Power, etc., Co.*, 197 N. C. 766, 150 S. E. 621 (1929). See also, *Green Sea Lbr. Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119 (1924).

Attachment Proceedings.—In attachment and other ancillary proceedings it is competent for the court to find the facts from

the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Linberger*, 90 N. C. 159 (1884).

Special Proceeding to Establish Boundary Line.—As to defendant's waiver of jury trial by failure to tender pertinent issues, see *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Acts Constituting Waiver after Compulsory Reference.—See note to § 1-189.

Findings of Court Are Conclusive.—Where a jury trial is waived, the findings by the court upon conflicting evidence are

conclusive under this section, and are not subject to review upon appeal. *Barringer v. Wilmington Sav., etc., Co.*, 207 N. C. 505, 177 S. E. 795 (1935).

Quoted in *Burnsville v. Boone*, 231 N. C. 577, 58 S. E. (2d) 351 (1950); *Icenhour v. Bowman*, 233 N. C. 434, 64 S. E. (2d) 428 (1951).

Cited in *Lee v. Pearce*, 68 N. C. 76 (1873); *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124 (1897); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90 (1938).

§ 14. **Special courts in cities.**—The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in cities and towns, where the same may be necessary. (Const. 1868.)

Cross Reference.—See §§ 7-185 et seq.

In General.—This section was construed with Art. IV, § 2 and Art. IV, § 30 in determining the meaning of "other courts" in the case of *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

This section held to modify Art. IV, § 27 in the cases of *State v. Doster*, 157 N. C. 634, 73 S. E. 111 (1911); *Farmers' Cotton Oil Co. v. Blue Ridge Gro. Co.*, 169 N. C. 521, 86 S. E. 338 (1915).

Constitutionality of Act Establishing Court.—A legislative enactment creating a municipal court for an incorporated city or town, and conferring thereon jurisdiction in a territory extending one mile beyond its corporate limits over criminal cases concurrently cognizable in a justice's court, is valid and does not contravene this section. *State v. Brown*, 159 N. C. 467, 74 S. E. 580 (1912). See also, *Washington v. Hammond*, 76 N. C. 33 (1877); *State v. Collins*, 151 N. C. 648, 65 S. E. 617 (1909);

§ 15. **Clerk of the Supreme Court.**—The clerk of the Supreme Court shall be appointed by the Court, and shall hold his office for eight years. (Const. 1868.)

§ 16. **Election of Superior Court clerk.**—A clerk of the Superior Court for each county shall be elected by the qualified voters thereof, at the time and in the manner prescribed by law for the election of members of the General Assembly. (Const. 1868.)

Cross Reference.—See § 2-2.

When Term Begins.—The term of office of a superior court clerk, elected in August, 1878, began on the first Monday of September following. *Clarke v. Carpenter*, 81 N. C. 309 (1879).

§ 17. **Term of office.**—Clerks of the Superior Courts shall hold their offices for four years. (Const. 1868.)

Cross Reference.—See § 2-2.

Cited in *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *In re Wright's*

State v. Boyd, 175 N. C. 791, 95 S. E. 161 (1918).

Jurisdiction Confined to Misdemeanors.—This jurisdiction of courts established under this section is confined to misdemeanors. *State v. Walker*, 65 N. C. 461 (1871); *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742 (1906).

Appeal.—The legislature cannot give to courts established under this section a right of appeal direct to the Supreme Court. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

Quoted in *Durham Provision Co. v. Davis*, 190 N. C. 7, 128 S. E. 593 (1925).

Cited in *Wilmington v. Davis* 63 N. C. 582 (1869); *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167 (1894); *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473 (1900); *Singer Sewing Mach. Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921); *State v. Abernathy*, 190 N. C. 768, 130 S. E. 619 (1925); *Jones v. Standard Oil Co.*, 202 N. C. 328, 162 S. E. 741 (1932).

Cited in *Trustees v. McIver*, 75 N. C. 76 (1876); *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57 (1898); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *In re Styers' Estate*, 202 N. C. 715, 164 S. E. 123 (1932).

Estate, 200 N. C. 620, 158 S. E. 192 (1931); *In re Styers' Estate*, 202 N. C. 715, 164 S. E. 123 (1932).

§ 18. **Fees, salaries and emoluments.**—The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office. (Const. 1868.)

Cross Reference.—See §§ 138-1 et seq., and the notes thereto.

The legislature may designate the compensation of these officials prior to the beginning of their terms and it should follow that the compensation may be declared a certain amount less the income tax on that amount. See § 105-141. See 11 N. C. Law Rev. 256.

Legislature May Delegate Power to Fix Salary of County Court Judge.—The fixing of the salary of the judge of a county court is essentially a local matter which the General Assembly may delegate to the commissioners of the county, and therefore subsec. 14 of § 1, c. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth County should have the power to fix the salary of the judge of the county court, is a constitutional delegation of the power of the legislature. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

Prohibition of Salary Diminution Applies to Constitutional Courts.—The provision of this section that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment. *Efrid v. Board of Com'rs*, 219 N. C. 96, 12 S. E. (2d) 889 (1941).

Salaries Exempt from Taxation.—Where the Constitution provides that the salaries of judges shall not be diminished during their continuance in office, the salaries are exempt from taxation. In the *Matter of Taxation of Salaries of Judges*, 131 N. C. 692, 42 S. E. 970 (1902).

The constitutional restriction on the legislature not to diminish salaries of the

judges during their continuance in office is still in force, unaffected or disturbed by the amendment of 1920 (as to income tax), and though their income from other sources may be taxed, a tax on their salaries during their term of office is to diminish their income from such source in contravention of the express terms of this section. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765 (1922).

See Note in 1 N. C. Law Rev. 39.

Same—When Salaries Increased.—An increase of the salaries of the judges during a term of office is the fixing of their salary by the legislature in such amount as in its judgment is a proper compensation for their services, and an attempt by an agency of the legislature, either under actual or mistaken authority, to impose a tax thereon is an attempt to diminish these salaries during the term of office. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765 (1922).

Same—Duty of Supreme Court to Pass upon Rights.—It is the duty of the Supreme Court to pass upon the rights of one of the judges of the State as a citizen thereof, when he, in a case properly presented, denies the constitutional right of the State or one of its designated agencies, to tax his salary paid to him as one of its judges, being in contravention of this section, prohibiting the legislature from diminishing the salaries of the judges during their continuance in office. *Long v. Watts*, 183 N. C. 99, 110 S. E. 765 (1922).

Same—Compensation for Holding Extra Term.—The additional compensation of one hundred dollars given to a superior court judge for services in holding a special term is a part of his salary. *Buxton v. Commissioners*, 82 N. C. 91 (1880).

§ 19. **What laws are, and shall be, in force.**—The laws of North Carolina, not repugnant to this Constitution or to the Constitution and laws of the United States, shall be in force until lawfully altered. (Const. 1868.)

Cited in *State v. Hairston*, 63 N. C. 451 (1869); *State v. Baskerville*, 141 N. C. 311, 53 S. E. 742 (1906).

§ 20. **Disposition of actions at law and suits in equity, pending when this Constitution shall go into effect, etc.**—Actions at law and suits in equity pending when this Constitution shall go into effect shall be transferred to the courts having jurisdiction thereof, without prejudice by reason of the change; and all such actions and suits commenced before, and pending at the adoption by the General Assembly of the rules of practice and procedure herein

provided for, shall be heard and determined according to the practice now in use, unless otherwise provided for by said rules. (Const. 1868.)

Cross Reference.—As to superior courts becoming the successors of courts of equity see § 1 of this Article and notes thereto.

Applied in *Johnson v. Sedberry*, 65 N. C. 1 (1871).

§ 21. Elections, terms of office, etc., of justices of the Supreme and judges of the Superior Courts.—The justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly. They shall hold their offices for eight years. The judges of the Superior Courts, elected at the first election under this amendment, shall be elected in like manner as is provided for justices of the Supreme Court, and shall hold their offices for eight years. The General Assembly may, from time to time, provide by law that the judges of the Superior Courts, chosen at succeeding elections, instead of being elected by the voters of the whole State, as is herein provided for, shall be elected by the voters of their respective districts. (Const. 1868; Convention 1875.)

Cross Reference.—See § 7-2.

Editor's Note.—To form this section, the Convention of 1875 combined with some changes §§ 26 and 27 of the Constitution of 1868, which were as follows:

"Sec. 26. The Justices of the Supreme Court shall be elected by the qualified voters of the State, as is provided for the election of members of the General Assembly." They shall hold their offices for eight years. The Judges of the Superior Courts shall be elected in like manner, and shall hold their offices for eight years; but the Judges of the Superior Courts elected at the first election under this Constitution shall, after their election, under the superintendence of the Justices of the Supreme Court, be divided by lot into two

Cited in *Foard v. Alexander*, 64 N. C. 69 (1870); *Patton v. Shipman*, 21 N. C. 347 (1879); *Reynolds v. Reynolds*, 208 N. C. 578, 182 S. E. 341 (1935).

equal classes, one of which shall hold office for four years, the other for eight years.

"Sec. 27. The General Assembly may provide by law that the Judges of the Superior Courts, instead of being elected by the voters of the whole State as is herein provided for, shall be elected by the voters of their respective district."

Applied in *Ingle v. State Board of Elections*, 226 N. C. 454, 38 S. E. (2d) 566 (1946).

Cited in *Trustees v. McIver*, 72 N. C. 76 (1875); *Opinion of Judges*, 114 N. C. Appx. 992 (1894); *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57 (1898); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905).

§ 22. Transaction of business in the Superior Courts.—The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury. (Const. 1868.)

Does Not Apply to Terms of Courts.—This section must be construed in connection with § 11 of this article, and does not apply to the terms of courts and matters connected therewith. *Delafield v. Mercer Construction Co.*, 115 N. C. 21, 20 S. E. 167 (1894).

Court of Clerk Not Included.—The phrase "superior court" in this section does not mean the court of the clerk. *McAdoo v. Benbow*, 63 N. C. 461 (1869).

Rendition of Judgment after Term.—Where the issues of fact had been disposed of by a consent verdict, and the court having jurisdiction of the case, clearly, and

being always open, there is nothing in this clause of the Constitution which forbids the rendition of a judgment upon verdict after the expiration of the term, as well as during the term. *Harrell v. Peebles*, 79 N. C. 26 (1878). See, also, *Shackelford v. Miller*, 91 N. C. 181 (1884).

Quoted in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942).

Cited in *Foard v. Alexander*, 64 N. C. 69 (1870); *Keener v. Finger*, 70 N. C. 35 (1874) (dis. op.); *Blue v. Blue*, 79 N. C. 69 (1878); *Mott v. Commissioners*, 126 N. C. 866, 36 S. E. 330 (1900); *Marshall v. Kemp*, 190 N. C. 491, 130 S. E. 193 (1925).

§ 23. Solicitors and solicitorial districts.—The State shall be divided into twenty-one solicitorial districts, for each of which a solicitor shall be chosen by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf

of the State in all criminal actions in the Superior Courts, and advise the officers of justice in his district. But the General Assembly may reduce or increase the number of solicitor districts, which need not correspond to, or be the same as, the judicial districts of the State. (Const. 1868; 1941, c. 261.)

Editor's Note.—Section 29 of Article IV of the Constitution of 1868 read as follows prior to its amendment pursuant to c. 261 of the Public Laws of 1941 ratified by vote of the people in November, 1942: "A solicitor shall be elected for each judicial district, by the qualified voters thereof, as is prescribed for members of the General Assembly, who shall hold office for the term of four years, and prosecute on behalf of the State, in all criminal actions in the superior courts, and advise the officers of justice in his district."

Public Laws 1927, c. 99, Public Laws 1929, c. 140, and Public Laws 1931, c. 367, proposed amendments to this section which were defeated.

§ 24. Sheriffs and coroners.—In each county a sheriff and coroner shall be elected by the qualified voters thereof as is prescribed for members of the General Assembly, and shall hold their offices for a period of four years. In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for a period of two years. When there is no coroner in a county, the clerk of the Superior Court for the county may appoint one for special cases. In case of a vacancy existing for any cause in any of the offices created by this section, the commissioners of the county may appoint to such office for the unexpired term. (Const. 1868; 1937, c. 241.)

Cross References.—As to sheriffs and constables, see §§ 151-1, 162-1. As to coroners, see § 152-1.

Editor's Note.—The effect of the amendment adopted pursuant to c. 241 of the Public Laws of 1937 was to change the terms of office of the sheriff and coroner from two years to four years.

A sheriff occupies a constitutional public office, and a sheriff takes office, not by contract, but by commission subject to the power of the legislature to fix fees and compensation for which the Constitution does not provide. *Borders v. Cline*, 212 N. C. 472, 193 S. E. 826 (1937).

The term of office of sheriffs-elect begins on the first Monday in December next ensuing their election, and the constitutional amendment changing the term of office of sheriffs from two to four years, approved by the voters in the election of 1938, being in effect on the first Monday in December, the date of the beginning of the term of the sheriffs elected in the 1938 election, their term of office is four years in accordance with the amendment then in effect. *Freeman v. Cook*, 217 N. C. 63, 6 S. E. (2d) 894 (1940).

Deputy Sheriffs.—While the office of sheriff is provided for by this section, the right of the sheriff to appoint deputies is

Issuance of Capias.—A solicitor is the most responsible officer of the court and has been spoken of as "its right arm." He is a constitutional officer and his duties are presented by the Constitution. The court has not authority to give the solicitor discretion as to when a capias shall issue, this not being within his duties. *State v. McAfee*, 189 N. C. 320, 127 S. E. 204 (1925); *State v. Carden*, 209 N. C. 404, 183 S. E. 898 (1936).

Cited in *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57 (1898); *Wilson v. Jordan*, 124 N. C. 683, 33 S. E. 139 (1899); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *State v. Palmore*, 189 N. C. 538, 127 S. E. 599 (1925).

a common law right and deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. *Gowens v. Alamance County*, 216 N. C. 107, 3 S. E. (2d) 339 (1939).

Intention Was Not to Restrict Powers of Constables.—The intention of those who drafted this section, when they wrote, "In each township there shall be a constable elected in like manner by the voters thereof, who shall hold his office for two years," was not to restrict the powers and duties of the constables to the township in which they were elected, but to intersperse the constables throughout every part of the county. *State v. Corpening*, 207 N. C. 805, 178 S. E. 564 (1935).

Vacancy after Expiration of Term.—Where a constable was elected in 1875 for two years, and no election was had in 1877 a vacancy occurred which the county commissioners had the power to fill under this section. *State v. McLure*, 84 N. C. 153 (1881).

Where, before the expiration of his term a sheriff is re-elected but dies before the expiration of that term, the commissioners are entitled to appoint someone to fill the

vacancy for the remainder of the first term and at the beginning of the next term should fill by appointment that vacancy also. *People v. Smith*, 81 N. C. 304 (1879).
Cited in *Boyle v. New Bern*, 64 N. C.

664 (1870); *Loftin v. Sowers*, 65 N. C. 251 (1871); *State v. Sigman*, 106 N. C. 728, 11 S. E. 520 (1890); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905).

§ 25. Vacancies.—All vacancies occurring in the offices provided for by this article of the Constitution shall be filled by the appointment of the Governor, unless otherwise provided for, and the appointees shall hold their places until the next regular election for members of the General Assembly that is held more than thirty days after such vacancy occurs, when elections shall be held to fill such offices: Provided, that when the unexpired term of any of the offices named in this article of the Constitution in which such vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next general election, the Governor shall appoint to fill said vacancy for the unexpired term of said office. If any person, elected or appointed to any of said offices, shall neglect and fail to qualify, such offices shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of said offices shall hold until their successors are qualified. (Const. 1868; Convention 1875; 1951, c. 1082; 1953, c. 1033, s. 2.)

Editor's Note.—This section is § 31 of the Constitution of 1868 as amended by the Convention of 1875 by the addition of the latter portion beginning with the words "for members."

This section was amended by vote at the general election of November 4, 1952.

The amendment proposed by Session Laws 1953, c. 1033, s. 2, and adopted by vote of the people at the general election held November 2, 1954, added the proviso to the first sentence.

Limitation on Term Appointed For.—The provisions added to the original section were manifestly made, in view of the decision of the Supreme Court in *People v. Wilson*, 72 N. C. 155 (1875), and were intended to limit the tenure of the appointees of the chief executive, whether to fill a vacancy caused by the death or resignation of an incumbent, or by the refusal of a person elected to qualify, to the time intervening between the making of the appointment and the next regular election for members of the General Assembly, together with a reasonable interval for qualification. *State v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895).

Concurrence of Senate Unnecessary.—The general appointing power is given to the Governor with the concurrence of the Senate; the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the legislature is in session or not, and without calling the Senate. *Nichols v. McKee*, 68 N. C. 429 (1873).

§ 26. Terms of office of first officers.—The officers elected at the first election held under this Constitution shall hold their offices for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this Constitution by the Congress of the United States. (Const. 1868.)

Meaning of "Until the Next Regular Election."—The words "until the next regular election," in this section mean until the next regular election for the office in which a vacancy has occurred. *People v. Wilson*, 72 N. C. 155 (1875).

Refusal of Judge to Accept Office.—Where a person was elected judge of the superior court and declined to accept the office and never qualified there was a vacancy within the meaning of this section and the Governor had the power to fill such vacancy by appointing a successor. *People v. Wilson*, 72 N. C. 155 (1875).

Constables Not Included.—The provision in this section that "all incumbents of said offices shall hold until their successors are qualified," does not embrace the office of constable. *State v. McLure*, 84 N. C. 153 (1881).

Associate Justice of Supreme Court.—This section of the Constitution requires that vacancies in the office of associate justice of the Supreme Court shall be filled by the appointment of the Governor, and that "the appointees shall hold their places until the next regular election for members of the General Assembly, when elections shall be held to fill such offices." In re *Advisory Opinion*, 232 N. C. 737 (appx.), 61 S. E. (2d) 529 (1950).

Cited in *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247 (1890); *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895); *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905); *State v. Baskerville*, 141 N. C. 811, 53 S. E. 742 (1906).

Time of First Election.—The next regular election for members of the General Assembly is to be held on the first Thursday in August 1870. Legislative Term of Office. 64 N. C. Appx. 787 (1870).

Cited in *Loftin v. Sowers*, 65 N. C. 251 (1871); *People v. McKee*, 65 N. C. 257 (1871); *Opinion of Judges*, 114 N. C. Appx. 922 (1894).

§ 27. **Jurisdiction of justices of the peace.**—The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to the justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. When an issue of fact shall be joined before a justice, on demand of either party thereto he shall cause a jury of six men to be summoned, who shall try the same. The party against whom the judgment shall be rendered in any civil action may appeal to the Superior Court from the same. In all cases of a criminal nature the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew. In all cases brought before a justice, he shall make a record of the proceedings, and file the same with the clerk of the Superior Court for his county. (Const. 1868; Convention 1875.)

Cross References. — For a thorough treatment of the civil jurisdiction of justices of the peace, see annotations under §§ 7-121 and 7-122. As to their criminal jurisdiction, see annotations under § 7-129. As to punishment for assault, see annotations under § 14-33.

Editor's Note.—This section is § 33 of the Constitution of 1868 with the changes made by the Convention of 1875.

Jurisdiction of Justice.—A justice of the peace can only exercise such powers as are conferred upon him by this section of the Constitution, and the statutes in harmony therewith. His jurisdiction is special, not general, and his authority is not to be enlarged by principles of law applicable to courts of general jurisdiction; nor can he adopt methods of procedure not strictly allowed by law. *State v. Jones*, 100 N. C. 438, 6 S. E. 655 (1888); *Hopkins v. Barnhardt*, 223 N. C. 617, 27 S. E. (2d) 644 (1943).

Same—Jurisdiction Concurrent. — The jurisdiction conferred upon justices of the peace to try civil actions, where the property in controversy does not exceed fifty dollars, is concurrent with that possessed by the superior court. *Montague v. Mial*, 89 N. C. 137 (1883).

Same—Waiver of Objection by Appearance. — Where the defendant is sued on two accounts before a justice of the peace separately stated, each appearing to be in amount coming within his jurisdiction, but together exceeding it, by his appearing and acknowledging his liability for the sum total he thereafter waives his right on appeal to set up the defense that in fact

the two accounts were but one. *Honig v. Hawa*, 194 N. C. 208, 139 S. E. 222 (1927).

Section Does Not Embrace Damages. —The provisions in this section, authorizing the General Assembly to give the justices of the peace "jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars," is not a restriction, even by implication, to forbid conferring jurisdiction where damages and not property is in controversy. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880 (1898).

Contempt.—The constitutional restriction imposed by this section applies only to the administration of the law in the trial of criminal cases, and were not intended to affect the inherent or statutory powers possessed by these courts and conferred upon them as necessary to enable them to transact business and maintain a proper respect for their authority. *C. S.*, 981, 983. *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922).

Criminal Appeals. — The clause of this section providing that in criminal cases in a justice's court, "the party against whom judgment is given may appeal to the superior court, where the matter shall be heard anew," is for the benefit only of the party accused. *State v. Powell*, 86 N. C. 640 (1882).

Appeal May Be Direct to Superior Court.—It is not required that an appeal from a judgment of the justice of the peace be first taken to the general county court of the county, but the appeal may be taken directly to the superior court. *Mc-*

Neeley v. Anderson, 206 N. C. 481, 174 S. E. 305 (1934).

Trial in the superior court is on the original warrant without indictment. State v. Thomas, 236 N. C. 454, 73 S. E. (2d) 283 (1952).

"Thirty Days."—"Thirty days," as used in this section, is not synonymous with "one month": It may be more or less. State v. Upchurch, 72 N. C. 146 (1875).

Legislature Cannot Confer Justice's Powers on Mayor.—The legislature cannot confer on the mayor of a town the judicial powers of a justice of the peace in civil actions. This section confers exclusive original jurisdiction on justice of the peace wherever the sum demanded does not exceed two hundred dollars. Edenton v. Wool, 65 N. C. 379 (1871). But see Editor's Note, *supra*.

Establishment of Special Courts.—This section should be construed with §§ 12 and 14, and the latter sections modify the first named so as to authorize and empower the legislature to establish special courts in cities and towns and confer jurisdiction upon them without regard to its provisions and limitations. State v. Baskerville, 141 N. C. 811, 53 S. E. 742 (1906); Farmers Cotton Oil Co. v. Blue Ridge Gro. Co., 169 N. C. 521, 86 S. E. 338 (1915). See also, State v. Doster, 157 N. C. 634, 73 S. E. 111 (1911).

Justice's Courts Are Not Courts of Record.—Justice's courts are not courts of record. Williams v. Bowling, 111 N. C. 295, 16 S. E. 176 (1892).

In summary proceeding in ejectment, based upon affidavit that defendant had entered into possession of house and lot and refused to vacate the house, justice of

peace had no jurisdiction in absence of allegation that relationship of landlord and tenant existed and that defendant was holding over. Howell v. Branson, 226 N. C. 264, 37 S. E. (2d) 687 (1946).

Applied in Froelich v. Southern Exp. Co., 67 N. C. 1 (1872); State v. Vermington, 71 N. C. 264 (1874); State v. Dudley, 83 N. C. 660 (1880); Singer Sewing Machine Co. v. Burger, 181 N. C. 241, 107 S. E. 14 (1921).

Cited in Wilmington v. Davis, 63 N. C. 582 (1869); State v. Deaton, 65 N. C. 496 (1871); Froelich v. Southern Exp. Co., 67 N. C. 1 (1872); State v. Perry, 71 N. C. 522 (1874); State v. Buck, 73 N. C. 630 (1875); Pullen v. Green, 75 N. C. 215 (1876); State v. Threadgill, 76 N. C. 17 (1877); Heyer v. Beatty, 76 N. C. 28 (1877); London v. Headen, 76 N. C. 72 (1877); State v. Edney, 80 N. C. 360 (1879); State v. Moore, 82 N. C. 660 (1880); State v. Watts, 85 N. C. 517 (1881); State v. Crook, 91 N. C. 536 (1884); Durham v. Wilson, 104 N. C. 595, 10 S. E. 683 (1889); State v. Burton, 113 N. C. 655, 18 S. E. 657 (1893); State v. Ivie, 118 N. C. 1227, 24 S. E. 539 (1896); McDonald v. Morrow, 119 N. C. 66, 26 S. E. 132 (1896); Wilson v. Jordan, 124 N. C. 683, 3 S. E. 39 (1899); Mott v. Commissioners, 126 N. C. 866, 36 S. E. 330 (1900); State v. Lytle, 138 N. C. 738, 51 S. E. 66 (1905); Higgs-Loft Furniture Co. v. Clark, 191 N. C. 369, 131 S. E. 731 (1926); Roebuck v. Short, 196 N. C. 61, 144 S. E. 515 (1928); Miles v. Powell, 205 N. C. 30, 169 S. E. 828 (1933); State v. Wilkes, 233 N. C. 645, 65 S. E. (2d) 129 (1951).

§ 28. Vacancies in office of justices.—When the office of justice of the peace shall become vacant otherwise than by expiration of the term, and in case of a failure by the voters of any district to elect, the clerk of the Superior Court for the county shall appoint to fill the vacancy for the unexpired term. (Const. 1868.)

Conferring Authority on Governor.—A statute, conferring authority upon the Governor to fill vacancies in the office of justices of the peace, caused by the failure of the appointees of the General Assembly to qualify within the time therein prescribed, is not unconstitutional. Gilmer v. Holton, 98 N. C. 26, 3 S. E. 812 (1887).

Appointments Must Be Made by Clerk of Superior Court.—An examination of the

Constitution reveals the fact that the only power or duty of a clerk of the superior court mentioned therein is in this section, which provides that vacancies in the office of justice of the peace shall be filled by appointment by the clerk of the superior court, and this function of the office, we apprehend, must still be performed by the clerk alone. In re Barker, 210 N. C. 617, 188 S. E. 205 (1936).

§ 29. Vacancies in office of Superior Court clerk.—In case the office of clerk of a Superior Court for a county shall become vacant otherwise than by the expiration of the term, and in case of a failure by the people to elect, the judge of

the Superior Court for the county shall appoint to fill the vacancy until an election can be regularly held. (Const. 1868.)

Term of Appointee.—Under this section the appointee of the judge holds only until the next election at which members of the General Assembly are chosen. *Rodwell*

v. Rowland, 137 N. C. 617, 50 S. E. 319 (1905).

Cited in *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319 (1905).

§ 30. Officers of other courts inferior to Supreme Court.—In case the General Assembly shall establish other courts inferior to the Supreme Court, the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may from time to time prescribe, and they shall hold their offices for a term not exceeding eight years. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875.

Legislature May Elect Clerk.—Where a criminal court is created the legislature could either elect the clerk itself or devolve his election upon the people, or other constituency. *White v. Murray*, 126 N. C. 153, 35 S. E. 256 (1900).

May Provide for Election of Officers of County Courts.—Under the provisions of this section, the legislature is authorized to provide for the election of officers and clerks of general county courts established by it, such courts being "other courts inferior to the Supreme Court" referred to in Art. IV, §§ 2 and 14. *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

The word "election" does not necessarily import a popular election by the qualified

electors, and the delegation of the power to elect judges of the general county courts to the county commissioners is not an unlawful delegation of legislative power, this section providing that they "shall be elected in such manner as the General Assembly may prescribe." *Meador v. Thomas*, 205 N. C. 142, 170 S. E. 110 (1933).

Deprivation of Inferior Judge's Office.—Where the legislature has abolished a court inferior to the superior court of this State, the incumbent judge takes subject to this legislative right, and cannot successfully maintain that during the term of his office he has been thus deprived of his right of property guaranteed him by this section. *Queen v. Comm'rs*, 193 N. C. 821, 138 S. E. 310 (1927).

Cited in *Ewart v. Jones*, 116 N. C. 570, 21 S. E. 787 (1895).

§ 31. Removal of judges of the various courts for inability.—Any judge of the Supreme Court, or of the Superior Courts, and the presiding officers of such courts inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability, upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875.

Cited in *People v. Smith*, 81 N. C. 304 (1879).

§ 32. Removal of clerks of the various courts for inability.—Any clerk of the Supreme Court, or of the Superior Courts, or of such courts, inferior to the Supreme Court as may be established by law, may be removed from office for mental or physical inability; the clerk of the Supreme Court by the judges of said court, the clerks of the Superior Courts by the judge riding the district, and the clerks of such courts inferior to the Supreme Court as may be established by law by the presiding officers of said courts. The clerk against whom proceedings are instituted shall receive notice thereof, accompanied by a copy of the cause alleged for his removal, at least ten days before the day appointed to act thereon, and the clerk shall be entitled to an appeal to the next term of the Superior Court and thence to the Supreme Court as provided in other cases of appeals. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875.

Quoted in *Stephens v. Dowell*, 208 N. C. 555, 181 S. E. 629 (1935), wherein city

commissioners were held without authority to dismiss clerk of municipal court without notice and opportunity to be heard.

§ 33. **Amendments not to vacate existing offices.**—The amendments made to the Constitution of North Carolina by this convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled, or held, by virtue of any election or appointment under the said Constitution and the laws of the State made in pursuance thereof. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875.

Legislature May Diminish Emoluments.—The legislature has the constitutional power to diminish the emoluments of an office by the transfer of a portion of its

duties to another office, and in such case the incumbent must submit. *State v. Gales*, 77 N. C. 283 (1877).

Cited in Opinion of Judges, 114 N. C. Appx. 922 (1894).

ARTICLE V

REVENUE AND TAXATION

§ 1. **Capitation tax; exemptions.**—The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed two dollars, and cities and towns may levy a capitation tax which shall not exceed one dollar. No other capitation tax shall be levied. The commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special cases on account of poverty or infirmity. (Const. 1868; Ex. Sess. 1920, c. 93.)

Cross Reference.—For article on property and poll tax limitations under this section and § 6 of this article, see 18 N. C. Law Rev. 275.

Editor's Note.— This section was changed pursuant to c. 93, Public Laws of 1920, extra session, from § 1 in the Constitution of 1868 which was as follows: "The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each, to the tax on property value at three hundred dollars in cash. The commissioners of the several counties may exempt from capitation tax in special cases, on account of poverty and infirmity, and the State and county capitation tax combined shall never exceed two dollars on the head."

Effect of Amendment on Bonds Purchased Prior Thereto.— The amendment will not have the effect of relating back and invalidating taxation on the polls in a school district which had met the constitutional requirement before the amendment had become the law; for such would have the effect of impairing vested rights existing under a valid contract. *Hammond v. McRae*, 182 N. C. 747, 110 S. E. 102 (1921); *Board v. Bray Bros. Co.*, 184 N. C. 484, 115 S. E. 47 (1922).

The amendment will invalidate taxation of the polls in a township where the electors therein voted for the levy of a poll tax of six dollars in addition to the regular poll tax of two dollars although the election was held and the tax in question was voted

before the amendment of this section. *Dixon v. Board of County Com'rs*, 200 N. C. 215, 156 S. E. 852 (1931).

The Constitution does not require that a capitation tax shall be levied for ordinary State and county purposes. *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890).

Taxation for State and County Purposes Limited.—Taxation, for State and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. *French v. Board*, 74 N. C. 692 (1876); *Southern R. Co. v. Board*, 148 N. C. 220, 61 S. E. 690 (1908).

No Limit on Taxation for Payment of Debts.—There is no limitation, however, of the power of taxation, upon either State or county, for the payment of their lawful debts, created before the adoption of the Constitution. *Brothers v. Commissioners*, 70 N. C. 726 (1874); *French v. Board*, 74 N. C. 692 (1876).

When Limitation May Be Exceeded.— Without special legislation a county may not authorize a levy of tax, exceeding the constitutional limitation upon the poll or property, to provide for a sinking fund to pay the principal and interest on bonds to be issued by it for highway purposes. It is otherwise as to a six months' period of public schools required by Article IX, § 3. *Bennett v. Board*, 173 N. C. 625, 92 S. E. 603 (1917). See, also, *Ballou v. Board*, 182 N. C. 473, 109 S. E. 628 (1921).

The limitation as to the levy on poll tax

prescribed by this section, does not apply to the levy of a special tax by a county for road purposes, authorized by the legislature submitted to the vote of the electors of the county and duly approved by them. *Moose v. Board*, 172 N. C. 419, 90 S. E. 441 (1916).

Section Does Not Apply to Municipal Corporations.—The restriction that the State and county tax combined shall never exceed \$2 on the poll, applies only to State and county taxation, and not to municipal or quasi-public corporations other than counties. *Perry v. Commissioners*, 148 N. C. 521, 62 S. E. 608 (1908).

Cited in *University R. Co. v. Holden*, 63

N. C. 410 (1869) (con. op.); *Street v. Board*, 70 N. C. 664 (1874); *Clifton v. Wynne*, 80 N. C. 146 (1879); *Cromartie v. Commissioners*, 85 N. C. 211 (1881); *Parker v. Board*, 104 N. C. 166, 10 S. E. 137 (1889); *Redmond v. Tarboro*, 106 N. C. 122, 10 S. E. 845 (1890); *Board v. Commissioners*, 137 N. C. 310, 49 S. E. 353 (1904); *Pace v. Raleigh*, 140 N. C. 65, 52 S. E. 277 (1905); *Kitchen v. Wood*, 154 N. C. 565, 70 S. E. 995 (1911); *Ingram v. Johnson*, 172 N. C. 676, 90 S. E. 805 (1916); *Parvin v. Board*, 177 N. C. 508, 99 S. E. 432 (1919); *Director General v. Commissioners*, 178 N. C. 449, 101 S. E. 91 (1919).

§ 2. Application of proceeds of State and county capitation tax.—The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose. (Const. 1868.)

Section Only Applies to General Purposes.—An objection that an act applies a part of the county capitation tax to the use of the public roads in violation of this section, which appropriates the State and county poll tax "to the purposes of education and the support of the poor," can not be sustained, as that provision applies to the levy of taxation for general, not special, purposes. *Crocker v. Moore*, 140 N. C. 429, 53 S. E. 229 (1906).

Percentage Devoted to School Purpose.—Not less than 75 per cent of the capitation tax must be devoted to school purposes. *Board v. Board*, 127 N. C. 263, 37 S. E. 261 (1900).

Power of Legislature as to Indigents.—

It is the exclusive right of the legislature to determine and declare by whom and how the indigent of the State entitled to support shall be ascertained, and from what fund and by whom allowances for their support shall be made. *Board v. Commissioners*, 113 N. C. 379, 18 S. E. 661 (1893).

Cited in *Parker v. Board*, 104 N. C. 166, 10 S. E. 137 (1889); *Redmond v. Tarboro*, 106 N. C. 122, 10 S. E. 845 (1890); *Board v. Commissioners*, 137 N. C. 310, 49 S. E. 353 (1904); *County Board v. Board*, 150 N. C. 116, 63 S. E. 724 (1909); *Waystaff v. Central Highway Comm.*, 177 N. C. 354, 99 S. E. 1 (1919) (con. op.).

§ 3. State taxation.—The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended or contracted away. Taxes on property shall be uniform as to each class of property taxed. Taxes shall be levied only for public purposes, and every act levying a tax shall state the object to which it is to be applied. The General Assembly may also tax trades, professions, franchises, and incomes: Provided, the rate of tax on income shall not in any case exceed ten per cent (10%), and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to wit: for a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than \$2,000; to all other persons not less than \$1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed. (Const. 1868; 1917, c. 119; Ex. Sess. 1920, c. 93; Ex. Sess. 1924, c. 115; 1935, c. 248.)

Editor's Note.—Section 3 of the Constitution of 1868 read as follows: "Sec. 3 Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and, also, all real and personal property according to its true value in money. The General Assembly may also tax trades,

professions, franchises, and incomes, provided that no income shall be taxed when the property, from which the income is derived, is taxed."

The first amendment was made pursuant to c. 119, Public Laws of 1917, by the addition of the following proviso after the word "money": "Provided, notes, mort-

gages, and all other evidence of indebtedness given in good faith for the purchase price of a home, when said purchase price does not exceed three thousand dollars, and said notes, mortgages, and other evidence of indebtedness shall be made to run for not less than five nor more than twenty years, shall be exempt from taxation of every kind: Provided, that the interest carried by such notes and mortgages shall not exceed five and one-half per cent."

The second amendment was made pursuant to c. 93, Public Laws of 1920, extra session, by the repeal of the clause "provided that no income shall be taxed when the property, from which the income is derived, is taxed" and the addition of the proviso beginning with the words "Provided, the rate of tax on incomes."

The third amendment was made pursuant to c. 115, Public Laws of 1924, extra session. The proviso added in 1917 was repealed and for it was substituted the three provisos now appearing as the second paragraph of § 3. Chapter 248, Public Laws of 1935, repealed the entire section except for the last sentence and provisos, and substituted the present first three sentences in lieu thereof.

For a brief discussion of this section, see 25 N. C. Law Rev. 504.

This section provides that the General Assembly may tax trades and professions; and while this clause does not expressly apply the rule of uniformity to taxes imposed on trades and professions it has been judicially determined that the rule applies to these taxes as well as to taxes on property. *Roach v. Durham*, 204 N. C. 587, 169 S. E. 149 (1933).

The word "trades" as used in this section means any employment or business engaged in for gain or profit. *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

The purchase of horses or mules for the purpose of resale, at wholesale or retail, is a trade within the meaning of this section, and the imposition of a license tax on such trade is valid. *Nesbitt v. Gill*, 227 N. C. 174, 41 S. E. (2d) 646 (1947).

The power to levy taxes is the exclusive province of the legislature, and the superior court has no jurisdiction of an action, the nature and purpose of which is to discover, to list and assess for taxation, property which has escaped taxation. *Henderson County v. Smyth*, 216 N. C. 421, 5 S. E. (2d) 136 (1939).

Taxes can be levied only for public purposes. *Palmer v. Haywood County*, 212

N. C. 284, 193 S. E. 668, 113 A. L. R. 1195 (1937).

There can be no lawful tax which is not levied for a public purpose. *Nash v. Tarboro*, 227 N. C. 283, 42 S. E. (2d) 209 (1947).

Meaning of "Public Purpose." — A tax or an appropriation is for a public purpose if it is for the support of the government, or for any of the recognized objects of the government. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500. As to what are "public purposes," for which a municipality may levy taxes, see 25 N. C. Law Rev. 504.

"Public purpose, as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion." *Nash v. Tarboro*, 227 N. C. 283, 42 S. E. (2d) 209 (1947), quoting *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. (2d) 803 (1946).

The fact that moneys are paid to an individual does not affect the character of the expenditure, since the object of the expenditure and not to whom paid determines whether it is for a public purpose. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500.

What May Be Taxed. — All taxes must be levied upon the poll or upon property; or, in the nature of a license, upon "trades, professions, franchises and incomes." *State v. Ballard*, 122 N. C. 1024, 29 S. E. 899 (1898).

Under this section all property, real and personal, is subject to taxation, unless exempt from taxation by the Constitution. *Hardware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449 (1936).

What "Property" Includes. — It seems that the word "property" is used by the Constitution in a sense to make it exclude "money, credits, investments in bonds," etc. *Pullen v. Raleigh*, 68 N. C. 451 (1873).

The words "all real and personal property," in this section are to be taken in their most comprehensive legal import, and include every kind of real and personal property whatever, not excepting the several

classes of personal property expressly mentioned in the first clause of the section. *Redmond v. Commissioners*, 106 N. C. 123, 10 S. E. 845 (1890).

This section includes both tangible property, and taxes on "trades, professions, franchises, and incomes." *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701 (1928).

Property Is Taxable without Regard to Ownership.—In *Latta v. Jenkins*, 200 N. C. 255, 156 S. E. 857 (1931), it is said: By virtue of the provisions of this section, all property, real and personal, in this State, is subject to taxation, in accordance with a uniform rule, under laws which the General Assembly is required by the Constitution to enact, without regard to its ownership, and without regard to the purposes for which specific property is held, unless exempted by or under the provisions of § 5 of this article. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805 (1933).

Equality in Levying of Excise Tax. — Section 11, c. 127, Public Laws 1937, cannot be construed as imposing an excise tax upon the receipt of proceeds of life insurance policies issued to the beneficiary who retains all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies issued to the insured or in which he retains some incidents of ownership, since such excise tax would have to be computed in accordance with graduated scale on the basis of the amount of insurance together with the value of the estate or the legacy or the distributive share, and thus would produce inequality in the levying of such excise tax in contravention of this section. *Wachovia Bank, etc., Co. v. Maxwell*, 221 N. C. 528, 26 S. E. (2d) 840 (1942).

The tax on income, imposed by the revenue acts of this State, is not a tax on property, within the meaning of the requirement of this section that property shall be taxed according to its true value in money. *State v. Kent-Coffey Mfg. Co.*, 204 N. C. 365, 168 S. E. 397 (1933).

Under this section which limits income taxes to a maximum of six per cent, any attempted increase in productivity of this field of revenue had to come at the expense of the small income man, and this is what has happened. See 11 N. C. Law Rev. 255.

Tax Must Be Uniform. — This section imperatively requires that all real and personal property be taxed by a uniform rule according to its true value in money. *Po-*

comeke Guano Co. v. Biddle, 158 N. C. 212, 73 S. E. 996 (1912).

The only constitutional restriction upon the power of the legislature in classifying vocations and laying a tax of a different amount upon the different occupations is that the tax shall be uniform upon all in each classification. *Dalton v. Brown*, 159 N. C. 175, 75 S. E. 40 (1912).

Chapter 30, Public Laws of 1937, providing for the licensing of dry cleaners and pressers by the commission set up in the act, construed in *pari materia* with c. 337, Public Laws of 1939, exempting from the provision of the act fourteen counties of the State, is held unconstitutional, whether the license fee therein imposed in addition to the license prescribed by the revenue act be considered a State tax or not, since it places a burden upon those engaged in the specified business in a portion of the State which is not imposed upon those engaged in the same business in other parts of the State without any reasonable basis of classification, and therefore discriminates within the class and accords a privilege and immunity to some not accorded to others. *State v. Harris*, 216 N. C. 746, 6 S. E. (2d) 854, 128 A. L. R. 658 (1940).

When Tax Is Uniform. — A tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed. *Gatlin v. Tarboro*, 78 N. C. 119 (1878); *State v. Danenberg*, 151 N. C. 718, 66 S. E. 301, 26 L. R. A. (N. S.) 890 (1909); *Leonard v. Maxwell*, 216 N. C. 89, 3 S. E. (2d) 316 (1939).

A tax is uniform and consistent with this section when it is equal upon all persons in the same class, and hence a tax imposed on hotel keepers, which exempts from taxation those whose yearly receipts are less than \$1,000, is not unconstitutional. *Cobb v. Commissioners*, 122 N. C. 307, 30 S. E. 338 (1898).

Municipal Airport Is Public Purpose.—The construction and maintenance of a municipal airport for a city of more than ten thousand inhabitants, engaged in many industries and pursuits, is for a public purpose within the meaning of this section, and no right guaranteed by the 14th Amendment to the federal Constitution will be injuriously affected thereby. *Turner v. Reidsville*, 224 N. C. 42, 29 S. E. (2d) 211 (1944); *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

A tax imposed to raise moneys for **Employees' Retirement Fund** is for a public purpose and the act provides benefits to thousands of teachers and employees of this State without discrimination, and

therefore the tax does not offend this section. *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

The construction, maintenance and operation of a public hospital by a county is a public purpose for which funds may be provided by taxation under this section. *Trustees of Watts Hospital v. Board of Com'rs*, 231 N. C. 604, 58 S. E. (2d) 696 (1950).

An expenditure by a municipality for special training of a police officer is for a public purpose. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500.

The cost of constructing and maintaining a hotel is not a public purpose, within the meaning of this section. *Nash v. Tarboro*, 227 N. C. 283, 42 S. E. (2d) 209 (1947).

Whom Tax on Occupation Must Reach.—A tax upon an occupation must reach all who follow it—all of a class, either of persons or things. *Worth v. Petersburg R. Co.*, 89 N. C. 301 (1883).

Reasonableness of Classification.—See notes under §§ 105-98, 105-118.

The power of the legislature to classify subjects for the purpose of taxation is flexible, and the reasonableness of any classification will generally be construed with reference to the facts of the particular case, the predominant limitation on the power to classify being that the classification must be reasonable and not arbitrary and must rest upon some substantial difference between the classes, and that the burden must be equal upon all in the same class, and a special classification by statute of wholesale grocers operating a cold storage chamber of some character for the preservation of fresh meats, as distinguished from those who handled only canned meats not requiring refrigeration, is a reasonable classification imposing an equal burden upon all of the class, and is constitutional and valid. *Southern Grain Provision Co. v. Maxwell*, 199 N. C. 661, 155 S. E. 557 (1930).

The classification must not be arbitrary or unjust, but must be based on substantial and reasonable differences between such classes. *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N. C. 145, 144 S. E. 701 (1928).

While the provisions of this section do not expressly apply to taxes on trades, professions, franchises and incomes, it does apply to such taxes from its inherent justice, but the General Assembly has the power to classify trades, professions, franchises and incomes for taxation where the

classifications are reasonable and not arbitrary and are based upon substantial differences between the classes and apply equally to all within the classification. *Great A. & P. Tea Co. v. Maxwell*, 199 N. C. 433, 154 S. E. 838 (1930).

The classification of subjects for taxation must be based upon reasonable distinctions and must apply equally to all within each class defined. *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. (2d) 19 (1940). This rule applies to municipal corporations taxing trades or professions. *Kenny Co. v. Brevard*, 217 N. C. 269, 7 S. E. (2d) 542 (1940).

Wide Latitude Accorded Taxing Authorities.—The power to classify subjects of taxation carries with it the discretion to select them, and a wide latitude is accorded taxing authorities, particularly in respect of occupational taxes, under the power conferred by this section of the Constitution of North Carolina. *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N. C. 307, 59 S. E. (2d) 819 (1950).

Classification of Mechanical Vending Devices.—While the legislature may not classify mechanical vending machines in accordance with the kinds of merchandise sold by such machines in levying privilege taxes on their use, since the manner in which the article is sold is the same in all instances and the economic advantages in this method of sale may be regarded as the same, it may classify mechanical vending devices for the purpose of taxation and make a further classification or sub-classification in accordance with the quantity or kind of commodities sold by such method when such classifications are based upon real and reasonable distinctions. *Snyder v. Maxwell*, 217 N. C. 617, 9 S. E. (2d) 19 (1940).

Classifying Dealers in Different Kinds of Merchandise.—The requirement of this section that all taxes shall be uniform does not prohibit a municipality, which is empowered to tax persons engaged in mercantile business, from classifying dealers in a particular kind of merchandise, separately from those whose business it is to sell other articles falling within the same generic terms. *Rosenbaum v. New Bern*, 118 N. C. 83, 24 S. E. 1 (1896).

Tax Based on Volume of Business.—A tax levied quarterly by a town, under authority of an act of the General Assembly, upon all traders doing business in the town, "of \$1 for every \$1,000 worth of goods sold during the preceding quarter," is uniform and constitutional. *Gatlin v. Tarboro*, 78 N. C. 119 (1878).

Tax Based on Counties in Which a Firm Does Business.—An act taxing every meat packing house doing business in the State \$100 for each county in which such business is carried on is valid. *Lacy v. Armour Packing Co.*, 134 N. C. 567, 47 S. E. 53 (1904).

Basing Taxes on Size of City in Which Business Located.—In act imposing an annual graduated license tax on the business of buying and selling fresh meats from offices, stores, vehicles, etc., in cities of 12,000, 8,000, and under 8,000 inhabitants, respectively, is not unconstitutional, as not being uniform and in not imposing a license if the business is carried on outside a city or town; it being uniform as to all within each class. *State v. Carter*, 129 N. C. 560, 40 S. E. 11 (1901).

Taxing Shares of Stock in a National Bank.—Shares of stock in a national bank are proper subjects of State, county and municipal taxation. Such shares owned by nonresidents are to be taxed in the city or town where the bank is located and not elsewhere. *Kyle v. Commissioners*, 75 N. C. 445 (1876).

Taxing Cotton by Bale.—An act to provide improved marketing facilities for cotton, which enacts that on each bale of cotton ginned in North Carolina for two years, twenty-five cents shall be collected to specially guarantee the State warehouse system against loss, is not in derogation of this section. *Bickett v. State Tax Comm.*, 177 N. C. 433, 99 S. E. 415 (1919).

Tax on Indictments.—A tax on indictments, civil suits, etc., is not a tax within the meaning of this section. *State v. Nutt*, 79 N. C. 263 (1878).

Inheritance Tax.—An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed and its imposition rests with the legislative power. *In re Davis*, 190 N. C. 358, 130 S. E. 22 (1925).

License on Business of Hauling Timber.—An act requiring a license of anyone who carries on the business of hauling timber in a certain county, grading the license with reference to the number of horses driven to the wagon used is not repugnant to this section. *State v. Bullock*, 161 N. C. 223, 75 S. E. 942 (1912).

Zoning Cities.—An act authorizing the division of a city into several zones for the purpose of fixing an ad valorem basis of real estate for taxation, uniform within

each zone, but classified in accordance with density of population, character of building, etc., violates the mandatory provisions of our Constitution that within its corporate limits all taxable property shall be by a uniform rule and ad valorem. *Anderson v. Asheville*, 194 N. C. 117, 138 S. E. 715 (1927).

Exception of Farm Products.—The exception of "farm products purchased from the producer" from the return required to be made by merchants and other dealers as the basis for a license tax is not a discrimination against the products or citizens of other states; nor is it in violation of the provisions of this section which requires uniformity of taxation. *State v. Stevenson*, 109 N. C. 730, 14 S. E. 385 (1891); *Ex parte Brown*, 48 F. 435 (1891).

Railroad Property May Be Assessed by Corporation Commission.—An act providing for the assessment of railroad property by the Corporation Commission, is not in conflict with this section providing that such assessment be uniform and ad valorem. *Atlantic, etc., R. Co. v. New Bern*, 147 N. C. 165, 60 S. E. 925 (1908).

Requiring Railroads to Pay State Taxes Earlier.—The provisions requiring railroads and other like corporations to pay their State taxes within a shorter period than those to the counties, is a uniform legislative classification applying equally to all within its terms and not objectionable as a discrimination or a denial of the equal protection of the laws prohibited by this section. *Norfolk Southern R. R. Co. v. Lacy*, 187 N. C. 615, 122 S. E. 763 (1924).

Exemptions from Taxation.—The legislature in exempting property from taxation, Art. V, § 5, is required to observe the basic principle of equality, and exemptions allowed by it must be uniform within the class as required by this section, both before and after its amendment in 1936. *Sir Walter Lodge, etc. v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365 (1940).

Exempting Bonds of Drainage District from Taxation.—Drainage districts are not regarded as municipal corporations, and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by this section. *Commissioners v. Webb & Co.*, 160 N. C. 594, 76 S. E. 552 (1912).

Exemption of Property and Bonds of Municipality.—A legislative provision exempting the property and bonds of a city from taxation is valid when the bonds are to be issued for a public purpose, and certainly the bonds are exempt from taxation

if sold to and held by an agency of the United States government, or are held by a purchaser from such federal agency. Any doubt as to the validity of this provision under this section must be resolved in favor of its validity. *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934). See § 5 of this article.

Taxes Reduced if Assets Returned for Taxes.—An act imposing license taxes on the business of selling automobiles reducing the rate if three fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this State when the seller is already paying a tax here on three fourths of his assets, is not violative. *Bethlehem Motors Corp. v. Flynt*, 178 N. C. 399, 100 S. E. 693 (1919).

Local Assessment Based on Benefits.—The constitutional provision that taxation shall be equal, uniform, and within certain limits, does not apply to local assessments imposed upon owners of property, who in respect to such ownership are to derive a special benefit in the local improvements for which the tax is expended. *Cain v. Commissioners*, 86 N. C. 8 (1882).

While assessments on lands abutting on streets improved are not required to be uniform with all other subjects of taxation, and in view of the particular benefits, such must be uniform as to all property owners within that class to meet the constitutional requirements. *Gastonia v. Cloninger*, 187 N. C. 765, 123 S. E. 76 (1924).

Making Taxing District of Each Improved Street.—Where the charter of a city provides that each street or portion of a street improved shall be a taxing district, by requiring the total cost of improvement on each street or portion of street improved to be ascertained and one third thereof assessed on the property abutting on each side of the street, according to the frontage of each lot, and also provides methods whereby each lot owner may contest the assessment, such charter is not in violation of this section, requiring a uniform rule of taxing an estate according to its value in money. *Hillard v. Asheville*, 118 N. C. 845, 24 S. E. 738 (1896).

Providing for Collection of Taxes for Past Years.—A law to provide for the collection of taxes for past years does not violate the provisions of this section in regard to uniformity of taxation. *North*

Carolina R. Co. v. Commissioners, 82 N. C. 260 (1880).

The tax levied under § 105-167, subsec. 13, was held not void as discriminatory in amount because of the provision of the section that such tax need not be paid when the owner furnishes a certificate from a dealer in this State to the effect that the tax has been paid, and that such dealer will be responsible therefor to the Commissioner of Revenue, since the section requires the same amount to be paid regardless of whether the car is purchased from a dealer within or outside the State. *Powell v. Maxwell*, 210 N. C. 211, 186 S. E. 326 (1936).

Special License Tax on Real Estate Brokers Discriminatory.—Chapter 241, Public-Local Laws 1927, requiring real estate brokers in certain designated counties to be licensed by a real estate commission on the basis of moral character and proficiency in the public interest, and requiring payment of a license fee in addition to the State-wide license required, is unconstitutional as it applies only to the real estate brokers in the designated counties and is therefore discriminatory. *State v. Warren*, 211 N. C. 75, 189 S. E. 108 (1937).

When Lien Attaches.—The lien for the payment of taxes assessed against personal property attaches only from the date of levy thereon. *Carstarphen v. Plymouth*, 186 N. C. 90, 118 S. E. 905 (1923).

Enjoining Collection of Income Tax.—A bill of equity to restrain the assessment and collection of the income tax provided by this section, and the collection and enforcement of certain franchise or privilege taxes as unconstitutional, does not warrant interlocutory injunctions. *Southern R. Co. v. Watts*, 289 F. 301 (1923).

Interference by Courts.—This section of the Constitution vests exclusive authority in the legislature to levy taxes, which may not be interfered with by the courts. *Person v. Board*, 184 N. C. 499, 115 S. E. 336 (1922).

Applied in *Hilton v. Harris*, 207 N. C. 465, 177 S. E. 411 (1934); *State v. Bridgers*, 211 N. C. 235, 189 S. E. 869 (1937).

Quoted in *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654 (1936); *Bowie v. West Jefferson*, 231 N. C. 408, 57 S. E. (2d) 369 (1950).

Cited in *Carolina Cent. R. Co. v. Wilmington*, 72 N. C. 73 (1875); *Wilson v. Board*, 74 N. C. 748 (1876); *Albertson v. Wallace*, 81 N. C. 479 (1879); *Richmond, etc., R. Co. v. Commissioners*, 84 N. C. 504 (1881) (con. op.); *Raleigh v. Peace*, 110

N. C. 32, 14 S. E. 521 (1892); *Wiley v. Board*, 111 N. C. 397, 16 S. E. 542 (1892); *Charlotte Bldg., etc., Ass'n v. Commissioners*, 115 N. C. 410, 20 S. E. 526 (1894); *Schau v. Charlotte*, 118 N. C. 733, 24 S. E. 526 (1896); *Collins v. Pettitt*, 124 N. C. 726, 32 S. E. 975 (1899) (dis. op.); *State v. Roberson*, 136 N. C. 587, 48 S. E. 595 (1904); *Wolfender v. Board*, 152 N. C. 83, 67 S. E. 319 (1910); *State v. Williams*, 158 N. C. 610, 73 S. E. 1000 (1912); *Leonard v. Sink*, 198 N. C. 114, 150 S. E. 813 (1929); *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56 (1934); *Saluda v. Polk*

County, 207 N. C. 180, 176 S. E. 298 (1934); *Raleigh v. Jordan*, 218 N. C. 55, 9 S. E. (2d) 507 (1940) (dis. op.); *Rockingham County v. Elon College*, 219 N. C. 342, 13 S. E. 618 (1941); *Belk's Dept. Store v. Guilford County*, 222 N. C. 441, 22 S. E. (2d) 897 (1943); *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. (2d) 789 (1950); *Southern R. Co. v. Watts*, 260 U. S. 519, 43 S. Ct. 192, 67 L. Ed. 375 (1923); *Horner v. Chamber of Commerce*, 235 N. C. 77, 68 S. E. (2d) 660 (1952).

§ 4. Limitations upon the increase of public debts.—The General Assembly shall have the power to contract debts and to pledge the faith and credit of the State and to authorize counties and municipalities to contract debts and pledge their faith and credit for the following purposes: To fund or refund a valid existing debt; to borrow in anticipation of the collection of taxes due and payable within the fiscal year to an amount not exceeding fifty per centum of such taxes; to supply a casual deficit; to suppress riots or insurrections, or to repel invasions. For any purpose other than these enumerated, the General Assembly shall have no power, during any biennium, to contract new debts on behalf of the State to an amount in excess of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium, unless the subject be submitted to a vote of the people of the State; and for any purpose other than these enumerated the General Assembly shall have no power to authorize counties or municipalities to contract debts, and counties and municipalities shall not contract debts, during any fiscal year, to an amount exceeding two-thirds of the amount by which the outstanding indebtedness of the particular county or municipality shall have been reduced during the next preceding fiscal year, unless the subject be submitted to a vote of the people of the particular county or municipality. In any election held in the State or in any county or municipality under the provisions of this section, the proposed indebtedness must be approved by a majority of those who shall vote thereon. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon. (Const. 1868; 1923, c. 145; 1935, c. 248.)

Editor's Note. — This section as contained in the Constitution of 1868 was as follows: "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submit-

ted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." This section was § 5 of Article V of the original Constitution, but with the repeal of the original § 4 pursuant to c. 85 of the Laws of 1872-73 this section was renumbered to be § 4. By virtue of an amendment adopted pursuant to c. 145 of the Public Laws of 1923, the first sentence was stricken out and the following inserted in lieu thereof: "Except for refunding of valid bonded debt, and except to supply a casual deficit, or for suppressing invasions or insurrections, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State to an amount exceeding in the aggregate, in-

cluding the then existing debt recognized by the State, and deducting sinking funds then on hand, and the par value of the stock in the Carolina Railroad Company and the Atlantic and North Carolina Railroad Company owned by the State, seven and one-half per cent of the assessed valuation of taxable property within the State as last fixed for taxation." Pursuant to c. 248 of the Public Laws of 1935 this section was entirely rewritten in its present form. For article discussing that amendment, see 16 N. C. Law Rev. 329. Many of the cases cited below were decided prior to the amendment.

Proposed Amendment. — The amendment of this section proposed by Session Laws 1947, c. 784, failed of adoption at the general election held on November 2, 1948.

Purpose.—As to the purpose of this section, see *Pennington v. Tarboro*, 180 N. C. 438, 105 S. E. 199 (1920) (dis. op.).

The language of this section is unambiguous, and by its plain terms the power of the State, or any county or municipality to contract debts in any biennium or fiscal year, respectively, without submitting the matter to a vote of the people, except for those purposes specifically enumerated in the amendment, is definitely prescribed to two thirds of the amount by which its outstanding indebtedness was decreased during the prior biennium or fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21 (1938).

The provisions of this section now constitute the dominant or controlling limitation upon the power of local units to contract debts or to issue bonds, and its provisions are superimposed upon the limitations contained in Art. 7, § 7, and in Art. 5, § 6, of the Constitution. *Coe v. Surry County*, 226 N. C. 125, 36 S. E. (2d) 910 (1946).

Bonds are outstanding within the meaning of this section until actually paid and canceled, or delivered to the county for cancellation. *Coe v. Surry County*, 226 N. C. 125, 36 S. E. (2d) 910 (1946).

Thus, where county bonds were payable at a certain banking institution on the first day of a county fiscal year, and before the close of the next preceding fiscal year the county made available funds for payment thereof, the bonds were outstanding at the close of the latter year within the meaning of this section. *Coe v. Surry County*, 226 N. C. 125, 36 S. E. (2d) 910 (1946).

Refunding Bonds. — Defendant county proposed to issue bonds to refund bonds of several of its townships, which bonds constituted a valid existing debt of the

county, the county having received the benefit of the proceeds of the bonds and having agreed to assume the indebtedness prior to the adoption of the amendment to this section. Plaintiff contended that the county bonds could not be issued without a vote by mandate of this section as amended. It was held that the proposed county bond issue was to refund a valid existing debt of the county within the meaning of this section, as amended, and under the exception therein provided a vote is unnecessary, nor could the means for the repayment of the bonds be adversely affected by any constitutional change. *Thompson v. Harnett County*, 212 N. C. 214, 193 S. E. 158 (1937).

During the prior fiscal year defendant county began refunding operations, and during that year issued its refunding bonds, but did not retire the bonds refunded until the first day of the present fiscal year. Plaintiff contended that since both the refunding bonds and the bonds refunded were outstanding during the prior fiscal year, there had been an increase rather than a decrease in the county's outstanding indebtedness during the prior fiscal year. It was held that the failure of the county to complete its refunding operations during the prior fiscal years is immaterial, and the refunding bonds should not be included in determining the amount by which the county had reduced its outstanding indebtedness during the prior fiscal year within the meaning of the constitutional limitation on an increase of debt by counties and municipalities. *Royal v. Sampson County*, 214 N. C. 259, 199 S. E. 15 (1938).

Bonds in excess of two thirds of amount by which taxing unit decreased its outstanding debt during prior fiscal year may be issued upon the approval of a majority of those voting under this section. *Twinning v. Wilmington*, 214 N. C. 655, 200 S. E. 416 (1939).

When a proposed bond issue is in excess of two thirds of the amount by which the issuing county reduced its outstanding indebtedness during the prior fiscal year, the question must be submitted to a vote and issuance approved by a majority of the voters who shall vote thereon regardless of the purpose of the bonds, unless the purpose is within the specific exceptions enumerated in this section. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939).

In determining the amount of debt contracted in any fiscal year within the provision of this section, limiting the power of a taxing unit to contract debts to two

thirds the amount by which the taxing unit's outstanding debt was decreased during the prior fiscal year, the total amount of bonds issued during the fiscal year, by the taxing unit, whether with or without the approval of its voters, should be included, except bonds issued by it to fund or refund a valid existing debt, to supply a casual deficit, to suppress riots or insurrections, or to repel invasions, and except tax anticipation notes issued in an amount not exceeding fifty per centum of the taxes for the fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21 (1938).

Bonds for Purpose Other than Necessary Expense. — A proposed bond issue which is not only in excess of the amount by which the county reduced its outstanding indebtedness during the prior fiscal year, but also for a purpose other than a necessary expense, must be approved not only by the majority of voters voting in the election under the provisions of this section, but also by a majority of the qualified voters of the county under the provisions of Art. VII, § 7, there being no conflict between the constitutional provisions, and both being applicable. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939).

Bonds for Streets and Sewage.—A municipality may not issue bonds for street and sewage construction or extension without a vote when, during the fiscal year, such city has issued bonds with the approval of the voters in excess of the amount by which it had reduced its outstanding indebtedness during the prior fiscal year, the purpose of the amendment being to limit the existing power of the governing authorities to issue bonds for necessary expenses so that the net indebtedness of the taxing unit should not be increased beyond the limits prescribed in the amendment, except with the approval of its voters. *Gill v. Charlotte*, 213 N. C. 160, 195 S. E. 368 (1938).

Bonds for Municipal Power Plant.—A contract of a municipality to construct a municipal electric power plant and to issue its bonds to pay for same, with provision that principal and interest of the bonds should be paid exclusively from the profits from the plant without resort to funds raised by taxation, does not create a "debt" of the municipality within the meaning of this section as amended, which prohibits the contraction of a debt by a municipality in any fiscal year in excess of two thirds of the amount by which its debt was decreased during the prior fiscal year. *Williamson v. High Point*, 213 N. C.

96, 195 S. E. 90 (1938). See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941).

Year Debt Contracted. — The debt is contracted during the fiscal year following that in which the debt was reduced, even though the certificate of the secretary of the local government commission required by § 159-18 was not executed within that time. *Board of Education v. State Board of Education*, 217 N. C. 90, 6 S. E. (2d) 833 (1940).

Issuing Bonds to Aid War Veterans.—A statute for the purpose of issuing bonds, passed by the legislature and which has been approved by the vote of the people of the State at an election duly had for the purpose, providing for an issuance and sale of State bonds for the purpose of lending the proceeds on mortgage to a certain amount of the value of the land to the veterans of the World War to help them in providing homes for themselves, is the pledging of the credit of the State for a public purpose, and is a valid exercise of statutory authority. *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669 (1927).

Section Does Not Apply to School System.—This section is an inhibition on giving or lending the credit of the State to third persons, individual or corporate, and of the kind contemplated in the provision; and cannot be construed to affect the mandatory provisions of Art. IX as to the maintenance of a State-wide school system by legislative enactment. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612 (1922).

Vote of People Necessary to Aid New Railroad. — The General Assembly has no power to contract a debt, without a vote of the people, to aid in the construction of, or build a new railroad. *University R. Co. v. Holden*, 63 N. C. 410 (1869).

Same—Issuing Bonds to Pay for Stock.—A subscription for stock in a corporation and issuing bonds to pay for such stock, is a gift of the credit of the State, within the meaning of this section. *Galloway v. Jenkins*, 63 N. C. 147 (1869).

In an election for the issuance of county bonds for a new school building, a necessary expense, a favorable vote of the majority of those voting is sufficient to validate the bond resolution and authorize the issuance and sale of the proposed bonds. *Mason v. Moore County Board of Com'rs*, 229 N. C. 626, 51 S. E. (2d) 6 (1948).

When Counties May Subscribe to Railroad Stock. — This section could not be construed as limited in application to cases where railroads had been commenced and were unfinished at the time the constitution was adopted, and in which the coun-

ties, as such, had a direct pecuniary interest; but it conferred the power on counties to subscribe for stock, in the manner prescribed, in any railroad company which had been duly incorporated to build a projected road in which the citizens of the county, as a body, have a general interest because of the supposed benefits to be derived from it. *Board v. Coler*, 113 F. 705 (1902).

Test of Bonds Being at Par.—The test of bonds being at par is, whenever in the particular transaction the State receives in legal money the sum which she becomes liable to pay. *Galloway v. Jenkins*, 63 N. C. 147 (1869) (con. op.).

National Park Act.—The statute establishing the North Carolina National Park Commission (Laws 1927, c. 48) with the certain powers therein enumerated is for the benefit of the public of the State and not that of some third person, and does not fall within the provision of this sec-

§ 5. **Property exempt from taxation.**—Property belonging to the State or to municipal corporations, shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes; also wearing apparel, arms for muster, household and kitchen furniture, the mechanical and agricultural implements of mechanics and farmers, libraries, and scientific instruments, or any other personal property, to a value not exceeding three hundred dollars. The General Assembly may exempt from taxation not exceeding one thousand dollars (\$1,000.00) in value of property held and used as the place of residence of the owner. (Const. 1868; 1872-73, c. 83; 1935, c. 444.)

Editor's Note.—This section, which was § 6 of the Constitution of 1868, was amended by the insertion of the phrase "or any other personal property," in pursuance of c. 83, Public Laws of 1872-73. The amendment, which added the last sentence of this section, was proposed by Public Laws 1935, c. 444, § 2, and adopted at the general election held in November 1936.

For article, "The Battle of Exemptions," see 19 N. C. Law Rev. 154.

The amendment of 1936 is only permissive in terms and not self-executing. The power of exemption, to the extent therein mentioned, is exercisable, in whole or in part, or not at all, as the General Assembly, in its wisdom, shall determine. *Nash v. Board of Com'rs*, 211 N. C. 301, 190 S. E. 475 (1937).

Legislative Exemptions Must Be Considered with This Section.—The provisions of the revenue act exempting property from taxation must be considered in connection with this section, since the General Assembly has no power to exempt property from taxation beyond the permissive power granted it by this section. *Sir Walter Lodge, etc. v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365 (1940).

Yarbrough v. Park Commission, 196 N. C. 284, 145 S. E. 563 (1928).

