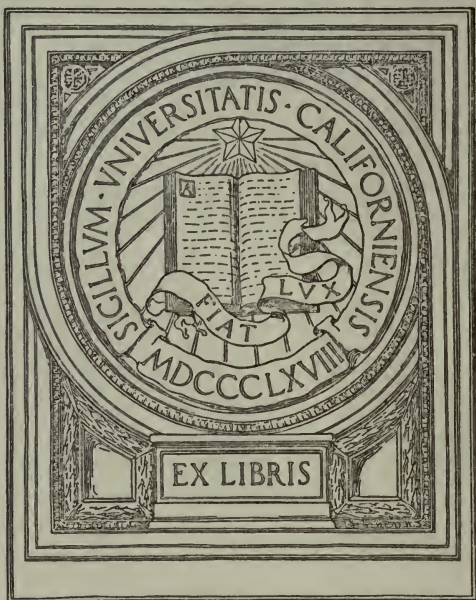


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P. ORMAN RAY,  
EVANSTON, ILL.

CONSTITUTIONAL CONVENTION

Illinois Constitution

Constitution of the State of

Illinois

ANNOTATED



Compiled and Published by the

**LEGISLATIVE REFERENCE BUREAU**

[Printed by authority of the State of Illinois.]

FROM  
P. O. RAY  
HARRIS HALL  
EVANSTON, ILL.



CONSTITUTIONAL CONVENTION

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## PREFACE.

The present constitution of the State of Illinois was adopted by the people on July 2, 1870, and became operative on August 8, 1870. In the course of nearly fifty years the Supreme Court of Illinois has, in hundreds of judicial decisions, construed most of the provisions of the constitution. By these decisions the meaning of some constitutional provisions has been restricted and that of other provisions has been enlarged or elaborated. The meaning of but a few of the provisions of the constitution of 1870 can be ascertained merely by reading the constitutional language. Generally, the full purport of a provision of that instrument can be determined only by considering it in connection with the judicial interpretation that has been placed upon it. For these reasons, it has been thought that a publication, which would state briefly under each section of the constitution the judicial construction of the provisions of that section, might be of value to the delegates to the constitutional convention; and this is the primary purpose of this volume. The discussion under each section of the constitution, however, is not limited to a statement of the decisions of the Supreme Court based on that section. Opinions of the Attorney General and veto messages of the Governor, which construe or apply the provisions of the constitution, have also been considered.

Some provisions of the present constitution are similar to those of the constitutions of 1818 and 1848. It is clear that decisions of the Supreme Court construing provisions of the earlier constitutions have an important bearing upon similar provisions of the constitution of 1870. Again, some provisions of the present constitution were adopted for the express purpose of retaining or overcoming the results of previous judicial decisions. The earlier decisions also have an important bearing on such provisions. In the preparation of this publication it has been deemed necessary, therefore, to examine all of the constitutional decisions of the Supreme Court, both before and after the adoption of the present constitution. In order to do this volumes 1 to 289, both inclusive, of the Illinois Supreme Court Reports have been consulted. It is interesting to note that these volumes of the Supreme Court Reports extend over a period of almost one hundred years, from the December Term, 1819, to the October Term, 1919. All of the available opinions of the Attorney General have been consulted, but it must be borne in mind that the opinions of that officer have been published only since 1893. All veto messages of the Governor since 1870 have also been examined.

Wherever possible, the discussion of the Supreme Court decisions, Attorney General's opinions and veto messages relating to a particular section of the constitution has been arranged and classified under appropriate subheadings. All statements made in the

discussion under each section of the constitution are accompanied by references to footnotes which contain citations of the Supreme Court decisions, Attorney General's opinions, or veto messages supporting the statements. It has been impossible, of course, to discuss all of the judicial decisions, Attorney General's opinions and veto messages, or even to cite them in the foot notes. Many of the decisions, opinions and veto messages are merely cumulative and add nothing to the construction that has been placed upon the provisions of the constitution. Some sections of the constitution have been construed or applied so frequently that it would be utterly impossible, in a publication of this character, to present a clear statement of each decision, opinion or veto message involving those sections. For example, the "due process of law" clause (article 2, section 2) has been applied in almost five hundred decisions of the Supreme Court, and in a large number of the opinions of the Attorney General. Many of these decisions and opinions are relatively unimportant in so far as the interpretation of that section is concerned. It is apparent that the discussion of all of these decisions and opinions, or even the citation of them in the footnotes, would result in confusion. For this reason only the important decisions, opinions and veto messages are discussed or cited in this volume. It must be remembered, however, that the statements as to the interpretation which has been placed upon the provisions of the constitution are based upon a careful study of all of the decisions, opinions and veto messages, even though all of them are not discussed or cited.

Attention should be called to the form of the citation of veto messages. Generally veto messages may be found in the journals of the senate and house of representatives, or in pamphlets containing all of the veto messages with reference to bills passed by the General Assembly at a particular session. It is only in recent years, however, that pamphlets containing veto messages have been published. In all cases where veto messages are available in the journals, or in pamphlet form, references are made either to the journals or the pamphlets. In a few cases, however, veto messages can be obtained only by consulting the records in the office of the Secretary of State. Copies have been made of the messages obtainable only from the records in the office of the Secretary of State, and are on file in the office of the Legislative Reference Bureau. The messages on file in the office of the Legislative Reference Bureau have been given arbitrary numbers for reference purposes and may be procured from that office.

The text of the constitution of 1870 as it appears in this volume has been compared with the original document on file in the office of the Secretary of State, and is an exact copy of that instrument.

This volume also contains a full and complete index of the constitution of 1870 by articles and sections.

LEGISLATIVE REFERENCE BUREAU.

December, 1919.

## TABLE OF CONTENTS.

### CONSTITUTION OF 1870

	PAGE.
PREAMBLE .....	13
ARTICLE I—BOUNDARIES .....	15
ARTICLE II—BILL OF RIGHTS.....	19
Section 1. Inherent and inalienable rights.....	19
Section 2. Due process of law.....	19
Section 3. Religious freedom.....	29
Section 4. Freedom of speech.....	30
Section 5. Right of trial by jury.....	31
Section 6. Unreasonable searches and seizures.....	35
Section 7. Bail, writ of <i>habeas corpus</i> .....	37
Section 8. Indictment, grand jury.....	37
Section 9. Rights of persons accused of crime.....	38
Section 10. Self crimination, jeopardy.....	43
Section 11. Penalties, corruption of blood, forfeiture of estate	46
Section 12. Imprisonment for debt.....	47
Section 13. Eminent domain.....	48
Section 14. <i>Ex post facto</i> laws, contracts, irrevocable grants...	55
Section 15. Military subordinate to civil power.....	60
Section 16. Quartering of soldiers.....	61
Section 17. Right of assembly and petition.....	61
Section 18. Elections to be free and equal.....	61
Section 19. Protection of the laws.....	62
Section 20. Fundamental principles.....	63
ARTICLE III—DISTRIBUTION OF POWERS.....	65
ARTICLE IV—LEGISLATIVE DEPARTMENT.....	73
Section 1. General Assembly.....	73
Section 2. Elections, vacancies.....	76
Section 3. Eligibility.....	77
Section 4. Disqualifications.....	78
Section 5. Oath of office.....	79
Section 6. Senatorial apportionment.....	79
Secs. 7 & 8. Minority representation.....	80
Section 9. Time of meeting, general rules.....	83
Section 10. Open sessions, adjournments, journals, protests...	84
Section 11. Style of laws.....	85
Section 12. Origin and passage of bills.....	85
Section 13. Reading, printing, title, amendments.....	87
Section 14. Privileges of members.....	97
Section 15. Disability of members.....	98
Section 16. Appropriations.....	98
Section 17. Payment of money, statement of expenses.....	100
Section 18. Ordinary expenses, casual deficits, appropriations	101
limited.....	101
Section 19. Extra compensation or allowance.....	103
Section 20. Public credit not to be loaned.....	104
Section 21. Pay and mileage of members.....	105
Section 22. Special legislation prohibited.....	110
Section 23. No power to release obligations to state.....	121

## TABLE OF CONTENTS.

ARTICLE IV—LEGISLATIVE DEPARTMENT—Concluded.	PAGE.
Section 24. Proceedings on impeachment.....	121
Section 25. Fuel, stationery, and printing.....	122
Section 26. State not to be sued.....	122
Section 27. Lotteries and gift enterprises.....	123
Section 28. Terms of office not to be extended.....	123
Section 29. Protection of miners.....	123
Section 30. Roads, public and private.....	124
Section 31. Drainage.....	124
Section 32. Homestead and exemption laws.....	126
Section 33. Completion of the state house.....	126
Section 34. Special legislation for Chicago permitted.....	127
 ARTICLE V—EXECUTIVE DEPARTMENT.....	 131
Section 1. Executive department.....	131
Section 2. State Treasurer.....	132
Section 3. Time of electing state officers.....	132
Section 4. Returns, tie, contested election.....	133
Section 5. Eligibility.....	133
Section 6. Governor, powers and duties.....	134
Section 7. His message and statement.....	134
Section 8. Special sessions of General Assembly.....	135
Section 9. Power to prorogue General Assembly.....	135
Section 10. Appointments.....	136
Section 11. Vacancies.....	137
Section 12. Power to remove officers.....	138
Section 13. Reprieves, commutations, pardons.....	139
Section 14. Commander-in-chief of army and navy.....	140
Section 15. Impeachment of civil officers.....	141
Section 16. Veto power.....	141
Section 17. Lieutenant Governor.....	145
Section 18. President of the senate.....	145
Section 19. Vacancy in office of Lieutenant Governor.....	145
Section 20. Vacancy in other state offices.....	145
Section 21. Report of the state officers.....	146
Section 22. Great seal of Illinois.....	146
Section 23. Fees and salaries.....	147
Section 24. "Office" and "employment" defined.....	147
Section 25. Oath of civil officers.....	149
 ARTICLE VI—JUDICIAL DEPARTMENT.....	 151
Section 1. Courts established.....	151
Section 2. Supreme Court, jurisdiction.....	153
Section 3. Qualifications of Supreme Court judges.....	156
Section 4. Terms of the Supreme Court.....	156
Section 5. Grand divisions, districts.....	156
Section 6. Election of Supreme Court judges.....	159
Section 7. Salaries of the Supreme Court judges.....	160
Section 8. Appeals and writs of error.....	161
Section 9. Reporter.....	161
Section 10. Clerks of the Supreme Court.....	161
Section 11. Appellate courts authorized.....	161
Section 12. Circuit courts, jurisdiction.....	162
Section 13. Judicial circuits.....	163
Section 14. Time of holding circuit courts.....	164
Section 15. Increase in number of circuit judges.....	165
Section 16. Salaries of the circuit judges.....	165
Section 17. Qualifications of judges and county commissioners.....	166
Section 18. County judges, county clerks.....	166
Section 19. Appeals from county courts.....	169

## TABLE OF CONTENTS.

ARTICLE VI—JUDICIAL DEPARTMENT—Concluded.	PAGE.
Section 20. Probate courts authorized.....	169
Section 21. Justices of the peace and constables.....	170
Section 22. State's attorneys.....	171
Section 23. Cook county courts of record.....	171
Section 24. Powers of Cook county judges, chief justice.....	173
Section 25. Salaries of Cook county judges and state's attorney	173
Section 26. Criminal court of Cook county.....	174
Section 27. Clerks of Cook county courts.....	175
Section 28. Justices of the peace in Chicago.....	176
Section 29. Judicial commissions, uniformity of laws relating to courts.....	176
Section 30. Removal of judges.....	179
Section 31. Written reports to Governor.....	179
Section 32. Terms of office, vacancies.....	180
Section 33. Process, prosecutions, population.....	182
 ARTICLE VII—SUFFRAGE .....	 185
Section 1. Qualifications of voters.....	185
Section 2. Ballot.....	188
Section 3. Privileges of electors.....	189
Section 4. Residence.....	189
Section 5. Persons in military service of United States.....	189
Section 6. Qualifications for office.....	189
Section 7. Exclusion from suffrage.....	190
 ARTICLE VIII—EDUCATION .....	 191
Section 1. Free schools.....	191
Section 2. Gifts or grants in aid of schools.....	192
Section 3. Aid to sectarian schools prohibited.....	193
Section 4. Sale of textbooks, teachers and officers not to be interested in.....	194
Section 5. County superintendent of schools.....	194
 ARTICLE IX—REVENUE .....	 195
Section 1. Taxation by valuation, uniformity.....	195
Section 2. Taxation of other subjects or objects.....	206
Section 3. Exemptions.....	206
Section 4. Sale of real property for taxes.....	211
Section 5. Right of redemption.....	212
Section 6. Release from taxation forbidden.....	214
Section 7. Taxes to be paid into state treasury.....	217
Section 8. Limitation on county taxes.....	217
Section 9. Special assessment and special taxation, local im- provements.....	219
Section 10. Municipal taxation, uniformity.....	235
Section 11. Defaulting officers.....	235
Section 12. Limitation on municipal indebtedness.....	236
Section 13. World's Columbian Exposition bonds.....	246
 ARTICLE X—COUNTIES .....	 249
Section 1. New counties.....	249
Section 2. Division of counties.....	249
Section 3. Attaching or detaching territory.....	249
Section 4. Removal of county seats.....	250
Section 5. County government, township organization.....	251
Section 6. Boards of county commissioners.....	253
Section 7. County affairs in Cook county.....	254
Section 8. County officers, terms of office.....	254
Section 9. Salaries and fees in Cook county.....	255

TABLE OF CONTENTS.

ARTICLE X —COUNTIES—Concluded.	PAGE.
Section 10. Salaries fixed by county board.....	257
Section 11. Fees of township officers.....	260
Section 12. Fees of state, county, and township officers.....	260
Section 13. Verified report of fees.....	262
<b>ARTICLE XI—CORPORATIONS</b> .....	<b>263</b>
Section 1. Organization of corporations.....	263
Section 2. Existing charters.....	263
Section 3. Election of directors or managers.....	264
Section 4. Street railroads.....	265
Section 5. State bank forbidden, laws authorizing banking corporations to be general, necessity for referendum.....	266
Section 6. Individual responsibility of stockholders.....	268
Section 7. Specie payment.....	269
Section 8. Provisions to be contained in a general banking law.....	270
Section 9. Railroads, transfer offices, reports.....	270
Section 10. Personal property of railroads, execution and sale..	270
Section 11. Consolidations.....	271
Section 12. Railroads deemed highways, maximum rates.....	272
Section 13. Stocks, bonds, and dividends.....	273
Section 14. Eminent domain.....	274
Section 15. Discrimination and extortion in freight and passenger rates.....	275
<b>ARTICLE XII—MILITIA</b> .....	<b>277</b>
Section 1. Persons liable to duty.....	277
Section 2. Organization, equipment, discipline.....	277
Section 3. Officers.....	277
Section 4. Privileged from arrest.....	277
Section 5. Records, banners, relics.....	277
Section 6. Exemption from duty.....	277
<b>ARTICLE XIII—WAREHOUSES</b> .....	<b>279</b>
Section 1. Public warehouses.....	279
Section 2. Weekly statements.....	280
Section 3. Examination of records and property stored.....	280
Section 4. Delivery of full weights.....	280
Section 5. Delivery of grain by railroads.....	281
Section 6. Warehouse receipts.....	282
Section 7. Grain inspection.....	282
<b>ARTICLE XIV—AMENDMENTS TO CONSTITUTION</b> .....	<b>283</b>
Section 1. Convention.....	283
Section 2. Proposals by General Assembly.....	284
<b>SECTIONS SEPARATELY SUBMITTED</b> .....	<b>287</b>
Illinois Central Railroad.....	287
Minority representation.....	288
Municipal subscriptions to railroads or private corporations...	288
Canals.....	290
Convict labor.....	292
<b>SCHEDULE</b> .....	<b>293</b>
Section 1. Saving clause.....	293
Section 2. Fines, taxes, forfeitures.....	295
Section 3. Official bonds, crimes.....	295
Section 4. County courts continued.....	295
Section 5. Courts continued.....	296



## TABLE OF CONTENTS.

SCHEDULE—Concluded		PAGE.
Section 6.	Officials continued in office.....	297
Section 7.	Elections for Supreme and circuit court judges....	298
Section 8.	Submission of constitution.....	299
Section 9.	Poll books, tally sheets.....	300
Section 10.	Ballots.....	300
Section 11.	Election returns.....	301
Section 12.	Constitution in force, when.....	301
Section 13.	Apportionment for representatives.....	302
Section 14.	Numbering of districts.....	302
Section 15.	Terms of senators.....	303
Section 16.	Legislative apportionment.....	303
Section 17.	Election of constitutional officers.....	303
Section 18.	English language.....	304
Section 19.	Duty of General Assembly with respect to laws re- quired by constitution.....	305
Section 20.	Circuit clerks, recorders.....	305
Section 21.	Salaries of judges of Cook county courts.....	305
Section 22.	Circuit court of Lake county.....	306
Section 23.	Two mill tax abolished.....	306
Section 24.	Aid to railroads by city of Quincy.....	307
Section 25.	Effect of adoption of constitution.....	307
Section 26.	Certain provisions of constitution in immediate effect.....	308
INDEX .....	.....	309



## CONSTITUTION OF THE STATE OF ILLINOIS.

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Adopted in Convention at Springfield, May 13th, A. D. 1870 <sup>1</sup>

### PREAMBLE.

We, the people of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity; do ordain and establish this Constitution for the State of Illinois.

<sup>1</sup> Ratified by the people, July 2, 1870. In force, August 8, 1870. Amendments were adopted in 1878, 1880, 1884, 1886, 1890, 1904, and 1908.



## ARTICLE I—BOUNDARIES

---

The boundaries and jurisdiction of the State shall be as follows, to-wit: Beginning at the mouth of the Wabash river; thence up the same, and with the line of Indiana, to the northwest corner of said State; thence east, with the line of the same State, to the middle of Lake Michigan; thence north along the middle of said lake, to north latitude forty-two degrees and thirty minutes; thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river, and thence up the latter river along its northwestern shore to the place of beginning: Provided, that this State shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may hereafter be agreed upon by this State and the State of Kentucky.

The act of Congress, April 18, 1818, enabling the people of Illinois to form a state, established the boundaries of Illinois.<sup>1</sup> The constitutions of 1818, 1848 and 1870 each describe the boundaries of the state in the language used in the enabling act.

The precise eastern limit is not defined other than by reference to the Wabash river, and the Indiana state line. In the act of Congress, February 3, 1809, dividing the Indiana Territory into two separate governments and establishing the territory of Illinois, this boundary is referred to as "the Wabash river, and a direct line drawn from the said Wabash river and Post Vincennes due north, to the territorial line between the United States and Canada."<sup>2</sup> This is substantially the language of the ordinance of 1787, for the government of the Northwest Territory.<sup>3</sup> The language of the enabling act for Indiana,<sup>4</sup> approved April 19, 1816, and of the Indiana constitution<sup>5</sup> fix this boundary "by a line drawn along the middle of the Wabash river, from its mouth to a point where a due north line drawn from the town of Vincennes would last touch the northwestern shore of the said river; and from thence by a due north line . . ." This language plainly includes within the state of Illinois whatever territory may be west of the Wabash river, south of the point where the Vincennes line due north last touches the Wabash river, even though such land may lie to the east of a line due north from Vincennes.

The Attorney General has said: "The jurisdiction of this state over the waters of the Wabash river which touch the counties of Lawrence and Wabash in this state, extends to the center thread of the main channel thereof, except where said center thread may be east of a line drawn from Post Vincennes due north."<sup>6</sup> This inaccuracy doubtless arose from over-

<sup>1</sup> Act of Congress, 3 Stat. at large 428 (1818).

<sup>2</sup> Act of Congress, 2 Stat. at large 514 (1809).

<sup>3</sup> Article V. Ordinance of 1787.

<sup>4</sup> Act of Congress, 3 Stat. at large 289 (1816).

<sup>5</sup> Constitution of Indiana 1851, article 14, section 1.

<sup>6</sup> Report Attorney General 1916, p. 623.

looking the fact that the due north line from Vincennes only becomes the eastern boundary from the point where it last touches the northwestern shore of the Wabash river, which point lies north of Lawrence and Wabash counties.

By the ordinance of 1787, the northern boundary for the western state in the Northwest Territory was fixed along the territorial line between the United States and Canada to the Lake of the Woods and Mississippi with the proviso that Congress should have authority "to form one or two states in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan."<sup>7</sup> The bill to authorize the formation of the state of Illinois was introduced with the northern boundary along an east and west line from the southern extreme of Lake Michigan but, on motion of the territorial delegate from Illinois, this was amended by fixing the northern boundary along latitude forty-two degrees and thirty minutes. The due north line from Vincennes was not extended to meet the line along this latitude but the boundary line from the northwest corner of Indiana was run east along the northern boundary of Indiana to the middle of Lake Michigan and thence north along the middle of the lake to latitude forty-two degrees and thirty minutes and thence west along that latitude. The United States Supreme Court has held that the boundary of the state includes all that portion of Lake Michigan lying east of the main land of the state and the middle of the lake south of latitude forty-two degrees and thirty minutes.<sup>8</sup>

The ordinance of 1787 provided that the western state in the Northwest Territory should be bounded by the Mississippi river. This boundary line is fixed by the enabling act for Illinois "along the middle" of the Mississippi river from the northern boundary to the Ohio river. The Supreme Court of Illinois and the United States Supreme Court have held this to mean the middle of the main navigable channel as usually followed. If the river changes imperceptibly from natural causes, the river as it runs, continues to be the boundary, but if it should suddenly change its course or desert the original channel, the boundary would remain the middle of the deserted bed.<sup>9</sup>

The deed of cession from Virginia conveyed to the United States the territory northwestward of the river Ohio.<sup>10</sup> The United States Supreme Court in deciding whether certain land lay in Kentucky or in Indiana, said "when a great river is the boundary between two nations or states, if the original property is in neither and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary."<sup>11</sup>

The same court in a later case held that the state of Kentucky extended to low water mark on the Indiana shore.<sup>12</sup> The boundary line between Illinois and Kentucky is, also undoubtedly, the low water mark on the northwestern shore of the Ohio river. The Illinois Supreme Court held that there was no liability under the workmen's compensation act for a death occurring while the deceased was working on a bridge pier south of the low water mark of the Ohio river on the Illinois shore.<sup>13</sup> In an earlier case, the same court in sustaining the wharfage rights of a riparian owner on the northwestern bank of the Ohio river said that the property of a riparian owner extended at least to low water mark "although as the state

<sup>7</sup> Article V, Ordinance of 1787.

<sup>8</sup> *I. C. R. R. Co. v Illinois*, 146 U. S. 387 (1892).

<sup>9</sup> *St. Louis v Rutz*, 138 U. S. 226 (1891); *Iowa v Illinois*, 147 U. S. 1 (1893); *Buttenuth v St. Louis Bridge Co.*, 125 Ill. 535 (1888); *Keokuk and Hamilton Bridge Co. v People*, 145 Ill. 596 (1893); *Keokuk and Hamilton Bridge Co. v People*, 176 Ill. 267 (1898).

<sup>10</sup> Deed of Cession, XI Hen. Stat. Va. 571 (1784).

<sup>11</sup> *Handley's Lessee v Anthony*, 5 Wheaton (U. S.) 374 (1820).