Section Does Not Apply to Insuring School Property.—A county board of education has the authority to insure school property in a mutual fire insurance company authorized to do business in this State, and assume the contingent liability limited to the amount of the cash premium, and the execution of such policy does not lend the credit of the State to a private corporation under this section. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

Cited in Northwestern North Carolina R. Co. v. Jenkins, 65 N. C. 173 (1871); *Commissioners v. Snuggs*, 121 N. C. 394, 28 S. E. 539 (1897); *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90 (1938); *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N. C. 293, 34 S. E. (2d) 430 (1945).

Municipal Bonds to Provide Schoolhouses and Equipment Are Exempt.—Bonds issued by a municipality to provide schoolhouses and equipment were for a public purpose, and since the bonds, although the property of a private corporation, were issued for a necessary public purpose and purchased in reliance upon the statutory provision exempting them from taxation, they stand upon the same footing as the school buildings erected with the proceeds of the bonds. *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654 (1936).

Section Applies Only to Ad Valorem Taxes.—Any intent or attempt, on the part of the legislature, to grant an exemption from any tax or assessment on real property, pursuant to the provisions of this section, other than for ad valorem taxes, would be without constitutional authorization. *Raleigh Cemetery Ass'n v. Raleigh*, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

And Does Not Grant Exemption from Special or Local Assessments.—Property belonging to municipal corporations is not exempt from assessment for local improvements. *Raleigh Cemetery Ass'n v. Ral-*

eight, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

The general rule that exemption from taxation does not mean exemption from a special or local assessment, applies with respect to cemetery property. *Raleigh Cemetery Ass'n v. Raleigh*, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

Assessments on public school property for special benefits thereto, caused by the improvement of the street on which it abuts, are not embraced within the prohibition of this section exempting property belonging to the State or to municipal corporations from taxation. *Raleigh v. Raleigh City Administrative Unit*, 223 N. C. 316, 26 S. E. (2d) 591 (1943); *Raleigh Cemetery Ass'n v. Raleigh*, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

Municipal property acquired by tax foreclosure and subsequently rented is liable for county taxes, since it is not used by the city for a governmental purpose, and therefore does not come within the constitutional provision for the exemption of property from taxation. *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6 (1936). See also, in this connection, *Board of Financial Control v. Henderson County*, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783 (1935).

Excise taxes on municipal property are not prohibited. *Stedman v. Winston-Salem*, 204 N. C. 203, 167 S. E. 813 (1933).

Property Exempted by Constitution.—Only one class of property is exempted from taxation by the Constitution itself, to-wit, "property belonging to the State or to municipal corporations." *Charlotte Bldg., etc., Ass'n v. Commissioners*, 115 N. C. 410, 20 S. E. 526 (1894).

The power to grant exemptions under authority of the second sentence in this section, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *Rockingham County v. Elon College*, 219 N. C. 342, 13 S. E. (2d) 618 (1941). See also, *Guilford College v. Guilford County*, 219 N. C. 347, 13 S. E. (2d) 622 (1941).

All property is subject to taxation unless exemption is authorized by the Constitution and laws of the State. *Piedmont Memorial Hospital v. Guilford County*, 221 N. C. 308, 20 S. E. (2d) 332 (1942).

The power of the legislature to exempt from taxation property not owned by the State or its political subdivisions is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. *Rockingham*

County v. Elon College, 219 N. C. 342, 13 S. E. (2d) 618 (1941). See also, *Guilford College v. Guilford County*, 219 N. C. 347, 13 S. E. (2d) 622 (1941).

Business property owned by an educational institution and rented for offices and business purposes to private enterprises, the net profit derived therefrom being devoted exclusively to educational purposes, was not within the exemption granted by this section. *Rockingham County v. Elon College*, 219 N. C. 342, 13 S. E. (2d) 618 (1941). See also, *Guilford College v. Guilford County*, 219 N. C. 347, 13 S. E. (2d) 622 (1941).

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. *Sparrow v. Beaufort County*, 221 N. C. 222, 19 S. E. (2d) 861 (1942).

Statutes Exempting Specific Property Are Construed Strictly.—Statutes enacted by the General Assembly exempting specific property from taxation, because of the purposes for which such property is held and used, are and should be construed strictly, when there is room for construction, against exemption and in favor of taxation. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805 (1933); *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265 (1940); *Harrison v. Guilford County*, 218 N. C. 718, 12 S. E. (2d) 269 (1940).

Same—Corporation Composed of Stockholder Not a Municipal Corporation.—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions and this section, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose. *Southern Assembly v. Palmer*, 116 N. C. 75, 32 S. E. 18 (1895).

Same—Drainage Districts Are Not Municipal Corporations.—Drainage districts are not regarded as municipal corporation in purview of this section and a legislative act exempting their bonds from taxation violates the uniform rule as to taxation required by § 3 of this article. *Drainage Comm. v. Webb & Co.*, 160 N. C. 594, 76 S. E. 552 (1912).

Same—Local Assessment for Paving Street.—Local assessments against lands

along the streets of a city for paving and improving the streets do not fall within the intent and meaning of this section. *Tarboro v. Forbes*, 185 N. C. 59, 116 S. E. 81 (1923).

Realty acquired for purposes of rural housing authority under §§ 157-1 to 157-39 is exempt from taxation under this section. *Mallard v. Eastern Carolina Regional Housing Authority*, 221 N. C. 334, 20 S. E. (2d) 281 (1942).

Interest of State in Business Enterprises Not Included.—The provision contained in this section exempting property belonging to the State from taxation, does not embrace the interest of the State in business enterprises, such as railroads and the like, but applies to the property of the State held for State purposes. *Atlantic R. Co. v. Board*, 75 N. C. 474 (1876). See also, *Warrenton v. Warren County*, 215 N. C. 342, 2 S. E. (2d) 463 (1939).

Section Permissive.—Under this section the legislature may exercise, to the full extent or in part, the power to exempt from taxation property held for educational, scientific, literary, charitable or religious purposes, or may decline to exempt at all. The constitutional provision being in the disjunctive, the legislature can exempt the property up to a certain value and tax all above it, and may also tax property held for one of the purposes named and exempt that held for others. *United Brethren v. Commissioners*, 115 N. C. 489, 20 S. E. 626 (1894). See also, *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805 (1933).

It Is Self-Executing. — The provisions of this section that property belonging to or owned by the State or municipal corporations, shall be exempt from taxation, is self-executing and requires no legislation to make it effective. *Salisbury Hospital v. Rowan County*, 205 N. C. 8, 169 S. E. 805 (1933). See also, *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265 (1940); *Raleigh Cemetery Ass'n v. Raleigh*, 235 N. C. 509, 70 S. E. (2d) 506 (1952).

When Exemption Attaches.—The quality of exemption attaches to property, as soon as it is lawfully acquired and remains with such property so long as it is owned by the municipal corporation, without regard to the purpose for which it was acquired or was held. *Andrews v. Clay County*, 200 N. C. 280, 156 S. E. 855 (1931).

Exemption of Property Used for Religious, etc., Purposes Is Not Self-Executing. — The provision of this section that the General Assembly may exempt from

taxation property held for educational, scientific, literary, charitable or religious purposes, is a grant of power and is not self-executing, and the power of the legislature to prescribe such exemptions is limited by the terms of the grant. *Piedmont Memorial Hospital v. Guilford County*, 218 N. C. 673, 12 S. E. (2d) 265 (1940).

Use to Which Property Is Devoted.—Under this section it is the use to which the property is devoted and to the extent of the interest so dedicated which should control, rather than the title or other tenure by which it is held, and its provisions are broad and comprehensive enough to uphold the legislative exemption as to all property used exclusively for educational purposes. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640 (1912).

A lot purchased by trustee of a church for the purpose of erecting a new church and Sunday school thereon adequate for the needs of the congregation, and, pending the accumulation of sufficient funds to build the new church, used exclusively for open air Sunday school and church meetings, is property held for religious purposes within the meaning of this section and the legislature has power to exempt such property from taxation. *Harrison v. Guilford County*, 218 N. C. 718, 12 S. E. (2d) 269 (1940).

The power granted the legislature to exempt property from taxation is limited by the language of this section to property held for educational, scientific, charitable or religious purposes, the purpose for which the property is held and not the character of the corporation or association holding the property being the basis for the grant of permissive power to exempt, and the legislature has no power to exempt property held by a religious or charitable corporation or organization for business or commercial purposes. *Sir Walter Lodge, etc. v. Swain*, 217 N. C. 632, 9 S. E. (2d) 365 (1940).

Lands in Hands of Trustee.—Where in construing a devise of various property in a city the courts have decreed that the lands be sold within a period of five years and fifty-five per cent of the proceeds distributed among several beneficiaries of the class exempted by this section, the property itself is not held by the beneficiaries designated, but by the trustee in trust for the purpose of sale and distribution of part of the proceeds of the sale to them, and the exemption does not apply except to the proceeds of the sale when received by

the beneficiaries in accordance with the decree, and the lands in the hands of the trustee are subject to taxation under Art. V, § 3. *Latta v. Jenkins*, 200 N. C. 255, 156 S. E. 857 (1931).

Weight of Fact That Institution Has Not Been Paying.—The fact that an educational incorporation had gone for a long period of time without paying taxes unchallenged by both the legislative and executive department of the government is deserving of great weight by the court in construing this section. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640 (1912).

No Distinction Between Public and Private Institutions.—The provisions of this section make no distinction between public and private educational corporations, or

between institutions which are in part conducted for the personal profit of the owner and those which are run on a salary basis, using any profits which may arise in the extension of the work. *Corporation Comm. v. Oxford Seminary Constr. Co.*, 160 N. C. 582, 76 S. E. 640 (1912).

Cited in *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845 (1890) (dis. op.); *Board v. Commissioners*, 137 N. C. 310, 49 S. E. 353 (1904); *Davis v. Salisbury*, 161 N. C. 56, 76 S. E. 657 (1912); *Wagstaff v. Central Highway Comm.*, 177 N. C. 354, 99 S. E. 1 (1919) (con. op.); *Weaverville v. Hobbs*, 212 N. C. 684, 194 S. E. 860 (1938); *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

§ 6. Taxes levied for counties.—The total of the State and county tax on property shall not exceed twenty cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollars value of property. (Const. 1868; Ex. Sess. 1920, c. 93; 1951, c. 142.)

Editor's Note.—Pursuant to c. 93, Public Laws of 1920, extra session, this section was substituted for the old § 6 (§ 7 of the Constitution of 1868), which was as follows: "The taxes levied by the commissioners of the several counties for county purposes, shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax, except for a special purpose, and with the special approval of the General Assembly."

This section was amended by vote at the general election of November 4, 1952.

For article on property and poll tax limitations under this section and § 1 of this article, see 18 N. C. Law Rev. 275.

Proposed Amendment. — The amendment of this section proposed by Session Laws 1947, c. 421, failed of adoption at the general election held on November 2, 1948.

Ordinarily Expenses of Holding Courts and Maintaining Jails Are General Expenses. — Only under exceptional circumstances may the expenses of holding courts and maintaining the county jail and caring for jail prisoners be classified as expenses for special purposes, since ordinarily the holding of courts is a general expense recurring in the ordinary course of and as necessary steps in the operation of the county government, and the maintenance

of the county jail and the caring for prisoners is a general expense, continuous and ever present, and a tax levy therefor in addition to the 15c. levy made for general county purposes in another item is invalid, and plaintiff is entitled to recover the amount paid under the additional levy in his suit therefor instituted in accordance with the statutory procedure. *Southern Ry. Co. v. Cherokee County*, 218 N. C. 169, 10 S. E. (2d) 607 (1940); *Atlantic Coast Line R. Co. v. Duplin County*, 226 N. C. 719, 40 S. E. (2d) 371 (1946).

General or Special Act Suffices. — The legislative authority necessary to the validity of an assessment of taxes by a county for a special purpose in excess of the constitutional limit for general county purposes may be conferred by special or general act. *Atlantic Coast Line R. Co. v. Lenoir County*, 200 N. C. 494, 157 S. E. 610 (1931).

Regularly Recurring Expenditures in Performance of Governmental Duty. — A purpose which involves a regularly recurring expenditure in the performance of a duty or the exercise of a power which is essential to government and which has been delegated to the county unit of government, is a general rather than a special purpose within the meaning of this provision. *Southern R. Co. v. Mecklenburg*

County, 231 N. C. 148, 56 S. E. (2d) 438 (1949).

What is a "special purpose" within the meaning of this section of the State Constitution is a matter for judicial rather than legislative determination, since such purpose for which an unlimited tax may be levied with the special approval of the General Assembly must also be a "necessary expense" of the county within the meaning of Art. VII, § 7, which involves both questions of law and fact. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

The last paragraph of § 153-152, authorizing a county to levy a tax to pay a public hospital for the care and hospitalization of the indigent sick of the county under a contract with a hospital does not violate this section since the tax contemplated is for a special, necessary purpose, with special approval of the General Assembly. *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777 (1935).

County Tax for Necessary Expenses. — Within the limitations of this section the county commissioners of the respective counties may levy a tax for necessary expenses without a vote of the people or special legislative authority. *Glenn v. Board of County Com'rs*, 201 N. C. 233, 159 S. E. 439 (1931); *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939).

And a county may levy taxes for necessary expenses in excess of the limitation fixed in this section, without a vote when the levy is also for a special purpose with the special approval of the legislature. *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939).

The limitation of Art. V, § 4, on the contraction of debts by counties and municipalities is in addition to the limitations prescribed by Art. VII, § 7, and this section, and such local units may not create debts and issue bonds without a vote of the people, even for necessary expenses within the limitation prescribed by this section without the approval of the legislature, or in excess of the limitation prescribed by this section with the special approval of the legislature, unless such bonds, together with such other bonds as may have been issued during the fiscal year, do not exceed two thirds of the amount by which such unit decreased its outstanding indebtedness during the prior fiscal year. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21 (1938).

While ordinarily when a statute is constitutional in part and unconstitutional in

part, only the unconstitutional provisions will be disregarded, when an item for the levy of taxes includes both general and special expenses, the entire item in excess of the constitutional limitation, must fail, or if an item combines both a special and an unnecessary expense, the item must fail in its entirety. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

Incidental Expenses.—Defendant county levied taxes up to the 15-cent limitation for general county purposes, and in addition thereto levied a tax for "upkeep of county buildings, courthouse, county home, poor and paupers, and incidental purposes." It was held that the court may not determine whether the "incidental expenses" are for a necessary or unnecessary purpose, or for a general or special purpose, or how much of the tax is for "incidental expenses," and therefore the entire item is void as not being for a special purpose with special approval of the legislature within the meaning of this section. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

Attorney's Fees. — Defendant county levied taxes up to the 15-cent limitation for general county purposes and in addition thereto levied taxes for the purposes of "commissioners' pay, expense and board, courthouse and grounds, and county attorney's fees." It was held that no special approval of the legislature being shown for county attorney's fees, the entire item must fail, and furthermore, the other purposes included in the item are for general county expenses and not for a special purpose within the meaning of this section. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

A tax to pay the county farm agent's salary is for a special purpose having the special approval of the legislature, within the meaning of Art. V, § 6, for which a tax in excess of the 15-cent limitation may be imposed. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

Supremacy of Legislative Power.—The constitutional power conferred on the legislature to authorize counties to levy a special tax upon the property and poll for special county purposes is essential to the existence of the State, and in the exercise of this power the legislature is supreme. *Moose v. Board*, 172 N. C. 419, 90 S. E. 441 (1916).

When Vote and Legislative Authority Necessary.—Cities and towns may levy a

tax for necessary expenses up to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters: but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. *Henderson v. Wilmington*, 191 N. C. 269, 132 S. E. 25 (1926).

Levy Beyond Limitation Void.—A levy beyond the limitation is void. *County Board v. Commissioners*, 107 N. C. 110, 12 S. E. 190 (1890).

Levy Partly for Special and Partly for General Purposes.—Where a statute authorizing the levy of a tax beyond the constitutional limit for a special purpose is *infra vires*, the taxes collected beyond the requirements of the special purposes may be turned into the general fund and used for general purposes, but where the act authorizes the levy partly for a "special purpose" and partly for general purposes it is *ultra vires* and no part of the levy can be collected. *Williams v. Commissioners*, 119 N. C. 520, 26 S. E. 150 (1896).

Where Act Severable, Valid Part Effective.—An act that attempts to authorize a county to supplement to any extent its fund for general county expenses by special tax beyond the limitations by this section of the Constitution, is to that extent unconstitutional and void; but where the valid portion of the act is distinctly severable from the invalid part, and may alone be enforced by the methods prescribed, without being affected by the invalid part, the entire statute will not be declared invalid by the courts. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534 (1924).

Giving County Commissioners Authority to Issue Bonds.—The authority conferred upon the board of county commissioners to build its roads and bridges in any way that may seem practicable, and issue bonds not to exceed the actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with this section excepting from the limitation of 15 cents on the \$100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act." *Norfolk Southern R. Co. v. McArtan*, 185 N. C. 201, 116 S. E. 731 (1923).

Special Approval for Necessary Expenditures.—This section, of the State Constitution, authorizes the legislature to give special approval of taxation by a county for necessary expenditures by either a special or general statute. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534 (1924). As to necessary expenses see note to Art. VII, § 7.

Tax for Road Purposes.—Authority may be given by the legislature to a county to levy a special tax for road purposes upon the approval of its electors lawfully ascertained, to exceed the general tax limitation, by special or general acts. *State v. Kelly*, 186 N. C. 365, 119 S. E. 755 (1923).

An act authorizing counties to issue bonds for the purpose of laying out and operating, altering and improving the public roads of the county, etc., is for a special purpose within the intent and meaning of this section. *Parvin v. Board*, 177 N. C. 508, 99 S. E. 432 (1919).

Details Unnecessary.—An act giving the special approval of the legislature to county taxation for special purposes need not specify the sum to be raised by such taxation, nor a limit beyond which it cannot be carried; details are not proper in such statutes—these should be left to the commissioners. *Brodnax v. Groom*, 64 N. C. 244 (1870).

A tax levied by the county commissioners for the aged and infirm, to pay jurors, for feeding and caring for the county prisoners are expenses to be paid from the general county fund as current expenses, and fall within the limitations of this section. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467 (1928).

Under this section Cumberland County is authorized by the Act of 1923 to levy annually five cents only on the one hundred dollar valuation, for maintaining county homes for the aged and infirm and for similar purposes. *Atlantic Coast Line R. Co. v. Cumberland County*, 223 N. C. 750, 28 S. E. (2d) 238 (1943).

Upkeep of county buildings and upkeep and maintenance of county home for the aged and infirm are general expenses and must be covered in the fifteen-cent levy limited for general purposes. *Atlantic Coast Line R. Co. v. Duplin County*, 226 N. C. 719, 40 S. E. (2d) 371 (1946).

Levy for Public Welfare.—The board of county commissioners of Beaufort County having levied, in the year 1942, a tax rate of fifteen cents on the one hundred dollars property valuation for general purposes,

the limit fixed by this section, the levy for public welfare or poor relief was limited to a rate of five cents on the one hundred dollars property valuation, and any levy for public welfare or poor relief, in excess thereof, was held invalid. *Atlantic Coast Line R. Co. v. Beaufort County*, 224 N. C. 115, 29 S. E. (2d) 201 (1944).

Statutory Validation of Excessive Levy.

— Where a county has levied a tax for general purposes in excess of that permitted by our Constitution, Art. V, § 6, which a property owner has paid under protest, and has reserved his right under the provisions of § 105-406, it may not be validated by an act passed after the assessment had been passed upon or levied under the former statute. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467 (1928).

Correction of Minutes of Levy. — The board of commissioners of a county may correct the minutes of a levy of taxes formerly made by it to show separately the items relating to current county expenses and the items of levy for unauthorized special purposes when no change in the former levies are thereby made. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467 (1928).

Public-Local Laws 1927, c. 201, applicable to Cherokee County, cannot validate a void levy. *Southern Ry. Co. v. Cherokee County*, 194 N. C. 781, 140 S. E. 748 (1927). It may be that the General Assembly could pass a special act or general law allowing a levy for special purposes of this kind in emergency cases. *Southern Ry. Co. v. Cherokee County*, 195 N. C. 756, 143 S. E. 467 (1928).

Expenditures for maintenance of a rural police force is for a continuing expense in furtherance of an indispensable function of county government, and therefore is for a general county purpose within the meaning of the constitutional limitation on the tax rate for such purposes. *Southern R. Co. v. Mecklenburg County*, 231 N. C. 148, 56 S. E. (2d) 438 (1949).

Bonds for Erection of Jail.—Where the erection of a new jail was a public necessity, bonds necessary to provide funds for the erection or for a special necessary county expense under §§ 153-9, 153-49, and the taxes necessary to pay principal and interest of such bond issue are not subject to limitation on the tax rate. *Castevens v. Stanly County*, 209 N. C. 75, 183 S. E. 3 (1935).

Bonds Issued to Refund Other Bonds.—

Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the legislature: Held, the bonds later authorized by the legislature and issued by the county to refund the indebtedness to the general county fund are for a special purpose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution. *Barbour v. Wake County*, 197 N. C. 314, 148 S. E. 470 (1929).

Under c. 342, Public-Local Laws 1935, defendant county proposed to issue county bonds to refinance bonds issued by the townships of the county. The proceeds of the township bonds were used in the construction of highways which were later taken over by the county and thereafter by the State. The proposed county bond issue is for a county purpose within the meaning of this section. *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936).

A county has authority to issue funding and refunding bonds with the approval of the local government commission to take up valid, outstanding indebtednesses of the county which were incurred for necessary county expenses. *Brooks v. Avery County*, 206 N. C. 840, 175 S. E. 199 (1934). See *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936).

Cited in *Cromartie v. Commissioners*, 85 N. C. 211 (1881); *Parker v. Board*, 104 N. C. 166, 10 S. E. 137 (1889); *Redmond v. Commissioners*, 106 N. C. 122, 10 S. E. 845 (1890); *Board v. Board*, 111 N. C. 578, 16 S. E. 621 (1892); *Herring v. Dixon*, 122 N. C. 420, 29 S. E. 368 (1898); *Jones v. Commissioners*, 135 N. C. 218, 47 S. E. 753 (1904); *Board v. Commissioners*, 137 N. C. 310, 49 S. E. 353 (1904); *Director-General v. Commissioners*, 178 N. C. 449, 101 S. E. 91 (1919); *Board v. Assell*, 194 N. C. 412, 140 S. E. 34 (1927); *Castevens v. Stanly County*, 211 N. C. 642, 191 S. E. 739 (1937); *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195 (1937); *Gill v. Charlotte*, 213 N. C. 160, 195 S. E. 368 (1938); *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544 (1939).

§ 7. Acts levying taxes shall state objects, etc.—Every act of the Gen-

eral Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (Const. 1868.)

Section Does Not Apply to Counties or Towns.—The provisions of this section do not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. *Cabe v. Board*, 185 N. C. 158, 116 S. E. 419 (1923).

This section has no application to taxes levied by the county authorities for county purposes. *Parker v. Board*, 104 N. C. 166, 10 S. E. 137 (1889).

Act Providing for Levy to Pay County Bonds.—Where an act authorizes the levy and collection of a special tax for the payment of certain county bonds; and a later act directed that the special tax collected under the first act should be turned into the general county fund, the first act is in conflict with this section which provides that every act of the General Assembly levying a tax shall state the special object

to which it is to be applied. *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99 (1895).

Statute Authorizing County to Impose Tax.—Where the statute authorizes a county to impose a tax for necessary expenses, it is a delegation of the power to be exercised by the county as an agency for the State for the convenience of local administration, and the statute is not void in failing to state the special object to which it is to be applied, nor is the tax itself invalid if this constitutional requirement has been observed by the county authority in the imposition of the special tax. *Norfolk Southern R. Co. v. Reid*, 187 N. C. 320, 121 S. E. 534 (1924).

Cited in University R. Co. v. Holden, 63 N. C. 410 (1869); *Kyle v. Commissioners*, 75 N. C. 445 (1876); *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544 (1939).

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

§ 1. **Who may vote.**—Every person born in the United States, and every person who has been naturalized, twenty-one years of age, and possessing the qualifications set out in this article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (Const. 1868; Convention 1875; 1899, c. 218; 1900, c. 2; 1945, c. 634, s. 2.)

Cross References.—See annotations under § 2. For statutory provisions regarding elections and the qualifications of voters therein, see §§ 163-1 et seq.

Editor's Note.—Article VI was re-drafted and submitted to a popular vote, August 2, 1900, to become effective July 1, 1902. Chapter 218, Public Laws of 1899; c. 2, Public Laws of 1900.

Section 1 of this article originally was as follows: "Every male person born in the United States, and every male person who has been naturalized, twenty-one years old, or upward, who shall have resided in this State twelve months next preceding the election, and thirty days in the county in which he offers to vote shall be deemed an elector." The Convention of 1875 changed "thirty" to "ninety" and added the sentence: "But no person who, upon conviction or confession in open court, shall be adjudged guilty of a felony, or any

other crime infamous by the laws of this State, and hereafter committed shall be deemed an elector, unless such person shall be restored to the rights of citizenship in a manner prescribed by law."

This section was last amended by vote at the general election of 1946. The amendment deleted the word "male" formerly appearing before the word "person".

Cited in Chester, etc., R. Co. v. Commissioners, 72 N. C. 486 (1875); *Foard v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892); *Quinn v. Lattimore*, 120 N. C. 426, 26 S. E. 638 (1897); *Gill v. Board of Com'rs*, 160 N. C. 176, 76 S. E. 203, 43 L. R. A. (N. S.) 293 (1912); *State v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915F, 898, Ann. Cas. 1917D, 517 (1915) (right of women to vote); *Harris v. Watson*, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441 (1931); *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

§ 2. **Qualifications of voters.**—Any person who shall have resided in the State of North Carolina for one year, and in the precinct, ward or other election district in which such person offers to vote for thirty days next preceding an election, and possessing the other qualifications set out in this article, shall be entitled to vote at any election held in this State; provided, that removal from one precinct.

ward or other election district to another in this State shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which such person has removed until thirty days after such removal. No person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime the punishment of which now is, or may hereafter be, imprisonment in the State's Prison, shall be permitted to vote, unless the said person shall be first restored to citizenship in the manner prescribed by law. (Convention 1875; 1899, c. 218; 1900, c. 2, s. 2; Ex. Sess. 1920, c. 93; 1953, c. 972.)

Editor's Note.—This section was added pursuant to c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900. The first sentence read: "He shall have resided in the State of North Carolina for two years, in the county six months, and in the precinct, ward or other election district in which he offers to vote, four months next preceding the election." This sentence was changed pursuant to c. 93, Public Laws of 1920, extra session.

The amendment proposed by Session Laws 1953, c. 972, and adopted by vote of the people at the general election held November 2, 1954, rewrote the first sentence.

Qualifications Same for Municipal Election.—The qualifications of voters in a municipal election is the same as in a general one. *State v. Carter*, 194 N. C. 293, 139 S. E. 604 (1927).

Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same, to-wit, citizenship, twenty-one years of age, twelve months (now two years) residence in the State and thirty days (now four months) in the city or town. *People v. Canaday*, 73 N. C. 198 (1875).

A provision in the charter of a municipality limiting the right of suffrage in municipal elections to owners of real property within the town is unconstitutional. *Smith v. Carolina Beach*, 206 N. C. 834, 175 S. E. 313 (1934).

"Residence" Defined. — Residence, as used in this section defining political rights, is synonymous with domicile, denoting a permanent dwelling place, to which the party, when absent, intends to return. *State v. Grizzard*, 89 N. C. 115 (1883); *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12 (1948).

A person, in order to become a qualified elector in this State, must have come into the State a year (now two years) before the election, or have been domiciled within it for twelve months after forming the purpose to remain, and the same intent must be concurrent with the actual occupation of a domicile in the county in order

to entitle him to the rights of an elector within its limits. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665 (1890).

In order to acquire a residence for the purpose of exercising the right to vote in a given locality, the "residence" must be of a permanent, and not of a temporary character, corresponding with the word domicile. *State v. Carter*, 195 N. C. 697, 143 S. E. 513 (1928).

This constitutional provision applies primarily to an incoming person who is not permitted to exercise political rights until after he has been in the State and the voting precinct for the prescribed periods. *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12 (1948).

Are Not to a Citizen Temporarily Absent.—This constitutional provision is not designed to disfranchise a citizen of the State when he leaves his home and goes into another state or into another county of this State for temporary purposes with the intention of retaining his home and of returning to it when the objects which call him away are attained. *State v. Chaplin*, 228 N. C. 705, 47 S. E. (2d) 12 (1948).

Protracted Residence Abroad. — A protracted residence abroad of one engaged in business and with no home in this State, is not consistent with the idea of a residence here. *State v. Grizzard*, 89 N. C. 115 (1883).

Conviction of Crime. — In a contested election case, a conviction of an offense under a local law prescribing punishment in the State's Prison, renders void the vote of the one so convicted, whether the indictment charged or failed to charge that the alleged offense was "feloniously" committed. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593 (1922).

Vote of Escaped Prisoner.—If a person in jail for misdemeanor (not infamous), and sentenced to imprisonment, escapes, and, before he is recaptured, his term or sentence expires, and he votes in his own precinct, in which he resided before he was sentenced, such vote is valid if the voter be otherwise qualified; but, if the voter is a fugitive from justice, and hiding from one part of the county to another, and voted in the precinct he happened to be in,

and not in the precinct of his residence when sentenced, such vote is illegal. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665 (1890).

Where Voter Resides Near Precinct Line.—When a voter resides on or so near the precinct line, or the line be so uncertain that it is doubtful in which precinct the voter lives, and the voter, honestly and in good faith, bona fide, registers and votes in the precinct he, in good faith, alleges and believes he lives in, and has good reason to believe he is correct, and registers and votes in no other precinct, such vote is legal. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665 (1890).

Mere Failure to Administer Oath.—The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. *Woodall v. Highway Commission*, 176 N. C. 377, 97 S. E. 226 (1918).

Oath Does Not Embrace All Qualifications.—The oath prescribed for electors by § 163-29, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out in this section. The oath does not extend to disqualification incident upon conviction for crime. *State v. Houston*, 103 N. C. 383, 9 S. E. 699 (1889).

Same—Increasing Length of Residence.—The General Assembly cannot in any

§ 3. **Voters to be registered.**—Every person offering to vote shall be at the time a legally registered voter as herein prescribed, and in the manner hereafter provided by law, and the General Assembly of North Carolina shall enact general registration laws to carry into effect the provisions of this article. (Const. 1868; 1899, c. 218; 1900, c. 2, s. 3.)

Cross Reference.—For statutory provision as to registration, see §§ 163-28 et seq.

Editor's Note.—Section 2 of the Constitution of 1868 was as follows: "It shall be the duty of the General Assembly to provide from time to time, for the registration of all electors, and no person shall be allowed to vote without registration, or to register, without first taking an oath or affirmation to support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina, not inconsistent therewith." This was amended to read as the present § 3 pursuant to c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900. For the present registration laws, see §§ 163-29 to 163-52.

way change the qualifications of voters in State, county, township, city or town elections; an act which requires a longer residence in the county than this section requires, is unconstitutional. *People v. Canaday*, 73 N. C. 198 (1875).

A provision in a town charter permitting nonresident freeholders to vote in all municipal elections is void because in conflict with this section. However, an election held under this provision is not void if it is shown that no persons not qualified under the Constitution actually participated in the election. *Wrenn v. Kure Beach*, 235 N. C. 292, 69 S. E. (2d) 492 (1952).

Provision That Commissioners Come from Different Parties.—A provision in a statute that township highway commissioners shall be selected for their fitness, and not for political faith, and to remove the position from partisan politics, one each of the two members to be elected shall, "so far as feasible and practicable, come from each of the two leading political parties of the township," is too indefinite and uncertain to affix a qualification to the position, being recommendatory only to the voters, whose action is not reviewable by the courts. *State v. Sanders*, 174 N. C. 112, 93 S. E. 476 (1917).

Cited in *Quinn v. Lattimore*, 120 N. C. 426, 2 S. E. 638 (1897); *Cox v. Com'rs of Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253 (1908); *State v. Windley*, 178 N. C. 670, 100 S. E. 116 (1919); *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

Power of General Assembly.—While the General Assembly cannot add to the qualifications prescribed by the Constitution for voters, it has the power, and, it is the duty, to enact such registration laws as will protect the rights of duly qualified voters, and no person is entitled to vote until he has complied with the requirements of those laws. *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737 (1892).

Act Requiring New Registration.—An act authorizing a bond issue by a county is not objectionable as violating this section, upon the ground that it empowered the county commissioners to order a new registration. *Cox v. Commissioners*, 146 N. C. 584, 60 S. E. 516 (1908).

Act Requiring Proof of Ability to Read and Write Is Valid.—The provisions of § 163-28 providing that a person presenting himself for registration shall, before he is registered, prove to the satisfaction of the registrar his ability to read and write any

section of the Constitution, was held valid, since the authority was granted the legislature by this section to enact general legislation to carry out the provisions of this article. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

§ 4. Qualification for registration.—Every person presenting himself for registration shall be able to read and write any section of the Constitution in the English language. But no male person who was, on January 1, 1867, or at any time prior thereto, entitled to vote under the laws of any state in the United States wherein he then resided, and no lineal descendant of any such person, shall be denied the right to register and vote at any election in this State by reason of his failure to possess the educational qualifications herein prescribed: Provided, he shall have registered in accordance with the terms of this section prior to December 1, 1908. The General Assembly shall provide for the registration of all persons entitled to vote without the educational qualifications herein prescribed, and shall, on or before November 1, 1908, provide for the making of a permanent record of such registration, and all persons so registered shall forever thereafter have the right to vote in all elections by the people in this State, unless disqualified under section two of this article (Const. 1868; 1899, c. 218; 1900, c. 2, s. 4; Ex. Sess. 1920, c. 93.)

Editor's Note.—This section was added in pursuance of c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900. The following changes were made pursuant to c. 93, Public Laws of 1920, to make the section read as at present: the clause "and before he shall be entitled to vote, he shall have paid on or before the first of May, of the year in which he proposes to vote, his poll tax for the previous year as prescribed by Article V, Section 1, of the Constitution," immediately following the word "language," was stricken out; the proviso, "Provided, such person shall have paid his poll tax as above required," was stricken from the end of the section.

The language of this section is mandatory. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

Registration Essential.—Registration is essential to the exercise by a citizen, possessed of the other legal qualifications, of his right to vote, and, when duly made, is prima facie evidence of the right. *State v. Waldrop*, 104 N. C. 453, 10 S. E. 694 (1889).

Same—Act of Public Officer.—The registration of an elector, who is qualified to vote, must be accepted as the act of a public officer, and entitles the elector to cast his vote. *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545 (1889).

Registrar Is Logical Person to Carry Out Requirements of Section.—As this section of the Constitution says "presenting himself for registration," someone has to determine whether or not the person shall be able to read and write any section of the Constitution in the English lan-

guage. Section 163-28, putting this duty on the registrar is unquestionably a reasonable provision, and the registrar is the logical person to carry out the provisions of the Constitution. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

What Registrars May Ask.—Registrars may ask the elector his age and residence, the township or county from whence he removed, in case of such removal since the last election, and whether he has resided in the State two years, and in the county in which he proposes to vote four months, preceding the election. If, in reply to such questions, the elector answers that he is twenty-one years old, and has resided in the State two years and in the county four months preceding the election, it is the duty of the registrars, upon his taking the prescribed oath, to record his name as a voter; but bystanders may require him to be sworn as to his residence. *In re Reid*, 119 N. C. 641, 26 S. E. 337 (1896).

As to the oath, see *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545 (1889).

Permanent Roll Does Not Dispense with Further Registration.—The fact that a voter is registered on the permanent roll as provided by the Constitution does not dispense with the necessity of his registering anew in order to become a qualified voter, whenever required by the statutes regulating the registration of voters. *Clark v. Statesville*, 139 N. C. 490, 52 S. E. 52 (1905).

Purpose of Permanent Roll.—The making of a permanent roll of record was intended to be done for the sole purpose of furnish-

ing convenient and easily available evidence of the fact that those whose names appear thereon are not required to have the educational qualification. *Clark v. Statesville*, 139 N. C. 490, 52 S. E. 52 (1905).

Registration Book Lost. — Where the registration book of an election precinct had been lost, and could not be replaced, but the registrar procured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who applied for registration subsequently and it appeared that, at the election following, no one voted whose name did not appear on the registration book, that no one voted who was not entitled to vote, and no one who was entitled to vote was excluded the election was valid. *State v. Waldrop*, 104 N. C. 453, 10 S. E. 694 (1889).

When No Registration at All. — Where there has been no registration at all, the votes cast cannot be counted by proving that none but duly qualified electors voted; possibly this principle might be relaxed where a fraudulent conspiracy to deprive the voters of the right of suffrage is shown; and it does not apply where the legislature has failed to provide means for

registration. *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737 (1892).

When Prevented from Registering by Registrars.—Where a voter offers to comply with the laws in reference to registration, but is prevented by the wrongful conduct of the registrar, his vote should be received and counted, but a vote cast upon an invalid registration should be rejected. *State v. Scarborough*, 110 N. C. 232, 14 S. E. 737 (1892).

Necessity of Having Paid Taxes. — Where the validity of a special tax depends upon whether certain persons who had voted had paid their taxes for the previous year according to the requirements of this section the constitutional requirements must be met in order that they may exercise the privilege of voting, though they are permitted to wait until May 1st to pay them, if they so choose. *Ingram v. Johnson*, 172 N. C. 676, 90 S. E. 805 (1916).

Cited in *State v. Grizzard*, 89 N. C. 115 (1883); *Pace v. Raleigh*, 140 N. C. 65, 52 S. E. 277 (1905); *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44 (1907); *Cox v. Com'rs of Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. S.) 253 (1908).

§ 5. Indivisible plan; legislative intent. — That this amendment to the Constitution is presented and adopted as one indivisible plan for the regulation of the suffrage, with the intent and purpose to so connect the different parts, and to make them so dependent upon each other, that the whole shall stand or fall together. (1900, c. 2, s. 5.)

§ 6. Elections by people and General Assembly.—All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. (Const. 1868; 1899, c. 218.)

How Elector May Vote. — The provisions of this section give the elector the choice to deposit his own ballot secretly, or to declare his choice openly when depositing it, or to have the registrar, or one of the judges of election, deposit it for him. *Jenkins v. State Board*, 180 N. C. 169, 104 S. E. 346 (1920).

Secret Ballot. — The provisions of this section imply that in elections by the people the ballot shall be a secret one. *Withers v. Commissioners of Harnett*, 196 N. C. 535, 146 S. E. 225 (1929).

It is not necessary to show undue in-

fluence or intimidation for the courts to declare an election void when the voters have been deprived of their right to a secret ballot. *Withers v. Commissioners of Harnett*, 196 N. C. 535, 146 S. E. 225 (1929).

A voter at an election does not waive his constitutional right to a secret ballot by not protesting, unless he has been made aware of his rights under the facts and circumstances of the balloting. *Withers v. Commissioners of Harnett*, 196 N. C. 535, 146 S. E. 225 (1929).

§ 7. Eligibility to office; official oath. — Every voter in North Carolina, except as in this article disqualified, shall be eligible to office, but before entering upon the duties of the office he shall take and subscribe the following oath:

"I,, do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully

discharge the duties of my office as, so help me, God." (Const. 1868; 1899, c. 218; 1900, c. 2, s. 7.)

Editor's Note.—Section 4 of the Constitution of 1868 amended to become the present § 7 pursuant to c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900, was as follows: "Every voter, except as hereinafter provided, shall be eligible to office; but before entering upon the discharge of the duties of his office, he shall take and subscribe the following oath: 'I, . . . , do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith, and that I will faithfully discharge the duties of my office. So help me, God.'"

Legislature Cannot Increase Qualifications.—This section provides "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and

the legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." *State v. Bateman*, 162 N. C. 588, 77 S. E. 768 (1913).

Women as Public Officers.—A woman is qualified to act as a notary public since the adoption of the 19th Amendment to the Constitution of the United States, and also to pass upon the proper probate of a deed to lands, and make a valid certificate for its registration, when thereto deputized by the clerk of the superior court under the provisions of our statute. *Preston v. Roberts*, 183 N. C. 62, 110 S. E. 586 (1922). For the former rule, see *State v. Knight*, 169 N. C. 333, 85 S. E. 418 (1915).

Cited in *Harris v. Watson*, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441 (1931).

§ 8. Disqualification for office.—The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted or confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony, or of any other crime for which the punishment may be imprisonment in the penitentiary, since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall be restored to the rights of citizenship in a manner prescribed by law. (Const. 1868; 1899, c. 218; 1900, c. 2, s. 8.)

Editor's Note.—The last sentence of this section, which was § 5 of the Constitution of 1868, was as follows: "Second, all persons who shall have been convicted of treason, perjury, or of any other infamous crime, since becoming citizens of the United States, or of corruption, or malpractice in office, unless such person shall have been legally restored to the rights of citizenship." The section was amended to read as the present § 8 pursuant to c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900.

Disqualification Not Part of Judgment.—The disqualification for office and the loss of the right of suffrage imposed by this section upon persons convicted of infamous offenses constitute no part of the judgment of the court, but are mere consequences of such judgment. *State v. Jones*, 82 N. C. 685 (1880).

§ 9. When this chapter operative.—That this amendment to the Constitution shall go into effect on the first day of July, nineteen hundred and two, if a majority of votes cast at the next general election shall be cast in favor of this suffrage amendment. (1899, c. 218; 1900, c. 2, s. 9.)

Editor's Note.—This section was added pursuant to c. 218, Public Laws of 1899 and c. 2, Public Laws of 1900.

Removal of Prosecuting Attorney.—A prosecuting attorney is removable from office as a matter of law or legal inference upon findings of his wilful misconduct or maladministration in office, supported by evidence. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

Same—Appeal.—An appeal from the judgment of the superior court judge that a prosecuting attorney be removed for "wilful misconduct or maladministration in office," etc., is upon questions of law and legal inference, if justified by the findings of facts supported by evidence. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

Cited in *Bank v. Redwine*, 171 N. C. 559, 88 S. E. 878 (1916) (dis. op.); *State v. Windley*, 178 N. C. 670, 100 S. E. 116 (1919).

ARTICLE VII

MUNICIPAL CORPORATIONS

§ 1. **County officers.**—In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: A treasurer, register of deeds, surveyor, and five commissioners. (Const. 1868.)

Cross References.—As to municipal corporations generally, see §§ 160-1 et seq.; as to the register of deeds, see §§ 161-1 et seq.; as to the county surveyor, see §§ 154-1 et seq.; as to the county commission, see §§ 153-1 et seq.

County Commissioners. — Chapter 526, Public-Local Laws of 1935, providing that Cherokee County should be divided into three districts and that one county commissioner should be nominated and elected by the qualified voters of each of the districts, is constitutional as a valid exercise of legislative power over municipal corporations, the General Assembly being given express power by Art. VII, § 14, to change and modify the provisions of this section, relating to number and election of county commissioners. *Watkins v. Johnson*, 210 N. C. 449, 187 S. E. 584 (1936).

Registers of Deeds.—The constitutional

§ 2. **Duty of county commissioners.**—It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes, and finances of the county, as may be prescribed by law. The register of deeds shall be ex officio clerk of the board of commissioners. (Const. 1868.)

Cross Reference. — See §§ 153-1 et seq. and notes thereto.

The General Assembly can give almost unlimited power to the counties to carry out this provision. *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936).

Fiscal Powers Are Subject to Modification.—The General Assembly has power to appoint a tax collector or manager for a county of the State, the fiscal powers granted the county commissioners by this section being subject to modification or abrogation by statute by express provision of Art. VII, § 13. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354 (1940).

Supervision and Control of Roads.—Under this section the commissioners of a county have the duty to exercise a general supervision and control of the roads and levying of taxes as prescribed by law in reference to roads. *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936).

Authority to Borrow from General County Fund.—The board of county commissioners, having the supervision and control of roads, bridges, and the levying

provision for the election of registers of deeds for a term of two years is subject to modification by statute, and therefore the legislature has the power to make the office appointive rather than elective, to extend the term, or to abolish it altogether, and even to dispossess the incumbent, since public office is not a property right. *Penny v. Salmon*, 217 N. C. 276, 7 S. E. (2d) 559 (1940).

Applied in *Rhodes v. Lewis*, 80 N. C. 136 (1879).

Stated in *Harris v. Watson*, 201 N. C. 661, 161 S. E. 215, 79 A. L. R. 441 (1931).

Cited in *People v. McKee*, 65 N. C. 257 (1871); *People v. Canaday*, 73 N. C. 198 (1875); *Perry v. Franklin County Com'rs*, 148 N. C. 521, 62 S. E. 608 (1908); *Southern R. Co. v. Mecklenburg County*, 231 N. C. 148, 56 S. E. (2d) 438 (1949).

of taxes and the finances of the county, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction. *Barbour v. Wake County*, 197 N. C. 314, 148 S. E. 470 (1929).

How School Fund Disbursed.—This section gives the "supervision of schools" to the county commissioners; they levy the school tax, and in their treasury is kept the school fund, and their treasurer disburses the fund, upon the order of the school committee. *Lane v. Stanly*, 65 N. C. 153 (1871). See note to § 153-9, par. 2.

When Commissioners Fail to Qualify.—If from any cause the newly elected commissioners of a county fail to qualify at the time prescribed by law, the old board, as de facto officers, have the power to qualify a county treasurer-elect and induct him into office; or upon his default in filing the

required bond, they have the power to declare a vacancy and fill the same by appointment. *State v. Jones*, 80 N. C. 127 (1879).

General Assembly May Authorize Ferry.—This section does not deprive the General Assembly of the power to pass an act authorizing the establishment of a public ferry at a certain point. In re *Spease Ferry*, 138 N. C. 219, 50 S. E. 625 (1905).

As to the power of General Assembly to abrogate the provisions of the section, see § 14 of the article and annotations thereunder.

Cancellation of Official Bond.—In the absence of a statute specifically authorizing the board of commissioners of a county to cancel an official bond, which the board has taken, accepted and filed, in the performance of its official duty, the duty imposed by this section upon such board, with respect to the finances of the county,

§ 3. **Counties to be divided into districts.**—It shall be the duty of the commissioners first elected in each county to divide the same into convenient districts, to determine the boundaries and prescribe the name of the said districts, and report the same to the General Assembly before the first day of January, 1869. (Const. 1868.)

Alteration of Township after First Division.—The creation or alteration of townships in the several counties of the State, after the first division by the county commissioners under this section is left with the Legislature. *Grady v. County Com'rs*, 74 N. C. 101 (1876). See § 153-9, par. 2, and notes thereto.

§ 4. **Townships have corporate powers.**—Upon the approval of the reports provided for in the foregoing section by the General Assembly, the said districts shall have corporate powers for the necessary purposes of local government, and shall be known as townships. (Const. 1868.)

Township Powers Must Be Conferred.—Townships are corporate bodies and have no corporate powers when not specially conferred by statute. *Wittkowsky v. Board*, 150 N. C. 90, 63 S. E. 275 (1908). See notes to section 153-9, par. 33.

Municipality Subject to Legislative Control.—A municipality, such as a city, town or county, is subject to the control of the General Assembly even in respect to necessary expenses. *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173 (1910).

Township Trustees Not a Municipal Corporation.—The board of township trus-

tees does not confer upon the board such power. *State v. Inman*, 203 N. C. 542, 166 S. E. 519 (1932).

Applied in *Reen v. Farmer*, 211 N. C. 249, 189 S. E. 882 (1937).

Cited in *Flat Swamp, etc., Co. v. McAlister*, 74 N. C. 159 (1876); *Board v. Commissioners*, 111 N. C. 578, 16 S. E. 621 (1892); *Crocker v. Moore*, 140 N. C. 429, 53 S. E. 229 (1906); *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283 (1908); *Bunch v. Randolph County Com'rs*, 159 N. C. 335, 74 S. E. 1048 (1912); *Commissioners v. Road Com'rs*, 165 N. C. 632, 81 S. E. 1001 (1914); *Wilson v. Holding*, 170 N. C. 352, 86 S. E. 1043 (1915); *Holmes v. Bullock*, 178 N. C. 376, 100 S. E. 530 (1919); *Lenoir County v. Taylor*, 190 N. C. 336, 130 S. E. 25 (1925); *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164 (1926); *Dare County v. Mater*, 235 N. C. 179, 69 S. E. (2d) 244 (1952).

Cited in *Wilson v. Board*, 74 N. C. 748 (1876); *Wallace v. Board*, 84 N. C. 164 (1881); *Wittkowsky v. Board*, 150 N. C. 90, 63 S. E. 275 (1908); *Road Comm. v. Commissioners*, 178 N. C. 61, 100 S. E. 122 (1919).

tees has no existence as a municipal corporation, and hence it cannot be a party to a suit. *Wallace v. Board*, 84 N. C. 164 (1881).

Townships Not Given Power of Taxation.—This section does not give townships the power of taxation for school purposes either through their trustees or committees. *Lane v. Stanly*, 65 N. C. 153 (1871). See § 160-56 and notes thereto.

Cited in *Mann v. Allen*, 171 N. C. 219, 88 S. E. 235 (1916); *Road Comm. v. Commissioners*, 178 N. C. 61, 100 S. E. 122 (1919).

§ 5. **Officers of townships.**—In each township there shall be biennially elected, by the qualified voters thereof, a clerk and two justices of the peace, who shall constitute a board of trustees, and shall, under the supervision of the county commissioners, have control of the taxes and finances, roads and bridges of the

township, as may be prescribed by law. The General Assembly may provide for the election of a larger number of justices of the peace in cities and towns, and in those townships in which cities and towns are situated. In every township there shall also be biennially elected a school committee, consisting of three persons, whose duty shall be prescribed by law. (Const. 1868.)

Cross References.—As to the election, powers and duties of the clerk generally, see §§ 2-1 et seq. As to the justices, see §§ 7-112 et seq.

Editor's Note.—The act of 1877, c. 141, passed in pursuance of Art. VII, § 13, amended this section so as to deprive the board of township trustees of its existence as a municipal corporation and to establish other means of electing and appointing justices of the peace. See *Wallace v. Trustees*, 84 N. C. 164 (1881).

Justice Elected. — This section requires that justices of the peace shall be elected by townships. *Edenton v. Wool*, 65 N. C. 379 (1871).

Same—Power Cannot Be Conferred. — An attempt to confer the power of a justice of the peace on the judge of a special court cannot avail, for this section requires justices of the peace to be elected by the several townships, and the legislature cannot change the mode of their appointment. *Wilmington v. Davis*, 63 N. C. 582 (1869).

All Justices Members of Board of Trustees.—Where an act of the General Assembly authorized the election, in townships

containing cities and towns, of a larger number of justices than two, all such justices are members of the township board of trustees. *Conoley v. Harris*, 64 N. C. 662 (1870).

Trustees without Authority to Build Bridges.—Township trustees have no authority to contract for building bridges; when such a contract is entered into without the sanction and supervision of the county commissioners, it is a nullity. *Paine v. Caldwell*, 65 N. C. 488 (1871).

Legislature May Create Highway Commission.—The Legislature has the constitutional authority to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory. *Ellis v. Greene*, 191 N. C. 761, 133 S. E. 395 (1926).

Cited in *Wallace v. Board*, 84 N. C. 164 (1881); *Jones, etc., Co. v. Commissioners*, 85 N. C. 278 (1881); *Road Comm. v. Commissioners*, 178 N. C. 61, 100 S. E. 122 (1919).

§ 6. **Trustees shall assess property.** — The township board of trustees shall assess the taxable property of their townships and make return to the county commissioners for revision, as may be prescribed by law. The clerk shall also be, ex-officio, treasurer of the township. (Const. 1868.)

Assessment by Mayor and Commissioners.—An assessment of the property subject to taxation by a municipal corporation, made by the mayor and commissioners of such corporation, is void. Such assessment, under the provision of the Constitution, must be made by the township board of trustees. *Cobb v. Corporation*, 75 N. C. 1 (1876).

When Appeal Lies from Commissioners' Decision. — The county commissioners have exclusive original jurisdiction to grant relief against excessive valuation of property for taxation; and from their decision, upon a petition for that purpose, there is no appeal, unless it appears from the facts found by them as to the valuation of property, that they have proceeded upon

some erroneous principle; for the reason that the statute gives no appeal. *Wade v. Commissioners*, 74 N. C. 81 (1876).

Legislative Power When Section Abrogated.—The General Assembly, during the abrogation of this section could constitute other agencies to perform the duties herein imposed upon the township board of trustees. *North Carolina R. Co. v. Commissioners*, 82 N. C. 260 (1880).

Cited in *Carolina Cent. R. Co. v. Wilmington*, 72 N. C. 73 (1875); *Richmond, etc., R. Co. v. Commissioners*, 84 N. C. 504 (1881); *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890); *Board v. Commissioners*, 111 N. C. 578, 16 S. E. 621 (1892); *Road Com. v. Commissioners*, 178 N. C. 61, 100 S. E. 122 (1919).

§ 7. **No debt or loan except by a majority of voters.**—No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless approved by a majority

of those who shall vote thereon in any election held for such purpose. (Const. 1868; 1947, c. 34.)

- I. Editor's Note.
- II. General Consideration.
- III. Necessary Expenses.
 - A. General Consideration and Application.
 - B. School Bonds or Taxation.

Cross References.

As to municipal taxation, see § 160-56; as to election on question of county aid to railroads, see § 60-22.

For article on "Necessary Expenses," see 18 N. C. Law Rev. 93.

I. EDITOR'S NOTE.

Municipal corporations may levy a tax for necessary expenses to the constitutional limitation without a vote of the people and without legislative permission: for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters; but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. The constitutionality of a legislative act exceeding the constitutional limitation depends upon whether or not the bill passed each branch of the legislature on three separate days, with the "aye" not "no" vote both entered on the journals of the second and third readings. See *Henderson v. Wilmington*, 191 N. C. 269, 132 S. E. 25 (1926).

This section was amended by vote at the general election of November 2, 1948. Prior to the amendment the last clause read "unless by a vote of the majority of the qualified voters therein". For a brief comment on the amendment, see 25 N. C. Law Rev. 395.

II. GENERAL CONSIDERATION.

Intent of Section.—This section was intended to present another check to the impudence of county and municipal officers. *Paine v. Caldwell*, 65 N. C. 488 (1871).

This section is an absolute prohibition. It is cumulative and adds another restraint to § 7 of Art. V. *Brodnax v. Groom*, 64 N. C. 244 (1870).

Cannot Be Evaded by Legislature.—This section prohibits any county, city, town or other municipal corporation, from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote and a legislative act which attempts to evade the restriction which this section puts on counties, etc., to contract debts, is unconstitutional and void. *Chester, etc., R.*

Co. v. Commissioners, 72 N. C. 486 (1875), decided prior to the amendment.

Rule and Exception Thereto.—Under this section approval of taxation by popular vote is the rule, and the power to impose a tax for a necessary expense without a vote is the exception. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702 (1946).

No Vested Right by Former Construction of Section.—A public service corporation, which was granted a franchise and entered into a contract with a city when, under this section as then construed, the city was without power to construct competing works, but which constitutional provision was subsequently construed to grant such power, held to have no standing, after its franchise and contract had expired by limitation, to invoke the rule that one acquiring rights under one construction of the State law may not be deprived of them by a subsequent different construction. *Hill v. Elizabeth City*, 298 F. 67 (1924).

The only way to preserve the vitality of this section and § 6 of Art. 5 is to adhere to the construction, that the "special purpose" for which the "special approval" of the General Assembly is essential must be for a "necessary expense" in contemplation of the constitutional provision. *Castevens v. Stanly County*, 209 N. C. 75, 183 S. E. 3 (1935), citing *Glenn v. Board of County Com'rs*, 201 N. C. 233, 159 S. E. 439 (1931).

The term "municipal corporation" should not be construed narrowly to include only cities, towns, counties and school districts, as the Constitution contemplates a broader construction of the term, and in its broader sense the term includes all public corporations exercising governmental functions within the constitutional limitations. *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

The State is not a municipality within the meaning of the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality but an administrative agency of the State, such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to a vote, the limitations imposed by this section being applicable solely to municipalities. *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to con-

duct schools of higher standards and longer terms, the provision for a vote is not in deference to this section and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school system. *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

School Districts as Municipal Corporations.—School districts are public quasi-corporations, included in the term municipal corporations as used in this section. *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524 (1906). See post, this note, "School Bonds or Taxation," III, B.

A legally qualified board of trustees of the graded schools of a town is a municipal corporation within the meaning and purport of this section. *Hollowell v. Borden*, 148 N. C. 255, 61 S. E. 638 (1908).

Debt. — This section and the amended Art. V, § 4, will be considered in *pari materia*, and the word "debt" in Art. V, § 4, will be given the same construction as has been given the word in construing this section since the legislature in framing the amendment must have had in mind the construction which has been given the word as used in this section. *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90 (1938). See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941).

Function Must Be Public.—A municipal corporation cannot, even with express legislative sanction, embark on any private enterprise or assume any function which is not in a legal sense public. *Brown v. Board of Com'rs*, 223 N. C. 744, 28 S. E. (2d) 104 (1943).

Majority of Qualified Voters Formerly Necessary.—For cases decided under the former wording of this section "unless by a vote of a majority of the qualified voters therein", see *Sprague v. Board of Com'rs*, 165 N. C. 603, 81 S. E. 915 (1914); *Long v. Commissioners*, 181 N. C. 146, 106 S. E. 481 (1921); *Madry v. Scotland Neck*, 214 N. C. 461, 199 S. E. 618 (1938); *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939); *Twining v. Wilmington*, 214 N. C. 655, 200 S. E. 416 (1939).

Same—Act Not Stating Necessity of Majority Vote.—An issue of bonds for a school district would not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, where it appeared that such majority, as ascertained from a valid registry, was cast in favor of the issue. *Hammond v. McRae*, 182 N. C.

747, 110 S. E. 102 (1921), decided prior to the amendment.

Distinct Debts May Be Voted for in One Ballot Box.—An issue of municipal bonds, when approved by the voters, under the authority of a statute passed according to the constitutional requirements, is not invalid because there were several distinct debts provided and voted for in one ballot box. This section does not require that the vote upon each distinct proposition must be in a separate ballot box. *Smith v. Belhaven*, 150 N. C. 156, 63 S. E. 610 (1909).

But a legislative act which authorizes an election to be held upon the question of levying a special school tax providing that if any township should cast a majority of its votes in its favor it should apply only to the township, should the county as a whole reject the proposition, and requiring but a single ballot upon two propositions, is contrary to this section and void. *Hill v. Lenoir County*, 176 N. C. 572, 97 S. E. 498 (1918).

When Act Does Not Limit Bond Issue.—An exception to the constitutionality of an act submitting the question of a bond issue to the voters cannot be sustained on the ground that it does not limit the amount of the bonds that may be issued for the purposes therein authorized. *Waters v. Board*, 186 N. C. 719, 120 S. E. 450 (1923).

When Funds Are Already on Hand. — This provision has no application where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. *Adams v. Durham*, 189 N. C. 232, 126 S. E. 611 (1925). See note of this case under section 160-1 of the code.

The acquisition of the land for a municipal airport from surplus funds was not beyond the power of the city and it in no way offended the provisions of this section. *Goswick v. Durham*, 211 N. C. 637, 191 S. E. 728 (1937).

When Indebtedness Already Voted on.—That part of this section forbidding the levy of any taxes by a municipal corporation except for necessary expenses, unless by a vote of the people, applies only to such indebtedness as has not been submitted to a vote of the people. *Charlotte v. Shepard & Co.*, 122 N. C. 602, 29 S. E. 842 (1898).

Where appropriations were made by two cities and county to airport authority out of funds not derived from ad valorem taxes and funds were free from other specified purpose or legal commitment, no question

of credit or taxation in violation of this section is involved. Greensboro-High Point Airport Authority v. Johnson, 226 N. C. 1, 36 S. E. (2d) 803 (1946), distinguishing Sing v. Charlotte, 213 N. C. 60, 195 S. E. 271 (1938).

Endorsement of Township Bonds by County.—Where townships are permitted to call an election for the purpose of voting upon the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, and contrary to this section. Commissioners v. Boring, 175 N. C. 105, 95 S. E. 43 (1918).

Authorization of Bonds without Tax to Pay Them.—The power given by a statute to a city to issue bonds with the approval of a vote of the people of the city does not confer, by implication, the power to levy a tax to pay them unless the power to levy such tax has been conferred by the act authorizing the issue and ratified by a vote of the people, as required by this section. Charlotte v. Shepard, 120 N. C. 411, 27 S. E. 109 (1897).

Taxes to Pay New Debts.—The commissioners of a town have no authority to collect taxes to pay "new debts" unless the proposition is submitted to the voters of the town, even though commanded by mandamus. Weinstein v. Commissioners, 71 N. C. 535 (1874).

Railroad Aid Bonds.—It is essential to the validity of bonds issued in aid of railroads, or other similar enterprises, by counties, townships and other municipal organizations, that the proposition shall have first had the assent of the voters in the territory affected, to be duly ascertained by an election regularly held for that purpose. Lynchburg, etc., R. Co. v. Board, 109 N. C. 159, 13 S. E. 783 (1891). See § 60-22. As to constitutional provision regarding state aid of railroads, see Art. V, § 4.

Bonds to Refund Bonds.—A municipal corporation does not contract a debt, within the meaning of this section, when under statutory authority it issues bonds to refund bonds which at the date of the issuance of the refunding bonds are valid and enforceable obligations of the corporation. Bolich v. Winston-Salem, 202 N. C. 786, 164 S. E. 361 (1932).

Local Assessments to Drain Land.—No

vote of the people is required on the proposition of apportioning the burden of draining lands by local assessments. Sandlerin v. Luken, 152 N. C. 738, 68 S. E. 225 (1910).

Appropriation of Taxes by Chamber of Commerce.—This section refers to the county, city, or town as a State governmental agency, and does not authorize an appropriation of a certain per cent of taxes levied upon their taxpayers for the use or disposition of a chamber of commerce of a city, without the approval of the qualified voters therein. Ketchie v. Hedrick, 186 N. C. 392, 119 S. E. 767 (1923).

Where a city sells land used for recreation purposes and turns the proceeds of the sale over to its park and recreation commission the action is not a pleading of its faith and credit so as to involve the application of this section. Hall v. Redd, 196 N. C. 622, 146 S. E. 583 (1929).

Applied in Sessions v. Columbus County, 214 N. C. 634, 200 S. E. 418 (1939), treated under Art. V, § 4.

Cited in Lane v. Stanly, 65 N. C. 153 (1871); **People v. Canaday,** 73 N. C. 193 (1875); **Parker v. Board,** 104 N. C. 166, 10 S. E. 137 (1889); **Goldsboro Graded School v. Broadhurst,** 109 N. C. 228, 13 S. E. 781 (1891); **Railroad Co. v. Commissioners,** 116 N. C. 563, 21 S. E. 205 (1895); **McCless v. Meekins,** 117 N. C. 34, 23 S. E. 99 (1895); **Vaughn v. Board,** 117 N. C. 429, 23 S. E. 354 (1895); **Commissioners v. Payne,** 123 N. C. 432, 31 S. E. 711 (1898); **Slocum v. Fayetteville,** 125 N. C. 362, 34 S. E. 436 (1899); **State v. Irvin,** 126 N. C. 989, 35 S. E. 430 (1900); **Rodman-Heath Cotton Mills v. Waxhaw,** 130 N. C. 293, 41 S. E. 488 (1902); **Commissioners v. MacDonald,** 148 N. C. 125, 61 S. E. 690 (1908); **Commissioners v. Road Comm'rs,** 165 N. C. 632, 81 S. E. 1001 (1914); **Moran v. Board,** 168 N. C. 289, 84 S. E. 402 (1915); **Bickett v. State Tax Comm.,** 177 N. C. 433, 99 S. E. 415 (1919); **Waters v. Board,** 186 N. C. 719, 120 S. E. 450 (1923); **Yarbrough v. Park Commission,** 196 N. C. 284, 145 S. E. 563 (1928); **Castevens v. Stanly County,** 211 N. C. 642, 191 S. E. 739 (1937); **Weaverville v. Hobbs,** 212 N. C. 684, 194 S. E. 860 (1938). See also, **McGuinn v. High Point,** 219 N. C. 56, 13 S. E. (2d) 48 (1941); **Horner v. Chamber of Commerce,** 231 N. C. 440, 57 S. E. (2d) 789 (1950).

III. NECESSARY EXPENSES.

A. General Consideration and Application.

In General.—This section does not require that a debt, to be contracted for necessary expenses by a city or town, shall be submitted to a vote of the people there-

in. *Tucker v. Raleigh*, 75 N. C. 267 (1876). *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173 (1910).

Under this section as construed with Art. V, § 6 a municipality may issue valid bonds for its necessary expenses without the approval of its voters within the constitutional limitation in the absence of statutory authority, and with statutory authority and the approval of its voters it may issue bonds in excess of this limitation. *Burleson v. Spruce Pine*, 200 N. C. 30, 156 S. E. 241 (1930).

For purposes other than necessary expenses, whether special or not, taxes may not be levied by a county either within or in excess of the limitation fixed by our Constitution, Art. V, § 6, except by a vote of the people under special legislative authority. *Glenn v. Board of County Com'r*, 201 N. C. 233, 159 S. E. 439 (1931); *Sessions v. Columbus County*, 214 N. C. 634, 200 S. E. 418 (1939).

For note on "necessary expenses" of municipal corporations under this section, see 30 N. C. Law Rev. 313.

Legislative Discretion.—It is within the discretion of the legislature to authorize a county to issue bonds for necessary expenses, either with or without the approval of its voters, or to require only the approval by a majority of the votes cast at a special election authorized for the purpose, and the approval by the majority of the qualified voters is not required for their validity. *Davis v. Lenoir County*, 178 N. C. 668, 101 S. E. 260 (1919).

Same—Presumption.—Under legislative authority a county may issue bonds to refund its existing floating debt for necessary county expenses, in excess of the 15 cents limitation upon the \$100 valuation of its taxable property according to Art. V, § 6, when coming within the provisions of the municipal finance act, c. 81, § 8, Public Laws of 1927, and where the record on appeal states that the issuance of the bonds is for necessary county purposes, and for taking care of its floating indebtedness, it will be assumed on appeal that the excess over the 15 cents valuation was for necessary county expenses, coming within the provision of this section, not requiring the question of the issuance of the bonds to be submitted to the voters of the county. *Board v. Assell*, 194 N. C. 412, 140 S. E. 34 (1927).

Legislative Declaration and Municipal Commissioners Finding That Tax Is for Necessary Expense Is Not Controlling.—The declaration of the General Assembly in a statute authorizing a municipality to levy a tax and the finding of the municipal

commissioners that the tax is for a necessary municipal expense within the meaning of this section, is not controlling, but, when made in good faith, such declaration and finding are persuasive, and are entitled to serious consideration by the courts in determining whether the purpose for which the tax is proposed to be levied is for a necessary municipal expense within the meaning of term as used in the Constitution. *Martin v. Raleigh*, 208 N. C. 369, 180 S. E. 786 (1935); *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702 (1946).

What Are "Necessary Expenses."—The term, "necessary expenses" is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality, but it has a more comprehensive meaning. *Storm v. Wrightsville Beach*, 189 N. C. 679, 128 S. E. 17 (1925).

The county commissioners are the sole judges of what are "necessary expenses." *Evans v. Commissioners*, 87 N. C. 154 (1882); *Williams v. Commissioners*, 119 N. C. 520, 26 S. E. 150 (1896).

Where the purpose for which a proposed expense is to be incurred by a municipality is the maintenance of public peace or administration of justice, or partakes of a governmental nature, or purports to be an exercise by the municipality of a portion of the State's delegated sovereignty, the expense is a necessary expense within this section, and may be incurred without a vote of the people. *Green v. Kitchin*, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500.

Bonds issued for the following purposes have been held to have been issued for necessary expenses: For the payment of interest on bonds already issued for necessary purposes (*Wilson v. Board*, 74 N. C. 748 (1876)); the building and maintenance of public roads (*Woodall v. Western Wake Highway Comm.*, 176 N. C. 377, 97 S. E. 226 (1918); *Lassiter v. Board*, 188 N. C. 379, 124 S. E. 738 (1924); *Hill v. Board*, 190 N. C. 123, 129 S. E. 154 (1925); *Ellis v. Greene*, 191 N. C. 761, 133 S. E. 395 (1926)); paving streets (*Hendersonville v. Jordan*, 150 N. C. 35, 63 S. E. 167 (1908); *Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41 (1923)); lighting streets (*Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255 (1910)) to the extent of furnishing a plant for that purpose (*Fawcett v. Mt. Azy*, 134 N. C. 125, 45 S. E. 1029 (1903); *Swindell v. Belhaven*, 173 N. C. 1, 91 S. E. 369 (1917)); furnishing sidewalks (*Storm v. Wrightsville Beach*, 189 N. C. 679, 128 S. E. 17 (1925)); building bridges (*Herring*

v. Dixon, 122 N. C. 420, 29 S. E. 363 (1898); Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534 (1924)) even though the bridge is interstate (Emery v. Commissioners, 181 N. C. 420, 107 S. E. 443 (1921)); furnishing waterworks and sewerage systems (Brockenbrough v. Board, 134 N. C. 1, 46 S. E. 28 (1903); Greensboro v. Scott, 138 N. C. 181, 50 S. E. 589 (1905); Underwood v. Asheboro, 152 N. C. 641, 68 S. E. 147 (1910); Reed v. Howerton Engineering Co., 188 N. C. 39, 123 S. E. 479 (1924)); erection of a courthouse (Halcomb v. Commissioners, 89 N. C. 346 (1883)); erection of a municipal building in a large city (Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279 (1909)); and the building of county homes (Norfolk Southern R. Co. v. Reid, 187 N. C. 320, 121 S. E. 534 (1924)). See Board of Financial Control v. Henderson County, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783 (1935), as to municipal electric plant being a necessary expense.

Bonds for establishing and maintaining playgrounds, in populous, industrial city, for its children, are for a necessary expense. Atkins v. Durham, 210 N. C. 295, 186 S. E. 330 (1936).

The imposition of a tax or the expenditure of funds derived therefrom for municipal parks and recreational facilities is for a public purpose but it is not for a necessary municipal expense, within the meaning of this section, and the expenditure of funds for this purpose derived from a tax imposed without a referendum may be enjoined by the courts. Purser v. Ledbetter, 227 N. C. 1, 40 S. E. (2d) 702 (1946).

The legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel. Nash v. Tarboro, 227 N. C. 283, 42 S. E. (2d) 209 (1947).

Bonds for the construction of a municipal electric power plant are for a public purpose and a necessary municipal expense, and may be issued up to the constitutional limitation without a vote of its electors and without legislative authority, and in excess of the constitutional limitation by legislative authority without a vote of the people. Williamson v. High Point, 213 N. C. 96, 195 S. E. 90 (1938).

Other projects which have sustained the issuance of bonds as necessary expenses, though of less frequent occurrence than

those just enumerated, are: For the installation of an electric fire-alarm system (Kinston v. Security Trust Co., 169 N. C. 207, 85 S. E. 399 (1915)); purchase of an incinerator for the destruction of garbage (Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17 (1925)); erection of an abattoir (Moore v. Greensboro, 191 N. C. 592, 132 S. E. 565 (1926)); and of jetties (Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17 (1925)).

The establishment of a wharf is not a necessary expense, Henderson v. Wilmington, 191 N. C. 269, 132 S. E. 25 (1926). Nor is the erection and maintenance of a dispensary such an expense. Garsed v. Greensboro, 126 N. C. 159, 355 S. E. 254 (1900).

The building of a county fence by a county having the free-range law, between it and an adjoining county having the stock law, is not a necessary expense within the meaning of this section. Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640 (1916).

But laying an assessment for building a stock-law fence in territory where the law is effective is not taxation requiring its submission to a vote of the people of the district. Shuford v. Commissioners, 86 N. C. 552 (1882); Tripp v. Commissioners, 158 N. C. 180, 73 S. E. 896 (1912).

It has long been decided that water and sewer are "necessary expenses," within the meaning of § 7, Art. VII, Constitution of North Carolina, and a vote of the people is not necessary. Storm v. Wrightsville Beach, 189 N. C. 679, 128 S. E. 17 (1925). So, also, are roads. See Davis v. Lenoir, 178 N. C. 668, 101 S. E. 260 (1919); Drysdale v. Prudden, 195 N. C. 722, 143 S. E. 530 (1928). See also, Starmount Co. v. Hamilton Lakes, 205 N. C. 514, 171 S. E. 909 (1933); Lamb v. Randleman, 206 N. C. 837, 175 S. E. 293 (1934); Burt v. Biscoe, 209 N. C. 70, 183 S. E. 1 (1935).

The building of a drilling tower to train the city's firemen is not a necessary expense within the meaning of this section. Wilson v. Charlotte, 206 N. C. 856, 175 S. E. 306 (1934). But an expenditure by a municipality for special training of a police officer is a necessary expense within the meaning of this section. Green v. Kitchin, 229 N. C. 450, 50 S. E. (2d) 545 (1948), discussed in 27 N. C. Law Rev. 500.

Borrowing money to pay judgments for salaries owing to the employees of a city school in anticipation of collection of taxes levied thereon is not in contravention of this section. Hammond v. Charlotte, 206 N. C. 604, 175 S. E. 148 (1934).

The sale of refunding bonds under § 153-77, subsection (j), is a necessary expense. *Morrow v. Durham*, 210 N. C. 564, 187 S. E. 752 (1936). So also is the issuance of bonds by a county to refinance highway bonds issued by its townships. *Thomson v. Harnett County*, 209 N. C. 662, 184 S. E. 490 (1936). The expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor under § 160-229 is a necessary expense of a city. *Martin v. Raleigh*, 208 N. C. 369, 180 S. E. 786 (1935). See also, *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777 (1935).

The sale of intoxicating liquor is not a "necessary expense," nor is it a public purpose or undertaking. *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935).

While there is no contention that the construction, equipment, and maintenance of an airport and landing field is a necessary municipal expense within the meaning of this section, yet it may not be improper to say that man's constantly advancing progress in the conquest of the air as a medium for the transportation of commerce and for public and private use indicates the practical advantage and possible future necessity of adequate landing facilities to the same extent that paved streets and roads are now regarded for the purposes of communication and transportation on land. *Goswick v. Durham*, 211 N. C. 687, 191 S. E. 728 (1937), citing *Hargrave v. Board of Com'rs*, 168 N. C. 626, 84 S. E. 1044 (1915).

The construction, maintenance and operation of an airport by a city is a public purpose for which funds may be provided by taxation, when approved by a vote of the people in accordance with this section. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

What May Be Included in Tax for Expense.—A municipal platform is not a public market and such platform erected for the purpose of obtaining revenue for the town by the imposition of a fee for the sale of cotton therefrom is not a necessary municipal expense and the town may not issue its notes for the purchase price of such platform without a vote of its electors. *Walker v. Faison*, 202 N. C. 694, 163 S. E. 875 (1932).

Where a vote of the people is not necessary to the validity of the bonds proposed to be issued if an election should be called and the tax approved by the electors of the town, such tax would be valid regardless of whether it was levied for a necessary expense. *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934).

Province of Court.—It has become the accepted meaning of this section that it is the province of the courts to decide whether a particular municipal expense falls within the category of necessary expenses, leaving to the municipal authorities the power to determine whether a proposed expense within that category is necessary in a given case. *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649 (1932).

The courts determine whether a given project is a necessary expense of a municipality, but the governing authorities of the municipality determine in their discretion whether such given project is necessary or needed in the designated locality. *Starmount Co. v. Hamilton Lakes*, 205 N. C. 514, 171 S. E. 909 (1933); *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

Expansion of City's Power Lines.—Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of this section, nor is it in violation of the Fourteenth Amendment to the federal Constitution. *Holmes v. Fayetteville*, 197 N. C. 740, 150 S. E. 624 (1929).

Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of this section, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. *Barbour v. Wake County*, 197 N. C. 314, 148 S. E. 470 (1929).

Operating and Improving Airport.—Since a municipality may not levy a tax directly for the purpose of operating, maintaining and improving an airport without a vote of the people, it may not levy a tax for a contingent fund and thereafter in the same year appropriate money from the contingent fund thus created for the purpose of operating, maintaining, and improving the airport, since it may not do indirectly what it is without power to do directly. *Sing v. Charlotte*, 213 N. C. 60, 195 S. E. 271 (1938).

The construction of an annex to a county hospital, to be used principally for the care of the indigent sick of the county, is not a necessary expense of the county within the

meaning of this section. *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195 (1937).

B. School Bonds or Taxation.

Editor's Note.—It has been held in several cases that the erection of school buildings is not a necessary expense within the purview of this section, and therefore a county cannot be brought under this indebtedness without the approval of the qualified voters. *Jones v. Board*, 185 N. C. 303, 117 S. E. 37 (1923); *Davis v. Board*, 186 N. C. 227, 119 S. E. 372 (1923). However these cases did not involve an indebtedness incurred by legislative authority in carrying on the public school system of the State and the necessary maintenance of a six-months school term, as required by § 3 of Art. 9 of the Constitution, and it has been held that the question of taxation for this purpose need not be submitted to the voters. *Tate v. Board*, 192 N. C. 516, 135 S. E. 336 (1926); *Hartsfield v. Craven County*, 194 N. C. 358, 139 S. E. 698 (1927).

The better reason advanced for this distinction is that each part of the Constitution is of equal weight and merit and this section should be construed so as not to nullify any other portion of the Constitution. In *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612 (1922), the court said: "The restrictions contained in this section . . . must be understood to refer to the debts and taxes in furtherance of local measures and do not extend to a State-wide measure . . . , undertaken in obedience to a separate provision of the Constitution, and in which the counties are . . . expressly recognized as the governmental units through which the general purpose may be made effective." See annotations under § 115-99.

As to estoppel of taxpayers to deny the invalidity of a special school tax, see *Carr v. Little*, 188 N. C. 100, 123 S. E. 625 (1924).

The limitations of this section are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act (§ 153-77), for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. *Hall v. Commissioners*, 194 N. C. 768, 140 S. E. 739 (1927).

This section applies to local matters relating to the affairs of the county separately considered, and not to a State-wide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made

mandatory by the Constitution, Art. IX, §§ 1, 2, 3, requiring the maintenance of a six-months term of public schools. *Owens v. Wake County*, 195 N. C. 132, 141 S. E. 546 (1928).

But the power is not given the county to issue bonds for the erection and purchase of schoolhouses without a popular vote except where such schoolhouses and necessary land therefor are required for the establishment and maintenance of a six-months school term as provided by the Constitution. *Lovlace v. Pratt*, 187 N. C. 686, 122 S. E. 661 (1924); *Frazier v. Commissioners*, 194 N. C. 49, 138 S. E. 433 (1927); *Owens v. Wake County*, 195 N. C. 132, 141 S. E. 546 (1928); *Hall v. Commissioners*, 195 N. C. 367, 142 S. E. 315 (1928).

The findings of fact disclosed that defendant county had not reduced its outstanding indebtedness during the prior fiscal year, and that it proposed to borrow money and issue its bonds to erect a schoolhouse necessary for the maintenance of the constitutional school term in the county, without submitting the question of borrowing the money to the qualified voters of the county. It was held that the limitation prescribed by Art. V, § 4, as amended, is in addition to other constitutional limitations relating to taxation, and the county may not borrow money, even for a necessary expense, without submitting the question to a vote, when its outstanding indebtedness has not been reduced during the prior fiscal year, and plaintiff taxpayer is entitled to injunctive relief restraining the issuance of the proposed bonds. *Hallyburton v. Board of Education*, 213 N. C. 9, 195 S. E. 21 (1938).

Where by special act the legislature grants a charter to an existing city, enlarging the city limits to take in territory within one or more nonlocal tax districts, it is not necessary, nor contrary to this section, that a vote of the people within the added territory be had either upon the question of annexing such territory or upon the question of levying school taxes therein, the object of the charter being to provide for the government, welfare and improvement of the city, and not primarily for the mere maintenance of schools. *Hailey v. Winston-Salem*, 196 N. C. 17, 144 S. E. 377 (1928).

Premiums for insurance of its public school buildings is a necessary public expense of a county. *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

Liability for bonds for unnecessary school buildings is not a necessary ex-

pense. Greensboro v. Guilford County, 209 N. C. 655, 184 S. E. 473 (1936).

As to school district bonds or taxes for

athletic stadium, see Boney v. Board of Trustees, 229 N. C. 136, 48 S. E. (2d) 56 (1948).

§ 8. **No money drawn except by law.**—No money shall be drawn from any county or township treasury, except by authority of law. (Const. 1868.)

Cited in Winslow v. Commissioners, 64 N. C. 218 (1870); Faison v. Commissioners, 171 N. C. 411, 88 S. E. 761 (1916);

Reed v. Farmer, 211 N. C. 249, 189 S. E. 882 (1937); Wilson v. Farmer, 211 N. C. 254, 189 S. E. 885 (1937).

§ 9. **When officers enter on duty.**—The county officers first elected under the provisions of this article shall enter upon their duties ten days after the approval of this Constitution by the Congress of the United States. (Const. 1868.)

Editor's Note.—Section 9 of Art. VII of the original Constitution of 1868 read as follows: "All taxes levied by any county, city, town, or township shall be uniform and ad valorem upon all property in the same, except property exempted by this Constitution." The original § 9 was repealed pursuant to c. 248 of the Public

Laws of 1935 which also proposed amendments, subsequently adopted to Art. V, § 3, and Art. V, § 4. With the repeal of the original § 9, it was provided that §§ 10 through 14 of Art. VII be appropriately renumbered. Thus, the present § 9 of this article was originally § 10 of Art. VII.

§ 10. **Governor to appoint justices.**—The Governor shall appoint a sufficient number of justices of the peace in each county, who shall hold their places until sections four, five, and six of this article shall have been carried into effect. (Const. 1868; 1935, c. 248.)

Cross Reference.—See note under preceding section. And see §§ 7-112 et seq.

Editor's Note.—The present § 10 was originally § 11, but was renumbered pur-

suant to c. 248 of the Public Laws of 1935. See note under Art. VII, § 9.

Cited in Nichols v. McKee, 68 N. C. 429 (1873).

§ 11. **Charters to remain in force until legally changed.**—All charters, ordinances, and provisions relating to municipal corporations shall remain in force until legally changed, unless inconsistent with the provisions of this Constitution. (Const. 1868; 1935, c. 248.)

Cross Reference. — See note under § 9 of this article.

Editor's Note.—The present § 11 was

originally § 12, but was renumbered pursuant to c. 248 of the Public Laws of 1935. See note under Art. VII, § 9.

§ 12. **Debts in aid of the rebellion not to be paid** — No county, city, town, or other municipal corporation shall assume or pay, nor shall any tax be levied or collected for the payment of any debt, or the interest upon any debt, contracted directly or indirectly in aid or support of the rebellion. (Const. 1868; 1935, c. 248.)

Editor's Note.—The present § 12 was originally § 13, but was renumbered pursuant to c. 248 of the Public Laws of 1935. See note under Art. VII, § 9.

See Leake v. Commissioners, 64 N. C. 133 (1870); Poindexter v. Davis, 67 N. C. 112 (1872); Weith v. Wilmington, 68 N. C. 24 (1873); Logan v. Plummer, 70 N. C. 388 (1874); Davis v. Board, 72 N. C. 441

(1875); Brickwell v. Commissioners, 81 N. C. 240 (1879); Wingate v. Parker, 136 N. C. 369, 48 S. E. 774 (1904); Jones v. Commissioners, 137 N. C. 579, 50 S. E. 291 (1905); Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524 (1906); Southern R. Co. v. Board, 148 N. C. 220, 61 S. E. 690 (1908); Board v. Webb, 155 N. C. 379, 71 S. E. 520 (1911).

§ 13. **Powers of General Assembly over municipal corporations.**—The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections seven, nine and thirteen. (Const. 1868; 1935, c. 248.)

Editor's Note.—The present § 13 was originally § 14, which was added by the Convention of 1875, but was renumbered

pursuant to c. 248 of the Public Laws of 1935. See note under Art. VII, § 9. Municipality Subject to Legislative Con-

trol.—A municipality, such as a city, town or county, is subject to the control of the General Assembly even in respect to necessary expenses. *Jones v. New Bern*, 152 N. C. 64, 67 S. E. 173 (1910).

And the General Assembly may, at its discretion, abolish municipal as well as other corporations. *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993 (1897).

Control of Municipal Contract.—The power conferred by its charter upon a city to provide water and lights, and to contract for same, provide for cleaning and repairing the streets, regulate the market, take proper means to prevent and extinguish fires, is subject to the police power of the State, with respect to rates to be charged under such contracts as the city may make under its charter with a public service corporation. *Corporation Comm. v. Henderson Water Co.*, 190 N. C. 70, 128 S. E. 465 (1925).

Dividing County into Three Districts.—Chapter 526, Public-Local Laws 1935, providing that Cherokee County be divided into three districts and a commissioner elected from each district falls well within the full power given the General Assembly by this section. *Watkins v. Johnson*, 210 N. C. 449, 187 S. E. 584 (1936).

See §§ 7-112 et seq. of the Code.

Act Need Not Be General.—It is not required that the power conferred in this section should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the act making such change, local in its operation, must be given effect under its provisions, if otherwise valid. *Smith v. School Trustees*, 141 N. C. 143, 53 S. E. 524 (1906); *Tyrrell County v. Holloway*, 182 N. C. 64, 108 S. E. 337 (1921).

Charters and Ordinances Entrusted to Legislature.—Under this section all charters, ordinances and provisions relating to municipal corporations are entrusted to the discretion of the legislature. *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269 (1897).

Creation of Highway Commission.—The legislature has authority under this section to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory.

Commissions v. Road Comm'rs, 165 N. C. 632, 81 S. E. 1001 (1914); *Ellis v. Greene*, 191 N. C. 761, 133 S. E. 395 (1926).

The powers given to county commissioners over public highways, may be taken away from them and conferred by statute upon other political agencies of the State. *Day v. Commissioners*, 191 N. C. 780, 133 S. E. 164 (1926).

Appointing City Aldermen.—The delegation by the legislature to the Governor of the State of the power of appointing a portion of the aldermen of a city is within the scope of the power entrusted to the discretion of the legislature by this section. *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269 (1897).

Compelling County to Issue Bonds.—The legislature has power to pass an act compelling a county to issue bonds to fund its existing indebtedness incurred for necessary expenses. *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291 (1905).

Establishment of School District.—The establishing of a school district relates to public municipal corporations, which may be done by special legislative enactment under this section. *Dickson v. Brewer*, 180 N. C. 403, 104 S. E. 887 (1920).

Creating County Board of Audit and Finance.—The legislature has constitutional power to provide a board of audit and finance for a particular county and to direct that payment of an expert accountant authorized thereunder be made by the county treasurer as a charge against the county's public funds, upon an order made by said board in a certain prescribed manner. *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283 (1908).

Quoted in Board of Trustees v. Webb, 155 N. C. 379, 71 S. E. 520 (1911); *Penny v. Salmon*, 217 N. C. 276, 7 S. E. (2d) 559 (1940).

Cited in Rhodes v. Hampton, 101 N. C. 629, 8 S. E. 219 (1888); *Board v. Commissioners*, 111 N. C. 578, 16 S. E. 621 (1892); *Gattis v. Griffin*, 125 N. C. 332, 34 S. E. 429 (1899) (dis. op.); *In re Spease Ferry*, 138 N. C. 219, 50 S. E. 625 (1905); *Crocker v. Moore*, 140 N. C. 429, 53 S. E. 229 (1906); *Bunch v. Commissioners*, 159 N. C. 335, 74 S. E. 1048 (1912); *Mann v. Allen*, 171 N. C. 219, 88 S. E. 235 (1916); *Township Road Comm. v. Board*, 178 N. C. 61, 100 S. E. 122 (1919).

ARTICLE VIII

CORPORATIONS OTHER THAN MUNICIPAL

§ 1. **Corporations under general laws.**—No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except

corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed; and the General Assembly may at any time by special act repeal the charter of any corporation. (Const. 1868; 1915, c. 99.)

Editor's Note.—Section 1 in the Constitution of 1868 was as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of corporations cannot be attained under general laws. All general laws and special acts passed, pursuant to this section, may be altered from time to time or repealed." This section was stricken out and the present § 1 substituted therefor pursuant to c. 99, Public Laws of 1915, ratified by the people in November, 1916, and effective January 10, 1917.

In General.—Except for purposes of absolute repeal which is retained throughout as essential to the proper exercise and enforcement of the police powers of government, and except, also, in the instances expressly designated in this section, this section withdraws from the General Assembly any and all power by special enactments to create, extend, alter, or amend the charter of all private business corporations, and all quasi-public corporations, such as railroads, incorporated turnpike or toll roads, bridge companies, and the like, and also those corporations which while having at times and to some extent powers appertaining to government are in fact and in truth business corporations for the purpose principally of promoting private interest. *Watts v. Lenoir, etc., Turnpike Co.*, 181 N. C. 129, 106 S. E. 497 (1921).

The title of this section, which must be read into the text to give the intended classification significance, refers to "corporations other than municipal," thus classifying all public corporations as municipal. *Wells v. Housing Authority*, 213 N. C. 744, 197 S. E. 693 (1938).

Before the constitutional prohibition of this section, against creating corporations or amending their charters by special act, the General Assembly had granted numerous charters to utility companies giving them authority to set their own rates. However, such charter authority does not preclude rate regulation under the power of the State. Contracts between utilities and consumers setting the price of current

are also subject to rate regulation. See 12 N. C. Law Rev. 296.

Purpose of Section.—"The purpose and effect of this section is to enable the State to control, modify or repeal corporate powers, thus avoiding the effect of the doctrine announced in *Dartmouth College v. Woodward*, 4 Wheat. (17 U. S.) 518, 4 L. Ed. 629 (1819)." *Connor & Cheshire Const. of N. C. (anno.)* pages 339, 340, cited and approved in *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611 (1924). See also, *Railroad Co. v. Dortch*, 124 N. C. 663, 33 S. E. 1014 (1899).

Applicable to Private Corporation.—The prohibition contained in this section refers only to private or business corporation, and does not refer to public or quasi-public corporation acting as governmental agencies. *Mills v. Com'rs*, 175 N. C. 215, 95 S. E. 481 (1918); *Dickson v. Brewer*, 180 N. C. 403, 104 S. E. 887 (1920). See *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934).

Under this interpretation, the sections should be construed in connection with § 2, dealing with "dues from corporations;" § 3, defining corporations as including "associations and joint stock companies," and it should be noted that if § 4 (properly belonging in Art. VII) included corporations as governmental agencies, it would be meaningless. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920).

The provisions of this section, prohibiting the legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. *Holmes v. Fayetteville*, 197 N. C. 740, 150 S. E. 624 (1929).

Legislature May Create Corporation for

Public Purpose.—The legislative power as to State and political and administrative subdivisions thereof is restrained only by the limitations imposed by the State Constitution or that of the United States, and there is no constitutional limitation on power of the General Assembly to create a corporation for a public purpose. *Brumley v. Baxter*, 225 N. C. 691, 36 S. E. (2d) 281, 162 A. L. R. 930 (1945).

A commission created as an agency of the State to form the governmental function of providing port facilities for the commerce of the State in the public interest, and not for private gain, is a public corporation, and the legislature is not prohibited from creating such corporation by this section, nor is the act creating it a special act within the meaning of this section, and the commission may lawfully exercise all powers conferred upon it in order to perform its duties as prescribed by the act. *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934).

Power to Extinguish Corporations.—The General Assembly may, at its discretion, abolish municipal as well as other corporations, because they are all alike creatures of its will, and exist only at its pleasure. *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993 (1897).

Right of Alteration a Part of Every Charter.—The provisions of this section, affecting the organization of corporations, and specifically providing that all "such laws or special acts may be altered from time to time or repealed," etc., enters into every charter taken out or corporation formed thereunder, and any such corporation may not complain when a statutory

repeal or amendment has been made, on the ground that it works a hardship on it or impairs the value of its property, unless vested rights have been prior acquired by it which have been impaired or destroyed by the repealing or amendatory act complained of. *State v. Cantwell*, 142 N. C. 604, 55 S. E. 820 (1906); *Power Co. v. Whitney Co.*, 150 N. C. 31, 63 S. E. 188 (1908); *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611 (1924).

"Special Act" Only Prohibited.—This section only prohibits the enactment of a special act and an act which relates to all municipal corporations of a county, including cities, town, townships, and school districts is not a special act within its meaning and intent. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920).

Effect of Dissolution upon Corporate Property.—Upon the dissolution or extinction of a corporation under this section for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs, and its personal property does not escheat to the State; and this is so whether or not the duration of the corporation was limited by its charter or general statute. *Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630 (1897), overruling *Fox v. Horah*, 36 N. C. 358 (1841).

Applied in *Coleman v. Sou. R. Co.*, 138 N. C. 351, 50 S. E. 690 (1905).

Cited in *Carolina Coal, etc., Co. v. Southern R. Co.*, 144 N. C. 732, 57 S. E. 444 (1907); *Liggett Co. v. Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929, 25 A. L. R. 699 (1933) (dis. op.); *Lee v. Poston*, 233 N. C. 546, 64 S. E. (2d) 835 (1951).

§ 2. **Debts of corporations, how secured.**—Dues from corporations shall be secured by such individual liabilities of the corporations, and other means, as may be prescribed by law. (Const. 1868.)

§ 3. **What corporations shall include.**—The term "corporation," as used in this article shall be construed to include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons. (Const. 1868; 1915, c. 99.)

Where Corporate Powers Extinguished.—Where the legislature deprived the board of township trustees of its existence as a municipal corporation, the right to sue and be sued are likewise extinguished, and hence it cannot thereafter be a party to a suit. *Wallace v. Trustees*, 84 N. C. 164

(1881). As to power to extinguish corporations, see note of *Ward v. Elizabeth City*, 121 N. C. 1, 27 S. E. 993 (1897) under § 1.

Stated in *Barker v. Southern R. Co.*, 137 N. C. 214, 49 S. E. 115 (1904).

§ 4. **Legislature to provide for organizing cities, towns, etc.**—It shall be the duty of the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages, and to restrict their power of taxa-

tion, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessment and in contracting debts by such municipal corporations. (Const. 1868; 1915, c. 99.)

Editor's Note.—Pursuant to c. 99, Public Laws of 1915, § 4 of the original Constitution of 1868 was amended to read as the present § 4 by adding "by general laws" after "to provide" and by changing the word "assessments" to "assessment." This section, in substance, constitutes a limitation on the provision of Art. VII, § 7 and must be construed therewith. One court has said that this section properly belongs in Art. VII. *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187 (1920). The searcher is therefore referred to the note placed under that article.

In General.—The court in *Pullen v. Raleigh*, 68 N. C. 451 (1873), said: "This (section) seems to give a general control to the legislature on the subject of municipal corporations, and the legislature may, under it, restrict the power of taxation by corporations as it may think proper, due regard being had to other parts of the Constitution."

Municipal corporations are instrumentalities of the State for the administration of local government. They are created by the General Assembly under the general authority conferred by this section. They have such powers as are expressly conferred by statute and those necessarily implied therefrom. *Grimesland v. Washington*, 234 N. C. 117, 66 S. E. (2d) 794 (1951).

Municipal corporations derive their powers almost solely from legislative enactment under this section, and are subject to statutory restrictions and regulations of their taxing power. *Purser v. Ledbetter*, 227 N. C. 1, 40 S. E. (2d) 702 (1946).

Although a municipality may ordinarily levy a tax, as a necessary expense in the cases mentioned in Art. 7, § 7, without submitting the question to the qualified voter, it may not do so where the legislature by statute requires the consent of such voter. *Wadsworth v. Concord*, 133 N. C. 587, 45 S. E. 948 (1903); *Robinson v. Goldsboro*, 135 N. C. 382, 47 S. E. 462 (1904); *Ellison v. Williamston*, 152 N. C. 147, 67 S. E. 255 (1910). It is for the legislature to decide when it is necessary to pass a restrictive statute. *State v. Irvin*, 126 N. C. 989, 35 S. E. 430 (1900). As to specific cases wherein it is necessary to secure the consent of the voters, see Art. 7, § 7 and note thereto.

The provisions of this section relate to municipal corporations as originally formed under legislative enactment, and

is more restrictive in limiting the municipality in contracting debts or pledging their credit than Art. VII, § 7, which requires an election by its voters to do so, when not for necessary expenses. *Waters v. Comrs.*, 186 N. C. 719, 120 S. E. 450 (1923).

Authority May Be Enlarged, Abridged or Withdrawn. — The authority of cities and towns as instrumentalities for the administration of local government may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature. *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460 (1911); *Rhodes v. Asheville*, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

The legislature may restrict or limit the power of incorporated towns or cities to tax or contract debts for purposes which fall within the class of necessary expenses, for they are but the State's instrumentalities for the administration of local government; and when this restriction is thus placed upon them, or it is required of them to submit the question of a bond issue to popular vote, and an issue of bonds is made without compliance therewith, the issue is invalid. *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460 (1911), and cases cited therein.

The setting up of a municipal corporation by the legislature at any place, under this section, is left to legislative discretion. *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649 (1932).

Counties, cities and towns are governmental agencies of the State, created by the legislature for administrative purposes, and the legislature retains control and supervision over both classes of municipal corporations, limited only by this section. *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298 (1934).

Not Applicable to Special Assessments. — It seems that this section does not apply to special assessments for local municipal improvements. *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521 (1892). It is said by the court in this case: "Even if it did apply, an act of the legislature authorizing an assessment is not void because it does not prescribe all of the particulars relating to such assessment. It is sufficient if it authorizes a fair and equitable method of ascertaining the peculiar benefits conferred upon the property, and apportioning the costs between the abutting owners."

School District Not Included. — A school district is not within the purview

of the provisions of this section, it being not a city, town or incorporated village. *Felmet v. Commissioners*, 156 N. C. 251, 119 S. E. 353 (1923); *Waters v. Comrs.*, 186 N. C. 719, 120 S. E. 450 (1923).

Alteration of Charter Not Forbidden.

—This section does not forbid altering or amending charter of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. *Holton v. Mocksville*, 189 N. C. 144, 126 S. E. 326 (1924). See *Deese v. Lumberton*, 211 N. C. 31, 188 S. E. 857 (1936).

Control of Finances.—The legislature has plenary power to control the finances of the municipal corporations which it creates, and to direct how their revenues shall be applied. Hence it can direct that revenues derived from municipal enter-

prises shall be applied on outstanding bonds as well as upon bonds to be issued thereafter. *George v. Asheville*, 80 F. (2d) 50, 103 A. L. R. 568 (1935).

Applied in *Hutton v. Webb*, 124 N. C. 749, 23 S. E. 169 (1899); *Brockenbrough v. Commissioners*, 134 N. C. 1, 46 S. E. 28 (1903).

Cited in *Bradshaw v. High Point*, 151 N. C. 517, 66 S. E. 601 (1909); *Underwood v. Ashboro*, 152 N. C. 641, 68 S. E. 147 (1910); *Winston v. Wachovia Bank, etc., Co.*, 158 N. C. 512, 74 S. E. 611 (1912); *Holmes v. Fayetteville*, 197 N. C. 740, 150 S. E. 624 (1929); *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934); *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298 (1934); *Williamson v. High Point*, 213 N. C. 96, 195 S. E. 90 (1938); *Starmount Co. v. Ohio Sav. Bank, etc., Co.*, 55 F. (2d) 649 (1932).

ARTICLE IX

EDUCATION

§ 1. **Education shall be encouraged.**—Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. (Const. 1868.)

Editor's Note.—This section constitutes the corner-stone in the foundation on which rest the provisions of the following sections, the courts in practically all the cases referring to the provision hereof and using them as a supplemental basis for the decisions primarily falling under one or more of the subsequent sections. Reference, therefore, is here made to the notes placed under the sections following in this article.

This and the following sections are mandatory in their provisions. *Fuller v. Lockhart*, 209 N. C. 61, 182 N. C. 733 (1935). *Mebane Graded School Dist. v.*

Alamance County, 211 N. C. 213, 189 S. E. 873 (1937). See also, *Elliott v. State Board of Equalization*, 203 N. C. 749, 166 S. E. 918 (1932).

Quoted in *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44 (1907); *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654 (1936).

Cited in *Julian v. Ward*, 198 N. C. 480, 152 S. E. 401 (1930); *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140 (1939); *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606 (1940).

§ 2. **General Assembly shall provide for schools; separation of the races.**—The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years. And the children of the white race and the children of the colored race shall be taught in separate public schools: but there shall be no discrimination in favor of, or to the prejudice of, either race. (Const. 1868; Convention 1875.)

Cross Reference.—See Art. IX, § 5.

Editor's Note.—The last sentence was added by the Convention of 1875.

For note on the "separate but equal" test of race discrimination in graduate education, see 30 N. C. Law Rev. 153.

In General.—It was said by the court in *Lane v. Stanly*, 65 N. C. 153 (1871): "It will be seen that the Constitution es-

tablishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State Board of Education, by the aid of school committees, manage it. It will be observed that it is to be a 'system'; it is to be 'general', and it is to be 'uniform'. It is not to be subject to the caprices of lo-

calities, but every locality, yea, every child, is to have the same advantage and be subject to the same rules and regulations."

The requirement of this section of the Constitution, that our public school system shall be uniform by legislative authority, relates to the uniformity of the "system," and not to the uniformity of the class or kind of the "schools;" and thus qualifying the word "system," it is sufficiently complied with where, by statute or authorized regulation of the public school authorities, provision is made for establishment of schools of like kind throughout all sections of the State and available to all of the school population of the territories contributing to their support. *Board v. County Com'rs*, 174 N. C. 469, 93 S. E. 1001 (1917).

This and the following section of the Constitution require that at least one elementary school be maintained in each district, but the constitutional mandate does not extend to high schools. *Elliott v. Board of Equalization*, 203 N. C. 749, 166 S. E. 918 (1932).

Duty on Legislature.—It is the province of the General Assembly, and not of the State Board of Education, to establish a uniform system of public schools. *Board v. State Board*, 114 N. C. 313, 19 S. E. 277 (1894). See also, *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

The establishment and maintenance of a general and uniform system of public schools is upon and exclusively within the province of the General Assembly. *Moore v. Board of Education*, 212 N. C. 499, 193 S. E. 732 (1937), and cases cited therein.

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to the pertinent constitutional provisions as to uniformity, as provided in this section, and length of term, as provided in the following section. *Coggins v. Board of Education*, 223 N. C. 763, 28 S. E. (2d) 527 (1944).

This section contemplates that the General Assembly shall provide a State system of public schools to the end that every child between the ages of six and twenty-one years, without regard to the county in which such child resides, shall have an opportunity to attend a school in which standards set up by the State are maintained and wherein tuition shall be free of charge, and it is the duty of the commissioners of each county, when such State system has been provided, to maintain in each district of the county one or more schools for the constitutional school

term. *Marshburn v. Brown*, 210 N. C. 331, 186 S. E. 265 (1936).

Same—Mandatory.—The provisions of our Constitution, Art. IX, §§ 1, 2, 3, are mandatory that the legislature provide by "taxation and otherwise for general and uniform system of public education, free of charge, to all of the children of the State from six to twenty-one years," etc., and for the continuance of the school term in the various districts for at least six months in each and every year, recognizing the counties of the State and designating them as the governmental agencies through which the legislature may act in the performance of this duty and in making its measure effective. *Lacy v. Fidelity Bank*, 183 N. C. 373, 111 S. E. 612 (1922). See *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937). See also, *Collie v. Franklin County Com'rs*, 145 N. C. 170, 59 S. E. 44 (1907).

The provision of this section is mandatory and may not be disregarded either by the legislature or by officials charged with the duty of administering the law. *Blue v. Durham Public School Dist.*, 95 F. Supp. 441 (1951).

Method of Distribution of Allowance.—County high schools are entitled to have a special allowance made to them in the yearly estimate of the county board of education for a four-months term (now six); but it is otherwise as to a school which is in strictness one of a town or city, governed by local authority and accessible only to the school population of the specified district, for such is not a part of our public school system; and this class of high schools may only receive their per capita or pro rata share of the estimate according to average and actual attendance and according to the provision of the statute or authoritative regulations applicable. *Board v. County Commissioners*, 174 N. C. 469, 93 S. E. 1001 (1917).

All of the funds raised in the State for common school purposes should be distributed per capita among the beneficiaries and not be retained in the counties where it is raised. *Board v. State Board*, 114 N. C. 313, 19 S. E. 277 (1894); *School Commissioners v. Board*, 169 N. C. 196, 85 S. E. 138 (1915). And in the distribution of the fund the General Assembly may not discriminate in favor, or to the prejudice of either the white or colored race. *Hooker v. Greenville*, 130 N. C. 472, 42 S. E. 141 (1902).

Racial Discrimination.—An act of the legislature which provides for the erection of a schoolhouse in a certain school dis-

tract from the proceeds of a bond issue to be voted upon therein, "for the whites" in that district, violates the plain mandate of this section, and a purchaser of these bonds, though issued according to all other legal requirements, may refuse to accept them on the ground of their being invalid. *Williams v. Bradford*, 158 N. C. 36, 73 S. E. 154 (1911).

Separate Buildings, Teachers, etc. — This section commands that the children of each race are to be taught in separate buildings and by separate teachers. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905).

Under this section the school building now provided for the colored children cannot be taken for use of white children. *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905).

Exemption of School Bonds from Taxation Is Valid.—See *Mecklenburg County v. Piedmont Fire Ins. Co.*, 210 N. C. 171, 185 S. E. 654 (1936).

County Need Not Assume Bonds of Unnecessary School Buildings.—Where a special charter school district and a city operating schools within a special charter school district coterminous with its corporate limits, issue bonds, respectively, for school sites, buildings, and maintenance of schools in order to provide better schools within the districts than those

provided by the General Assembly for the county generally, in accordance with intent of the General Assembly in creating such special charter districts, but at the time such bonds are issued they are not reasonably essential and necessary for the operation of schools in the districts for the minimum constitutional term of six months, the city and special charter school district are not entitled to mandamus to force the county to assume such bonds upon the taking over by the county of the buildings as a part of the general system of public schools. *Greensboro v. Guilford County*, 209 N. C. 655, 184 S. E. 473 (1936).

Quoted in *Epps v. Carmichael*, 93 F. Supp. 327 (1950).

Cited in *State v. Wolf*, 145 N. C. 440, 59 S. E. 40 (1907); *Julian v. Ward*, 198 N. C. 480, 152 S. E. 401 (1930); *Posey v. Board of Education*, 199 N. C. 306, 154 S. E. 393 (1930); *Benton v. Board of Education*, 201 N. C. 653, 161 S. E. 96 (1931); *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936); *Board of Education v. Wilson*, 215 N. C. 216, 1 S. E. (2d) 544 (1939); *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140 (1939); *Fletcher v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606 (1940); *Winborne v. Taylor*, 195 F. (2d) 649 (1952).

§ 3. **Counties to be divided into districts.**—Each county of the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment. (Const. 1868; 1917, c. 192.)

Editor's Note. — This section was amended by the substitution of "six" for "four" pursuant to c. 192, Public Laws of 1917, ratified by the people in November, 1918.

Generally. — In discharging the duty, imposed by this section, to keep the public schools open for at least four months (now six) every year, the county commissioners cannot disregard the limitations imposed by Art. V, § 1, as to the amount of tax to be levied. *Board v. Commrs.*, 111 N. C. 578, 16 S. E. 621 (1892). But see *Board v. County Commissioners*, 174 N. C. 469, 93 S. E. 1001 (1917).

Under this section, the State is required to be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in the year. For a long period of its history, the State performed this duty by proxy, maintaining the schools through

the agency of the counties; and this section denounces as a criminal offense the failure of their tax levying bodies to comply with the requirement that the schools be maintained at least six months in the year. *Bridges v. Charlotte*, 221 N. C. 472, 20 S. E. (2d) 825 (1942).

This section is mandatory, but the mode of performance is prescribed by statute. *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56 (1934). See *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 218, 189 S. E. 873 (1937).

It does not apply to high schools. *Kreeger v. Drummond*, 235 N. C. 8, 68 S. E. (2d) 800 (1952), reh. den. 235 N. C. 758, 69 S. E. (2d) 721 (1952).

Counties May Be Directed to Provide Funds.—By reason of this constitutional mandate it is within the power of the General Assembly to authorize and direct the counties of the State as administrative units or governmental agencies to

provide the necessary funds by taxation or otherwise. *Harrell v. Board of Com'rs*, 206 N. C. 225, 173 S. E. 614 (1934).

Legislative Function.—It is a legislative function to formulate the means of carrying out the provisions of this section. *Wilkinson v. Board of Education*, 199 N. C. 669, 155 S. E. 562 (1930).

The establishment and operation of the public school system is under the control of the legislative branch of the government, subject only to pertinent constitutional provisions as to uniformity, as provided in the preceding section, and length of term, as provided in this section. *Coggins v. Board of Education*, 223 N. C. 763, 28 S. E. (2d) 527 (1944).

Legislative Discretion. — This section having required a public school system of the State to have at least six-months terms in each year, leaves it to the discretionary power of the legislature to fix terms in excess of that period. *Frazier v. Board of Com'rs*, 194 N. C. 49, 138 S. E. 433 (1927).

A county is an administrative unit of the State in our State-wide public school system, and under mandate of this section, a statute requiring a county to maintain at least a six-months school term in each of its school districts and to provide the necessary funds therefor by taxation or otherwise, is valid. *Evans v. Mecklenburg County*, 205 N. C. 560, 172 S. E. 323 (1934).

The counties are made the governmental agencies of the State, under the provisions of this section in the maintenance of the constitutional six-months term of public school, and the county boards of education are given power to create, divide, abolish and consolidate school districts in accordance with a county-wide plan. *Elliott v. State Board of Equalization*, 203 N. C. 749, 166 S. E. 918 (1932).

It is the duty of the commissioners of the various counties in this State to maintain at least a six-months term of public school in their respective counties, subject to indictment for their failure to do so. *Reeves v. Board of Education*, 204 N. C. 74, 167 S. E. 454 (1933).

It is the duty of the State under this section to provide a general and uniform State system of public schools of at least six months in every year wherein tuition shall be free of charge to all the children of the State between the ages of six and twenty-one. It is a necessary expense and a vote of the people is not required to make effective these and other constitutional provisions in relation to the public school system of the State. *Mebane*

Graded School Dist. v. Alamance County, 211 N. C. 213, 189 S. E. 873 (1937). See also, *Fuller v. Lockhart*, 209 N. C. 61, 182 S. E. 733 (1935).

Discretion of General Assembly Rules as to Financing Public School System.—Under the mandatory provision of this section in relation to the public school system of the State, the financing of the public school system of the State is in the discretion of the General Assembly by appropriate legislation, either by State appropriation or through the county acting as an administrative agency of the State. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937).

Building and Equipment Necessary for School Term.—Under this section sites, buildings, and equipment acquired, constructed, and used by a school district were deemed reasonably essential and necessary for the conduct and operation of the six-months school term at the time the said sites, buildings, and equipment were acquired and constructed. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937).

Assumption of Indebtedness. — When necessary to maintain the six-months term of public schools required by this section it is within its legislative authority in establishing its State-wide system to assume an indebtedness of a school district therefor, including the cost of necessary buildings, and direct that it be provided for by the respective counties as administrative units of the public school system of the State. *Lovelace v. Pratt*, 187 N. C. 686, 122 S. E. 661 (1924).

The fact that this section provides that county commissioners failing to perform their duties in regard to the maintenance of the required school term shall be guilty of a misdemeanor, does not preclude a writ of mandamus to compel the assumption by the county of indebtedness incurred by the districts for the erection and equipment of school buildings necessary to the constitutional school term. *Hickory v. Catawba County*, 206 N. C. 165, 173 S. E. 56 (1934).

Redistricting for School Purposes.—See *Moore v. Board of Education*, 212 N. C. 499, 193 S. E. 732 (1937).

Issuance of Mandamus.—This section of the Constitution has committed to the judgment and discretion of the county commissioners the manner and method of levying taxes to maintain a four-months minimum period (now six) of the public schools, and in the exercise thereof the courts will not interfere by civil process,

mandamus or otherwise, unless their action is so unreasonable as to amount to a manifest abuse of power. County Board v. Board, 150 N. C. 116, 63 S. E. 724 (1909).

Immediately after filing the opinion in this case, the legislature (of 1909), then in session, passed an act giving the county boards of education the right to sue out a mandamus in such cases.—Ed. Note.

See *Mebane Graded School Dist. v. Al-
amance County*, 211 N. C. 213, 189 S. E. 873 (1937), citing *Hickory v. Catawba
County*, 206 N. C. 165, 173 S. E. 56 (1934),
where it was held that resort may be had
to the courts to compel performance of
the duties of this section by mandamus
when indictment of the defendants would
not be an adequate remedy.

Applied in *Powell v. Bladen County*,
206 N. C. 46, 173 S. E. 50 (1934).

Quoted in *Mecklenburg County v. Pied-
mont Fire Ins. Co.*, 210 N. C. 171, 185 S.
E. 654 (1936).

Cited in *Collie v. Franklin County
Com'rs*, 145 N. C. 170, 59 S. E. 44 (1907);
Julian v. Ward, 198 N. C. 480, 152 S. E.
401 (1930); *School Committee v. Taxpay-
ers*, 202 N. C. 297, 162 S. E. 612 (1932);
School Committee v. Taxpayers, 202 N. C.
382, 162 S. E. 907 (1932); *Greensboro v.
Guilford County*, 209 N. C. 655, 184 S. E.
473 (1936); *East Spencer v. Rowan
County*, 212 N. C. 425, 193 S. E. 837
(1937); *Board of Education v. Wilson*, 215
N. C. 216, 1 S. E. (2d) 544 (1939); *Fletcher
v. Collins*, 218 N. C. 1, 9 S. E. (2d) 606
(1940) (dis. op.).

§ 4. What property devoted to educational purposes.—The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; also all moneys, stocks, bonds, and other property now belonging to any State fund for purposes of education; also the net proceeds of all sales of the swamp lands belonging to the State, and all other grants, gifts or devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State, or by the terms of the grant, gift or devise, shall be paid into the State treasury, and, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining in this State a system of free public schools, and for no other uses or purposes whatsoever. (Const. 1868; Convention 1875.)

Editor's Note.—Section 4 of the Consti-
tution of 1868, which was changed to read
as the present § 4 by the Convention of
1875, was as follows: "The proceeds of all
lands that have been, or hereafter may be
granted by the United States to this
State and not otherwise specially appro-
priated by the United States or heretofore
by this State; also, all moneys, stocks,
bonds, and other property now belonging
to any fund for purposes of education;
also, net proceeds that may accrue to the
State from sales of estrays, or from fines,
penalties, and forfeitures; also, the pro-
ceeds of all sales of the swamp land be-
longing to the State; also, all moneys that
shall be paid as an equivalent for exemp-
tion from military duty; also, all grants.

gifts or devises that may hereafter be
made to this State, and not otherwise
appropriated by the grant, gift or devise,
shall be securely invested and sacredly
preserved as an irreducible educational
fund, the annual income of which, to-
gether with so much of the ordinary reve-
nue of the State as may be necessary,
shall be faithfully appropriated for estab-
lishing and perfecting in this State a sys-
tem of free public schools, and for no other
purposes or uses whatsoever."

Stated in *McDonald v. Morrow*, 119 N.
C. 666, 26 S. E. 132 (1896); *Bear v. Com-
missioners*, 124 N. C. 204, 32 S. E. 558
(1899); *Collie v. Franklin County Com'rs*,
145 N. C. 170, 59 S. E. 44 (1907).

§ 5. County school fund; proviso.—All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal or military laws of the State; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State: Provided, that the amount collected in

each county shall be annually reported to the Superintendent of Public Instruction. (Const. 1868; Convention of 1875.)

Editor's Note.—This section was added by the Convention of 1875.

In General.—This section appropriates all fines for violation of the criminal laws of the State for establishing and maintaining free public schools in the several counties, whether the fines are for violation of town ordinances made misdemeanors by statute or other criminal statutes. *Board v. Henderson*, 126 N. C. 669, 36 S. E. 158 (1900).

This section was designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes. *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56 (1948).

Fines, etc., Must Be Given by Law.—Under this section penalties and forfeitures belong to the State for free school purposes only when given by law to the State. *Carter v. Wilmington, etc., R. Co.*, 126 N. C. 437, 36 S. E. 14 (1900), and cases there cited.

And Municipal Clerk Is Not Entitled to Fees from Fines.—By provision of this section, the clear proceeds of fines collected by the clerk of a municipal court belong to the county school fund, and the clerk is not entitled to retain a percentage thereof as his fees, regardless of the provisions of public-local laws relating to his compensation. *County Board of Education v. High Point*, 213 N. C. 636, 197 S. E. 191 (1938).

§ 6. Election of trustees, and provisions for maintenance, of the University.—The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in anywise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws, and regulations from time to time, as may be necessary and expedient for the maintenance and management of said University. (1872-3, c. 86.)

Editor's Note.—Pursuant to c. 86, Public Laws of 1872-73, this § 6 was substituted for § 5 of the Constitution of 1868, which was as follows: "The University of North Carolina, with its lands, emolu-

The maintenance of an athletic field and playground is a proper use of school funds, since physical training is a legitimate function of education. *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56 (1948).

An agreement under which a graded school district, without monetary consideration, was to transfer in fee to a municipality a tract of school property, and the municipality was to construct thereon an athletic stadium and grant the graded schools of the district free and unlimited use of the stadium and grounds during the school term except when required for regularly scheduled games of a professional baseball association, did not constitute a diversion of school property in contravention of this section. *Boney v. Board of Trustees*, 229 N. C. 136, 48 S. E. (2d) 56 (1948).

The "clear proceeds" of a forfeiture are defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and process against the bondsman usual in the practice. *Hightower v. Thompson*, 231 N. C. 491, 57 S. E. (2d) 763 (1950).

Parties.—A suit to compel a city to pay fines and penalties to the county board of education should be brought against the city or the board of aldermen, and not against the chief of police. *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 204 (1901).

Applied in In re Wiggins, 171 N. C. 372, 88 S. E. 508 (1916).

Cited in State v. Yandle, 235 N. C. 532, 70 S. E. (2d) 565 (1952).

ments and franchises, is under the control of the State, and shall be held to an inseparable connection with the free public school system of the State."

§ 7. Benefits of the University.—The General Assembly shall provide that the benefits of the University, as far as practicable, be extended to the youth of the State free of expense for tuition; also, that all the property which has heretofore accrued to the State, or shall hereafter accrue, from escheats, un-

claimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University. (Const. 1868.)

The right of succession by escheat to all property, when there is no wife or husband or parties entitled to inherit or take under the statutes of descent and distribution, has been conferred upon the University of North Carolina by this section, and extended by several statutes which are now G. S., §§ 116-20 through

116-25. Board of Education v. Johnston, 224 N. C. 86, 29 S. E. (2d) 126 (1944).

Applied in *In re Neal*, 182 N. C. 405, 109 S. E. 70 (1921); *University of North Carolina v. High Point*, 203 N. C. 558, 166 S. E. 511 (1932); *Carter v. Smith*, 209 N. C. 788, 185 S. E. 15 (1936).

§ 8. **State Board of Education.**—The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof, except those mentioned in section five of this article, shall, from and after the first day of April, one thousand nine hundred and forty-five, be vested in the State Board of Education to consist of the Lieutenant Governor, State Treasurer, the Superintendent of Public Instruction, and ten members to be appointed by the Governor subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts, which may be altered from time to time by the General Assembly. Of the appointive members of the State Board of Education, one shall be appointed from each of the eight educational districts, and two shall be appointed as members at large. The first appointments under this section shall be: Two members appointed from educational districts for terms of two years; two members appointed from educational districts for terms of four years; two members appointed from educational districts for terms of six years; and two members appointed from educational districts for terms of eight years. One member at large shall be appointed for a period of four years and one member at large shall be appointed for a period of eight years. All subsequent appointments shall be for terms of eight years. Any appointments to fill vacancies shall be made by the Governor for the unexpired term, which appointments shall not be subject to confirmation. The State Superintendent of Public Instruction shall be the administrative head of the public school system and shall be secretary of the board. The board shall elect a chairman and vice chairman. A majority of the board shall constitute a quorum for the transaction of business. The per diem and expenses of the appointive members shall be provided by the General Assembly. (Const. 1868; 1941, c. 151; 1943, c. 468.)

Editor's Note.—This section was amended by vote at general election of November 7, 1944.

Pursuant to c. 151 of the Public Laws of 1941, the former §§ 8 and 9 of the Constitution of 1868 were repealed and the present § 8 substituted in lieu thereof. Such former sections read as follows: "§ 8. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor,

Superintendent of Public Instruction, and Attorney-General shall constitute a State Board of Education."

"§ 9. The Governor shall be president and the Superintendent of Public Instruction shall be secretary of the Board of Education."

Cited in *In re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944).

§ 9. **Powers and duties of the board.**—The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised

in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly. (Const. 1868; 1941, c. 151.)

Editor's Note.—Pursuant to c. 151 of the Public Laws of 1941, the former §§ 10, 11, 12, and 13 of the Constitution of 1868 were repealed and the present § 9 substituted in lieu thereof. Those former sections read as follows:

“§ 10. The Board of Education shall succeed to all the powers and trusts of the president and directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said board may be altered, amended, or repealed by the General As-

sembly, and when so altered, amended, or repealed they shall not be re-enacted by the board.

“§ 11. The first session of the Board of Education shall be held at the capital of the State within fifteen days after the organization of the State government under this Constitution; the time of future meetings may be determined by the board.

“§ 12. A majority of the board shall constitute a quorum for the transaction of business.

“§ 13. The contingent expenses of the board shall be provided by the General Assembly.”

§ 10. **Agricultural department.**—As soon as practicable after the adoption of this Constitution, the General Assembly shall establish and maintain, in connection with the University, a department of agriculture, of mechanics, of mining, and of normal instruction. (Const. 1868; 1941, c. 151.)

Editor's Note.—This section, formerly § 14 of Art. IX of the Constitution of 1868, was renumbered to become § 10 pursuant to c. 151 of the Public Laws of 1941.

The Board a Department of State Government.—The Board of Agriculture is a department of the State government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the State not having given its consent to be sued in that respect. *Chemical Co. v. Board*, 111 N. C. 135, 15 S. E. 1032 (1892).

§ 11. **Children must attend school.**—The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means. (Const. 1868; 1941, c. 151.)

Editor's Note.—This section, formerly § 15 of Art. IX of the Constitution of 1868, was renumbered to become § 11, pursuant to c. 151 of the Public Laws of 1941.

Levy of Tax for Farm Agent's Salary.

—The encouragement of agriculture is a fundamental objective of the State government, and a levy of a tax by a county to pay the county farm agent's salary is for a special purpose having the special approval of the legislature, within the meaning of Art. V, § 6, for which a tax in excess of the 15-cent limitation may be imposed. *Nantahala Power, etc., Co. v. Clay County*, 213 N. C. 698, 197 S. E. 603 (1938).

Applied in State v. Wolf, 145 N. C. 440, 59 S. E. 40 (1907).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

§ 1. **Exemptions of personal property.**—The personal property of any resident of this State, to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any court, issued for the collection of any debt. (Const. 1868.)

Editor's Note.—It is thought more proper to place the main annotations regarding the homestead and personal property exemptions under §§ 1-369 et seq. The notes placed thereunder together with

the references compose a comprehensive treatment of the subject—reference to which is here made. The note found under this section is meant to embrace only direct construction of the provisions here-

of, and may be of aid to the practitioner in dealing with the sections above mentioned.

Section Liberally Construed.—Hyman v. Stern, 43 F. (2d) 666 (1930).

The Marital Duty of Husband.—The husband's duty to protect and provide for his wife is more than a debt in its ordinary acceptation of the word, or within the contemplation of this and the following section of the Constitution. Anderson v. Anderson, 183 N. C. 139, 110 S. E. 863 (1922).

A husband's obligation to support his wife during the existence of the marital relation is not a "debt" within the meaning of this and the following section of the Constitution. Barber v. Barber, 217 N. C. 422, 8 S. E. (2d) 204 (1940), citing White v. White, 179 N. C. 592, 103 S. E. 216 (1920).

A Constitutional Right.—The right to the personal property exemption exists not by virtue of the allotment, but by virtue of the Constitution which confers it and attaches the protection to the debtor before the allotment or appraisal. Lockhart v. Bear, 117 N. C. 298, 23 S. E. 484 (1895). See Crow v. Morgan, 210 N. C. 153, 185 S. E. 668 (1936).

This and the following section are explicit in guaranteeing to every resident of the State his homestead and personal property exemption of the value fixed—"to be selected by the owner thereof." McKeithen v. Blue, 142 N. C. 360, 55 S. E. 285 (1906).

Meaning of "Final Process."—A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution, giving the creditor such right until execution or other final process. Be-farrah v. Spell, 178 N. C. 231, 100 S. E. 321 (1919).

Diminution in Value of Property.—In the well considered opinion in Campbell v. White, 95 N. C. 344 (1886), it was said: "Though the debtor's personal property exemption has been duly allotted, whenever it has been diminished by use, loss, or other cause, he has a right to have any other personal property he may have exempted up to the prescribed limit." Smith, C. J., saying that this section of the Constitution, is a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and, of course, the diminution from use, loss,

or other cause must be replenished with other, if the debtor has such, up to the prescribed limits. It is plainly meant that when any final process against the debtor's estate is to be enforced, that much of his estate must be allowed to remain with him as not liable to sale. Gardner v. McConnaughey, 157 N. C. 481, 73 S. E. 125 (1911).

Set-Off.—A party may not demand that his claim be allowed him as his personal property exemption so as to defeat the adverse party's right of counterclaim or set-off prior to the rendition of the final judgment on his claim, since to permit the party to assert the exemption before judgment would enable him to obtain judgment in instances in which, if a balance were struck, nothing would be due him. Edgerton v. Johnson, 218 N. C. 300, 10 S. E. (2d) 918 (1940). For note on this case, see 19 N. C. Law Rev. 227.

Plaintiff moved that the judgment rendered against him in this cause on defendant's counterclaim should be offset by a judgment subsequently obtained by plaintiff against defendant in a separate action, contending that defendant is insolvent. Defendant demanded that the judgment rendered in his favor upon the counterclaim in this cause be allowed to him as his personal property exemption. Held: To allow offset would amount to "final process" within the meaning of this section, and defendant's demand that the judgment in his favor on the counterclaim be allowed him as his personal property exemption precludes plaintiff's right of offset. Edgerton v. Johnson, 218 N. C. 300, 10 S. E. (2d) 918 (1940).

Exemption Ceases at Death of Claimant.—The personal property exemption provided for by this section and the laws passed pursuant thereto, exists only during the life of the homesteader and after his death passes to his personal representative, to be disposed of in a due course of administration. Johnson v. Cross, 66 N. C. 167 (1872).

It is to be noted that by §§ 3 and 5, after the death of the owner of a homestead, the exemption is continued on for the benefit of his children or widow; but there is no such provision in regard to the "personal property exemption."—Ed. Note.

Forfeiture of Exemption.—A bankrupt who conceals assets exceeding in value his statutory exemption forfeits his right to such exemption. Hyman v. Stern, 43 F. (2d) 666 (1930).

One who is a fugitive from justice, though leaving his family here, who can-

not be found in the State and whose whereabouts are unknown, and the object of whose absence is to avoid serving a criminal sentence imposed by our courts, is not a resident of the State within the meaning of this section, of our Constitution, and not entitled to his exemptions here in the absence of evidence or finding on the question of his *animus revertendi*. *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885, 128 Am. St. Rep. 658 (1908).

Debtor Entitled to Exemption at All Times.—The five hundred dollar personal property exemption prescribed by this section of the Constitution entitles a judgment debtor to the amount of the exemption at all times, and such sum may be set apart for the comfort and support of

the judgment debtor as often as the judgment debtor may be pressed with execution. *Commissioner of Banks v. Yelverton*, 204 N. C. 441, 168 S. E. 505 (1933), commented on in 12 N. C. Law Rev. 65.

A debtor may legally demand his personal property exemption at any time and to the last moment before the appropriation thereof by the court, and the order of court directing a payment of the money derived from the sale of such property is final process within the meaning of the Constitution giving the creditor such right until execution or other final process. *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936).

Cited in *Carpenter v. Duke*, 144 N. C. 291, 56 S. E. 938 (1907).

§ 2. **Homestead.**—Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a city, town or village with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises. (Const. 1868.)

Cross Reference.—See §§ 1-369 et seq. and notes placed thereunder.

A Constitutional Right.—The right to a homestead is guaranteed by the Constitution. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Homestead and Personal Property Exemptions Distinguished.—The homestead exemption is permanent unless there is a reallocation by reason of an increase in value in the manner provided by § 1-373. But the personal property exemption is to be reassigned, whenever, at subsequent dates, executions are levied. The reason is that the realty is fixed and stable, whereas the articles of personal property may be increased or diminished in quantity, between the levy of executions. *Gardner v. McConnaughey*, 157 N. C. 481, 73 S. E. 125 (1911).

In view of this section the doctrine of estoppel cannot deny the bankrupt his right to a homestead in lands which were subject to his debts. In selecting the land for his homestead exemption, he is not restricted to the tract on which he lives. In re *Hamrick*, 56 F. (2d) 240 (1932).

The right to claim homestead may be lost by failure to assert it in apt time, by waiver, or by estoppel. *Cameron v. McDonald*, 216 N. C. 712, 6 S. E. (2d) 497 (1940).

Homestead is a right created for the benefit of the judgment debtor, and there-

fore other judgment creditors cannot complain of a waiver by the debtor of this right in designated realty as to a particular judgment. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

A written request by judgment debtors to the sheriff to sell lands under execution without the allotment of homestead to the end that the property might bring the highest price possible, and the joinder of the judgment debtors in the sheriff's deed to the purchaser, constitute an authorization and ratification of the act of the sheriff in making the execution sale without allotment of homestead and is a valid waiver by the judgment debtors of their homestead exemption in regard to that particular execution. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

Right May Be Sold or Assigned.—The homestead right or estate is salable or assignable, and the purchaser can hold the land to which it pertains to the exclusion of judgment creditors during its existence. *Gardner v. Batts*, 114 N. C. 496, 19 S. E. 794 (1894). As to requisites of deed, see Art. X, § 8, and note thereto.

Where there is a homestead right in land, the homesteader may alienate the same only with the joinder and private examination of the wife. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 73 (1929).

The owner of lands loses his right to a homestead therein allowed by this section upon his conveying the title to the same, by deed, though he may select a homestead thereafter in other of his lands under the provisions of § 1-370. *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928).

Only Residents Entitled to Homestead.—Evidence held insufficient to support finding by the court that judgment debtor is resident and entitled to homestead. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

Duration of Homestead.—The homestead as allowed lasts during the life of the owner thereof; and, after his death, it lasts during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Presumption of Continuance.—Once acquired the homestead is presumed to continue. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Allotment Unnecessary.—The title to the homestead is vested in the owner by the Constitution of this State, and no allotment by the sheriff is necessary to vest the title thereto. The allotment by the sheriff is only for the purpose of ascertaining whether there be an excess of property over the homestead which is subject to execution. *Lambert v. Kinnery*, 74 N. C. 348 (1876). See note to § 1-369.

Land must be selected by the owner and allotted before it becomes exempt. It must also be both owned and occupied by the homesteader, and this at the time of issuance of the execution. *Chadborn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1 (1910).

Where a judgment debtor is present when his homestead in his land is laid off to him by the appraisers and designates the land he desires for the purpose, he may not successfully contend thereafter that other lands should have been included, it not being contended that the value of the homestead as allotted was less than one thousand dollars. *Citizens' Bank v. Robinson*, 201 N. C. 796, 161 S. E. 487 (1931).

Where a mortgage on land is foreclosed and the land brings at the foreclosure sale a sum more than sufficient to pay the mortgage debt, the surplus remaining to the constitutional limit of one thousand dollars is to be regarded as realty to which the homestead right attaches when the same has not been waived. *Farris v.*

Hendricks, 196 N. C. 439, 146 S. E. 73 (1929).

A mortgagor of lands is entitled to his homestead exemption in his equity of redemption as against the liens of judgment creditors, and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

There is no lien for purchase money in North Carolina, and while the judgment debtor cannot claim homestead as against a judgment for purchase money, the lien of a mortgage executed to a third person has priority over the judgment lien, when the mortgage is executed prior to the rendition of the judgment and prior to an amendment putting the title to the property in issue. *Jarrett v. Holland*, 213 N. C. 428, 196 S. E. 314 (1938).

A duly docketed judgment is a lien on the lands of the judgment debtor but is subject to the homestead interest in the lands as provided by this section. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 73 (1929).

The only way property may lose its homestead character, after the homestead has been allotted, is by death, abandonment or alienation. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Homestead interest in land is terminated by the owner's removal from the State. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

The right to the homestead exemption is not forfeited by a fraudulent conveyance, and the judgment was properly modified by order directing that defendant be allotted his homestead in the land which should be exempt from sale by the commissioner. *New Amsterdam Cas. Co. v. Dunn*, 209 N. C. 736, 184 S. E. 488 (1936).

Exemption Allowed in Mortgaged Lands.—A debtor may have his homestead exemption allotted in lands owned by him but mortgaged to a third person, but in ascertaining the value thereof the mortgage debt should be disregarded, and the land appraised as though the debtor owned the unencumbered fee. *Crow v. Morgan*, 210 N. C. 152, 185 S. E. 668 (1936).

Or Vacant Lots.—Where the only real property owned by a judgment debtor consists of vacant lots, he may claim his homestead therein, since he may thereafter build an habitable structure thereon. *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936).

Quoted in *Simmons v. Respess*, 151 N.

C. 5, 65 S. E. 516, 134 Am St. Rep. 961 (1909).

Cited in *Vannoy v. Green*, 206 N. C. 77,

§ 3. **Homestead exemption from debt.**—The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any of them. (Const. 1868.)

Cross Reference.—See Editor's Note to § 5.

Only Infant Children Included.—An heir twenty-one years old is not entitled to homestead in the lands of his ancestor, his right thereto ceased as soon as he attained his majority. *Saylor v. Powell*, 90 N. C. 202 (1884).

The widow by a second marriage of one who died seized and possessed of land leaving no children by her, is not entitled to the benefit of a homestead therein, when he has left children by his first marriage, though they are adult. The meaning of the language of this section and § 5 is too plain for construction, that in speaking of children the instrument refers to children of the deceased owner. *Simmons v. Respass*, 151 N. C. 5, 65 S. E. 516 (1909).

Same—Where Only One Minor.—Where the owner of a homestead dies, leaving children, some of age and one a minor, the homestead estate vests alone in the minor child until his or her majority. *Simpson v. Wallace*, 83 N. C. 477 (1880).

Pecuniary Standing of Children Not Considered.—The right to a homestead is given to the minor children of an insolvent father, regardless of their pecuniary circumstances. *Allen v. Shields*, 72 N.

§ 4. **Laborer's lien.**—The provisions of section one and two of this article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises. (Const. 1868.)

Cross References.—See §§ 44-1 et seq. and notes thereto. For other exceptions to the exemptions, see note of *Mebane v. Layton*, 89 N. C. 396 (1883), under § 1-369.

Definition of Terms.—A "laborer's lien" is solely for labor performed, while a "mechanic's lien" is broader and includes the "work done," i. e., the "building built" or superstructure put on the premises. *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

§ 5. **Benefit of widow.**—If the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. (Const. 1868.)

Cross Reference.—See § 1-369, analysis line "Who Entitled to Homestead and

173 S. E. 277 (1934); *Sample v. Jackson*, 225 N. C. 380, 35 S. E. (2d) 236 (1945).

C. 504 (1875); *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859 (1901).

Right Not Waivable by Guardian Ad Litem.—A guardian ad litem cannot waive the homestead rights of infant heirs, especially when there is no consideration therefor, for such waiver would affect the substantial rights of the infants. *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859 (1901).

Debts Contracted for Work and Labor.—By construing § 6 of this article in connection with this section the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N. C. 83, 52 S. E. 410, 3 L. R. A. (N. S.) 307 (1905).

The debt referred to in this section means the debt of the owner of the homestead, and not the debt of the infant children. *Bruton v. McRae*, 125 N. C. 206, 34 S. E. 397 (1899).