<sup>12</sup> *Henderson Bridge Co. v Henderson City*, 173 U. S. 592 (1899).

<sup>13</sup> *Union Bridge Co. v Industrial Commission*, 287 Ill. 396 (1919).

of Kentucky originally owned the fee of the river to that point, it may be, in this case, it extended no further."<sup>14</sup>

While the physical boundary of Illinois extends to the middle of the Wabash and Mississippi rivers and to the low water mark of the Ohio river on the Illinois shore, its jurisdiction on these rivers extends further. By the enabling acts of Congress for Illinois,<sup>15</sup> and Indiana,<sup>16</sup> each state is given concurrent jurisdiction over the Wabash river so far as it forms the common boundary. The same is true as to the Mississippi river where it is the boundary between Illinois and Iowa,<sup>17</sup> and Illinois and Missouri.<sup>18</sup>

An act of Virginia concerning the formation of a state from the district of Kentucky, provided that "the respective jurisdictions of this commonwealth (Virginia) and of the proposed state, (Kentucky) on the (Ohio) river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."<sup>19</sup> The United States Supreme Court held that this compact between Virginia and Kentucky had been sanctioned by Congress and had become a law of the union. The court does not, in this case, attempt to say precisely what is meant by concurrent jurisdiction but does say that it is not only legislative jurisdiction but includes the right to administer the law on the river. Consequently, it was held that process of an Indiana court might properly be served on the Ohio river near the Kentucky shore.<sup>20</sup> This case is referred to in a recent decision of the Illinois Supreme Court denying compensation under the workmen's compensation act for an accident on a bridge pier extending from the Illinois shore into the Ohio river. "The exact nature," the court said, "of the concurrent jurisdiction does not seem to have been adjudicated . . . . If this state may enact laws operative on the Ohio river, the Supreme Court of the United States has limited such jurisdiction to laws relating to rights and liabilities on the river . . . and not to structures attached to the river bed and within the boundary of one or the other state."<sup>21</sup> This decision, however, is based partly on the ground that the Illinois statute by its terms, cannot be given extra-territorial effect. The Attorney General has said that the authority of the state of Illinois to enforce its fish and game laws on those rivers that form a part of the state's boundaries or on so much of those rivers as form the boundary, extends not only to the Illinois side or to the center of the channel but all the way across the stream.<sup>22</sup>

The constitution of 1848 added to the article on boundaries, a proviso authorizing this state to exercise such jurisdiction upon the Ohio river as it is now entitled to or such as may hereafter be agreed upon by this state and the state of Kentucky. This proviso was adopted without change in the article on boundaries in the constitution of 1870, but apparently no attempt has been made on the part of either Illinois or Kentucky to enter into any such agreement.

<sup>14</sup> *Ensminger v People*, 47 Ill. 384 (1867).

<sup>15</sup> Act of Congress, 3 Stat. at large 428 (1818).

<sup>16</sup> Act of Congress, 3 Stat. at large 289 (1816).

<sup>17</sup> Act of Congress, 5 Stat. at large 742 (1845).

<sup>18</sup> Act of Congress, 3 Stat. at large 545 (1820).

<sup>19</sup> Act of Virginia, XIII Hen. Stat. Va. 19 (1789).

<sup>20</sup> *Wedding v Meyler*, 192 U. S. 573 (1904).

<sup>21</sup> *Union Bridge Co. v Industrial Commission*, 287 Ill. 396 (1919).

<sup>22</sup> Report Attorney General 1917-18, p. 501; but see Report Attorney General 1912, p. 1317.





## ARTICLE II—BILL OF RIGHTS

---

Section 1. All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

(See reference to this section in discussion article 2, section 2, sub-heading, "Historical development".)

Section 2. No person shall be deprived of life, liberty or property, without due process of law.

**Historical development.** The constitutions of 1818 and 1848 contain the famous provision from Magna Charta "that no freeman shall be . . . deprived of his life, liberty or property but by the judgment of his peers or the law of the land." In the constitution of 1870 the same guarantee appears with the phrase "due process of law." It is generally agreed that this change in phraseology is not a change in substance but that the legal effect of these expressions is the same. There has been, however, an expansion by judicial construction, of the content and scope of the protection afforded by this clause. It was regarded at first merely as a requirement that the taking of the rights of the individual by the state be in accordance with certain established and fundamental rules of procedure. But about 1870 a tendency developed to extend the protection of the constitution along lines not expressly protected. In the search for constitutional limitation against legislation which, in the opinion of the court, unjustifiably violated private right, reference was made to some of the broad declarations, such as section 1 of this article, which had before been regarded as "glittering generalities."<sup>1</sup> But with the development of section 2 as a test of the substance of legislation, the court found in it the principal prohibition against the imposition of restraints and burdens upon persons and property which the court deemed oppressive and unreasonable. In 1886<sup>2</sup> began a decided advance in the exercise of judicial power under the due process clause and since that time there has been a steady increase in the number of important statutes declared unconstitutional upon the basis of it. As a limitation upon procedure this section has occasioned relatively little difficulty but the court has established no definite standard for its application as a test of the substance of statutory enactments.

While this section has been invoked in the great majority of instances in connection with legislative action, it is directed to the executive and judi-

<sup>1</sup> *People v Turner*, 55 Ill. 280 (1870).

<sup>2</sup> *Millett v People*, 117 Ill. 294 (1886).

cial authorities of the state as well, and to all officers and agents by whom the powers of the state are exerted. Thus, a court may not punish a litigant for contempt by striking his pleas from the file and entering judgment against him,<sup>3</sup> nor punish summarily without notice or hearing for a contempt committed out of the view and hearing of the court.<sup>4</sup>

**Life, liberty and property.** Although the phrase "due process of law" has been a more frequent subject of judicial consideration, the courts have also declared what rights and privileges are included in the words "life, liberty and property." The commitment of dependent minors to state institutions after judicial determination of dependency is not a violation of this section although it deprives unoffending persons of their liberty.<sup>5</sup> The right of a convict to his liberty under parole is within the protection of this section and he may not be deprived of it without due process of law.<sup>6</sup> In an opinion of the Attorney General, it is held that a judicial determination is necessary for the detention of persons *non compos mentis*, and that a statute authorizing the holding of persons for mental disturbance or in the incipient stages of insanity for treatment or extended observation would probably be unconstitutional.<sup>7</sup> The right of a peaceful citizen of a loyal state to personal liberty, except when restrained upon a charge of crime and for the purpose of judicial investigation, or under the command of law pronounced by a judicial tribunal, may not be taken away by an unauthorized proclamation of the President of the United States, even when a state of rebellion exists in other sections of the United States.<sup>8</sup> But the term "liberty" means not only freedom from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary for the common good.<sup>9</sup> It includes, as well, the right to contract, and, in fact, many of the privileges known as property rights. Property is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it, and the right of property is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit which the citizen in the exercise of the liberty guaranteed may choose to adopt.<sup>10</sup>

The right to acquire property includes the right to make and enforce contracts and a statute which denies workmen, or lists of workmen, from free employment agencies to employers whose employees are on strike, is a deprivation of the right to contract.<sup>11</sup> The right to subdivide realty or leave it unsubdivided is a property right which may not be taken away by a city under legislative authority.<sup>12</sup> It has been held by the Illinois Supreme Court that it is a deprivation of property to prohibit the employment of aliens on work to be paid from funds raised by taxation, and for a local improvement contract to specify an eight-hour day and citizen labor,<sup>13</sup> but a statute providing an eight-hour day for work done for a state and its municipalities was sustained by the United States Supreme Court.<sup>14</sup> Rights of defense arising from the complete running of statutes of limitations, are property within the protection of this provision.<sup>15</sup> An acknowledgment improperly taken before an officer of the corporation which is the grantee or mortgagee in the in-

<sup>3</sup> Walter Cabinet Co. v Russell, 250 Ill. 416 (1911).

<sup>4</sup> Hohenadel v Steele, 237 Ill. 229 (1908).

<sup>5</sup> County of McLean v Humphreys, 104 Ill. 378 (1882).

<sup>6</sup> People v Strassheim, 242 Ill. 359 (1909).

<sup>7</sup> Report Attorney General 1908, p. 630.

<sup>8</sup> Johnson v Jones, 44 Ill. 142 (1867).

<sup>9</sup> People v Steele, 231 Ill. 340 (1907).

<sup>10</sup> Braceville Coal Co. v People, 147 Ill. 66 (1893).

<sup>11</sup> Mathews v People, 202 Ill. 389 (1903).

<sup>12</sup> City of Chicago v Wells, 236 Ill. 129 (1908).

<sup>13</sup> McChesney v People, 200 Ill. 146 (1902); City of Chicago v Hulbert, 205 Ill. 346 (1903).

<sup>14</sup> Atkin v Kansas, 191 U. S. 207, (1903).

<sup>15</sup> Fish v Farwell, 160 Ill. 236 (1896).

strument, may be validated to effectuate the intention of the parties thereto, but not if vested rights of third persons have intervened.<sup>16</sup> Nor can a law operate retroactively so as to affect payments of usury which, according to the law when made, became payments on the principal since the right to so apply them vested at the time of payment.<sup>17</sup> An invalid tax sale may not be validated by act of legislature, because the right of defense to such sale becomes a vested right.<sup>18</sup>

But a person cannot have a vested right in a particular remedy or procedure. The legislature may provide that evidence of certain facts shall create a legal presumption, as in the case of giving *prima facie* weight to official certificates,<sup>19</sup> or providing that the failure of a corporation to make a required return to the Secretary of State shall constitute *prima facie* evidence of non-user.<sup>20</sup> But in such cases the facts which are given a probative value must have a fair and natural relation to the ultimate fact.<sup>21</sup> A statute requiring carriers to weigh grain for shipment, and in the event of failure to do so, making the sworn statement of the shipper conclusive proof of such weight, is void.<sup>22</sup> Acts requiring the bringing of suit on claims within a fixed period do not take away property rights so long as they afford a reasonable opportunity to bring suit.<sup>23</sup> The right to have a statutory cause reviewed by appeal or writ of error is not a constitutional privilege.<sup>24</sup>

But it has been held that a person cannot, within the meaning of this section, have a property right to public office,<sup>25</sup> such as that of executor<sup>26</sup> or county treasurer;<sup>27</sup> or to sell or give away a street car transfer issued for continuous trip.<sup>28</sup> Gambling implements, after the possession of them has been made unlawful, are not lawful subjects of property, but may be destroyed without violating this provision,<sup>29</sup> nor is there a property right in the continued use in dry territory of dram shop fixtures which are not suitable for any other business.<sup>30</sup> While the right to engage in usual lawful occupations is a property right, the operation of a street railroad is a special privilege or franchise which does not belong to individuals by common right.<sup>31</sup> Although game and fish laws are frequently referred to as police measures, the courts have said that the title to all game and fish is in the state, and that the taking of game and fish is not a matter of individual right but a permit or license granted in such a manner as to best conserve the common interest.<sup>32</sup> The right to use or sell special knowledge, training or experience is undoubtedly a liberty or property right, but compelling a person with special knowledge to give expert testimony without compensation other than the fees fixed by law does not deprive him of that property.<sup>33</sup>

Subdivisions of the state like counties while acting in their public or governmental capacity, are agents of the state and their property acquired for this purpose is not protected against a taking on the part of the state.<sup>34</sup> Municipalities are entrusted as agencies of the state, with the duty of preserving peace and order and a statute imposing liability on

<sup>16</sup> Steger v Traveling Men's Bldg. & Loan Ass'n., 208 Ill. 236 (1904).

<sup>17</sup> Hunter v Hatch, 45 Ill. 178 (1867).

<sup>18</sup> Conway v Cable, 37 Ill. 82 (1865).

<sup>19</sup> Chicago Terminal Transfer R. R. Co. v City of Chicago, 217 Ill. 343 (1905).

<sup>20</sup> People v Rose, 207 Ill. 352 (1904).

<sup>21</sup> Meadowcroft v People, 163 Ill. 56 (1896).

<sup>22</sup> Shellabarger Elevator Co. v I. C. R. R. Co., 278 Ill. 333 (1917).

<sup>23</sup> McCogg v Heacock, 42 Ill. 153 (1866).

<sup>24</sup> People v Cohen, 219 Ill. 200 (1906).

<sup>25</sup> People v Kiple, 171 Ill. 44, (1898); People v City of Chicago, 242 Ill. 561 (1909); City of Aurora v Schoeberlein, 230 Ill. 496 (1907).

<sup>26</sup> In re petition of Mulford, 217 Ill. 242 (1905).

<sup>27</sup> Donahue v County of Will, 100 Ill. 94 (1881).

<sup>28</sup> City of Chicago v Openheim, 229 Ill. 313 (1907).

<sup>29</sup> Frost v People, 193 Ill. 635 (1901).

<sup>30</sup> People v McBride, 234 Ill. 146 (1908).

<sup>31</sup> Goddard v C. & N. W. Ry. Co., 202 Ill. 362 (1903).

<sup>32</sup> People v Bridges, 142 Ill. 30 (1892); Magner v People, 97 Ill. 320 (1881).

<sup>33</sup> Dixon v People, 168 Ill. 179 (1897).

<sup>34</sup> Dunne v County of Rock Island, 283 Ill. 628 (1918).

municipalities for damage done by mobs is based on the failure to perform this delegated duty.<sup>35</sup>

Contract rights are specifically protected by section 14 of this article, and the taking of such rights is discussed under that provision.

**Due process of law as a procedural requirement.** As a limitation on the method by which an individual may be deprived of his rights and liberties, due process of law embodies certain fundamental principles. Some of the more important of these, such as the safeguards protecting persons accused of crime are the subject of special provision in other sections of the bill of rights and are considered in connection with the appropriate sections. Due process implies that the rights of life, liberty, and property of each individual shall be determined by general rules which shall apply to all who have similar rights. Thus, the General Assembly may not limit an appeal by one party to questions of law only while giving to the other party to a suit a right to a review of all matters of law and fact.<sup>36</sup> Nor may a law require personal representatives holding title or power of sale under wills to register lands of their decedents, since this would affect unequally persons taking and holding real estate.<sup>37</sup> This requirement of generality of laws and the matter of classification for purposes of legislation, become of the greatest importance in testing the substance of statutory enactments under the developed construction of due process. In fact, the objection to a majority of the statutes declared invalid under this clause has been that they, in the opinion of the court, single out certain persons or classes and impose upon them burdens or restrictions not imposed on others in like conditions. A statement of these cases follows later in this note. (See discussion subsequent sub-heading "Due process as a test of the substance of legislation.")

A fundamental element of due process is the possession of jurisdiction by the tribunal or board passing upon rights of life, liberty and property. A foreign corporation not engaged in business or owning property in this state, is not amenable to process from Illinois courts and since a court here has no jurisdiction, the rendition of a judgment is not due process of law.<sup>38</sup> Equally fundamental is the principle that a litigant shall not be the judge in his own case. The appointment of a commissioner, who is himself a land owner in a drainage district, to act in the assessment of benefits upon land in that district requires land owners to submit their controversy to a tribunal of which their adversary is a member and is violative of this principle.<sup>39</sup>

The conception of due process of law implies notice with an opportunity to appear and a hearing or inquiry with a right to be heard.<sup>40</sup> But in judging what constitutes due process, regard must be had to the nature of the proceeding. Thus, the same kind of notice is not required in a special assessment proceeding for local improvements as in a suit at law for a personal judgment.<sup>41</sup> Constructive service of process for the rendition of a personal judgment against a resident defendant has been held to be due process.<sup>42</sup> And in a tax levy by a sanitary district, it was held that the requirement of publication might be dispensed with by a curative act since due process does not require notice of each step of the proceeding, and application of the collector for judgment would afford notice before the tax became fixed as an irrevocable charge on property.<sup>43</sup> In fact, in a proceeding for a contempt committed in the presence of the court, due process, from the nature of the offense, does

<sup>35</sup> *Sturges v City of Chicago*, 237 Ill. 46 (1908).

<sup>36</sup> *Green v Red Cross Medical Service Co.*, 232 Ill. 616 (1908).

<sup>37</sup> *Anderson v Shepard*, 285 Ill. 544 (1918).

<sup>38</sup> *Booz v Texas & Pacific Ry. Co.*, 250 Ill. 376 (1911).

<sup>39</sup> *Commissioners v Smith*, 233 Ill. 417 (1908).

<sup>40</sup> *Sherman v People*, 210 Ill. 552 (1904); *Gage v City of Chicago*, 225 Ill. 218 (1907).

<sup>41</sup> *McChesney v City of Chicago*, 226 Ill. 238 (1907).

<sup>42</sup> *Nelson v C. B. & Q. R. R. Co.*, 225 Ill. 197 (1907)

<sup>43</sup> *People v Arnold Bros.*, 282 Ill. 305 (1918).

not require notice and a hearing.<sup>44</sup> It has been held that because of the character of gambling implements seized under a search warrant and their connection with criminal offenses, personal notice to the owner is not required, notice to the person in possession being deemed sufficient.<sup>45</sup> The right to present evidence in a civil suit may not be taken away even from a violator of the law nor can evidence not conclusive in itself be made so by legislative fiat.<sup>46</sup> There may be, in fact, certain situations which from necessity require summary action in the interest of the general welfare, in which the right to notice and a hearing preceding the taking and destruction of property is dispensed with. In an emergency to prevent the spread of disease, infected articles or animals may be ordered destroyed by legislative authority without notice or hearing.<sup>47</sup> But the authority vested in boards or officials to so proceed depends on the jurisdictional fact as to the actual existence of the nuisance or dangerous condition.<sup>48</sup> This leaves open a subsequent right to a judicial inquiry with a hearing as to the validity of the action. Thus, in an action of trespass against the board of live stock commissioners for destroying horses claimed to have been diseased, the fact that they were diseased constitutes a justification, but not the fact that the board after a hearing determined that they were diseased.<sup>49</sup>

Due process does not necessarily mean judicial process, and the right to a hearing does not always imply a trial by court. Sections 5 and 9 of this article make specific provision for certain kinds of hearings for certain proceedings, but for the determination of some other rights, the legislature may provide for hearings before administrative boards. In a general way, it may be said that the kind of hearing and the character of the tribunal depend on the nature of the case. Thus, the tax assessor and county clerk may not be authorized to assess penalties on land owners in a drainage district for failure to clean streams on their property.<sup>50</sup> An ordinance cannot provide in the case of stock running at large for the assessment of damages by three disinterested men.<sup>51</sup> On the other hand, the state board of examiners may after notice and a hearing, revoke the license of an architect for cause,<sup>52</sup> and the state board of health may revoke a license to practice medicine for advertising under a false name.<sup>53</sup> The public utilities commission may be vested with power to conduct hearings on the question as to reasonableness of rates and the determination by the commission constitutes due process of law.<sup>54</sup>

As a general rule, a person may not be deprived of life or freedom from physical restraint except by a judicial hearing, but it has been held that the qualified liberty of a convicted person on parole may be taken after a hearing by the parole board,<sup>55</sup> and in the judgment of the Attorney General, he must be given notice of the charge against him and the precise time and place of the hearing and have an opportunity to prepare and present his defense, and probably, to be represented by counsel.<sup>56</sup> The question as to the nature of the case and the character of the tribunal involve also the principle of the distribution of governmental powers, for a discussion of which see article 3.

**Due process as a test of the substance of legislation.** As has been stated earlier in this note, the construction of this section has been extended to embody a test of the reasonableness of legislative interference

<sup>44</sup> *Hohenadel v Steele*, 237 Ill. 229 (1908).

<sup>45</sup> *Glennon v Britton*, 155 Ill. 232 (1895).

<sup>46</sup> *Shellabarger Elevator Co. v I. C. R. R. Co.*, 278 Ill. 333 (1917).

<sup>47</sup> *Durand v Dyson*, 271 Ill. 382 (1916).

<sup>48</sup> *Sings v City of Joliet*, 237 Ill. 300 (1908).

<sup>49</sup> *Pearson v Zehr*, 138 Ill. 48 (1891).

<sup>50</sup> *C. C. C. & St. L. Ry. Co. v People*, 212 Ill. 638 (1904).

<sup>51</sup> *Bullock v Geomble*, 45 Ill. 218 (1867).

<sup>52</sup> *Klafter v Board of Examiners*, 259 Ill. 15 (1913).

<sup>53</sup> *People v Apfelbaum*, 251 Ill. 18 (1911).

<sup>54</sup> *Public Utilities Commission v C. & W. T. Ry. Co.*, 275 Ill. 555 (1916).

<sup>55</sup> *People v Strassheim*, 242 Ill. 359 (1909).

<sup>56</sup> Report Attorney General 1912, p. 1126.

with individual rights. The General Assembly may enact regulations designed to secure and guard the health, morals, safety and general welfare of society. These regulations, enacted in the exercise of the police power operate by the suppression of the liberties of the individual and the restriction of his use and enjoyment of property. This section under its extended construction as a test of reasonableness and appropriateness to be applied by the court, is the dividing line between legislative power and private right.

**Nature of police regulations.** It is recognized that the state under the police power may exercise a wide degree of control over business affected with a public interest, such as common carriers and railroad,<sup>57</sup> banking,<sup>58</sup> warehousemen and grain elevators,<sup>59</sup> public utility companies,<sup>60</sup> insurance,<sup>61</sup> and places of amusement,<sup>62</sup> but not a public golf course.<sup>63</sup>

For the preservation of the general health, statutes and ordinances have been sustained licensing and restricting the sale of cigarettes;<sup>64</sup> requiring the pasteurization of milk;<sup>65</sup> requiring the providing of washrooms for workmen in businesses where they become covered with grease, smoke, grime and perspiration;<sup>66</sup> prohibiting the sale of boric acid in preservatives;<sup>67</sup> limiting the hours of labor for women in certain kinds of employment;<sup>68</sup> authorizing the destruction of infected cattle,<sup>69</sup> and of buildings impregnated with small pox germs;<sup>70</sup> and regulating the use and prohibiting the sale of intoxicating liquors.<sup>71</sup>

The public morals are a proper subject for police legislation and the court has held valid measures prohibiting an exhibition or business which is against decency and good morals,<sup>72</sup> suppressing gambling and grain option contracts,<sup>73</sup> and forbidding the marriage of divorced persons within one year,<sup>74</sup> but the court has held otherwise as to an ordinance to prohibit public dancing in restaurants<sup>75</sup> and one prohibiting all public dances and open air picnics.<sup>76</sup>

The state may to prevent deceit and fraud, regulate the business of dealing in small produce from farms on commission;<sup>77</sup> prohibit an arrangement between owners of theaters and ticket brokers to sell tickets at an advanced price and share the profits;<sup>78</sup> require the labelling of a harmless compound intended to resemble an article of commerce;<sup>79</sup> prohibit the coloring of oleomargarine to resemble butter;<sup>80</sup> and require the capacity of

<sup>57</sup> *Chicago Union Traction Co. v City of Chicago*, 199 Ill. 484 (1902); *C. C. & St. L. Ry. Co. v People*, 175 Ill. 359 (1898).

<sup>58</sup> *Meadowcroft v People*, 163 Ill. 56 (1896).

<sup>59</sup> *Munn v People*, 69 Ill. 80 (1873).

<sup>60</sup> *City of Chicago v O'Connell*, 278 Ill. 591 (1917); (recently affirmed by the United States Supreme Court).

<sup>61</sup> *People v American Life Ins. Co.*, 267 Ill. 504 (1915).