Right Not to Be Sold for Assets.—In a proceeding to sell land for assets, the executor cannot sell the homestead interest of a minor child and devisee of the testator. *Bruton v. McRae*, 125 N. C. 206, 34 S. E. 397 (1899).

Cited in *Narron v. Musgrave*, 236 N. C. 388, 73 S. E. (2d) 6 (1952).

Lien for Materials Furnished.—See note of *Cumming v. Bloodworth*, 87 N. C. 83 (1882), under § 44-1. See also, *Broyhill v. Gaither*, 119 N. C. 443, 26 S. E. 31 (1896).

Applied in *McMillan v. Williams*, 109 N. C. 252, 13 S. E. 764 (1891); *Isler v. Dixon*, 140 N. C. 529, 53 S. E. 348 (1906); *Sugg v. Pollard*, 184 N. C. 494, 115 S. E. 153 (1922).

Quoted in *Roper Lumber Co. v. Lawson*, 195 N. C. 840, 143 S. E. 847 (1928).

and notes thereto; as to right of widow whose deceased husband leaves adult children by a former marriage, see note of *Simmons v. Respass*, 151 N. C. 5, 65 S. E. 516 (1909), under § 3 of this article.

Editor's Note.—It is to be noted that the widow's right to the homestead provided for by this section is expressly conditioned upon her not being the owner of a homestead in her own right. Such a clause is not contained in § 3 which gives the right to the children during minority. On this point it was said in *Spence v. Goodwin*, 128 N. C. 273, 38 S. E. 859 (1901): "This * * * emphasizes by direct implication the unconditional right of exemption given to the children by § 3."

Ownership at Death Essential.—It is only in the contingency that the husband is the owner of a homestead at the time of his death that the exemption from debts

inures to her benefit. *Thomas v. Bunch*, 158 N. C. 175, 73 S. E. 899 (1912).

A widow is not required to take action for the preservation of the right to a homestead in the lands of her deceased husband under the provisions of this section, and before the land can be validly sold by the personal representatives to make assets for payment of the debts of the deceased the homestead must first be assigned. *Fulp v. Brown*, 153 N. C. 531, 69 S. E. 612 (1910).

Heirs Prior to Widow Where There Are No Creditors.—A widow is not entitled to homestead against the heirs at law where there are no creditors, but only to dower. *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912). See also, *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299 (1889).

Cited in *Pence v. Price*, 211 N. C. 707, 192 S. E. 99 (1937).

§ 6. **Property of married women secured to them.**—The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried. (Const. 1868.)

Cross Reference.—See notes to § 52-1.

Editor's Note.—To give effect to the provisions of the organic law as embodied in this section, the legislature from time to time has enacted statutes whose essence may be boiled down in substance to what is contained in this section. In fact some of those statutes are a verbatim confirmation of these provisions, while others are corollaries thereof deducible by necessary inference from those provisions through judicial construction.

For example § 39-7 et seq. deals with the execution and proof of instruments affecting a married woman's title to her property; § 52-1, secures to her all property acquired before and after marriage as her separate estate free from the claims of her husband; § 52-2 authorizes her to contract, with certain qualifications, as if she were unmarried, §§ 31-2, 52-1, 52-8, empower her to dispose of her property by will, and there are many other sections in the Code which are directly or indirectly offsprings of, or satellites to, this section.

By virtue of the community of source of these statutes, the instances are rare where this constitutional section has been construed apart from its satellites, or where the construction placed upon the latter is not applicable to the former, or

vice versa. These constructions have been placed under the respective subordinate sections to which they refer, and all of them radiate a light upon the provisions of the organic law contained in this section. To the end that repetition may be avoided the counsel is urged to refer to those sections for no less direct constructions of this section than the sections under which they are placed, while he will find hereunder the more or less independent constructions of this section which do not appear under its subordinates.

For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N. C. Law Rev. 228.

In General.—There is no "beneficent provision of the Constitution" which throws additional shackles around women in the management of their separate property. The provision of the Constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them, to emancipate them from most of the restrictions formerly existing. *Strouse*

v. Cohen, 113 N. C. 349, 18 S. E. 323 (1893).

General Policy of Section.—This section is intended to emancipate married women and place them, so far as property rights are concerned, on a par with men and femes sole. *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129 (1898).

Common-Law Rule Changed.—The common-law rule giving to the husband the actual or potential ownership of the separate choses in action belonging to his wife by reducing them into possession is now changed by this section giving to the wife the sole ownership of her separate estate. *Turlington v. Lucas*, 186 N. C. 283, 119 S. E. 366 (1923).

In *Etheredge v. Cochran*, 196 N. C. 681, 146 S. E. 711 (1929), referring to this section, it is said by Adams, J.: "By virtue of these and other provisions the relation which married women formerly sustained to their husbands has been materially modified. Unity of person in the strict common-law sense no longer exists, and many of the common-law disabilities have been removed. Not only may they contract with each other; a married woman may now sue her husband in contract or in tort. *Dorsett v. Dorsett*, 183 N. C. 354, 111 S. E. 541, 23 A. L. R. 15 (1922); *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9, 29 A. L. R. 1479 (1923)." *Shirley v. Ayers*, 201 N. C. 51, 158 S. E. 840 (1931).

Husband's Consent Necessary Only in Conveyances.—Under this section a married woman may dispose of her property by gift or otherwise without the assent of her husband, unless the law requires the disposition of it to be evidenced by a conveyance or a writing. *Vann v. Edwards*, 135 N. C. 661, 47 S. E. 784 (1904). See *Martin v. Bundy*, 212 N. C. 437, 193 S. E. 831 (1937).

The purpose of requiring the written assent is to afford the wife the counsel and protection of her husband, and not to convey any estate in the realty. When he signs it under her signature and then acknowledges the execution of the deed as one of the grantors, but one inference can arise, and that is that he was giving his required written assent to her conveyance. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (1934).

Sufficiency of Husband's Written Assent.—Since the deed of the husband conveys no title to his wife's land, but evidences his written assent to her conveyance, upon reason and authority, subscribing his name under seal to her deed, and acknowledging his execution thereof

as required by law, is a sufficient written assent to make her deed valid. *Joiner v. Firemen's Ins. Co.*, 6 F. Supp. 103 (1934).

Wife May Not Convey Real Estate by Estoppel.—By this section and the laws of this State a married woman is incapable of making a valid conveyance of her real estate without the written assent of her husband and privy examination duly taken and certified. Hence, she may not convey it by estoppel, fraudulently divest herself of coverture, if such characterization be preferred. *Buford v. Mochy*, 224 N. C. 235, 29 S. E. (2d) 729 (1944).

In view of the above holding it would seem that the power of a married woman to effect a conveyance of her real property by estoppel in pais is delimited by this section of the Constitution. *Merchants, etc., Bank v. Sherrill*, 231 N. C. 731, 58 S. E. (2d) 741 (1950).

The renunciation of a will is not a conveyance which requires the written assent of the husband, as provided in this section. *Perkins v. Isley*, 224 N. C. 793, 32 S. E. (2d) 588 (1945).

No Formal Conveyance to Transfer Note or Bond.—No formal conveyance is necessary under the requirement of this section of the Constitution in the transfer of a note or bond. The delivery of the note or bond to the endorsee after it has been endorsed in blank by the wife, the owner, and the husband, is a sufficient conveyance of the note or bond to satisfy the constitutional requirement. *Coffin v. Smith*, 128 N. C. 252, 38 S. E. 864 (1901).

Legislative Power to Declare Wife Free Trader.—There is no constitutional inhibition on the power of the legislature to declare where and how the wife may become a free trader, this section being intended to protect instead of disabling her. *Hall v. Walker*, 118 N. C. 377, 24 S. E. 6 (1896).

A married woman who has been abandoned by her husband is a free trader, and she may execute a valid conveyance of her lands without his joinder. *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941).

Legislative Control over Capacity to Make Will.—This section conferring upon married women the right to make a will, etc., "as if she were unmarried," was designed chiefly to remove the common-law restriction on married women in this respect, and was not intended to free such right from every and all legislative regulation. *Flanner v. Flanner*, 160 N. C. 126, 75 S. E. 936 (1912).

May Devise or Bequeath Property as

if Sole.—Under the provisions of this section, and as later declared by our statutes, a married woman may now devise and bequeath her separate real and personal property as if she were a feme sole, which does not apply to a conveyance of her realty by deed. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402 (1918).

Liability of Husband for Rents Paid Wife after Foreclosure.—Where lands belonging to the separate estate of a wife have been foreclosed under a deed of trust thereon duly executed, and after such foreclosure the rents from the land are paid to the wife, the husband may not be held responsible for such rents by the person entitled to the rent by virtue of the foreclosure, since, under this section a wife is given sole ownership of her separate estate. *In re Longley*, 205 N. C. 488, 171 S. E. 788 (1933).

May Bar Husband's Curtesy by Devising the Property.—By marriage, before the adoption of the Constitution of 1868, the husband acquired no vested rights in the lands of his wife before a child was born capable of inheriting; and when the first child born of the marriage was after the adoption of the Constitution, which gives a married woman the power, among other things, of disposing, by will, of her property acquired before marriage, she may accordingly dispose of it by will and deprive him of his interest therein as tenant by the curtesy. *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510 (1909).

Where a feme covert dies intestate her husband is entitled to his common-law right of curtesy; where she devises her land, under this section, the estate of curtesy is destroyed. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. 127 (1900).

Vested curtesy rights of the husband at the time of the adoption of the Constitution were not impaired by this section. *Richardson v. Richardson*, 150 N. C. 549, 64 S. E. 510 (1909).

Devise of Equitable Separate Estate.—She may devise her equitable separate estate, in the absence of contrary provisions in the instrument creating it, where the trustee is a passive trustee; and, whether the trust be passive or active, where the trust is to terminate with her life, and the estate to become absolute thereafter. *Freeman v. Lide*, 176 N. C. 434, 97 S. E. 402 (1918).

Same—Provisions of Instrument Creating the Estate Still Controls.—Married women have no greater estates, by operation of this section of the Constitution, than those conveyed by the terms of the deed under which they derive title; nor are

the properties and incidents belonging to estates changed by that instrument. *Long v. Barnes*, 87 N. C. 329 (1882).

The Constitution imposes no limitation upon the right of a grantor or deviser to restrict or enlarge, by the terms of the instrument through which title passes, her *jus disponendi*. *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18 (1896).

Not Applicable to Obligations of Wife as Surety to Her Husband.—This section, providing that the separate property of the wife shall not be liable for the debts of the husband, has no application to the obligation of the wife as surety of her husband, such obligation being regarded as a direct one between the creditor and herself. *Royal v. Southerland*, 168 N. C. 405, 84 S. E. 708 (1915).

Extent of Veto Power of Husband.—The veto power of the husband does not extend to devises and bequests, nor to any other disposition of her property, save in those cases which under the law must be made by a "conveyance," i. e., deeds and mortgages of realty and such mortgages of personalty as are made by deed. To hold that the husband's veto power, by reason of the requirement of his written assent, extends to all gifts, sales, transfers and assignments of her personal property, oral or written, is to make the veto as broad as the enfranchisement. It is to say that her property shall remain hers, as before marriage, but that in no case whatever shall she own it as if she had remained single. It would be to require the husband's written assent in cases where no writing would be necessary on the part of the wife. *Jennings v. Hinton*, 126 N. C. 48, 35 S. E. 187 (1900).

Estates by entireties as between husband and wife still exist in North Carolina, but where there is a judgment upon a joint contract against husband and wife, a lien thereunder is created against lands held by them in entireties, and execution may be issued against them. *Martin v. Lewis*, 187 N. C. 473, 122 S. E. 180 (1924).

Action for Tort.—The husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. If the husband could maintain an action to recover damages for torts on the wife she would be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of

both, or neither, but in view of the Constitution of 1868 and our statute on the subject, such action cannot be maintained by either on account of the injury to the other. *Hipp v. Dupont*, 182 N. C. 9, 108 S. E. 318 (1921).

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N. C. 51, 12 S. E. (2d) 649 (1941).

Statute providing that earnings and damages from personal injury are wife's property (G. S. § 52-10) should be read in the light of this section. *Helmstetler v. Duke Power Co.*, 224 N. C. 821, 32 S. E. (2d) 611 (1945).

Power to Contract by Virtue of This Section.—Where it was contended that when the Constitution gave married women separate estates in their property, it gave them by a necessary implication an unrestricted dominion over the property, to bind it directly or indirectly, except when expressly forbidden, and an unrestricted right to contract, such as a feme sole or a man has, it was held that there was no such grant implied, that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and that it must be taken that they were used in that instrument in the sense which had been affixed to them by prior decisions of the court. *Pippen v. Wesson*, 74 N. C. 437 (1876). But this power is now expressly accorded to married women by the terms of statute known as Martin Act embodied in § 52-2.—Ed. Note.

Husband a Freeholder Where Wife Owns Land and There Are Children.—In *Hodgin v. Southern R. Co.*, 143 N. C. 93, 55 S. E. 413 (1906), it is said by Brown, J.: "One of the jurors was challenged by defendant upon the ground that he was not a freeholder. The challenge was allowed and plaintiff excepted. The juror owned no land, but his wife was seized of a fee and had children by her husband. While the Constitution, Art. X, § 6 [this section], has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this court that the husband still has what is termed an "interest" in her land which constitutes him technically a freeholder."

State v. Avant, 202 N. C. 680, 163 S. E. 806 (1932).

Prohibitions of § 52-5, Not Inhibited by This Section.—The provisions of § 52-5, dispensing with the necessity of the written consent of the husband to the conveyance by the wife of her lands when he has "been declared an idiot or a lunatic" is not inhibited by this section of the Constitution. *Lancaster v. Lancaster*, 178 N. C. 22, 100 S. E. 120 (1919).

Conveyance by Submitting Title to Arbitrators.—If a married woman could dispose of her real estate, without the joinder of her husband, by submitting her title to arbitrators, that part of this section which ordains that a married woman, with the written assent of her husband, may convey her real estate, would be a dead letter. If such were the law, married women, from design or by means of fraud and deceit, might by arbitrators, be deprived of their real estate and the husband deprived of his rights therein before he had knowledge of the matter, or the power to prevent it in either case. If a married woman could dispose of her real estate through arbitration, she would be enabled by an indirect method to do that which the Constitution and the laws prohibit, and that will never be allowed. *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64 (1904).

Conveyances between Husband and Wife.—A deed executed by husband to wife in 1841, even if a fee simple deed, would have been void in law, and sustainable in equity only upon meritorious consideration; it is otherwise, as to such deed executed now, which is rendered valid under this section. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900).

Assignment of Insurance Policy.—The signature of the husband, as witness, to a written assignment by the wife, of her interest in an insurance policy on his life, taken out by him for her benefit, is equivalent to an assignment by the wife, "with the written assent of her husband," as provided by this section. *Jennings v. Hinton*, 126 N. C. 48, 35 S. E. 187 (1900).

Estates by entireties are not changed or affected by this section of the Constitution as to rights of married women. *Moore v. Shore*, 208 N. C. 446, 181 S. E. 275 (1935), citing *Bank of Greenville v. Gornto*, 161 N. C. 341, 77 S. E. 222 (1913).

The husband has the right, during coverture, to deal with the possession of land held by him and his wife by entireties without the consent of the wife, but neither may make a contract affecting title so as to defeat the right of the survivor in the whole estate without the consent of the

other. *Moore v. Shore*, 208 N. C. 446, 181 S. E. 275 (1935).

Where lots are conveyed with restrictive covenants limiting buildings to residences and one of such lots is owned by a husband and wife by the entireties, the husband may not convey or contract in respect to

the negative easement of such lot over the other lots without the consent of his wife, since the wife has the right to such negative easement as a part of the estate if she should survive her husband. *Moore v. Shore*, 208 N. C. 446, 181 S. E. 275 (1935).

§ 7. Husband may insure his life for the benefit of wife and children.—The husband may insure his own life for the sole use and benefit of his wife and children, and in case of the death of the husband the amount thus insured shall be paid over to the wife and children, or to the guardian, if under age, for her or their own use, free from all the claims of the representatives of her husband, or any of his creditors. And the policy shall not be subject to claims of creditors of the insured during the life of the insured, if the insurance issued is for the sole use and benefit of the wife and/or children. (Const. 1868; 1931, c. 262.)

Editor's Note.—The amendment proposed by Public Laws of 1931, c. 262, and ratified at the next succeeding general election, added the second sentence to this section.

Generally.—This section clearly looks to the provision for the wife and children so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive. *Hooker v. Sugg*, 102 N. C. 115, 8 S. E. 919 (1889).

The purpose is to enable the husband to make valuable provision for his wife and children after his death, above, beyond and unaffected by his estate, personal and real, and the conditions of the same remaining at the time of his death. *Burwell v. Snow*, 107 N. C. 82, 11 S. E. 1090 (1890).

Not a Part of Insured's Estate.—Where a life insurance policy is issued to one in the name and for the benefit of the wife and children it does not upon his death become a part of his estate. *Burton v. Farinholt*, 86 N. C. 260 (1882). See also the discussion of this point contained in *Herring v. Sutton*, 129 N. C. 107, 39 S. E. 772 (1901) (dis. op.).

Under this section the proceeds from the insurance policy payable to the wife and children is not a part of the insured's estate so that it may be claimed by an heir or next of kin. *Burwell v. Snow*, 107 N. C. 82, 11 S. E. 1090 (1890).

This section "means, in the absence of fraud, that payment of premiums, ever by an insolvent husband, shall not defeat payment at the death of the husband to the beneficiaries named in the policy." *Whiting v. Squires*, 6 F. (2d) 100 (1925), reversing *In re Pittman*, 275 F. 686 (1921).

"The limit of the constitutional exemption of an insurance policy on the life of the husband against the claims of his creditors is that the wife or the wife and chil-

dren take the benefits of a policy payable to her or them as beneficiaries at the death of the insured. The exemption may cover a policy payable to the wife and children with no power of the insured to change the beneficiaries, because in such a policy the wife or the wife and children have a vested interest, and the policy, if paid at all, must be paid to them at the death of the husband. But the exemption does not embrace the surrender value, the property of the husband, of a policy in which he can change the beneficiary at will." *Whiting v. Squires*, 6 F. (2d) 100 (1925), reversing *In re Pittman*, 275 F. 686 (1921).

"The legislature could not by statute add to the constitutional exemption. *Wharton v. Taylor*, 88 N. C. 230 (1883). Therefore it could not make an exemption of the surrender value of the policy which might or might not, according to the will of the husband, fall to the wife or the wife and children as a policy of which they were beneficiaries at the death of the husband. It follows that, if the statute be construed as embracing the surrender value of a policy like these, it would be invalid as a legislative attempt to enlarge the insurance exemption to the wife and children provided by the Constitution." *Whiting v. Squires*, 6 F. (2d) 100 (1925), reversing *In re Pittman*, 275 F. 686 (1921).

If § 58-205 stood alone, with its language unrestrained by the constitutional provision, the argument would be strong in favor of the view that every possible value of a policy including cash surrender value, though the husband retained the right to change the beneficiary, inures to the benefit and use of the wife or her children. This is the view taken of somewhat similar statutes where no constitutional limitation was involved. But, as this construction of the statute of North Carolina is doubtful, it should not be adopted when opposed to the

provision of the Constitution, for every presumption must be indulged that the legislature did not intend to attempt by statute to confer an exemption beyond that provided by the Constitution. Taking this view, we hold that the last sentence of the statute is but a repetition of the constitutional provision on the same subject, and is limited in its application to a policy of insurance standing in the name of the wife or her children as beneficiaries at the death of the husband. *Whiting v. Squires*, 6 F. (2d) 100 (1925), reversing *In re Pittman*, 275 F. 686 (1921).

"The rule laid down by the Supreme Court is that under § 70a of the bankruptcy statute (Comp. St. § 9654) the cash surrender value of a policy of insurance is an asset of a bankrupt's estate, even when the policy is payable to a beneficiary other than

the bankrupt, his estate, or his personal representative, if the bankrupt has reserved absolute power to change the beneficiary. *Cohen v. Samuels*, 245 U. S. 50, 38 S. Ct. 36, 62 L. Ed. 143 (1917); *Cohn v. Malone*, 248 U. S. 450, 39 S. Ct. 141, 63 L. Ed. 352 (1919). The court has further held that insurance policies embraced within the exemption laws of the State do not become assets in the hands of the trustee for the benefit of creditors. *Holden v. Stratton*, 198 U. S. 202, 25 S. Ct. 656, 49 L. Ed. 1018 (1905)." *Whiting v. Squires*, 6 F. (2d) 100 (1925), reversing *In re Pittman*, 275 F. 686 (1921).

Cited in *Peoples Building & Loan Assn. v. Swaim*, 198 N. C. 14, 150 S. E. 663 (1929); *Russell v. Owen*, 203 N. C. 262, 165 S. E. 687 (1932); *In re Reiter*, 58 F. (2d) 631 (1932).

§ 8. How deed for homestead may be made.—Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of a homestead shall be valid without the signature and acknowledgment of his wife. (Const. 1868; 1943, c. 662.)

Cross References.—See §§ 39-7 et seq. and notes thereto. As to form of private examination, see §§ 47-39, 47-40. See also note of *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915), under § 1-370.

Editor's Note.—This section was amended by vote at the general election of November 7, 1944.

Section Applies After Allotment of Homestead.—This section applies only to a conveyance of the homestead after it has been laid off. *Mayho v. Cotton*, 69 N. C. 289 (1873), approved in *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915). See also, *Hager v. Nixon*, 69 N. C. 108 (1873).

General Rule.—A deed executed by the homesteader without the joinder of his wife is invalid and passes no interest. *Wittkowsky v. Gidney*, 124 N. C. 437, 32 S. E. 731 (1899). See *Lambert v. Kinnery*, 74 N. C. 348 (1876).

Right of Grantee upon Non-Jointure of Wife.—Where a husband conveys his land without having his wife join in the deed, the grantee acquires the land free from the right of the wife to a homestead, unless the same has been laid off therein to the husband, but subject to the wife's right of dower, should she survive him. *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915). For other enumerated instances wherein the assent of the wife is not necessary, see note of *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437 (1889), under § 39-9. See also, *Dalrymple v. Cole*, 156 N. C. 353, 72 S. E. 451 (1911); *Simmons v. McCullin*, 163 N. C. 409, 79 S. E. 625 (1913).

It will be seen that the provisions of this section do not become effective, and do not begin to operate until an allotment of the homestead is made to the husband. On this point the cases appear to be entirely in accord. A full discussion containing a minute detail of the reasons therefor may be found in *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915).

Jointure of Wife Unnecessary in Conveyance of Estate in Reversion.—A married woman has no interest or estate in the reversion which takes effect after a homestead estate; therefore the assent of the wife is not necessary to give validity to a deed of the husband conveying such estate in reversion. *Jenkins v. Bobbitt*, 77 N. C. 385 (1877).

This holding is based on the construction placed on this section which is to the effect that the assent of the wife is necessary to a disposition of the homestead estate, and does not embrace the reversion.—Ed. Note.

Same—Unnecessary as to Residue.—The general power of alienation incident to ordinary ownership of real property exists as to all the residue or remaining interest in the lands over the homestead exemption, whether the exemption has or has not been allotted, this section of the Constitution applying alone to the homestead interest, and none other. *Davenport v. Fleming*, 154 N. C. 291, 70 S. E. 472 (1911).

Land Acquired Prior to 1868.—The husband may convey land acquired before the Constitution of 1868 without the joinder of

the wife and thereby bar the wife of dower or homestead. *Cawfield v. Owens*, 129 N. C. 286, 40 S. E. 62 (1901).

Cited in *Barrett v. Barrett*, 120 N. C. 127, 26 S. E. 691 (1897); *Boyd v. Brooks*,

197 N. C. 644, 150 S. E. 178 (1929); *Corporation Commission v. Transportation Committee*, 198 N. C. 317, 151 S. E. 648 (1930); *Pence v. Price*, 211 N. C. 707, 192 S. E. 99 (1937).

ARTICLE XI

PUNISHMENTS, PENAL INSTITUTIONS, AND PUBLIC CHARITIES

§ 1. **Punishments; convict labor; proviso.**—The following punishments only shall be known to the laws of this State, viz.: death, imprisonment with or without hard labor, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State. The foregoing provision for imprisonment with hard labor shall be construed to authorize the employment of such convict labor on public works or highways, or other labor for public benefit, and the farming out thereof, where and in such manner as may be provided by law; but no convict shall be farmed out who has been sentenced on a charge of murder, manslaughter, rape, attempt to commit rape, or arson: Provided, that no convict whose labor may be farmed out shall be punished for any failure of duty as a laborer, except by a responsible officer of the State; but the convicts so farmed out shall be at all times under the supervision and control, as to their government and discipline, of the penitentiary board or some officer of this State. (Const. 1868; Convention 1875.)

Editor's Note.—All of this section after the first sentence was added by the Convention of 1875. This section of the Constitution constitutes the basis for the legislative enactments regulating the punishment of violation of the criminal law found in the specific sections in the General Statutes. It sets definite boundaries beyond which the legislature, in the exercise of the power to prescribe the punishment for the various crimes, cannot transgress. The cases placed in the notes found under the specific sections in the chapter, "Crimes and Punishments," of the General Statutes, will necessarily throw some light on this section of the Constitution. This fact renders it needless to repeat, at this point, a citation of those cases, and it is only necessary to refer the counsel to the sections of the above-mentioned chapter.

For article on punishment for crime in North Carolina, see 17 N. C. Law Rev. 205.

Working Convicts—Section Not Basis of

§ 2. **Death punishment.**—The object of punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact. (Const. 1868.)

Cross References.—See Editor's Note to § 1 of this article. As to punishment for murder, see § 14-17 and note thereto; as to punishment for arson, see § 14-58 and note thereto; as to burning of buildings other than dwelling houses, see §§ 14-59 et seq., and notes thereto; as to punishment for burglary, see § 14-52 and note thereto; as to punishment for rape, see § 14-21 and note thereto.

Disciplinary Rules.— This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries. *State v. Nipper*, 166 N. C. 272, 81 S. E. 164 (1914). But officers are civilly and criminally liable for an abuse or oppression of the adopted regulations under which the convicts are kept. *State v. Young*, 138 N. C. 571, 50 S. E. 213 (1905).

Same—Regulations Must Be Reasonable.—Whether the prisoners are worked on the public road or kept in jail the regulations under which they must live must be reasonable. *State v. Young*, 138 N. C. 571, 50 S. E. 213 (1905).

Stated in *State v. Burnett*, 179 N. C. 735, 102 S. E. 711 (1920).

Cited in *State v. Stansbury*, 230 N. C. 589, 55 S. E. (2d) 185 (1949).

Power of Legislature.—The punishment to be inflicted for any crime is left entirely to the General Assembly, which can in its discretion affix lesser punishments, even for the four crimes, mentioned in this section, which are now visited with capital punishment. *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

Under the discretionary power given by the Constitution, the legislature has di-

vided the crimes murder and burglary into two degrees and has affixed thereto the punishment for each enumerated offense. See specific cross references.—Ed. Note.

§ 3. **Penitentiary.**—The General Assembly shall, at its first meeting, make provision for the erection and conduct of a State's prison or penitentiary, at some central and accessible point within the State. (Const. 1868.)

Legislative Duties.—This provision imposes upon the legislature the duty of attending to the details as to the erection of the necessary buildings, the purchase of such property, real and personal, as may be necessary for the uses of the prison; and also to form such regulations for the government and conduct of the prison as may seem proper. The officers or placement, their salaries and the distribution of

Applied to repeal portion of statute prescribing punishment of death for burning mill house, in *State v. King*, 69 N. C. 419 (1873).

their duties are all left with the General Assembly. *State Prison v. Day*, 124 N. C. 362, 32 S. E. 748 (1899).

As to appointment of the directors of the penitentiary and filling vacancies, see N. C. Const., Art. III, section 10.

Referred to in *Railroad v. Holden*, 63 N. C. 410 (1869); *Sedberry v. Carver*, 77 N. C. 319 (1877).

§ 4. **Houses of correction.**—The General Assembly may provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed. (Const. 1868.)

Cross References.—See §§ 134-1 et seq. See also §§ 153-209 et seq.

Definition.—A house of correction, "as the name indicates, is designed for the re-

formation of youthful criminals, those who have not yet become hardened in crime." In re *Watson*, 157 N. C. 340, 72 S. E. 1049 (1911).

§ 5. **Houses of refuge.**—A house or houses of refuge may be established whenever the public interest may require it, for the correction and instruction of other classes of offenders. (Const. 1868.)

§ 6. **The sexes to be separated.**—It shall be required, by competent legislation, that the structure and superintendence of penal institutions of the State, the county jails, and city police prisons secure the health and comfort of the prisoners, and that male and female prisoners be never confined in the same room or cell. (Const. 1868.)

The word "superintendence," as used in this section, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695 (1889).

Liability of the City.—Under this section a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things nec-

essary, as to secure to prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the aldermen of a city comply with the above requirements, the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the jailer, policeman or attendants, to properly minister to his wants and necessities. *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695 (1889).

This section imposes liability on a municipality only for such injuries to prisoners as result from its failure to properly construct and furnish the prison to afford prisoners reasonable comfort and protection from suffering an injury to health. *Parks v. Princeton*, 217 N. C. 361, 8 S. E. (2d) 217 (1940). For note on this case, see 19 N. C. Law Rev. 101.

§ 7. **Provision for the poor and orphans.**—Beneficent provisions for the poor, the unfortunate and orphan, being one of the first duties of a civilized and Christian state, the General Assembly shall, at its first session, appoint and define the duties of a board of public charities, to whom shall be entrusted the supervision of all charitable and penal State institutions, and who shall annually report

to the Governor upon their condition, with suggestions for their improvement. (Const. 1868.)

Cross References. — As to corporate powers of a county generally, as exercised by the board of commissioners, see § 153-9; as to limitation on county indebtedness, see § 153-2; as to the corporate powers of a municipal corporation, see § 160-2; as to maintenance of the county poor, see § 153-152 and notes thereto; as to allowance of pensions, see § 153-157.

Editor's Note.—This section of the Constitution has been the source of numerous legislative enactments, some of the most important of which are referred to above. The notes placed under these sections of the General Statutes contain many cases which will throw an illuminating light on the substantive law embodied in this section of the Constitution. It is believed to be more helpful and beneficial to the practitioner to make reference to these specific sections of General Statutes, and the notes placed thereunder, where the constructions of the Code sections are given in connection with basic constitutional provisions, than to segregate them and leave it to the searcher to find the connecting links.

Erection of County Home — Issuing Bonds.—The building of a county home is for a class of citizens without a place of residence, and beneficent provision for whom is recommended by this section, "as one of the first duties of a civilized and

Christian State"; therefore, providing for such a home being included in the idea of their support, a county may pledge its faith and credit and issue valid bonds for that purpose, as a necessary expense, without the approval of its voters. *Commissioners v. Spitzer & Co.*, 173 N. C. 147, 91 S. E. 707 (1917).

Care of Indigent Sick Is Proper Function of State Government.—In accordance with express constitutional declaration of this section, the care of the indigent sick and afflicted poor is a proper function of the State government, and the General Assembly may by statute require the counties, as administrative agencies of the State, to perform this function, at least within their territorial limits. *Martin v. Board of Com'rs*, 208 N. C. 354, 180 S. E. 777 (1935).

There is no contractual duty on the part of the State to care for and maintain insane persons, the State hospitals being charitable institutions of the State, maintained voluntarily in recognition of Christian principles, as set out in this section. See §§ 143-120 et seq. *State v. Security Nat. Bank*, 207 N. C. 697, 178 S. E. 487 (1935).

Referred to in Board v. Commissioners, 113 N. C. 379, 18 S. E. 661 (1893); *Board v. Commissioners*, 137 N. C. 310, 49 S. E. 353 (1904).

§ 8. **Orphan houses.**—There shall also, as soon as practicable, be measures devised by the State for the establishment of one or more orphan houses, where destitute orphans may be cared for, educated, and taught some business or trade. (Const. 1868.)

§ 9. **Inebriates and idiots.**—It shall be the duty of the Legislature, as soon as practicable, to devise means for the education of idiots and inebriates. (Const. 1868.)

§ 10. **Deaf-mutes, blind, and insane.**—The General Assembly may provide that the indigent deaf-mute, blind, and insane of the State shall be cared for at the charge of the State. (Const. 1868; 1879, cc. 254, 268, 314.)

Cross References. — As to construction of the term "indigent," see note of *In re Hybart*, 119 N. C. 359, 25 S. E. 963, under § 122-38. See also, *Hospital v. Fountain*, 128 N. C. 23, 38 S. E. 34. As to statutory provision for indigent patients in hospital for the insane, see §§ 122-38 et seq.

Editor's Note. — This section was inserted, pursuant to cc. 254 and 314, Public Laws of 1879, in lieu of § 10 of the Con-

stitution of 1868 which was as follows: "The General Assembly shall provide that all the deaf mutes, the blind, and the insane of the State, shall be cared for at the charge of the state."

Referred to in In re Boyett, 136 N. C. 415, 48 S. E. 789 (1904); *State v. Security Nat. Bank*, 207 N. C. 697, 178 S. E. 487 (1935).

§ 11. **Self-supporting.**—It shall be steadily kept in view by the Legislature and the board of public charities that all penal and charitable institutions should

be made as nearly self-supporting as is consistent with the purposes of their creation. (Const. 1868.)

Cited in *Palmer v. Haywood County*, 212 N. C. 284, 193 S. E. 668, 113 A. L. R. 1195 (1937).

ARTICLE XII

MILITIA

§ 1. **Who are liable to militia duty.**—All able-bodied male citizens of the State of North Carolina, between the ages of twenty-one and forty years, who are citizens of the United States, shall be liable to duty in the militia: Provided, that all persons who may be averse to bearing arms, from religious scruples, shall be exempt therefrom. (Const. 1868.)

Stated in *Hinton v. Lacy*, 193 N. C. 496, 137 S. E. 669 (1927); In *re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944).

§ 2. **Organizing, etc.**—The General Assembly shall provide for the organizing, arming, equipping, and discipline of the militia, and for paying the same, when called into active service. (Const. 1868.)

Cross References. — For the numerous legislative enactments on the subjects, see the chapter "Militia", §§ 127-1 et seq. As to support of families of indigent militiamen, see § 153-157.

By Whom Militia Paid.—The legislature may provide, if it think proper to do so, how and by whom the militia shall be paid.

§ 3. **Governor commander-in-chief.**—The Governor shall be commander-in-chief and shall have power to call out the militia to execute the law, suppress riots or insurrections, and to repel invasion. (Const. 1868.)

Governor May Call Out Militia.—In the absence of legislation, the Governor, as commander-in-chief, has the power to call out the militia, and the State guard being made a part of the militia, he has the power to call them out. This constitutional power may be regulated by legislation providing what shall amount to sufficient evidence of the existence of the causes mentioned in this section of the Constitution. *Worth v. Commissioners*, 118 N. C. 112, 24 S. E. 778 (1896).

And in the absence of any special provision, they are to be paid by the State—the "power" that calls them out. *Worth v. Commissioners*, 118 N. C. 112, 24 S. E. 778 (1896). See § 127-80 and the note thereto.

Cited in *Baker v. State*, 200 N. C. 232, 156 S. E. 917 (1931).

Officers in the militia are liable to be called out to suppress riots or insurrection, "and to repel invasion." In *re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944).

Same—Not Subject to Legislative Restriction.—The legislature has no authority to restrict the power of the Governor to call out the militia. *Worth v. Commissioners*, 118 N. C. 112, 24 S. E. 778 (1896).

When Called into Service of United States.—See N. C. Const., Art. III, § 8.

§ 4. **Exemptions.**—The General Assembly shall have power to make such exemptions as may be deemed necessary, and to enact laws that may be expedient for the government of the militia. (Const. 1868.)

ARTICLE XIII

AMENDMENTS

§ 1. **Convention, how called.**—No convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each house of the General Assembly, and except the proposition, convention or no convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it

shall assemble on such day as may be prescribed by the General Assembly. (Const. 1868; Convention 1875.)

Editor's Note.—The Convention of 1875 added the word "ever" after "shall" in line 2 and all of the section after the words "General Assembly" in the first sentence.

See 11 N. C. Law Rev., 242, for discussion as to whether the provisions of this section apply to the calling of a convention to consider a proposed federal amendment. This question was said to perplex the leg-

islature and served to divide the Supreme Court.

General Assembly may call convention to consider proposed amendment to the U. S. Constitution either under this section or in the exercise of its plenary powers. See Opinions of the Justices, 204 N. C. 806, 172 S. E. 474 (1933).

§ 2. How the Constitution may be altered.—No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each house of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State. (Const. 1868; Convention 1875.)

Editor's Note.—Section 2 of the original Constitution of 1868, before it was amended by the Convention of 1875 to read as the present § 2, was as follows: "No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been read three times in each House of the General Assembly and agreed to by three-fifths of the whole number of members of each House respectively; nor shall any alteration take place until the bill, so agreed to, shall have been published six months previous to a new election of members to the General Assembly. If, after such publication, the alteration proposed by the preceding General Assembly shall be agreed to, in the first session thereafter, by two-thirds of the whole representation in each House of the General Assembly, after the same shall have been read three times on three several days in each House, then the said General Assembly shall prescribe a mode by which the amendment or amendments may be submitted to the qualified voters of the House of Representatives throughout the State; and if, upon comparing the votes given in the whole State, it shall ap-

pear that a majority of the voters voting thereon have approved thereof, then, and not otherwise, the same shall become a part of the Constitution." Public Laws 1931, c. 104, proposed an amendment to this section, whereby the submission could be at a special election called for the purpose, which was defeated.

Generally.—While to amend the Constitution of the State it is necessary for the voters to approve the proposed amendments to be submitted to them, it is likewise necessary to the validity of the election that the legislature enact the proposition to amend into a statute by a three-fifths vote of each branch; and the constitutional provision that they be submitted "in such manner as may be prescribed by law" includes within its intent and meaning the time at which the amendments will be effective, if approved, the Constitution being silent on this point. *Reade v. Durham*, 173 N. C. 668, 91 S. E. 712 (1917). See also, *Freeman v. Cook*, 217 N. C. 63, 6 S. E. (2d) 894 (1940).

Applied in *University v. McIver*, 72 N. C. 76 (1875).

ARTICLE XIV

MISCELLANEOUS

§ 1. Indictments.—All indictments which shall have been found, or may hereafter be found, for any crime or offense committed before this Constitution takes effect, may be proceeded upon in the proper courts, but no punishment shall be inflicted which is forbidden by this Constitution. (Const. 1868.)

Cross References.—See §§ 15-140 to 15-155 and the notes thereto. As to punishments, see N. C. Const., Art. XI, §§ 1 et

seq., and the references there made.

Cited in *Debham v. Telephone Co.*, 126 N. C. 831, 36 S. E. 269 (1900).

§ 2. Penalty for fighting duel.—No person who shall hereafter fight a duel, or assist in the same as a second, or send, accept, or knowingly carry a challenge therefor, or agree to go out of the State to fight a duel, shall hold any office in this State. (Const. 1868.)

Stated in *Cole v. Sanders*, 174 N. C. 112, 93 S. E. 476 (1917).

§ 3. Drawing money.—No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published. (Const. 1868.)

Editor's Note.—This section is an exact repetition of the United States Constitution, Art. I, § 9, cl. 7.

Legislative Authority Required.—This section means that there must be legislative authority in order for money to be validly drawn from the treasury. In other words, the legislative power is supreme over the public purse. *White v. Hill*, 125 N. C. 194, 34 S. E. 432 (1899), citing *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364 (1898).

Moneys paid into the hands of the State Treasurer by virtue of a State law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority. *Gardner v. Board of Trustees*, 226 N. C. 465, 38 S. E. (2d) 314 (1946).

Section as Bar to Judicial Action.—This section effectually bars any judicial action to enforce collection of liabilities against the State, and the courts cannot direct the State Treasurer to pay such claims, how-

§ 4. Mechanic's lien.—The General Assembly shall provide, by proper legislation, for giving to mechanics and laborers an adequate lien on the subject-matter of their labor. (Const. 1868.)

Editor's Note.—Under the power given by this section of the Constitution the legislature has passed numerous enactments which secure to mechanics and laborers adequate liens and means for their enforcement. These provisions may be found in §§ 44-1 et seq. Since the language of this constitutional section is clear and unobscure, merely giving to the General Assembly a well-defined power, little judicial construction will be found, all the cases merely stating this provision of the Con-

stitution as the foundation of the G. S. sections above referred to. Whatever seemingly ambiguous terms that may be found in the Code sections which have sprung out of this section of the Constitution are explained in the note to the specific section in the Code.

Quoted in *Roper Lumber Co. v. Lawson*, 195 N. C. 840, 143 S. E. 847 (1928); *Boykin v. Logan*, 203 N. C. 196, 165 S. E. 680 (1932).

Mandamus to Enforce Payment against County.—See § 153-64 and the notes thereto.

Mandamus to Enforce Payment against County.—See § 153-64 and the notes thereto.

§ 5. Governor to make appointments.—In the absence of any contrary provision, all officers of this State, whether heretofore elected or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor, or, if the officers are elective, until their successors shall have been chosen and duly qualified according to the provisions of this Constitution. (Const. 1868.)

Cited in *Markham v. Simpson*, 175 N. C. of Com'rs, 217 N. C. 209, 7 S. E. (2d) 354 135, 95 S. E. 106 (1918); *Freeman v. Board* (1940).

§ 6. **Seat of government.**—The seat of government in this State shall remain at the city of Raleigh. (Const. 1868.)

§ 7. **Holding office.**—No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this State or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: Provided, that nothing herein contained shall extend to officers in the militia, notaries public, justices of the peace, commissioners of public charities, or commissioners for special purposes. (Const. 1868; 1872-73, c. 88; 1943, c. 432.)

Cross References.—As to what constitutes a public office and numerous illustrations thereof, see note to § 1-515. As to form and nature of the action to declare an office vacant, see §§ 1-515 et seq. and the notes there placed.

Editor's Note.—This section was amended by vote at the general election of November 7, 1944. The amendment inserted "notaries public" in the proviso to the section.

Section 7 of the Constitution of 1868, was amended pursuant to c. 88, Public Laws of 1872-73, to read as follows: "No person shall hold more than one lucrative office under the State, at the same time: Provided, That officers in the Militia, Justices of the Peace, Commissioners of Public Charities, and Commissioners appointed for special purposes, shall not be considered officers within the meaning of this section."

Purpose.—The manifest intent is to prevent double office-holding—that offices and places of public trust should not accumulate in any single person—and the super-added words of "places of trust or profit" were put there to avoid evasion in giving too technical a meaning to the preceding words. *Doyle v. Raleigh*, 89 N. C. 133 (1883), approved in *Groves v. Borden*, 169 N. C. 8, 84 S. E. 1042 (1915).

This section was never intended to discourage public officials from assuming military leadership in time of emergency. In *re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944).

Under this section, which is intended and designed to prevent or inhibit double office-holding, except in certain instances, it is not permissible for one person to hold two offices at the same time. In *re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944); In *re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217 (1946).

Definition of Public Office.—An office is a public station, or employment, conferred by appointment of government and the term embraces the idea of tenure, duration, emolument, and duties. In *re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217 (1946).

Where the office which judge proposed to accept carried with it some of the attributes of sovereignty, and perforce invested him with governmental authority, he would be holding an office or place of trust or profit under the United States, or a department thereof, within the meaning of this section. In *re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217 (1946).

Effect of Acceptance of Similar Office.—Where one holding an "office or place of profit" accepts another such office or position in contravention of this section of the Constitution, the first is vacated eo instanti, and any further acts done by him in connection with the first office are without color, and cannot be de facto. *Whitehead v. Pittman*, 165 N. C. 89, 80 S. E. 976 (1914).

The acceptance of a second office, which is forbidden or incompatible with the office already held, operates ipso facto to vacate the first. In *re Yelton*, 223 N. C. 845, 28 S. E. (2d) 567 (1944); In *re Advisory Opinion*, 226 N. C. 772, 39 S. E. (2d) 217 (1946).

In *Barnhill v. Thompson*, 122 N. C. 493, 29 S. E. 720 (1898), it is said: "The acceptance of a second office by holding a public office operates ipso facto to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second." The acceptance of the second office is of itself a resignation of the first. *Whitehead v. Pittman*, 165 N. C. 89, 80 S. E. 976 (1914).

The jurisdiction of a judge of a municipal recorder's court to impose sentence cannot be successfully attacked on the ground that at the time the recorder was appointed he was mayor of the municipality and therefore held two offices in contravention of this section, since even if it be granted that the statute permitting a mayor to be appointed recorder confers upon the mayor when chosen recorder other than ex-officio duties, the acceptance of the office of recorder would vacate the office of mayor, but would not affect the office of

recorder. In re Barnes, 212 N. C. 735, 194 S. E. 499 (1938).

The constitutional inhibition against double office holding is enforced in alternative ways, depending on whether the first office is a State or a federal office. 1. Where one holding a first office under the State violates this section by accepting a second office under either the State or the United States without surrendering the first office, he automatically and instantly vacates the first office, and he does not thereafter act as either a de jure or a de facto officer in performing functions of the first office because he has neither right nor color of right to it. 2. Where one holding a first office under the United States violates the section by accepting a second office under the State without surrendering the first office, his attempt to qualify for the second office is absolutely void, and he does not act as either a de jure or a de facto officer in performing functions of the second office because he has neither right nor color of right to it. Edwards v. Yancey County Board of Ed., 235 N. C. 345, 70 S. E. (2d) 170 (1952).

Where a vacancy in a public office occurs by virtue of the constitutional provision against double office holding, such vacancy occurs as of the date of the acceptance of the second office unaffected by the fact that the person accepting the second office continues to discharge the duties of the office in good faith, since ignorance of the law excuses no man. State v. Fortner, 236 N. C. 264, 72 S. E. (2d) 594 (1952).

Actions for Removal Where One Accepts Second Office.—When a person holding an office or place of trust accepts and qualifies for a second office, within the meaning of this section, the first office ipso facto becomes vacated, and an action to declare the first office vacant may be instituted in the name of the State on the relation of the Attorney General, by any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise the powers of his office, but such an action cannot be maintained unless it appears that the leave of the Attorney General has been obtained either before the commencement of the action or afterwards supplied pending the proceedings. Midgett v. Gray, 158 N. C. 133, 73 S. E. 791 (1912).

A statute providing that the incumbent of one public office should also fill another public office is unconstitutional as violating this section, and cannot be upheld as

merely affording the choice between the offices so that the acceptance of the second office would ipso facto vacate the first, since incumbency in the first is essential to incumbency in the second. But a statute which creates no new office and appoints no additional, but merely attaches new duties to offices already existing, to be performed by the incumbents therein, does not violate this section. Brigman v. Baley, 213 N. C. 119, 195 S. E. 617 (1938).

County Commissioner Accepting Commission as Notary.—For case decided prior to the addition of the words "notary public" in the proviso to this section, see Harris v. Watson, 201 N. C. 661, 161 S. E. 215 (1931).

Naval Officer Appointed to Office of Zoning Commissioner.—A naval officer holds office under the United States government and therefore under the provision of this section he could not hold the office of zoning commissioner, and was neither a de facto nor a de jure commissioner. Vance S. Harrington & Co. v. Renner, 236 N. C. 321, 72 S. E. (2d) 838 (1952).

Recorder May Also Be Justice of Peace.—This section does not forbid one to hold the position of recorder of a town and the office of justice of the peace at the same time. State v. Lord, 145 N. C. 479, 59 S. E. 656 (1907).

Imposition of Additional Duties.—Chapter 341, Public-Local Laws of 1931, providing that the chairmen of certain county boards of Madison County should elect a tax manager for the county, merely imposes additional duties ex officio upon the said chairmen, and does not provide that any one of them should hold two public offices in violation of this section. Freeman v. Board of Com'rs, 217 N. C. 209, 7 S. E. (2d) 354 (1940).

Delegation of Duties.—A statute which places the affairs of a municipal corporation in the hands of a city council and a city manager and provides that in the event of a vacancy in the office of city manager, by sickness or otherwise, the council may delegate the duties of this office to one of its members, to be performed ex officio as mere auxiliary duties with such compensation as the council may determine, but shall receive no salary as a member of the council, is held not to contravene this section. State v. Holmes, 207 N. C. 293, 176 S. E. 746 (1934).

Applied in Barnhill v. Thompson, 122 N. C. 493, 29 S. E. 720 (1898); McCullers v. Commissioners, 158 N. C. 75, 73 S. E. 816 (1911).

§ 8. Intermarriage of whites and negroes prohibited.—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 hereby forever prohibited. (Convention 1875.)

Editor's Note.—This section was added by the Convention of 1875. It constitutes the first clause of § 14-181. Reference is therefore made to the note placed under that section.

Persons within Prohibited Degree.—Every person who has one-eighth negro

blood in his veins is within the prohibited degree set out in this section and § 51-3. *State v. Miller*, 224 N. C. 228, 29 S. E. (2d) 751 (1944).

Stated in *Epps v. Carmichael*, 93 F. Supp. 327 (1950).

Constitution of the United States

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I

§ 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. [1.] The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

[2.] No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the state in which he shall be chosen.

[3.] Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

The first sentence of this clause (art. I, § 2, cl. 3) is amended by Amendment XIV, § 2 and Amendment XVI.

[4.] When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

[5.] The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

§ 3. [1.] The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Art. I, § 3, cl. 1, is superseded by Amendment XVII.

[2.] Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary

appointments until the next meeting of the legislature, which shall then fill such vacancies.

[3.] No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

[4.] The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

[5.] The senate shall chuse their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

[6.] The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present.

[7.] Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

§ 4. [1.] The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of chusing senators.

[2.] The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. [1.] Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

[2.] Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

[3.] Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

[4.] Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. [1.] The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same, and for any speech or debate in either house they shall not be questioned in any other place.

[2.] No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. [1.] All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

[2.] Every bill which shall have passed the house of representatives and the senate shall, before it become a law, be presented to the president of the United States. If he approve, he shall sign it; but if not, he shall return it with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

[3.] Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. The congress shall have power [1.] To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7.] To establish post offices and post roads;

[8.] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9.] To constitute tribunals inferior to the supreme court;

[10.] To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

[11.] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12.] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13.] To provide and maintain a navy;

[14.] To make rules for the government and regulation of the land and naval forces;

[15.] To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

[16.] To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress;

[17.] To exercise exclusive legislation in all cases whatsoever, over such dis-

tract (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—and

[18.] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. [1.] The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

[2.] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3.] No bill of attainder or ex post facto law shall be passed.

[4.] No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

[5.] No tax or duty shall be laid on articles exported from any state.

[6.] No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

[7.] No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

[8.] No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office or title, of any kind whatever, from any king, prince, or foreign state.

§ 10. [1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

[3.] No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II

§ 1. [1.] The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected, as follows:

[2.] Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[3.] The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the

number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately chuse by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner chuse the president. But in chusing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall chuse from them by ballot the vice president.

Art. II, § 1, cl. 3, is superseded by Amendment XII.

[4.] The congress may determine the time of chusing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States.

[5.] No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

[6.] In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

[7.] The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

[8.] Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will to the best of my ability preserve, protect and defend the constitution of the United States."

§ 2. [1.] The president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

[2.] He shall have power, by and with the advice and consent of the senate to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the congress may

by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

[3.] The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

§ 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. The president, vice president and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

§ 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. [1.] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

See Amendment XI, as to suits against a state by citizens of another state or citizens or subjects of a foreign state.

[2.] In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

[3.] The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. [1.] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

[2.] The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV

§ 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

§ 2. [1.] The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

[2.] A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

[3.] No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.

§ 3. [1.] New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

[2.] The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI

[1.] All debts contracted and engagements entered into, before the adoption of this constitution shall be as valid against the United States under this constitution as under the confederation.

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

[3.] The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to

support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In Witness whereof we have hereunto subscribed our names.

Go. WASHINGTON
Presidt. and deputy from Virginia.

New Hampshire.

John Langdon and Nicholas Gilman.

Massachusetts.

Nathaniel Gorham and Rufus King.

Connecticut.

Wm. Saml. Johnson and Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

Wil: Livingston, David Brearley, Wm. Patterson and Jona: Dayton.

Pennsylvania.

B. Franklin, Robt. Morris, Thos. Fitzsimmons, James Wilson, Thomas Mifflin, Geo. Clymer, Jared Ingersoll and Gouv Morris.

Delaware.

Geo. Read, John Dickenson, Jaco: Broom, Gunning Bedford Jun, and Richard Bassett.

Maryland.

James McHenry, Danl. Carroll and Dan: of St. Thos. Jenifer.

Virginia.

John Blair—James Madison, Jr.

North Carolina.

Wm. Blount, Hu Williamson and Richd. Dobbs Spaight.

South Carolina.

Charles Pinckney, J. Rutledge, Charles Cotesworth Pinckney and Pierce Butler.

Georgia.

William Few and Abr. Baldwin.

Attest: William Jackson, Secretary.

The states ratified the Constitution in the following order:

Delaware	December 7, 1787
Pennsylvania	December 12, 1787
New Jersey	December 18, 1787
Georgia	January 2, 1788
Connecticut	January 9, 1788
Massachusetts	February 6, 1788
Maryland	April 26, 1788
South Carolina	May 23, 1788
New Hampshire	June 21, 1788
Virginia	June 26, 1788
New York	July 26, 1788
North Carolina	November 21, 1789
Rhode Island	May 29, 1790

AMENDMENTS

Articles in addition to, and amendment of, the constitution of the United States of America, proposed by congress, and ratified by the legislatures of the several states, pursuant to the fifth article of the original constitution.

The first ten amendments were proposed by Congress on September 25, 1789, and became effective on December 15, 1791.

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT II.

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

AMENDMENT III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people.

AMENDMENT XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

AMENDMENT XII.

The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate;—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

AMENDMENT XIII.

§ 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state,

excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

AMENDMENT XVII.

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

AMENDMENT XVIII.

§ 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or

the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XIX.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.

§ 1. The terms of the president and vice president shall end at noon on the 20th day of January, and the terms of senators and representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

§ 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

§ 3. If, at the time fixed for the beginning of the term of the president, the president elect shall have died, the vice president elect shall become president. If a president shall not have been chosen before the time fixed for the beginning of his term, or if the president elect shall have failed to qualify, then the vice president elect shall act as president until a president shall have qualified; and the congress may by law provide for the case wherein neither a president elect nor a vice president elect shall have qualified, declaring who shall then act as president, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a president or vice president shall have qualified.

§ 4. The congress may by law provide for the case of the death of any of the persons from whom the house of representatives may choose a president whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the senate may choose a vice president whenever the right of choice shall have devolved upon them.

§ 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

§ 6. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

The Twentieth Amendment was declared dated February 6, 1933, to have been ratified by thirty-nine of the forty-eight states. in a proclamation of the Secretary of State.

AMENDMENT XXI.

§ 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed.

§ 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

§ 3. This article shall be inoperative unless it shall have been ratified as an

amendment to the constitution by conventions in the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

The Twenty-first Amendment was declared in a proclamation of the Acting Secretary of State, dated December 5, 1933, to have been ratified by thirty-six of the forty-eight states.

By his proclamation of December 5, 1933, the President proclaimed that the Eighteenth Amendment to the Constitution was repealed on December 5, 1933.

AMENDMENT XXII.

§ 1. No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative from holding the office of president or acting as president during the remainder of such term.

§ 2. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the congress.

The Twenty-second Amendment was certified by the Administrator of General Services on March 1, 1951, to have been ratified by three fourths of the whole num-

ber of states and to have become valid as a part of the Constitution of the United States.

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I. Rules of Practice in the Supreme Court and Superior Courts of North Carolina

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

(Rules revised and approved at the spring term, 1942, of the Supreme Court of North Carolina, as amended down through October 20, 1954.)

Rule

- 1-3(c). [Obsolete.]
4. Appeals—How Docketed.
5. Appeals—When Heard.
6. Appeals—Criminal Actions.
7. Call of Judicial Districts.
8. End of Docket.
9. Call of Docket.
10. Submission on Printed Arguments.
11. Briefs Not Received after Argument.
12. Briefs Regarded as Personal Appearance.
13. When Case May Be Heard Out of Order.
14. When Cases May Be Heard Together.
15. Appeal Dismissed if Not Prosecuted.
16. Motion to Dismiss Appeal — When Made.
17. Appeal Dismissed for Failure to Docket in Time.
18. Appeal Docketed and Dismissed Not to Be Reinstated until Appellant Has Paid Costs.
19. Transcripts.
 - (1) What to Contain and How Arranged.
 - (2) Two Appeals.
 - (3) Exceptions Grouped.
 - (4) Evidence to Be Stated in Narrative Form.
 - (5) Unnecessary Portions of Transcript—How Taxed.
 - (6) Transcripts in Pauper Appeals.
 - (7) Maps.
 - (8) Appeal Bond.
 - (9) Prosecution Bond.
 - (10) Insufficient Transcript.
20. Pleadings.
 - (1) When Deemed Frivolous.
 - (2) When Containing More than One Cause of Action.
 - (3) When Scandalous.
 - (4) Amendments.
21. Exceptions.
22. Printing Transcripts.
23. How Printed.

Rule

24. Appeal Dismissed if Transcript Not Printed or Mimeographed.
25. Mimeographed Records and Briefs.
26. Cost of Printing and Mimeographing Transcripts and Briefs to Be Recovered.
27. Briefs.
- 27½. Statement of the Questions Involved.
28. Appellant's Brief.
29. Appellee's Brief.
30. Arguments.
31. Rearguments.
32. Agreements of Counsel.
33. Appearances.
34. Certiorari.
 - (1) When Applied for.
 - (2) How Applied for.
 - (3) Notice of.
35. Additional Issues.
36. Motions.
37. Abatement and Revivor.
38. Certification of Decisions.
39. Judgment and Minute Dockets.
40. Clerk and Commissioners.
41. Librarian.
 - (1) Report by Him.
 - (2) Books Taken Out.
42. Court's Opinions.
43. Executions.
 - (1) Teste of Executions.
 - (2) Issuing and Return of.
44. Petition to Rehear.
 - (1) When Filed.
 - (2) What to Contain.
 - (3) Two Copies to Be Filed, How Endorsed.
 - (4) Justices to Act in Thirty Days.
 - (5) New Briefs to Be Filed.
 - (6) When Petition Docketed for Rehearing.
 - (7) Stay of Execution.
45. Sittings of the Court.
46. Citation of Reports.
47. Court Reconvened.

1-3 (c). Obsolete.

The obsolete rules related to licensing by the Supreme Court of applicants to practice law. Admission by examination is now regulated by § 84-24. And see "Rules Governing Admission to Practice of Law", VII of this Appendix.

Editor's Note to Rules Generally.—The impression seems to prevail among some lawyers that the rules of practice prescribed by the Supreme Court are merely directory, and that they may be disregarded, or at least waived by the consent of parties. Nothing could be further from the truth. The Supreme Court has ample authority to make the rules. Constitution, Art. I, Sec. 8, Art. IV, Sec. 12; G. S. §§ 7-20, 7-21. The

rules were passed for the protection of litigants and to hasten the administration of justice. They are mandatory and there is no power, aside from the Supreme Court itself, to change or suspend them. *Washington County v. Norfolk Southern Land Co.*, 222 N. C. 637, 24 S. E. (2d) 338 (1943). The legislature has no authority to interfere, and in case of conflict the rules by the court will be observed. See *Cooper v. Comm'rs*, 184 N. C. 615, 113 S. E. 569 (1922). Ordinarily where the appellant fails to comply with the rule the court will dismiss the appeal without discussing the merits of the case. *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906).

4. Appeals—How Docketed

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

The rules of the Supreme Court governing appeals are mandatory and not directory, and must be universally enforced.

Warshaw v. Warshaw, 236 N. C. 754, 73 S. E. (2) 900 (1952).

5. Appeals—When Heard

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term twenty-one days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed twenty-one days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: Provided, however, that an appeal in a civil case from the First, Second, Third, Eighteenth, Nineteenth, Twentieth, and Twenty-first Districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

Cross References.—As to dismissal of appeals when not docketed within time required by this rule, see Rule 17 and notes thereto. As to certiorari, see Rule 34 and notes thereto. As to appeals generally, see G. S. § 1-268 et seq. As to requisites of the transcript, see G. S. § 1-284 and notes thereto.

Editor's Note.—By amendment, effective

July 1, 1951, the words "twenty-one days" in lines two and three of the first paragraph and in line three of the second paragraph were substituted for "fourteen days." This should be borne in mind when reading the following annotations derived from cases decided prior to the amendment.

In General.—The rules in regard to the

time in which appeals should be docketed have been construed often, and the decisions may be summarized as follows: (1) Appeals in causes tried before the commencement of a term of the Supreme Court must be docketed at such term, fourteen days before the completion of the call of causes from the district to which they belong. (2) If not docketed before the call of causes from that district is concluded, the appellee may docket a certificate under Rule 17, and have the appeal dismissed. (3) If the appellee does not do this, and the appeal is docketed at such term of the Supreme Court which begins next after the trial below, but after the perusal of the district to which it belongs, the appellee cannot then move to dismiss. But the appellee's negligence extends no further, and, if the appeal is docketed at a term of the Supreme Court after the one at which it is required to be filed, the appeal will be dismissed on motion. (4) Appeals taken from judgments rendered below during the progress of a term of the Supreme Court are not necessarily to be docketed at such term, but are in time if docketed at the first term of the Supreme Court beginning next after the trial below. If, by reason of observance of the statutory time allowed for settling the case on appeal, it is docketed fourteen days before the perusal of the district to which it belongs, at the term of the court which was in progress when the trial below was had, it stands for trial. (5) Appeals in criminal cases, and civil cases submitted upon printed arguments under Rule 10, are heard at the first term, though docketed after the perusal of the district to which they belong. (6) If, by neglect of the judge, clerk, or cause other than neglect of the appellant, the "case on appeal" cannot be docketed at the term at which it is required to be filed, it is the duty of the appellant to docket the rest of the transcript and move for a certiorari, or he will lose his appeal. *Porter v. Western, etc., R. Co.*, 106 N. C. 478, 11 S. E. 515 (1890). See *Howard v. Speight*, 180 N. C. 653, 104 S. E. 35 (1920).

Rules Mandatory.—The rule of Court requiring the docketing of the appeal within a certain time, etc., is mandatory. *State v. Farmer*, 188 N. C. 243, 124 S. E. 562 (1924); *State v. National Surety Co.*, 192 N. C. 52, 133 S. E. 172 (1926); *Pruitt v. Wood*, 199 N. C. 788, 156 S. E. 126 (1930).

The rules of the Supreme Court regulating appeals are mandatory. *Womble v. Moncure Mill, etc., Co.*, 194 N. C. 577, 140 S. E. 230 (1927); *Pentuff v. Park*, 195 N. C. 609, 143 S. E. 139 (1928). And must be equally observed, or the case will be dismissed. *Covington v. Hanes Hosiery*

Mills Co., 195 N. C. 478, 142 S. E. 705 (1928).

Where the record from the general county court is not docketed in the Superior Court within the time prescribed, the appeal is properly dismissed, it being provided by § 7-295 that appeals from the general county court shall be governed by the rules governing appeals from the Superior Courts to the Supreme Court, and dismissal in such circumstances is mandatory under this rule. *Grogg v. Graybeal*, 209 N. C. 575, 184 S. E. 85 (1936).

The rules may not be disregarded by the Legislature, the judge of a Superior Court, or by litigants or counsel. The Supreme Court has found it necessary to enforce them uniformly. *Pentuff v. Park*, 195 N. C. 609, 143 S. E. 139 (1928).

This rule regulating the time within which appeals must be docketed in the supreme court is mandatory and cannot be abrogated by consent or otherwise. *Jones v. Jones*, 232 N. C. 518, 61 S. E. (2d) 335 (1950).

When case is not docketed within time prescribed by this rule and no application for writ of certiorari is made, appeal will be dismissed, the rules of practice in the Supreme Court being mandatory and not directory. *State v. Presnell*, 226 N. C. 160, 36 S. E. (2d) 927 (1946).

And Dismissal Results Where Agreement of Parties Prohibits Compliance Therewith.—Where the parties agree upon an extension of time for service of case on appeal that will not permit the docketing of the appeal in the Supreme Court in time to be heard according to the procedure in such instances, they knowingly put it beyond their power to comply with the mandatory provisions of this rule of the procedure, and the case will be dismissed in the Supreme Court when these requirements have not been complied with by the appellant. *Pruitt v. Wood*, 199 N. C. 788, 156 S. E. 126 (1930).

Rules 5 and 7 may not be varied, either in criminal or civil cases, under agreement with the solicitor or opposing counsel to extend time to the appellant later than that allowed; and when these requirements for any reason cannot be complied with, the appellant must docket the record proper in the Supreme Court, and apply to the court for a certiorari. *State v. Trull*, 169 N. C. 363, 85 S. E. 133 (1915).

Legislature Cannot Change Rule.—The power of the Legislature to permit an extension of the time for settling the case on appeal, does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof, within a prescribed time, or the issuance by the court of a cer-

tiorari, in its discretion. *State v. Butner*, 185 N. C. 731, 117 S. E. 163 (1923).

Same—Cannot Be Changed by Parties or Trial Judge.—The rules of the Supreme Court regulating the time of docketing appeals are uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise. *Rose v. Rocky Mount*, 184 N. C. 609, 113 S. E. 506 (1922); *Finch v. Commissioners*, 190 N. C. 154, 129 S. E. 195 (1925); *Stone v. Ledbetter*, 191 N. C. 777, 133 S. E. 162 (1926).

With Regard to Appeals, Judgments of Trial Courts Date as of Last Day of Term.—Where the trial term begins before, but is not adjourned until after, the first day of the term of the Supreme Court, appellant need not docket his appeal until the ensuing term of the Supreme Court; the rule that judgments date as of the first day of the term at which they are rendered having no application to appeals, as to which the rule is that judgments date as of the last day of the term. *Davison v. West Oxford Land Co.*, 120 N. C. 259, 26 S. E. 782 (1897).

But where the case is tried below since the beginning of a term of the Supreme Court, and the appeal is filed in proper time at such term it stands regularly for argument. *Avery v. Pritchard*, 106 N. C. 344, 11 S. E. 281 (1890); *Clegg v. Southern R. Co.*, 132 N. C. 292, 43 S. E. 836 (1903), rehearing denied in *Clegg v. Sou. R. Co.*, 133 N. C. 303, 45 S. E. 657 (1903).

No Requirement That Term End Ten Days before Supreme Court Term.—There is no requirement, as a prerequisite for perfecting appeals, that the term at which the judgment was rendered should end ten days before the commencement of the term of this Court. The headnote in *Gregory v. Hobbs*, 92 N. C. 39 (1885), which so indicates, is misleading. *Avery v. Pritchard*, 106 N. C. 344, 11 S. E. 281 (1890).

When Two Districts Called Same Week.—Where cases from two districts are docketed the same week, transcripts from both districts are required to be filed fourteen days before entering upon the call of the docket. *Carroll v. Victory Mfg. Co.*, 180 N. C. 660, 104 S. E. 528 (1920).

Case Dismissed for Failure to Docket.—An appeal will be dismissed when the appellant has not docketed it fourteen days before the call of the district, at the first term of the Supreme Court beginning after the trial, and has failed to apply for a certiorari on good cause shown. *State v. Ward*, 180 N. C. 693, 104 S. E. 531 (1920); *Mimms v. Seaboard Air Line R. Co.*, 183 N. C. 436, 111 S. E. 778 (1922); *State v. Brown*, 183 N. C. 789, 111 S. E. 780 (1922).

It will be dismissed on motion, notwithstanding the appellee did not docket the certificate and dismiss the appeal, as he might have done under Rule 17. *Hinton v. Pritchard*, 108 N. C. 412, 12 S. E. 838 (1891); *Corbett Buggy Co. v. McLamb*, 182 N. C. 762, 108 S. E. 344 (1921); *Stone v. Ledbetter*, 191 N. C. 777, 133 S. E. 162 (1926).

Cannot Be Docketed at Next Term.—When an appeal is not docketed in accordance with this rule it is too late to do so at a subsequent term of the Court. *Hewitt v. Beck*, 152 N. C. 757, 67 S. E. 586 (1910).

May Be Dismissed During Term.—Where the appellant failed to have his appeal docketed at the proper term, it may be dismissed at the call of the district to which it belonged, or at any time thereafter during that term. *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917).

Agreements of Counsel.—The requirement of this rule will be enforced uniformly regardless of an agreement to the contrary that the attorneys for the parties may have made in any particular case. *State v. Farmer*, 188 N. C. 243, 124 S. E. 562 (1924). Formerly the rule was contra. *Morrison v. Craven*, 120 N. C. 327, 26 S. E. 940 (1897).

Neglect of Attorney.—In one case where a farmer employed an attorney to attend to an appeal in the Supreme Court but the attorney failed to have the record printed, and the appeal was dismissed, it was held a case of excusable negligence on the client's part, and that the appeal should be reinstated. *Wiley v. Logan*, 94 N. C. 564 (1886).

But later cases hold the negligence of counsel sending up, docketing, and printing the transcript is that of the client. *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487 (1910); *Howard v. Speight*, 180 N. C. 653, 104 S. E. 35 (1920). See also *Carroll v. Victory Mfg. Co.*, 180 N. C. 660, 104 S. E. 528 (1920); *Kear v. Drake*, 182 N. C. 764, 108 S. E. 393 (1921).

Failure to Docket.—The motion for a certiorari in the Supreme Court by appellant who has failed to docket his case in time under the requirements of this section may be allowed, in the discretion of the court, upon the docketing of the record proper and the showing as required for merit and want of laches. *State v. Taylor*, 194 N. C. 738, 140 S. E. 728 (1927).

Failure to Docket Entire Record.—Though the court, without appellant's fault, fails to settle the case, appellant must within the time allowed by this section docket all of the record proper, or so much thereof as he can obtain, and file an affidavit as

to why the entire record cannot be docketed; otherwise the appeal will be dismissed. *Caudle v. Morris*, 158 N. C. 594, 74 S. E. 98 (1912).

When Appellant Files Original Papers.—Where the appellant failed to file a transcript of the record, but attempted to file the original papers from the trial court, his motion for reinstatement after dismissal of appeal will be denied for laches. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Transcript Mailed in Time.—Where the transcript of a record is deposited in the post office in ample time to reach the Supreme Court within the time required by this section, but by some delay in the mails does not reach its destination until after the time has expired, the excuse is reasonable, and the appeal will not be dismissed. *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523 (1889).

Fees Must Be Paid before Transcript Docketed.—The clerk of the Supreme Court is not required to docket a transcript of an appeal before appellant has paid him the required fee therefor. *Dunn v. Clerk's Office*, 176 N. C. 50, 96 S. E. 738 (1913). But see *West v. Reynolds*, 94 N. C. 333 (1886). See G. S. § 6-34 and notes thereto.

Same—Failure to Pay Costs.—Where a transcript is not sent up in time by reason of the appellant's failure, when notified, to pay costs of the transcript, as he is bound to do, the appellee may move to docket and dismiss the appeal. *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890).

Negotiations for Compromise of Action.—The fact that, on an appeal, negotiations for compromise were pending, is no excuse for failure to docket the appeal. *British, etc., Mortg. Co. v. Long*, 116 N. C. 77, 20 S. E. 964 (1895).

Delay of Clerk.—Failure to docket the transcript on appeal within the time required by this rule cannot be excused by delay of the clerk, in which case appellant should docket the title of the case with affidavit as to the cause of delay. *Carroll v. Victory Mfg. Co.*, 180 N. C. 660, 104 S. E. 528 (1920).

It is no sufficient excuse for the appellant's failure to docket his appeal under this rule that the case was delayed in being settled and that the clerk was too busy with a term of court to make out the transcript. *Hewitt v. Beck*, 152 N. C. 757, 67 S. E. 586 (1910).

The mere fact that appellant tendered payment to the Superior Court clerk of his fees for transcript on appeal, and the clerk said he would send up the transcript without payment is no sufficient legal excuse for the failure to docket under this

rule. *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487 (1910).

Case Not Settled.—It is no excuse for failure to docket the appeal that the case on appeal was not settled by the judge until too late to docket the case at the proper term it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript. *Pittman v. Kimberly*, 92 N. C. 562 (1885); *State v. Telfai*, 139 N. C. 555, 51 S. E. 911 (1905); *Kerr v. Drake*, 182 N. C. 764, 108 S. E. 393 (1921).

When Prisoner Has Fled State.—Upon the failure of appellant to docket his appeal from the conviction of a capital felony, within the time prescribed, it will be docketed and dismissed unless a motion is made for a certiorari at the next succeeding term, and sufficient cause shown for the failure to docket in time; and the fact that he had fled the state and remained absent until arrested and brought back entitles him to no special favor. *State v. Devane*, 166 N. C. 281, 81 S. E. 293 (1914); *State v. Dalton*, 185 N. C. 606, 115 S. E. 881 (1922).

Docketing Removes Case from Litigants' Control.—When the case on appeal has been agreed upon by the parties and at the request of either party the clerk of the superior court has sent it up to the clerk of the Supreme Court and there docketed promptly, and in time for argument of the call of the district under the rule of court, though otherwise the case would not then have stood for argument, it being thus docketed takes it from the control of the parties litigant, and the hearing will accordingly be regularly heard as placed. *Carswell v. Talley*, 192 N. C. 37, 133 S. E. 181 (1926).

Abandonment.—The part of this rule allowing the convicted defendant to abandon his appeal in a criminal action in the court below, commented upon. *State v. Taylor*, 194 N. C. 738, 140 S. E. 728 (1927).

Trial Court May Adjudge Appeal Abandoned.—When the appellant does not docket his transcript on appeal in the Supreme Court, the trial judge may adjudge the appeal abandoned and proceed as if no appeal had been taken. *Cline v. Bryson City Mfg. Co.*, 116 N. C. 837, 21 S. E. 791 (1895). When, however, it is doubtful whether an appeal lies, it is best that the court below should await the action of the Supreme Court. *Avery v. Pritchard*, 93 N. C. 266 (1885); *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845 (1906).

Where appellant has failed to docket the record on appeal and no writ of certiorari has been allowed in the Supreme Court, the court below may adjudge, upon proper

notice, upon proof of such facts, that the appeal has been abandoned. *Pruitt v. Wood*, 199 N. C. 788, 156 S. E. 126 (1930).

Renewing of Withdrawn Appeal.—A party to an action has a right to renew his appeal after having once withdrawn it, provided he does so within the time prescribed by the statutes and rules for perfecting appeals. *State v. Chastain*, 104 N. C. 900, 10 S. E. 519 (1889).

Case Is Dismissed if Moot Question Presented.—Where on appeal it appears that an election sought to be enjoined has already been held, the appeal presents only

a moot question, and will be dismissed. *Rousseau v. Bullis*, 201 N. C. 12, 158 S. E. 553 (1931).

Applied in *Officers v. Bland*, 90 N. C. 6 (1884); *Parker v. Southern Ry. Co.*, 121 N. C. 501, 28 S. E. 347 (1897); *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445 (1905); *Cozart v. Assurance Co.*, 142 N. C. 522, 55 S. E. 411 (1906); *Vivian v. Mitchell*, 144 N. C. 472, 57 S. E. 167 (1907); *State v. Harrell*, 226 N. C. 743, 40 S. E. (2d) 205 (1946); *State v. Scriven*, 232 N. C. 198, 59 S. E. (2d) 428 (1950); *State v. Hall*, 233 N. C. 310, 63 S. E. (2d) 636 (1951).

6. Appeals—Criminal Actions

Appeals in criminal cases, docketed twenty-one days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Eleventh District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

Cross Reference.—As to appeals in criminal actions generally, see G. S. § 15-177 et seq. and notes thereto.

Editor's Note.—The rules for the docketing of criminal appeals are the same, and will be enforced as rigidly, as in civil appeals. See *State v. O'Kelly*, 88 N. C. 609 (1883). And see notes to the preceding section.

By amendment, effective July 1, 1951, "twenty-one" in line one was substituted for "fourteen."

Case Dismissed if Appeal Abandoned.—

(1) **Appeal Bond.**—If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by § 1-286, General Statutes, the appeal will be dismissed.

Cross References.—As to the appeal bond, see G. S. § 1-285 et seq. As to costs on appeal, generally, see G. S. § 6-33 et seq.

(2) **Pauper Appeals.**—See Rule 22 and notes thereto.

(3) **When Appeal Abates.**—See Rule 37.

(4) **Appeal Dismissed if Transcript Not Printed or Mimeographed.**—See Rule 24 and notes thereto.

7. Call of Judicial Districts

Appeals from the several districts will be called for hearing in the following order:

From the First, Twentieth, and Twenty-first Districts, the first week of the term.

From the Second and Nineteenth Districts, the second week of the term.

From the Third and Eighteenth Districts, the fourth week of the term.

From the Fourth and Seventeenth Districts, the fifth week of the term.

From the Fifth and Sixteenth Districts, the seventh week of the term.

From the Sixth and Fifteenth Districts, the eighth week of the term.

From the Seventh District, the tenth week of the term.

From the Fourteenth District, the eleventh week of the term.

From the Eighth and Thirteenth Districts, the thirteenth week of the term.

From the Ninth and Twelfth Districts, the fourteenth week of the term.

From the Tenth and Eleventh Districts, the sixteenth week of the term.

In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on Tuesday of the week to which the district is allotted, unless otherwise directed by the Court, and those from the district last named will not be called before Wednesday of said week, unless otherwise directed by the Court, but appeals from the district last named must nevertheless be docketed not later than twenty-one days preceding the call for the week.

Cross Reference.—See Rule 9.

Editor's Note.—The amendment, effective July 1, 1951, inserted in the last paragraph the words "unless otherwise directed by the Court" and substituted "twen-

ty-one" for "fourteen" near the end of the paragraph.

Applied in *State v. Edwards*, 205 N. C. 443, 171 S. E. 608 (1933).

8. End of Docket

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Eleventh District, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

Cross Reference.—As to terms of the Supreme Court see G. S. § 7-7.

9. Call of Docket

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

Cross Reference.—As to call of judicial districts, see Rule 7.

Counsel Must Attend All Week.—The Supreme Court has no daily calendar, and

counsel must attend during the week for which the case is set under our rules. *Lunsford v. Alexander*, 162 N. C. 528, 78 S. E. 275 (1913).

10. Submission on Printed Arguments

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of ap-

peals from the Ninth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(Note—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

Necessity of Brief.—A case cannot be submitted in Supreme Court without oral argument unless a printed argument or brief for each party is filed. *Mills v. Guaranty Co.*, 136 N. C. 255, 48 S. E. 652 (1904).

Applied in *Shaw University v. Durham Life Ins. Co.*, 230 N. C. 526, 53 S. E. (2d) 656 (1949).

Cited in *Fuquay v. Fuquay*, 232 N. C. 692, 62 S. E. (2d) 320 (1950).

11. Briefs Not Received After Argument

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

Opposition to Continuance.—The party filing a printed brief is to be taken as asking a decision at such term, and as opposing a continuance, and a motion by the opposite party to continue the case till

next term will not be granted unless expressly assented to or for good cause shown. *Dibrell v. Georgia Home Ins. Co.*, 109 N. C. 314, 13 S. E. 739 (1891).

13. When Case May Be Heard Out of Order

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

Title to Public Office.—Where an action involving title to public office is begun after the term of the Supreme Court, and on appeal has come to such term of the Supreme Court after the call of the district to which the cause belongs, the court can, under this rule, set the same down for argument, though it was not entitled to be heard as of right. *Caldwell v. Wilson*, 121 N. C. 423, 28 S. E. 363 (1897).

Enjoining Issue of County Bonds.—An injunction suit to restrain a county from issuing bonds for the payment of certain county indebtedness will not be advanced for hearing because a certain portion of such indebtedness is due to the board of education for borrowed money. *Black v. Commissioners*, 129 N. C. 121, 39 S. E. 818 (1901).

14. When Cases May Be Heard Together

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed if Not Prosecuted

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

Cross References.—As to when appeals will be dismissed, see note to G. S. § 1-284, analysis line IV, B. As to judgment on appeal generally, see G. S. § 1-297 and notes thereto.

Dismissal of Appeal.—Failure to prosecute an appeal for two terms, is sufficient ground for dismissal, unless, for sufficient cause shown, the case shall be continued. The motion to reinstate, upon notice, may be heard not later than the next term. *Brantley v. Jordan*, 92 N. C. 291 (1885); *Wiseman v. Commissioners*, 104 N. C. 330, 10 S. E. 481 (1889). See, also, *Briggs v. Jernis*, 98 N. C. 454, 4 S. E. 631 (1887).

Sickness of Attorney.—Where an appeal after being on the docket for two terms was dismissed, when reached in its order at the third term, for want of prosecution, it will not be reinstated on appellant's af-

fidavit that his attorney was sick, it not appearing that the appellant made any inquiry of his attorney regarding the appeal or sought to get other counsel to prosecute it. *Martin v. Chambers*, 116 N. C. 673, 21 S. E. 402 (1895).

When Cause Remanded.—An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law. *State v. Straughn*, 197 N. C. 691, 150 S. E. 330 (1929).

16. Motion to Dismiss Appeal—When Made

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

See notes to the succeeding section.

Although the statement of case on appeal is subject to the plea of "nul tiel record," the Supreme Court will examine it, and upon the absence of reversible error

appearing therein or on the face of the record proper, the judgment will be affirmed and the appeal dismissed. *State v. Goldston*, 201 N. C. 89, 158 S. E. 926 (1931).

17. Appeal Dismissed for Failure to Docket in Time

If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record twenty-one days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause; Provided, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docket-

ing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

Cross References.—As to the time within which the record must be docketed, see Rule 5. As to certiorari as a substitute for appeal, see Rule 34 and notes thereto.

Editor's Note.—By amendment, effective July 1, 1951, "twenty-one" in line three of the first paragraph was substituted for "fourteen." This should be borne in mind when reading the following annotations derived from cases decided prior to the amendment.

Right of Appellee.—When the appellant does not docket his appeal before the perusal of the docket of the district to which it belongs, the appellee, upon filing the certificate required by this section, is entitled, upon motion, to have the appeal docketed and dismissed. *Rose v. Shaw*, 105 N. C. 126, 10 S. E. 1055 (1890).

It is not discretionary with the Supreme Court to refuse to dismiss an appeal where appellant has failed to docket the case within the time required by Rule 5, but such refusal can only be based on sufficient legal excuse for the delay. *Hewitt v. Beck*, 152 N. C. 757, 67 S. E. 586 (1910); *Carroll v. Victory Mfg. Co.*, 180 N. C. 660, 104 S. E. 528 (1920).

An appeal from the conviction of a capital felony, will be docketed and dismissed on motion of the Attorney General when not prosecuted as required by the rules of Court regulating such matters, after an examination of the record of errors appearing on its face. *State v. Taylor*, 194 N. C. 738, 140 S. E. 728 (1927); *State v. Thomas*, 195 N. C. 458, 142 S. E. 474 (1928); *State v. Clyburn*, 195 N. C. 618, 143 S. E. 129 (1928); *State v. Newsome*, 196 N. C. 16, 144 S. E. 300 (1928); *State v. Sentell*, 208 N. C. 140, 179 S. E. 456 (1935); *State v. Day*, 215 N. C. 566, 2 S. E. (2d) 569 (1939); *State v. Mayes*, 216 N. C. 542, 5 S. E. (2d) 722 (1939); *State v. Moore*, 216 N. C. 543, 5 S. E. (2d) 719 (1939); *State v. Mitchell*, 216 N. C. 544, 5 S. E. (2d) 723 (1939); *State v. Young*, 216 N. C. 626, 5 S. E. (2d) 847 (1939); *State v. Morrow*, 220 N. C. 441, 17 S. E. (2d) 507 (1941); *State v. Blue*, 221 N. C. 36, 18 S. E. (2d) 697 (1942); *State v. Wilfong*, 222 N. C. 746, 24 S. E. (2d) 629 (1943). See *State v. Alexander*, 224 N. C. 478, 31 S. E. (2d) 357 (1944); *State v. Taylor*, 224 N. C. 479, 31 S. E. (2d) 367 (1944); *State v. Buchanan*, 224 N. C. 626, 31 S. E. (2d) 774 (1944); *State v. Brooks*, 224 N. C. 627, 31 S. E. (2d) 754 (1944).

Certiorari to Preserve Right of Appeal.—Where appellant fails to file his case on appeal fourteen days before the call of the district to which it belongs, he may apply for certiorari to preserve his right of appeal and appellees' motion filed thereafter to docket and dismiss under this rule will be denied. *State v. Jones*, 225 N. C. 363, 34 S. E. (2d) 202 (1945).

Appellee Must Obey Rules.—A motion to dismiss an appeal, upon the ground that the appellant did not cause the same to be docketed in accordance with Rule 5 will not be granted, where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the rule must himself observe it. *Barbee v. Green*, 91 N. C. 158 (1884).

When Motion May Be Made.—A motion to docket and dismiss an appeal may be made at the beginning of the call of the district to which it belongs, or at any time thereafter during the term. In *re Burwell's Will*, 123 N. C. 125, 31 S. E. 382 (1898).

A motion to dismiss an appeal in the Supreme Court for failure of appellant to docket in the time required is in apt time when it is made during the term of court to which the appeal is returnable, and before the case is docketed. *Standard Mirror Co. v. Philadelphia Casualty Co.*, 157 N. C. 28, 72 S. E. 826 (1911).

Same—Need Not Be at First Opportunity.—A motion by the appellee to docket and dismiss made before the docketing of the transcript, though not at the first opportunity, will be allowed. *Worth v. Wilmington*, 131 N. C. 532, 42 S. E. 964 (1902).

When Motion Allowed in Capital Case.—In a capital case, where the time for bringing up the case on appeal has expired, in the absence of any apparent error in the record before the Court, the motion of the Attorney General to docket and dismiss, under this rule, is allowed. *State v. Poole*, 223 N. C. 394, 26 S. E. (2d) 858 (1943).

Where appellant did not docket the appeal or file transcript of the record on appeal within the time allowed, and failed to comply with mandatory rules of practice in the Supreme Court, the motion of the Attorney General to docket and dismiss will be allowed, but in a capital case this will be done only after a careful examination of the whole record fails to dis-

close error. *State v. Scriven*, 232 N. C. 198, 59 S. E. (2d) 428 (1950). See *State v. Hall*, 233 N. C. 310, 63 S. E. (2d) 636 (1951).

Where defendant fails to file statement of case on appeal or apply for writ of certiorari within the time allowed, the appeal will be dismissed on motion of the Attorney General, but where defendant has been convicted of a capital felony this will be done only after an inspection of the record proper fails to show error. *State v. Garner*, 230 N. C. 66, 51 S. E. (2d) 895 (1949); *State v. Lewis*, 230 N. C. 539, 53 S. E. (2d) 528 (1949).

Where a defendant convicted of a capital felony fails to file case on appeal in the Superior Court, the motion of the Attorney General to docket and dismiss, made after expiration of time agreed for perfecting the appeal and any extension of time which may have been granted, will be allowed after a careful inspection of the record proper fails to disclose error. *State v. Nelson*, 226 N. C. 529, 39 S. E. (2d) 391 (1946).

Appellant Not Entitled to Notice.—An appellee entitled to move for the dismissal of an appeal because of appellants' failure to file transcript of record within the required time, is not required to give appellants notice of such motion. *Johnston v. Whitehead*, 109 N. C. 207, 13 S. E. 731 (1891); *Kerr v. Drake*, 182 N. C. 764, 108 S. E. 393 (1921).

Laches of Appellant.—Where the appellant was guilty of laches for putting off his application for the transcript of record until just before the time when it should have been sent up for hearing, and further when the clerk delayed in making out the transcript, he did not take steps to have it made out himself and certified by the clerk, the motion to dismiss under this rule will be granted. *Johnson v. Covington*, 178 N. C. 658, 100 S. E. 881 (1919).

Case Docketed before Motion to Dismiss.—Though an appeal is not docketed fourteen days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss. *Standard Mirror Co. v. Philadelphia Casualty Co.*, 157 N. C. 28, 72 S. E. 826 (1911); *Gupton v. Sledge*, 161 N. C. 213, 76 S. E. 527 (1912); *McLean v. McDonald*, 175 N. C. 418, 95 S. E. 769 (1918). See, also, *Benedict v. Jones*, 131 N. C. 473, 42 S. E. 909 (1902); *Laney v.*

Mackey, 144 N. C. 630, 57 S. E. 386 (1907).

Same—Applies to First District.—The rule that though an appeal is not docketed fourteen days before the call of the district to which it belongs, it will not be dismissed (when docketed at the next term here after the trial below) if it is docketed before the motion is made to dismiss, applies to the first as well as the other districts, as the appellee can file his motion to dismiss with the clerk whether the Court is in session or not. *Craddock v. Barnes*, 140 N. C. 427, 53 S. E. 239 (1906).

Failure to Make Motion No Waiver.—This rule applies only to that term of the Supreme Court next ensuing the trial; and where the appellant has docketed his case after that term the case will, on motion, be dismissed at the following term of the Supreme Court, and the failure of the appellee to have previously moved to dismiss is not a waiver of his right. *Howard v. Speight*, 180 N. C. 653, 104 S. E. 35 (1920).

Necessity of Clerk's Certificate.—A motion to dismiss an appeal for appellant's failure to file the transcript fourteen days before entering on the call of the docket as required by Rule 5, where not accompanied by the certificate of the clerk of court as required by this rule, is defective. *Mitchell v. Melton*, 178 N. C. 87, 100 S. E. 124 (1919).

Certificate Need Not Be Duplicated.—Where the appellant has filed a certificate of the clerk below that the case has been tried there, giving the names of the parties, and unsuccessfully applied for a certiorari in the Supreme Court, it is not necessary to appellee's motion to dismiss, that he should duplicate the certificate. *Lindsay v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Duty of Clerk Where Judgment Stayed but Appeal Not Docketed.—Even though execution of the judgment is stayed, unless the defendant shall proceed further and docket the appeal within the time prescribed by Rule 5, the clerk of the Superior Court wherein the case is tried should certify the facts to the Attorney General of the State, to the end that he may move to docket and dismiss the appeal under this rule. *State v. Watson*, 208 N. C. 70, 179 S. E. 455 (1935).

Clerk Cannot Refuse to Sign Certificate.—Where the transcript of appeal was not docketed in the time required, and the appellee prepared the certificate required by this rule, for motion to dismiss, and

forwarded it to the clerk of the trial court, with a request that he sign the same, the clerk had no right to decline to sign and return the certificate because plaintiff's counsel had two weeks previously paid him \$20 on account for the making out of a transcript and requested that he prepare the same. *Johnson v. Covington*, 178 N. C. 658, 100 S. E. 881 (1919).

Case on Appeal Unnecessary.—A motion to docket and dismiss an appeal will be allowed, where no transcript has been docketed, and no case on appeal is necessary to entitle appellee to such dismissal. *Fowle & Son v. Mitchell*, 149 N. C. 581, 62 S. E. 311 (1908).

Time of Stating Excuse.—Where a motion to docket and dismiss an appeal is made by appellee, for appellant's failure to docket the case, excuses for failure to docket should be then made. *British, etc., Mortg. Co. v. Long*, 116 N. C. 77, 20 S. E. 964 (1895); *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917).

Agreement of Parties.—Where the parties have entered into a written agreement or an oral agreement not denied, that the appellee will not move to dismiss under this section the Court will uphold the agreement and a motion to dismiss will be denied. See *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917).

When Appellant Has Abandoned Appeal.—When it appeared from the record on file in the Supreme Court, that the appellant had abandoned his appeal below, no motion to dismiss was necessary, and it will therefore be disallowed. *Standard Mirror Co. v. Philadelphia Casualty Co.*, 157 N. C. 28, 72 S. E. 826 (1911).

Requisites of Motion to Reinstate.—A motion to reinstate an appeal dismissed for failure to docket the record at the first term of this Court after the trial below, is fatally defective where it does not show that the delay was without laches on the part of the appellant. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534 (1893).

Where an appeal has been dismissed under this rule, the appellant, applying for a reinstatement upon the ground that

the trial judge has failed to settle the case, must show that he has had his record properly docketed in this Court, as required by the rules, or his motion will be denied. *Caudle v. Morris*, 158 N. C. 594, 74 S. E. 98 (1912).

Same—Motion Based on Same Grounds as Dismissed.—A motion to reinstate a case on appeal must be denied when based on the same grounds upon which it was properly dismissed. *McDowell v. Kent*, 153 N. C. 555, 69 S. E. 626 (1910).

Same—Based on Absence of Counsel.—Where an appeal has been dismissed for failure to docket the transcript on appeal in proper time, it will not be reinstated upon the ground that appellant's counsel was prevented from appearing to settle the case before the trial judge on the days designated for the purpose, by other urgent business of his client, the appellant, requiring his presence elsewhere. *Parker v. Southern Ry. Co.*, 121 N. C. 501, 28 S. E. 347 (1897).

Applied in *Barbee v. Green*, 91 N. C. 158 (1884); *Rollins v. Love*, 97 N. C. 210, 2 S. E. 166 (1887); *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890); *Avery v. Pritchard*, 106 N. C. 344, 11 S. E. 281 (1890); *Porter v. Western, etc., R. Co.*, 106 N. C. 478, 11 S. E. 515 (1890); *Hinton v. Pritchard*, 108 N. C. 412, 12 S. E. 838 (1891); *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150 (1894); *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487 (1910); *Rosemond v. McPherson*, 156 N. C. 593, 72 S. E. 570 (1911); *Jordan v. Simmons*, 175 N. C. 537, 95 S. E. 919 (1918); *State v. Williams*, 216 N. C. 740, 6 S. E. (2d) 492 (1940); *State v. Page*, 217 N. C. 288, 7 S. E. (2d) 559 (1940); *State v. Flynn*, 217 N. C. 345, 7 S. E. (2d) 700 (1940); *State v. Gibson*, 217 N. C. 563, 8 S. E. (2d) 804 (1940); *State v. Daniels*, 231 N. C. 509, 57 S. E. (2d) 653 (1950); *Woody v. Barnett*, 235 N. C. 73, 68 S. E. (2d) 810 (1952); *State v. Miller*, 235 N. C. 394, 70 S. E. (2d) 2 (1952).

Cited in *State v. Baldwin*, 221 N. C. 471, 20 S. E. (2d) 298 (1942); *Brown v. Allen*, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953).

(1) Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay. The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

(Note—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

Cross Reference.—As to appeals the Supreme Court will consider, see analysis line II, C. of notes to G. S. § 1-277.

Frivolous Appeal Dismissed.—While ordinarily an appeal lies to the Supreme from the Superior Court as a matter of right, it is required that it must be bona fide for the purpose of reviewing some alleged error; and when from the record it appears that the appeal is frivolous and made solely for delay, it will, upon due notice to the appellant, be dismissed upon appellee's motion. *Ludwick v. Unwarra Min. Co.*, 171 N. C. 60, 87 S. E. 949 (1916); *Blount v. Jones*, 175 N. C. 708, 95 S. E. 541 (1918); *Headman v. Commissioners*, 177 N. C. 261, 98 S. E. 776 (1919); *Ross v. Robinson*, 185 N. C. 548, 118 S. E. 4 (1923).

Instant Relief for Appellee.—Where the appellee has moved to dismiss the appeal, showing that appellant's defense was frivolous and only for advantages to be

gained by delay to the appellee's loss, and that the appellant had lost the right to have the case settled on appeal to the Supreme Court, and his answer to the motion is also frivolous, the Supreme Court will affirm the judgment in appellee's favor rendered in the trial court, and order the judgment to be certified down instantler to afford the appellee relief from the appellant's abuse of the Court's process and procedure. *Selwyn Hotel Co. v. Griffin*, 182 N. C. 539, 109 S. E. 371 (1921).

When Statement of Case Contains No Assignments of Error.—Where the agreed statement of case on appeal contains no exceptions or assignments of error, making it apparent that the appeal was taken solely for the purpose of delay, appellee's motion to docket and dismiss under this rule will be allowed. *Stephenson v. Watson*, 226 N. C. 742, 40 S. E. (2d) 351 (1946).

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

Cross References.—As to costs on appeal generally, see G. S. § 6-33, et seq. As to undertaking required on appeal, see G. S. § 1-285 et seq.

19. Transcripts

(1) **What to Contain and How Arranged.** In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	Page
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior

Court shall designate the same by written order: Provided, that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: Provided, further, that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

Cross Reference.—As to contents of case on appeal, see G. S. §§ 1-282, 1-283 and notes thereto.

Editor's Note.—The transcript is necessary to give the Supreme Court jurisdiction of a case, see notes to § 1-284, analysis line I.

The omission of the essential parts of a transcript, as required by this rule, is fatal to the appeal. *Allen v. Allen*, 235 N. C. 554, 70 S. E. (2d) 505 (1952).

Pleadings, Issues and Judgment a Part of Record.—The rules of practice in the Supreme Court require among other things that the pleadings, issues and judgment shall be a part of the record proper, and this appeal, the record not including the summons or complaint, and the Court, consequently, not being informed as to the nature of the action, is dismissed. *Waters v. Waters*, 199 N. C. 667, 155 S. E. 564 (1930). See *Goodman v. Goodman*, 208 N. C. 416, 181 S. E. 328 (1935); *Washington County v. Norfolk Southern Land Co.*, 222 N. C. 637, 24 S. E. (2d) 338 (1943).

The pleadings are an essential part of the record in order that the Supreme Court may be advised as to the nature of the action or proceeding. *Allen v. Allen*, 235 N. C. 554, 70 S. E. (2d) 505 (1952).

Essential Parts of Transcript in Criminal Cases.—On appeal in criminal cases, the indictment or warrant and plea on which the case is tried, the verdict and the judgment appealed from are essential parts of the transcript. *State v. Jenkins*, 234 N. C. 112, 66 S. E. (2d) 819 (1952).

Where the pleadings and the referee's report have been omitted from the record, the appeal must be dismissed as not conforming to subsec. (1) of this rule. *Payne v. Brown*, 205 N. C. 785, 172 S. E. 348 (1934).

The pleadings are a necessary part of the record proper upon appeal, and where the pleadings are omitted from the record, the appeal must be dismissed. *State v. Ravensford Lbr. Co.*, 207 N. C. 47, 175 S. E. 713 (1934).

Jurisdiction of Trial Court Should Appear.—In order to sustain an appeal to the Supreme Court it is essential that the jurisdiction of the trial court should be made to appear. *State v. Patterson*, 222 N. C. 179, 22 S. E. (2d) 267 (1942).

Submission of Controversy without Action.—Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits are necessary parts of the record proper. *Consolidated Realty Corp. v. Koon*, 215 N. C. 495, 2 S. E. (2d) 360 (1939).

Dismissal of Appeal.—The case on appeal to the Supreme Court will be dismissed when the transcript does not conform to the rules of Court regulating appeals. *Bridgers v. Griffin*, 195 N. C. 862, 142 S. E. 221 (1928).

Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. *Schwarberg v. Howard*, 197 N. C. 126, 147 S. E. 741 (1929); *Plott Co. v. Ferguson Const. Co.*, 198 N. C. 782, 153 S. E. 396 (1930).

Where on appeal the record contains only a synopsis of the complaint the appeal will be dismissed. *Plott Co. v. Ferguson Const. Co.*, 198 N. C. 782, 153 S. E. 396 (1930).

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissible under this rule. *Vail v. Stone*, 222 N. C. 431, 23 S. E. (2d) 329 (1942).

Purpose of Rule.—It is the duty of the courts to prevent the imposition by either party of unnecessary costs upon the other. It is for this reason that the rule designates what matter is unnecessary to be sent up, and prescribes that the evidence on appeal shall be set out in narrative form. *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182 (1919).

Failure to Index.—Appeals will be dismissed where no index is sent up in the record and printed and no marginal references prepared. *Sigman v. Sou. Railroad Co.*, 135 N. C. 181, 47 S. E. 420 (1904); *Kearnes v. Gray*, 173 N. C. 717, 92 S. E. 149 (1917). See, also, *Alexander v. Alexander*, 120 N. C. 472, 27 S. E. 121 (1897); *Pretzfelder v. Merchants Ins. Co.*, 123 N. C. 164, 31 S. E. 470 (1898).

An index of exhibits solely by the alphabetical designation of such exhibits does not comply with this rule of practice.

Millwood v. Firestone Cotton Mills, 215 N. C. 519, 2 S. E. (2d) 560 (1939).

Proceedings Not Set Forth in Regular Order.—Where the transcript does not set forth the proceedings in the order of time in which they occur, and the record shows no error warranting an order for a new trial, the appeal will be dismissed on motion. Hobbs v. Cashwell, 158 N. C. 597, 74 S. E. 23 (1912).

Transcript of Indictment Must Appear in Record.—Where an appeal is taken to the refusal of the trial court to quash an indictment, it is the duty of the appellant to see that a transcript of the indictment appears in the record; and when it does not so appear he should apply to the Superior Court to supply it, if one convenes in time; and if not, he should send to the Supreme Court as much of the record as could be procured, and apply here for a certiorari to give him opportunity to move in the court below. State v. McDraughon, 168 N. C. 131, 83 S. E. 181 (1914).

Copy of Judgment Omitted.—Where on appeal no printed copy of the judgment accompanies the record, the appeal will be dismissed under this rule. Wiley v. Bessemer City Mining Co., 117 N. C. 489, 23 S. E. 448 (1895).

(2) **Two Appeals.** When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

Where indictments relating to one offense against several defendants are properly consolidated for trial, only one record should be filed on the appeals of defendants. State v. Jackson, 226 N. C. 760, 40 S. E. (2d) 417 (1946).

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the court into one action, separate appeals should be taken and separate records filed by the respective applicants, and this rule is not applicable. Osborne

Case Decided on False Record.—Where a criminal case is decided in the Supreme Court on a record afterwards found to be false, it will be restored to the docket and a certiorari issued to correct the record. State v. Marsh, 134 N. C. 184, 47 S. E. 6 (1903).

Motion to Reinstate.—A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of the court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error in accordance with the manner specified, will be denied, when the granting of the motion would not cure the defects. Redding v. Dunn, 185 N. C. 311, 117 S. E. 26 (1923).

Transcript Failing to Meet Requirements of Subdivision (1).—See Smoak v. Newton, 234 N. C. 451, 67 S. E. (2d) 462 (1951).

Applied in Ericson v. Ericson, 226 N. C. 474, 38 S. E. (2d) 517 (1946); Wayne County Board of Education v. Lewis, 231 N. C. 661, 58 S. E. (2d) 725 (1950).

Cited in State v. Avery, 236 N. C. 276, 72 S. E. (2d) 670 (1952); Brown v. Allen, 344 U. S. 443, 73 S. Ct. 397, 437, 97 L. Ed. 469 (1953).

v. Canton, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Marginal References.—There must be printed on the margin, or as subheads, of each transcript of record a brief statement of the subject matter contained therein, and such marginal references or subheads embrace also the duty of numbering the exceptions. Brinkley v. Smith, 130 N. C. 224, 41 S. E. 106 (1902).

Cited in Hoke v. Atlantic Greyhound Corp., 227 N. C. 412, 42 S. E. (2d) 593 (1947).

(3) **Exceptions Grouped.** All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than \$5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file

with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

Cross References.—See notes to Rule 21. As to exceptions, generally, see G. S. §§ 1-186 and 1-206 and notes thereto.

Rule Strictly Adhered to.—The requirement that errors relied on be assigned in the record, and that the exceptions relied on shall be grouped, numbered, and set out immediately after the statement of the case on appeal, must be strictly adhered to, except when the appeal is on the ground the judgment was not justified by the facts found or admitted, or that the court did not have jurisdiction. *Sigman v. Sou. R. Co.*, 135 N. C. 181, 47 S. E. 420 (1904); *Pegram v. Hester*, 152 N. C. 765, 68 S. E. 8 (1910); *Owens v. Hines*, 178 N. C. 325, 100 S. E. 617 (1919).

Assignment of Error Necessary.—Appellee's motion to dismiss the appeal will be allowed when the record contains no assignment of error. *Hobbs v. Hobbs*, 218 N. C. 468, 11 S. E. (2d) 311 (1940).

Not Sufficient to Show Exceptions in Record.—This rule is not complied with by showing in the record the various exceptions numbered, but on different pages, when there is no assignment of errors at the end of the case, either before or after the judge's signature; and the appeal will be dismissed. *Jones v. Atlantic, etc., R. Co.*, 153 N. C. 419, 69 S. E. 427 (1910). See *State v. Biggerstaff*, 226 N. C. 603, 39 S. E. (2d) 619 (1946).

When Only Correctness of Judgment Questioned.—When the appeal calls in question only the correctness of the judgment no summary of exceptions is required, because it is error on the face of the record. *Wilson v. Beaufort County Lumber Co.*, 131 N. C. 163, 42 S. E. 565 (1902); *Ullery v. Guthrie*, 148 N. C. 417, 62 S. E. 552 (1908).

When Error Plainly Apparent.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941 (1905).

When Only One Exception Taken.—An appeal will not be dismissed for non-compliance with this rule, requiring all the exceptions relied on to be set out immediately after the statement of the case on appeal, where the appellee was not prejudiced; there being only one exception taken, and that being stated in the record, though improperly. *Wall v. Holloman*, 156 N. C. 275, 72 S. E. 369 (1911).

Transcript Filed Too Late for Hearing.—Where transcript was filed too late for hearing at term on appeal, a motion to dismiss, on the ground that assignments of error were not grouped and numbered as required by the rule, could not be entertained until the following term. *McLean v. McDonald*, 175 N. C. 418, 95 S. E. 769 (1918).

Exceptions to Rulings Granting New Trial Should Be Specifically Stated in Case of Appeal to Supreme Court.—When an appeal is taken from the general county court to the Superior Court for errors assigned in matters of law, as authorized by § 7-295, and a new trial is granted by the Superior Court, it is essential that the rulings upon exceptions granting the new trial be specifically stated, so that in case of appeal to the Supreme Court they may be separately assigned as error in accordance with this rule, and properly considered on appeal. *Jenkins v. Castelleo*, 208 N. C. 406, 181 S. E. 266 (1935).

In *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219 (1944), it was held that any confusion there was in the transcript of the case on appeal to the Supreme Court, arose upon the merging of the proceedings in the trial in the municipal court with the proceedings had on appeal to Superior Court, without separate grouping of exceptions presented on such appeal. See also, *Watkins v. Grier*, 224 N. C. 339, 30 S. E. (2d) 223 (1944).

Appeal Dismissed for Failure to Follow Rule.—Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of discovery through the record, Rule 19, § 3, and otherwise the appeal will be dismissed on the appellee's motion. *Cecil v. Snow Lumber Company*, 197 N. C. 81, 147 S. E. 735 (1929).

Assignments of error which only group the exceptions, as, "Group 1 includes the first assignment," etc., give no indication of the error complained of, and are far from being a compliance with the rule, and will be dismissed under this rule. *Merritt v. Dick*, 169 N. C. 244, 85 S. E. 2 (1915). See, also, *Smith v. Globe Home Furn. Mfg. Co.*, 151 N. C. 260, 65 S. E. 1009 (1909); *McDonald v. Kent*, 153 N. C. 555, 69 S. E. 626 (1910).

Where the exceptions and assignments of error are not grouped as required by this rule, the appeal may be dismissed. *Eno Inv. Co. v. Protective Chemicals Laboratory*, 233 N. C. 294, 63 S. E. (2d) 637 (1951).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. *Sprinkle v. Reidsville*, 235 N. C. 140, 69 S. E. (2d) 179 (1952).

Exceptions Not Set Out Deemed Abandoned.—This rule provides that all exceptions shall be grouped and separately numbered immediately before or after the signature to the case on appeal, and exceptions not thus set out are deemed abandoned. *State v. Biggerstaff*, 226 N. C. 603, 39 S. E. (2d) 619 (1946).

Discretion of Supreme Court.—Where the exceptions are separately numbered and only one of them is necessary to be considered in disposing of the appeal, the Supreme Court in its discretion may dispose of the case on its merits notwithstanding failure of appellant to separately assign the exceptions as error. *Aydlett v. Keim*, 232 N. C. 367, 61 S. E. (2d) 109 (1950).

In Capital Case.—Where defendant's exceptions are not brought forward and grouped as required by this rule, the appeal will be dismissed, but where defendant has been convicted of a capital crime

(4) Evidence to Be Stated in Narrative Form. The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

Cross Reference.—As to case on appeal, generally, see G. S. §§ 1-282, 1-283 and notes thereto.

Stenographer's Notes Insufficient.—When the appellant has set out in the case on appeal the transcribed stenographer's notes of the trial, he fails to prepare a concise statement of the case as required by this section, and his appeal will be dismissed, when upon examination no error is found in the record proper. *Bucken v. South, etc., R. Co.*, 157 N. C. 443, 73 S. E. 137 (1911); *Skipper v. Kingsdale Lumber Co.*, 158 N. C. 322, 74 S. E. 342 (1912).

Cannot Be Waived.—The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal

this will be done only after an inspection of the record proper and the exceptions fail to disclose prejudicial error. *State v. West*, 229 N. C. 416, 50 S. E. (2d) 3 (1948).

In *State v. Thompson*, 224 N. C. 661, 32 S. E. (2d) 24 (1944), although the assignments of error appearing on the record were not brought forward and grouped in accordance with the requirements of this rule, since defendants had been sentenced to death, the Supreme Court considered the appeal on its merits.

Exception Held Ineffectual.—An exception to the charge on the ground that it "did not give the contentions of the plaintiffs with equal dignity with those of defendant" as required by G. S. § 1-180 held ineffectual as a broadside exception in that it fails to point out any particular contention or series of contentions given or omitted by the court as the basis for the exception. *Poniros v. Nello L. Teer Co.*, 236 N. C. 144, 72 S. E. (2d) 9 (1952).

Applied, as to subsection (3), in *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31 (1942).

Cited in *Curlee v. Scales*, 223 N. C. 788, 28 S. E. (2d) 576 (1944); *State v. Scriven*, 232 N. C. 198, 59 S. E. (2d) 428 (1950); *State v. Summerlin*, 232 N. C. 333, 60 S. E. (2d) 322 (1950); *State v. Liles*, 232 N. C. 622, 61 S. E. (2d) 603 (1950).

in narrative form, cannot be waived by the parties. *Bucken v. South, etc., R. Co.*, 157 N. C. 443, 73 S. E. 137 (1911); *Bank v. Fries*, 162 N. C. 516, 77 S. E. 678 (1913).

Same—Appeal in Forma Pauperis.—That the action is in forma pauperis, does not excuse the appellant in sending up the transcribed stenographer's notes in a voluminous record. *Skipper v. Kingsdale Lumber Co.*, 158 N. C. 322, 74 S. E. 342 (1912).

Effect of Failure to Comply.—Where the appellant has failed to make a concise statement of the evidence according to the rules of practice, but gives the entire evidence in the form of questions to and answers of witnesses, taken from the ste-

nographer's notes, the appeal will be dismissed and the judgment affirmed upon motion of the appellee. *Casey v. East Carolina Ry.*, 198 N. C. 432, 152 S. E. 38 (1930); *Rhoades v. Asheville*, 220 N. C. 443, 17 S. E. (2d) 500 (1941).

(5) Unnecessary Portions of Transcript—How Taxed. The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

Cross Reference.—See notes to Rule 26.

(6) Transcripts in Pauper Appeals. See Rule 22.

(7) Maps. Nine copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

Filing Copies of Plat.—Where a plat is referred to in the pleadings and evidence, and is necessary to the understanding of an appeal, the same number of copies of the plat must be filed as is required of the printed record and briefs, or the judgment below will be affirmed or appeal dismissed. *Stephens v. McDonald*, 132 N. C. 135, 43 S. E. 592 (1903).

Although case on appeal was not prepared in accordance with subsection (4) of this rule the appeal was allowed as a dismissal would have been a denial of justice. *Messick v. Hickory*, 211 N. C. 531, 191 S. E. 43 (1937).

This is also true of an exhibit made part of the case on appeal. *Fleming v. McPhail*, 121 N. C. 183, 28 S. E. 258 (1897); *Hicks v. Royal*, 122 N. C. 405, 29 S. E. 413 (1898).

But where the map or plat is irrelevant its exclusion will not be held error. *Fulwood v. Fulwood*, 161 N. C. 601, 77 S. E. 763 (1913).

(8) Appeal Bond. See Rule 6 (1).

Cross References.—As to appeal bond generally, see G. S. § 1-285 et seq. As to

costs on appeal generally, see G. S. § 6-33 et seq.

(9) Prosecution Bond. The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) Insufficient Transcript. If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of \$5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Appeal Properly Dismissed Where "Judgment of Superior Court" Is Assigned as Error.—Where, on appeal from judgment of the general county court to the Superior Court on matters of law, the Superior Court overrules each of the exceptions relied upon by appellant, upon further appeal to the Supreme Court the appellant should

bring forward each ruling of the Superior Court on the exceptions deemed erroneous, and properly group them and assign same as error, and where appellant merely assigns as error "the judgment of the Superior Court," the appeal will be dismissed or the judgment affirmed. *Harrell v. White*, 208 N. C. 409, 181 S. E. 268 (1935).

20. Pleadings

(1) When Deemed Frivolous. Memoranda of pleadings will not be received or recognized in the Supreme Court as pleading, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Transcript Failing to Meet Requirements of Rule.—See *Smoak v. Newton*, 234 N. C. 451, 67 S. E. (2d) 462 (1951).

Applied in *Ericson v. Ericson*, 226 N. C.

474, 38 S. E. (2d) 517 (1946).

Cited in *Washington County v. Norfolk Southern Land Co.*, 222 N. C. 637, 24 S. E. (2d) 338 (1943).

(2) When Containing More than One Cause of Action. Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

Referring to Prior Paragraphs by Number Insufficient.—A party may not bring forward allegations contained in prior paragraphs of the pleading by referring to such paragraphs by number and stating that pleader repleads them. *Wrenn v. Graham*, 236 N. C. 719, 74 S. E. (2d) 232 (1952).

An attempt to repeat in the statement of the second cause of action what is alleged in the first cause of action merely by referring to the appropriate paragraphs of the first cause by number is violative of this rule. *Guy v. Baer*, 234 N. C. 276, 67 S. E. (2d) 47 (1951).

(3) When Scandalous. Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

Editor's Note.—For article on motion to strike pleadings, see 29 N. C. Law Rev. 3.

(4) Amendments. The Court may 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, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

Cross References.—As to amendments to pleadings generally, see G. S. § 1-161 et seq. As to the power of the Supreme Court to order amendment, see G. S. § 7-13 and notes thereto.

The Supreme Court will not anticipate questions of constitutional law in advance of the necessity of deciding them, nor will it give advisory opinions on such questions, and where the record in a case on appeal is so complete that it may not be determined that the constitutionality of a statute is squarely presented, the questions will not be decided. *Plott Co. v.*

Effect of Noncompliance.—Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this rule and § 1-138. *Pearce v. Pearce*, 226 N. C. 307, 37 S. E. (2d) 904 (1946).

Cited in *King v. Coley*, 229 N. C. 258, 49 S. E. (2d) 648 (1948).

Ferguson Const. Co., 198 N. C. 782, 153 S. E. 396 (1930).

Impertinent Matter Is Stricken.—Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Court, to be stricken out at the expense of the party introducing it. *Powell v. Cobb*, 56 N. C. 1 (1856).

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue. *Powell v. Cobb*, 56 N. C. 1 (1856).

21. Exceptions. (See also, Rule 19 (3).)

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When

testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

I. Exceptions.

II. Corroborative and Contradictory Evidence.

I. EXCEPTIONS.

Cross References.—As to exceptions generally, see G. S. §§ 1-186 and 1-206 et seq. and notes thereto. See also, analysis line III of the notes to G. S. § 1-282.

Assignment of Error Must Be Clearly Stated.—Assignments of error must be clearly and intelligently stated so that the Court will not have to look at exceptions therein referred to in order that they may be understood; for otherwise they will not be considered on appeal. *Myrose v. Swain*, 172 N. C. 223, 90 S. E. 118 (1916).

Duty to Prepare Assignment of Error.—The preparation of the assignment of error is the work of the attorney for the appellant, and is not a part of the case on appeal, and its office is to group the exceptions noted in the case on appeal; and, if there is an assignment of error not supported by an exception, it will be disregarded. *Worley v. Laurel River Logging Co.*, 157 N. C. 490, 73 S. E. 107 (1911); *Allred v. Kirkman*, 160 N. C. 392, 76 S. E. 244 (1912); *McLeod v. Gooch*, 162 N. C. 122, 78 S. E. 4 (1913).

An assignment of error alone will not suffice. Only an assignment of error bot-tomed on an exception duly entered in the record will serve to present a question of law for the Supreme Court to decide. *State v. Williams*, 235 N. C. 429, 70 S. E. (2d) 1 (1952).

The questions arising on an appeal are those defined by appropriate exceptions taken by the appellant in the superior court. *Sprinkle v. Reidsville*, 235 N. C. 140, 29 S. E. (2d) 179 (1952).

Appeal Dismissed for Failure to Follow Rule.—The Court will dismiss the appellant's case when he fails to assign error as required by this rule. *Hobbs v. Cashwell*, 158 N. C. 597, 74 S. E. 23 (1912); *Thresher Co. v. Thomas*, 170 N. C. 680, 87 S. E. 327 (1915); *In re Bailey*, 180 N. C. 30, 103 S. E. 896 (1920).

The appellee's motion to dismiss the appeal because, (1) the exceptions are not "briefly and clearly stated and numbered," (2) the exceptions relied upon are not grouped and numbered immediately after the end of the case on appeal, (3) the in-

dex is not placed at the front of the record, will be allowed. *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350 (1906). See, also, *Jones v. Atlantic, etc., R. Co.*, 153 N. C. 419, 69 S. E. 427 (1910).

Rule Cannot Be Waived.—The rule requiring the assignment of error in the record on appeal is for the benefit of the court, and counsel cannot waive it. *Southern Spruce Co. v. Hunnicutt*, 166 N. C. 202, 81 S. E. 1079 (1914); *Parrott v. Hardesty*, 169 N. C. 667, 86 S. E. 582 (1915).

Agreement of Counsel.—Where the record shows that the solicitor agreed that the statement of case on appeal, containing an exception to his argument to the jury and an assignment of error based thereon, should constitute the case on appeal, this is sufficient as an exceptive assignment of error even though defendant made no objection and took no exception at the time. *State v. Hawley*, 229 N. C. 167, 48 S. E. (2d) 35 (1948).

General Exception.—Where the plaintiff filed a large number of exceptions to the referee's report and the judge confirms or modifies certain portions of the report and sets aside others, an exception, "The plaintiff excepts to such rulings, adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 140 N. C. 193, 52 S. E. 785 (1905).

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail. *Buie v. Kennedy*, 164 N. C. 290, 80 S. E. 445 (1913).

Exception Not Considered.—The failure of the court to restrict the admission of testimony competent for the purpose of corroboration is not error where defendant neither objects to the admission of the testimony nor requests that its admission be restricted. *State v. Perry*, 226 N. C. 530, 39 S. E. (2d) 460 (1946).

Assignments Not Based on Exceptions Considered in Capital Case.—Assignments of error should be based upon exceptions briefly and clearly stated and numbered in the record, but in a capital case, wherein the life of defendant is at stake, assignments of error not so based nevertheless will be considered. *State v. Herring*, 226 N. C. 213, 37 S. E. (2d) 319 (1946).

Reference by Number Insufficient.—This rule must be complied with to have the

appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. *Porter v. American Cigar Box Lumber Co.*, 164 N. C. 396, 80 S. E. 443 (1913).

A statement purporting to be assignments of error appearing in the record just after the statement of the case on appeal, setting forth in general terms that the appellant excepted to the rulings of the court, as appeared in certain numbered exceptions of record taken on trial, such exceptions themselves not being sufficiently stated, in excluding evidence, and "to a judgment of nonsuit as noted in the forty-seventh exception," is not definite enough for the court to consider on appeal or to be referred to the clerk to be put in the prescribed shape therefor, and the appeal should be dismissed. *Thompson v. Seaboard Air Line R. Co.*, 147 N. C. 412, 61 S. E. 286 (1908).

Reference to Page.—Where the assignments of error are not comprehensive enough to give a clear idea to the court of the matters to be debated without examining the record, they will not be considered, as, "to the question and answer in the admission of the evidence" of a certain witness, "as contained in the exception 1 on page — of the record;" and the giving of proper page will not cure its insufficiency. *Rogers v. Jones*, 172 N. C. 156, 90 S. E. 117 (1916).

Exceptions to Evidence. — The assignments of error on questions of evidence should set out the testimony so that their relevancy can be seen; and on the rulings of the court or some other matters occurring at the trial, the ruling itself or the attendant facts and circumstances should be so stated that their bearing on the controversy can be perceived to some extent in reading the assignments themselves. *Thompson v. Seaboard Air Line R. Co.*, 147 N. C. 412, 61 S. E. 286 (1908); *Carter v. Reaves*, 167 N. C. 131, 83 S. E. 248 (1914).

The admission of evidence generally and without qualification will not be held erroneous, even though the evidence is competent only for the purpose of corroboration, when at the time of its admission defendant does not request that its purpose be restricted. *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940).

Exceptions to Unanswered Questions.—Where exception is taken to the judge's exclusion of evidence upon the trial, it is upon appellant to show error, and when the exception is taken to unanswered ques-

tions, the substance of the answers must be made to appear on appeal, so that the Supreme Court may pass upon its competency. *Wallace v. Barlow*, 165 N. C. 676, 81 S. E. 924 (1914); *Hamlet Ice Co. v. Jones Constr. Co.*, 194 N. C. 407, 139 S. E. 771 (1927).

Defendant desiring evidence to be restricted to particular purpose should make request to that effect. *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557 (1935).

Exception to Issues Submitted.—Where a cause was tried under one issue, without exception taken, the assignment of error that other issues should have been submitted is not in compliance with the rules of court regulating appeals. *McNairy v. Norfolk, etc., R. Co.*, 172 N. C. 505, 90 S. E. 497 (1916).

Exception to Directed Verdict.—It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of Rules 19, 21 and 28, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record. *Wynn v. Grant*, 166 N. C. 39, 81 S. E. 949 (1914).

Questions Discussed in Brief Only.—A question discussed in the brief but not presented by any exception or assignment of error cannot be considered. *Coon v. Southern R. Co.*, 171 N. C. 759, 88 S. E. 510 (1916); *Needham v. Southern R. Co.*, 171 N. C. 765, 88 S. E. 511 (1916).

When Complaint Does Not State Cause of Action.—A defendant, without filing exception on appeal from an adverse judgment, may move to dismiss the action on the ground that the complaint does not state a cause of action. *Lloyd v. North Carolina R. Co.*, 151 N. C. 536, 66 S. E. 604 (1909).

This is not true of an objection for misjoinder of cause of action. *Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874 (1898).

Insufficiency of Indictment.—A motion in arrest of judgment for insufficiency of the indictment may be made in the Supreme Court on appeal, and it is not necessary that the question be presented by exception taken in the trial court. *State v. Jones*, 218 N. C. 734, 12 S. E. (2d) 292 (1940).

A motion in arrest of judgment for insufficiency of an indictment or warrant may be made for the first time in the Supreme Court. *State v. Sawyer*, 233 N. C. 76, 62 S. E. (2d) 515 (1950).

Misnomer.—A motion in arrest of judgment must be based on matters appearing on the face of the record or which should appear thereon and do not, and therefore motion in arrest will not lie for a mis-

nomer, since it can be supported only by facts dehors the record. *State v. Sawyer*, 233 N. C. 76, 62 S. E. (2d) 515 (1950).

A motion in arrest of judgment, based upon facts which defendant alleges did not come to his knowledge until after expiration of the trial term, cannot be allowed in the Supreme Court when there is no fatal defect appearing on the face of the record. *State v. Chapman*, 221 N. C. 157, 19 S. E. (2d) 250 (1942).

Applied in *Chamblee v. Baker*, 95 N. C. 98 (1886); *Davenport v. Leary*, 95 N. C. 203 (1886); *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521 (1892); *Greensboro v. McAdoo*, 110 N. C. 430, 14 S. E. 974 (1892); *Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. 178 (1893); *Alexander v. Alexander*, 120 N. C. 472, 27 S. E. 121 (1897); *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897); *Baker v. Hobgood*, 126 N. C. 149, 35 S. E. 253 (1900); *McDowell v. Kent*, 153 N. C. 555, 69 S. E. 626 (1910); *State v. Ham*, 224 N. C. 128, 29 S. E. (2d) 449 (1944); *State v. McKnight*, 226 N. C. 766, 40 S. E. (2d) 419 (1946); *State v. Gentry*, 228 N. C. 643, 46 S. E. (2d) 863 (1948); *State v. Harris*, 229 N. C. 413, 50 S. E. (2d) 1 (1948); *State v. Scriven*, 232 N. C. 198, 59 S. E. (2d) 428 (1950).

Cited in *Curlee v. Scales*, 223 N. C. 788, 28 S. E. (2d) 576 (1944); *State v. Scoggins*, 225 N. C. 71, 33 S. E. (2d) 473 (1945); *Wayne County Board of Education v. Lewis*, 231 N. C. 661, 58 S. E. (2d) 725 (1950); *State v. Dover*, 231 N. C. 735, 61 S. E. (2d) 63 (1950); *State v. Liles*, 232 N. C. 622, 61 S. E. (2d) 603 (1950); *Morgan v. High Penn Oil Co.*, 236 N. C. 615, 73 S. E. (2d) 477 (1952).

II. CORROBORATIVE AND CONTRADICTORY EVIDENCE.

Effect of Rule.—This rule relieves the trial judge of the duty of instructing specially upon the nature of corroborative or impeaching evidence, unless specially requested. *Westfeldt v. Adams*, 135 N. C. 591, 47 S. E. 816 (1904).

Exception Not Considered.—A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. *Whitehurst v. Padgett*, 157 N. C. 424, 73 S. E. 240 (1911); *Perry v. Branning Mfg. Co.*, 176 N. C. 68, 97 S. E. 162 (1918); *Singleton v. Roebuck*, 178 N. C. 201, 100 S. E. 313 (1919).

When the evidence is corroborative, the

failure of the trial court to restrict it will not be considered on appeal unless the objecting party asks for an instruction to that effect. *Chrisco v. Yow*, 153 N. C. 434, 69 S. E. 422 (1910); *Cooper v. Seaboard Air Line R. Co.*, 163 N. C. 150, 79 S. E. 418 (1913).

Where several witnesses testified to certain facts which the trial judge at the time stated were competent only for the purpose of corroboration, and when charging the jury in reciting the testimony of one of these witnesses he repeated that it was to be considered only for the purpose of corroboration, but failed to do so in reciting the testimony of other witnesses, an exception to such omission cannot be sustained, in the absence of a request to charge that the same rule applied to all of the testimony of that class. *Liles v. Lumber Co.*, 142 N. C. 39, 54 S. E. 795 (1906).

Evidence Competent for Some Purpose.—When evidence is competent for some purpose, its general admission is not reversible error unless the appellant asks at the time of the admission that it be restricted. *Tise v. Thomasville*, 151 N. C. 281, 65 S. E. 1007 (1909).

When evidence competent for some purposes, but not for all, is admitted generally, unless appellant asks at the time of the admission that its purpose be restricted, or requests special instructions to that effect, the failure of the judge to so restrict it is not assignable for error. *Hill v. Bean*, 150 N. C. 436, 64 S. E. 212 (1909).

Where evidence, admissible only for the purpose of attacking the credibility of a witness, is admitted generally without objection, there is no error in the court's failure to so restrict its use. *State v. McKinnon*, 223 N. C. 160, 25 S. E. (2d) 606 (1943).

Where the evidence to which exceptions relate is competent for purpose of corroboration, and the record fails to show that appellant asked, at the time, that its purpose be restricted, the admission of the statements will not be ground for exception. *Humphries v. Queen City Coach Co.*, 228 N. C. 399, 45 S. E. (2d) 546 (1947).

Where evidence competent for the purpose of corroboration is admitted generally, and defendant fails at the time of its admission to request that its purpose be restricted, his exception to the admission of the testimony cannot be sustained. *State v. Walker*, 226 N. C. 458, 38 S. E. (2d) 531 (1946).

Where blouse introduced had certain tears about the shoulder, and prosecutrix and another witness testified that on night

of alleged assault blouse prosecutrix had on was torn about the shoulder, the admission of the blouse in evidence was competent to corroborate witnesses, and, in absence of request to limit it to corroboration, it was competent for general purposes. *State v. Petry*, 226 N. C. 78, 36 S. E. (2d) 653 (1946).

Evidence Competent When Introduced.—Where plaintiff sued for divorce on ground of adultery and defendant in cross action alleged adultery on the part of plaintiff but at close of evidence withdrew her cross action, it was held that since evidence of adultery on the part of plaintiff was competent at the time of its introduction and there was no motion to strike when defendant withdrew cross action, plaintiff was not unduly prejudiced by its admission. *Ziglar v. Ziglar*, 226 N. C. 102, 36 S. E. (2d) 657 (1946).

Objection That Instruction Insufficient.—Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so,

which was refused. *Plemmons v. Murphey*, 176 N. C. 671, 97 S. E. 648 (1918).

Error in Restricting Evidence Harmless.—In view of this rule, a charge which informed the jury that the testimony was to be considered solely in impeachment of a witness, even if error, was harmless. *Medlin v. County Board*, 167 N. C. 239, 83 S. E. 483 (1914).

Unsupported Statements of Appellant.—A statement in the assignments of error, when there is nothing in the statement or record of the case on appeal to give it any support, is only the unsupported statement of the appellant of what had occurred, and hence the assignment of error depending thereon will not be considered on appeal. *State v. Freeze*, 170 N. C. 710, 86 S. E. 1000 (1915).

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. *State v. Jones*, 182 N. C. 781, 108 S. E. 376 (1921).

22. Printing Transcripts. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

Cross References.—See notes to Rule 24. As to appeals from civil suits in forma pauperis generally, see G. S. § 1-288 and notes thereto. As to appeals in forma pauperis in criminal actions, see § 15-181 and notes thereto.

Pauper Appeals—Rule Mandatory.—The rule of practice in the Supreme Court requiring appellant in appeals in forma pauperis to file seven [nine] typewritten copies of his brief and of the transcript, in

addition to the original transcript, is mandatory, and a compliance with its provisions is necessary to entitle the appellant to have his appeal decided on its merits. *Wachovia Bank, etc., Co. v. Miller*, 191 N. C. 787, 133 S. E. 97 (1926); *Wishon v. Gastonia Weaving Co.*, 220 N. C. 420, 17 S. E. (2d) 509 (1941).

Upon appeal to the Supreme Court in forma pauperis, the appellant is required to file seven [nine] typewritten copies of

his brief upon penalty of having his case dismissed, and printed briefs must be filed by the appellee for him to be heard on the oral argument. *Fisher v. Toxaway Co.*, 171 N. C. 547, 88 S. E. 887 (1916).

The nine typewritten copies must be legible. *Wishon v. Gastonia Weaving Co.*, 220 N. C. 420, 17 S. E. (2d) 509 (1941).

Same—Dismissal for Failure to Follow Rule.—An appeal to the Supreme Court will be dismissed if the appellant fails to comply with the rule, requiring the appellant, in pauper appeals, when docketing the appeal, to file seven [nine] typewritten copies of the record, including case on appeal and briefs; and that the brief of the appellant be prefaced by a clear and concise statement, showing the nature of the

case and the facts bearing upon the assignments of error; and this is required whether the appellant may have received notice of the rule from the Supreme Court clerk or not. *Estes v. Rash*, 170 N. C. 341, 87 S. E. 109 (1915).

The omission in an affidavit to appeal in forma pauperis of the averment that it was made "in good faith" is of a matter of jurisdiction; and the appeal must be dismissed on motion, as a matter of right, and is not one of discretion. *State v. Smith*, 152 N. C. 842, 67 S. E. 965 (1910).

Applied in *State v. Hopkins*, 217 N. C. 324, 7 S. E. (2d) 566 (1940); *State v. Scriven*, 232 N. C. 198, 59 S. E. (2d) 423 (1950).

23. How Printed

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

Purpose of Rule.—This rule is for the purpose of preserving printed briefs and records in bound volumes of uniform size, for the use of the Court, and must be complied with. *Howard v. Western Union Teleg. Co.*, 170 N. C. 495, 87 S. E. 313 (1915).

Appeal Dismissed if Deposit Not Made.—If the record has not been printed, and appellant has failed to make the deposit in

the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this Court, the appeal will be dismissed for failure to print the record as required by the rule, the laches in the case being imputable to the party appealing and not to his attorney. *State v. Charles*, 161 N. C. 286, 76 S. E. 715 (1912).

24. Appeal Dismissed if Transcript Not Printed or Mimeographed

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed but the Court may, on motion of appellant, after five days' notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

Necessity of Printed Record.—The requirement as to printing the parts of the record which are essential to be considered on appeal is a necessity, demonstrated by the experience of the Court, and hence is not a purely arbitrary matter, to be dis-

pensed with at will. It was not adopted without full consideration, and its nonobservance will not be excused without a good cause. *Barnes v. Crawford*, 119 N. C. 127, 25 S. E. 791 (1896).

Appeal Dismissed When Record Not

Printed.— If the record has not been printed, and appellant has failed to make the deposit in the clerk's office required to cover the cost of printing the same, on motion duly made, under the rule of this Court, the appeal will be dismissed for failure to print the record. *Stroud v. Western Union Tel. Co.*, 133 N. C. 253, 45 S. E. 592 (1903); *State v. Charles*, 161 N. C. 286, 76 S. E. 715 (1912).

Same—Judgment for Costs Final.— A judgment in the Supreme Court dismissing an appeal for the failure of appellant to print the record and taxing him with costs, is final, without authority in the lower court to permit him to recover them. *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801 (1912).

Appellant Not in Default.—Denial of a motion to dismiss because the appeal was not docketed and printed ready for argument within the time prescribed is proper only where appellant is not in default. *Board v. Chapman*, 151 N. C. 327, 66 S. E. 221 (1909).

Negligence of Counsel No Excuse.—The printing of a record on appeal requires no legal skill and, hence, the negligence of counsel is no excuse for the failure to print and where an appeal has been dismissed for such failure a motion to reinstate will not be allowed. *Griffin v. Nelson*, 106 N. C. 235, 11 S. E. 414 (1890); *Neal v. Old North State Land Co.*, 112 N. C. 841, 17 S. E. 538 (1893); *Dunn v. Underwood*, 116 N. C. 525, 20 S. E. 965 (1895). For an earlier case holding contra, see *Wiley v. Logan*, 94 S. E. 564 (1886).

Delay of Appellant No Excuse.—If a party will delay sending up his transcript to the last minute, he should either send it up with the requisite parts of the record printed, or arrange to have it promptly done here. It is no excuse for an appellant to delay docketing his appeal till the time left between the docketing and calling the case for argument is perhaps too brief in which to print the record. *Stainback v. Harris*, 119 N. C. 107, 25 S. E. 858 (1896); *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487 (1910).

Ignorance of Requirement as to Printed Record.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the record printed, a motion to reinstate, because the appellant did not know that a printed record was required in an appeal like this from an order in the case, will be denied, where it appears that appellant has been otherwise guilty of laches in the prosecution of his appeal. *Stephens v. Koonce*, 106 N. C. 255, 11 S. E. 282 (1890).

Request That Clerk Print Record.—A mere request by appellant of the clerk of the Court to have the record printed, and the bill sent appellant, without further attention by appellant, though he receives no bill, will not justify a reinstatement of his appeal, dismissed for lack of printed record. *Carter v. Long*, 116 N. C. 44, 20 S. E. 1013 (1895).

Lack of Money as Excuse for Failure to Print.—One not appealing in forma pauperis must comply, notwithstanding his inability to raise the money necessary for the printing of the record, with the rule of court requiring such printing. *Rencher v. Anderson*, 93 N. C. 105 (1885). And a motion to reinstate the case will be denied. *Turner v. Tate*, 112 N. C. 457, 17 S. E. 72 (1893).

Time within Which Record Must Be Printed.—The rule requiring a printed record is satisfied if the record has been printed when the cause is called for argument. *Smith v. Montague*, 121 N. C. 92, 28 S. E. 137 (1897); *Armour Packing Co. v. Williams*, 122 N. C. 406, 29 S. E. 366 (1898).