<sup>62</sup> *People v Thompson*, 283 Ill. 87 (1918).

<sup>63</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917).

<sup>64</sup> *Gundling v City of Chicago*, 176 Ill. 340 (1898).

<sup>65</sup> *Koy v City of Chicago*, 263 Ill. 122 (1914).

<sup>66</sup> *People v Solomon*, 265 Ill. 28 (1914).

<sup>67</sup> *People v Price*, 257 Ill. 587 (1913).

<sup>68</sup> *Ritchie & Co. v Wayman*, 244 Ill. 509 (1910); *People v Elerding*, 254 Ill. 579 (1912).

<sup>69</sup> *Durand v Dyson*, 271 Ill. 382 (1916).

<sup>70</sup> *Sings v City of Joliet*, 237 Ill. 300 (1908).

<sup>71</sup> *Tarantina v L. & N. R. R. Co.*, 254 Ill. 624 (1912); *People v Jones*, 280 Ill. 259 (1917); *Wall v Allen*, 244 Ill. 456 (1910); but see *Town of Cortland v Larson*, 273 Ill. 602 (1916); *Haskell v Howard*, 269 Ill. 550 (1915).

<sup>72</sup> *City of Chicago v Shaynin*, 258 Ill. 69 (1913).

<sup>73</sup> *Booth v People*, 186 Ill. 43 (1900).

<sup>74</sup> *Hobbs v Hobbs*, 279 Ill. 163 (1917).

<sup>75</sup> *City of Chicago v Drake Hotel Co.*, 274 Ill. 408 (1916).

<sup>76</sup> *Village of Des Plaines v Poyer*, 123 Ill. 348 (1888).

<sup>77</sup> *Lasher v People*, 183 Ill. 226 (1899).

<sup>78</sup> *People v Thompson*, 283 Ill. 87 (1918).

<sup>79</sup> *People v William Henning Co.*, 260 Ill. 554 (1913).

<sup>80</sup> *People v Freeman*, 242 Ill. 373 (1909).

milk and cream bottles to be permanently stamped thereon.<sup>81</sup> Under the police power, the General Assembly may regulate or prohibit the sale of deadly weapons,<sup>82</sup> fix speed limits for automobiles,<sup>83</sup> and authorize municipalities to create fire limits,<sup>84</sup> to guard the safety of the public.

Other measures designed to promote the general welfare of society, the validity of which have been sustained by the courts, have prescribed the qualifications for persons engaging in businesses and occupations demanding special knowledge, experience and skill such as medicine,<sup>85</sup> dental surgery,<sup>86</sup> plumbing,<sup>87</sup> barbering,<sup>88</sup> and coal mining,<sup>89</sup> but not the practice of optometry when it was made to include the sale of glasses after an examination or fitting in which the purchaser himself tested the lenses and made a selection.<sup>90</sup> A law prescribing qualifications for horseshoers and regulating the business of horseshoeing was declared not to be a proper police measure by the court, but the measure was objectionable because of an improper classification on the basis of population.<sup>91</sup>

The General Assembly may require corporations to keep at their principal office correct books of account and make such books accessible to stockholders,<sup>92</sup> give cities and villages the power to prescribe the size of loaves and quality of bread sold,<sup>93</sup> make unlawful the possession of a motor bicycle or motor vehicle with the manufacturer's numbers defaced, or changed,<sup>94</sup> regulate by license private employment bureaus,<sup>95</sup> and impose the support of paupers on counties or towns.<sup>96</sup>

Municipalities may be authorized to regulate the location of businesses which may be offensive or dangerous in certain localities. Thus, livery stables<sup>97</sup> and public garages<sup>98</sup> may be prohibited in strictly residential districts.

**Legality of purpose and appropriateness of a particular measure to effect that purpose.** The police power while paramount to rights of the individual, is itself restrained by the fundamental principles of justice connoted by the phrase, due process of law. This implies action not merely arbitrary but having a substantial relation to the health, safety, morals or general welfare of the public. Not only must it have this relation, but it must appear to the court to be an appropriate measure to secure the result sought.<sup>99</sup> The purpose of a statute prohibiting structures for advertising purposes within five hundred feet of a park or boulevard is purely aesthetic and is not within the purview of the police power.<sup>1</sup> A reasonable regulation however, as to material and dimensions of bill boards to safeguard life and property is a valid exercise of police power.<sup>2</sup> An ordinance was sustained which prohibited bill boards in residential blocks except upon the consent of the owners of a majority of the property fronting that block. This regulation was held not unreasonable since bill boards might increase the danger from fire and afford protection to criminals and disorderly

<sup>81</sup> *City of Chicago v Bowman Dairy Co.*, 234 Ill. 294 (1908).

<sup>82</sup> *Biffer v City of Chicago*, 278 Ill. 562 (1917).

<sup>83</sup> *Christy v Elliott*, 216 Ill. 31 (1905).

<sup>84</sup> *King v Davenport*, 98 Ill. 305 (1881).

<sup>85</sup> *Williams v People*, 121 Ill. 84 (1887).

<sup>86</sup> *Kettles v People*, 221 Ill. 221 (1906).

<sup>87</sup> *Douglas v People*, 225 Ill. 536 (1907).

<sup>88</sup> *People v Logan*, 284 Ill. 83 (1918).

<sup>89</sup> *People v Evans*, 247 Ill. 547 (1910).

<sup>90</sup> *People v Griffith*, 280 Ill. 18 (1917).

<sup>91</sup> *Bessette v People*, 193 Ill. 334 (1901).

<sup>92</sup> *Venner v Chicago City Ry. Co.*, 246 Ill. 170 (1910).

<sup>93</sup> *City of Chicago v Schmidinger*, 243 Ill. 167 (1909).

<sup>94</sup> *People v Fernow*, 286 Ill. 627 (1919).

<sup>95</sup> *Price v People*, 193 Ill. 114 (1901).

<sup>96</sup> *Town of Fox v Town of Kendall*, 97 Ill. 72 (1880).

<sup>97</sup> *City of Chicago v Stratton*, 162 Ill. 494 (1896).

<sup>98</sup> *People v Ericsson*, 263 Ill. 368 (1914).

<sup>99</sup> *People v Steele*, 231 Ill. 340 (1907).

<sup>1</sup> *Halle: Sign Works v Physical Culture Training School*, 249 Ill. 436 (1911).

<sup>2</sup> *City of Chicago v Gunning System*, 214 Ill. 628 (1905).

persons.<sup>3</sup> Municipalities may not prohibit retail stores in residential districts since there is nothing inherently dangerous to the public health or safety in conducting a retail store.<sup>4</sup> It was held by the Illinois Supreme Court that a measure to restrict the use of the national flag for advertising purposes was not proper police legislation,<sup>5</sup> but this view was not shared by the United States Supreme Court in a later decision.<sup>6</sup> The licensing of itinerant merchants by municipalities is a proper police measure, but not a prohibition of such business by the requirement of a prohibitive license fee.<sup>7</sup> Nor can the purchase of receptacles bearing a registered trade mark without the written consent of the original owner, be prohibited.<sup>8</sup> It has been held by the Illinois Supreme Court that the right of mine owners and employees to contract as to wages and method of ascertaining them cannot be abridged by a law requiring the weighing of coal at mines and providing for the payment of wages on the basis of such weight,<sup>9</sup> but similar legislation has been sustained in the United States Supreme Court.<sup>10</sup> The General Assembly, in the opinion of the court, may not forbid an employee to pay for goods purchased by working out the debt,<sup>11</sup> nor make it a criminal offense for an employer to prevent his employees from joining unions or to discharge them because of connection with unions.<sup>12</sup> The prohibition of the sale of secondhand mattresses is unreasonable inasmuch as the use of such articles may be made safe by sterilization.<sup>13</sup> And while it would be proper for a municipality to require milk to be cooled and kept cool, a regulation which required a carrier to keep milk below a certain temperature while transporting it and at the same time made the taking of the temperature impracticable by requiring cans to be sealed, cannot be sustained.<sup>14</sup> A law limiting the employment of women in certain occupations to eight hours a day was held invalid, one objection being that it was a purely arbitrary restriction upon the fundamental right of the citizen to control her own time or faculties.<sup>15</sup> But in two later cases, ten hour laws for women were sustained, the infringement on the right to contract and labor being justified by the likelihood that too long periods of labor would affect women injuriously and produce weak and sickly children.<sup>16</sup>

To what extent regulation under the police power may interfere with the individual liberty depends on the character of the business and the degree of public interest therein, as well as the nature of the regulation. In the case of warehousemen, carriers and other public utilities the state may so far control their operation as to prescribe maximum rates for service,<sup>17</sup> so long as the rates fixed are reasonable and do not amount to a deprivation of property,<sup>18</sup> or may require uniformity of insurance rates between insurants of the same class.<sup>19</sup>

A police measure will not necessarily be unreasonable because its effect is to restrain the private use of property so as to result in a property loss to the owner. And, as has been noted above, property may even be destroyed altogether when its continued existence constitutes a menace to the public welfare. Thus, a statute prohibiting the sale of intoxicating

<sup>3</sup> Thomas Cusack Co. v City of Chicago, 267 Ill. 344 (1915).

<sup>4</sup> People v City of Chicago, 261 Ill. 16 (1913).

<sup>5</sup> Ruhstrat v People, 185 Ill. 133 (1900).

<sup>6</sup> Halter v Nebraska, 205 U. S. 34 (1907).

<sup>7</sup> City of Carrollton v Bazzette, 159 Ill. 284 (1896).

<sup>8</sup> Horwich v Walker-Gordon Lab. Co., 205 Ill. 497 (1903).

<sup>9</sup> Ramsey v People, 142 Ill. 380 (1892); Harding v People, 160 Ill. 459 (1896).

<sup>10</sup> Rail and River Coal Co. v Yapple, 236 U. S. 338 (1915); McLean v Arkansas, 211 U. S. 539 (1909).

<sup>11</sup> Kelleyville Coal Co. v Harrier, 207 Ill. 624 (1904); Frorer v People, 141 Ill. 171 (1892); but see Knoxville Iron Co. v Harbison, 183 U. S. 13 (1901).

<sup>12</sup> Gillespie v People, 188 Ill. 176 (1900).

<sup>13</sup> People v Weiner, 271 Ill. 74 (1915).

<sup>14</sup> City of Chicago v C. & N. W. Ry. Co., 275 Ill. 30 (1916).

<sup>15</sup> Ritchie v People, 155 Ill. 98 (1895).

<sup>16</sup> Ritchie & Co. v Wayman, 244 Ill. 509 (1910); People v Elerding, 254 Ill. 579 (1912).

<sup>17</sup> Munn v People, 69 Ill. 80 (1873).

<sup>18</sup> Chicago Union Traction Co. v City of Chicago, 199 Ill. 484 (1902).

<sup>19</sup> People v American Life Ins. Co., 267 Ill. 504 (1915).



liquor may wholly deprive a saloonkeeper of the use of bar fixtures not adapted to other businesses,<sup>20</sup> or an ordinance may, by requiring milk and cream bottles to have their capacity permanently indicated thereon, destroy the use and value of bottles not so marked.<sup>21</sup> In such cases there is not a taking or appropriation to public use for which compensation must be made. But the annexation by a city of a narrow strip of territory when it destroys the use of a turnpike company's property as a toll road, is an act of eminent domain.<sup>22</sup> When under the police power, the elevation of railroad tracks to eliminate grade crossings is required, the consequent damage to private property lying alongside is a taking or damaging for public use for which compensation must be made.<sup>23</sup>

**Generality of legislation.** The requirement of generality of action and uniformity of application implied by the expanded construction of this section restricts the arbitrary singling out of persons or groups upon whom the burdens and restrictions of a police measure will fall. Classification for the purpose of regulation is not improper so long as there is in the class created a natural distinction which makes it a proper subject for the regulation in view of the purpose and effect of the particular measure.<sup>24</sup> It has been held by the Illinois Supreme Court that an act which prohibited persons engaged in a mining or manufacturing business from owning or operating a store for the furnishing of groceries, clothing and supplies, creates a class which is unnatural and arbitrary in relation to the prohibition imposed.<sup>25</sup> But a somewhat similar statute applying to all employers was sustained in the United States Supreme Court.<sup>26</sup> The Supreme Court of Illinois held invalid a law requiring corporations engaged in certain businesses to pay employees weekly on the ground that there was no reason which demanded weekly payments of wages by the corporations included which did not apply with equal force to many other kinds of businesses not included.<sup>27</sup> But a New York statute which required railroad employees to be paid semi-monthly was sustained by the United States Supreme Court.<sup>28</sup> In the opinion of the Illinois court there is nothing in the business of coal-mining which differentiates it from other occupations, so as to permit the General Assembly to deprive mine operators and employees of the right to contract without restraint as to wages and the methods of determining them,<sup>29</sup> but this view was not shared by the United States Supreme Court.<sup>30</sup> An ordinance forbidding persons engaged in selling dry goods, clothing, jewelry and drugs, to deal in meats, fish, butter, cheese, lard, vegetables or other provisions is a denial of a property right to a particular class which is not justified by any reason relating to the promotion of health, safety or welfare of the public.<sup>31</sup> The court has declared discriminatory a licensing act for horeshoers limited to those in cities over a certain population;<sup>32</sup> a statute, which fixed a prohibitive license fee for the sale of patent medicine by itinerant merchants but permitted sales by resident vendors;<sup>33</sup> and a law which required barbershops to close on Sunday.<sup>34</sup>

<sup>20</sup> *People v McBride*, 234 Ill. 146 (1908).

<sup>21</sup> *City of Chicago v Bowman Dairy Co.*, 234 Ill. 294 (1908).

<sup>22</sup> *City of Belleville v St. Clair County Turnpike Co.*, 234 Ill. 428 (1908).

<sup>23</sup> *City of Chicago v Jackson*, 196 Ill. 496 (1902).

<sup>24</sup> *Bailey v People*, 190 Ill. 28 (1901); *City of Chicago v Netcher*, 183 Ill. 104 (1899).

<sup>25</sup> *Frorer v People*, 141 Ill. 171 (1892).

<sup>26</sup> *Knoxville Iron Co. v Harbison*, 183 U. S. 13 (1901).

<sup>27</sup> *Braceville Coal Co. v People*, 147 Ill. 66 (1893).

<sup>28</sup> *Erie Railroad Co. v Williams*, 233 U. S. 685 (1914).

<sup>29</sup> *Millett v People*, 117 Ill. 294 (1886); *Ramsey v People*, 142 Ill. 380 (1892).

<sup>30</sup> *McLean v Arkansas*, 211 U. S. 539 (1909); *Rail and River Coal Co. v Yapple*, 236 U. S. 338 (1915).

<sup>31</sup> *City of Chicago v Netcher*, 183 Ill. 104 (1899).

<sup>32</sup> *Bessette v People*, 193 Ill. 334 (1901).

<sup>33</sup> *People v Wilson*, 249 Ill. 195 (1911).

<sup>34</sup> *Eden v People*, 161 Ill. 296 (1896).

It is obvious that no precise standard as to proper classification can be made to govern all statutory enactments. It is equally true that judicial opinion may vary as to the application of this principle to a particular situation. In some instances, it may seem difficult to reconcile decisions of the same court as to different situations. The court held invalid a law which punished employers who secured non-resident workmen by means of misrepresentation or failure to disclose labor troubles and conditions.<sup>35</sup> Apparently the court disapproves the classification of employers of workmen for the purpose of punishing misrepresentation, and finds no reason for a different measure of liability for such action in the case of resident workmen and those brought from other places. A classification may be a natural one for some purposes but for the purpose of the act creating it, a wholly arbitrary and unreasonable one. It is essential that there be a logical and proper relation between the purpose of the legislation and the group it affects. In most cases of classification for this purpose, there cannot be an exact exclusion or inclusion of persons or things and frequently, as to particular persons just within the class and those just beyond the limits of it, there may be no substantial difference.<sup>36</sup> As was pointed out by the court in sustaining a ten hour labor law for women in hotels, the law must be considered as to hotels generally and not with reference to the character of the work performed and under the conditions existing in a particular instance.<sup>37</sup> But the court held invalid a law which prohibited the use of emery wheels or belts in basement rooms for the reason that a basement room might be more sanitary than a room so used above the surface.<sup>38</sup> And a law which limited the giving of assignments on wages and salaries, in the opinion of the court, made an improper classification since it included some who by reason of larger remuneration for their services, did not need protection against loan sharks.<sup>39</sup>

The question of classification for purposes of legislation is involved in the prohibition in section 22 of article 4 against granting special or exclusive privileges, immunities or franchises and a further discussion may be found under that section. (See discussion article 4, section 22, subheading, "Special privileges and immunities.")

**Arbitrary discretion.** The General Assembly may provide for the determination of certain rights by administrative boards or officials and the proceeding will constitute due process of law<sup>40</sup> so long as the act itself determines a policy and prescribes a method for its application, either by laying down the rules or by requiring the administrative agency to formulate the rules and principles which are to govern the particular instance after the facts have been ascertained. But a measure which vests arbitrary power in an administrative agency to act in a manner affecting the rights of individuals, necessarily is subject to the objection that it is not general or uniform in its application. The court has held unconstitutional a statute which made the estates of insane patients liable for their support at state institutions but at the same time, permitted the board of administration to release or modify any claim that it might see fit.<sup>41</sup> A gas safety appliance act was held objectionable for the same reason. It exempted from the requirements of the act, buildings which received less than a certain volume of gas unless the conditions endangered life or property. In that case the city fire marshal was vested with arbitrary authority to require such buildings to be equipped in a certain manner with gas safety appliances or to exempt them, as he saw fit.<sup>42</sup> So an act amending the school law was held improper since it left to the

<sup>35</sup> *Josma v Western Steel Car & Foundry Co.*, 249 Ill. 508 (1911); but see *Commonwealth v Libbey*, 216 Mass. 356 (1914).

<sup>36</sup> *Magoun v Illinois Trust & Savings Bank*, 170 U. S. 283 ((1898).

<sup>37</sup> *People v Elerding*, 254 Ill. 579 (1912).

<sup>38</sup> *People v Schenck*, 257 Ill. 384 (1913).

<sup>39</sup> *Massie v Cessna*, 239 Ill. 352 (1909).

<sup>40</sup> *Public Utilities Commission v C. & W. T. Ry. Co.*, 275 Ill. 555 (1916).

<sup>41</sup> *Board of Administration v Miles*, 278 Ill. 174 (1917).

<sup>42</sup> *Sheldon v Hoyne*, 261 Ill. 222 (1914).

uncontrolled discretion of the county superintendent of schools the determination of what would constitute a satisfactory and efficient high school district.<sup>43</sup> But the court sustained the validity of a fire-escape measure which gave to the factory inspector a large measure of discretion as to the number, location, material and construction of fire escapes on buildings coming within the class stated.<sup>44</sup> And a statute may vest general power in an administrative body like the board of health to grant or refuse licenses for the treatment of human ailments, so long as the board is required to adopt rules and regulations which are applicable to all and which tend to test the qualifications of applicants.<sup>45</sup>

Section 3. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

This section guarantees the full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine limited only by the laws of morality and property and the personal rights of others,<sup>46</sup> and prohibits compulsion as to religious faith or forms of worship.

It was held by the Supreme Court that this section prohibits Bible readings in the public schools. To this opinion Hand and Cartwright J.J. filed a vigorous and able dissenting opinion. The constitutional provision guarantees three things; (1) freedom of religious belief and worship, (2) freedom from civil or political disability on account of religious belief and (3) freedom from compulsory support or taxation for a church establishment. The decision of the court is based on the first and third rights. "The free enjoyment", the court held, "of religious worship includes freedom not to worship". Reading the Bible in any version was held to be religious worship. It is said, as to the second ground, that the reading of the Bible in the public schools is sectarian instruction supported by public funds and therefore, prohibited. The dissenting opinion points out that "the framers of the constitution of 1870 expressly refused to incorporate into the constitution a provision excluding the Bible from the public schools". Religious toleration, in the view of the minority of the court, does not demand an entire absence of moral instruction nor does it forbid teaching the principles of morality by means of readings from the Bible.<sup>47</sup> The decision in this case is against the weight of authority in the courts of other states and of the United States. In an earlier case, the court refused to issue a *mandamus* to compel the trustees of the University of Illinois to reinstate a pupil who had been expelled for failure either to attend chapel services or to make application to be excused. The decision of the court is based partly on the ground that the writ was not

<sup>43</sup> *Kenyon v Moore*, 287 Ill. 233 (1919).

<sup>44</sup> *Arms v Ayer*, 192 Ill. 601 (1901).

<sup>45</sup> *People v Kane*, 288 Ill. 235 (1919).

<sup>46</sup> *Christian Church v Church of Christ*, 219 Ill. 503 (1906).

<sup>47</sup> *People v Board of Education*, 245 Ill. 334 (1910); but see *Millard v Board of Education*, 121 Ill. 297 (1887). For a full discussion, see Schofield, *Religious liberty and Bible reading in Illinois public schools*. *Illinois Law Review*, VI p. 17, 91 (1911).

asked in good faith to protect a personal interest.<sup>48</sup> Religious worship has been construed to include every variety of religious faith and philosophy of life or death.<sup>49</sup>

The guaranty of religious freedom applies not only to individuals but to religious organizations, and all questions of membership, rites, discipline, doctrine and all ecclesiastical controversies will be left to the legislative and judicial bodies of such organizations.<sup>50</sup> And, although the civil courts will take jurisdiction for the determination of property rights, even then, as to ecclesiastical issues involved, the adjudications of the church authorities will be binding on the civil courts unless their action is manifestly a deviation from the established laws of the organization and a perversion of the fundamental doctrines.<sup>51</sup>

The common law rule and the early law in Illinois disqualified a witness from testifying unless he affirmed a belief in a God and a personal accountability for sins.<sup>52</sup> This section prohibits the denial of any civil or political right, privilege or capacity on account of religious opinion. The Supreme Court has held that the right to vote is a right, privilege or capacity within the meaning of this section and that it may not be denied on account of religious belief.<sup>53</sup>

The provision prohibiting compulsory support of a ministry or place of worship has been construed not to prevent school directors from permitting church organizations to meet in school buildings;<sup>54</sup> nor is it a violation of this clause to permit the building of chapels on county poor farms.<sup>55</sup> This prohibition against giving a preference by law to any denomination or mode of worship has been construed by the Attorney General to have no application to the case of the selection of chaplains in the state penal institutions.<sup>56</sup> (See also, discussion article 8, section 3.)

Section 4. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

Freedom of speech as guaranteed by this section is subject to some implied limitations. Thus, it may be limited by a proper exercise of the police power, such as a provision in the medical practice act prohibiting advertising under a false name.<sup>57</sup> The exercise of free speech is also subject to the inherent right of courts to punish for contempt, but under the constitutional provision this power is restricted to actions not merely defamatory but calculated to hinder, obstruct or delay them in the exercise of their proper functions.<sup>58</sup>

The second clause expressly abrogates the common law rules both that the truth alone was a complete defense in civil actions for libel and that the truth was not a defense to criminal libel.<sup>59</sup>

<sup>48</sup> *North v Trustees of University of Illinois*, 137 Ill. 296 (1891).

<sup>49</sup> *In re Walker*, 200 Ill. 566 (1903).

<sup>50</sup> *Chase v Cheney*, 58 Ill. 509 (1871); *Fussell v Hall*, 233 Ill. 73. (1908).

<sup>51</sup> *Christian Church v Church of Christ*, 219 Ill. 503 (1906); *Presbyterian Church v Cumberland Church*, 245 Ill. 74 (1910).

<sup>52</sup> *Central Military Tract R. R. Co. v Rockafellow*, 17 Ill. 541 (1856).

<sup>53</sup> *Hronek v People*, 134 Ill. 139 (1890).

<sup>54</sup> *Nichols v School Directors*, 93 Ill. 61 (1879).

<sup>55</sup> *Reichwald v Catholic Bishop of Chicago*, 258 Ill. 44 (1913).

<sup>56</sup> Report Attorney General 1914, p. 130.

<sup>57</sup> *People v Apfelbaum*, 251 Ill. 18 (1911).

<sup>58</sup> *Storey v People*, 79 Ill. 45 (1875); *People v Gilbert*, 281 Ill. 619 ((1917).

<sup>59</sup> *People v Fuller*, 238 Ill. 116 (1909); *Ogren v Rockford Star Printing Co.*, 288 Ill. 405 (1919).

Section 5. The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace, by a jury of less than twelve men, may be authorized by law.

Although the guaranty of the right of trial by jury in this section applies to both civil and criminal proceedings, the discussion here has been limited to civil cases. For jury trials in criminal prosecutions, see section 9 of this article and discussion thereunder.

The Supreme Court has said that the first clause of section 5 manifestly refers to a jury of twelve men,<sup>60</sup> but that a jury of less than twelve may by law constitute a jury for justice of the peace courts,<sup>61</sup> and "jury", as used in section 13 of this article, must be construed with reference to the two kinds of juries. So a statute may provide for eminent domain proceedings for road purposes in a justice of the peace court with a jury of six.<sup>62</sup> The term "jury" as used here, has come to mean a jury from the county. But there is no guaranty in civil cases as in criminal prosecutions of trial by a jury of a particular district or county.<sup>63</sup>

It is the plain purpose of this section of the constitution of 1870 to preserve the right of trial by jury to the same extent and in the same manner that it had been enjoyed. The phrase "as heretofore enjoyed" appears in this connection for the first time in the constitution of 1870. The precise period of time referred to by this phrase is left somewhat uncertain by the decisions of the Supreme Court. The guaranty of jury trial in the constitution of 1848 was construed in the case of *Ross v Irving* to preserve the right of trial by jury as it was understood to exist at the time of the adoption of the constitution. In this case the court sustained the validity of an early statute which authorized seven commissioners to assess the value of improvements placed on land by an evicted claimant.<sup>64</sup> This construction was adopted as to section 5 of the constitution of 1870 in an opinion in *Commercial Insurance Company v Scammon* holding that the appellate court may reverse the finding of a trial court and render final judgment.<sup>65</sup> In passing upon this same question in 1896 in *Borg v C. R. I. & P. Ry. Co.*, the court pointed out that courts of review at common law and prior to 1837 in this state reviewed questions of law alone, and that the power to reverse without remanding and to review questions of fact was given by statute, one in 1827 and the other in 1837. The court held that the right of jury trial adopted by the constitution of 1870 was the right as it existed subject to this power of the appellate court to review questions of fact.<sup>66</sup> But the year following, 1897, in the case of *George v People*, the court sustained the validity of the indeterminate sentence law which fixed the amount of punishment in criminal cases instead of permitting juries to do so. It was there said that the guaranty of jury trial is substantially the same in the three constitutions, and that it is the right to trial by jury as it existed at common law, which these provisions protect.<sup>67</sup> In 1898, however, in *City of Spring Valley v Spring Valley Coal Co.*, the court affirmed the holding of *Borg v C. R. I. & P. Ry. Co.*, and said that the right of trial by jury which is preserved by the constitution is the right as it had been enjoyed at the time of the adoption of the constitution.<sup>68</sup> Two decisions followed,—*Brewster v People* in 1899 and *Paulsen v People* in 1902; both consider the right of a defendant in a criminal proceeding to waive a

<sup>60</sup> *McManus v McDonough*, 107 Ill. 95 (1883).

<sup>61</sup> *Hermanek v Guthman*, 179 Ill. 563 (1899).

<sup>62</sup> *McManus v McDonough*, 107 Ill. 95 (1883).

<sup>63</sup> *People v Rodenberg*, 254 Ill. 386 (1912); *City of Chicago v Knobel*, 232 Ill. 112 (1908).

<sup>64</sup> *Ross v Irving*, 14 Ill. 171 (1852).

<sup>65</sup> *Commercial Ins. Co. v Scammon*, 123 Ill. 601 (1888).

<sup>66</sup> *Borg v C. R. I. & P. Ry. Co.*, 162 Ill. 348 (1896).

<sup>67</sup> *George v People*, 167 Ill. 447 (1897).

<sup>68</sup> *City of Spring Valley v Spring Valley Coal Co.*, 173 Ill. 497 (1898).

jury. In the first case, the court stated the two constructions and held that as to the particular offense charged, the right to waive a jury would be the same under either construction.<sup>69</sup> In *Paulsen v People*, the court after citing the *Brewster* case for the opposite view, expressly held that this section protects and preserves the common law right of jury trial.<sup>70</sup>

While it is impossible to reconcile the statements of the court in these decisions, the cases do not conflict as to the rights which are held either to be included or excluded in the right of jury trial. The result in each instance is to preserve the substantial right of trial by jury, both as it existed at common law and as it had come to be at the time of the adoption of the constitution and to exclude from the protection of this section those provisions relating to juries which are not fundamentally included in the right of jury trial. Thus, a jury except in civil cases before justices of the peace, shall be composed of twelve men; it must stand impartial between the parties; it must, for criminal cases, come from the vicinage; it must concur unanimously in a verdict; and a litigant may not be deprived of the right of jury trial in causes where such right had previously existed;—all these are the fundamental principles which cannot be changed or taken away. But the precise manner of obtaining a jury, and the exact extent and operation of juries are matters which, under the constitution, the General Assembly may regulate and change. This construction of this section makes unimportant the question whether the phrase "as heretofore enjoyed" relates to the time of the constitution or earlier, and probably gives to this phrase the effect intended by the constitutional framers.

This section is a guaranty of the right of trial by jury in cases where that right had existed before. An ordinance which authorizes the assessment by three commissioners of the damages against an owner of stock running at large, violates this guaranty.<sup>71</sup> Nor may an ordinance authorize a pound master to sell stock taken up unless the owner pays a penalty and costs.<sup>72</sup> Where an act to provide for the permanent survey of land, authorizes a report to the court by a commission of surveyors, it will be presumed that the act intends that the report together with other evidence shall be presented to a jury.<sup>73</sup> But it was never intended to extend the jury system into the special summary jurisdiction where no such right had existed before. It, therefore, has no application to contempt proceedings,<sup>74</sup> nor to a proceeding to disbar an attorney,<sup>75</sup> nor a probate proceeding to compel an executor to inventory personal property,<sup>76</sup> nor to proceedings against sureties on appeal bonds after conviction of the principal,<sup>77</sup> nor to a law adopted in 1811 which provided for an assessment by seven commissioners of the value of improvements constructed by claimants to land,<sup>78</sup> nor to eminent domain proceedings.<sup>79</sup> The guaranty of the right to jury trial does not extend to cases of equity jurisdiction<sup>80</sup> such as a bill to foreclose a mortgage<sup>81</sup> nor a partition suit even in a situation where the practical effect is the same as ejectment,<sup>82</sup> nor a bill to enjoin insurance companies from the prosecution of business until they complied with state laws,<sup>83</sup> nor a proceeding to discover assets of an estate,<sup>84</sup> nor to purely legal

<sup>69</sup> *Brewster v People*, 183 Ill. 143 (1899).

<sup>70</sup> *Paulsen v People*, 195 Ill. 507 (1902).

<sup>71</sup> *Bullock v Geomble*, 45 Ill. 218 (1867).

<sup>72</sup> *Willis v Legris*, 45 Ill. 289 (1867).

<sup>73</sup> *Huston v Atkins*, 74 Ill. 494 (1874).

<sup>74</sup> *People v Kipley*, 171 Ill. 44 (1898); *People v Seymour*, 272 Ill. 295 (1916).

<sup>75</sup> *People v Goodrich*, 79 Ill. 148 (1875).

<sup>76</sup> *Coffey v Coffey*, 179 Ill. 283 (1899).

<sup>77</sup> *Hennies v People*, 70 Ill. 100 (1873); *Whitehurst v Coleen*, 53 Ill. 247 (1870).

<sup>78</sup> *Ross v Irving*, 14 Ill. 171 (1852).

<sup>79</sup> *Wabash R. R. Co. v Drainage District*, 194 Ill. 310 (1902); *Johnson v Joliet & Chicago R. R. Co.*, 23 Ill. 202 (1859).

<sup>80</sup> *Phillips v Edsall*, 127 Ill. 535 (1889).

<sup>81</sup> *Dowden v Wilson*, 71 Ill. 485 (1874).

<sup>82</sup> *Flaherty v McCormick*, 113 Ill. 538 (1885).

<sup>83</sup> *North American Ins. Co. v Yates*, 214 Ill. 272 (1905).

<sup>84</sup> *Martin v Martin*, 170 Ill. 18 (1897).

controversies such as the assessment of contract or tort damages which are merely incidental to a matter concerning which equity has jurisdiction.<sup>85</sup>

It is not an infringement of this right for the General Assembly to create new rights unknown to the common law procedure of trial by jury and make provision for their determination without a jury, such as proceedings to adjudge infants dependent under the juvenile court act,<sup>86</sup> to compel the support of paupers by relatives,<sup>87</sup> to restore lost records,<sup>88</sup> to enforce an attorney's lien,<sup>89</sup> or to destroy gaming apparatus.<sup>90</sup> There is no constitutional right to a trial by jury in appeals from decisions of probate courts admitting wills to probate,<sup>91</sup> or petitions under the assignment act to determine that property had passed to the assignee for creditors.<sup>29</sup>

Where a new class of cases is directed to be tried as chancery causes and it appears that they are of equitable character either as to subject matter or the relief prayed when tested by the general principles of equity, the statute may provide for the determination of the questions of fact involved by the court without submission to a jury in the same manner as other cases in equity. Consequently it has been held that there is no constitutional right to a jury trial in proceedings in equity by the Attorney General to dissolve a corporation,<sup>93</sup> by a creditor of a corporation in equity against stockholders for unpaid stock subscriptions,<sup>94</sup> or to compel a surviving partner to account to the administrator of a deceased partner,<sup>95</sup> or to establish title under the burnt record act in an equity court,<sup>96</sup> regardless of the fact that the decree will have the same effect as a judgment in ejectment.<sup>97</sup>

Of course it is not competent for the General Assembly to defeat the right of jury trial by transferring to the jurisdiction of an equity court, a cause legal in nature in which the right of jury trial had existed at the time the constitution was adopted. A statute providing that in a chancery proceeding to enforce a mechanic's lien, if the court finds no right to a lien exists, it may render judgment as at law for the amount found due, is a deprivation of the right to trial by jury in a cause involving a simple contract debt. Nor is it a valid answer to this objection that the chancellor may submit questions of fact to a jury because the parties are entitled to a jury verdict which shall be not merely advisory but binding on controverted questions of fact.<sup>98</sup>

It is the function of a jury to determine controverted questions of fact, but whether there is any evidence legally tending to prove a material issue is a question of law for the court. Consequently the action of courts in excluding the evidence or directing verdicts is not an invasion of the right of jury trial;<sup>99</sup> nor is a motion asking the court to direct a verdict, a waiver of the right of jury trial as to questions of fact at issue.<sup>1</sup>

It has been noted in another connection that under the common law, causes tried by jury were reviewed on error or appeal solely for errors of law. This method of reviewing causes continued in Illinois until by statute in 1837 the Supreme Court was authorized to pass upon the facts and

<sup>85</sup> Keith v Henkleman, 173 Ill. 137 (1898); Shedd v Seefeld, 230 Ill. 118 (1907).

<sup>86</sup> Lindsay v Lindsay, 257 Ill. 328 (1913); Petition of Ferrier, 103 Ill. 367 (1882).

<sup>87</sup> People v Hill, 163 Ill. 186 (1896).

<sup>88</sup> Culver v Colehour, 115 Ill. 558 (1886).

<sup>89</sup> Standidge v Chicago Rys. Co., 254 Ill. 524 (1912).

<sup>90</sup> Frost v People, 193 Ill. 635 (1901).

<sup>91</sup> Moody v Found, 208 Ill. 78 (1904).

<sup>92</sup> Holnback v Wilson, 159 Ill. 148 (1895).

<sup>93</sup> Ward v Farwell, 97 Ill. 593 (1881); Chicago Mutual Life Indemnity Ass'n. v Hunt, 127 Ill. 257 (1889).

<sup>94</sup> Parmalee v Price, 208 Ill. 544 (1904).

<sup>95</sup> Maynard v Richards, 166 Ill. 466 (1897).

<sup>96</sup> Heacock v Hosmer, 109 Ill. 245 (1884).

<sup>97</sup> Harding v Fuller, 141 Ill. 308 (1892).

<sup>98</sup> Turnes v Brenckle, 249 Ill. 394 (1911); but see Gage v Ewing, 107 Ill. 11 (1883).

<sup>99</sup> Commercial Ins. Co. v Scammon, 123 Ill. 60 (1888); Frazer v Howe, 106 Ill. 563 (1883).

<sup>1</sup> Wolf v Chicago Sign Printing Co., 233 Ill. 501. (1908).

from that time the court has continuously, in cases where it was deemed proper, reversed the judgment and refused to remand the cause for another trial. Later when the appellate courts were organized this power was transferred to them. The precise nature of this power, however, does not seem to have been considered by the court until after the adoption of the constitution of 1870. In fact, in two cases, one decided in 1888 and the other in 1889, the court said that the authority given appellate courts was "limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed . . . laying entirely out of view the effect of all modifying or countervailing evidence."<sup>2</sup> Whether there is or is not such evidence is a question of law and the power to determine it is the same possessed by trial courts in passing upon motions to direct a verdict.

This view, however, of the extent of the power of appellate courts to review the evidence, is rejected by the court in a number of later decisions. It is now definitely settled that appellate courts have more extended powers than trial courts in passing upon evidence and that they may, upon a consideration of the evidence, find the facts to be different from the finding of the court from which the cause is brought. Nor is this practice an invasion of the right to have a jury pass upon the facts in issue. In support of this position, the court said that the right of jury trial preserved by this section, was the right as it existed at the time of the adoption of the constitution and that the right of jury trial as it was then enjoyed was subject to the power of a court of review to review the judgments of trial courts on the facts and to reverse such judgments without remanding the causes for further trials.<sup>3</sup>

But a court of review has not the power to reverse a finding and assess damages or render a judgment for the recovery of property or damages without the verdict of a jury,<sup>4</sup> unless a jury has been waived in the trial court,<sup>5</sup> nor may an appellate court reverse and remand such a cause with directions to the trial court to enter a judgment for damages or property.<sup>6</sup>

The rule that an appellate court may not reverse a judgment for the defendant and enter judgment for plaintiff for damages or property has been applied to divorce proceedings where by statute a right to a jury trial had existed prior to the adoption of the constitution.<sup>7</sup> But in a case where two trials had been had with the same result and the evidence showed clearly that the ends of justice would not be served by a third submission to a jury, the result of which would be certain, the Supreme Court reversed a judgment of the trial court and entered final judgment granting a divorce to the complainant.<sup>8</sup> A dissenting opinion in this case, however, expresses the view that the cause should be remanded to the trial court where a finding by a jury might be had.

This section does not secure a jury trial without cost necessarily, and a statute requiring the payment of reasonable jury fees when a jury is demanded does not violate the guaranty of a jury trial.<sup>9</sup> Since, by the constitution, the Supreme Court is given original jurisdiction of *mandamus* proceedings and no provision is made for a jury in that court, the guaranty of the right of jury trial must be held not to apply to such proceedings.<sup>10</sup>

<sup>2</sup> Commercial Insurance Co. v Scammon, 123 Ill. 601 (1888); Jones v Fortune, 128 Ill. 518 (1889).

<sup>3</sup> Borg v C. R. I. & P. Ry. Co., 162 Ill. 348 (1896); City of Spring Valley v Spring Valley Coal Co., 173 Ill. 497 (1898); Larkins v Terminal R. R. Ass'n., 221 Ill. 428 (1906).

<sup>4</sup> City of Spring Valley v Spring Valley Coal Co., 173 Ill. 497 (1898).

<sup>5</sup> Manistee Lumber Co. v Union National Bank, 143 Ill. 490 (1892); United Workmen v Zuhlke, 129 Ill. 298 (1889).

<sup>6</sup> Osgood v Skinner, 186 Ill. 491 (1900).

<sup>7</sup> Kincaid v Kincaid, 256 Ill. 548 (1912).

<sup>8</sup> Lindsay v Lirdsay, 226 Ill. 309 (1907).

<sup>9</sup> Williams v Gottschalk, 231 Ill. 175 (1907); Morrison Hotel Co. v Kirsner, 245 Ill. 431 (1910).

<sup>10</sup> People v Mayor of Alton, 233 Ill. 542 (1908).



The court has held unconstitutional a statute that permitted a party to appeal to the Supreme Court from a judgment of the appellate court reversing and remanding a cause, by stipulating that a final judgment may be entered against him if the appeal is not prosecuted with effect. The effect of such a provision might be to require the Supreme Court to pass upon questions of fact which the party not stipulating, is entitled to have tried by jury.<sup>11</sup> The right of jury trial is a rule of procedure applying to cases litigated in this state. It is not a right guaranteed citizens of Illinois which attends them in litigation in other jurisdictions. Thus an equity court will not enjoin the prosecution of a suit in Missouri against a citizen of this state, on the ground that by the law of Missouri a valid verdict may be rendered by three-fourths of a jury of twelve.<sup>12</sup> It has also been held that a statute making certain evidentiary facts *prima facie* evidence of an ultimate fact or conclusion does not deprive a party of the right to have a jury determine the facts, if the facts given a probative value have a fair and natural relation to the ultimate fact.<sup>13</sup>

In civil suits, the right to have a jury determine the facts involved may be waived by agreement of both parties thereto and a finding had by the court alone,<sup>14</sup> and such waiver will be presumed from a participation in a trial before a judge without objection.<sup>15</sup> Trial may be had with a jury of less than twelve jurors by agreement of the parties thereto.<sup>16</sup> A waiver of trial by jury is binding only as to the first trial and after a remand either party may demand a jury.<sup>17</sup> Nor is such a waiver binding on the defendant when the plaintiff subsequently files an amended declaration forming new and different issues.<sup>18</sup>

**Section 6.** 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 warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

This section has been construed not to change or abridge the common law right to arrest without warrant in certain cases; nor does it apply to the search of persons under arrest for particular offenses, an element of which is the possession of dangerous weapons or particular articles.<sup>19</sup> It has no application to a rule requiring policemen at certain times to submit to a physical examination.<sup>20</sup> Search warrants, however, are not available as aids to the enforcement of civil proceedings or private rights and a provision in an act to protect manufacturers, bottlers and dealers from loss of bottles, kegs and similar containers, authorizing the issuance of a search warrant for the recovery of such articles, is invalid.<sup>21</sup> It is not improper for courts in civil proceedings to require the production of books

<sup>11</sup> Patterson v Warfield, 233 Ill. 147 (1908); Hayward v Sencenbaugh 235 Ill. 580 (1908).

<sup>12</sup> Illinois Life Ins. Co. v Prentiss, 277 Ill. 383 (1917).

<sup>13</sup> Meadowcroft v People, 163 Ill. 56 (1896); C. B. & Q. R. R. Co., v Jones, 149 Ill. 361 (1894).

<sup>14</sup> City of Highland Park v McMullin, 249 Ill. 568 (1911); C. S. F. & C. Ry. Co. v Ward, 128 Ill. 349 (1889).

<sup>15</sup> Rothschild v Mudd & Hughes, 33 Ill. 476 (1864); Miller v Simons, 156 Ill. 113 (1895); Burgwin v Babcock, 11 Ill. 28 (1849).

<sup>16</sup> Rehm v Halverson, 197 Ill. 378 (1902).

<sup>17</sup> Rigdon v Moore, 242 Ill. 256 (1909).

<sup>18</sup> Gage v Commercial National Bank of Chicago, 86 Ill. 371 (1877).

<sup>19</sup> North v People, 139 Ill. 81 (1891).

<sup>20</sup> People v Steward, 249 Ill. 311 (1911).

<sup>21</sup> Lippman v People, 175 Ill. 101 (1898).

or writings which contain evidence material to the issue;<sup>22</sup> but if the purpose or effect of the order is to compel a general disclosure of the business transactions of a party, it is within the meaning of the prohibition against unreasonable searches and seizures.<sup>23</sup> Consequently a party required to produce books of account may seal up and conceal parts not relating to the matter at issue<sup>24</sup> and, if necessary, the court may, in lieu of exposing books in which pertinent matter is intermingled with other items, order the clerk of court to make an accurate copy of the pertinent items.<sup>25</sup> But an order depriving a party of his books and committing them to the court clerk for an indefinite period for inspection by the opposing party is a violation of this section.<sup>26</sup>

It is not within the prohibition against unreasonable searches to require the keeping of records or furnishing of information for tax-assessing and tax-collection bodies,<sup>27</sup> or to require a sworn monthly report by manufacturers of butter and cheese on the cooperative plan.<sup>28</sup>

In several early cases, however, municipal ordinances have been declared unconstitutional by reason of authorizing the search and seizure of intoxicating liquor when the possession of such liquor was illegal only when kept for purposes of sale or gift within city limits.<sup>29</sup> And an ordinance prohibiting sales of liquor but exempting sales by druggists for certain purposes and requiring sworn statements of such sales, has been held an unreasonable invasion of private rights by inquisition into a private business.<sup>30</sup>

The affidavit which is necessary for the issuance of a warrant, must state the facts constituting the crime and be sufficiently definite so that if false, perjury might be assigned.<sup>31</sup> A complaint therefore which alleges the ownership of stolen property and that it is in the possession of an unknown person is invalid since it does not charge the commission of an offense and aver probable cause to suspect that a certain person committed the same.<sup>32</sup> A warrant for the search and seizure of property contemplates the taking into custody of the person found in possession.<sup>33</sup> Since the objects of searches are either criminal by nature, or the possession of them is prohibited by law, notice by the bringing in of the person in possession is sufficient notice to the owner for the purpose of a judicial inquiry as to the disposition to be made of them.<sup>34</sup> The constitutional provision requires that the affidavit describe with particularity property to be seized. But in the case of gambling apparatus and implements, a complaint and writ using these terms is sufficient.<sup>35</sup> The requirement that a warrant be supported by affidavit is self-executing and a provision in the county court act dispensing with an oath in the filing of an information at the instance of the state's attorney or Attorney General is unconstitutional and void.<sup>36</sup>

It has been held that the unauthorized and illegal search of a defendant's room and the seizure of incriminating articles will not render such articles inadmissible in evidence to prove the guilt of the defendant.<sup>37</sup>

<sup>22</sup> Swedish American Tel. Co. v Fidelity & Casualty Co., 208 Ill. 562 (1904).