Misunderstanding as to Time of Printing.—Where there was an honest misunderstanding between counsel in regard to making up the case on appeal, and the case had not been made up when the case was heard in the appellate court, the record having been docketed without a case, and counsel for appellant supposed that there was no necessity of printing the record until the case came up, and the appellee moved to dismiss, which was allowed, it was proper to reinstate the appeal. *Rencher v. Anderson*, 94 N. C. 661 (1886).

When Cause Docketed Too Late for Hearing.—Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to print the record must be denied. *Gupton v. Sledge*, 161 N. C. 213, 76 S. E. 527 (1912); *Bumgarner v. Thornton Light, etc., Co.*, (N. C.), 76 S. E. 528 (1912).

Printing Index.—When any part of the record on appeal is printed, the indexes and marginal references should also be printed. *Alexander v. Alexander*, 120 N. C. 472, 27 S. E. 121 (1897); *Lucas v. Carolina Central R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897); *Pretzfelder v. Merchants Ins. Co.*, 123 N. C. 164, 31 S. E. 470 (1898).

Attorney Absent When Appeal Dismissed.—Where, in the absence of appellant's counsel, an appeal was dismissed because of appellant's failure to have the rec-

ord printed as therein required, the cause will not be reinstated. *Avery v. Pritchard*, 106 N. C. 344, 11 S. E. 281 (1890).

Failure to Transmit Sufficient Copies.—An appeal which has been dismissed for appellant's failure to print the copies of the record will be reinstated on affidavits of appellant and others that he caused the requisite number of copies to be printed, but, owing to a misunderstanding of the instructions given him by his counsel and the clerk of the Superior Court, to whom he applied for information, he sent only one printed copy to the Supreme Court. *Smith v. Summerfield*, 107 N. C. 530, 12 S. E. 465 (1890).

When Motion to Reinstatement Made.—A motion to reinstate an appeal dismissed for failure to print must be made at the same term, and will only then be allowed for good cause shown. *Pipkin v. Green*, 112 N. C. 355, 17 S. E. 534 (1893).

Applied in *Witt v. Long*, 93 N. C. 388 (1885); *Horton v. Green*, 104 N. C. 400, 10 S. E. 470 (1889); *Whitehurst v. Petti-pher*, 105 N. C. 39, 10 S. E. 857 (1890); *In re Berry*, 107 N. C. 326, 12 S. E. 125 (1890); *Hunt v. Richmond, etc.*, Ry. Co., 107 N. C. 447, 12 S. E. 378 (1890); *Hinton v. Pritchard*, 108 N. C. 412, 12 S. E. 838 (1891); *Rodman v. Archbell*, 108 N. C. 413, 13 S. E. 111 (1891); *Edwards v. Henderson*, 109 N. C. 83, 13 S. E. 779 (1891); *Dunn v. Underwood*, 116 N. C. 525, 20 S. E. 965 (1895); *Wiley v. Bessemer City Min. Co.*, 117 N. C. 489, 23 S. E. 448 (1895); *Thurber v. Eastern Bldg., etc.*, Ass'n, 118 N. C. 129, 24 S. E. 730 (1896); *Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713 (1896); *Barnes v. Crawford*, 119 N. C. 127, 25 S. E. 791 (1896); *Hicks v. Royal*, 122 N. C. 405, 29 S. E. 413 (1898); *Bradshaw v. Stansberry*, 164 N. C. 356, 79 S. E. 302 (1913).

25. Mimeographed Records and Briefs

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed \$1.35 per page of an average of 40 lines and 400 words to the page: Provided, however, that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

Editor's Note.—By amendment, effective February 1, 1947, this rule was changed so as to authorize the clerk to charge not in excess of \$1.25 per page for mimeographing records and briefs. By amendment, effective July 1, 1951, this amount

was increased to \$1.40. The amendment also struck out the former provisions relating to the marshal of the Supreme Court. By amendment, effective July 1, 1954, the amount was changed to \$1.35.

26. Cost of Printing and Mimeographing Transcripts and Briefs to Be Recovered

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed \$1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed: provided receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of preparing typewritten copies of the transcript of appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page and not to exceed sixty pages for transcript and twenty pages for brief.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either

by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

Cross Reference.—As to costs on appeal generally, see G. S. § 6-33.

Evidence Not Sent Up in Narrative Form.—Upon objection duly entered to the sending up on appeal of the stenographer's notes with questions and answers, instead of in a narrative form, the unnecessary additional pages thus made will be taxed against the party at whose instance it is done. *Brazille v. Carolina Barytes Co.*, 157 N. C. 454, 73 S. E. 215 (1911); *Overman v. Lanier*, 157 N. C. 544, 73 S. E. 192 (1911).

Same—When Settlement of Case Delayed.—Stenographer's notes of the trial should be sent up on appeal only as to matters involved in the inquiry; but when settlement of the case was delayed so long that the trial judge could not separate the material parts, a motion that costs of such should not be taxed against appellee will not be granted. *Asheville, etc., Co. v. Machin*, 150 N. C. 738, 64 S. E. 887 (1909).

Charge Uselessly Included.—Where a party insists that the entire charge of the trial judge should be sent up on appeal as a part of the record, and this has been uselessly done over the objection of the opposing party, being unnecessary to the proper presentation of the matters of law involved, the motion of the latter, upon notice, to retax the cost for the full amount of the printed record, will be sustained. *Roanoke R., etc., Co. v. Privette*, 179 N. C. 1, 101 S. E. 489 (1919). See, also, *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (1904); *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182 (1919).

Excess over Limitation Not Taxed against Losing Party.—Costs of brief exceeding twenty pages will not be taxed against the unsuccessful party, under the rule of the Supreme Court. *Brown v. Harding*, 172 N. C. 835, 90 S. E. 3 (1916).

When Excess Taxed against Losing Party.—The successful party on appeal

will not be allowed to recover costs for printing record in excess of the amount prescribed by this rule, except in extraordinary cases where the necessity for such printing is made to appear. *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891) *Roberts v. Lewald*, 108 N. C. 405, 12 S. E. 1028 (1891).

Where the defendant is the successful party on appeal, and on his motion to retax costs in the Supreme Court it appears that there was no unnecessary or superfluous matter in the transcript, and that the whole thereof was pertinent and necessary to a proper statement of the facts upon which the assignments of error was based, and the allowance specifically made in this rule was not sufficient to pay for the cost of printing, which is not denied by the other party, it presents a proper instance for the court to specially order that the full cost of printing the transcript be taxed against the plaintiff and the surety on his prosecution bond. *Hardy v. Phoenix Mutual Life Ins. Co.*, 167 N. C. 569, 83 S. E. 801 (1914).

Where the record was in excess of that required to properly present the appeal, the appellee at whose instance it was done was taxed with the cost of mimeographing it for the excess over the sixty pages allowed by this rule. *Page Trust Co. v. Pumpelly*, 194 N. C. 580, 140 S. E. 212 (1927).

When Subject Matter of Appeal Destroyed.—Where the subject matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. *Taylor v. Vann*, 127 N. C. 243, 37 S. E. 263 (1900).

27. Briefs

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

Cross Reference.—See note to Rule 28.

Brief Not in Accordance with Rules.—An appeal will be dismissed where there is a failure to print the record and briefs in accordance with the rules of the Supreme Court. *Bradshaw v. Stansberry*, 164 N. C. 356, 79 S. E. 302 (1913).

When No Brief Filed.—Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the records proper no error appears. *Rowe v. Campbell* (N. C.), 76 S. E. 474 (1912); *Board v. Dickson & Co.*, 190 N. C. 330, 129 S. E. 726 (1925).

Where the defendant, convicted of a capital felony, fails to file a brief in the Supreme Court, the appeal will be dismissed on motion of the Attorney General after an examination of the record discloses no error. *State v. Kinyon*, 210 N. C. 294, 186 S. E. 368 (1936).

The failure to file a brief as required by this rule works an abandonment of the assignments of error, except those appearing upon the face of the record, which are cognizable *ex mero motu*. *Dillard v. Brown*, 233 N. C. 551, 64 S. E. (2d) 843 (1951).

27½. Statement of the Questions Involved

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

Statement of Case.—A fair and succinct statement of the case should be made at the beginning of the brief, so that the Supreme Court may understand the issues and more expeditiously hear the argument and decide the case. *Balfour Quarry Co. v. West Constr. Co.*, 151 N. C. 345, 66 S. E. 217 (1909).

Applied in *Kugler Lbr. Co. v. Latham*, 199 N. C. 820, 156 S. E. 128 (1930). See also, *Pruitt v. Wood*, 199 N. C. 788, 156

S. E. 126 (1930).

Quoted in *Steelman v. Benfield*, 228 N. C. 651, 46 S. E. (2d) 829 (1948).

Cited in *Acme Mfg. Co. v. Kornegay*, 195 N. C. 373, 142 S. E. 224 (1928); *Caldwell v. Southern Ry. Co.*, 218 N. C. 63, 10 S. E. (2d) 680 (1940); *State v. Dover*, 231 N. C. 735, 61 S. E. (2d) 63 (1950); *State v. Liles*, 232 N. C. 622, 61 S. E. (2d) 603 (1950).

28. Appellant's Brief

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Tuesday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

Editor's Note.—By amendment, effective July 1, 1951, the word "Tuesday" in line six of the second paragraph was substituted for "Saturday".

Pass Briefs Insufficient.—Briefs which merely state with reference to the exceptions taken of record, "Exceptions No. 1. This question and answer are incompetent," etc., afford no assistance to the Court. They are merely pass briefs, and do not conform to the rules. *Jones v. Southern R. Co.*, 164 N. C. 392, 80 S. E. 408 (1913); *State v. Gibson*, 221 N. C. 252, 20 S. E. (2d) 51 (1942).

Failure to File in Time.—Where appellant failed to file his brief within the time prescribed, and the case on appeal contains no assignments of error or grouped exceptions, as required by the rules of the Supreme Court, a motion by appellee to dismiss will be granted. *Rosemond v. McPherson*, 156 N. C. 593, 72 S. E. 570 (1911); *In re Bailey*, 180 N. C. 30, 103 S. E. 896 (1920).

Where an appellant knew that his brief must be prepared, printed, and filed by noon of a certain day, and he took no steps to this end, a motion to dismiss the appeal under Rule 17 will be granted. *Truelove v. Norris*, 152 N. C. 755, 67 S. E. 487 (1910).

Same—Delay in Docketing Transcript.—Although the transcript was not docketed till the Saturday preceding the Tuesday on which the brief should have been filed, yet, it not being clear that a brief could not be printed in one or two days, and appellant not having moved during

the week preceding the call for longer time in which to print the brief, and not having had it printed at the time of the call, when the appeal was dismissed, his subsequent motion to reinstate will not be granted. *Calvert v. Carstarphen*, 133 N. C. 25, 45 S. E. 353 (1903).

When Cause Docketed Too Late for Hearing.—Where a cause was docketed too late for hearing at a term of the Supreme Court, a motion to dismiss for failure to file printed briefs must be denied. *Gupton v. Sledge*, 161 N. C. 213, 76 S. E. 527 (1912); *Bumgarner v. Thornton Light, etc., Co. (N. C.)*, 76 S. E. 528 (1912); *McLean v. McDonald*, 175 N. C. 418, 95 S. E. 769 (1918).

When Appellant Must Discuss Appellees' Exceptions.—On an appeal from an order of a trial judge setting aside a verdict of the jury in favor of the plaintiff because of error committed against the defendant, the brief of appellant must refer to exceptions taken by defendant. *Powers v. Wilmington*, 177 N. C. 361, 99 S. E. 102 (1919).

Failure to File Brief.—Where an appellant failed to file a brief in the Supreme Court, as required by this rule, upon motion of the Attorney General the appeal of the appellant was held properly dismissed. *State v. Pelley*, 222 N. C. 684, 24 S. E. (2d) 635 (1943).

Where appellant does not file a brief his appeal will be dismissed. *Wilson v. Ervin*, 227 N. C. 396, 42 S. E. (2d) 468 (1947).

An appeal will be dismissed upon mo-

tion of the Attorney General for failure of defendant to file a brief, but when defendant has been convicted of a capital felony this will be done only after a careful examination of the record fails to disclose material defect. *State v. Peele*, 220 N. C. 83, 16 S. E. (2d) 449 (1941); *State v. Sturdivant*, 220 N. C. 535, 17 S. E. (2d) 661 (1941).

Exceptions Not Discussed Deemed Abandoned.—It is necessary that exceptions appearing in the record on appeal be mentioned in appellant's brief, with reason or argument to support them, to entitle them to be considered by the Court, for otherwise they are taken as abandoned. *State v. Barnhill*, 186 N. C. 446, 119 S. E. 894 (1923); *Austin v. Crisp*, 186 N. C. 616, 120 S. E. 199 (1923); *In re Fuller*, 189 N. C. 509, 127 S. E. 549 (1925). See *State v. Wells*, 209 N. C. 358, 183 S. E. 282 (1936); *Stephenson v. Honeycutt*, 209 N. C. 701, 184 S. E. 482 (1936); *Sparks v. Holland*, 209 N. C. 705, 184 S. E. 552 (1936); *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469 (1936); *Taylor v. Rierison*, 210 N. C. 185, 185 S. E. 627 (1936); *Texas Co. v. Elizabeth City*, 210 N. C. 454, 187 S. E. 551 (1936); *Wilson v. Williams*, 215 N. C. 407, 2 S. E. (2d) 19 (1939); *In re Escoffery*, 216 N. C. 19, 3 S. E. (2d) 425 (1939); *State v. Cox*, 217 N. C. 177, 7 S. E. (2d) 473 (1940); *Rose v. Bank of Wadesboro*, 217 N. C. 600, 9 S. E. (2d) 2 (1940); *State v. Howley*, 220 N. C. 113, 16 S. E. (2d) 705 (1941); *Bank of Pilot Mountain v. Snow*, 221 N. C. 14, 18 S. E. (2d) 711 (1942); *State v. Gibson*, 221 N. C. 252, 20 S. E. (2d) 51 (1942); *Brown v. Ward*, 221 N. C. 344, 20 S. E. (2d) 324 (1942); *Moyle v. Hopkins*, 222 N. C. 33, 21 S. E. (2d) 826 (1942).

Mere reference to exceptions of record made in the brief, without argument or citation of authority, is not a compliance with this rule. *Ingle v. Southern Ry. Co.*, 167 N. C. 636, 83 S. E. 744 (1914).

Exceptions not set up in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. *Gray v. Cartwright*, 174 N. C. 49, 93 S. E. 432 (1917). See *State v. Tate*, 210 N. C. 613, 188 S. E. 91 (1936).

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within this rule, and they will not be considered; the requirements being that there must be some reason or argument in their

support set out in the brief. *Watkins v. Lawson*, 166 N. C. 216, 81 S. E. 623 (1914).

Exceptions in the record not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. *Hyatt v. McCoy* 194 N. C. 760, 140 S. E. 807 (1927); *Ludford v. Combs*, 195 N. C. 851, 141 S. E. 541 (1928); *Grant v. Tallassee Power Company*, 196 N. C. 617, 146 S. E. 531 (1929); *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929); *State v. Hill*, 225 N. C. 74, 33 S. E. (2d) 470 (1945); *State v. Britt*, 225 N. C. 364, 34 S. E. (2d) 408 (1945); *Troitino v. Goodman*, 225 N. C. 406, 35 S. E. (2d) 277 (1945); *Clark v. Cagle*, 226 N. C. 230, 37 S. E. (2d) 672 (1946); *State v. Frye*, 229 N. C. 581, 50 S. E. (2d) 895 (1948); *State v. Muse*, 230 N. C. 495, 53 S. E. (2d) 529 (1949); *Williams v. Williams*, 231 N. C. 33, 56 S. E. (2d) 20 (1949); *State v. Wiggins*, 232 N. C. 619, 61 S. E. (2d) 611 (1950); *Weaver v. Morgan*, 232 N. C. 642, 61 S. E. (2d) 916 (1950).

Exceptions not set out in the brief and in support of which no argument is given, are deemed abandoned. *State v. Randolph*, 228 N. C. 228, 45 S. E. (2d) 132 (1947); *State v. Brown*, 233 N. C. 202, 63 S. E. (2d) 99 (1951).

Where an exception is not argued in the brief it is taken as abandoned. *Randle v. Grady*, 228 N. C. 159, 45 S. E. (2d) 35 (1947).

Exceptions not set out in defendants' brief are considered abandoned. *State v. Thompson*, 224 N. C. 661, 32 S. E. (2d) 24 (1944). See *State v. Stone*, 226 N. C. 97, 36 S. E. (2d) 704 (1946); *State v. Malpass*, 226 N. C. 403, 38 S. E. (2d) 156 (1946).

Exceptions not argued or referred to in appellant's brief are deemed abandoned. *State v. Smith*, 223 N. C. 457, 27 S. E. (2d) 114 (1943); *State v. Epps*, 223 N. C. 740, 28 S. E. (2d) 219 (1943); *State v. Hart*, 226 N. C. 200, 37 S. E. (2d) 487 (1946).

Exceptions not discussed in appellant's brief are deemed abandoned. *Gillis v. Great Atlantic, etc., Tea Co.*, 223 N. C. 470, 27 S. E. (2d) 283 (1943); *Merchant v. Lassiter*, 224 N. C. 343, 30 S. E. (2d) 217 (1944); *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849 (1949).

Assignments of error, without reason, argument, or authority in the brief to support them, will not be considered on

appeal. *Hopkins v. Colonial Stores*, 224 N. C. 137, 29 S. E. (2d) 455 (1944); *State v. Hightower*, 226 N. C. 62, 36 S. E. (2d) 649 (1946).

Assignments of error not brought forward and discussed in appellant's brief are deemed abandoned. *State v. Jones*, 227 N. C. 94, 40 S. E. (2d) 700 (1946). See *State v. Carroll*, 226 N. C. 237, 37 S. E. (2d) 688 (1946); *State v. Cogdale*, 227 N. C. 59, 40 S. E. (2d) 467 (1946); *State v. Fairley*, 227 N. C. 134, 41 S. E. (2d) 88 (1947); *Bell v. Brown*, 227 N. C. 319, 42 S. E. (2d) 92 (1947); *State v. Avery*, 236 N. C. 276, 72 S. E. (2d) 670 (1952).

Exceptions set out in the record, and not preserved as required by this rule, are to be considered as abandoned. *Higgins v. Higgins*, 223 N. C. 453, 27 S. E. (2d) 128 (1943).

Exceptions to allegations not brought forward in the plaintiff's brief are abandoned. *Reliable Trucking Co. v. Payne*, 233 N. C. 637, 65 S. E. (2d) 132 (1951).

Exceptions to which no reason or argument is submitted are deemed abandoned. *Swinton v. Savoy Realty Co.*, 236 N. C. 723, 73 S. E. (2d) 785 (1952).

Exceptions referred to in defendants' brief as "formal exceptions" and as to which no argument is made and no authority cited are deemed abandoned. *State v. Hunt*, 223 N. C. 173, 25 S. E. (2d) 598 (1943).

Where an exception is carried forward in appellants' brief, but no reason or argument is stated or authority cited in support thereof, as required by this rule, the exception is taken as abandoned. *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160 (1943); *Penny v. Stone*, 228 N. C. 295, 45 S. E. (2d) 362 (1947).

Exceptions to the refusal of the court below to sustain the defendant's motion for judgment as of nonsuit have not been brought forward in his brief and argued, as required by Rule 28 of the rules of practice in the Supreme Court, and will therefore be considered as abandoned. *State v. Stallings*, 230 N. C. 252, 52 S. E. (2d) 901 (1949).

Where defendants not only assign as error the several conclusions of law upon which the judgment below is founded, and the judgment, but except to and assign as error the findings of fact made by the court upon which the conclusions of law are based, yet in their brief they challenge only the correctness of the conclusions of law and the judgment, under this rule the exception to the findings of

fact will be taken as abandoned, leaving for consideration the challenge to the conclusions of law and judgment. *Amick v. Coble*, 222 N. C. 484, 23 S. E. (2d) 854 (1943).

Same—Question Discussed in Oral Argument.—A question discussed on oral argument, but not embraced in the assignments of error referred to in the brief, will not be considered. *Mitchem v. Mitchem*, 169 N. C. 48, 85 S. E. 146 (1915).

Where briefs do not contain the exceptions and assignments of error, properly numbered, with references to the printed record, they do not conform to the rules. It is impossible to determine just what exceptions or assignments of error are referred to. *State v. Newton*, 207 N. C. 323, 177 S. E. 184 (1934).

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. *State v. Abernethy*, 220 N. C. 226, 17 S. E. (2d) 25 (1941).

Effect of Failure to Set Forth Exceptions and Assignments of Error.—The exceptions and assignments of error were not set forth in defendant appellant's brief. This is tantamount to the admission that the evidence was sufficient to be submitted to the jury. *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

In Capital Case.—Although exceptions, in support of which no reason or argument is stated or authority cited, will be taken as abandoned in accordance with the provisions of this rule, nevertheless in the case of a capital felony, the Supreme Court will examine the matters to which those exceptions relate in its search for prejudicial error. *State v. Roman*, 235 N. C. 627, 70 S. E. (2d) 857 (1952).

Exception Too General.—An exception simply to the general failure of the judge to state in a plain and correct manner the evidence and declare and explain the law arising thereon is too general and cannot be sustained. *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884 (1944).

Citation of Cases.—The grouping of cases cited in a brief does not authorize the use of the names of such cases throughout the brief without giving the citation of such cases. *Weaver v. Morgan*, 232 N. C. 642, 61 S. E. (2d) 916 (1950).

Failure to Furnish Appellee with Copy of Brief.—The appellee may not successfully move in the Supreme Court to have the case dismissed for the failure of the

appellant to furnish him a copy of his briefs when the brief was duly filed with the clerk under the rule, and he could have obtained one in the time prescribed by applying to the clerk, who is not under duty to either notify him or supply him a copy except at his request. *Turnage v. Dunn*, 196 N. C. 105, 144 S. E. 521 (1928).

Applied in *Merrimon v. Lyman*, 124 N. C. 434, 32 S. E. 732 (1899); *Smith v. Atlantic, etc., R. Co.*, 142 N. C. 21, 54 S. E. 786 (1906); *Liles v. Lumber Co.*, 142 N. C. 39, 54 S. E. 795 (1906); *Johnson, etc., R. Co. v. South, etc., R. Co.*, 148 N. C. 59, 61 S. E. 683 (1908); *Rushing v. Seaboard, etc., R. Co.*, 149 N. C. 158, 62 S. E. 890 (1908); *White v. Lane*, 153 N. C. 14, 68 S. E. 895 (1910); *Edwards v. Price*, 162 N. C. 243, 78 S. E. 145 (1913); *State v. Smith*, 164 N. C. 475, 79 S. E. 979 (1913); *In re Parker*, 165 N. C. 130, 80 S. E. 1057 (1914); *Lloyd v. Southern R. Co.*, 166 N. C. 24, 81 S. E. 1003 (1914); *Lynch v. Rosemary Mfg. Co.*, 167 N. C. 98, 83 S. E. 6 (1914); *Ingle v. Southern R. Co.*, 167 N. C. 636, 83 S. E. 744 (1914); *Winborne Guano Co. v. Plymouth Mercantile Co.*, 168 N. C. 223, 84 S. E. 272 (1915); *Starnes v. Raleigh, etc., R. Co.*, 170 N. C. 222, 87 S. E. 43 (1915); *Estes v. Rash*, 170 N. C. 341, 87 S. E. 109 (1915); *Campbell v. Sigmon*, 170 N. C. 348, 87 S. E. 116 (1916); *Lovelace v. Atlantic, etc., R. Co.*, 172 N. C. 12, 89 S. E. 797 (1916); *State v. Bryson*, 173 N. C. 803, 92 S. E. 698 (1917); *Gray v. Cartwright*, 174 N. C. 49, 93 S. E. 432 (1917); *Borden v. Carolina Power, etc., Co.*, 174 N. C. 72, 93 S. E. 442 (1917); *State v. Coble*, 177 N. C. 588, 99 S. E. 339 (1919); *Allen v. Reidsville*, 178 N. C. 513, 101 S. E. 267 (1919); *Hill v. Aman*, 181 N. C. 483, 106 S. E. 214 (1921); *Baker v. Winslow*, 184 N. C. 1, 113 S. E. 570 (1922); *Harrison v. Norfolk Southern R. Co.*, 184 N. C. 86, 113 S. E. 678 (1922); *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628 (1922); *Bunn v. Dunn*, 185 N. C. 108, 116 S. E. 172 (1923); *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215 (1923); *In re Westfeldt's Will*, 188 N. C. 702, 125 S. E. 531 (1924); *State v. Hopkins*, 217 N. C. 324, 7 S. E. (2d) 566 (1940); *Sills*

v. Morgan, 217 N. C. 662, 9 S. E. (2d) 518 (1940); *State v. McMahan*, 224 N. C. 476, 31 S. E. (2d) 357 (1944); *Bailey v. Inman*, 224 N. C. 571, 31 S. E. (2d) 769 (1944); *Whitehurst v. FCX Fruit, etc., Service*, 224 N. C. 628, 32 S. E. (2d) 34 (1944); *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352 (1944); *State v. Harrell*, 226 N. C. 743, 40 S. E. (2d) 205 (1946); *State v. McKnight*, 226 N. C. 766, 40 S. E. (2d) 419 (1946); *State v. Anderson*, 228 N. C. 720, 47 S. E. (2d) 1 (1948); *State v. Shackelford*, 232 N. C. 299, 59 S. E. (2d) 825 (1950); *State v. Carter*, 233 N. C. 581, 65 S. E. (2d) 9 (1951); *Commercial Solvents, Inc. v. Johnson*, 235 N. C. 237, 69 S. E. (2d) 716 (1952); *Dillingham v. Klizerman*, 235 N. C. 298, 69 S. E. (2d) 500 (1952); *In re McGowan's Will*, 235 N. C. 404, 70 S. E. (2d) 189 (1952); *Thompson v. Thompson*, 235 N. C. 416, 70 S. E. (2d) 495 (1952); *Williams v. Robertson*, 235 N. C. 478, 70 S. E. (2d) 692 (1952).

Cited in *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557 (1935); *Staté v. Kinyon*, 210 N. C. 294, 186 S. E. 368 (1936); *State v. Murray*, 216 N. C. 681, 6 S. E. (2d) 513 (1940); *Caldwell v. Southern Ry. Co.*, 218 N. C. 63, 10 S. E. (2d) 680 (1940); *State v. Ward*, 222 N. C. 316, 22 S. E. (2d) 922 (1942); *Gordon v. Calhoun Motors*, 222 N. C. 398, 23 S. E. (2d) 325 (1942); *State v. Reddick*, 222 N. C. 520, 23 S. E. (2d) 909 (1943); *Curlee v. Scales*, 223 N. C. 788, 28 S. E. (2d) 576 (1944); *State v. Murdock*, 225 N. C. 224, 34 S. E. (2d) 69 (1945); *State v. Friddle*, 225 N. C. 240, 34 S. E. (2d) 5 (1945); *State v. Gordon*, 225 N. C. 241, 34 S. E. (2d) 414 (1945); *State v. Reid*, 230 N. C. 561, 53 S. E. (2d) 849 (1949); *State v. Herbin*, 232 N. C. 318, 59 S. E. (2d) 635 (1950); *State v. Lamm*, 232 N. C. 402, 61 S. E. (2d) 188 (1950); *State v. Liles*, 232 N. C. 622, 61 S. E. (2d) 603 (1950); *State v. Minton*, 234 N. C. 716, 68 S. E. (2d) 844 (1951); *State v. Birchfield*, 235 N. C. 410, 70 S. E. (2d) 5 (1952); *State v. Williams*, 235 N. C. 429, 70 S. E. (2d) 1 (1952); *Chambers v. Chambers*, 235 N. C. 749, 71 S. E. (2d) 57 (1952).

29. Appellee's Brief

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Tuesday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the

appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

Editor's Note.—By amendment, effective July 1, 1951, the word "Tuesday" in line two was substituted for "Saturday."

Appellee's Brief Dismissed When Not Filed in Time.—Upon motion of appellant aptly made at the call of the district to which the case belongs, the appellee's brief will be dismissed if not filed on the preceding Saturday (now Tuesday) by noon, and disposed of without argument by appellee, unless for good cause shown,

the time should be extended. *Phillips v. Junior Order U. A. M.*, 175 N. C. 133, 95 S. E. 91 (1918).

Contents of Appellee's Brief.—All material exceptions not abandoned by appellants should be considered with care, and appellee's counsel should call court's attention to such portions of the record as tend to sustain the validity of the trial. *Marshall v. Interstate Tel., etc., Co.*, 181 N. C. 410, 107 S. E. 498 (1921).

30. Arguments

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Rearguments

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

Court May Order Reargument.—It is the duty of parties to see that their causes are fully argued in the Supreme Court, and where this has not been—especially where the record is voluminous and assignments of error indefinite—the court will require it to be reargued. *Lenoir v. Valley River Mining Co.*, 104 N. C. 490, 10 S. E. 525 (1889).

new trial is granted without passing upon certain exceptions, and, upon a rehearing of the exceptions upon which new trial was granted, is reversed, the Supreme Court may order a reargument of the exceptions not passed upon, without a petition for the same being filed. *Fleming v. Southern R. Co.*, 132 N. C. 714, 44 S. E. 551 (1903).

Petition Need Not Be Filed.—Where a

32. Agreements of Counsel

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

Verbal Agreements Not Considered When Denied.—The Supreme Court will not consider appellant's alleged verbal agreement between the parties when such is denied. *Standard Mirror Co. v. Philadelphia Casualty Co.*, 157 N. C. 28, 72 S

E. 826 (1911); *Brewer v. Mineola Mfg. Co.*, 161 N. C. 211, 76 S. E. 237 (1912); *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917).

When it appears in the Supreme Court that appellant has not served his case on

appeal in time, no agreement for further extension thereof will be considered, unless it is in writing or appears by an entry on the record. *Standard Mirror Co. v. Philadelphia Casualty Co.*, 157 N. C.

28, 72 S. E. 826 (1911); *State v. Black*, 162 N. C. 637, 78 S. E. 210 (1913).

Applied in *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948).

33. Appearances

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari

(1) When Applied for.—Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) How Applied for.—The writs of certiorari and supersedeas shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) Notice of.—No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

Cross Reference.—As to certiorari generally, see G. S. § 1-269 and notes thereto.

When Certiorari Should Be Applied for.

—Where the appellant can show good and sufficient cause why his case on appeal had not been docketed in the Supreme Court in the time required by the rules, or that he was not therein at fault, he should file a transcript of the record proper and move for a certiorari for the statement of the case, which may be done at any time during the term before appellee moves to dismiss it. *McNeil v. Virginia-Carolina R. R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917); *Rose v. Rocky Mount*, 184 N. C. 609, 113 S. E. 506 (1922).

Not a Matter of Right.—Where the record of a case on appeal is not docketed in the Supreme Court at the time required by Rule 5, it will be dismissed, but the Court may, in its discretion and not as a matter of right of the appellant, grant further time for the filing of the record, if the appellant files the record proper in

apt time and thereupon moves for a certiorari, showing that the delay was not attributable to himself. *State v. National Surety Co.*, 192 N. C. 52, 133 S. E. 172 (1926); *Fruit v. Wood*, 199 N. C. 788, 156 S. E. 126 (1930).

When he has depended solely upon a void order of the trial judge extending the time for the service of his case, which is excepted to, the case will be dismissed. *State v. Crowder*, 195 N. C. 335, 142 S. E. 222 (1928).

Legal Excuse Decided by Supreme Court.—Whether the appellant has legal excuse in not docketing his case on appeal in time for it to be regularly heard at the call of the district to which it belongs is a matter for the Supreme Court to determine upon his docketing the record proper and moving for a certiorari under the rule. *State v. Johnson*, 183 N. C. 730, 110 S. E. 782 (1922).

Motion Too Late after Argument.—

Where the plaintiff's motion for a certiorari was disallowed at a former term of

the Supreme Court without prejudice, for the purpose of allowing him to renew his motion after he had applied to the trial judge to correct the case, the plaintiff should again move the court for a writ before the call of the district to which the case belonged, and it comes too late after argument of the case. *Todd v. Mackie*, 160 N. C. 352, 76 S. E. 245 (1912).

Motion Denied after Appeal Dismissed.—A motion for a certiorari to bring up the case on appeal will be denied if made after the appellee has had it docketed and dismissed under Rule 17. *Cox v. Kinston Carolina R., etc., Co.*, 177 N. C. 227, 98 S. E. 704 (1919).

Application for Certiorari.—Where the appellant in a criminal action has failed to have his case docketed in the time required by the Rules of Practice in the Supreme Court, in order to preserve his right to appeal it is required that he file an application for a certiorari, addressed to the sound discretion of the Supreme Court, and show a good and sufficient reason for granting his motion therefor, and where this has not been done the appeal will be dismissed upon motion of the State. *State v. Harris*, 199 N. C. 377, 154 S. E. 628 (1930).

Appellant Must Docket All Available Record.—When the appeal is not docketed at or before the time prescribed in Rule 5 the appellant must docket all of the record proper, or so much thereof as he can obtain, with an affidavit, as to why the entire record cannot be docketed and move at that time for a certiorari. If he fails to do so, the appellee has the right to docket the certificate prescribed by Rule 17 and have the appeal dismissed. *Caudle v. Morris*, 158 N. C. 594, 74 S. E. 98 (1912); *State v. Johnson*, 183 N. C. 730, 110 S. E. 782 (1922); *Hardy v. Heath*, 188 N. C. 271, 124 S. E. 564 (1924).

Appellant's motion for a writ of certiorari will be denied where the petition is not verified and no transcript of the record has been filed nor any good reason shown for failure to file it. *Critz v. Sprager*, 121 N. C. 283, 28 S. E. 365 (1897); *Rothchild v. McNichol*, 121 N. C. 284, 28 S. E. 364 (1897).

In order to support a motion for certiorari it is required that appellant file transcript of the record proper and give appellee notice of the motion, and appellee's transcript of record filed on motion to docket and dismiss, under Rule 17, cannot avail the appellant on his motion

for certiorari. *Hinnant v. American Fire, etc., Ins. Co.*, 204 N. C. 306, 168 S. E. 199 (1933.)

Filing of Original Papers Insufficient.—A transcript of the record proper should be filed by appellant in the Supreme Court to entitle him to move for a certiorari; and the filing of the original papers, which should remain in the office of the Superior Court, is insufficient. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Writ Not Applied for at First Term.—Where the transcript is not filed at the first term after trial, on the failure of the appellant to apply at such term for a writ of certiorari to procure it, he is not entitled to such writ. *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150 (1894); *Haynes v. Coward*, 116 N. C. 840, 21 S. E. 690 (1895); *State v. Dawkins*, 190 N. C. 443, 129 S. E. 814 (1925).

Due Diligence Shown by Party.—If it appears that the unexpected indisposition of the clerk of the Superior Court was the cause of the failure to docket an appeal in time at the next ensuing term of this Court, and that appellant was not guilty of any lack of diligence, and that he promptly applied for a certiorari, the writ should be granted. *Howerton v. Henderson*, 86 N. C. 718 (1882).

Effect of Agreement for Extension of Time.—Where the parties have agreed upon such extension of time for the service of their respective cases on appeal that the delay will cause the docketing of the case too late to come within the rule, the appellant having used his full time may not successfully move in the Supreme Court for a certiorari upon the ground that the delay was caused by a loss of the papers in it, for which he was not responsible, without proof sufficient to overcome evidence in denial of the allegation. *Baker v. Hare*, 192 N. C. 788, 136 S. E. 113 (1926).

Question of Laches May Be Heard.—Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon. *Stone v. Ledbetter*, 191 N. C. 777, 133 S. E. 162 (1926).

Where an appeal was dismissed because not docketed before the perusal of the district to which it belongs, and appellant moved to reinstate on the allegation that he had directed the clerk to send up the

transcript and paid the fees therefor in advance, the motion will be denied, for, although such allegation would have been a sufficient answer to the motion to dismiss if affidavit had been filed to such effect and a certiorari applied for, yet it was laches not to interpose such affidavit and show excuse for the failure. *Paine v. Cureton*, 114 N. C. 606, 19 S. E. 631 (1894).

When Case on Appeal Not Prepared.—Where a case and counter-case are served within the time as extended by agreement, but neither is accepted, appellant must immediately request a settlement, file the record proper, and sue out certiorari; otherwise appellee may move to docket and dismiss under Rule 17. *Waynesville Transp. Co. v. Waynesville Lumber Co.*, 168 N. C. 60, 84 S. E. 54 (1915); *Washam, etc., Motor Co. v. Reep*, 186 N. C. 509, 119 S. E. 821 (1923).

Certiorari Denied When Case Unsettled by Agreement.—Where the parties to an action have agreed, or the judge at their request has allowed an extension of time for service of case and counter-case, etc., that will prevent its being docketed in the time prescribed by Rule 5, and consequently no case has been settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. *Waller v. Dudley*, 193 N. C. 354, 137 S. E. 149 (1927).

When Appellee Prevents Docketing of Appeal.—Where the appellant is prevented from docketing his appeal within the time prescribed by Rule 5, in consequence of the conduct of the appellee or his counsel, he is entitled to the writ of certiorari to bring up the case. *Briggs v. Jervis*, 98 N. C. 454, 4 S. E. 631 (1897).

Failure to Pay Clerk's Fees.—The failure of the clerk below to send up the transcript after the case on appeal had been filed in his office will not excuse appellant's failure to have the transcript or case on appeal filed, where there is no allegation that the appellant had tendered the fees for such transcript and was otherwise free from laches. *Critz v. Sparger*, 121 N. C. 283, 28 S. E. 365 (1897).

Extent of Waiver by Consent.—The parties to an appeal, without the consent of the Court, cannot waive the rule of the Supreme Court requiring that a transcript of the record proper, or all thereof that may be had, shall be filed therein as the basis for the motion for a certiorari; but they may, by written agreement, consent that the appeal may be docketed at the next ensuing term of the Supreme Court. *Murphy v. Carolina Electric Co.*, 174 N. C. 782, 93 S. E. 456 (1917).

May Docket Appeal Though Certiorari Denied.—Although appellant's motion for a writ of certiorari is denied, he may docket his appeal during the term, or, if the case was tried since the term to which the appeal is taken began, he may docket it at the next term. *Critz v. Sparger*, 121 N. C. 283, 28 S. E. 365 (1897); *Rothchild v. McNichol*, 121 N. C. 284, 28 S. E. 364 (1897).

Applied in Causey v. Snow, 116 N. C. 497, 21 S. E. 179 (1895); *Brown v. House*, 119 N. C. 622, 26 S. E. 160 (1896); *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782 (1897); *Rothchild v. McNichol*, 121 N. C. 284, 28 S. E. 364 (1897); *Parker v. Southern Ry. Co.*, 121 N. C. 501, 28 S. E. 347 (1897).

35. Additional Issues

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

Cross Reference.—As to power of Supreme Court to remand case for amendment, or for the taking of additional testimony, see § 7-13.

36. Motions

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

Only Motions in Writing Entertained.—This Court will not entertain any motion, unless reduced to writing. *McCoy v. Lassiter*, 94 N. C. 131 (1886.)

37. Abatement and Revivor

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: Provided, such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

Where a party dies pending appeal, his personal representative will be made a party by order of the Court. First, etc., *Nat. Bank v. Toxey*, 210 N. C. 470, 187 S. E. 553 (1936).

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. *Peterson v. McLamb*, 221 N. C. 538, 19 S. E. (2d) 488 (1942).

38. Certification of Decisions

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. General Statutes, § 7-16. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

Cross Reference.—As to the certification upon appeals from interlocutory orders, see G. S. § 7-12.

39. Judgment and Minute Dockets

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

Cited in *Corporation Comm. v. Railroad*, 137 N. C. 1, 49 S. E. 191 (1904).

40. Clerk and Commissioners

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office, of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

Cross References.—As to the clerk's clerk to report money on hand, see G. S. bond, see G. S. § 7-27. As to duty of § 7-28.

41. Librarian

(1) Report by Him. The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) Books Taken Out. No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause seven typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end, that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

Cross Reference.—As to requiring judgments to be written, see G. S. § 7-15.

43. Executions

(1) Teste of Executions. When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) Issuing and Return of. Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

Cross References.—As to execution generally, see G. S. § 1-302 et seq. As to judgments on appeal, see G. S. § 1-297. As to stay of execution, see G. S. § 1-293 et seq.

Execution a Lien from Its Teste.—An execution issuing from the Supreme

Court, upon a judgment obtained therein, to a county in which the defendant has land, is a lien upon the land from its teste. *Rhyne v. McKee*, 73 N. C. 259 (1875).

Cited in Corporation Comm. v. Railroad, 137 N. C. 1, 49 S. E. 191 (1904).

44. Petition to Rehear

(1) When Filed. Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

Cross Reference.—As to the petition to rehear generally, see G. S. § 7-18.

Rule Mandatory.—The requirement that a petition for a rehearing be filed within forty days after the filing of the opinion in the case is mandatory upon all litigants alike, and will be rigidly enforced. *Cooper v. Board of Comm'rs*, 184 N. C. 615, 113 S. E. 569 (1922).

Time of Filing Affidavit in Support of Motion.—Where the Supreme Court, on appeal, has allowed a motion for a new trial for newly discovered evidence after having fixed a time in which the parties may file their affidavit in support of the motion and per contra, the Court will not thereafter allow a motion retaining the case on its docket for the purpose of cor-

recting the amount of the judgment. *Moore v. Tidwell*, 194 N. C. 186, 138 S. E. 541 (1927).

When Time Begins to Run.—The time begins to run against a petition to rehear in the Supreme Court from the time the opinion was filed in the office of the clerk of that Court. *McGeorge v. Nicola*, 173 N. C. 733, 92 S. E. 610 (1917).

Distinction Between Filing and Docketing.—The petition is said to be filed when it is received by the clerk, and this must be done within forty days after the filing of the opinion; it is docketed when the clerk enters it upon the records at the order of the Justice, who grants the rehearing. *Bird v. Gilliam*, 123 N. C. 63, 31 S. E. 267 (1898).

(2) What to Contain. The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of coun-

sel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

Failure to File Certificate.—Where the applicant has failed to file the certificates of two disinterested members of the bar, indorsed by two members of the Court, the application will not be considered, except in certain instances where the Court

may reconsider the case *ex mero motu*. *Teeter v. Southern Express Co.*, 172 N. C. 620, 90 S. E. 927 (1916).

Cited in *In re Will of Franks*, 231 N. C. 736, 57 S. E. (2d) 315 (1950).

(3) **Two Copies to Be Filed, How Endorsed.** The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: Provided, however, that when there have been three dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) **Justices to Act in Thirty Days.** The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

When Rehearing Allowed.—No case will be reviewed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. *Haywood v. Daves*, 81 N. C. 8 (1879); *Mullen v. Norfolk, etc., Canal Co.*, 115 N. C. 15, 20 S. E. 167 (1894).

In an action for construction of a will, a former decision of this Court, rendered when the Court was differently constituted from what it is at present, should not be reversed because the present members of the Court might infer differently as to the intention of the testatrix from the words and context of the will. *Devereux v. Devereux*, 81 N. C. 12 (1879).

This petition to rehear having been fully and carefully considered, and it appearing that the errors assigned have already been passed upon in well considered opinions of this Court, and no new fact has been called to the attention of the Court, or new case or authority cited, or new position assumed, the petition is dismissed.

Weston v. Roper Lumber Co., 168 N. C. 98, 83 S. E. 693 (1914).

Rehearing a Matter of Discretion.—Unlike an appeal, a petition to rehear is a matter in the discretion of the Supreme Court to be exercised under the rules prescribed by it. *Moore v. Harkins*, 179 N. C. 525, 103 S. E. 12 (1920).

Presumption in Favor of Judgment.—Rehearings of decisions of cases of this Court are granted only in exceptional cases and, when granted, every presumption is in favor of the judgment already rendered. *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312 (1898).

Rehearing by Means of Second Appeal Not Allowed.—A second appeal on matters determined by a decision on a former appeal will not be considered, the procedure being by a motion to rehear. *Gainesville, etc., Hospital Ass'n v. Atlantic Coast Line R. Co.*, 157 N. C. 460, 73 S. E. 242 (1911); *LaRogue v. Kennedy*, 161 N. C. 459, 77 S. E. 695 (1913).

Where a carrier does not take the proper steps to have a judgment rendered

against it in the State court reviewed in the United States court upon a defense set up in denial of its rights under the Federal law, and seeks to enjoin the enforcement of the judgment in the State courts, it is an endeavor to obtain a rehearing of the case by means of a second suit, which is not permissible. *North Carolina R. Co. v. Story*, 187 N. C. 184, 121 S. E. 433 (1924).

Same State of Facts Will Not Warrant Second Appeal.—A party to an action may not have the decision of the Supreme Court again reviewed by it, upon a second appeal, upon the same state of facts, the former decisions having become the law of the case. *Strunks v. Southern R. Co.*, 188 N. C. 567, 125 S. E. 182 (1924).

No Rehearing on Summary Motion.—A rehearing will not be granted upon a summary motion to modify a final judgment of this Court. *Ruffin v. Harrison*, 91 N. C. 398 (1884).

Only Points Certified as Erroneous Considered.—Upon a rehearing, the Supreme Court will not consider any point not certified as erroneous by counsel making the certificate. *Kerr v. Hicks*, 133 N. C. 175, 45 S. E. 529 (1903).

When Conclusion Assigned as Error.—It is unnecessary to consider a broadside assignment of error in a petition to rehear, "for that, granting the correctness of every legal proposition laid down by the Court, and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the Court in its opinion is erroneous." *Bunn v. Braswell*, 142 N. C. 113, 55 S. E. 85 (1906).

When Error Committed in Former Decision.—The doctrine of *stare decisis* has no application, when it clearly appears that error has been committed in the decision of the former case by the Supreme Court; and where the exceptions present, on the second appeal, under different and somewhat similar statutes, the question as to whether a mandamus will lie for the failure of the county commissioners to make a special levy for the payment of the principal of the sinking funds for road bonds of a certain district, and the Supreme Court has erroneously decided that it was unnecessary as to another road district within the same county, on the appeal in the later case the position is untenable that it was an attempt to obtain a rehearing contrary to the rules on the subject. *Spitzer & Co. v. Commissioners*, 188 N. C. 30, 123 S. E. 636 (1924).

When Petitioner Guilty of Laches.—A

Court will not be granted when the alleged error is attributable solely to the petitioner's own laches or want of attention in looking after his case or he has neglected to follow the rules of procedure necessary to a proper presentment thereof, and especially when there is nothing to warrant the assurance that substantial relief would otherwise be afforded him. *Battle v. Mercer*, 188 N. C. 116, 123 S. E. 258 (1924).

Immaterial Assumption.—It is no ground for the rehearing of a case that the defendant was assumed to be a citizen petition to rehear a case in the Supreme of North Carolina, whereas, in fact, he was not, when the place of his residence is immaterial. *Blackwell v. Wright*, 74 N. C. 733 (1876).

When Everything Considered on First Hearing.—Where neither the record nor the briefs on the rehearing of a case disclose anything that was not apparently considered on the first hearing, the former judgment will not be disturbed. *Weisel v. Cobb*, 122 N. C. 67, 30 S. E. 312 (1898).

New Trial for Newly Discovered Evidence.—A motion for a new trial, in the Supreme Court, upon the ground of newly discovered evidence, is a matter for the full Court, and will not be entertained after the case has been certified down, nor will an ungranted petition to rehear, made at the same time to the Justices of the Court, under the rule, put the case in the Supreme Court. *Smith v. Moore*, 150 N. C. 158, 63 S. E. 735 (1909).

Contents of Affidavit.—It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear by affidavit that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail. *Johnson v. Seaboard Air Line R. Co.*, 163 N. C. 431, 79 S. E. 690, Ann. Cas. 1915B. 598 (1913).

In criminal actions, the Supreme Court will deny a motion for a new trial made upon the ground of newly discovered evidence. *State v. Griffin*, 190 N. C. 133, 129 S. E. 410 (1925).

New trial in criminal actions for newly discovered evidence.—When the judgment in a criminal action has been affirmed and certified to the clerk of the Superior Court, § 7-11, it is in the latter court for execution of the sentence, and a motion for new trial may be there entertained for disqualification of jurors and newly discovered evidence, G. S. § 15-174, and the motion is made in apt time if made at the next succeeding term after the case is certified down. *State v. Casey*, 201 N. C. 620, 161 S. E. 81 (1931).

When Petitioner Erroneously Deprived of Property.—Upon a petition to rehear, the case will be corrected when it appears that the petitioner has thereby been erroneously deprived of its property. *State v. Martin, etc., Casualty Co.*, 188 N. C. 119, 123 S. E. 631 (1924).

Omission of Questions Not Discussed in Brief.—A petition to rehear in the Supreme Court will be denied when founded upon the ground that a certain question was not mentioned in the opinion, when it had not been discussed in movant's brief according to Rule 28, and he has not appealed from the judgment. *Greene v. Lyles*, 187 N. C. 598, 122 S. E. 297 (1924).

When No Error Assigned.—Where no exception is taken in trial court to a ruling, and no error is assigned upon rehearing, the Supreme Court will not review the ruling. *Faison v. Grandy*, 128 N. C. 438, 38 S. E. 897 (1901).

Second Petition to Rehear.—Where a petition to rehear a case in the Supreme Court has been allowed, the oppos-

ing party only may petition for a second rehearing thereof. *Moore v. Harkins*, 179 N. C. 525, 103 S. E. 12 (1920).

A party whose application for a rehearing of the case has been denied may not successfully petition for a rehearing, though additional reasons are given in the denial of the former petition by the Court in reaching the same conclusion. *Moore v. Harkins*, 179 N. C. 525, 103 S. E. 12 (1920).

Costs When New Trial Granted.—Where, upon a rehearing, the Court grants a new trial, which was refused on the former hearing, all the costs of the appeal, including those of the rehearing, are properly taxed against the appellee. *Waldo v. Wilson*, 174 N. C. 767, 94 S. E. 715 (1917).

Reasons for Denying Petition Not Usually Set Out.—The reasons for denying a petition to rehear in the Supreme Court are not usually set out. *Crowell v. Crowell*, 181 N. C. 66, 106 S. E. 149 (1921).

Applied in *Etheridge v. Vernoy*, 71 N. C. 184 (1874); *Neal v. Cowles*, 71 N. C. 266 (1874); *Grant v. Edwards*, 88 N. C. 246 (1883); *Wilson v. Lineberger*, 90 N. C. 180 (1884); *McDonald v. Carson*, 95 N. C. 377 (1886); *Manufacturing Co. v. Gray*, 126 N. C. 108, 35 S. E. 236 (1900); *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155 (1900); *Morganton Hdw. Co. v. Morganton Graded Schools*, 151 N. C. 507, 66 S. E. 583 (1909); *Forest City Cotton Co. v. Mills*, 219 N. C. 279, 13 S. E. (2d) 557 (1941).

(5) **New Briefs to Be Filed.** There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument, but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) **When Petition Docketed for Rehearing.** The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

When Petition Will Be Dismissed.—Petitions to rehear will be dismissed where the grounds of error assigned are substantially the same as on the former

hearing, and no new facts appear, no new authorities cited, and no new positions as-
sumed. *Montgomery v. Blades*, 223 N. C. 331, 26 S. E. (2d) 567 (1943).

(7) Stay of Execution. When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

45. Sittings of the Court

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1 N. C.
1 Haywood	as	2 N. C.
2 Haywood	as	3 N. C.
1 and 2 Car. Law Repository & N. C. Term	as	4 N. C.
1 Murphey	as	5 N. C.
2 Murphey	as	6 N. C.
3 Murphey	as	7 N. C.
1 Hawks	as	8 N. C.
2 Hawks	as	9 N. C.
3 Hawks	as	10 N. C.
4 Hawks	as	11 N. C.
1 Devereux Law	as	12 N. C.
2 Devereux Law	as	13 N. C.
3 Devereux Law	as	14 N. C.
4 Devereux Law	as	15 N. C.
1 Devereux Eq.	as	16 N. C.
2 Devereux Eq.	as	17 N. C.
1 Dev. & Bat. Law	as	18 N. C.
2 Dev. & Bat. Law	as	19 N. C.
3 & 4 Dev. & Bat. Law	as	20 N. C.
1 Dev. & Bat. Eq.	as	21 N. C.
2 Dev. & Bat. Eq.	as	22 N. C.
1 Iredell Law	as	23 N. C.
2 Iredell Law	as	24 N. C.

3 Iredell Law	as 25 N. C.
4 Iredell Law	as 26 N. C.
5 Iredell Law	as 27 N. C.
6 Iredell Law	as 28 N. C.
7 Iredell Law	as 29 N. C.
8 Iredell Law	as 30 N. C.
9 Iredell Law	as 31 N. C.
10 Iredell Law	as 32 N. C.
11 Iredell Law	as 33 N. C.
12 Iredell Law	as 34 N. C.
13 Iredell Law	as 35 N. C.
1 Iredell Eq.	as 36 N. C.
2 Iredell Eq.	as 37 N. C.
3 Iredell Eq.	as 38 N. C.
4 Iredell Eq.	as 39 N. C.
5 Iredell Eq.	as 40 N. C.
6 Iredell Eq.	as 41 N. C.
7 Iredell Eq.	as 42 N. C.
8 Iredell Eq.	as 43 N. C.
Busbee Law	as 44 N. C.
Busbee Eq.	as 45 N. C.
1 Jones Law	as 46 N. C.
2 Jones Law	as 47 N. C.
3 Jones Law	as 48 N. C.
4 Jones Law	as 49 N. C.
5 Jones Law	as 50 N. C.
6 Jones Law	as 51 N. C.
7 Jones Law	as 52 N. C.
8 Jones Law	as 53 N. C.
1 Jones Eq.	as 54 N. C.
2 Jones Eq.	as 55 N. C.
3 Jones Eq.	as 56 N. C.
4 Jones Eq.	as 57 N. C.
5 Jones Eq.	as 58 N. C.
6 Jones Eq.	as 59 N. C.
1 and 2 Winston	as 60 N. C.
Phillips Law	as 61 N. C.
Phillips Eq.	as 62 N. C.

In quoting from the reprinted Reports counsel will cite always the marginal (i. e., the original) paging, except 20 N. C., which is repaged throughout, without marginal paging.

47. Court Reconvened

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

(2) RULES OF PRACTICE IN THE SUPERIOR COURTS OF NORTH CAROLINA

(Rules revised and adopted by the Justices of the Supreme Court of North Carolina, as amended down through October 20, 1954.)

Rule

1. Entries on Records.
2. Surety on Prosecution Bond and Bail.
3. Opening and Conclusion.
4. Examination of Witnesses.
5. Motion for Continuance.
6. Decision of Right to Conclude Not Appealable.
7. Issues.
8. Judgments.
9. Transcript of Judgment.
10. Docketing Magistrate's Judgments.
11. Transcript to Supreme Court.
12. Transcript on Appeal—When Sent Up.
13. Reports of Clerks and Commissioners.
14. Recordari.
15. Judgment—When to Require Bonds to Be Filed.
16. Next Friend—How Appointed.

Rule

17. Guardians Ad Litem—How Appointed.
18. Cases Put at Foot of Docket.
19. When Opinion Is Certified.
20. Calendar.
21. Cases Set for a Day Certain.
22. Calendar under Control of Court.
23. Nonjury Cases.
24. Appeals from Justices of the Peace.
25. On Consent Continuance—Judgment for Costs.
26. Time to File Pleadings—How Computed.
27. Counsel Not Sent for.
28. Criminal Dockets.
29. Civil and Criminal Dockets—What to Contain.
30. Books.

1. Entries on Records

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the Court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court, or other officer authorized to administer oaths, in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

Editor's Note.—By amendment passed December 17, 1953, the words "or other officer authorized to administer oaths" were inserted in the last sentence of this section.

3. Opening and Conclusion

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. Examination of Witnesses

When several are employed on the same side, the examination, or cross-examina-

tion, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance

When a party in a civil suit moves for continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. Issues

Issues shall be made up as provided and directed in G. S. § 1-200.

8. Judgments

Judgments shall be docketed as provided and directed in G. S. §§ 1-233 and 1-234.

9. Transcript of Judgment

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of certiorari as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be writ-

ten on the margin of each a brief statement of the subject matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

	Page
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit of attachment	4

and so on to the end.

12. Transcript on Appeal—When Sent Up

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. G. S. § 1-284.

13. Reports of Clerks and Commissioners

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue of or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari

The Superior Court shall grant the writ of recordari only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of supersedeas, if prayed for as required by G. S. § 1-269. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days' notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of certiorari in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to Be Filed

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. Guardians Ad Litem—How Appointed

All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases Put at Foot of Docket

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion Is Certified

When the opinion of the Supreme Court in any cause which has been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. G. S. § 15-186.

20. Calendar

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which

a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar under Control of Court

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. Appeals from Justices of the Peace

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On Consent Continuance—Judgment for Costs

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel Not Sent for

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments nisi have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain

Clerks will be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. Books

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

II. Removal of Causes

(Removal from State Courts to District Courts of the United States. Title 28, U. S. Code, §§ 1441-1450, and Rule 81(c) of Federal Rules of Civil Procedure.)

Chapter 89.

District Courts; Removal of Cases from State Courts.

Sec.	Sec.
1441. Actions removable generally.	1446. Procedure for removal.
1442. Federal officers sued or prosecuted.	1447. Procedure after removal generally.
1443. Civil rights cases.	1448. Process after removal.
1444. Foreclosure action against United States.	1449. State court record supplied.
1445. Carriers; non-removable actions.	1450. Attachment or sequestration; securities.

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. (June 25, 1948, ch. 646, § 1, 62 Stat. 937.)

§ 1442. Federal officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties.

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, ch. 646, § 1, 62 Stat. 938.)

§ 1444. Foreclosure action against United States.

Any action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending. (June 25, 1948, ch. 646, § 1, 62 Stat. 938; May 24, 1949, ch. 139, § 82, 63 Stat. 101.)

§ 1445. Carriers; non-removable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 20 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds \$3,000, exclusive of interest and costs. (June 25, 1948, ch. 646, § 1, 62 Stat. 939.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of sum-

mons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101.)

§ 1447. Procedure after removal generally.

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. (June 25, 1948, ch. 646, § 1, 61 Stat. 939; May 24, 1949, ch. 139, § 84, 63 Stat. 102.)

§ 1448. Process after removal.

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

§ 1449. State court record supplied.

Where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any district court of the United States, and the clerk of such State court, upon demand, and the payment or tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting such facts, direct such record to be supplied by affidavit or otherwise. Thereupon such proceedings, trial, and judgment may be had in such district court, and all such process awarded, as if certified copies had been filed in the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940; May 24, 1949, ch. 139, § 85, 63 Stat. 102.)

§ 1450. Attachment or sequestration; securities.

Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

All bonds, undertakings, or security given by either party in such action prior to its removal shall remain valid and effectual notwithstanding such removal.

All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court. (June 25, 1948, ch. 646, § 1, 62 Stat. 940.)

Federal Rules of Civil Procedure**Rule 81. Applicability in general.****(c) Removed Actions.**

These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.

III. Authentication of Records

(Title 28, U. S. Code, §§ 1738-1742, and Rule 44 of Federal Rules of Civil Procedure.)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1739. State and Territorial nonjudicial records; full faith and credit.

All nonjudicial records or books kept in any public office of any State, Territory, or Possession of the United States, or copies thereof, shall be proved or admitted in any court or office in any other State, Territory, or Possession by the attestation of the custodian of such records or books, and the seal of his office annexed, if there be a seal, together with a certificate of a judge of a court of record of the county, parish, or district in which such office may be kept, or of the Governor, or secretary of state, the chancellor or keeper of the great seal, of the State, Territory, or Possession that the said attestation is in due form and by the proper officers.

If the certificate is given by a judge, it shall be further authenticated by the clerk or prothonotary of the court, who shall certify, under his hand and the seal of his office, that such judge is duly commissioned and qualified; or, if given by such Governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or Possession in which it is made.

Such records or books, or copies thereof, so authenticated, shall have the same full faith and credit in every court and office within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1740. Copies of consular papers.

Copies of all official documents and papers in the office of any consul or vice consul of the United States, and of all official entries in the books or records of any such office, authenticated by the consul or vice consul, shall be admissible equally with the originals. (June 25, 1948, ch. 646, § 1, 62 Stat. 947.)

§ 1741. Foreign documents, generally; copies.

A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian. (June 25, 1948, ch. 646, § 1, 62 Stat. 948; May 24, 1949, ch. 139, § 92 (b), 63 Stat. 103.)

§ 1742. Land titles; foreign records.

A keeper or person having custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of a department or agency of the United States, may authenticate and certify copies thereof under his hand and seal.

When such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the General Counsel for the Department of the Treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose.

A certified copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or recorded may be read in evidence, equally with the original, in any court, where the title to land claimed by or under the United States may come into question. (June 25, 1948, ch. 646, § 1, 62 Stat. 948.)

Federal Rules of Civil Procedure**Rule 44. Proof of official record.****(a) Authentication of Copy.**

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) Proof of Lack of Record.

A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) Other Proof.

This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

IV. Extradition

(These rules of practice of the Executive Department of North Carolina in making requisitions were adopted upon the recommendation of the Interstate Extradition Conference.)

As to the Uniform Criminal Extradition Act, see §§ 15-55 to 15-84.

The application for the requisition must be made by the district or prosecuting attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney:

(a) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in Roman capital letters, for example: JOHN DOE.

(b) That in his opinion the ends of public justice require that the alleged criminal be brought to this state for trial at the public expense.

(c) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(d) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(e) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(f) If the fugitive is known to be under either civil or criminal arrest in the state or territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(g) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceeding shall not be used for any of said objects.

(h) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(i) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretense, embezzlement, or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purposes, and will not directly nor indirectly use the same for any of said purposes, shall be required or a sufficient reason be given for the absence of such affidavit.

APPENDIX IV—EXTRADITION

2. Proof or affidavit of facts and circumstances satisfying the executive that the alleged criminal has fled from the justices of the state, and is in the state on whose executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the state where the alleged crime was committed at the time of the commission thereof, and is found in the same state upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate (a notary public is not a magistrate within the meaning of the statutes), and that a warrant has been issued and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon application.

5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrant must be duly certified.

6. Upon the renewal of an application, for example, on the ground that the fugitive has fled to another state, not having been found in the state on which the first was granted, new or certified copies of papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence, upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

FORM OF REQUISITION

To His Excellency, the Governor of

The Annexed Papers, Duly authenticated in accordance with the law show that by in the county of State of North Carolina, stands charged with which is a crime against the laws of this State; and it appearing that the said has fled from justice and has taken refuge in the State of

Therefore, In pursuance of justice, and by authority of the Constitution and Laws of the United States I Governor of the State of North Carolina hereby require that the said be apprehended and delivered to who is hereby authorized and commissioned as the agent of this State to receive said fugitive and convey him to the county of, in the State of North Carolina, to be dealt with according to law.

In Witness Whereof, I have hereunto set my hand and caused to be fixed the Great Seal of the State.

Done at our City of Raleigh, this day of in the year of our Lord one thousand nine hundred and, and in the one hundred and year of our American Independence

[L. S.]

By the Governor:

APPENDIX IV—EXTRADITION

FORM OF WARRANT

THE GOVERNOR OF NORTH CAROLINA

To the Sheriff or other Officer of the State of North Carolina to whom these Presents shall come—Greeting:

Whereas, it has been represented to me by the Governor of that stand charged with the crime of which he certifies to be a crime under the laws of said State, committed in the county of in the said State, and has taken refuge in the State of North Carolina, and the said Governor of having, in pursuance of the Constitution and Laws of the United States, demanded of me that I shall cause the said to be arrested and delivered to who is duly authorized to receive into his custody and convey back to the said state of

And, Whereas, That said representation and demand is accompanied by whereby the said shown to have been duly charged with the said crime, and with having fled from the said State of, and taken refuge in the State of North Carolina, which duly certified by the said Governor of to be authentic and duly authenticated;

Therefore, You are hereby required to arrest and secure the said wherever may be found within the State of North Carolina, and afford such opportunity to sue out a writ of Habeas Corpus as is prescribed by the laws of this State, and to thereafter deliver into the custody of the said to be taken back to the said State, from which fled, pursuant to the said requisition; and also to return this warrant and make return to the Governor of North Carolina, within thirty days from the date hereof, of all your proceedings had thereunder, and of all the facts and circumstances relating thereto.

In witness whereof, I have hereunto set my hand and caused to be affixed the Great Seal of the State.

Done at our City of Raleigh, this day of, in the year of our Lord one thousand nine hundred and, and in the one hundred and year of our American Independence.

[L. S.]

By the Governor:

AGENT'S AUTHORITY

To All Men to whom these Presents May Come—Greeting:

Know All Men, That I, Governor of the State of North Carolina, by virtue of authority in me vested by the Constitution and Laws of the United States, and the Constitution and Laws of North Carolina passed in pursuance thereof, do hereby authorize, commission and appoint Agent of the State of North Carolina to convey fugitive from justice from the said State of North Carolina, to the county of therein, to be dealt with according to law.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State to be affixed.

Done at our City of Raleigh, this day of in the year of our Lord one thousand nine hundred and, and in the one hundred and year of our American Independence.

[L. S.]

By the Governor:

V. Naturalization

(Title 8, U. S. Code, "Aliens and Nationality," Chapter 11, Subchapter III.)

Chapter 11.

Nationality.

Subchapter III. Nationality and Naturalization

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SUBCHAPTER III. NATIONALITY AND NATURALIZATION

PART I. NATIONALITY AT BIRTH AND COLLECTIVE NATURALIZATION

§ 1401. Nationals and citizens of United States at birth.

- (a) The following shall be nationals and citizens of the United States at birth:
- (1) a person born in the United States, and subject to the jurisdiction thereof;
 - (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;
 - (3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;
 - (4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;
 - (5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;
 - (6) a person of unknown parentage found in the United States while under

the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: Provided, however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended. (June 27, 1952, ch. 477, title III, ch. 1, § 301, 66 Stat. 235.)

§ 1402. Persons born in Puerto Rico on or after April 11, 1899.

All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth. (June 27, 1952, ch. 477, title III, ch. 1, § 302, 66 Stat. 236.)

§ 1403. Persons born in the Canal Zone or Republic of Panama on or after February 26, 1904.

(a) Any person born in the Canal Zone on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States, is declared to be a citizen of the United States.

(b) Any person born in the Republic of Panama on or after February 26, 1904, and whether before or after the effective date of this chapter, whose father or mother or both at the time of the birth of such person was or is a citizen of the United States employed by the Government of the United States or by the Panama Railroad Company, or its successor in title, is declared to be a citizen of the United States. (June 27, 1952, ch. 477, title III, ch. 1, § 303, 66 Stat. 236.)

§ 1404. Persons born in Alaska on or after March 30, 1867.

A person born in Alaska on or after March 30, 1867, except a noncitizen Indian, is a citizen of the United States at birth. A noncitizen Indian born in Alaska on or after March 30, 1867, and prior to June 2, 1924, is declared to be a citizen of the United States as of June 2, 1924. An Indian born in Alaska on or after June 2, 1924, is a citizen of the United States at birth. (June 27, 1952, ch. 477, title III, ch. 1, § 304, 66 Stat. 236.)

§ 1405. Persons born in Hawaii.

A person born in Hawaii on or after August 12, 1898, and before April 30, 1900, is declared to be a citizen of the United States as of April 30, 1900. A person born in Hawaii on or after April 30, 1900, is a citizen of the United States at birth. A person who was a citizen of the Republic of Hawaii on August 12, 1898, is declared to be a citizen of the United States as of April 30, 1900. (June 27, 1952, ch. 477, title III, ch. 1, § 305, 66 Stat. 237.)

§ 1406. Persons living in and born in the Virgin Islands.