<sup>23</sup> Walter Cabinet Co. v Russell, 250 Ill. 416 (1911).

<sup>24</sup> Denison Cotton Co. v Schermerhorn, 257 Ill. 128 (1913).

<sup>25</sup> Pynchon v Day, 118 Ill. 9 (1886).

<sup>26</sup> Lester v People, 150 Ill. 408 (1894).

<sup>27</sup> National Safe Deposit Co. v Stead, 250 Ill. 584 (1911).

<sup>28</sup> Hawthorn v People, 109 Ill. 302 (1883).

<sup>29</sup> Darst v People, 51 Ill. 286 (1869); Sullivan v City of Oneida, 61 Ill. 242 (1871).

<sup>30</sup> City of Clinton v Phillips, 58 Ill. 102 (1871).

<sup>31</sup> Myers v People, 67 Ill. 503 (1873).

<sup>32</sup> Housh v People, 75 Ill. 487 (1874).

<sup>33</sup> White v Wagar, 185 Ill. 195 (1900).

<sup>34</sup> Glennon v Britton, 155 Ill. 232 (1895).

<sup>35</sup> Frost v People, 193 Ill. 635 (1901).

<sup>36</sup> People v Clark, 280 Ill. 160 (1917); but see People v Viskniski 255 Ill. 384 (1912).

<sup>37</sup> Gindrat v People, 138 Ill. 103 (1891).

Section 7. All persons shall be bailable, by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and 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.

The question whether a particular offense is bailable under this provision is addressed to the court and the fact that a grand jury has returned an indictment for murder does not preclude an inquiry of the facts by the court to ascertain whether the offense is of a grade which is bailable.<sup>38</sup> It has also been held that the Supreme Court would not admit to bail pending the determination of a writ of error unless it was very clear that no conviction could be had upon another trial.<sup>39</sup>

Section 8. No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: Provided, that the grand jury may be abolished by law in all cases.

This section has been referred to as drawing the line between felonies and misdemeanors, requiring that felonies be prosecuted by indictment but permitting misdemeanors to be prosecuted on information,<sup>40</sup> but in a later case the Supreme Court has pointed out that this provision limits the prosecution on information to offenses punishable by fine or imprisonment otherwise than in the penitentiary. Consequently since by an early statute larceny (including petit larceny) was an infamous crime, involving a deprivation of civil rights, petit larceny, though a misdemeanor, was punished by loss of civil rights in addition to fine and imprisonment in a county jail and could be prosecuted only by indictment.<sup>41</sup> And an offense under the civil service law punishable by disqualification from holding office for five years in addition to a fine and imprisonment in a county jail, cannot be prosecuted on information.<sup>42</sup> But a criminal statute authorizing a court to abate a nuisance at the expense of the defendant and punish the defendant by fine and imprisonment in the county jail does not bring this offense within the class of crimes which can be prosecuted only by indictment because the abatement of the nuisance is not a part of the penalty.<sup>43</sup>

It has been contended that prosecution on information is limited by this section to offenses punishable by fine only, and offenses punishable by imprisonment otherwise than in the penitentiary only, but the construction by the Supreme Court includes as well, offenses punishable by either fine or imprisonment otherwise than in the penitentiary, in the alternative.<sup>44</sup>

There are, therefore, four classes of cases which may be prosecuted on information: (1) Offenses punishable by fine only; (2) offenses punishable

<sup>38</sup> *Lynch v People*, 38 Ill. 494 (1865).

<sup>39</sup> *Bennett v People*, 94 Ill. 581 (1880).

<sup>40</sup> *Brewster v People*, 183 Ill. 143 (1899).

<sup>41</sup> *People v Russell*, 245 Ill. 268 (1910).

<sup>42</sup> *People v Kipley*, 171 Ill. 44 (1898).

<sup>43</sup> *People v Archibald*, 258 Ill. 333 (1913).

<sup>44</sup> *People v Glowacki*, 236 Ill. 612 (1908).

by imprisonment otherwise than in the penitentiary only; (3) offenses punishable either by fine or by imprisonment otherwise than in the penitentiary; (4) offenses punishable both by fine and by imprisonment otherwise than in the penitentiary.

The provision of this section does not apply to a holding either by a recognizance or by imprisonment to await the presentment of the grand jury.<sup>45</sup>

The proviso as to the abolishment of the grand jury by law in all cases has not been construed by the Supreme Court but the Attorney General has said that the grand jury may not be abolished by law as to some offenses unless it is abolished entirely.<sup>46</sup>

**Section 9.** In all criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation, and to have a copy thereof; to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

**Criminal prosecution.** This section has no application to summary proceedings to enforce the authority of a court, but a statute which authorizes a court to punish as for contempt, for refusal to appear in answer to a notary's subpoena, is violative of this section.<sup>47</sup> It is not improper, however, for a statute to authorize a court on application to order the attendance of a witness before a notary and in the event of refusal, to compel obedience in a summary way.<sup>48</sup> A proceeding to disbar an attorney is not a criminal prosecution in which there is a right to meet the witnesses face to face.<sup>49</sup>

**The right to appear.** The record must show the presence of the accused in court.<sup>50</sup> But if present at the commencement of the trial which proceeds continuously, he will be presumed to have been present at every subsequent stage,<sup>51</sup> down to the return and receipt of the verdict.<sup>52</sup> However, the record must show his presence during the hearing of a motion for a new trial.<sup>53</sup> Where the court has overruled such a motion and pronounced judgment in the absence of the defendant, the whole proceeding is not void, but may be corrected by retracing these steps in his presence.<sup>54</sup> The constitutional privilege of appearing in criminal prosecutions was conferred for the benefit and protection of the accused, but if he is present at the commencement of trial and voluntarily absents himself, he will have waived his privilege.<sup>55</sup>

<sup>45</sup> *Garrison v People*, 21 Ill. 535 (1859).

<sup>46</sup> Report Attorney General 1908, p. 52.

<sup>47</sup> *Puterbaugh v Smith*, 131 Ill. 199 (1890); *McIntyre v People*, 227 Ill. 26 (1907).

<sup>48</sup> *People v Kipley*, 171 Ill. 44 (1898).

<sup>49</sup> *People v Stonecipher*, 271 Ill. 506 (1916).

<sup>50</sup> *Harris v People*, 130 Ill. 457 (1889).

<sup>51</sup> *Padfield v People*, 146 Ill. 660 (1893).

<sup>52</sup> *Sewell v People*, 189 Ill. 174 (1901).

<sup>53</sup> *Harris v People*, 130 Ill. 457 (1889).

<sup>54</sup> *Harris v People*, 138 Ill. 63 (1891).

<sup>55</sup> *Sahlinger v People*, 102 Ill. 241 (1882); *Gallagher v People* 211 Ill. 158 (1904).

The right of a defendant in criminal proceedings to be present in court does not extend to writs of error in the appellate or Supreme Court.<sup>56</sup>

**Right to defend in person and by counsel.** The attorney appointed by the court to defend a person unable to secure counsel should be of sufficient ability to protect adequately the rights of the defendant and must not have any interest adverse to the defendant, and sufficient time must be allowed him to prepare the defense.<sup>57</sup> The court should appoint an attorney to aid a defendant not only during the actual trial but during arraignment, when the accused needs such counsel.<sup>58</sup> It is not a violation of this provision for the court in its discretion to limit the argument of counsel, but a sufficient opportunity must be afforded to permit a discussion and presentation of the whole case to the jury.<sup>59</sup>

**Right to demand the nature and cause of the accusation.** The Supreme Court has been called upon in a great many cases to determine whether the indictment describes the offense charged with sufficient preciseness and particularity to satisfy the constitutional right of the accused to be informed of the nature and cause of the accusation against him. The degree of particularity required is indicated in a general way by the purpose of this provision as stated by the court, viz., to enable the accused to prepare fully for his defense and also to plead the judgment in bar of a subsequent prosecution for the same offense.<sup>60</sup> However, the second reason given for a specific description of the offense is rejected by the court in a later case for the reason that, by the present practice, a former conviction or acquittal is proved by parol testimony under a plea of not guilty.<sup>61</sup> It is also said that the offense must be described so as to enable the court to pass sentence in case of conviction. It has been held that an indictment for extorting money by threats to kill need not set out the words of the threat.<sup>62</sup> An indictment for robbery need not describe with absolute accuracy the property taken.<sup>63</sup> But an indictment for having or giving away an obscene pamphlet must set out the supposed obscene matter if possible, or aver the reason for its omission.<sup>64</sup> The full name of the injured party or the initials in place of the Christian name, if they are as well known, must be stated in an indictment,<sup>65</sup> but an indictment charging the sale of whiskey without a license need not state the name of the purchaser.<sup>66</sup> An averment that the pistol was loaded is unnecessary in an indictment for assault with a deadly weapon, to-wit, a pistol,<sup>67</sup> but in an indictment for homicide, the means whereby life was taken must be averred if known, and the instrumentality must not be essentially different from that alleged in the indictment.<sup>68</sup> Evidence of beating the deceased to death with a gun will not support an indictment for murder by shooting.<sup>69</sup>

Where there is a statute creating an offense, it is generally sufficient to describe the offense in the language of the statute,<sup>70</sup> so an indictment under a statute prohibiting a banker from receiving deposits while insolvent need

<sup>56</sup> Fielden v People, 128 Ill. 595 (1889).

<sup>57</sup> People v Bopp, 279 Ill. 184 (1917).

<sup>58</sup> Gardner v People, 106 Ill. 76 (1883).

<sup>59</sup> White v People, 90 Ill. 117 (1878).

<sup>60</sup> West v People, 137 Ill. 189 (1891).

<sup>61</sup> People v Brady, 272 Ill. 401 (1916).

<sup>62</sup> Glover v People, 204 Ill. 170 (1903).

<sup>63</sup> People v Nolan, 250 Ill. 351 (1911).

<sup>64</sup> McNair v People, 89 Ill. 441 (1878).

<sup>65</sup> Vandermark v People, 47 Ill. 122 (1868).

<sup>66</sup> Cannady v People, 17 Ill. 158 (1855).

<sup>67</sup> Allen v People, 82 Ill. 610 (1876).

<sup>68</sup> People v Lukoszus, 242 Ill. 101 (1909).

<sup>69</sup> Guedel v People, 43 Ill. 226 (1867).

<sup>70</sup> McCutcheon v People, 69 Ill. 601 (1873).

not aver an intent to defraud, if the statute does not make that a material element.<sup>71</sup> An indictment under a statute prohibiting the distribution to or by minors, of publications principally made up of criminal news is sufficient without incorporating all the matter contained in the publication or reciting the prohibited matter.<sup>72</sup> But besides stating the substantive elements of the crime in the statutory language, the particular transaction must be identified and distinguished by apt averments.<sup>73</sup> A statute may be so general in its terms that an indictment following its language will not apprise the accused of the precise nature of the crime charged. An indictment under such a statute must set forth the specific act or acts.<sup>74</sup>

Where a statute creating an offense contains exceptions or provisos, these need not be negated by an indictment framed under the statute unless such exceptions or provisos are embraced in the same clause which creates the offense, and even then it is not necessary if the exceptions or provisos are not incorporated with the enacting clause, by apt words of reference.<sup>75</sup>

The Supreme Court has sustained the validity of a statutory provision which dispenses with a specific setting out of the particular acts and transactions constituting the confidence game, and makes sufficient an indictment charging the unlawful and felonious obtaining of money (or property) from A. B. The naming of the victim sufficiently identifies the offense.<sup>76</sup>

Informations when substituted for indictments in the county court by statute must, like indictments, inform the accused of the nature and cause of the accusation,<sup>77</sup> and in both informations and indictments, the proper venue must be laid.<sup>78</sup>

Many of the cases cited under this subheading discuss the sufficiency of the indictment in question without an express reference to the constitutional provision, but the requirement as to particularity and preciseness in indictments is based on the constitutional right of the accused to be informed of the nature and cause of the accusation against him.

**Right to meet the witnesses face to face.** The reading by counsel to a jury from medical books which have not been introduced in evidence and the statement as to what an absent witness would have testified deprive a defendant of his right to confront the witnesses against him.<sup>79</sup> This constitutional right makes impossible the use of depositions in criminal prosecutions as in civil cases for the purpose of supplying the testimony of absent witnesses, but it does not render inadmissible what is known as record evidence,<sup>80</sup> nor does it prevent the use of public records which import verity. Thus, in a prosecution for bigamy, proof may be made by the certificate of marriage returned to the county clerk, or copy thereof, or the county clerk's record of the return.<sup>81</sup>

A defendant in a criminal case is not deprived of his privilege of meeting the witnesses by a statute which authorizes a court to grant a continuance on account of the absence of a material witness unless the opposing party admits in evidence the affidavit as to what such witness, if present, would testify, since the constitutional right may be waived to secure the advantage of an immediate trial.<sup>82</sup> Nor is it a deprivation of this right to admit on the trial of a case the testimony given at a preliminary hearing by

<sup>71</sup> *Meadowcroft v People*, 163 Ill. 56 (1896).

<sup>72</sup> *Strohm v People*, 160 Ill. 582 (1896).

<sup>73</sup> *West v People*, 137 Ill. 189 (1891).

<sup>74</sup> *Cochran v People*, 175 Ill. 28 (1898).

<sup>75</sup> *Beasley v People*, 89 Ill. 571 (1878).

<sup>76</sup> *People v Brady*, 272 Ill. 401 (1916).

<sup>77</sup> *Parris v People*, 76 Ill. 274 (1875).

<sup>78</sup> *People v Higgins*, 15 Ill. 110 (1853).

<sup>79</sup> *Yoe v People*, 49 Ill. 410 (1868).

<sup>80</sup> *Sokol v People*, 212 Ill. 238 (1904).

<sup>81</sup> *Tucker v People*, 122 Ill. 533 (1887).

<sup>82</sup> *Hoyt v People*, 140 Ill. 588 (1892).

a witness since deceased.<sup>83</sup> The admission in evidence of dying declarations in homicide cases is an exception to the right to meet the witnesses face to face,<sup>84</sup> but statements of the deceased tending to show a motive which are neither dying declarations nor a part of the *res gestae*, are inadmissible, since motive is a fact which must be proved by witnesses met face to face.<sup>85</sup>

**Right to a speedy public trial.** The right to be tried without undue delay, as expressed in general terms in this section has been given effect by legislation requiring trials of accused persons within certain limited periods (Hurd's Revised Statutes 1917, chap. 38, sec. 438) and providing that failure to bring a defendant to trial within the period or term of court fixed shall operate as a complete discharge. While this means entire immunity from prosecution for the offense charged,<sup>86</sup> it does not bar subsequent prosecution for a different and distinct offense growing out of the same transaction.<sup>87</sup> To give effect to the constitutional intent, the period fixed must date from the arrest, and not from the time the indictment is returned.<sup>88</sup> But where a first trial resulted in a hung jury, the period commences to run again from the date of the disagreement of the jury.<sup>89</sup> Neither the sickness of the judge nor inability for other reasons to preside nor the fact that the trial judge dispensed with a petit jury can operate to defeat the right of an accused to be put on trial within the period fixed by statute.<sup>90</sup> But the constitutional provision prohibits only arbitrary and oppressive delays and has no reference to the delay caused by the prosecution of a writ of error to the Supreme Court.<sup>91</sup>

The right of a defendant in a criminal prosecution to a public trial is not denied by a temporary closing and locking of the doors of the court room on account of noise and confusion, so long as no one was denied access to the room.<sup>92</sup>

Trial, as used in this section, means by a fully constituted court and a hearing for two days in the absence of the judge, his place being filled by members of the bar, does not constitute a trial.<sup>93</sup> Even the absence of the judge from the court room during the closing argument for the prosecution is a deprivation of the right to a trial.<sup>94</sup> But it is not error for a judge to go to an adjoining room during the argument of counsel, when the door remained open and he was in a position to pass upon questions presented.<sup>95</sup>

**Trial by an impartial jury.** A consideration of the right to jury trial in criminal cases necessarily involves the more comprehensive provision of section 5 of this article, that "the right to trial by jury, as heretofore enjoyed, shall remain inviolate". In passing upon the right of a defendant to waive a jury in criminal prosecutions, the court has made reference to the phrase, "as heretofore enjoyed", which occurs in the other section.

In several early cases decided prior to the adoption of the constitution, a waiver of the right to a jury trial in prosecutions for misdemeanors was permitted,<sup>96</sup> but it was held that a jury was an indispensable part of a court

<sup>83</sup> Barnett v People, 54 Ill. 325 (1870).

<sup>84</sup> Starkey v People, 17 Ill. 17 (1855).

<sup>85</sup> Weyrich v People, 89 Ill. 90 (1878).

<sup>86</sup> People v Heider, 225 Ill. 347 (1907).

<sup>87</sup> Nagel v People, 229 Ill. 598 (1907).

<sup>88</sup> Guthman v People, 203 Ill. 260 (1903).

<sup>89</sup> People v Jonas, 234 Ill. 56 (1908).

<sup>90</sup> Newlin v People, 221 Ill. 166 (1906).

<sup>91</sup> Marzen v People, 190 Ill. 81 (1901).

<sup>92</sup> Stone v People, 3 Ill. 326 (1840).

<sup>93</sup> Meredith v People, 84 Ill. 479 (1877).

<sup>94</sup> Thompson v People, 144 Ill. 378 (1893).

<sup>95</sup> Schintz v People, 178 Ill. 320 (1899).

<sup>96</sup> Zarresseller v People, 17 Ill. 101 (1855); Darst v People, 51 Ill. 286 (1869).

for the trial of felony cases, and that the consent of the accused could not vest jurisdiction in a judge to try a case alone.<sup>87</sup> In holding that a jury might be waived in the trial of misdemeanors, it has been shown that it is immaterial in this connection whether the phrase, "as heretofore enjoyed", refers to the common law system of jury trials or whether it means the jury system that existed at the time of the adoption of the constitution since, in either case, a jury of twelve men was indispensable only for offenses which required a commencement by indictment.<sup>88</sup> In a more recent decision, the court after holding that the constitution guarantees the right of trial by jury as it existed at common law, points out that the use of the term "misdemeanors" to indicate the class of cases in which a jury may be waived, is inaccurate, since at common law a trial by jury was known only as to cases which followed upon indictment, and under the construction placed on section 8 of this article, an indictment is required in the case of certain misdemeanors. Consequently, a jury trial may be waived only in the trial of those misdemeanors which may be commenced otherwise than by indictment.<sup>89</sup> It has been held, however, that the right to waive a jury in any kind of a criminal case is dependent upon a statute vesting jurisdiction in the court without a jury, but this point seems to have been overlooked in the earlier cases.<sup>1</sup> The right of jury trial does not include the right to have one jury try an issue of misnomer and a different jury to pass upon the merits.<sup>2</sup> Nor is there a constitutional right to have the jury fix the punishment, but it may be fixed by operation of law, as in the case of an indeterminate sentence,<sup>3</sup> or by the court as in convictions for wife abandonment.<sup>4</sup>

The expression "impartial jury" as incorporated in the constitution had a fixed and definite meaning in the common law, and must be understood to mean a jury which stands indifferent between the parties. The court, however, in determining the competency of a juror has distinguished between mere impressions which have been hastily formed, and the decided bias which comes from a fixed opinion. It was early recognized that the fact that a prospective juror had expressed his opinion was entitled to consideration in determining whether the opinion was apt to be of an abiding character. In fact, in the first decision by the Supreme Court on this question, it was said that no opinion, whether the most hasty impression or a confirmed belief, would disqualify unless it had been expressed,<sup>5</sup> but shortly after this decision, the court in a leading case laid down the rule that if a juror had made up a decided opinion upon the merits of the case, either from personal knowledge of the facts, or from the statements of witnesses, or from the relations of the parties, or from rumor, and that opinion was positive and not hypothetical, he was disqualified.<sup>6</sup> A statute providing that the forming of an unexpressed opinion shall not disqualify if the juror shall state he can fairly and impartially render a verdict and the court shall be satisfied of the truth of the statement, does not violate the constitutional provision,<sup>7</sup> but it must be construed as merely admitting in evidence the statement of the juror along with other facts by which the court can determine his qualifications.<sup>8</sup>

While the limits to the examination of prospective jurors by counsel must rest in the sound discretion of the court, it must afford a reasonable opportunity, not only to disclose ground for challenge for cause, but also other

<sup>87</sup> *Harris v People*, 128 Ill. 585 (1889); *Morgan v People*, 136 Ill. 161 (1891); but see *Kelly v People*, 115 Ill. 533 (1886).

<sup>88</sup> *Brewster v People*, 183 Ill. 143 (1899).

<sup>89</sup> *Paulsen v People*, 195 Ill. 507 (1902).

<sup>1</sup> *Brewster v People*, 183 Ill. 143 (1899).

<sup>2</sup> *Schram v People*, 29 Ill. 162 (1862).

<sup>3</sup> *George v People*, 167 Ill. 447 (1897); *People v Illinois State Reformatory*, 148 Ill. 413 (1894).

<sup>4</sup> *People v Heise*, 257 Ill. 443 (1913).

<sup>5</sup> *Noble v People*, 1 Ill. 54 (1822).

<sup>6</sup> *Smith v Eames*, 4 Ill. 76 (1841).

<sup>7</sup> *Spies v People*, 122 Ill. 1 (1887).

<sup>8</sup> *Coughlin v People*, 144 Ill. 140 (1893).



facts which might have a bearing on the exercise of the right of peremptory challenge. Otherwise, it is practically a denial of the right to a fair and impartial jury.<sup>9</sup> Thus, in selecting a jury for a trial on the charge of selling intoxicating liquor to a person in the habit of becoming intoxicated, it is error not to permit the defendant's attorney to inquire as to membership in temperance societies or leagues formed for the prosecution of a certain class of persons.<sup>10</sup>

The locality from which the jury is to come. This section guarantees the right of a person accused of crime to be tried by a jury of the county or district in which the offense is alleged to have been committed. County or district corresponds to the visne or neighborhood of the common law and has come to mean simply county. It has no relation to a judicial circuit, so that when the right to a trial in a particular county is waived by an application for a change of venue, there is no constitutional requirement that it be sent to another county in the same circuit.<sup>11</sup> A statute, however, permitting offenses committed within one hundred yards of a county line to be tried in either county, is invalid. The court expressly exempts from this holding offenses committed on a county line or within an inappreciable distance from it and cases where the offense is committed by a person in one county on a person or thing in another county.<sup>12</sup> For the same reason, the city court act can not have application to a city, the territory of which lies in two counties.<sup>13</sup>

While the constitutions of 1818 and 1848 limit absolutely the jurisdiction of criminal offenses to the county where the offense actually was committed, the revised wording in the present constitution must be taken as evidence that the intent was to empower the General Assembly, in its discretion, to provide for the presentment of indictments in which the allegation as to the venue is not in accordance with the fact, and to determine what offenses shall be treated as transitory. Therefore, a statute providing that when an offense is committed on a railroad car or water-craft, and it cannot readily be determined in what county the commission actually occurred, it may be prosecuted in any county through which the car or water-craft has come on or near the time of the commission of the offense, does not violate the constitutional provision.<sup>14</sup>

**Section 10.** No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

**Self crimination.** The first clause in this section guarantees the right of a person to refuse to answer any question, if the answer will expose him to imprisonment, fine, forfeiture or penalty.<sup>15</sup> The provision is directed against compulsion in obtaining self-criminating evidence and not against testimony voluntarily offered. Incriminating statements made by an accused after being warned that they might be used against him, are properly received in evidence.<sup>16</sup> But testimony elicited by a special interrogation of the accused at a coroner's inquest, not given voluntarily or of his own motion,

<sup>9</sup> *Donovan v People*, 139 Ill. 412 (1891).