(a) The following persons and their children born subsequent to January 17, 1917, and prior to February 25, 1927, are declared to be citizens of the United States as of February 25, 1927:

(1) All former Danish citizens who, on January 17, 1917, resided in the Virgin Islands of the United States, and were residing in those islands or in the United States or Puerto Rico on February 25, 1927, and who did not make the declaration required to preserve their Danish citizenship by article 6 of the treaty entered into on August 4, 1916, between the United States and Denmark, or who, having made such a declaration have heretofore renounced or may hereafter renounce it by a declaration before a court of record;

(2) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in those islands, and were residing in those islands or in the United States or Puerto Rico on February 25, 1927, and who were not on February 25, 1927, citizens or subjects of any foreign country;

(3) All natives of the Virgin Islands of the United States who, on January 17, 1917, resided in the United States, and were residing in those islands on February 25, 1927, and who were not on February 25, 1927, citizens or subjects of any foreign country; and

(4) All natives of the Virgin Islands of the United States who, on June 28, 1932, were residing in continental United States, the Virgin Islands of the United States, Puerto Rico, the Canal Zone, or any other insular possession or territory of the United States, and who, on June 28, 1932, were not citizens or subjects of any foreign country, regardless of their place of residence on January 17, 1917.

(b) All persons born in the Virgin Islands of the United States on or after January 17, 1917, and prior to February 25, 1927, and subject to the jurisdiction of the United States are declared to be citizens of the United States as of February 25, 1927; and all persons born in those islands on or after February 25, 1927, and subject to the jurisdiction of the United States, are declared to be citizens of the United States at birth. (June 27, 1952, ch. 477, title III, ch. 1, § 306, 66 Stat. 237.)

§ 1407. Persons living in and born in Guam.

(a) The following persons, and their children born after April 11, 1899, are

declared to be citizens of the United States as of August 1, 1950, if they were residing on August 1, 1950, on the island of Guam or other territory over which the United States exercises rights of sovereignty:

(1) All inhabitants of the island of Guam on April 11, 1899, including those temporarily absent from the island on that date, who were Spanish subjects, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality; and

(2) All persons born in the island of Guam who resided in Guam on April 11, 1899, including those temporarily absent from the island on that date, who after that date continued to reside in Guam or other territory over which the United States exercises sovereignty, and who have taken no affirmative steps to preserve or acquire foreign nationality.

(b) All persons born in the island of Guam on or after April 11, 1899 (whether before or after August 1, 1950) subject to the jurisdiction of the United States, are declared to be citizens of the United States: *Provided*, That in the case of any person born after August 1, 1950, he has taken no affirmative steps to preserve or acquire foreign nationality.

(c) Any person hereinbefore described who is a citizen or national of a country other than the United States and desires to retain his present political status shall have made, prior to August 1, 1952, a declaration under oath of such desire, said declaration to be in form and executed in the manner prescribed by regulations. From and after the making of such a declaration any such person shall be held not to be a national of the United States by virtue of this chapter. (June 27, 1952, ch. 477, title III, ch. 1, § 307, 66 Stat. 237.)

§ 1408. Nationals but not citizens of the United States at birth.

Unless otherwise provided in section 1401 of this title, the following shall be nationals, but not citizens, of the United States at birth:

(1) A person born in an outlying possession of the United States on or after the date of formal acquisition of such possession;

(2) A person born outside the United States and its outlying possessions of parents both of whom are nationals, but not citizens, of the United States, and have had a residence in the United States, or one of its outlying possessions prior to the birth of such person; and

(3) A person of unknown parentage found in an outlying possession of the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in such outlying possession. (June 27, 1952, ch. 477, title III, ch. 1, § 308, 66 Stat. 238.)

§ 1409. Children born out of wedlock.

(a) The provisions of paragraphs (3)—(5) and (7) of section 1401 (a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401 (a) (7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the

date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year. (June 27, 1952, ch. 477, title III, ch. 1, § 309, 66 Stat. 238.)

PART II.—NATIONALITY THROUGH NATURALIZATION

§ 1421. Jurisdiction to naturalize.

(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is conferred upon the following specified courts: District courts of the United States now existing, or which may hereafter be established by Congress in any State, District Courts of the United States for the Territories of Hawaii and Alaska, and for the District of Columbia and for Puerto Rico, the District Court of the Virgin Islands of the United States, and the District Court of Guam; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited. The jurisdiction of all the courts herein specified to naturalized persons shall extend only to such persons resident within the respective jurisdiction of such courts, except as otherwise specifically provided in this subchapter.

(b) A person who petitions for naturalization in any State court having naturalization jurisdiction may petition within the State judicial district or State judicial circuit in which he resides, whether or not he resides within the county in which the petition for naturalization is filed.

(c) The courts herein specified, upon request of the clerks of such courts, shall be furnished from time to time by the Attorney General with such blank forms as may be required in naturalization proceedings.

(d) A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter, and not otherwise. (June 27, 1952, ch. 477, title III, ch. 2, § 310, 66 Stat. 239.)

§ 1422. Eligibility for naturalization.

The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married. Notwithstanding section 405 (b) of this Act, this section shall apply to any person whose petition for naturalization shall hereafter be filed, or shall have been pending on the effective date of this chapter. (June 27, 1952, ch. 477, title III, ch. 2, § 311, 66 Stat. 239.)

§ 1423. Requirements as to understanding the English language, history, principles and form of government of the United States.

No person except as otherwise provided in this subchapter shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate—

(1) an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language: *Provided*, That this requirement shall not apply to any person physically unable to comply therewith, if otherwise qualified to be naturalized, or to any person who, on the effective date of this chapter, is over fifty years of age and has been living in the United States for periods totaling at least twenty years: *Provided* further, That the requirements of this section relating to ability to read and write shall be met if the applicant can read or write simple words and phrases to the end that a reasonable test of his literacy shall be made and that no extraordinary or unreasonable condition shall be imposed upon the applicant; and

(2) a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 312, 66 Stat. 239.)

§ 1424. Prohibition upon the naturalization of persons opposed to government or law, or who favor totalitarian forms of government.

(a) Notwithstanding the provisions of section 405 (b) of this act, no person shall hereafter be naturalized as a citizen of the United States—

(1) who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches, opposition to all organized government; or

(2) who is a member of or affiliated with (A) the Communist Party of the United States; (B) any other totalitarian party of the United States; (C) the Communist Political Association; (D) the Communist or other totalitarian party or any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (E) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; (F) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 786 of Title 50; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-front organization during the time it is registered or required to be registered under section 786 of Title 50, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization; or

(3) who, although not within any of the other provisions of this section, advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who is a member of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under authority of such organization or paid for by the funds of such organization; or

(4) who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches (A) the overthrow by force or violence or

other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or

(5) who writes or publishes or causes to be written or published, or who knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (A) the overthrow by force, violence, or other unconstitutional means of the Government of the United States or of all forms of law; or (B) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (C) the unlawful damage, injury, or destruction of property; or (D) sabotage; or (E) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship; or

(6) who is a member of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (5) of this subsection.

(b) The provisions of this section or of any other section of this title shall not be construed as declaring that any of the organizations referred to in this section or in any other section of this title do not advocate the overthrow of the Government of the United States by force, violence, or other unconstitutional means.

(c) The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes.

(d) Any person who is within any of the classes described in subsection (a) solely because of past membership in, or past affiliation with, a party or organization may be naturalized without regard to the provisions of subsection (c) of this section if such person establishes that such membership or affiliation is or was involuntary, or occurred and terminated prior to the attainment by such alien of the age of sixteen years, or that such membership or affiliation is or was by operation of law, or was for purposes of obtaining employment, food rations, or other essentials of living and where necessary for such purposes. (June 27, 1952, ch. 477, title III, ch. 2, § 313, 66 Stat. 240.)

§ 1425. Ineligibility to naturalization of deserters from the armed forces.

A person who, at any time during which the United States has been or shall be at war, deserted or shall desert the military, air, or naval forces of the United States, or who, having been duly enrolled, departed, or shall depart from the jurisdiction of the district in which enrolled, or who, whether or not having been duly enrolled, went or shall go beyond the limits of the United States, with intent to

avoid any draft into the military, air, or naval service, lawfully ordered, shall, upon conviction thereof by a court martial or a court of competent jurisdiction, be permanently ineligible to become a citizen of the United States; and such deserters and evaders shall be forever incapable of holding any office of trust or of profit under the United States, or of exercising any rights of citizens thereof. (June 27, 1952, ch. 477, title III, ch. 3, § 314, 66 Stat. 241.)

§ 1426. Citizenship denied alien relieved of service in armed forces because of alienage; conclusiveness of records.

(a) Notwithstanding the provisions of section 405 (b) of this Act, any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien. (June 27, 1952, ch. 477, title III, ch. 2, § 315, 66 Stat. 242.)

§ 1427. Requirements of naturalization.

(a) Residence.

No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the period referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

(b) Absences.

Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the petition for naturalization, or during the period between the date of filing the petition and the date of final hearing, shall break the continuity of such residence, unless the petitioner shall establish to the satisfaction of the court that he did not in fact abandon his residence in the United States during such period.

Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the petition for naturalization) shall break the continuity of such residence, except that in the case of a person who has been physically present and residing in the United States, after being lawfully admitted for permanent residence, for an uninterrupted period of at least one year, and who thereafter is employed by or under contract with the Government of the United States or an American institution of research recognized as such by the Attorney General, or is employed by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof more than 50 per centum of whose stock is owned by an American firm or corporation, or is em-

ployed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence, no period of absence from the United States shall break the continuity of residence if —

(1) prior to the beginning of such period of employment (whether such period begins before or after his departure from the United States), but prior to the expiration of one year of continuous absence from the United States, the person has established to the satisfaction of the Attorney General that his absence from the United States for such period is to be on behalf of such Government, or for the purpose of carrying on scientific research on behalf of such institution, or to be engaged in the development of such foreign trade and commerce or whose residence abroad is necessary to the protection of the property rights in such countries in such firm or corporation, or to be employed by a public international organization of which the United States is a member by treaty or statute and by which the alien was not employed until after being lawfully admitted for permanent residence; and

(2) such person proves to the satisfaction of the court that his absence from the United States for such period has been for such purpose.

(c) Physical Presence.

The granting of the benefits of subsection (b) of this section shall not relieve the petitioner from the requirement of physical presence within the United States for the period specified in subsection (a) of this section, except in the case of those persons who are employed by, or under contract with, the Government of the United States. In the case of a person employed by or under contract with Central Intelligence Agency, the requirement in subsection (b) of this section of an uninterrupted period of at least one year of physical presence in the United States may be complied with by such person at any time prior to filing a petition for naturalization.

(d) Moral Character.

No finding by the Attorney General that the petitioner is not deportable shall be accepted as conclusive evidence of good moral character.

(e) Same; Determination.

In determining whether the petitioner has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.

(f) Restrictions.

Naturalization shall not be granted to a petitioner by a naturalization court while registration proceedings or proceedings to require registration against an organization of which the petitioner is a member or affiliate are pending under section 792 or 793 of Title 50. (June 27, 1952, ch. 477, title III, § 316, 66 Stat. 242.)

§ 1428. Temporary absence of persons performing religious duties.

Any person who is authorized to perform the ministerial or priestly functions of a religious denomination having a bona fide organization within the United States, or any person who is engaged solely by a religious denomination or by an interdenominational mission organization having a bona fide organization within the United States as a missionary, brother, nun, or sister, who (1) has been lawfully admitted to the United States for permanent residence, (2) has at any time thereafter and before filing a petition for naturalization been physically present

and residing within the United States for an uninterrupted period of at least one year, and (3) has heretofore been or may hereafter be absent temporarily from the United States in connection with or for the purpose of performing the ministerial or priestly functions of such religious denomination, or serving as a missionary, brother, nun, or sister, shall be considered as being physically present and residing in the United States for the purpose of naturalization within the meaning of section 1426 (a) of this title, notwithstanding any such absence from the United States, if he shall in all other respects comply with the requirements of the naturalization law. Such person shall prove to the satisfaction of the Attorney General and the naturalization court that his absence from the United States has been solely for the purpose of performing the ministerial or priestly functions of such religious denomination, or of serving as a missionary, brother, nun, or sister. (June 27, 1952, ch. 477, title III, ch. 2, § 317, 66 Stat. 243.)

§ 1429. Prerequisite to naturalization; burden of proof.

Except as otherwise provided in this subchapter, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigrant visa, if any, or of other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry, in the custody of the Service. Notwithstanding the provisions of section 405 (b) of this Act, and except as provided in sections 1438 and 1439 of this title no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act: *Provided*, That the findings of the Attorney General in terminating deportation proceedings or in suspending the deportation of an alien pursuant to the provisions of this chapter, shall not be deemed binding in any way upon the naturalization court with respect to the question of whether such person has established his eligibility for naturalization as required by this subchapter. (June 27, 1952, ch. 477, title III, ch. 2, § 318, 66 Stat. 244.)

§ 1430. Married persons.

(a) Any person whose spouse is a citizen of the United States may be naturalized upon compliance with all the requirements of this subchapter except the provisions of paragraph (1) of section 1427 (a) of this title if such person immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years, and during the three years immediately preceding the date of filing his petition has been living in marital union with the citizen spouse, who has been a United States citizen during all of such period, and has been physically present in the United States for periods totaling at least half of that time and has resided within the State in which he filed his petition for at least six months.

(b) Any person, (1) whose spouse is (A) a citizen of the United States, (B) in the employment of the Government of the United States, or of an American institution of research recognized as such by the Attorney General, or of an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States, or a subsidiary thereof, or of

a public international organization in which the United States participates by treaty or statute, and (C) regularly stationed abroad in such employment, and (2) who is in the United States at the time of naturalization, and (3) who declares before the naturalization court in good faith an intention to take up residence within the United States immediately upon the termination of such employment abroad of the citizen spouse, may be naturalized upon compliance with all the requirements of the naturalization laws, except that no prior residence or specified period of physical presence within the United States or within the jurisdiction of the naturalization court or proof thereof shall be required. (June 27, 1952, ch. 477, title III, ch. 2, § 319, 66 Stat. 214.)

§ 1431. Children born outside United States of one alien and one citizen parent; conditions for automatic citizenship.

(a) A child born outside of the United States, one of whose parents at the time of the child's birth was an alien and the other of whose parents then was and never thereafter ceased to be a citizen of the United States, shall, if such alien parent is naturalized, become a citizen of the United States, when—

(1) such naturalization takes place while such child is under the age of sixteen years; and

(2) such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of naturalization or thereafter and begins to reside permanently in the United States while under the age of sixteen years.

(b) Subsection (a) of this section shall not apply to an adopted child. (June 27, 1952, ch. 477, title III, ch. 2, § 320, 66 Stat. 245.)

§ 1432. Children born outside of United States of alien parents; conditions for automatic citizenship.

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of sixteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of sixteen years.

(b) Subsection (a) of this section shall not apply to an adopted child. (June 27, 1952, ch. 477, title III, ch. 2, § 321, 66 Stat. 245.)

§ 1433. Children born outside United States; naturalization on petition of citizen parent; requirements and exemptions.

(a) A child born outside of the United States, one or both of whose parents is at the time of petitioning for the naturalization of the child, a citizen of the United States, either by birth or naturalization, may be naturalized if under the age of eighteen years and not otherwise disqualified from becoming a citizen by reason of sections 1424—1426 or 1429 of this title, and if residing permanently in the United States, with the citizen parent, pursuant to a lawful admission for permanent residence, on the petition of such citizen parent, upon compliance with all the provisions of this subchapter, except that no particular period of residence or physical presence in the United States shall be required. If the child is of tender years he may be presumed to be of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States.

(b) Subsection (a) of this section shall not apply to an adopted child. (June 27, 1952, ch. 477, title III, ch. 2, § 322, 66 Stat. 246.)

§ 1434. Children adopted by citizens.

(a) An adopted child may, if not otherwise disqualified from becoming a citizen by reason of sections 1424—1426 or 1429 of this title, be naturalized before reaching the age of eighteen years upon the petition of the adoptive parent or parents, upon compliance with all the provisions of this subchapter, if the adoptive parent or parents are citizens of the United States, and the child—

- (1) was lawfully admitted to the United States for permanent residence;
- (2) was adopted before attaining the age of sixteen years; and
- (3) subsequent to such adoption has resided continuously in the United States in legal custody of the adoptive parent or parents for two years prior to the date of filing such petition.

(b) In lieu of the residence and physical presence requirements of section 1427 (a) of this title such child shall be required to establish only two years' residence and one year's physical presence in the United States during the two-year period immediately preceding the filing of the petition. If the child is of tender years he may be presumed to be of good moral character, attached to the principles of the Constitution, and well disposed to the good order and happiness of the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 323, 66 Stat. 246.)

§ 1435. Former citizens regaining citizenship.

(a) Requirements.

Any person formerly a citizen of the United States who (1) prior to September 22, 1922, lost United States citizenship by marriage to an alien, or by the loss of United States citizenship of such person's spouse, or (2) on or after September 22, 1922, lost United States citizenship by marriage to an alien ineligible to citizenship, may if no other nationality was acquired by an affirmative act of such person other than by marriage be naturalized upon compliance with all requirements of this subchapter, except—

- (1) no period of residence or specified period of physical presence within the United States or within the State where the petition is filed shall be required;
- (2) the petition need not set forth that it is the intention of the petitioner to reside permanently within the United States;

(3) the petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

(4) the petition may be heard at any time after filing if there is attached to the petition at the time of filing a certificate from a naturalization examiner stating that the petitioner and the witnesses have appeared before such examiner for examination.

Such person, or any person who was naturalized in accordance with the provisions of section 317 (a) of the Nationality Act of 1940, shall have, from and after her naturalization, the status of a native-born or naturalized citizen of the United States, whichever status existed in the case of such person prior to the loss of citizenship: *Provided*, That nothing contained herein or in any other provision of law shall be construed as conferring United States citizenship retroactively upon such person, or upon any person who was naturalized in accordance with the provisions of section 317 (a) of the Nationality Act of 1940, during any period in which such person was not a citizen.

(b) Additional Requirements.

No person who is otherwise eligible for naturalization in accordance with the provisions of subsection (a) of this section shall be naturalized unless such person shall establish to the satisfaction of the naturalization court that she has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States for a period of not less than five years immediately preceding the date of filing a petition for naturalization and up to the time of admission to citizenship, and, unless she has resided continuously in the United States since the date of her marriage, has been lawfully admitted for permanent residence prior to filing her petition for naturalization.

(c) Oath of Allegiance.

(1) A woman who was a citizen of the United States at birth and (A) who has or is believed to have lost her United States citizenship solely by reason of her marriage prior to September 22, 1922, to an alien, or by her marriage on or after such date to an alien ineligible to citizenship, (B) whose marriage to such alien shall have terminated subsequent to January 12, 1941, and (C) who has not acquired by an affirmative act other than by marriage any other nationality, shall, from and after taking the oath of allegiance required by section 1448 of this title, be a citizen of the United States and have the status of a citizen of the United States by birth, without filing a petition for naturalization, and notwithstanding any of the other provisions of this subchapter except the provisions of section 1424 of this title: *Provided*, That nothing contained herein or in any other provision of law shall be construed as conferring United States citizenship retroactively upon such person, or upon any person who was naturalized in accordance with the provisions of section 317 (b) of the Nationality Act of 1940, during any period in which such person was not a citizen.

(2) Such oath of allegiance may be taken abroad before a diplomatic or consular officer of the United States, or in the United States before the judge or clerk of a naturalization court.

(3) Such oath of allegiance shall be entered in the records of the appropriate embassy, legation, consulate, or naturalization court, and, upon demand, a certified copy of the proceedings, including a copy of the oath administered, under the seal of the embassy, legation, consulate, or naturalization court, shall be delivered to such woman at a cost not exceeding \$5, which certified copy shall be evidence of the facts stated therein before any court of record or judicial tribunal and in any department or agency of the Government of the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 324, 66 Stat. 246.)

§ 1436. Nationals but not citizens; residence within outlying possessions.

A person not a citizen who owes permanent allegiance to the United States, and who is otherwise qualified, may, if he becomes a resident of any State, be naturalized upon compliance with the applicable requirements of this subchapter, except that in petitions for naturalization filed under the provisions of this section residence and physical presence within the United States within the meaning of this subchapter shall include residence and physical presence within any of the outlying possessions of the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 325, 66 Stat. 248.)

§ 1437. Resident Philippine citizens excepted from certain requirements.

Any person who (1) was a citizen of the Commonwealth of the Philippines on July 2, 1946, (2) entered the United States prior to May 1, 1934, and (3) has, since such entry, resided continuously in the United States shall be regarded as having been lawfully admitted to the United States for permanent residence for the purpose of petitioning for naturalization under this subchapter. (June 27, 1952, ch. 477, title III, ch. 2, § 326, 66 Stat. 248.)

§ 1438. Former citizens losing citizenship by entering armed forces of foreign countries during World War II.

(a) Requirements; Oath; Certified Copies of Oath.

Any person who, (1) during World War II and while a citizen of the United States, served in the military, air, or naval forces of any country at war with a country with which the United States was at war after December 7, 1941, and before September 2, 1945, and (2) has lost United States citizenship by reason of entering or serving in such forces, or taking an oath or obligation for the purpose of entering such forces, may, upon compliance with all the provisions of subchapter III of this chapter, except section 1427 (a) of this title, and except as otherwise provided in subsection (b) of this section, be naturalized by taking before any naturalization court specified in section 1421 (a) of this title the oath required by section 1448 of this title. Certified copies of such oath shall be sent by such court to the Department of State and to the Department of Justice.

(b) Exceptions.

No person shall be naturalized under subsection (a) of this section unless he—

(1) is, and has been for a period of at least five years immediately preceding taking the oath required in subsection (a) of this section, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States; and

(2) has been lawfully admitted to the United States for permanent residence and intends to reside permanently in the United States.

(c) Status.

Any person naturalized in accordance with the provisions of this section, or any person who was naturalized in accordance with the provisions of section 323 of the Nationality Act of 1940, shall have, from and after such naturalization, the status of a native-born or naturalized citizen of the United States, whichever status existed in the case of such person prior to the loss of citizenship: *Provided*, That nothing contained herein, or in any other provision of law, shall be construed as conferring United States citizenship retroactively upon any such person during any period in which such person was not a citizen.

(d) Span of World War II.

For the purposes of this section, World War II shall be deemed to have begun on September 1, 1939, and to have terminated on September 2, 1945.

(e) Inapplicability to Certain Persons.

This section shall not apply to any person who during World War II served in the armed forces of a country while such country was at war with the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 327, 66 Stat. 248.)

§ 1439. Naturalization through service in the armed forces.

(a) Requirements.

A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period, if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

(b) Exceptions.

A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 1447 (c) of this title, such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

(c) When Service Not Continuous.

In the case such petitioner's service was not continuous, the petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

(d) Residence Requirements.

The petitioner shall comply with the requirements of section 1427 (a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

(e) Moral Character.

Any such period or periods of service under honorable conditions, and good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during such service, shall be proved by duly authenticated copies of the records of the executive departments having custody of the records of such service, and such authenticated copies of records shall be accepted in lieu of compliance with the provisions of section 1427 (a) of this title. (June 27, 1952, ch. 477, title III, ch. 2, § 328, 66 Stat. 249.)

§ 1440. Naturalization through active-duty service in the Armed Forces during World War I or World War II.

(a) Requirements.

Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person shall have been in the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. The executive department under which such person served shall determine whether persons have served honorably in an active-duty status, and whether separation from such service was under honorable conditions: Provided, however, that no person who is or has been separated from such service on account of alienage, or who was a conscientious objector who performed no military, air, or naval duty whatever or refused to wear the uniform, shall be regarded as having served honorably or having been separated under honorable conditions for the purposes of this section. No period of service in the Armed Forces shall be made the basis of a petition for naturalization under this section if the applicant has previously been naturalized on the basis of the same period of service.

(b) Exceptions.

A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) he may be naturalized regardless of age, and notwithstanding the provisions of section 1442 of this title;

(2) no period of residence or specified period of physical presence within the United States or any State shall be required;

(3) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner;

(4) service in the military, air, or naval forces of the United States shall be proved by a duly authenticated certification from the executive department under which the petitioner served or is serving, which shall state whether the petitioner served honorably in an active-duty status during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and was separated from such service under honorable conditions; and

(5) notwithstanding section 1447 (c) of this title, the petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service.

(c) Revocation.

Citizenship granted pursuant to this section may be revoked in accordance with section 1451 of this title if at any time subsequent to naturalization the person is separated from the military, air, or naval forces under other than honorable conditions, and such ground for revocation shall be in addition to any other provided by law. The fact that the naturalized person was separated from the service under other than honorable conditions shall be proved by a duly authenticated certification from the executive department under which the person was serving at the time of separation.

(d) Applicability of Petitions Filed Prior to January 1, 1947.

The eligibility for naturalization of any person who filed a petition for naturalization prior to January 1, 1947, under section 701 of the Nationality Act of 1940, as amended (56 Stat. 182, 58 Stat. 886, 59 Stat. 658), and which is still pending on the effective date of this chapter, shall be determined in accordance with the provisions of this section. (June 27, 1952, ch. 477, title III, ch. 2, § 329, 66 Stat. 250.)

§ 1441. Constructive residence through service on certain United States vessels.

(a) (1) Any periods of time during all of which a person who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the Armed Forces of the United States, (A) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (B) on board a vessel whose home port is in the United States, and (i) which is registered under the laws of the United States, or (ii) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of any of the several States of the United States, shall be deemed residence and physical presence within the United States within the meaning of section 1427 (a) of this title, if such service occurred within five years immediately preceding the date such person shall file a petition for naturalization. Service on vessels described in clause (A) of this subsection shall be proved by duly authenticated copies of the records of the executive departments or agency having custody of the records of such service. Service on vessels described in clause (B) of this subsection may be proved by certificates from the masters of such vessels.

(2) For the purposes of this subsection, any periods of time prior to September 23, 1950, during all of which any person had served honorably or with good conduct for an aggregate period of five years on any vessel described in section 325 (a) of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, shall be deemed residence and physical presence within the United States within the meaning of section 1427 (a) of this title, if such petition is filed within one year from the effective date of this chapter. Notwithstanding the provisions of section 1429 of this title, a person entitled to claim the exemptions contained in this paragraph shall not be required to establish a lawful admission for permanent residence.

(3) For the purposes of this subsection, any periods of time prior to September 23, 1950, during all of which any person not within the provisions of paragraph (2) had, prior to September 23, 1950, served honorably or with good conduct on any vessel described in section 325 (a) of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and was so serving on September 23, 1950, shall be deemed residence and physical presence within the United States within the meaning of section 1427 (a) of this title, if such person at any time prior to filing his petition for naturalization shall have been lawfully admitted to the United States for permanent residence, and if such petition is filed on or before September 23, 1955.

(b) Any person who was excepted from certain requirements of the naturalization laws under section 325 of the Nationality Act of 1940 prior to its amendment by the Act of September 23, 1950, and had filed a petition for naturalization under section 325 of the Nationality Act of 1940, may, if such petition was pending on September 23, 1950, and is still pending on the effective date of this chapter, be naturalized upon compliance with the applicable provisions of the naturalization laws in effect upon the date such petition was filed: Provided, that any such person shall be subject to the provisions of section 1424 of this title and to those provisions of section 1429 of this title which relate to the prohibition against the naturalization of a person against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act, or which relate to the prohibition against the final hearing on a petition for naturalization if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this chapter or any other Act. (June 27, 1952, ch. 477, title III, ch. 2, § 330, 66 Stat. 251.)

§ 1442. Alien enemies.

(a) Naturalization under Specified Conditions.

An alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war may, after his loyalty has been fully established upon investigation by the Attorney General, be naturalized as a citizen of the United States if such alien's petition for naturalization shall be pending at the beginning of the state of war and the petitioner is otherwise entitled to admission to citizenship.

(b) Procedure.

An alien embraced within this section shall not have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the Attorney General to be represented at the hearing, and the Attorney General's objection to such final hearing shall cause the petition to be continued from time to time for so long as the Attorney General may require.

(c) Exceptions from Classification.

The Attorney General may, in his discretion, upon investigation fully establishing the loyalty of any alien enemy who did not have a petition for naturalization pending at the beginning of the state of war, except such alien enemy from the classification of alien enemy for the purposes of this subchapter, and thereupon such alien shall have the privilege of filing a petition for naturalization.

(d) Effect and Cessation of Hostilities.

An alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war shall cease to be an alien enemy within the meaning of this section upon the determination by proclamation of the President, or by concurrent resolution of the Congress, that hostilities between the United States and such country, state, or sovereignty have ended. Notwithstanding the provisions of section 405 (b) of this Act, this subsection shall also apply to the case of any such alien whose petition for naturalization was filed prior to the effective date of this chapter and which is still pending on that date.

(e) Apprehension and Removal.

Nothing contained herein shall be taken or construed to interfere with or prevent the apprehension and removal, consistent with law, of any alien enemy at any time prior to the actual naturalization of such alien. (June 27, 1952, ch. 477, title III, ch. 2, § 331, 66 Stat. 252.)

§ 1443. Administration.**(a) Rules and Regulations Governing Examination of Petitioners; Limitation on Examination.**

The Attorney General shall make such rules and regulations as may be necessary to carry into effect the provisions of this Part and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination, in the discretion of the Attorney General, and under such rules and regulations as may be prescribed by him, may be conducted before or after the applicant has filed his petition for naturalization. Such examination shall be limited to inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write, and speak English, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.

(b) Instruction in Citizenship.

The Attorney General is authorized to promote instruction and training in citizenship responsibilities of applicants for naturalization including the sending of names of candidates for naturalization to the public schools, preparing and distributing citizenship textbooks to such candidates as are receiving instruction in preparation for citizenship within or under the supervision of the public schools, preparing and distributing monthly an immigration and naturalization bulletin and securing the aid of and cooperating with official State and national organizations, including those concerned with vocational education.

(c) Prescription of Forms.

The Attorney General shall prescribe and furnish such forms as may be required to give effect to the provisions of this Part, and only such forms as may be so provided shall be legal. All certificates of naturalization and of citizenship shall be printed on safety paper and shall be consecutively numbered in separate series.

(d) Administration of Oaths and Depositions.

Employees of the Service may be designated by the Attorney General to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Attorney General may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes.

(e) Issuance of Certificate of Naturalization or Citizenship.

A certificate of naturalization or of citizenship issued by the Attorney General under the authority of this subchapter shall have the same effect in all courts, tribunals, and public offices of the United States, at home and abroad, of the District of Columbia, and of each State, Territory, and outlying possession of the United States, as a certificate of naturalization or of citizenship issued by a court having naturalization jurisdiction.

(f) Copies of Records.

Certifications and certified copies of all papers, documents, certificates, and records required or authorized to be issued, used, filed, recorded, or kept under any and all provisions of this chapter shall be admitted in evidence equally with the originals in any and all cases and proceedings under this chapter and in all cases and proceedings in which the originals thereof might be admissible as evidence.

(g) Furnished Quarters for Photographic Studios.

The officers in charge of property owned or leased by the Government are authorized, upon the recommendation of the Attorney General, to provide quarters, without payment of rent, in any building occupied by the Service, for a photographic studio, operated by welfare organizations without profit and solely for the benefit of persons seeking to comply with requirements under the immigration and nationality laws. Such studio shall be under the supervision of the Attorney General. (June 27, 1952, ch. 477, title III, ch. 2, § 332, 66 Stat. 252.)

§ 1444. Photographs; number.

(a) Three identical photographs of the applicant shall be signed by and furnished by each petitioner for naturalization or citizenship. One of such photographs shall be affixed by the clerk of the court to the original certificate of naturalization issued to the naturalized citizen and one to the duplicate certificate of naturalization required to be forwarded to the Service.

(b) Three identical photographs of the applicant shall be furnished by each applicant for—

(1) a record of lawful admission for permanent residence to be made under section 1259 (a) of this title;

(2) a certificate of derivative citizenship;

(3) a certificate of naturalization or of citizenship;

(4) a special certificate of naturalization;

(5) a certificate of naturalization or of citizenship, in lieu of one lost, mutilated, or destroyed;

(6) a new certificate of citizenship in the new name of any naturalized citizen who, subsequent to naturalization, has had his name changed by order of a court of competent jurisdiction or by marriage; and

(7) a declaration of intention.

One such photograph shall be affixed to each such certificate issued by the Attorney General and one shall be affixed to the copy of such certificate retained by the Service. (June 27, 1952, ch. 447, title III, ch. 2, § 333, 66 Stat. 253.)

§ 1445. Petition for naturalization.**(a) Evidence and Form; Verification.**

An applicant for naturalization shall make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing, signed by the applicant in the applicant's own handwriting if physically able to write, and duly verified by two witnesses, which petition shall be on a form prescribed by the Attorney General and shall include averments of all facts which in the opinion of the Attorney General may be material to the applicant's naturalization, and required to be proved upon the hearing of such petition.

(b) Who May File.

No person shall file a valid petition for naturalization unless (1) he shall have attained the age of eighteen years and (2) he shall have first filed an application therefor at an office of the Service in the form and manner prescribed by the Attorney General. An application for petition for naturalization by an alien shall contain an averment of lawful admission for permanent residence.

(c) When Filed.

Petitions for naturalization may be made and filed during the term time or vaca-

tion of the naturalization court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court.

(d) **Substitute Filing Place.**

If the applicant for naturalization is prevented by sickness or other disability from presenting himself in the office of the clerk to make the petition required by subsection (a) of this section, such applicant may make such petition at such other place as may be designated by the clerk of court or by such clerk's authorized deputy.

(e) **Same; Investigation into Reasons.**

Before a petition for naturalization may be made outside of the office of the clerk of the court, pursuant to subsection (d) of this section, or before a final hearing on a petition may be held or the oath of allegiance administered outside of open court, pursuant to sections 1447 (a) and 1448 (c) of this title, the court must satisfy itself that the illness or other disability is sufficiently serious to prevent appearance in the office of the clerk of court and is of a permanent nature, or of a nature which so incapacitates the person as to prevent him from personally appearing in the office of the clerk of court or in court as otherwise required by law.

(f) **Declaration of Intention.**

Any alien over eighteen years of age who is residing in the United States pursuant to a lawful admission for permanent residence may, upon an application prescribed, filed with, and approved by the Service, make and file in duplicate in the office of the clerk of court, regardless of the alien's place of residence in the United States, a signed declaration of intention to become a citizen of the United States, in such form as the Attorney General shall prescribe. Nothing in this subsection shall be construed as requiring any such alien to make and file a declaration of intention as a condition precedent to filing a petition for naturalization nor shall any such declaration of intention be regarded as conferring or having conferred upon any such alien United States citizenship or nationality or the right to United States citizenship or nationality, nor shall such declaration be regarded as evidence of such alien's lawful admission for permanent residence in any proceeding, action, or matter arising under this chapter or any other act. (June 27, 1952, ch. 477, title III, ch. 2, § 334, 66 Stat. 255.)

§ 1446. Investigation of petitioners.

(a) **Waiver.**

At any time prior to the holding of the final hearing on a petition for naturalization provided for by section 1447 (a) of this title, an employee of the Service, or of the United States designated by the Attorney General, shall conduct a personal investigation of the person petitioning for naturalization in the vicinity or vicinities in which such person has maintained his actual place of abode and in the vicinity or vicinities in which such person has been employed or has engaged in business or work for at least five years immediately preceding the filing of his petition for naturalization. The Attorney General may, in his discretion, waive a personal investigation in an individual case or in such cases or classes of cases as may be designated by him.

(b) **Conduct of Examinations; Authority of Designees; Record.**

The Attorney General shall designate employees of the Service to conduct preliminary examinations upon petitions for naturalization to any naturalization court and to make recommendations thereon to such court. For such purposes any such employee so designated is authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to administer oaths, including the oath of the petitioner for natural-

ization and the oaths of petitioner's witnesses to the petition for naturalization, and to require by subpoena the attendance and testimony of witnesses, including petitioner, before such employee so designated and the production of relevant books, papers, and documents, and to that end may invoke the aid of any court exercising naturalization jurisdiction as specified in section 1421 of this title; and any such court may, in the event of neglect or refusal to respond to a subpoena issued by any such employee so designated or refusal to testify before such employee so designated issue an order requiring such person to appear before such employee so designated, produce relevant books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. The record of the preliminary examination authorized by this subsection shall be admissible as evidence in any final hearing conducted by a naturalization court designated in section 1421 of this title.

(c) **Transmittal of Record of Preliminary Examination.**

The record of the preliminary examination upon any petition for naturalization may, in the discretion of the Attorney General be transmitted to the Attorney General and the recommendation with respect thereto of the employee designated to conduct such preliminary examination shall when made also be transmitted to the Attorney General.

(d) **Submission of Recommendations to Court.**

The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefor. In any case in which the recommendation of the Attorney General does not agree with that of the employee designated to conduct such preliminary examination, the recommendations of both such employee and the Attorney General shall be submitted to the court at the hearing upon the petition, and the officer of the Service in attendance at such hearing shall, at the request of the court, present both the views of such employee and those of the Attorney General with respect to such petition to the court. The recommendations of such employee and of the Attorney General shall be accompanied by duplicate lists containing the names of the petitioners, classified according to the character of the recommendations, and signed by such employee or the Attorney General, as the case may be. The judge to whom such recommendations are submitted shall, if he approve such recommendations, enter a written order with such exceptions as the judge may deem proper, by subscribing his name to each such list when corrected to conform to his conclusions upon such recommendations. One of each such lists shall thereafter be filed permanently of record in such court and the duplicate of each such list shall be sent by the clerk of such court to the Attorney General.

(e) **Withdrawal of Petition.**

After the petition for naturalization has been filed in the office of the clerk of court, the petitioner shall not be permitted to withdraw his petition, except with the consent of the Attorney General. In cases where the Attorney General does not consent to withdrawal of the petition, the court shall determine the petition on its merits and enter a final order accordingly. In cases where the petitioner fails to prosecute his petition, the petition shall be decided upon its merits unless the Attorney General moves that the petition be dismissed for lack of prosecution.

(f) **Affidavits.**

As to each period and place of residence in the State in which the petitioner resides at the time of filing the petition, during the entire period of at least six months immediately preceding the date of filing the petition, there shall be included in the petition for naturalization the affidavits of at least two credible wit-

nesses, citizens of the United States, stating that each has personally known the petitioner to have been a resident at such place for such period, and that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

(g) Hearing; Proof of Residence.

At the hearing on the petition, residence in the State in which the petitioner resides at the time of filing the petition, for at least six months immediately preceding the date of filing the petition, and the other qualifications required by section 1427 (a) of this title during such residence shall be proved by the oral testimony of at least two credible witnesses, citizens of the United States, in addition to the affidavits required by subsection (f) of this section to be included in the petition. At the hearing, residence and physical presence within the United States during the five-year period required by section 1427 (a) of this title, but outside the State, or within the State but prior to the six months immediately preceding the date of filing the petition, and the other qualifications required by section 1427 (a) of this title during such period at such places, shall be proved either by depositions taken in accordance with subsection (d) of section 1443 of this title, or oral testimony, of at least two such witnesses for each place of residence.

(h) Same; Satisfactory Evidence as to Good Moral Character, etc.

Notwithstanding the provisions of subsections (f) and (g) of this section, the requirements of subsection (a) of section 1427 of this title as to the petitioner's residence, good moral character, attachment to the principles of the Constitution of the United States, and disposition toward the good order and happiness of the United States may be established by any evidence satisfactory to the naturalization court in those cases under subsection (b) of section 1427 of this title in which the alien has been absent from the United States because of his employment by or contract with the Government of the United States or an American institution of research, recognized as such by the Attorney General, or employment by an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States or a subsidiary thereof, or employment by a public international organization in which the United States participates.

(i) Transfer of Petition; Transmittal of Certified Copy of Petition and Record.

(1) A petitioner for naturalization who removes from the jurisdiction of the court in which his petition for naturalization is pending may, at any time thereafter, make application to the court for transfer of the petition to a naturalization court exercising jurisdiction over the petitioner's place of residence, or to any other naturalization court if the petition was not required to be filed in a naturalization court exercising jurisdiction over the petitioner's place of residence: *Provided*, That such transfer shall not be made without the consent of the Attorney General, and of the court to which the petition is transferred.

(2) Where transfer of the petition is authorized the clerk of court in which the petition was filed shall forward a certified copy of the petition and the original record in the case to the clerk of court to which the petition is transferred, and proceedings on the petition shall thereafter continue as though the petition had originally been filed in the court to which transferred, except that the court to which the petition is transferred may in its discretion, require the production of two credible United States citizen witnesses to testify as to the petitioner's qualifications for naturalization since the date of such transfer. (June 27, 1952, ch. 477, title III, ch. 2, § 335, 66 Stat. 256.)

§ 1447. Final hearing.**(a) Open Court; Examination under Oath.**

Every final hearing upon a petition for naturalization shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the petitioner and the witnesses, except as provided in subsection (b) of this section, shall be examined under oath before the court and in the presence of the court. If the petitioner is prevented by sickness or other disability from being in open court for the final hearing upon a petition for naturalization, such final hearing may be had before a judge or judges of the court at such place as may be designated by the court.

(b) Exceptions.

The requirement of subsection (a) of this section for the examination of the petitioner and the witnesses under oath before the court and in the presence of the court shall not apply in any case where an employee designated under section 1446 (b) of this title has conducted the preliminary examination authorized by section 1446 (b) of this title; except that the court may, in its discretion, and shall, upon demand of the petitioner, require the examination of the petitioner and the witnesses under oath before the court and in the presence of the court.

(c) Waiting Period after Filing of Petition; Waiver.

Except as otherwise specifically provided in this subchapter, no final hearing shall be held on any petition for naturalization nor shall any person be naturalized nor shall any certificate of naturalization be issued by any court within a period of thirty days after the filing of the petition for naturalization. The Attorney General may waive such period in an individual case if he finds that the waiver will be in the public interest and will promote the security of the United States. Notwithstanding any other provisions of this subchapter, but except as provided in sections 1439 (b) (2) and 1440 (b) (5) of this title, in any case in which the final hearing on any petition for naturalization is scheduled to be held within sixty days preceding the holding of a general election within the territorial jurisdiction of the naturalization court, such final hearing may be held, but the petitioner shall not be permitted to take the oath required in section 1448 (a) of this title prior to the tenth day next following such general election. In any case in which the oath is not taken at the time of the final hearing, the petitioner shall not be a citizen of the United States until such oath has been taken.

(d) Appearance of Attorney General.

The Attorney General shall have the right to appear before any court in any naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of the petition concerning any matter touching or in any way affecting the petitioner's right to admission to citizenship, and shall have the right to call witnesses, including the petitioner, produce evidence, and be heard in opposition to, or in favor of, the granting of any petition in naturalization proceedings.

(e) Subpena of Witness.

The clerk of court shall, if the petitioner requests it at the time of filing the petition for naturalization, issue a subpena for the witnesses named by such petitioner to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned upon notice to the Attorney General, in such manner and at such time as the Attorney General may by regulation prescribe. If it should appear after the petition has been filed that any of the verifying witnesses thereto are not competent, and it further appears that the petitioner has acted in good faith in producing such witnesses found to be incompetent, other witnesses may be substituted in accordance with such regulations.

(f) Change of Name of Petitioner.

It shall be lawful at the time and as a part of the naturalization of any person, for the court, in its discretion, upon the bona fide prayer of the petitioner included in the petition for naturalization of such person, to make a decree changing the name of said person, and the certificate of naturalization shall be issued in accordance therewith. (June 27, 1952, ch. 477, title III, ch. 2, § 336, 66 Stat. 257.)

§ 1448. Oath of renunciation and allegiance.

(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath (1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when required by the law, or (C) to perform work of national importance under civilian direction when required by the law. Any such person shall be required to take an oath containing the substance of clauses (1)—(5) of the preceding sentence, except that a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to the bearing of arms in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of clauses (1)—(4) and clauses (5) (B) and (5) (C) of this subsection, and a person who shows by clear and convincing evidence to the satisfaction of the naturalization court that he is opposed to any type of service in the Armed Forces of the United States by reason of religious training and belief shall be required to take an oath containing the substance of said clauses (1)—(4) and clause (5) (C). The term "religious training and belief" as used in this section shall mean an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. In the case of the naturalization of a child under the provisions of section 1433 or 1434 of this title the naturalization court may waive the taking of the oath if in the opinion of the court the child is unable to understand its meaning.

(b) In case the person petitioning for naturalization has borne any hereditary title, or has been of any of the orders of nobility in any foreign state, the petitioner shall in addition to complying with the requirements of subsection (a) of this section, make under oath in open court in the court in which the petition for naturalization is made, an express renunciation of such title or order of nobility, and such renunciation shall be recorded in the court as a part of such proceedings.

(c) If the petitioner is prevented by sickness or other disability from being in open court, the oath required to be taken by subsection (a) of this section may be taken before a judge of the court at such place as may be designated by the court. (June 27, 1952, ch. 477, title III, ch. 2, § 337, 66 Stat. 258.)

§ 1449. Certificate of naturalization; contents.

A person admitted to citizenship by a naturalization court in conformity with the provisions of this subchapter shall be entitled upon such admission to receive from the clerk of such court a certificate of naturalization, which shall contain substantially the following information: Number of petition for naturalization; number of certificate of naturalization; date of naturalization; name, signature, place of residence, autographed photograph, and personal description of the

naturalized person, including age, sex, marital status, and country of former nationality; title, venue, and location of the naturalization court; statement that the court, having found that the petitioner intends to reside permanently in the United States, except in cases falling within the provisions of section 1435 (a) of this title, had complied in all respects with all of the applicable provisions of the naturalization laws of the United States, and was entitled to be admitted a citizen of the United States of America, thereupon ordered that the petitioner be admitted as a citizen of the United States of America; attestation of the clerk of the naturalization court; and seal of the court. (June 27, 1952, ch. 477, title III, ch. 2, § 338, 66 Stat. 259.)

§ 1450. Functions and duties of clerks of naturalization courts.

(a) It shall be the duty of the clerk of each and every naturalization court to forward to the Attorney General a duplicate of each petition for naturalization within thirty days after the close of the month in which such petition was filed, and to forward to the Attorney General certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of persons as may be required from time to time by the Attorney General.

(b) It shall be the duty of the clerk of each and every naturalization court to issue to any person admitted by such court to citizenship a certificate of naturalization and to forward to the Attorney General within thirty days after the close of the month in which such certificate was issued, a duplicate thereof, and to make and keep on file in the clerk's office a stub for each certificate so issued, whereon shall be entered a memorandum of all the essential facts set forth in such certificate, and to forward a duplicate of each such stub to the Attorney General within thirty days after the close of the month in which such certificate was issued.

(c) It shall be the duty of the clerk of each and every naturalization court to report to the Attorney General, within thirty days after the close of the month in which the final hearing and decision of the court was had, the name and number of the petition of each and every person who shall be denied naturalization together with the cause of such denial.

(d) Clerks of courts shall be responsible for all blank certificates of naturalization received by them from time to time from the Attorney General, and shall account to the Attorney General for them whenever required to do so. No certificate of naturalization received by any clerk of court which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificates shall be returned to the Attorney General.

(e) It shall be the duty of the clerk of each and every naturalization court to cause to be filed in chronological order in separate volumes, indexed, consecutively numbered, and made a part of the records of such court, all declarations of intention and petitions for naturalization. (June 27, 1952, ch. 477, title III, ch. 2, § 339, 66 Stat. 259.)

§ 1451. Revocation of naturalization.

(a) Concealment of Material Evidence; Refusal to Testify.

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that

such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) Notice to Party.

The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answers to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

(c) Membership in Certain Organizations; Prima Facie Evidence.

If a person who shall have been naturalized after the effective date of this chapter shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 1424 of this title, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

(d) Foreign Residence.

If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. The diplomatic and consular officers of the United States in foreign countries shall from time to time, through

the Department of State, furnish the Department of Justice with statements of the names of those persons within their respective jurisdictions who have been so naturalized and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to revoke and set aside the order admitting to citizenship and to cancel the certificate of naturalization.

(e) *Wife or Minor Child Not Affected.*

The revocation and setting aside of the order admitting any person to citizenship and canceling his certificate of naturalization under the provisions of subsection (a) of section 338 of the Nationality Act of 1940 shall not, where such action takes place after the effective date of this chapter, result in the loss of citizenship or any right or privilege of citizenship which would have been derived by or been available to a wife or minor child of the naturalized person had such naturalization not been revoked: *Provided*, That this subsection shall not apply in any case in which the revocation and setting aside of the order was the result of actual fraud.

(f) *Applicability to Citizenship through Naturalization of Parent or Spouse.*

Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship under the provisions of subsection (a) of this section on the ground that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which he may have, now has, or may hereafter acquire under and by virtue of such naturalization of such parent or spouse, regardless of whether such person is residing within or without the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship. Any person who claims United States citizenship through the naturalization of a parent or spouse in whose case there is a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization under the provisions of subsections (c) or (d) of this section, or under the provisions of section 1440 (c) of this title on any ground other than that the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, shall be deemed to have lost and to lose his citizenship and any right or privilege of citizenship which would have been enjoyed by such person had there not been a revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization, unless such person is residing in the United States at the time of the revocation and setting aside of the order admitting such parent or spouse to citizenship and the cancellation of the certificate of naturalization.

(g) *Citizenship Unlawfully Procured.*

When a person shall be convicted under section 1425 of Title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

(h) *Cancellation of Certificate of Naturalization.*

Whenever an order admitting an alien to citizenship shall be revoked and set aside or a certificate of naturalization shall be canceled, or both, as provided in this section, the court in which such judgment or decree is rendered shall make an order canceling such certificate and shall send a certified copy of such order to the Attorney General. In case such certificate was not originally issued by the court making such order, it shall direct the clerk of court in which the order is revoked

and set aside to transmit a copy of such order and judgment to the court out of which such certificate of naturalization shall have been originally issued. It shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of naturalization, if there be any, upon the records and to notify the Attorney General of the entry of such order and of such cancellation. A person holding a certificate of naturalization or citizenship which has been canceled as provided by this section shall upon notice by the court by which the decree of cancellation was made, or by the Attorney General, surrender the same to the Attorney General.

(i) **Applicability of Certificates of Naturalization and Citizenship.**

The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act.

(j) **Power of Court to Correct, Reopen, Alter, Modify or Vacate Judgment or Decree.**

Nothing contained in this section shall be regarded as limiting, denying, or restricting the power of any naturalization court, by or in which a person has been naturalized, to correct, reopen, alter, modify, or vacate its judgment or decree naturalizing such person, during the term of such court or within the time prescribed by the rules of procedure or statutes governing the jurisdiction of the court to take such action. (June 27, 1952, ch. 477, title III, ch. 2, § 340, 66 Stat. 260.)

§ 1452. Certificates of citizenship; procedure.

A person who claims to have derived United States citizenship through the naturalization of a parent or through the naturalization or citizenship of a husband, or who is a citizen of the United States by virtue of the provisions of section 1993 of the United States Revised Statutes, or of section 1993 of the United States Revised Statutes, as amended by section 1 of the Act of May 24, 1934 (48 Stat. 797), or who is a citizen of the United States by virtue of the provisions of subsections (c), (d), (e), (g), or (i) of section 201 of the Nationality Act of 1940, as amended (54 Stat. 1138), or of the Act of May 7, 1934 (48 Stat. 667), or of paragraphs (3)—(5) or (7) of section 1401 (a) of this title, or under the provisions of the Act of August 4, 1937 (50 Stat. 558), or under the provisions of section 203 or 205 of the Nationality Act of 1940 (54 Stat. 1139), or under the provisions of section 1403 of this title, may apply to the Attorney General for a certificate of citizenship. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen, and that the applicant's alleged citizenship was derived as claimed, or acquired, as the case may be, and upon taking and subscribing before a member of the Service within the United States to the oath of allegiance required by this chapter of a petitioner for naturalization, such individual shall be furnished by the Attorney General with a certificate of citizenship, but only if such individual is at the time within the United States. (June 27, 1952, ch. 477, title III, ch. 2, § 341, 66 Stat. 263.)

§ 1453. Cancellation of certificates issued by Attorney General, the Commissioner or a Deputy Commissioner; action not to affect citizenship status.

The Attorney General is authorized to cancel any certificate of citizenship, cer-

tificate of naturalization, copy of a declaration of intention, or other certificate, document or record heretofore issued or made by the Commissioner or a Deputy Commissioner or hereafter made by the Attorney General if it shall appear to the Attorney General's satisfaction that such document or record was illegally or fraudulently obtained from, or was created through illegality or by fraud practiced upon, him or the Commissioner or a Deputy Commissioner; but the person for or to whom such document or record has been issued or made shall be given at such person's last-known place of address written notice of the intention to cancel such document or record with the reasons therefor and shall be given at least sixty days in which to show cause why such document or record should not be canceled. The cancellation under this section of any document purporting to show the citizenship status of the person to whom it was issued shall affect only the document and not the citizenship status of the person in whose name the document was issued. (June 27, 1952, ch. 477, title III, ch. 2, § 342, 66 Stat. 263.)

§ 1454. Documents and copies issued by Attorney General.

(a) A person who claims to have been naturalized in the United States under section 323 of the Nationality Act of 1940 may make application to the Attorney General for a certificate of naturalization. Upon proof to the satisfaction of the Attorney General that the applicant is a citizen and that he has been naturalized as claimed in the application, such individual shall be furnished a certificate of naturalization by the Attorney General, but only if the applicant is at the time within the United States.

(b) If any certificate of naturalization or citizenship issued to any citizen or any declaration of intention furnished to any declarant is lost, mutilated, or destroyed, the citizen or declarant may make application to the Attorney General for a new certificate or declaration. If the Attorney General finds that the certificate or declaration is lost, mutilated, or destroyed, he shall issue to the applicant a new certificate or declaration. If the certificate or declaration has been mutilated, it shall be surrendered to the Attorney General before the applicant may receive such new certificate or declaration. If the certificate or declaration has been lost, the applicant or any other person who shall have, or may come into possession of it is required to surrender it to the Attorney General.

(c) The Attorney General shall issue for any naturalized citizen, on such citizen's application therefor, a special certificate of naturalization for use by such citizen only for the purpose of obtaining recognition as a citizen of the United States by a foreign state. Such certificate when issued shall be furnished to the Secretary of State for transmission to the proper authority in such foreign state.

(d) If the name of any naturalized citizen has, subsequent to naturalization, been changed by order of any court of competent jurisdiction, or by marriage, the citizen may make application for a new certificate of naturalization in the new name of such citizen. If the Attorney General finds the name of the applicant to have been changed as claimed, the Attorney General shall issue to the applicant a new certificate and shall notify the naturalization court of such action.

(e) The Attorney General is authorized to make and issue certifications of any part of the naturalization records of any court, or of any certificate of naturalization or citizenship, for use in complying with any statute, State or Federal, or in any judicial proceeding. No such certification shall be made by any clerk of court except upon order of the court. (June 27, 1952, ch. 477, title III, ch. 2, § 343, 66 Stat. 263.)

§ 1455. Fiscal provisions.

(a) The clerk of court shall charge, collect, and account for the following fees:

(1) For making, filing, and docketing a petition for naturalization, \$10, including the final hearing on such petition, if such hearing be held, and a certificate of naturalization, if the issuance of such certificate is authorized by the naturalization court.

(2) For receiving and filing a declaration of intention, and issuing a duplicate thereof, \$5.

(b) The Attorney General shall charge, collect, and account for the following fees:

(1) For application for a certificate of naturalization or declaration of intention in lieu of a certificate or declaration alleged to have been lost, mutilated, or destroyed, \$5.

(2) For application for a certificate of citizenship, \$5.

(3) For application for the issuance of a special certificate of citizenship to obtain recognition, \$5.

(4) For application for a certificate of naturalization under section 323 of the Nationality Act of 1940, or under section 1454 (a) of this title, \$5.

(5) For application for a certificate of citizenship in changed name, \$5.

(6) Reasonable fees in cases where such fees have not been established by law, to cover the cost of furnishing copies, whether certified or uncertified, of any part of the records, or information from the records, of the Service. Such fees shall not exceed a maximum of 25 cents per folio of one hundred words, with a minimum fee of 50 cents for any one such service, in addition to a fee of \$1 for any official certification furnished under seal. No such fee shall be required from officers or agencies of the United States or of any State or any subdivision thereof, for such copies or information furnished for official use in connection with the official duties of such officers or agencies.

(7) Notwithstanding the preceding provisions of this subsection, no fee shall be charged or collected for an application for declaration of intention or a certificate of naturalization in lieu of a declaration or a certificate alleged to have been lost, mutilated, or destroyed, submitted by a person who was a member of the military or naval forces of the United States at any time after April 20, 1898, and before July 5, 1902; or at any time after April 5, 1917, and before November 12, 1918; or who served on the Mexican border as a member of the Regular Army or National Guard between June 1916 and April 1917; or who has served or hereafter serves in the military, air, or naval forces of the United States after September 16, 1940, and who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform, or who was not at any time during such period or thereafter discharged from such military, air, or naval forces on account of alienage.

(c) The clerk of any naturalization court specified in subsection (a) of section 1421 of this title (except the courts specified in subsection (d) of this section) shall account for and pay over to the Attorney General one-half of all fees up to the sum of \$6,000, and all fees in excess of \$6,000, collected by any such clerk in naturalization proceedings in any fiscal year.

(d) The clerk of any United States district court (except in Alaska and in the District Court of the Virgin Islands of the United States and in the District Court of Guam) shall account for and pay over to the Attorney General all fees collected by any such clerk in naturalization proceedings: Provided, however, That the clerk of the District Court of the Virgin Islands of the United States and of the Dis-

trict Court of Guam shall report but shall not be required to pay over to the Attorney General the fees collected by any such clerk in naturalization proceedings.

(e) The accounting required by subsections (c) and (d) of this section shall be made and the fees paid over to the Attorney General by such respective clerks in their quarterly accounts which they are hereby required to render to the Attorney General within thirty days from the close of each quarter of each and every fiscal year, in accordance with regulations prescribed by the Attorney General.

(f) The clerks of the various naturalization courts shall pay all additional clerical force that may be required in performing the duties imposed by this subchapter upon clerks of courts from fees retained under the provisions of this section by such clerks in naturalization proceedings.

(g) All fees collected by the Attorney General and all fees paid over to the Attorney General by clerks of courts under the provisions of this subchapter shall be deposited by the Attorney General in the Treasury of the United States: Provided, however, That all fees received from applicants residing in the Virgin Islands of the United States, and in Guam, required to be paid under subsection (b) of this section, shall be paid over to the treasury of the Virgin Islands and to the treasury of Guam, respectively.

(h) During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military, air, or naval service of the United States for filing a petition for naturalization or issuing a certificate of naturalization upon admission to citizenship, and no clerk of any State court shall charge or collect any fee for such services unless the laws of the State require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the State shall be charged or collected. A report of all transactions under this subsection shall be made to the Attorney General as in the case of other reports required of clerks of courts by this subchapter.

(i) In addition to the other fees required by this subchapter, the petitioner for naturalization shall, upon the filing of a petition for naturalization, deposit with and pay to the clerk of court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom such petitioner may request a subpoena, and upon the final discharge of such witnesses, they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner. (June 27, 1952, ch. 477, title III, ch. 2, § 344, 66 Stat. 266.)

§ 1456. Official mail transmitted free of postage and registry fee.

All mail matter of whatever class, relating to naturalization, including duplicate papers required by law or regulation to be sent to the Service by clerks of courts addressed to the Department of Justice or the Service, or any official thereof, and endorsed "Official Business", shall be transmitted free of postage and, if necessary, by registered mail without fee, and so marked. (June 27, 1952, ch. 477, title III, ch. 2, § 345, 66 Stat. 266.)

§ 1457. Publication and distribution of citizenship textbooks; use of naturalization fees.

Authorization is granted for the publication and distribution of the citizenship textbook described in subsection (b) of section 1443 of this title and for the reimbursement of the appropriation of the Department of Justice upon the records

of the Treasury Department from the naturalization fees deposited in the Treasury through the Service for the cost of such publication and distribution, such reimbursement to be made upon statements by the Attorney General of books so published and distributed. (June 27, 1952, ch. 477, title III, ch. 2, § 346, 66 Stat. 266.)

§ 1458. Compilation of naturalization statistics and payment for equipment.

The Attorney General is authorized and directed to prepare from the records in the custody of the Service a report upon those heretofore seeking citizenship to show by nationalities their relation to the numbers of aliens annually arriving and to the prevailing census populations of the foreign-born, their economic, vocational, and other classification, in statistical form, with analytical comment thereon, and to prepare such report annually hereafter. Payment for the equipment used in preparing such compilation shall be made from the appropriation for the enforcement of this chapter by the Service. (June 27, 1952, ch. 477, title III, ch. 2, § 347, 66 Stat. 266.)

§ 1459. Admissibility in evidence of statements voluntarily made to officer or employees in the course of their official duties; failure of clerk of court to do duty; penalties.

(a) It shall be lawful and admissible as evidence in any proceedings founded under this subchapter, or any of the penal or criminal provisions of any law relating to immigration, naturalization, or citizenship, for any officer or employee of the United States to render testimony as to any statement voluntarily made to such officer or employee in the course of the performance of the official duties of such officer or employee by any defendant at the time or subsequent to the alleged commission of any crime or offense which may tend to show that such defendant did not have or could not have had knowledge of any matter concerning which such defendant is shown to have made affidavit, or oath, or to have been a witness pursuant to such law or laws.

(b) In case any clerk of court shall refuse or neglect to comply with any of the provisions of section 1450 (a), (b), or (c) of this title, such clerk of court shall forfeit and pay to the United States the sum of \$25 in each and every case in which such violation or omission occurs and the amount of such forfeiture may be recovered by the United States in a civil action against such clerk.

(c) If any clerk of court shall fail to return to the Service or properly account for any certificate of naturalization furnished by the Service as provided in subsection (d) of section 1450 of this title, such clerk of court shall be liable to the United States in the sum of \$50, to be recovered in a civil action, for each and every such certificate not properly accounted for or returned. (June 27, 1952, ch. 477, title III, ch. 2, § 348, 66 Stat. 267.)

PART III. LOSS OF NATIONALITY

§ 1481. Loss of nationality by native-born or naturalized citizen; voluntary action.

(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent,

or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the naturalization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 1101 (a) (27) (E) of this title; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That, notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restoring such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act. (June 27, 1952, ch. 477, title III, ch. 3, § 349, 66 Stat. 267.)

§ 1482. Dual nationals; divestiture of nationality.

A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall—

(1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States diplomatic or consular officer in a manner prescribed by the Secretary of State; and

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraphs (1), (2)—(7), or (8) of section 1485 of this title, or paragraph (1) or (2) of section 1486 of this title: Provided, however, That nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years. (June 27, 1952, ch. 477, title III, ch. 3, § 350, 66 Stat. 269.)

§ 1483. Restrictions on expatriation.

(a) Except as provided in paragraphs (7)—(9) of section 1481 of this title, no national of the United States can expatriate himself, or be expatriated, under this chapter while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this Part if and when the national thereafter takes up a residence outside the United States and its outlying possessions.

(b) A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (2) and (4)—(6) of section 1481 (a) of this title. (June 27, 1952, ch. 477, title III, ch. 3, § 351, 66 Stat. 269.)

§ 1484. Loss of nationality by naturalized national.

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 1485 of this title, whether such residence commenced before or after the effective date of this chapter;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 1485 and 1486 of this title, whether such residence commenced before or after the effective date of this chapter.

(b) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 1485 of this title shall not be counted in computing quantum of residence.

(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of sections 1485 and 1486 of this title shall not be counted in computing quantum of residence. (June 27, 1952, ch. 477, title III, ch. 3, § 352, 66 Stat. 269.)

§ 1485. Inapplicability of section 1484 to certain persons.

Section 1484 (a) of this title shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance: Provided, That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided*, That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: Provided, That such residence does not exceed five years; or

(7) is the spouse or child of an American citizen, and who has his residence

abroad for the purpose of being with his American citizen spouse or parent who has his residence abroad for one of the objects or causes specified in paragraphs (1)—(5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: Provided, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to persons defined in this paragraph. (June 27, 1952, ch. 477, title III, ch. 3, § 353, 66 Stat. 270.)

§ 1486. Inapplicability of section 1484 (a) (2) to certain persons.

Section 1484 (a) (2) of this title shall have no application to a national —

(1) who is a veteran of the Spanish-American War, World War I, or World War II, and the spouse, children, and dependent parents of such veteran whether such residence in the territory of a foreign state or states commenced before or after the effective date of this chapter: *Provided*, That any such veteran who upon June 27, 1952, has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provisions of section 406 (h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 1484 (a) (1) of this title: Provided further, That the provisions of section 404 (c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired United States passport or other valid document issued by the Secretary of State, that his residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;

(3) who is the widow or widower of a citizen of the United States and who has attained the age of sixty years, and who has had a residence outside of the United States and its outlying possessions for a period of not less than ten years during all of which period a marriage relationship has existed with a spouse who has had a residence outside of the United States and its outlying possessions in an occupation or capacity of the type designated in paragraphs (1)—(4) or (5) (A) of section 1485 of this title, or paragraphs (1), (2), or (4) of this section:

(4) who has attained the age of sixty years, and has had a residence outside

of the United States and its outlying possessions for not less than ten years, during all of which period he has been engaged in an occupation of the type designated in paragraphs (1), (2) or (4) of section 1485 of this title, or paragraph (2) of this section, and who is in bona fide retirement from such occupation; or

(5) who shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and prior to the establishment of his foreign residence. (June 27, 1952, ch. 477, title III, ch. 3, § 354, 66 Stat. 271.)

§ 1487. Loss of American nationality through parents' expatriation; not effective until persons attain age of twenty-five years.

A person having United States nationality, who is under the age of twenty-one and whose residence is in a foreign state with or under the legal custody of a parent who hereafter loses United States nationality under section 1482 or 1484 of this title, shall also lose his United States nationality if such person has or acquires the nationality of such foreign state: *Provided*, That, in such case, United States nationality shall not be lost as the result of loss of United States nationality by the parent unless and until the person attains the age of twenty-five years without having established his residence in the United States. (June 27, 1952, ch. 477, title III, ch. 3, § 355, 66 Stat. 272.)

§ 1488. Nationality lost solely from performance of acts or fulfillment of conditions.

The loss of nationality under this Part shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Part. (June 27, 1952, ch. 477, title III, ch. 3, § 356, 66 Stat. 272.)

§ 1489. Application of treaties; exceptions.

Nothing in this subchapter shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this subchapter: *Provided*, however, That no woman who was a national of the United States shall be deemed to have lost her nationality solely by reason of her marriage to an alien on or after September 22, 1922, or to an alien racially ineligible to citizenship on or after March 3, 1931, or, in the case of a woman who was a United States citizen at birth, through residence abroad following such marriage, notwithstanding the provisions of any existing treaty or convention. (June 27, 1952, ch. 477, title III, ch. 3, § 357, 66 Stat. 272.)

PART IV. MISCELLANEOUS

§ 1501. Certificate of diplomatic or consular officer of United States as to loss of American nationality.

Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of Part 3 of this subchapter, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. (June 27, 1952, ch. 477, title III, ch. 3, § 358, 66 Stat. 272.)

§ 1502. Certificate of nationality issued by Secretary of State for person not a naturalized citizen of United States for use in proceedings of a foreign state.

The Secretary of State is authorized to issue, in his discretion and in accordance with rules and regulations prescribed by him, a certificate of nationality for any person not a naturalized citizen of the United States who presents satisfactory evidence that he is an American national and that such certificate is needed for use in judicial or administrative proceedings in a foreign state. Such certificate shall be solely for use in the case for which it was issued and shall be transmitted by the Secretary of State through appropriate official channels to the judicial or administrative officers of the foreign state in which it is to be used. (June 27, 1952, ch. 477, title III, ch. 3, § 359, 66 Stat. 273.)

§ 1503. Denial of rights and privileges as national.

(a) Proceedings for Declaration of United States Nationality.

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28 against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any exclusion proceeding under the provisions of this chapter or any other act, or (2) is in issue in any such exclusion proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is conferred upon those courts.

(b) Application for Certificate of Identity; Appeal.

If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) Application for Admission to United States under Certificate of Identity; Revision of Determination.

A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens

seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this chapter relating to aliens seeking admission to the United States. (June 27, 1952, ch. 447, title III, ch. 3, § 360, 66 Stat. 273.)

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(As amended down through October 20, 1954.)

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ARTICLE I.

Functions.