<sup>10</sup> *Lavin v People*, 69 Ill. 303 (1873).

<sup>11</sup> *Weyrich v People*, 89 Ill. 90 (1878).

<sup>12</sup> *Buckrice v People*, 110 Ill. 29 (1884).

<sup>13</sup> *People v Rodenberg*, 254 Ill. 386 (1912).

<sup>14</sup> *Watt v People*, 126 Ill. 9 (1888).

<sup>15</sup> *People v Butler Street Foundry and Iron Co.*, 201 Ill. 236 (1903).

<sup>16</sup> *Hoch v People*, 219 Ill. 265 (1906).

cannot be used to convict him at a later trial.<sup>17</sup> Answers made by a defendant to a creditor's bill to discover property fraudulently concealed, cannot be read in evidence against a defendant on trial under indictment for fraud.<sup>18</sup> An indictment should be quashed when it is shown that it is based upon the testimony of the accused who was taken from jail to appear before that body.<sup>19</sup> Even after a defendant an arraignment has pleaded guilty, if it appears that he is a foreigner and does not understand the charge against him, or his rights, he should not be called upon by the court to divulge incriminating facts.<sup>20</sup>

The privilege of refusing to testify is a personal one and must be claimed by the witness himself and the refusal must be based on the ground that the answer would tend to criminate him.<sup>21</sup> A principal may not refuse to answer for the reason that his answer would criminate his agent;<sup>22</sup> nor can an officer refuse to produce books and papers of a corporation which are not his private records.<sup>23</sup> Nor can a party to a suit assign as error the refusal of the trial court to inform a witness of his right not to testify.<sup>24</sup> But when a defendant has waived his privilege at a former trial, his testimony may be introduced against him at a subsequent trial at which he does not take the stand.<sup>25</sup>

A witness is not the sole and absolute judge as to his right to refuse to answer, but the court must be able to see from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable grounds to apprehend danger to the witness from being compelled to answer.<sup>26</sup> But in order to claim the protection of the constitutional privilege, it is not necessary that the answer to a particular question is in itself incriminating, if it is one of a series of questions, the effect of which is to establish criminality. If, as the court has said, the answer would disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction.<sup>27</sup> And if a witness voluntarily discloses part of a transaction exposing him to criminal prosecution, he waives his privilege as to the whole transaction so long as it is a continuous account.<sup>28</sup>

The right to refuse to testify does not extend to offenses which can not be made the basis of criminal prosecution by reason of the running of the statute of limitations.<sup>29</sup> But the fact that the prosecution is barred by the statute, and that no prosecution is pending, must be shown before a witness can be compelled to answer.<sup>30</sup> For the same reason, where immunity from prosecution is granted a witness, he may not refuse to divulge incriminating evidence. But the immunity must cover prosecution as to all offenses involved in the transaction which is the subject of inquiry and be co-extensive with the constitutional privilege. Thus, a witness granted immunity from prosecution for bribery may refuse to answer if his answers would tend to criminate him of gambling.<sup>31</sup> But if there is merely a bare possibility that the disclosure will furnish evidence of violations of laws of the United States or other states, that is not a real and probable danger which will afford reason for refusing to testify.<sup>32</sup>

<sup>17</sup> Lyons v People, 137 Ill. 602 (1891).

<sup>18</sup> Parrish v Byrns, 67 Ill. 522 (1873).

<sup>19</sup> Boone v People, 148 Ill. 440 (1894).

<sup>20</sup> Gardner v People, 106 Ill. 76 (1883).

<sup>21</sup> Eggers v Fox, 177 Ill. 185 (1898); Buckingham v Angell, 238 Ill. 564 (1909).

<sup>22</sup> N. Y. Life Ins. Co. v People, 195 Ill. 430 (1902).

<sup>23</sup> Lamson v Boyden, 160 Ill. 613 (1896).

<sup>24</sup> Bolen v People, 184 Ill. 338 (1900).

<sup>25</sup> Miller v People, 216 Ill. 309 (1905).

<sup>26</sup> Manning v Mercantile Securities Co., 242 Ill. 584 (1909).

<sup>27</sup> Minters v People, 139 Ill. 363 (1891).

<sup>28</sup> Samuel v People, 164 Ill. 379 (1897).

<sup>29</sup> Weldon v Burch, 12 Ill. 374 (1851).

<sup>30</sup> Lamson v Boyden, 160 Ill. 613 (1896).

<sup>31</sup> People v Argo, 237 Ill. 173 (1908).

<sup>32</sup> People v Butler Street Foundry and Iron Co., 201 Ill. 236 (1903).

The prohibition against compelling a person to criminate himself necessarily implies that the refusal to testify may not be the basis of prejudice or disadvantage. The failure of a defendant to take the stand may not be the subject of comment by counsel or the court, nor can reference be made to the right of the defendant to testify in his own behalf.<sup>33</sup> And the same rule has been applied to the testimony of a co-defendant, particularly where the prosecution had the same opportunity to offer his testimony.<sup>34</sup>

It was contended that the practice of entering a rule on the defendant to answer in contempt proceedings for acts committed out of the presence of the court, was unconstitutional for the reason that it compelled the defendant to give evidence against himself. The court, however, refused to pass upon this question since no exemption from answering had been claimed in the trial court.<sup>35</sup> The fact that a witness might have properly refused to answer is no defense to a perjury charge if he waives his privilege and testifies falsely.<sup>36</sup>

**Double jeopardy.** The provision against double jeopardy for the same offense prohibits the retrial of a defendant after discharge by reason of not being afforded a speedy trial<sup>37</sup> or by acquittal. This bars the prosecution of a writ of error by the state in a criminal prosecution<sup>38</sup> whether for a felony or misdemeanor.<sup>39</sup> So a person indicted for murder and convicted of manslaughter, who obtains a new trial, may not be tried again for murder.<sup>40</sup>

But a trial, which in contemplation of law, does not constitute jeopardy will not bar a subsequent prosecution. The court has so held as to a trial under an indictment which was *nolle prossed* before a complete jury was selected and sworn;<sup>41</sup> and a trial in which the jury were unable to reach a verdict;<sup>42</sup> and also a trial in which the verdict had been set aside upon motion of the defendant.<sup>43</sup> A trial in a felony case by a judge without a jury does not constitute jeopardy so as to preclude a subsequent prosecution.<sup>44</sup>

One transaction may include several offenses, and the prosecution for one offense will not bar a subsequent prosecution for a separate and distinct offense.<sup>45</sup> One who has been convicted for assault and battery may be placed on trial for riot for the same transaction.<sup>46</sup> And so the trial and acquittal on a charge of larceny by embezzlement based on some forged notes does not bar a later trial for forgery, the notes being the basis of both prosecutions.<sup>47</sup> The principle is carried even to the extent of holding that a trial and acquittal for murdering a certain person by shooting is not a bar to a prosecution for the murder of the same person by beating with a gun.<sup>48</sup> In other words the second offense, to constitute double jeopardy, must agree in law and in fact with some offense of which the accused might have been convicted under the first indictment. A plea of former acquittal of a crime committed in one county will not be valid on a trial in another county except as to a transitory offense for which an indictment might be returned in either county.<sup>49</sup> The same act may be an offense against the state and a municipality and may be punished by both. Thus,

<sup>33</sup> Miller v People, 216 Ill. 309 (1905).

<sup>34</sup> People v Munday, 280 Ill. 32 (1917).

<sup>35</sup> People v Seymour, 272 Ill. 295 (1916).

<sup>36</sup> Mackin v People, 115 Ill. 312 (1885).

<sup>37</sup> People v Helder, 225 Ill. 347 (1907).

<sup>38</sup> People v Royal, 2 Ill. 557 (1839).

<sup>39</sup> People v Miner, 144 Ill. 308 (1893).

<sup>40</sup> Brennan v People, 15 Ill. 511 (1854).

<sup>41</sup> O'Donnell v People, 224 Ill. 218 (1906).

<sup>42</sup> Dreyer v People, 188 Ill. 40 (1900).

<sup>43</sup> Gannon v People, 127 Ill. 507 (1889); Lane v People, 10 Ill. 305 (1848).

<sup>44</sup> Paulsen v People, 195 Ill. 507 (1902).

<sup>45</sup> Nagel v People, 229 Ill. 598 (1907); People v Nall, 242 Ill. 284 (1909).

<sup>46</sup> Freeland v People, 16 Ill. 380 (1855).

<sup>47</sup> Spears v People, 220 Ill. 72 (1906).

<sup>48</sup> Guedel v People, 43 Ill. 226 (1867).

<sup>49</sup> Campbell v People, 109 Ill. 565 (1884).

a conviction under a city ordinance will not bar a prosecution by the state for the same act.<sup>50</sup> In fact, a statute may permit a township to recover a fine or penalty and another statute permit the state to punish the same act as a nuisance.<sup>51</sup>

It has been held that statutes providing heavier penalties for repeated offenses do not violate the prohibition against putting a person in jeopardy twice for the same offense.<sup>52</sup>

**Section 11.** All penalties shall be proportioned to the nature of the offense; and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same.

**Proportionate penalties.** It has been suggested that the provision requiring that punishments be proportioned to offenses is equivalent to the prohibition in the federal constitution against cruel and unusual punishments. It is directed to the law-making body and courts are reluctant to sustain an objection to a penalty fixed by that body unless it is a cruel and degrading punishment unknown to the common law, or so wholly disproportionate as to shock the moral sense.<sup>53</sup>

The Supreme Court has sustained a fine of not less than \$1,000 for failure on the part of railroad companies to make and file statements of taxable property;<sup>54</sup> a fine of \$200 by ordinance for selling or giving away intoxicating liquor without a license under a statute authorizing cities to punish by a fine of not over \$200;<sup>55</sup> a penalty of from \$1,000 to \$5,000 for unjust discrimination in rates for carriage;<sup>56</sup> and a fine of from \$500 to \$1,000 for rebating by insurance companies.<sup>57</sup> Inasmuch as the maximum term provided by law cannot be said to be disproportionate, commitment under the indeterminate sentence act for a period not longer than the maximum term provided will not violate the constitutional provision.<sup>58</sup> More severe punishments for subsequent convictions are sustained on the theory that a repetition of the offense aggravates the guilt, and are not objectionable.<sup>59</sup>

That a person has committed so many offenses that the combined punishment is severe does not constitute any objection to the penalty provided for each count as in the case of sentence on seventy-one counts for violations of the liquor laws on different days.<sup>60</sup>

But a statute prohibiting discriminations in freight rates and providing for the forfeiture of all franchises as a penalty for violation, in effect imposes a fine which would in some cases amount to millions of dollars and does not proportion the penalty to the offense.<sup>61</sup>

**Corruption of blood and forfeiture of estate.** This prohibition against corruption of blood or forfeiture of estate has not been invoked against legis-

<sup>50</sup> *Robbins v People*, 95 Ill. 175 (1880); *Hankins v People*, 106 Ill. 623 (1883).

<sup>51</sup> *Wragg v Penn Township*, 94 Ill. 11 (1879).

<sup>52</sup> *Kelly v People*, 115 Ill. 583 (1886).

<sup>53</sup> *People v Elliott*, 272 Ill. 592 (1916).

<sup>54</sup> *C. R. I. & P. Ry. Co. v People*, 217 Ill. 164 (1905).

<sup>55</sup> *City of Arcola v Wilkinson*, 233 Ill. 250 (1908).

<sup>56</sup> *People v B. & O. S. W. R. R. Co.*, 246 Ill. 474 (1910).

<sup>57</sup> *People v American Life Ins. Co.*, 267 Ill. 504 (1915).

<sup>58</sup> *People v State Reformatory*, 148 Ill. 413 (1894).

<sup>59</sup> *Kelly v People*, 115 Ill. 583 (1886).

<sup>60</sup> *People v Elliott*, 272 Ill. 592 (1916).

<sup>61</sup> *C. & A. R. R. Co. v People*, 67 Ill. 11 (1873).

lative enactment but has been construed by the Supreme Court in civil cases. It has been held that the legal execution of the insured is not a defense to a suit on a policy of insurance for his death unless made so by a provision to that effect in the policy.<sup>62</sup> Nor does an heir by causing the death of his intestate forfeit or lose either the equitable or legal right to take from the intestate.<sup>63</sup>

Section 12. No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in cases where there is strong presumption of fraud.

This section abolishes imprisonment for debt as it existed at common law. Wrongful evasion, or attempted evasion, of a debt is made the basis for imprisonment instead of mere inability to satisfy the debt.<sup>64</sup> A statute authorizing the arrest of the defendant in suits on specialties, bills or notes in writing, judgments, and actions on contracts and covenants, upon the plaintiff making affidavit that otherwise the debt is in danger of being lost, is in direct conflict with this provision and void.<sup>65</sup> It is necessary in order to imprison for debt, that one of two things be shown, a refusal on the part of the debtor to deliver up his estate for the satisfaction of his obligations or fraud either in contracting the debt or in avoiding payment of it.<sup>66</sup>

Debt, within the meaning of this section, includes any liability to pay money growing out of a contract, either express or implied.<sup>67</sup> The prohibition applies only to debts in the proper and popular sense where the relation of debtor and creditor exists and not to actions of debt for the recovery of penalties inflicted for violations of the penal laws of the state,<sup>68</sup> nor to penalties for violations of municipal ordinances,<sup>69</sup> nor fines and costs in criminal proceedings.<sup>70</sup> It does not apply to imprisonment in tort actions,<sup>71</sup> nor for wife abandonment,<sup>72</sup> nor bastardy.<sup>73</sup>

The Supreme Court has repeatedly said that the commitment of a defendant for contempt in refusing to pay alimony was not an imprisonment for debt within the meaning of this section.<sup>74</sup> But in a number of decisions, the court has intimated that orders or decrees for the payment of money are within the spirit of the prohibition contained in this section, and that imprisonment for contempt for non-compliance with a decree for the payment of money should only follow fraud or a willful and obstinate defiance of the court.<sup>75</sup> Thus, imprisonment should not be imposed for contempt for failure to comply caused by an honest misconception of the meaning of the court order.<sup>76</sup>

<sup>62</sup> *Collins v Metropolitan Ins. Co.*, 232 Ill. 37 (1908).

<sup>63</sup> *Wall v Pfanschmidt*, 265 Ill. 180 (1914).

<sup>64</sup> *Burnap v Marsh*, 13 Ill. 535 (1852); *People v Cotton*, 14 Ill. 414 (1853).

<sup>65</sup> *Stafford v Low*, 20 Ill. 152 (1858).

<sup>66</sup> *Malcolm v Andrews*, 68 Ill. 100 (1873); *Huntington v Metzger*, 158 Ill. 272 (1895).

<sup>67</sup> *Parker v Follensbee*, 45 Ill. 473 (1867).

<sup>68</sup> *People v Zito*, 237 Ill. 434 (1909); *Kettles v People*, 221 Ill. 221 (1906).

<sup>69</sup> *City of Chicago v Morell*, 247 Ill. 383 (1910).

<sup>70</sup> *Kennedy v People*, 122 Ill. 649 (1887).

<sup>71</sup> *McKindley v Rising*, 28 Ill. 337 (1862); *People v Walker*, 286 Ill. 541 (1919).

<sup>72</sup> *People v Heise*, 257 Ill. 443 (1913).

<sup>73</sup> *Rich v People*, 66 Ill. 513 (1873).

<sup>74</sup> *Wightman v Wightman*, 45 Ill. 167 (1867); *Barclay v Barclay*, 184 Ill. 375 (1900).

<sup>75</sup> *Goodwillie v Millmann*, 56 Ill. 523 (1870); *Blake v People*, 80 Ill. 11 (1875).

<sup>76</sup> *Dinet v People*, 73 Ill. 183 (1874).

Section 13. Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

What constitutes a public use. Property cannot be taken except for public use. To constitute a public use the property must be employed so as to render a substantial benefit to the public or a relatively large group of persons as distinguished from individuals.<sup>77</sup> Frequently private advantage and public benefit are both served by a use of property. It is not sufficient to constitute a public use, within the meaning of this section, that an incidental benefit is derived by the public.<sup>78</sup> On the other hand, the use may be a public one though private purposes are incidentally served.<sup>79</sup> Nor is a use rendered private by the fact that private parties contribute to the cost of the improvement or that such improvement accommodates some more than others.<sup>80</sup> To constitute a public use something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to control, use or enjoy the property not as a mere matter of favor or by permission of the owner, but as a matter of right.<sup>81</sup>

There are three types of public uses within the meaning of this section: (1) Property may be taken by the state or by its public or municipal corporations for the purpose of housing the various departments and agencies of government.<sup>82</sup> (2) Property may be taken for the purpose of enabling the state or its agencies to carry out its functions of government, such as would be in the interest of trade, commerce, navigation, public health, safety and general welfare. Accordingly land may be taken, for the improvement of navigation,<sup>83</sup> for jails,<sup>84</sup> public hospitals, public schools, public parks,<sup>85</sup> roads and streets,<sup>86</sup> forest preserves,<sup>87</sup> and for the carrying on of any business legally conducted by the state or by its agents.<sup>88</sup> The Attorney General has held that the state has power to take over coal mines in emergencies such as those caused by war.<sup>89</sup> (3) Property may be taken by private corporations if the use to which the property is to be devoted is of a character from which the public have the legal right to demand some service. Land may be taken by railroad companies and other public utilities to enable them to carry on such business.<sup>90</sup> Public grist mills come within the rule.<sup>91</sup> A fourth type of cases has been created by the expansion of the meaning of the term "public use" by express constitutional provisions, which authorize a taking of property for roads and cartways for private and public use (article 4, section 30) and for drainage purposes (article 4, section 31).

There have been but few cases in this state in which the court has ruled that the proposed use was not public. The following have been held not to be

<sup>77</sup> C. C. C. & St. L. Ry. Co. v Drainage District, 213 Ill. 83 (1904).

<sup>78</sup> Sholl v German Coal Co., 118 Ill. 427 (1887).

<sup>79</sup> Dunham v Village of Hyde Park, 75 Ill. 371 (1874).

<sup>80</sup> C. B. & Q. R. R. Co. v City of Naperville, 169 Ill. 25 (1897).

<sup>81</sup> Chicago Dock Co. v Garrity, 115 Ill. 155 (1885); Gaylord v Sanitary District, 204 Ill. 576 (1903).

<sup>82</sup> Deneen v Unverzagt, 225 Ill. 378 (1907).

<sup>83</sup> Beidler v Sanitary District, 211 Ill. 628 (1904).

<sup>84</sup> County of Mercer v Wolff, 237 Ill. 74 (1908).

<sup>85</sup> Village of Depue v Banschbach, 273 Ill. 574 (1916).

<sup>86</sup> City of Chicago v Lord, 276 Ill. 544 (1917).

<sup>87</sup> Perkins v Commissioners of Cook County, 271 Ill. 449 (1916).

<sup>88</sup> Helm v City of Grayville, 224 Ill. 274 (1906).

<sup>89</sup> Report Attorney General 1917-18, p. 606.

<sup>90</sup> L. S. & M. S. Ry. Co. v C. & W. I. R. R. Co., 97 Ill. 506 (1881); C. & N. W. Ry. Co. v Chicago Mechanics Institute 239 Ill. 197 (1909); Eddleman v Union County Traction & Power Co., 217 Ill. 409 (1905).

<sup>91</sup> Gaylord v Sanitary District, 204 Ill. 576 (1903).

for a public use; the taking of a right of way by a coal mining company;<sup>92</sup> the taking of land for a mill from which the public had no right to demand a service;<sup>93</sup> the taking of land for a private road under the constitution of 1848;<sup>94</sup> and the taking of land by a railroad for a side track to a manufacturing plant for the sole purpose of transporting the products of the plant.<sup>95</sup>

**Property subject to condemnation.** The power of eminent domain extends to every kind of private property,<sup>96</sup> including all rights and interests of all kinds.<sup>97</sup> Contract rights, like other property, are subject to the exercise of eminent domain and a taking for public use upon payment of just compensation does not constitute an impairment of contract obligations within the prohibition of article 2, section 14. A legislative grant or contract in restraint of a free exercise of the right of eminent domain is not binding on the state. Thus the state may authorize the condemnation for streets of property belonging to a cemetery company notwithstanding a provision in its charter that no roads or streets should be opened through its grounds.<sup>98</sup>

(In connection with this subheading and the general treatment of eminent domain in this note, see discussion article 11, section 14.)

**Condemnation of property already devoted to public use.** It is well established that property already devoted to public use is still subject to condemnation. The question of the propriety of authorizing the condemnation of such property is primarily a legislative question,<sup>99</sup> but is subject to judicial review.<sup>1</sup> Where the legislative grant of the power of eminent domain is general, the condemnation of property already devoted to public use will be upheld only when the new use will be a different use, not necessarily in kind but in degree, by which the public obtains some additional advantage. Extensions of streets across railways,<sup>2</sup> and railways across streets<sup>3</sup> and other railroads,<sup>4</sup> constitute new uses. A railroad may condemn land belonging to another railroad which is not devoted by the latter to railroad purposes,<sup>5</sup> or even a part of the tracks of another railway for a short distance,<sup>6</sup> but cannot condemn a considerable portion of the right of way.<sup>7</sup> A city sewer may be constructed through land devoted to public uses by a sanitary district.<sup>8</sup> But a general grant of the power of eminent domain to a city does not authorize a city to condemn a strip of land through a county poor farm;<sup>9</sup> nor to condemn a part of a library building for a city street.<sup>10</sup> The taking of property already devoted to public use does not impair the obligation of any contract.<sup>11</sup>

The decisions cited above merely involve the question of the power of a condemning authority acting under a general grant from the General Assembly to exercise the right of eminent domain. There is one Illinois case, however, which questions the power of the state to authorize the condemnation

<sup>92</sup> *Sholl v German Coal Co.*, 118 Ill. 427 (1887).

<sup>93</sup> *Gaylord v Sanitary District*, 204 Ill. 576 (1903).

<sup>94</sup> *Nesbitt v Trumbo*, 39 Ill. 110 (1866).

<sup>95</sup> *C. & E. I. R. R. Co. v Wiltse*, 116 Ill. 449 (1886).

<sup>96</sup> *City of Edwardsville v County of Madison*, 251 Ill. 265 (1911).

<sup>97</sup> *South Park Commissioners v Ward & Co.*, 248 Ill. 299 (1911); *Johnson v Joliet & Chicago R. R. Co.*, 23 Ill. 202 (1859).

<sup>98</sup> *Village of Hyde Park v Oakwoods Cemetery Ass'n.*, 119 Ill. 141 (1886).

<sup>99</sup> *O'Hare v C. M. & N. R. R. Co.*, 139 Ill. 151 (1891).

<sup>1</sup> *People v Walsh*, 96 Ill. 232 (1880).

<sup>2</sup> *C. R. I. & P. R. R. Co. v Town of Lake*, 71 Ill. 333 (1874); *C. & A. R. R. Co. v City of Pontiac*, 169 Ill. 155 (1897).

<sup>3</sup> *M. C. Ry. Co. v C. W. D. Ry. Co.*, 87 Ill. 317 (1877).

<sup>4</sup> *B. St. L. & C. Ry. Co. v B. C. Ry. Co.*, 159 Ill. 544 (1896); *I. C. R. R. Co. v C. B. & N. R. R. Co.*, 122 Ill. 473 (1887).

<sup>5</sup> *C. W. D. Ry. Co. v M. W. S. El. R. R. Co.*, 152 Ill. 519 (1894).

<sup>6</sup> *L. S. & M. S. Ry. Co. v C. & W. I. R. R. Co.*, 97 Ill. 506 (1881).

<sup>7</sup> *Central Ry. Co. v F. L. H. Ry. Co.* 81 Ill., 523 (1876).

<sup>8</sup> *City of Chicago v Sanitary District*, 272 Ill. 37 (1916).

<sup>9</sup> *City of Edwardsville v County of Madison*, 251 Ill. 265 (1911).

<sup>10</sup> *City of Moline v Greene*, 252 Ill. 475 (1911).

<sup>11</sup> *Village of Hyde Park v Oakwoods Cemetery Ass'n.*, 119 Ill. 141 (1886); *Long Island Water Supply Co. v Brooklyn*, 166 U. S. 685 (1897).

of property dedicated to a public use.<sup>12</sup> The property sought to be condemned was the right possessed by owners of property abutting a public park to have the park kept free from buildings. These rights or easements were created by the dedication of the land for park purposes with this restriction. The court held unconstitutional an act of the General Assembly which expressly authorized the park board to condemn these easements in order to permit the erection within the park of a privately owned museum. Three justices dissented from this decision, and it is not supported by the courts of other states or of the United States.<sup>13</sup> This decision seems to conflict squarely with the well-recognized principle that a state may not by contract divest itself of the power of eminent domain or create property rights which are not subject to that power.

**Jury trial.** There was no right to trial by jury in eminent domain proceedings under the general guaranty of jury trial in the constitution of 1831 and 1848.<sup>14</sup> The express guaranty of jury trial contained in the constitution of 1870 is self-executing.<sup>15</sup> It does not apply to takings by the state,<sup>16</sup> but the Attorney General has construed the eminent domain statute with its provision for trial by jury, to apply to condemnation by the state unless the General Assembly provides another method.<sup>17</sup>

A statute authorizing commissioners to determine compensation in lieu of a jury in takings other than by the state, is unconstitutional,<sup>18</sup> but a finding by commissioners can be made *prima facie* evidence of just compensation. The right of trial by jury is not satisfied by permitting the parties to object to a verdict rendered by a body of twelve men upon an *ex parte* hearing. The parties must be permitted to participate in the selection of the jurors.<sup>20</sup> The term "jury" as used in this clause does not mean a common law jury necessarily, but includes any kind of jury recognized by the constitution. Thus a jury of six men in justice of the peace courts is a jury within the meaning of the eminent domain clause.<sup>21</sup> The right of jury trial in eminent domain proceedings conferred by the constitution is a mere privilege which may be waived by the parties<sup>22</sup> and a waiver of this right will be implied unless specific objection to trial without jury is made.<sup>23</sup>

**Interest in land which may be taken.** The only constitutional limitation upon the interest in land which may be taken is, that the fee of land taken for railroad tracks shall remain in the owner.<sup>24</sup> But in the absence of an express grant to condemn the fee, the courts hold that only such estate may be taken as is necessary to accomplish the purpose in view.

Under a general statutory grant of power to condemn land, park commissioners may take for drive way purposes only an easement in the land. Likewise, a city may take only an easement in land to be used as a street. The abutting owner may use the subsidewalk space.<sup>27</sup> A telegraph company by condemning land under the eminent domain act, merely acquires the right

<sup>12</sup> South Park Commissioners v Ward & Co., 248 Ill. 299 (1911).

<sup>13</sup> L. & N. R. R. Co. v Cincinnati, 76 Ohio 481 (1907).

<sup>14</sup> Johnson v J. & C. R. R. Co., 23 Ill. 202 (1859).

<sup>15</sup> Mitchell v I. & St. L. R. R. Co. 68 Ill. 286 (1873).

<sup>16</sup> People v Stewart, 97 Ill. 123 (1880).

<sup>17</sup> Report Attorney General 1914, p. 153.

<sup>18</sup> Juvinall v Jamesburg Drainage District, 204 Ill. 106 (1903).

<sup>19</sup> C. T. T. R. R. Co. v City of Chicago, 217 Ill. 343 (1905).

<sup>20</sup> Wabash R. R. Co. v Coon Run Drainage District, 194 Ill. 310 (1902).

<sup>21</sup> McManus v McDonough, 107 Ill. 95 (1883).

<sup>22</sup> C. M. & St. P. Ry. Co. v Hock, 118 Ill. 587 (1886).

<sup>23</sup> Juvinall v Jamesburg Drainage District, 204 Ill. 106 (1903).

<sup>24</sup> C. & E. I. R. R. Co. v Clapp, 201 Ill. 418 (1903); R. I. & P. R. R. Co. Leisy Brewing Co., 174 Ill. 547 (1898).

<sup>25</sup> Miller v Commissioners of Lincoln Park, 278 Ill. 400 (1917).

<sup>26</sup> I. C. R. R. Co. v City of Chicago, 138 Ill. 453 (1891).

<sup>27</sup> Tacoma Safety Deposit Co. v City of Chicago, 247 Ill. 192 (1910).



to use it for the erection and maintenance of its poles and wires and the only exclusive right of occupancy acquired by the company is as to that ground occupied by the poles.<sup>28</sup> The owner retains the fee of land condemned by a drainage district.<sup>29</sup>

An easement created by condemnation for a public purpose exists only so long as the property is used for that purpose and when such use ceases, the property reverts to the owner of the fee or his heirs.<sup>30</sup>

**What constitutes a taking.** Under the constitutions of 1818 and 1848, compensation was payable only where property was "taken or applied." (Article 8, section 11, constitution 1818; article 13, section 11, constitution 1848.) The word "applied" seems not to have been construed nor to have added anything to the word "taken". In as much as the constitution of 1870 requires compensation when property is "taken or damaged" the question whether an injury constitutes a taking is important only in connection with the requirement as to procedure and the time, manner and extent of compensation. Taking has been defined as any act which causes direct physical injury to property, by which the owner is deprived of ordinary use and enjoyment.<sup>31</sup> Taking includes all appropriations of property, whether of fee simple title or of easements in the owner's land; and also includes the imposition of additional servitudes upon land which was subject to prior easements for other purposes. For example, where an easement has been acquired in land for street purposes, the use of that property by steam railroads constitutes an additional servitude thereon, and is a taking for which compensation must be made to the owner of the fee.<sup>32</sup> And this applies to interurban lines,<sup>33</sup> electric light lines<sup>34</sup> and telegraph and telephone lines.<sup>35</sup> The use of streets by street railways, however, has been held not to be an additional servitude.<sup>36</sup>

Of course, no question of additional servitude can arise when the fee to streets is in the city. In this case, an owner of land abutting a street is entitled to compensation not for the additional uses of the street, but for the consequential damage, if any, to his abutting property caused by that use.<sup>37</sup>

In the case of injuries to natural rights, there is a taking only when the invasion of the rights produces a direct and physical injury to property such as caused by the overflowing of land,<sup>38</sup> the casting of sparks and cinders upon it,<sup>39</sup> the removal of the lateral support of land<sup>40</sup> and interference with riparian rights.<sup>41</sup>

Since there is a taking only when there is a direct and physical damage to property, the right to compensation under the constitutions of 1818 and 1848 was not coextensive with common law rights against private

<sup>28</sup> Lockie v M. U. Telephone Co., 103 Ill. 401 (1882).

<sup>29</sup> West Skokie Drainage District v Dawson, 243 Ill. 175 (1905).

<sup>30</sup> C. & E. I. R. R. Co. v Clapp, 201 Ill. 418 (1903); Sullivan v A. T. & S. F. Ry. Co., 251 Ill. 108 (1911); Bell v Mattoon Waterworks Co., 245 Ill. 544 (1910).

<sup>31</sup> Nevins v City of Peoria, 41 Ill. 502 (1866); Rigney v City of Chicago, 102 Ill. 64 (1882).

<sup>32</sup> Bond v Penn. R. R. Co., 171 Ill. 508 (1898); Spalding v M. & W. I. Ry. Co., 225 Ill. 585 (1907).

<sup>33</sup> Wilder v A. DeK. & R. El. Tr. Co., 216 Ill. 493 (1905); City of Aurora v E. A. & S. Tr. Co., 227 Ill. 485 (1907).

<sup>34</sup> Carpenter v Capitol Electric Co., 178 Ill. 29 (1899).

<sup>35</sup> Burrall v American Tel. & Tel. Co., 224 Ill. 266 (1906); DeKalb County Tel. Co. v. Dutton, 228 Ill. 178 (1907).

<sup>36</sup> C. B. & Q. R. R. Co. v W. C. S. R. R. Co., 156 Ill. 255 (1895).

<sup>37</sup> Doane v Lake St. El. R. R. Co., 165 Ill. 510 (1897); McWethy v Aurora E. L. & P. Co., 202 Ill. 218 (1903).

<sup>38</sup> T. W. & W. Ry. Co. v Morrison, 71 Ill. 616 (1874); Gaylord v Sanitary District, 204 Ill. 576 (1903).

<sup>39</sup> Stone v F. P. & N. W. R. R. Co., 68 Ill. 394 (1873).

<sup>40</sup> City of Quincy v Jones, 76 Ill. 231 (1875).

<sup>41</sup> City of Kewanee v Otley, 204 Ill. 402 (1903); Ballance v City of Peoria, 180 Ill. 29 (1899).

persons. But where part of a tract was taken, all consequential damage to the remaining tract, measured by the difference between its fair cash market value before and after the taking, was and still is, under the constitution of 1870, held to be a taking.<sup>42</sup> For the part actually taken, the owner is entitled to receive its fair cash market value.

**What constitutes damage.** Under the constitutions of 1818 and 1848, compensation was allowed only when property was taken. The construction placed upon this by the court made the test the actual physical invasion of the property affected. To this provision, the constitution of 1870 added the words "or damaged", with a view to afford relief in those cases where no recovery had previously been allowed because there had been no physical injury although the property may have been rendered less valuable. The court, in allowing compensation for the damage to property by cutting off access from that property to the street except by stairs, construed the expanded provision of the constitution of 1870 as follows: "In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."<sup>43</sup> Recovery has been allowed for the depreciation in value of property caused by constructing a sidewalk above the street level and fourteen inches higher than the level of the first floor of a building on that property.<sup>44</sup> The physical injuries and inconveniences that result from a railroad dividing farm property<sup>45</sup> as to water, pasture, timber and improvements,<sup>46</sup> together with the noise, smoke, soot, cinders and vibration caused by the operation of trains,<sup>47</sup> if buildings are near enough to be affected, are all elements of special damages for which compensation may be had. The danger to stock and of loss by fire<sup>48</sup> and increased cost of insurance<sup>49</sup> may be shown if the market value of property is affected thereby. In the case of elevated railways, or other structures recovery may be had for the obstruction of light and air,<sup>50</sup> and the interference with free access to the street and the view.<sup>51</sup> This construction includes all cases actionable at common law except where property is damaged under the police power. The non-existence of common law liability, however, does not in itself defeat the constitutional right to compensation.<sup>52</sup>

Not every injury to private property which may affect its value, can be made the basis for a recovery. It must be shown as to noise, dust, smoke and disturbance from the operation of trains that a special damage results

<sup>42</sup> C. B. & N. R. R. Co. v Bowman, 122 Ill. 595 (1887); I. C. R. R. Co. v Turner, 194 Ill. 575 (1902).

<sup>43</sup> Rigney v City of Chicago, 102 Ill. 64 (1882).

<sup>44</sup> Chapman v City of Staunton, 246 Ill. 394 (1910).

<sup>45</sup> C. P. & St. L. Ry. Co. v Blume, 137 Ill. 448 (1891); C. T. T. R. R. Co. v Bugbee, 184 Ill. 353 (1900).

<sup>46</sup> C. & I. R. R. Co. v Hopkins, 90 Ill. 316 (1878); I. C. R. R. Co. v Town of Normal, 175 Ill. 562 (1898); C. B. & N. R. R. Co. v Bowman, 122 Ill. 595 (1887).

<sup>47</sup> C. N. S. S. Ry. Co. v Payne, 192 Ill. 239 (1901); C. & C. C. & D. Co. v Morawetz, 195 Ill. 398 (1902); I. C. R. R. Co. v Turner, 194 Ill. 575 (1902).

<sup>48</sup> I. I. & M. Ry. Co. v Ring, 219 Ill. 91 (1905); C. S. Ry. Co. v Nolin, 221 Ill. 367 (1906).

<sup>49</sup> I. I. & I. R. R. Co. v Stauber, 185 Ill. 9 (1900).

<sup>50</sup> Doane v Lake St. El. R. R. Co., 165 Ill. 510 (1897); Field v Barling, 149 Ill. 556 (1894).

<sup>51</sup> Aldis v Union El. R. R. Co., 203 Ill. 567 (1903).

<sup>52</sup> Aldis v Union El. R. R. Co., 203 Ill. 567 (1903).

not of a kind and character suffered in common by the public generally.<sup>53</sup> The impairment in value of property by reason of personal danger to the owner,<sup>54</sup> or on account of the location of a jail<sup>55</sup> or a small-pox hospital,<sup>56</sup> in particular instances, has been held to be speculative and not within the protection of the constitution. Nor may a recovery be had for damages which do not arise from the violation of any right, as in the case of loss of trade caused by a diversion of customers by reason of the erection of a viaduct,<sup>57</sup> or for the destruction of a grade switch-track connection from the property to a railroad, caused by the elevation of the railroad tracks in a case where the railroad company was under no legal obligation to maintain such connection.<sup>58</sup> An owner of property which is taken or damaged is not entitled to have compensation fixed with reference to his religious beliefs<sup>59</sup> or matters of a sentimental nature.<sup>60</sup>

**Taking of property under police power.** Regulations under the police power to promote and safeguard the health, safety, morals or general welfare of the public which govern and restrict the use of property do not constitute a taking or damaging for which compensation may be had under this section. Regulation of this character may destroy the use and value of property and, in cases of necessity, may even destroy the property itself when its continued existence constitutes a menace to the public. Police legislation is directed against property and the uses of property which are deemed harmful to society and it operates by prohibiting the use or destroying the property. No such element enters into a taking under the power of eminent domain. There is simply an appropriation of property or the use of property for public purposes. (See discussion article 2, section 2, subheading, "Legality of purpose and appropriateness of a particular measure to effect that purpose.")

**Just compensation—where part of a tract is taken.** Where a part only of a tract has been taken, the part not taken may be specially damaged or specially benefited. In determining whether the effect of the improvement upon the remaining parcel is one of special damage or of special benefit, the elements of special benefit arising from the improvement may be set off against the elements of special damage to the part not taken. This construction was placed upon the constitutional provisions of 1818,<sup>61</sup> 1848,<sup>62</sup> and the same construction has been placed upon this section in the constitution of 1870.<sup>63</sup>

If the special benefits to the part not taken exceeded the elements of special damage to the part not taken under the constitutions of 1818 and 1848, the excess could be set off against the market value of the part taken even though the effect of such set off was to deprive the owner of all right to pecuniary compensation for the part taken.<sup>64</sup> This rule was changed

<sup>53</sup> *I. C. R. R. Co. v School Trustees*, 212 Ill. 406 (1904); *Aldrich v Metropolitan West Side El. R. R. Co.*, 195 Ill. 456 (1902).

<sup>54</sup> *C. & M. Electric R. R. Co. v Mawman*, 206 Ill. 182 (1903).

<sup>55</sup> *Rigney v City of Chicago*, 102 Ill. 64 (1882).

<sup>56</sup> *Frazer v City of Chicago*, 186 Ill. 480 (1900).

<sup>57</sup> *Hohmann v City of Chicago*, 140 Ill. 226 (1892); *City of Chicago v Spoor*, 190 Ill. 340 (1901).

<sup>58</sup> *Otis Elevator Co. v City of Chicago*, 263 Ill. 419 (1914).

<sup>59</sup> *Dowie v C. W. & N. S. Ry. Co.*, 214 Ill. 49 (1905).

<sup>60</sup> *City of Decatur v Vaughan*, 233 Ill. 50 (1908).

<sup>61</sup> *State v Evans*, 3 Ill. 208 (1840).

<sup>62</sup> *A. & S. R. Co. v Carpenter*, 14 Ill. 190 (1852); *Curry v Town of Mt. Sterling*, 15 Ill. 320 (1853).

<sup>63</sup> *Page v C. M. & St. P. Ry. Co.*, 70 Ill. 324 (1873); *DuPont v Sanitary District*, 203 Ill. 170 (1903); *E. M. & S. W. R. R. Co. v Everett*, 225 Ill. 529 (1907); *Oil Belt Ry. Co. v Lewis*, 259 Ill. 108 (1913).

<sup>64</sup> *State v Evans*, 3 Ill. 208 (1840); *A. & S. R. Co. v Carpenter*, 14 Ill. 190 (1852).

by a statute in 1852 which forbade the setting off of benefits against the value of the part taken. The constitutionality of this act apparently was not questioned.<sup>65</sup>

It has been held that the effect of the constitution of 1870 has been to prevent the setting off of benefits to the part not taken against the value of the part taken. The owner is entitled to receive compensation for the part taken irrespective of benefits to the remaining land.<sup>66</sup> Where the effect of the taking of part has been to damage the part not taken, the whole is held to constitute a taking. (See discussion preceding subheading, "What constitutes a taking".) Cities, towns, villages, drainage districts and park districts are permitted to levy special assessments for local improvements. (See discussion article 9, section 9, subheading, "Special assessments and special taxation for local improvements," center subheading, "Municipalities that may be authorized to make local improvements by special assessments or special taxation".) By the levy of special assessments, these municipalities may, in effect, set off special benefits received by property not taken against the compensation required to be made for property taken. In other words, they may recoup the compensation they are obliged to make for property taken for a local improvement, to the extent that such local improvement benefits specially property not taken. The effect is, therefore, a discrimination against the state and those municipalities which are not authorized to levy special assessments, in making compensation for property taken for local improvements.

**Just compensation—where no property is taken.** Under the constitutions of 1818 and 1848 there was no right to compensation for damage which did not amount to a taking. The introduction of the word "damage" in the constitution of 1870 gave a constitutional right to compensation therefor. Recovery is allowed for special damage, as distinguished from general damage such as is sustained by the community as a whole, if such damage arises out of a violation of some right. In determining whether the owner is entitled to any compensation, special benefits, but not general benefits may be taken into consideration, i. e., special benefits may be set off against special damage.<sup>67</sup> If the special damage exceeds the special benefits, compensation must be in money.<sup>68</sup> Compensation need not be made before the infliction of the damage and an injunction to restrain the prosecution of the work will be denied.<sup>69</sup>

**Just compensation for property taken—medium and time of payment.** For an actual taking, the owner is entitled to be paid in money and he cannot be compelled to accept orders or other means of obtaining payment which he may be obliged to enforce by legal proceedings.<sup>70</sup> Actual payment is a condition precedent to the right to take.<sup>71</sup> Equity will enjoin a taking until compensation is made.<sup>72</sup> But the condemning authority may enter into the temporary possession of the premises pending an appeal from

<sup>65</sup> *Hayes v O. O. & F. R. V. R. R. Co.*, 54 Ill. 373 (1870); *P. P. & J. R. R. Co. v Black*, 58 Ill. 33 (1871); *P. P. & J. R. R. Co. v Laurie*, 63 Ill. 264 (1872).

<sup>66</sup> *Carpenter v Jennings*, 77 Ill. 250 (1875); *Harwood v City of Bloomington*, 124 Ill. 48 (1888); *Washington Ice Co. v City of Chicago*, 147 Ill. 327 (1893); *People v Burrall*, 253 Ill. 509 (1913).

<sup>67</sup> *City of Shawneetown v Mason*, 82 Ill. 337 (1876); *City of Elgin v Eaton*, 83 Ill. 535 (1876); *City of Chicago v Lonergan*, 196 Ill. 518 (1902); *Brand v Union Elevated R. R. Co.*, 258 Ill. 133 (1913); *Brand v Union Elevated R. R. Co.*, 238 U. S. 586 (1915).

<sup>68</sup> *L. S. & M. S. Ry. Co. v B. & O. R. R. Co.*, 149 Ill. 272 (1894).

<sup>69</sup> *Stetson v C. & E. R. R. Co.*, 75 Ill. 74 (1874); *Doane v Lake St. El. R. R. Co.*, 165 Ill. 510 (1897); *Childs v City of Chicago*, 279 Ill. 623 (1917).

<sup>70</sup> *Caldwell v Commissioners of Highways*, 249 Ill. 366 (1911).

<sup>71</sup> *Caldwell v Commissioners of Highways*, 249 Ill. 366 (1911).

<sup>72</sup> *Commissioners v Durham*, 43 Ill. 86 (1867).

the condemnation proceeding upon giving the required bond.<sup>73</sup> The Attorney General has rendered an opinion holding that the state may take property without actual prepayment, and that an appropriation duly passed by the General Assembly probably would be sufficient.<sup>74</sup>

Respective province of the court, the General Assembly and the condemning authority. The construction of all words in the eminent domain clause is for the court. A statutory declaration as to what constitutes a public use does not bind the court.<sup>75</sup> The question of the propriety of delegating the power of eminent domain and the procedure for its exercise is for the General Assembly.<sup>76</sup> The question as to the necessity for a particular taking is, in the first instance, for the condemning authority which is vested with a relatively wide discretion, but is subject to review by the courts in case of an abuse of that discretion.<sup>77</sup>

**Section 14.** No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed.

**Ex post facto laws.** The prohibition against *ex post facto* laws is limited to legislation relating to criminal matters,<sup>78</sup> which operates to the possible prejudice of an accused person as to an act committed prior to its passage. The indeterminate sentence law can be given a prospective effect only since, if applied retroactively, it prejudices the accused by abolishing his right to have the jury fix the punishment.<sup>79</sup> A statute increasing a penalty of \$50.00 to one not exceeding \$100.00 against railroad companies for failing to sound a bell or whistle at street crossings is void as to offenses committed prior to its passage.<sup>80</sup> But the General Assembly may reduce a penalty as to offenses already committed.<sup>81</sup> However, when it is doubtful whether the penalties of a new law are more severe than under the prior law, it has been said that the second act is not *ex post facto*, but the defendant will be permitted to select which act shall be applied to his case.<sup>82</sup> A law prohibiting the re-marriage of divorced persons within a certain period is not *ex post facto*.<sup>83</sup>

**Impairment of contracts.** This section prohibits legislation impairing the obligations of contracts which have been entered into prior to the passage of the legislation. But there is no constitutional objection to a law regulating future contracts.<sup>84</sup> Thus the General Assembly may require

<sup>73</sup> Mitchell v I. & St. L. R. R. Co., 68 Ill. 286 (1873).

<sup>74</sup> Report Attorney General, 1917-18, p. 729.

<sup>75</sup> Nesbitt v Trumbo, 39 Ill. 110 (1866); Gaylord v Sanitary District, 204 Ill. 576 (1903).