§ 1. **Purpose.**—The North Carolina State Bar shall foster the following purposes, namely:

- To cultivate and advance the science of jurisprudence;
- To promote reform in the law and in judicial procedure;
- To facilitate the administration of justice;
- To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;
- To encourage higher and better education for membership in the profession;
- To promote a spirit of cordiality and brotherhood among the members of the Bar; and
- To perform all duties imposed by law.

§ 2. **Division of Work.**—To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees of The North Carolina State Bar.

§ 3. **Cooperation with Local Bar Association Committees.** — The sections and committees so appointed may secure the cooperation of like sections and committees of The North Carolina Bar Association and all local Bar Associations of the State.

§ 4. **Organization of Local Bar Associations.**—The Council shall encourage and foster the organization of local Bar Associations.

§ 5. **Annual Program.**—The Council shall provide a suitable program for each annual meeting of The North Carolina State Bar.

§ 6. **Reports Made to Annual Meeting.**—The reports of the several sections and committees, with their recommendations, shall be delivered to the Secretary of The North Carolina State Bar at least thirty days before the annual meeting. Such reports, together with any reports from special committees that the Council desires to present to the annual meeting, may be printed and sent to each member of The North Carolina State Bar at least twenty days before such meeting. Nothing herein shall preclude any section, committee or the Council from presenting a report or recommendation that has not been so printed and mailed.

ARTICLE II.

Membership—Annual Membership Fees.

§ 1. **Register of Members.**—The Secretary-Treasurer shall keep a register for the enrollment of members of The North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Every member shall register by signing a registration card, which in substance shall require, until the future order of the Council, the member to furnish the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney.
5. Date and place of birth. If not born in the United States, when and where naturalized.
6. Whether admitted to United States District Court, United States Circuit Court of Appeals, or United States Supreme Court.
7. Membership, if any, in bar associations, giving name of each.
8. Whether suspended or disbarred, and if so, when and where, and when readmitted.

§ 2. **Annual Membership Fees, When Due.**—The annual membership fee for an active member shall be \$5.00.

Said membership fee shall be paid to the Secretary-Treasurer for the year 1933 on or before the 1st day of January, 1934, and for the year 1934, on or before the 1st day of July, 1934, and on or before the 1st day of July, of each year thereafter.

No part of said membership fees shall be apportioned to fractional parts of the year, and no part of the membership fees shall be rebated by reason of death, resignation, suspension or disbarment.

Written notice of failure to pay annual membership fees shall be sent to a member at his last known business address by the Secretary of the State Bar. Upon payment of delinquent fees by any member, his name shall be certified to the clerk of the Superior Court of the county of his residence.

§ 3. **Petition of Member Claiming to Be Inactive.**—All members who claim to be inactive shall file a duly verified petition with the Secretary addressed to the Council setting forth fully:

1. Date of admission to the Bar and place of residence from which admitted.

2. The practice, times and places.
3. Present occupation or work engaged in and residence.
4. Grounds upon which applicant desires classification.
5. That applicant is at the time of filing petition a member in good standing having paid all fees required and without any charges undisposed of against him.
6. Any further matters pertinent to the petition.

§ 4. **Order Placing Petitioner on Inactive List.**—The Council may in its discretion order the petitioner to be placed on the inactive list of membership on the records of the Secretary and may in its discretion revoke such order at any time.

ARTICLE III.

Election of Officers.

§ 1. **Election of Officers.**—The officers of The North Carolina State Bar, in addition to the Councillors, shall consist of a President, a first Vice-President, a second Vice-President, and Secretary-Treasurer. The Secretary-Treasurer shall receive a salary fixed by the Council; other officers shall serve without compensation, except per diem allowance fixed by the statute.

The first President and Vice-President shall be elected by the Councillors from the active members of The North Carolina State Bar.

At each annual meeting of The North Carolina State Bar the active members present shall elect a President and two Vice-Presidents who shall hold office until their successors are elected and qualified. The Secretary-Treasurer shall be elected by the Council annually. No officer elected by the Council or by The North Carolina State Bar need be a member of the Council. All such officers shall be the officers of the Council with the same titles.

ARTICLE IV.

Duties of Officers.

§ 1. **Absence or Inability of President.**—In the absence or inability of the President at any meeting of The North Carolina State Bar or the Council, one of the Vice-Presidents shall act in his place. In the event neither is present, the Council shall select one of its members to preside during such meeting.

In all other matters, if the President absents himself from the State, or for any reason is unable to perform his duties as president, the first Vice-President shall perform the duties of President and likewise in his absence the second Vice-President shall act. In the event of the inability of either to perform the duties of President, the Council may select one of their members to act until such absence or inability is removed.

§ 2. **Duties of Secretary-Treasurer.**—The Secretary-Treasurer shall attend all meetings of the Council and of The North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President or one of the Vice-Presidents, execute all contracts ordered by the Council. He shall have custody of the seal of The North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into The North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of The North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of The North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of

receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of The North Carolina State Bar. The books of accounts shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

ARTICLE V.

Meetings of The North Carolina State Bar.

§ 1. **Annual Meetings.**—The annual meetings of The North Carolina State Bar, beginning with the year 1937, shall be held in the city of Raleigh, on the fourth Friday in October.

§ 2. **Special Meetings.**—Special meetings of The North Carolina State Bar may be called upon thirty days' notice, as follows:

(a) By the Secretary, upon direction of the Council.

(b) By the Secretary, upon the call addressed to the Council, of not less than twenty-five per cent of the active members of The North Carolina State Bar.

At special meetings no subjects shall be dealt with other than those specified in the notice.

§ 3. **Notice of Meetings.**—Notice of all meetings shall be given by publication in such newspapers of general circulation as the Council may select, or, in the discretion of the Council, by mailing notice to the Secretary of the several district bars or to the individual active members of The North Carolina State Bar.

§ 4. **Quorum.** — At all annual and special meetings of The North Carolina State Bar, ten per cent of the active members of The North Carolina State Bar shall constitute a quorum, but there shall be no voting by proxy.

§ 5. **Parliamentary Rules.** — Proceedings at any meeting of The North Carolina State Bar shall be governed by "Roberts' Rules of Order."

ARTICLE VI.

Meetings of the Council.

§ 1. **Regular Meetings.**—Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April and July in the city of Raleigh; and on the day before the annual meeting of The North Carolina State Bar, in the place of such meeting. The hour of meeting shall in each case be at 10 o'clock a. m. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

§ 2. **Special Meetings.** — The President in his discretion may call special meetings of the Council. Upon written request of eight Councillors, filed with the Secretary-Treasurer requesting the President to call a special meeting of the Council, the Secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.

§ 3. **Notice of Called Special Meetings.**—Notice of called special meetings shall be signed by the Secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented

for consideration at such special meeting. Such notice must be given to each Councillor unless waived by him. A written waiver signed by any Councillor shall be equivalent to notice as herein provided. Notice to Councillors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said Councillors at his law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

§ 4. **Quorum at Meeting of Council.**—At meetings of the Council the presence of ten Councillors shall constitute a quorum.

§ 5. **Standing Committees of the Council.**—The standing committees of the Council shall consist of:

a. An Executive Committee of five Councillors, elected by the Council, and the President and Secretary-Treasurer.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate, including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council.

b. Committee on Legal Ethics and Professional Conduct of five Councillors elected by the Council.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the canons of ethics and rules of professional conduct as it may be requested to perform by the Council of The North Carolina State Bar.

c. Committee on Grievances of five Councillors elected by the Council.

It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The committee may include in its investigations all matters which may come to its attention with reference to the member complained of. Its recommendation to the Council shall be in writing, and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint, and shall state that a ten days' written notice by registered mail to his last known address has been given to the attorney, permitting him to be heard on affidavit, except in those cases where he has been convicted or confessed his guilt in open court, or the charges have been duly proven in a civil action. If the recommendation of the Grievance Committee is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

d. Committee on Legislation and Law Reform of five Councillors elected by the Council.

It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council or The North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before com-

mittees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council.

e. Committee on Unauthorized Practice of not less than three Councillors elected by the Council.

f. Committee on Membership of not less than three Councillors elected by the Council.

ARTICLE VII.

Office of The North Carolina State Bar.

§ 1. **Office.**—Until otherwise ordered by the Council, the office of The North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the Council.

ARTICLE VIII.

Board of Law Examiners.

§ 1. **Election.**—At the first meeting of the Council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The Council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected and such members shall serve for a term of three years, or until their successors are elected and qualified.

Beginning with the year 1935 and every third year thereafter the Council shall elect 3 members for a term of three years or until their successors are elected and qualified.

No member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council.

§ 2. **Examination of Applicants for License.**—All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that Board.

§ 3. **Admission to Practice.**—Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

§ 4. **Approval of Rules and Regulations of Board of Law Examiners.**—The Council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the Council shall be the subject of further study and action, and for the purpose of study, the Council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the Council.

ARTICLE IX.

Discipline and Disbarment of Attorneys.

§ 1. **Action on Report of Grievance Committee.**—Upon the receipt of the report of the Grievance Committee, and its recommendations, the Council will

determine at a regular meeting, its course in reference to the matters recommended by the Grievance Committee and shall adopt, modify, reject, or remand the said report to the Grievance Committee for further investigation, but no judgment shall be entered against any accused attorney except after a hearing has been had thereon, as provided in Art. 4, Chapter 84, of the General Statutes, and herein.

§ 2. **Procedure on Hearing.**—In case the Council decides to direct a hearing upon the matters, or any of them, so reported by the Grievance Committee, the following procedure shall be followed:

(a) A verified written statement, in separate paragraphs, shall be formulated by the Council, or under its directions, showing the nature and substance of all the charges preferred against the party against whom the same have been filed, or lodged, or included in the report of the Committee on Grievances. Such statement shall also contain a notice of the time and place for a hearing thereon, in the county where the respondent resides, and the respondent shall be entitled to receive two copies of said statement and notice, at least thirty days prior to the time designated for such hearing. Service of said statement and notice shall be made by the sheriff of the county in which said respondent resides, by delivering to the said respondent two copies of said statement and notice, and the Secretary of the Council shall pay to such sheriff for such service such fees as are allowed such sheriff for service of summons in civil actions.

(b) The Council shall name and designate a committee of three Councillors who shall sit at such hearing and preside over the proceedings had thereat, and remove the hearing as provided in Art. 4, Chapter 84, of the General Statutes.

(c) The respondent, within said period of thirty days, may file answer to the charges set out in the said statement and notice, which shall be accompanied by two copies thereof, and the said answer and copies thereof shall, within said period, be filed in the office of the Secretary of the Council. Every material allegation of the verified statement not controverted by an answer or to which no answer is made is, for the purpose of the action, taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary.

(d) At such hearing, and throughout the pendency of such charges, the respondent shall be entitled to counsel; to have process to secure and compel the attendance of witnesses, the production of papers and books, documents and, upon request, the same shall be issued as prescribed in Art. 4, Chapter 84, of the General Statutes. All process officers in the State of North Carolina shall be required to serve the same, and for such service shall receive fees allowed in their respective jurisdictions for the service of subpoenas issued by the Superior Courts.

(e) At said hearing, or hearings, a complete stenographic report of all testimony shall be had and the original and one copy of said testimony shall be filed with the Secretary of the Council.

(f) The cost of stenographic services for such trial shall be paid by the Council upon bills rendered and approved as other expenses of the Council, and shall be taxed as a part of the costs, as provided in Art. 4, Chapter 84, of the General Statutes.

(g) At said hearing, or hearings, before said committee, respondent shall have the right to produce in his behalf all competent evidence and to testify in person in respect to the matters and things set out in said statement and notice.

(h) Counsel shall have the right to submit oral argument and written briefs under the direction of the said committee, and to present such arguments as may now be presented in the trial of civil actions in the Superior Court.

(i) After hearing all the evidence and considering the same, the said committee shall file its report, stating its findings of fact and making its conclusions thereon as to discipline or disbarment, or as to the innocence of the respondent. Said report in duplicate shall be filed with the Secretary of the Council and shall stand for hearing at the next regular meeting of the Council, but the Council shall have power to continue the hearing to specified dates.

(j) When the said committee shall formulate its report, a copy thereof shall be sent, by registered mail, to the respondent, and the said respondent shall file his exceptions thereto within ten days from the receipt of the copy of said report.

If the respondent shall desire further time he may apply to the President of The North Carolina State Bar for an extension of time in which to file exceptions to said report. The President of The North Carolina State Bar is hereby authorized to grant such extension as will meet the ends of justice, having due regard to the right of the respondent to have a full and ample opportunity to present his defense and that it is to the interest of the public that such matters be speedily concluded. The respondent shall file his exceptions within the time herein provided or within the said extended time.

If the respondent shall fail to file any exceptions to said report, then the Council will proceed thereon *ex parte*.

(k) Said Council shall consider said report at a regular meeting and shall determine upon the record of the said hearing, which shall consist of the said statement and notice served on the respondent, his answer, if any, the testimony taken by the said committee, its report, recommendations, and the briefs of counsel filed before said committee, if any, and when the same is considered by the Council, the said respondent shall be entitled to be heard by the Council in person or through counsel, before determination, but no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings.

(l) Any evidence, discovered after the report of the committee hearing the matter has been filed with the Council, may be the subject of a motion before the Council at any time before final judgment to remand the said report to the committee, to the end that the said committee may hear said newly discovered evidence. Such motion, and the proof with respect thereto, shall be made and heard under the rules now applicable to motions for new trials in the Superior Court for newly discovered evidence in civil actions, and if the said report is remanded to said committee to hear said newly discovered evidence, then the same shall be heard by said committee, subject to its competency, and such other evidence as may be corroborative or contradictory thereof, may also be submitted, and the said committee shall include said newly discovered evidence in its report and shall make such further findings and recommendations as it may deem proper in the light of all the evidence. Notice of such motion shall be given to opposing counsel at least ten days before said motion is to be heard.

(m) Upon such record, after hearing the argument thereon, the Council shall render its judgment as authorized in Art. 4, Chapter 84, of the General Statutes, and amendments thereto, at a regular meeting, notice of which meeting shall be given the respondent, who shall have the right to be present in person or through counsel.

(n) From any judgment of suspension from the practice, or disbarment, the said respondent may appeal, as provided in Art. 4, Chapter 84, of the General Statutes, and notice of such appeal shall be sufficiently given the said Council, if given orally, when said judgment is rendered at a meeting of said Council, or by service of written notice of the same on the Secretary-Treasurer thereof, within fifteen days from the rendition of said judgment by said Council, which fifteen days shall begin to run from the final adjournment of the meeting of said Council at which

said judgment was rendered. A copy of said judgment duly certified by the Secretary-Treasurer shall be forthwith mailed to the respondent by registered letter, with return receipt requested.

(o) The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent.

(p) The Secretary-Treasurer shall certify the evidence in question-and-answer form as taken at the hearing, to the Superior Court, on appeal, which appeal shall be sent to the Clerk of the Superior Court in the county of the residence of the respondent.

(q) Whenever charges shall have been preferred against any member of the Bar, and the Council shall have directed a hearing upon the charges, it shall also designate a member or members of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the Superior and Supreme Courts. The Council may allow the counsel performing such services such compensation as it may deem proper.

(r) In the case of persons charged with an offense cognizable by the Council, or any committee thereof, a complete record of the proceedings and evidence taken before the Council or any committee thereof shall be made and preserved in the office of the Secretary-Treasurer and the Secretary-Treasurer shall see that such record is had and preserved according to the orders of the Council.

The Council may, upon sufficient cause shown, and with the consent of the person charged, cause the said record to be expunged and destroyed.

(s) Final judgment of suspension from the practice or disbarment by the Council shall be certified by the Secretary-Treasurer to the Superior Court of the county wherein the respondent resides, and also to the Supreme Court of North Carolina. If the judgment of the Council shall be that the respondent be privately reprimanded, the Council shall formulate the reprimand and shall appoint one of its members to read and deliver the same and shall name the time and place for delivery thereof. The Secretary shall spread upon his minutes as a final judgment of the Council, the order of private reprimand, the name of the member of the Council to deliver the same, and the time and place therefor.

(t) Whenever any attorney has been deprived of his license under the provisions of Art. 4, Chapter 84, of the General Statutes, the Council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

(u) Due notice of motion before said Council to restore such license shall, in so far as it relates to the Council, be had by serving a written notice upon the Secretary-Treasurer of the Council by delivery of two copies thereof at least forty days prior to the hearing on said motion. In lieu of service the said Secretary-Treasurer may, in his discretion, accept service of said notice. Notice by publication shall also be made by applicant in a newspaper published in the county in which applicant resides once a week for four successive weeks.

(v) All hearings to restore licenses shall be had by the Council which shall make its findings and declare its conclusions thereon and enter its judgment upon the same. If, as a result of said hearing, the Council decides to restore said license, a copy of its judgment restoring the same shall be certified to the Superior Court of the county wherein the said licentiate resides, and if he then resides in a county other than the county where the judgment disbaring said licentiate has been

recorded, then a copy shall be certified to the Superior Court in said county where said judgment of disbarment has been recorded, and a certified copy thereof shall be delivered to the Supreme Court, to the end that the same may be recorded in its minutes, and when so recorded the judgment of the Council restoring said license shall have full force and effect throughout the State.

(w) The cost of any proceedings for the restoration of license shall be paid by the person making application therefor.

§ 3. **Nature and Place of Hearing.**—All hearings on any complaint before the committee appointed by the Council to hear the same shall be public, and if possible, shall be held in the courthouse.

ARTICLE X.

Canons of Ethics and Rules of Professional Conduct.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. The Duty of the Lawyer to the Courts

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance or its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. The Selection of Judges

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. Attempts to Exert Personal Influence on the Court

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial, personal and official relations between Bench and Bar.

4. When Counsel for an Indigent Prisoner

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. The Defense or Prosecution of Those Accused of Crime

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. Adverse Influences and Conflicting Interests

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. Advising Upon the Merits of a Client's Cause

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which jus-

tice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject or controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Acquiring Interest in Litigation

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. Dealing With Trust Property

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

12. Fixing the Amount of the Fee

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. Contingent Fees

Reasonable contracts for contingent fees, both in criminal and civil cases, unless forbidden by law and in cases of guardianships or minors, are recognized and approved.

Editor's Note.—This rule was amended by the Council of The North Carolina State Bar on January 15, 1954, and certified by the Supreme Court of Appeals on January 29, 1954. Prior to the amendment the rule read as follows: "A contract for

a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness."

14. Suing a Client for a Fee

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. How Far a Lawyer May Go in Supporting a Client's Cause

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

16. Restraining Clients from Improprieties

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. Ill-Feeling and Personalities Between Advocates

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. Treatment of Witnesses and Litigants

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. Appearance of Lawyer as Witness for His Client

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. Newspaper Discussion of Pending Litigation

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. Punctuality and Expedition

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. Candor and Fairness

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. Attitude Toward Jury

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, look-

ing to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. Right of Lawyer to Control the Incidents of the Trial

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. Taking Technical Advantage of Opposite Counsel; Agreements with Him

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. Professional Advocacy Other than Before Courts

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. Advertising, Direct or Indirect

The customary use of simple professional cards is permissible. Publication in approved law lists and legal directories, in a manner consistent with the standard of conduct imposed by these Canons, of brief biographical data is permissible. This may include only a statement of the lawyer's name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, Bar and other Association memberships and, with their consent, the names of clients regularly represented. This does not permit solicitation of professional employment by circulars, or advertisements, or by personal communications or interviews not warranted by personal relations. It is unprofessional to endeavor to procure professional employment through touters of any kind. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the im-

portance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

28. Stirring Up Litigation, Directly or Through Agents

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attachés or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

29. Upholding the Honor of the Profession

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. Justifiable and Unjustifiable Litigations

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. Responsibility for Litigation

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. The Lawyer's Duty in Its Last Analysis

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33. Partnerships—Names

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the State, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.

Partnerships between lawyers and members of other professions of non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

34. Division of Fees

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

35. Intermediaries

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the

organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

36. Retirement from Judicial Position or Public Employment

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37. Confidences of a Client

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

38. Compensation, Commissions and Rebates

A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

39. Newspapers

A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

40. Discovery of Imposition and Deception

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

41. Expenses

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

42. Approved Law Lists

It shall be improper for a lawyer to permit his name to be published after April

16, 1948, in a law list that is not approved by the Council of The North Carolina State Bar.

Editor's Note.—The amendment of April 16, 1948, changed the date from "January 1, 1939" to "April 16, 1948." The amendment also substituted the words "Council of The North Carolina State Bar" for the words "American Bar Association," formerly appearing at the end of the paragraph.

43. Withdrawal from Employment as Attorney or Counsel

The right of an attorney or counsel to withdraw from employment once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

44. Specialists

The Canons apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

Editor's Note.—The amendment of April 16, 1948, deleted the words "of the American Bar Association" formerly appearing between the words "Canons" and "apply" in line one.

45. Notice of Specialized Legal Service

Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

46. Aiding the Unauthorized Practice of Law

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

A. Practicing in Court in Which Partner Is Judge

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of any judge of any court inferior to the Superior Court, to practice his profession in the court of any such judge, during the existence of such copartnership.

B. Practicing in Court in Which Partner Is Solicitor or Prosecuting Attorney

It shall be deemed unethical and unprofessional for a member of The North

Carolina State Bar, who is now or who may hereafter become a partner of a solicitor or prosecuting attorney of any court of the State of North Carolina, to practice his profession in any criminal court of such solicitor or prosecuting attorney.

C. Acceptance of Employment by Attorney Who Is or Has Been Prosecuting Officer

It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer in any court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a civil or criminal nature growing out of any matter or thing which is or may have been in any way connected with the office of such prosecuting officer during his incumbency.

D. Judge or Solicitor of Criminal Court Appearing in Other Courts of His County

It shall be deemed unethical for any Judge or Solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding, whether for the defendant or for the State, in other Courts of his county having criminal jurisdiction, whether concurrent with, inferior to or superior to the criminal jurisdiction of the Court over which he shall preside, or over which he shall be the prosecuting officer, except that this Canon shall not apply to Mayors of Incorporated Towns having like jurisdiction in criminal matters as a Justice of the Peace, except that such Mayors shall not appear in any criminal matters arising within their jurisdiction. Provided further, that nothing in this Canon is intended to preclude the Solicitor of any Recorder's Court or County Court from appearing in the Superior Court upon request of the District Solicitor.

E. Attorney Having Interest in Appearance Bond or Bonding Company

It shall be deemed unethical and unprofessional for any attorney to represent any defendant in any criminal action where such attorney or member of his family has personally signed an appearance bond with or without compensation, or wherein he has acted as agent or officer for, or is financially interested in, any person, firm, or corporation in executing such bond.

When any member of The North Carolina State Bar shall be financially interested, either directly or indirectly, in any bonding company authorized to write appearance bonds for any person charged with violation of the criminal laws of the State of North Carolina, or whenever such member of The North Carolina State Bar shall be regularly retained and employed as attorney for such bonding company, neither shall said member nor any partnership of attorneys with whom he is associated, or by whom he is employed, be permitted to represent as attorney any person charged with a criminal offense or a misdemeanor, whose appearance bond shall have been written with such bonding company as surety thereon for the appearance of said person in any court of the State.

Editor's Note.—The amendment adding Carolina State Bar on January 25, 1954, the second paragraph of Canon "E" was and certified by the Supreme Court on adopted by the Council of The North January 29, 1954.

F. Competitive Bidding for Legal Work

That it appearing to the Council that the United States Government has called for competitive bidding from lawyers to do abstract work and that upon the request of the Government lawyers have submitted competitive bids for such work—and the question having been raised as to whether such bidding is ethical —

NOW, therefore, be it resolved that it is the sense of this Council that hereafter any competitive bidding for any legal work is deemed to be unethical.

G. Client Identified with Claim Which Attorney Has Investigated or Adjusted for Insurer

When any member of The North Carolina State Bar shall investigate or adjust any claim for any insurance company or agency, either directly or indirectly, through the service of any other person, neither shall said member, nor any partnership of attorneys by whom he is employed, be permitted to represent for compensation as attorney, for any personal injuries sustained, any person, firm or corporation in anywise identified with said claim as a result of the facts or circumstances through which said claim originated, except the insurance company or agency for which or for whom the said investigation or adjustment was made. Provided that this Canon shall not apply to the representation of any person charged with a criminal offense in any court of the State.

Editor's Note.—This Canon was adopted as "G". Former Canon "G" now appears by the Council of The North Carolina as "H". State Bar on April 16, 1954, and designated

H. Name in Directory in Bold-Face Type

Hereafter it shall be improper for an attorney to have his name printed in any directory in bold-face type.

Editor's Note.—Prior to April 16, 1954 this Canon was designated "G".

ARTICLE XI.

Filing Papers with and Serving The North Carolina State Bar

§ 1. **When Papers Are Filed under These Rules and Regulations.** — Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on The North Carolina State Bar, or the Council, the same shall be filed with or served on the Secretary of The North Carolina State Bar.

ARTICLE XII.

Seal

§ 1. **Form and Custody of Seal.**—The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar—July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the Secretary-Treasurer at the office of The North Carolina State Bar, unless otherwise ordered by the Council.

VII. Rules Governing Admission to Practice of Law

(As amended down through October 20, 1954.)

Rule

1. Effective Date of These Rules.
2. Compliance Necessary.
3. Definitions.
4. Applications.
5. Citizenship, Character, Age, Residence.
6. Moral Character of Applicant.
7. Law Students to Register.
8. General Education.
9. Legal Education.
10. Evidence of Legal Education.
11. Years of Study Defined.

Rule

12. Approved Law Schools.
- 13, 13 (a). Examinations.
14. Protest.
15. Certificates Not Conclusive.
16. Effect of Disbarment, Suspension or Disciplinary Proceedings.
17. Comity.
18. Fees.
19. Issuance of License.
20. Appeals.

1. Effective Date of These Rules.—Except as otherwise provided herein, the rules of the Supreme Court as contained in 200 N. C. 813, shall govern application for admission to the practice of law at the examinations to be held in August, 1935, and January, 1936; thereafter the following rules shall govern, provided that, when the going into effect of any of the following rules is postponed, the approximate corresponding rules of the Supreme Court shall in the meantime control.

2. Compliance Necessary. — Subject to the provisions of the foregoing paragraph, no person shall hereafter be admitted to the practice of law in North Carolina until and unless he has complied with these rules and the laws of the State.

3. Definitions.—The terms “board” and “secretary” as herein used refer, respectively, to the Board of Law Examiners of North Carolina and the Secretary of the same. Masculine pronouns shall be deemed to include the female.

4. Applications. — Every person desiring to be admitted to the practice of law in North Carolina shall file an application with the Secretary not later than the 15th day of June prior to the next bar examination. This application shall contain such information as is called for by the blanks approved by the Board, and shall be accompanied by the fee required by Rule 18, and by such evidence of good moral character, certificates of general and legal education, and other credentials as applicant relies upon to show compliance with these rules. All applications, proofs, and certificates shall be made upon blanks furnished by the Secretary. As soon as possible after June 15 of each year the Secretary shall make public the list of applicants.

(a) Applicants for the March examination to be given during the years 1947, 1948, 1949, 1950 and 1951 shall file their applications with the Secretary on or before January 15 of the year in which the applicant applies to take the examination.

Editor's Note.—Paragraph (a) was added North Carolina State Bar on October 23, 1947.
to Rule 4 by amendment duly adopted at 1947.
a regular meeting of the Council of The

5. Citizenship, Character, Age, Residence.—Each applicant at the time of filing his application, must be a citizen of the United States, a person of good moral character, and must have been, for the twelve months next preceding the filing of his application, a citizen and resident of North Carolina, or must have been a nonresident student, for one scholastic year next preceding the filing of his application, in an approved North Carolina law school who has the intention, in good faith, of becoming a citizen and resident of North Carolina within six months after filing his application, in which latter event license shall not actually issue to him until and unless within this six months' period he has become a citizen and resident of North Carolina, and has satisfied the Chairman of the Board to that effect. He must be at least 21 years of age at the time of filing his application, or of such an age that he will become 21 within twelve months next after filing his application, provided that no license shall actually issue to any person until he has reached the age of 21.

6. Moral Character of Applicant.—No applicant shall be licensed upon examination or by comity until and unless he has been found by the Board to be of good moral character. Each applicant shall furnish certificates of good moral character from four responsible persons, at least two of whom shall be members of The North Carolina State Bar, practicing in the Supreme Court, provided that in exceptional and meritorious cases the Board may accept, in lieu of certificates from North Carolina practitioners, certificates from two attorneys of another State who are members of the Bar of the highest court in that State, and who accompany their certificates with proof to that effect.

Any person whose application for admission to the practice of law, either by examination or comity, has been denied on account of the lack of good moral character shall thereafter be ineligible to take the examination or have his credentials considered for two years.

7. Law Students to Register. — No one shall be permitted to take the examination to be held in August, 1936, and thereafter, unless he shall have previously registered with the Secretary as a law student, provided that all persons who have begun the study of law prior to June 15, 1936, shall be allowed to that date to register. In determining whether or not an applicant to take an examination has complied with Rules 9, 10, and 11, no time spent in legal study prior to sixty days before the date of his registration will be counted, except that students registering on and prior to June 15, 1936, shall be given credit for the entire time of their legal study prior to their respective dates of registration. Registration shall be upon blanks prescribed by the Board and shall be accompanied by the certificate of the dean of that approved law school in which the applicant has matriculated, or of that lawyer under whose instruction the applicant proposes to study (who must at the time have been a licensed practitioner in North Carolina for five years), corroborating the fact in the application of which such dean or lawyer has personal knowledge, and giving to the Board such information and such pledges of intention to be governed by these rules in the instruction of the applicant as the Board shall require. Registration papers shall be accompanied by the registration fee of one dollar required by Rule 18. Upon receipt of the registration papers, corroborating certificates, and the registration fee, the Secretary shall acknowledge the same and shall make entry upon his records to that effect. Whenever a registered law student changes his home address, or changes the school in which, or the lawyer under whom, he is studying, or whenever he shall abandon the study of law, he shall notify the Secretary of that fact within sixty days thereafter. Where a person applying to take the examination to be held in August, 1936, or an examination to be held thereafter shall have begun and pursued his legal studies outside of North Carolina and shall have failed to register as required above, deferred registration may, in exceptional and meritorious cases, be permitted by the Board.

From time to time during the period of the student's study the Board may require reports from him or the law school in which, or the lawyer under whom, he is studying concerning the kind and character of work he is doing and training he is receiving, and, if upon such investigation the Board is of the opinion that the work he is doing or the training he is receiving does not constitute a compliance with these rules, it may refuse to allow him credit for such work, or it may take such other action as seems to it appropriate.

8. General Education.—(a) Each person seeking to take the examination which is to be held in August, 1938, or any examination held thereafter, must, prior to taking such examination, have received a standard four-year high school education or its equivalent. This may be evidenced by the certificate of the principal of the high school last attended, if applicant is a graduate of a four-year high school fully accredited at the time of graduation by the North Carolina State Department of Education. Otherwise, the Board shall ascertain whether or not the applicant has complied with this rule by such investigations and examinations as shall satisfy it.

The Board of Law Examiners will, within the meaning of Rule 8 (a), deem an applicant to have the equivalent of a standard four-year high school education who has a diploma from a high school of any State accredited by the Department of Education of such State as a standard high school or who has been accepted as a first-year student in a senior college in any State accredited by the Department of Education of that State, or who has completed the first two years of study in a junior college of any State accredited by the Department of Education of that State, or has a diploma from a preparatory school recognized as a standard preparatory school of the grade of a standard high school by the Department of Education of the State where located.

(b) Each applicant, to take the examination to be held in August, 1940, and thereafter, must, prior to beginning the study of law, have completed, at a standard college, an amount of academic work equal to one-half of the work required for a bachelor's degree at the university of the State in which the college is located. With this application he shall file a certificate from such college furnishing all information that the Board shall require. If such person has not taken the above described amount of college work, or for any reason cannot furnish a certificate of such work, he may request an examination upon his general education, whereupon the Board itself or through some agency designated by it, shall examine him. If upon such examination, the Board is satisfied that his general education is sufficient to qualify the applicant to practice law, the Board may find that he has met the requirements of this rule as to general education.

If a person applying to take the examination to be held in August, 1940, or an examination to be held thereafter, cannot qualify under the above-stated provisions of this rule, the Board shall allow him to take the examination and be admitted if he has previously been accepted by an approved law school as a special student, if at such school he has complied with either Rule 9 (a) or Rule 9 (b), and if he presents a certificate to that effect by the dean of that school.

9. Legal Education. — Each person applying to take the examination in August, 1942, or thereafter, must have studied law for three years, all of which study must have been completed within a period of six years. During that period, he must either (a) have studied as a minimum requirement, all of the required subjects and any five of the optional subjects listed in Rule 13, or (b) he must have graduated from an approved law school.

A person shall be deemed to have complied with this rule if at the time of filing his application he presents the certificate of the dean of an approved law school that he (the applicant) will complete the course of study required for graduation from that school during the current summer session conducted by that school.

No license shall be issued, however, until the dean certifies that the applicant has satisfactorily completed that course of study and has graduated, provided that no review of work in preparation for the bar examination shall have constituted any part of the summer's course of study.

A person shall be deemed to have graduated from an approved law school for the purposes of these rules, if he has complied with all of the requirements for graduation therefrom except those relating to pre-legal education and if he was originally admitted to the law school as a special student and not as a candidate for a law degree.

10. Evidence of Legal Education.—Compliance with Rule 9 must be evidenced (a) by the certificate of the dean of an approved law school that the applicant has studied law in that school for three years and that he has passed examinations given by the faculty on all the required subjects and on five of the optional subjects listed in Rule 13, or that he has graduated from that law school; or (b) by the affidavit of a member of The North Carolina State Bar engaged in active practice of law, who has been a licensed practitioner in North Carolina for five years prior to the beginning of instruction, that the applicant has studied law under his personal instruction for three years and that he has passed written examinations given by him on all the required subjects and on five of the optional subjects listed in Rule 13; which affidavit shall be made on the form prescribed by the Board of Law Examiners, and the originals of which written examinations, and the answers thereto shall be attached to such affidavit; or (c) by a combination of such certificates showing that the aggregate total of the applicant's study in an approved law school or schools and under a lawyer or lawyers has equaled three years and that he has passed written examinations on all the required subjects and on five of the optional subjects listed in Rule 13; and no certificate showing study outside of an approved law school for less than six consecutive months will be considered. Persons who have studied law outside of North Carolina will not be allowed credit for the time spent in such study, except to the extent that the same has been pursued in an approved law school.

11. Years of Study Defined.—A year of study, within the meaning of Rule 9, shall consist of a minimum of either (a) thirty weeks, excluding vacations but including examinations, embracing an average of twelve hours of classroom work each week, and an average of two hours' preparation required for each hour of recitation, spent in a law school approved by the Board; or (b) forty-five weeks, exclusive of vacations embracing an aggregate of ten hundred and eighty hours during this period devoted to study, recitations, and examinations, and with final examinations in each subject of at least two hours' duration, spent under the personal instruction of a member of The North Carolina State Bar who, at the beginning of his instruction of the applicant, has been a licensed practitioner in North Carolina for five years.

Study in the summer session of any law school approved by the Board shall count for the same part as a year's study, within the meaning of this rule, as it is counted toward graduation under the regulations of that school.

12. Approved Law Schools.—The law schools maintained by the University of North Carolina, Duke University, and Wake Forest College are hereby approved; other law schools will be approved if and when they satisfy the Board that their standards, work, and equipment are substantially the equivalent of those of one or the other of the above-mentioned law schools. The Board may, from time to time, withdraw approval from law schools previously approved, if and when it determines that they do not conform to the foregoing requirements.

13. Examinations.—Beginning with the examination to be held in August,

1936, there shall be held one examination each year of those applying to be admitted to practice law in North Carolina; it shall be held in the City of Raleigh and shall commence on the first Tuesday in August at 10 a. m. No person other than one applying for admission by comity will be admitted to the practice of law until and unless he has been found by the Board to have duly passed an examination given in accordance with this rule, the Board being hereby vested with the authority to determine what shall constitute the passing of an examination. The examinations to be given in August, 1942, and thereafter, will deal with the following required and optional subjects: Required: Agency, Business Associations (including corporations, partnerships, joint stock companies and business trusts), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Equity, Evidence, Legal Ethics, Negotiable Instruments, Personal Property, Real Property, Security Transactions (including mortgages, security deeds of trust, trust receipts, pledges, conditional sales, guaranty and suretyship), Torts, and Wills and Administration. Optional: Administrative Law, Conflict of Laws, Debtor's Estates (including bankruptcy, receiverships, assignments for the benefit of creditors, compositions and state reorganization and insolvency statutes), Domestic Relations, Federal Jurisdiction and Procedure, Future Interests, Insurance, Labor Law, Municipal Corporations, Public Utilities, Quasi-Contracts, Sales, Taxation, Trade Regulation, and Trusts.

Applicants will be expected to answer all of the questions relating to the required subjects and those relating to any five of the optional subjects.

13 (a). For the purpose of meeting such emergencies as may arise during the present war, the Board may allow such applicants as are qualified to take any regular examination, but who are members of the armed forces, to take the examinations of this Board at or about the same time and during the same or about the same periods through proctors authorized by the Board at or near the stations where the applicants may be located. Any applicant taking an examination under this amendment shall be required to pay any added expense attached to such examination and the Board may consider the papers submitted by the applicant at such meeting as it may deem proper. For the purposes of effectuating this rule the Secretary is authorized to waive the requirements as to time of filing application. This rule is adopted for the purpose of meeting the emergency created by the present war.

14. Protest.—Any person may protest the right of any applicant to be admitted to the practice of law either by examination or as a matter of comity. Such protest shall be made in writing, signed by the person making the protest, and bearing his home and business address, and shall be filed with the Secretary of the Board not later than July 15 previous to the date on which the next succeeding examination is to be held. The Secretary shall immediately notify the applicant of the protest and of the charges therein made; and the applicant may thereupon withdraw as a candidate for admission to the practice of law at that examination; but, in case his withdrawal in writing is not received by the Secretary by noon of the Saturday preceding the examination, he shall not be allowed thereafter to withdraw, and the person making the protest and the applicant in question shall appear before the Board at 10 o'clock a. m. of the Monday preceding the examination, whereupon the Board shall proceed forthwith to hear the matter and to make such disposition thereof as in its judgment seems just and in accordance with these rules and with the laws of North Carolina. The protest shall not be made public unless and until the final disposition of the matter has been determined adversely to the interest of the applicant.

15. Certificates Not Conclusive.—Certificates furnished by an applicant shall not be conclusive upon the Board as to the facts therein stated; it shall make

such investigation as it sees fit into the character of an applicant and the facts relating to the question as to whether or not he has complied with these rules; and if it desires, it may require the applicant to appear in person before it, or before some person designated by it, at or before the time of the examination which the applicant is seeking to take, for the purpose of eliciting from him additional information. All information furnished to the Board by an applicant, and all answers and questions upon blanks furnished by the Board, shall be deemed material.

16. Effect of Disbarment, Suspension or Disciplinary Proceedings.—No one who has been suspended or disbarred from practicing law in this or any other State, or by any Federal Court, and whose sentence of suspension has not expired or whose sentence of disbarment has not been rescinded, and whose license to practice has not been restored, or against whom there are pending in any State or Federal Court charges, or proceedings undisposed of relating to his professional conduct shall be allowed to stand any examination held after the adoption of these rules, or admitted to practice law in this State by comity or otherwise. No one shall be admitted to practice law in this State by examination or comity who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges, relating to his professional conduct, whether same have been terminated or not, in this or any other State, or any Federal Court or other jurisdiction.

17. Comity.—Any person duly licensed to practice law in another State may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the State in which he was licensed upon the applicant's furnishing to the Board a certificate from a member of the court of last resort of such State that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law before the Courts of said State and the Courts of the Federal Government, or as a full-time teacher in a law school approved by the Board, for five years or more, is in good professional standing, with no charges undisposed of against him as to professional conduct, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such State, practicing in the court of last resort, and two persons who are not attorneys, as to the applicant's good moral character, whose signatures shall be attested by the clerk of the court; upon the applicant's satisfying the Board that he has complied with the provisions of Rule 5 relating to citizenship and residence in North Carolina.

Applicants for admission to practice law under this rule shall be required to deposit with the Secretary of the Board the same amount required of applicants who stand the examination, and they shall be required to file with the Secretary on or before the 15th day of June of the year in which they desire to be admitted all of the certificates and other documents required by these rules. In addition to all other fees required by these rules, each applicant for admission under this rule shall deposit with the Secretary the sum of \$75.50 to be used as the Board may direct for investigation or otherwise. If the fee charged comity applicants in such states or jurisdiction from which the applicant files shall be in excess of the total amount chargeable under the rules of this Board, then an amount equal to the charges fixed to be paid by comity applicants applying from this State in such foreign states or jurisdiction shall be paid to this Board. No license shall be issued to any applicant for admission under this rule except at the time of the annual examination of applicants after the filing of applications as required by Rule 4, and after determination of any protest that may be filed under Rule 14: Provided, that the Board may, when in session at any other time, grant an interim permission to such applicant to practice law until license shall be issued or de-

clined: Provided further, that such applicant must have previously complied with all the requirements of this rule.

Editor's Note.—The deposit required agraph of this rule was increased on April 16, 1948, from \$50.00 to \$75.50.

18. Fees.—(a) Each person registering in accordance with Rule 7, shall, at the time of registering, pay to the Secretary one dollar; and the money derived from the payment of registration fees shall be used to defray the expenses of administering Rule 7 and the other expenses of the Board.

(b) All applicants to take examinations held after the adoption of these rules shall pay to the Secretary a filing fee of one dollar and fifty cents, and shall deposit with him an additional sum of twenty-two dollars, of which last named sum two dollars shall be considered a deposit to pay for license if issued. Any applicant who shall fail to pass the examination shall receive a refund of twelve dollars from said twenty-two dollars so deposited.

19. Issuance of License.—Upon compliance with these rules the Secretary shall issue to each successful applicant a license to practice law in North Carolina, the same to be in such form as may be prescribed by the Board.

20. Appeals.—(a) Any applicant may appeal from an adverse ruling or determination of the Board of Law Examiners as to his eligibility to take the bar examination. After an applicant has successfully passed the bar examination, he may appeal from any adverse ruling or determination withholding his license from him.

(b) Any appealing applicant shall, within ten days after notice of such ruling or determination, give notice of appeal in writing and file with the Secretary of the Board his written exceptions to the ruling or determination, which exceptions shall state the grounds of objection to such ruling or determination.

(c) The record on appeal to the Superior Court shall consist of the following:

(1) The papers filed by the applicant with the Board under its rules.

(2) A certified copy of the evidence taken by the Board upon the question or questions appealed.

(3) The rulings and determinations of the Board.

(4) The notice of appeal.

(5) The exceptions.

Within sixty days of receipt of the exceptions filed by the applicant with the Board, the Secretary of the Board shall certify such record at the expense of the applicant.

(d) Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge, without a jury. The findings of fact by the Board, when supported by evidence or reliable information, shall be conclusive and binding upon the Court. If the Court is of the opinion that the Board was in error, it shall so specify and remand the matter to the Board, which may appeal as hereinafter provided. Said appeal shall operate as a supersedeas. In case no appeal is taken by the Board, it shall proceed in accordance with the judgment of the Court.

(e) The said applicant, or the Board of Law Examiners, may appeal to the Supreme Court from any order or judgment of the Superior Court. If the said cause is remanded by the Supreme Court to the Superior Court, then the Superior Court shall remand the same to the Board of Law Examiners, to be proceeded with in accordance with the opinion of the Supreme Court.

VIII. Comparative Tables

(1) TABLE OF COMPARATIVE SECTIONS

The numbers preceding the dots refer to sections in the Consolidated Statutes and in Michie's Codes; the numbers following the dots give the corresponding section in the General Statutes of North Carolina. The letters L. M. following the dots indicate that the section is not codified but has been made a local modification citation under the number following the above letters. For table of deleted sections, see Appendix VIII, (2).

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(2) TABLE OF DELETED SECTIONS

The sections in this table appeared in the Consolidated Statutes and in the Michie Codes. For sections transferred into sections of the General Statutes, see Appendix VIII, (1).

Sections in this table preceded by a star represent the following types of laws which were not codified in the General Statutes of North Carolina: (1) local in application affecting less than ten counties; (2) excepting pending litigation; (3) construction clauses; (4) repealing clauses; (5) partial invalidity clauses. The omission of such statutes does not for that reason repeal them. See General Statutes, sections 164-1 to 164-8.

Where a section was repealed by reference to its corresponding number in the General Statutes such number appears in parentheses following the repealed section.

The following abbreviations have been used in this table: Con. St. = Construction Statute; Loc. = Local; Obs. = Obsolete; P. Inv. = Partial Invalidity; P. Lit. = Pending Litigation; Rep. = Repealed; Rpl. St. = Repealing Statute; Sup. = Superseded; Unconst. = Unconstitutional.

§ 163. Obs.	§ 233. Sup., § 53-58.
§ 179-181. Obs.	§ 234. Sup., § 53-54.
§ 182-191. Rep., 1935, c. 243.	§ 235. Sup., § 53-14.
§ 191(s) (§ 63-19). Rep., 1943, c. 543.	§ 236. Sup., § 53-135.
§ 193(a)-193(h). Obs.	§ 237-239. Obs.
§ 193(12). Obs.	§ 240 (§ 53-147). Rep., 1943, c. 543.
§ 194-196. Sup., § 84-24.	§ 241, 242. Obs.
§ 204-215. Rep., 1933, c. 210, s. 20.	§ 243. Sup., § 53-41.
§ 216. Sup., § 53-2.	§ 244. Sup., § 53-104.
§ 217. Sup., §§ 53-3 to 53-5.	§ 245. Sup., § 53-137.
§ 217(m)1-217(m)13. Obs.	§ 246. Obs.
§ 218. Sup., § 53-6.	§ 247. Sup., §§ 53-106, 53-108.
§ 218(d). Sup., § 53-20.	§ 248. Sup., § 53-107.
§ 218(r), 218(s). Obs.	§ 249. Sup., §§ 53-117, 53-118, 53-122.
§ 218(u). Obs.	§ 250. Sup., §§ 53-122, 53-123.
§ 218(v). Unconst., 205 N. C. 822, 172 S. E. 484.	§ 251. Sup., § 53-125.
§ 219. Sup., §§ 53-7, 53-8.	§ 252. Sup., § 53-122.
§ 219(a). Obs.	§ 253. Sup., §§ 53-20, 53-118.
§ 219(a)2-219(a)4. Obs.	§ 254. Sup., § 53-121.
§ 219(b). Obs.	§ 255. Sup., § 53-136.
§ 219(d). Obs.	§ 256. Sup., § 53-137.
§ 220. Sup., § 53-43.	§ 257. Sup., § 53-139.
§ 221. Sup., § 53-61.	§ 258. Sup., § 53-138.
§ 221(s). Obs.	§ 259. Sup., § 53-141.
§ 221(u). Obs.	§ 260. Sup., § 53-142.
§ 222(c). Obs.	§ 261. Sup., § 53-143.
§ 222(o). Obs.	§ 262. Obs.
§ 223. Sup., § 53-43.	§ 263. Sup., § 53-144.
§ 224. Sup., § 53-64.	§ 264. Sup., § 53-13C.
§ 225. Sup., § 53-60.	§ 264(l). Obs.
§ 225(i), 225(j). Obs.	§ 265-276. Rep., 1933, c. 228.
§ 225(l). Obs.	§ *281. P. Lit.
§ 225(n)-225(r). Obs.	§ *282. P. Inv.
§ 226-229. Sup., §§ 53-1, 53-48, 53-50, 53-51, 53-53, 53-59.	§ 360. Obs.
§ 231. Sup., § 53-52.	§ 454. Sup., § 52-1 et seq.
§ 232. Sup., § 53-57.	§ 482. Sup., § 1-94.
	§ 486. Sup., § 1-121.
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- § 594. Obs.
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 § 1122 (§ 55-10). Rep., 1943, c. 543.
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 § 1163, 1164. Rep., 1941, c. 353, s. 24.
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 § *1316(d). Con. St.
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 § *1461(5), 1461(6). Loc
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- § 3846(ee). Rep., 1927, c. 95, s. 12.
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 § 3857. Rep., 1925, c. 110, s. 2.
 § *3857(b), 3857(c). Con. St.
 § 3860. Rep., 1925, c. 275, s. 6.
 § 3861(c). Obs.
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 § 4035. Sup., §§ 7-44, 114-7.
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- § 4689(d). Rep., 1941, c. 343.
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	1408	1592	1747
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1541	1421	1596	1751
1542	1412	1597	1754
1543	1418	1598	1763
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1545	1414	1600	1761
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1548	1416	1603	1773
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1555a	3887	1611	1778
1556	1654	1612	1768
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1558	1656	1614	4157
1559	1657	1614a	1770
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1572	1697	1625	1789
1573	1698	1626	1790
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1580	1736	1633	1794

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1635	1799	1687	2142
	1802	1688	2143
1636	1801	1689	2144
	1802	1690	2145
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1638	4571	1692	7554
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1641	1805	1695	7542
1642	1806	1696	7543
1643	1807	1697	1964
1644	1808	1698	1963
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1743	7591	1800	2182
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1746	7591	1803	2184
1747	7593	1804	2185
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1752	7598	1809	2190
1753	7599	1810	2197
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1755	7601	1812	2199
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1757	7603	1814	2201
1758	2191	1815	2202
1759	2191	1816	2195
1760	2194	1817	2196
1761	2193	1818	2196
1762	2151	1819	2203
1763	2151	1820	2204
1764	2151	1821	2205
1765	2152	1822	2206
1766	2150	1823	2207
1767	2155	1824	2208
1768	2155	1825	2209
1769	2155	1826	2210
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1771	2154	1828	2212
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1777	2161	1834	2218
1778	2162	1835	2219
1779	2163	1836	2220
1780	2164	1837	2221
1781	2165	1838	2222
1782	2165	1839	2223
1783	2166	1840	2224
1784	2167	1841	2225
1785	2168	1842	2226
1786	2169	1843	2231
1787	2170	1844	2232
1788	2171	1845	2233
1789	2172	1846	2234
1790	2174	1847	2235
1791	2175	1848	2236
1792	4018	1849	2237
1793	4019	1850	2238
1794	2176	1851	2239
1795	2177	1852	2240
1796	2178	1853	2241

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1856	2243	1912	2252
1857	2244	1913	2254
1858	2245	1914	2253
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1860	2247	1916	1633
1861	2248	1917	1634
1862	2087	1918	1635
1863	2089	1918a	1631
1864	2088	1919	1636
1865	2097	1920	1637
1866	2104	1921	1638
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1876	2103	1932	1623
1877	2139	1933	1624
1878	2139	1934	1625
1879	2139	1935	1647
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1881	2109	1937	1649
1882	2114	1938	1650
1883	2111	1939	1012
1884	2116	1940	1651
1885	2117	1941	1652
1886	2118	1942	1653
1887	2119	1943	1626
1888	2120	1944	1627
1889	2121	1945	1628
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1893	2287	1949	1630
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1896	2291	1952	2307
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1898	2293	1953	2308
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1900	2296	1955	2311
1901	2297	1956	2310
1902	2298	1957	2312
1903	2299	1958	2313
1904	2300	1959	2314
1905	2301		2315
1906	2302	1960	2316
1907	2303	1961	2317
1908	2304	1962	2318
1909	2249	1963	2319

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1965	2332	2020	2438
1966	2324	2021	2439
1967	2321		2440
1968	2322	2022	2441
1969	2333	2023	2442
1970	2335	2024	2467
1971	2336	2025	2468
1972	2337	2026	2469
1973	2338	2027	2474
1974	2339	2028	2470
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1976	2320	2030	2478
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1978	2327	2032	2476
1979	2328	2033	2479
1980	2329	2034	2472
1981	2330	2035	2471
1982	2341	2036	2473
1983	2343	2037	2461
1984	2355	2038	2462
1985	2350	2039	2463
1986	2345	2040	2446
1987	2346	2041	2447
1988	2347	2042	2448
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1990	2348	2044	2450
1991	2351	2045	2451
1992	2353	2046	2452
1993	2356	2047	2453
1994	2357	2048	2454
1995	2358	2049	2455
1996	2359	2050	2457
1997	2360	2051	2458
1998	2361	2052	2480
1999	2363	2053	2481
2000	2364	2054	2488
2001	2365		2489
	2366	2055	2490
2002	2367	2056	2491
2003	2368	2057	2492
2004	2369	2060	3408
2005	2370	2080	3369
2006	2371	2081	2493
2007	2372	2081a	2493
2008	2373	2082	2494
2009	2374	2083	2495
2010	2375	2084	2496
2011	2376	2085	2497
2012	2429	2086	2498
2013	2430	2087	2499
2014	2431	2088	2500
2015	2432	2089	2502
2016	2433	2090	2503
2016	2434	2091	2504
2017	2435	2092	2505
2018	2444	2093	2506

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2095	2508		2975
2096	2509	2150	2974
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2100	2514	2154	2986
2101	2517	2155	2987
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2105	2518	2159	2990
2106	2517	2160	2991
2107	2515	2161	2992
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2109	2522	2163	2994
2110	2523	2164	2995
2111	2524	2165	2996
2112	2525	2166	2997
2113	2526	2167	2999
2114	2527	2168	3000
2115	2528	2169	3001
2116	2529	2170	3002
2117	2530	2171	3003
2118	3292	2172	3004
2119	2531	2173	3005
2120	2532	2174	3006
2121	2533	2175	3007
2122	2535	2176	3008
2123	2536	2177	3009
2124	2537	2178	3010
2125	2538	2179	3011
2126	2539	2180	3012
2127	2540	2181	3013
2128	2541	2182	3014
2129	2542	2183	3015
2130	2543	2184	3016
2131	2544	2185	3017
2132	2545	2186	3018
2133	2546	2187	3019
2134	2547	2188	3020
2135	2548	2189	3021
2136	2549	2190	3022
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2139	2552	2193	3025
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2141	2555	2195	3027
2142	2556	2196	3028
2143	2557	2197	3029
2144	2557	2198	3030
2145	2558	2199	3031
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2147	2971	2201	3033
	2972	2202	3034
	2975	2203	3035
2148	2973	2204	3036

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2207	3039	2264	3096
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2218	3050	2275	3107
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2220	3052	2277	3109
2221	3053	2278	3110
2222	3054	2279	3111
2223	3055	2280	3112
2224	3056	2281	3113
2225	3057	2282	3114
2226	3058	2283	3115
2227	3059	2284	3116
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2230	3062	2287	3119
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2232	3064	2289	3121
2233	3065	2290	3122
2234	3066	2291	3123
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2236	3068	2293	3125
2237	3069	2294	3126
2238	3070	2295	3127
2239	3071	2296	3128
2240	3072	2297	3129
2241	3073	2298	3130
2242	3074	2299	3131
2243	3075	2300	3132
2244	3076	2301	3133
2245	3077	2302	3134
2246	3078	2303	3135
2247	3079	2304	3136
2248	3080	2305	3137
2249	3081	2306	3138
2250	3082	2307	3139
2251	3083	2309	3141
2252	3084	2310	3142
2253	3085	2311	3143
2254	3086	2312	3144
2255	3087	2313	3145
2256	3088	2314	3146
2257	3089	2315	3147
2258	3090	2316	3148
2259	3091	2317	3149
2260	3092	2318	3150
2261	3093	2319	3151

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2321	3153	2383	1920
2322	3154		1947
2323	3155	2384	1940
2324	3156	2385	1926
2325	3157	2386	1934
2326	3158	2387	1936
2327	3159	2388	1938
2328	3160	2389	1937
2329	3161	2390	1933
2330	3162	2391	1925
2331	3163		1926
2332	3164		1927
2333	3165		1952
2334	3166	2392	1943
2335	3167	2394	1941
2336	3168	2395	1935
2337	3169	2396	1921
2338	3170	2397	1926
2339	3171	2399	1924
2340	2976	2400	1939
2341	2998	2401	1945
2342	2977	2402	1946
2343	2978	2408	1915
2344	2979	2409	1913
2345	2981		1914
2346	2983	2411	1917
2346	2986	2412	1918
2347	3172	2413	1925
2348	3173	2415	1928
2349	3174		1929
2350	3175	2416	1931
2351	3176	2417	1922
2351a	3178	2417	1923
2352	3179	2418	1921
2353	3188	2420	1942
2354	3189	2421	1932
2355	3190	2423	1948
2356	3191		1951
2357	3193	2424	1986
2358	3194	2425	2061
2359	3195	2426	1952
2360	3199	2427	2012
2361	1386	2428	2011
	3197	2429	2013
2362	3196	2430	2049
2363	3198	2431	2050
2364	3200	2432	2051
2365	3201	2433	1988
2366	3202	2434	2037
2367	3203	2435	2036
2368	3204	2436	2040
	3205	2437	2042
2369	1957	2438	1967
2370	1958	2439	1981
2371	1902	2440	1979
2380	1919	2441	2014

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2443	2003		3249
2444	1969		3250
2445	2017	2502	3251
2446	1980	2503	3252
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2448	1978	2505	3254
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2453	2010	2509	3235
2454	2008	2510	3236
2455	2020	2511	3225
2457	1974	2512	3233
2459	1887		3241
	1891	2513	3242
2460	1964		3243
2462	1975	2514	3240
2463	1976	2515	3244
2464	1976	2516	3245
2465	1972	2517	3226
2466	1897	2518	3238
	1898	2519	3255
2467	1965		3256
2468	1997	2520	3257
2469	2001	2521	3258
2470	2000	2522	3259
	2022	2523	3260
2471	1993	2524	3261
2472	2023	2525	3262
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2476	2044	2527	3264
2478	1971	2528	3265
2481	2033	2529	3266
2483	1998	2530	3267
2484	2053	2531	3268
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2491	3222	2540	3279
	3225	2541	3280
2492	3220	2542	3281
2493	3229	2543	3282
2494	3228	2544	3283
	3230	2545	3284
2495	3231		3287
2496	3223	2546	3285
2497	3224	2547	3286
2498	3221	2548	3420
2499	3216	2549	3421
2500	3247	2550	3422

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	3462	2604	3414
2553	3429	2604a	3483
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2556	3426	2607	3485
2557	3427	2608	3486
2558	3431	2609	3487
2559	3432	2610	3488
2560	3433	2611	3475
2561	3434	2612	3476
2562	3435	2613	3480
2563	3458	2614	3481
2564	3456	2615	3541
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2566	3412	2617	3446
2567	3444	2619	3494
	3445	2620	3495
	3461	2621	3496
2568	3448	2622	3497
2569	3449	2622a	3536
2570	3451	2622b	3537
2571	3452	2622c	3539
2572	3453	2622d	3540
2573	3455	2622e	3536
2574	3459	2622f	3538
2575	1706	2623	3510
	1707	2624	3523
	3444	2625	3504
2575a	1708	2626	3504
2576	1712	2626a	4457
2577	1713	2627	3503
2578	1714	2628	3509
2579	1715	2629	3507
2580	1716	2629a	3511
2581	1717	2630	3513
2582	1718	2631	3515
2583	1719	2632	3516
2584	1720	2633	3518
2585	1721	2635	3525
2586	1722	2636	3526
2587	1723	2637	3532
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2589	1725	2639	3534
2590	1726	2640	3447
2591	1727	2641	3521
2592	1728	2642	3514
2593	1729	2643	3514
2594	1730	2644	3514
2595	1731	2645	3482
2596	1732	2646	3465
2597	1733	2646a	5091
2598	3413	2647	3415
2599	3471	2648	3430
2600	3472	2649	3550
2601	3454	2650	3543

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2653	3548	2706	3819
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2655	3551	2708	3822
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2659	3555	2711	3786
2660	3556	2712	3752
2661	3557	2713	3755
2662	3558	2714	3754
2663	3559	2715	3753
2664	3560	2716	3757
2665	3561	2717	3758
2666	3562	2718	3809
2667	3563	2719	3817
2668	3564	2720	3810
2669	3566	2721	3808
2670	3568	2722	3781
	3569	2723	3783
2671	3568	2725	3806
	3569	2726	3807
2672	3570	2727	3792
2673	3571	2728	3818
2674	3572	2729	3832
2674a	6536	2730	3833
2675	385	2731	3854
2676	386	2732	3855
2677	387	2733	3866
2678	388	2734	3856
2679	389	2735	3848
2680	390	2735a	3850
2681	3750	2735b	3850
2682	3779	2736	3858
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	3795	2754	3875
2698	3798	2755	3852
2699	3799	2756	3874
2700	3797	2757	6120
2701	3800	2758	6540
2702	3802	2759	3879
2703	3796	2760	5922

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2762	3881		3929
2763	3882	2812	3931
2764	3883	2813	3932
2765	3884	2814	3933
2766	3885	2815	3934
2767	3890	2816	3935
2768	3891	2817	3936
2769	3886	2818	3937
2770	3888	2819	3938
2771	3889	2820	3939
2771a	3887	2821	3940
2772	3847	2822	4394
2773	3903	2823	3943
	3904	2824	3944
2774	947	2825	3945
2775	3905	2826	3942
2776	3906	2828	3946
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3119	4137	3174	4538
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3198	4565	3253a	6683
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3200	4570	3255	4625
3201	4571	3255a	4610
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3246	4615	3298	4488

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3308	4280	3368	4444
3309	1852	3369	4340
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3343	4247	3399	4185
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3345	4240	3401	4186
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3417	1968	3475	2139
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3423	4182	3481	2128
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3427	4294	3485	6306
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3434a	4284	3493	4368
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3445	4766	3500	4249
3446	7072	3501	4263
3447	4766	3502	4258
3448	7151		4510
	7155	3503	4257
3449	7155	3504	4264
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3451	7241	3506	4251
3452	4765	3507	4250
3453	7066	3508	4255
3454	7159	3509	4261
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3457	7124	3512	4451
3458	7526	3513	4452
3459	2122	3517	4508
3460	2134	3518a	3410
3462	2125	3522	4453
3463	2136	3524	4456
3464	2105	3525	4456
3465	2141	3526	3371
3466	2102		3400
3467	2126	3527a	3370
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3469	2098	3533	3398
3470	2108		3399

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3536	6881	3593	5165
3537	6882	3594	7768
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3540	6885	3597	2228
3541	6883	3598	4395
3542	6884	3599	3567
3543	4304	3600	3561
3544	4333	3601	886
3545	6998	3602	2340
3546	6999	3603	1354
3547	6966	3604	4396
3548	8095	3605	4386
3549	6964	3606	7691
3550	6984	3607	2742
3551	6983	3608	2747
3552	6965	3609	2685
3553	6982	3610	2743
3554	6963	3611	4366
3555	4471	3612	4367
3556	4472	3613	2456
3557	4473	3614	1651
3558	4474	3615	4364
3559	7377	3616	4365
3560	6981	3617	1617
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3562	8097	3619	4227
3563	8098	3620	4215
3564	8099	3621	4213
3565	4383	3622	4216
3566	5013	3623	4228
3567	6790	3624	4207
3568	4372	3625	4208
3569	4373	3626	4211
3570	4374	3627	4210
3571	4382	3628	4411
3572	4388	3629	4203
3573	1301	3630	4222
3574	1319	3631	4200
3575	4389	3632	4201
3576	4385	3633	4202
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3585	750	3642	6632
3586	750		6647
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3588	1234	3644	6782
3589	1469	3645	6622
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3653	6662	3707	4412
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3655	6671	3709	4503
3656	6738	3710	4504
3657	4404	3711	4183
3658	4403	3712	4184
3659	4405	3712a	4509
3660	4408	3713	4900
3660a	7220	3714	4510
3661	4407	3715	4430
3662	4406	3716	4431
3663	2443	3717	4432
3664	2362	3718	4433
3665	2362	3719	4434
3666	4323	3720	4435
3667	4325	3721	4435
3668	4335	3722	4436
	4958	3723	4437
3669	4952	3724	4688
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3671	4324	3725	4427
3672	4322	3726	4428
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3676	4331	3730	4479
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3678	4315	3731a	4349
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3683	4314	3736	4462
3684	8075	3737	4463
3685	4316	3738	4464
3686	2352	3740	4459
3687	4306	3740a	4659
3688	4305	3740b	4660
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3689a	6537	3742	4303
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3754	4417	3806b	6683
3755	4418	3807	4731
3756	3478	3808	4734
3757	3504	3809	4468
3757a	4457	3811	5097
3757b	4350	3812	5083
3757c	3536	3813	4467
3757d	3537	3814	4709
3758	4420	3815	5086
3759	4332	3816	5085
3760	4400	3817	4425
3761	3506	3818	4696
3761a	3491	3819	4699
3761b	3492	3820	4703
3762	3520	3821	4691
3763	4419		4768
3764	4466	3822	4703
3765	4266	3822a	4900
3765a	4237	3823	2147
3766	4267	3824	2147
3767	3413	3825	2148
3768	3519	3826	2149
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3773	3796	3831	5123
3774	3804	3832	4440
3775	3797	3832a	4012
3776	4354	3832b	4013
3777	3794	3832c	4013
3778	3793	3832d	4013
3779	3811	3832e	4013
3780	3805	3832f	4014
3781	3787	3832g	4015
3782	3782	3832h	4016
3783	3784	3833	4390
3784	3789	3834	5719
3785	3760	3835	4391
3786	8005	3836	5746
3788	4397	3836c	5766
3790	8016	3836d	5770
3791	2457	3838	4414
3792	7885	3839	5456
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3851	3984	3903	5196
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3852a	3996	3905	5200
3852b	3998	3906	5198
3852c	3999	3907	5201
3852d	4000	3908	5203
3852e	4001	3909	7309
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3853	3991	3910	7311
3854	3990	3911	7312
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3856	3993	3914	5005
3857	7124		5006
3858	7125	3915	5006
3859	7123	3916	5007
3860	7127	3917	5008
3863	4936	3918	5009
3864	4937	3919	5010
3865	4938	3920	5011
3866	4939	3922	4033
3867	4940	3923	4034
3868	4941	3924	4035
3869	4941	3925	6932
	4942	3926	6933
	4943	3928	6934
3870	4944	3930	4666
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3872	4945	3932	4668
3873	4946	3933	4672
3874	4947	3934	4673
3875	4948	3935	4669
3876	5170	3936	4670
3877	5171	3937	4671
3878	5172	3937a	4674
3879	5173	3938	4675
3880	5169	3939	4676
3881	5174	3940	4677
3882	5175	3941	4684
3883	5180	3942	4686
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3890	5183	3949	4695
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3892	5185	3951	4697
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3895	5189	3954	4701
3896	5190	3955	4702
3897	5192	3956	4703
3898	5193	3957	4704
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3961a	4714	4013	5292
3970a	4759	4014	5293
3971	4761	4015	5294
3972	4764	4016	5275
3973	4750	4017	5276
3974	4765	4018	5277
3975	4753	4025	5279
	4754	4026	5280
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	4756	4028	5260
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4505a	6700	4551	6162

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5255	7933	5311	5129
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5259	7900	5316	7397
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5261	8047	5318	7399
5262	8052	5319	7400
5263	7975	5320	7536
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5265	7998	5321b	7537
5266	7978	5321c	7538
5267	7948	5321d	7539
5268	7921	5322a	7517
5269	7922		7520
5270	7941	5322b	7521
5271	7943	5322c	7518
5272	7944	5323	7624
5273	7945	5324	7625
5274	7946	5325	7626
5275	7947	5326	7627

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5327	7635	5383	7698
5328	7636	5384	7699
5329	7637	5385	7700
5330	7638	5386	7701
5331	7639	5387	7702
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5357	7667	5409	7746
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5368	7678	5416d	7318
5369	7679	5416e	7320
5370	7682	5416f	7322
5371	7684	5416g	7323
5372	7530	5416h	7327
	7683	5416j	7324
5373	7628	5416k	7326
	7686	5416l	7325
5374	7687	5416m	7317
5375	7688	5416n	7319
5376	7689	5416o	7321
5377	7690	5416p	7328
5378	7692	5426	8053
5379	7693	5426a	8059
5380	7694	5426b	8059
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5382	7697	5428	8055

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5436	6759	5448	8092
5437	6760	5449	8093
5438	6761	5450	8090
5438a	6677	5451	8095
5439	8082	5452	8096
5440	8083		

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

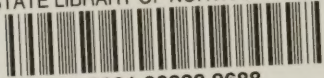
Raleigh, North Carolina

January 12, 1955

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing volume was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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