<sup>76</sup> City of Chicago v Lehmann, 262 Ill. 468 (1914); Gillette v Aurora Ry. Co., 228 Ill. 261 (1907).

<sup>77</sup> Burke v Sanitary District, 152 Ill. 125 (1894); Village of Depue v Banschback, 273 Ill. 574 (1916); P. F. W. & C. Ry. Co. v Sanitary District, 218 Ill. 286 (1905); C. & W. I. R. Co. v City of Chicago, 255 Ill. 136 (1912).

<sup>78</sup> Coles v County of Madison, 1 Ill. 154 (1826).

<sup>79</sup> Johnson v People, 173 Ill. 131 (1898).

<sup>80</sup> Wilson v O. & M. Ry. Co., 64 Ill. 542 (1872).

<sup>81</sup> C. & A. R. R. Co. v Adler, 56 Ill. 344 (1870).

<sup>82</sup> Kossakowski v People, 177 Ill. 563 (1899).

<sup>83</sup> Olsen v People, 219 Ill. 40 (1905).

<sup>84</sup> Burdick v People, 149 Ill. 600 (1894).

that deeds and mortgages to be valid shall be acknowledged.<sup>85</sup> This section will not protect against impairment a contract to do an act prohibited by a bill passed by the General Assembly and signed by the Governor, but not yet in full effect as a law at the time the contract was made.<sup>86</sup>

The Supreme Court has held that a court may not by judicial decision impair the obligation of a contract any more than the General Assembly may by statute.<sup>87</sup> This view is based on what is probably an erroneous conception of the holding of the United States Supreme Court which court has later expressly held (along with many state courts) that the constitutional provision prohibits impairment of contracts by action of a legislative character only.<sup>88</sup>

A law may provide for its adoption by the vote of the electorate in particular districts and also for its subsequent rejection in the same manner. A vote discarding the law is practically the same as to the district affected, as a repeal of the law by the General Assembly. Contracts, therefore, made while such a law is in force will be protected against impairment resulting from the rejection of the law by the action of the district. Thus it was held that the obligation of a contract for the construction of a building in a school district under an act adopted by vote, could not be impaired by a subsequent election discontinuing the school district.<sup>89</sup>

Contracts made by the state are within the protection of this constitutional provision and may not be impaired by legislation seeking to abrogate or change them. Thus where a contract to do certain printing for the state specified payment in state paper "at its specie value" the General Assembly may not fix an arbitrary higher valuation for such payment.<sup>90</sup> In a number of cases relating to franchises of special privileges which were granted by the state to corporations or individuals prior to the adoption of the constitution of 1870, it was held that such franchises constituted contracts which were not subject to impairment by subsequent legislation. As a result of these decisions, subsequent grants were made subject by express terms, to the power reserved to the state to alter, amend or repeal. Irrevocable grants of special privileges or immunities are prohibited in the constitution of 1870 by the last clause of this section. (See discussion subsequent subheading). A railroad having the right under its charter to use and sell its lands as it deemed expedient cannot be compelled by statute to dispose of them within a limited period at a fixed price, particularly when the land in question had been placed as security for bonds issued by the railroad company, since then the statute operates to impair not only the charter rights but also the obligations of the bonds.<sup>91</sup> So the right to maintain a toll road under a charter may not be impaired by the annexation to a city of the land enclosing it.<sup>92</sup> After a county has been authorized to subscribe for stock in a railroad company and levy taxes for that purpose by the charter of the company and has made a subscription and issued its bonds therefor, a subsequent act limiting the taxing power or the means to meet the bonds, impairs the obligation of these contracts.<sup>93</sup> But it has been held that a railroad charter amendment for the extension of the road, consolidation with other roads and the assumption of new and increased responsibilities, does not impair the validity or obligation of contracts for subscription of stock in the corporation,<sup>94</sup> so long as the changes in the charter are merely auxiliary to the original design and not a fun-

<sup>85</sup> Parrott v Kumpf, 102 Ill. 423 (1882).

<sup>86</sup> Dunne v County of Rock Island, 233 Ill. 628 (1918).

<sup>87</sup> Harmon v Auditor of Public Accounts, 123 Ill. 122 (1887).

<sup>88</sup> Bacon v Texas, 163 U. S. 207 (1896).

<sup>89</sup> Chalstran v Board of Education, 244 Ill. 470 (1910).

<sup>90</sup> Blackwell v Auditor of Public Accounts, 1 Ill. 196 (1826).

<sup>91</sup> People v Ketchum, 72 Ill. 212 (1874).

<sup>92</sup> City of Belleville v Turnpike Co., 234 Ill. 428 (1908).

<sup>93</sup> P. D. & E. Ry. Co. v People, 116 Ill. 401 (1886).

<sup>94</sup> Banet v A. & S. R. R. Co., 13 Ill. 504 (1851); T. H. & A. R. R. Co. v Earp, 21 Ill. 291 (1859).

damental change like an amendment which divides the original project into three parts.<sup>95</sup>

The purchase of property at tax sales constitutes a contract, with rights and obligations which may not be taken away or abridged by legislation. Thus if by the purchase, the buyer secures the right to the title or a redemption in specie, an act which authorizes the owner to redeem in United States treasury notes is void.<sup>96</sup> The contract of the sureties on a collector's bond is so materially altered by an act extending the time for the collector's final settlement as to release them from liability.<sup>97</sup> The General Assembly has no power to make the purchasers of the franchise and property of a railroad corporation liable for the debts of the old corporation by a law enacted subsequently to the sale, since by the sale certain rights are obtained which cannot be taken away.<sup>98</sup>

Grants by municipalities to public utility companies giving privileges in the use of streets, are not franchises but licenses which upon acceptance become contracts which can be rescinded or revoked only for cause.<sup>99</sup> And even where the grant is improperly given by resolution instead of by ordinance if the licensee has accepted and acted upon the grant with the tacit approval of the municipality, it is a contract not subject to revocation or impairment.<sup>1</sup>

Anticipation warrants are charges against a tax and are not contracts of the city which are protected by this section against a law which diminishes the taxing power of the city.<sup>2</sup> Nor is the election and induction of a person into a public office a contract within the protection of the constitution,<sup>3</sup> nor the right to participate in a police pension fund.<sup>4</sup> An act passed to validate a mortgage defectively executed cannot be said to impair any contract rights since its effect is merely to make obligatory the intention of the contracting parties.<sup>5</sup>

When a public municipal corporation acting outside its governmental character for purposes of private advantage, has contracted with the state, its position is analogous to individuals or private corporations whose contracts may not be impaired or altered by the state. But its acts in its public or governmental capacity are performed as agent for the state and this section does not prevent complete control as to such matters by the state.<sup>6</sup> Thus a grant of money for internal improvements to counties without railroads may be withdrawn by the state at any time before it has been expended,<sup>7</sup> or the General Assembly may properly direct the payment of money due school townships in other than gold and silver.<sup>8</sup>

A municipality may, with the consent of the other party to a contract, set aside an agreement for service and substitute therefor a new agreement fixing new rates for service, and such action will not be subject to objection as an impairment of the contract rights of the residents of the municipality to receive service at the original rates.<sup>9</sup>

The contract rights of the individual, like all property rights, are not absolute but are held subject to certain paramount rights of the state and this section is not construed to secure rights under contracts at the expense of the necessary sovereign powers which protect and secure the general welfare. All contracts whether made by the state or individuals are subject to be in-

<sup>95</sup> *Supervisors of Fulton County v M. & W. Ry. Co.*, 21 Ill. 338 (1859).

<sup>96</sup> *People v Riggs*, 56 Ill. 483 (1870).

<sup>97</sup> *Davis v People*, 6 Ill. 409 (1844).

<sup>98</sup> *Hatcher v T. W. & W. R. R. Co.*, 62 Ill. 477 (1872).

<sup>99</sup> *Chicago Municipal Gas Light Co. v Town of Lake*, 130 Ill. 42 (1889); *City of Belleville v Citizen's Horse Ry. Co.*, 152 Ill. 171 (1894); *People v Central Union Tel. Co.*, 192 Ill. 307 (1901).

<sup>1</sup> *Village of London Mills v White*, 208 Ill. 289 (1904).

<sup>2</sup> *Booth v Opel*, 244 Ill. 317 (1910).

<sup>3</sup> *Donahue v County of Will*, 100 Ill. 94 (1881).

<sup>4</sup> *Beutel v Foreman*, 288 Ill. 106 (1919).

<sup>5</sup> *Steger v Traveling Men's Bldg. Assn.*, 208 Ill. 236 (1904).

<sup>6</sup> *People v Power*, 25 Ill. 187 (1860).

<sup>7</sup> *County of Richland v County of Lawrence*, 12 Ill. 1 (1853).

<sup>8</sup> *Bush v Shipman*, 5 Ill. 186 (1843).

<sup>9</sup> *People v Chicago Tel. Co.*, 245 Ill. 121 (1910).

terfered with by subsequent statutes enacted in the exercise of the police power.

The following regulations for the operation of trains have been sustained as valid police measures though their effect was to limit or alter rights secured by charter from the state; requiring the sounding of warnings at road and street crossings,<sup>10</sup> and the fencing of right-of-ways,<sup>11</sup> the stopping of passenger trains at county seats,<sup>12</sup> and fixing reasonable rates for transportation and preventing discrimination in rates.<sup>13</sup> A railroad company may be compelled to secure a permit to lay a side track on its right-of-way across a street crossing.<sup>14</sup> With regard to ordinances relating to the operation of street railways in the city of Chicago, it was held that they constituted binding contracts in so far as their provisions related to matters other than those affecting the public safety, welfare, comfort or convenience—such as the division of net receipts with the city and an option of purchase to the city. But as to matters properly within the purview of the police power, the General Assembly retains the power to regulate and control.<sup>15</sup> When a charter to a railroad corporation merely requires the corporation in crossing a street or road with its tracks, to restore the road or street to its former state of usefulness, the railroad corporation may not, under guise of police regulation, be made liable for the maintenance of the paving upon a street in a subway beneath its tracks.<sup>16</sup>

The exercise of rights conferred by charter on an insurance company is subject to the power of the state to enact a police measure providing for the dissolution of such company if upon examination its financial condition makes the continued acceptance of risks hazardous,<sup>17</sup> and the General Assembly may provide that an insurance company failing to transact business for one year shall be deemed extinct.<sup>18</sup> An amendment to the city charter of Chicago may operate to annul a section of the charter of Chicago University which prohibited the sale of intoxicating liquor within one mile of the institution.<sup>19</sup> Rates fixed by municipalities by contract or ordinance may be changed by subsequent legislation since the right to prescribe reasonable rates as a part of the police power cannot be divested or bargained away.<sup>20</sup>

In a recent decision of the Supreme Court it was held that a railroad company was prohibited by the public utilities act of 1913 from furnishing free transportation under a prior contract by the terms of which the vendor of certain property was to receive free transportation as part consideration for property sold to the railroad company.<sup>21</sup> Shortly after this decision, the court held that the public utilities act did not impair or annul a contract under which free electrical power was the consideration for the transfer of certain property.<sup>22</sup> And in an earlier case a statute requiring railroads to fence their right-of-way was not permitted to impair rights under a contract authorized by law by which the owner of adjoining land agreed to build and maintain a fence and in the event of failure so to do, the railroad company was not to be liable for damages to stock of such owner.<sup>23</sup>

<sup>10</sup> *G. & C. U. R. R. Co. v Loomis*, 13 Ill. 548 (1852); *I. & St. L. R. R. Co. v Blackman*, 63 Ill. 117 (1872); *Venner v Chicago City Ry. Co.*, 246 Ill. 170 (1910).

<sup>11</sup> *O. & M. R. R. Co. v McClelland*, 25 Ill. 140 (1860); *G. & C. U. R. R. Co. v Crawford*, 25 Ill. 529 (1861).

<sup>12</sup> *C. & A. R. R. Co. v People*, 105 Ill. 657 (1883).

<sup>13</sup> *Ruggles v People*, 91 Ill. 256 (1878); *C. & A. R. R. Co. v People*, 67 Ill. 11 (1873); *C. B. & Q. R. R. Co. v Jones*, 149 Ill. 361 (1894).

<sup>14</sup> *P. F. W. & C. Ry. Co. v City of Chicago*, 159 Ill. 369 (1896).

<sup>15</sup> *City of Chicago v O'Connell*, 278 Ill. 591 (1917); (recently affirmed by United States Supreme Court).

<sup>16</sup> *People v I. C. R. R. Co.*, 235 Ill. 374 (1908).

<sup>17</sup> *Ward v Farwell*, 97 Ill. 593 (1881); *Chicago Life Ins. Co. v Auditor*, 101 Ill. 82 (1881).

<sup>18</sup> *Yates v People*, 207 Ill. 316 (1904).

<sup>19</sup> *Dingman v People*, 51 Ill. 277 (1869).

<sup>20</sup> *Freeport Water Co. v City of Freeport*, 186 Ill. 179 (1900); *City of Danville v Danville Water Co.*, 178 Ill. 299 (1899); *Rogers Park Water Co. v Fergus*, 178 Ill. 571 (1899).

<sup>21</sup> *Hite v C. I. & W. R. R. Co.*, 284 Ill. 297 (1918).

<sup>22</sup> *Schiller Piano Co. v Northern Utilities Co.*, 288 Ill. 580 (1919).

<sup>23</sup> *Lynch v B. & O. S. W. R. R. Co.*, 240 Ill. 567 (1909).



Contract rights, like all property rights, are subject to eminent domain and the state may for public use and by making compensation therefor, impair and destroy rights granted by charter from the state.<sup>24</sup> See discussion article 11, section 14). The state may in the exercise of its taxing power affect rights under contracts between individuals. Thus under a drainage act, assessments may be levied on property and a lien given for such taxes which is superior to the liens of existing encumbrances.<sup>25</sup> But valid contracts made by special grants by the state or its subdivisions under the constitution of 1848 which exempted property from taxation, are protected against impairment by subsequent legislation by the provision of this section.<sup>26</sup> (See discussion article 9, section 3, subheading, "Effect of the exemption provisions in special charters granted prior to 1870.")

It has been uniformly held that a specific method of enforcing the obligation of a contract is not a part of the obligation and therefore the General Assembly may regulate or change the remedies for the enforcement of existing contracts so long as such change in the extent or nature of existing remedies does not impair the substantive rights and interests under such contracts. A change in the remedy if it goes to the extent of abridging or altering substantive rights is just as much an impairment within the prohibition of this section as a direct violation of the contract.<sup>27</sup> A law which requires that property sold under mortgage foreclosure be appraised and sold for at least two-thirds of the valuation fixed was sustained as to rights accrued under prior contracts by the Illinois Supreme Court,<sup>28</sup> but the decision was reversed by the United States Supreme Court.<sup>29</sup> So an act which takes away all existing remedy leaving no redress impairs the validity of an existing contract as much as if it changed the terms.<sup>30</sup>

The following measures have been held to change the remedy or procedure only and, therefore, to be valid even as to prior contracts: a law permitting a creditor of a bank to proceed to judgment against a stockholder without waiting for execution against the bank;<sup>31</sup> the burnt records act which abolished a presumption as to the regularity of proceedings essential to the validity of tax deeds;<sup>32</sup> a statute permitting redemption from sales under decrees to enforce mechanic's liens;<sup>33</sup> a statute establishing a rule of evidence that the statement of the county collector in applying for judgments for taxes shall be prima facie evidence of the regularity of the assessment and levy of the taxes;<sup>34</sup> a statute making unnecessary the establishing a *devastavit* before bringing suit on a guardian's bond;<sup>35</sup> a requirement as to certain steps to be taken by tax purchasers in giving notice to the owners of property sold;<sup>36</sup> a law giving to owners assessed for local improvements the right of jury trial on question of benefits;<sup>37</sup> a statute permitting the forfeiture of a lease by service of a simple demand notice instead of the common law method of forfeiture;<sup>38</sup> and a statute changing the procedure for condemnation of property by a railroad company.<sup>39</sup> Statutes limiting the time within which the obligations of a contract may be enforced or changing the limita-

<sup>24</sup> *Mills v County of St. Clair*, 7 Ill. 197 (1845); *I. & M. Canal v C. & R. I. R. R. Co.*, 14 Ill. 314 (1853); *M. C. Ry. Co. v C. W. D. Ry. Co.*, 87 Ill. 317 (1877).

<sup>25</sup> *W. E. Ry. Co. v Commissioners of Drainage District*, 134 Ill. 384 (1890).

<sup>26</sup> *Parmelee v City of Chicago*, 60 Ill. 267 (1871); *People v Soldiers' Home & Baptist Theological Union*, 95 Ill. 561 (1880); *Northwestern University v People*, 99 U. S. 309 (1878); reversing *Northwestern University v People*, 80 Ill. 333 (1875).

<sup>27</sup> *Fisher v Green*, 142 Ill. 80 (1892).

<sup>28</sup> *Williams v Waldo*, 4 Ill. 264 (1841); *Delahay v McConnel*, 5 Ill. 157 (1842).

<sup>29</sup> *McCracken v Hayward*, 2 Howard (U. S.) 608 (1844).

<sup>30</sup> *Bruce v Schuyler*, 9 Ill. 221 (1847).

<sup>31</sup> *Smith v Bryan*, 34 Ill. 364 (1864).

<sup>32</sup> *Gage v Caraher*, 125 Ill. 447 (1888).

<sup>33</sup> *Templeton v Horne*, 82 Ill. 491 (1876).

<sup>34</sup> *Burbank v People*, 90 Ill. 554 (1878).

<sup>35</sup> *Winslow v People*, 117 Ill. 152 (1886).

<sup>36</sup> *Gage v Steward*, 127 Ill. 207 (1889).

<sup>37</sup> *Palmer v City of Danville*, 166 Ill. 42 (1897).

<sup>38</sup> *Woods v Soucy*, 166 Ill. 407 (1897).

<sup>39</sup> *C. B. & Q. Ry. Co. v Abbott*, 215 Ill. 416 (1905).

tion period have been sustained as to existing contracts or causes of action so long as a reasonable period is afforded for the assertion of the right before the action is barred.<sup>40</sup> A law which takes away the right to sue on causes barred by limitation statutes in the state where they accrued, does not violate the constitutional provision since the obligation of such contracts is already gone by force of the foreign limitation statute.<sup>41</sup>

**Irrevocable grants of special privileges or immunities.** Section 22 of article 4 provides that "the General Assembly shall not pass local or special laws . . . granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise". The prohibition is directed expressly to the General Assembly and it has been held that it does not apply to licenses or contracts created by municipalities.<sup>42</sup> Section 14 of article 11, however, says that "no law impairing the obligation of contracts, or making any irrevocable grant of special privilege or immunities, shall be passed." The prohibition against "impairing the obligation of contracts" has been applied to both municipal and state action. But the same word "law" with its second qualifying phrase, "making any irrevocable grant of special privilege or immunities," has been construed not to apply to municipalities.<sup>43</sup> The court erroneously cites the decision based on section 22 of article 4. But the court, in holding that the municipal ordinance in question is not a law which makes an irrevocable grant of special privilege or immunities, does not base its opinion wholly on the construction of the word "law" but also on the ground that the grant, although not for a definite term, was limited to the life of the corporation receiving it and was therefore not an irrevocable grant. The prohibition against an irrevocable grant, according to the construction placed upon it by the court, forbids a grant in perpetuity but not a grant for a limited term of years incapable of being revoked by the state.<sup>44</sup>

**Section 15. The military shall be in strict subordination to the civil power.**

The calling out of the militia to quell riotous conditions does not suspend the functions of the civil authorities but the military authority is merely in aid of the civil authorities. Consequently civil officers retain all their customary powers and duties.<sup>45</sup>

When it becomes necessary for the state to send aid to the civil authorities to suppress violence and execute the law, the civil authorities, acting as the representatives of the state and exercising governmental functions, are supreme. Their authority over the militia, however is not absolute but is limited to directing specific acts to be performed. As to the mode and manner of accomplishing the act ordered to be done, the militia acts independently of the civil authorities and is answerable to the Governor.<sup>46</sup>

It has been held by the Attorney General that a member of the state militia is subject to arrest by the civil authorities for treason, felony or breach of the peace, even when engaged in active service for the state and the fact of court martial and punishment by the military authorities does not bar

<sup>40</sup> *Bradley v Lightcap*, 201 Ill. 511 (1903).

<sup>41</sup> *Hyman v Bayne*, 83 Ill. 256 (1876).

<sup>42</sup> *Chicago City Ry. Co. v Story*, 73 Ill. 541 (1874).

<sup>43</sup> *People v Central Union Tel. Co.*, 232 Ill. 260 (1908).

<sup>44</sup> *St. Clair County Turnpike Co. v People*, 82 Ill. 174 (1876); *People v Central Union Tel. Co.*, 232 Ill. 260 (1908).

<sup>45</sup> *County of Christian v Merrigan*, 191 Ill. 484 (1901)

<sup>46</sup> *City of Chicago v Chicago Ball Club*, 196 Ill. 54 (1902).

a civil trial for the same offense.<sup>47</sup> (For the constitutional provisions relating to the organization of the militia, see article 12.)

**Section 16.** No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war except in the manner prescribed by law.

**Section 17.** The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances.

**Section 18.** All elections shall be free and equal.

This provision applies to all elections held under authority of law at which qualified electors may vote, including primary elections.<sup>48</sup>

Reasonable safeguards designed to maintain the purity of elections from fraud, such as requiring an unregistered voter to furnish two affidavits in support of his right to vote do not abridge the elective franchise or violate this section.<sup>49</sup>

The constitutional requirement of freedom and equality of elections prohibits intimidation and improper influences and requires that the vote of every elector shall be equal in its influence on the result to every other vote, but it does not demand absolute uniformity of regulation in all parts of the state.<sup>50</sup> But a law which permits the voting of electors who have resided thirty days in some election districts but not in other portions of the state destroys the freedom and equality of elections.<sup>51</sup> So distinctions applying to Cook County alone not justified by the difference in population, such as prohibiting an elector from voting at a party primary if he has voted at another party primary within two years but outside Cook County merely requiring him to state his party affiliation, are violative of this section and void.<sup>52</sup>

Freedom of elections also means that the voters shall be free to exercise the elective franchise for any eligible person of their choice without unwarranted restrictions and hindrances. Thus reasonable regulations such as requiring a candidate to file a petition with a proper percentage of voters, may be imposed but not a requirement for the payment of a fee so large as not to be intended as compensation for services rendered in filing the papers.<sup>53</sup>

A statutory prohibition against a candidate's name appearing more than once on the ballot does not prevent freedom of elections since any elec-

<sup>47</sup> Report Attorney General 1915, p. 229.

<sup>48</sup> *People v Election Commissioners*, 221 Ill. 9 (1906).

<sup>49</sup> *Byler v Asher*, 47 Ill. 101 (1868).

<sup>50</sup> *People v Hoffman*, 116 Ill. 587 (1886); *People v Wanek*, 241 Ill. 529 (1909).

<sup>51</sup> *People v Strassheim*, 240 Ill. 279 (1909).

<sup>52</sup> *People v Election Commissioners*, 221 Ill. 9 (1906).

<sup>53</sup> *People v Election Commissioners*, 221 Ill. 9 (1906).

tor desiring to vote for that candidate, is afforded the opportunity of doing so.<sup>54</sup>

An act which provides that precinct and ward committeemen shall nominate candidates for their respective parties does not violate the requirement of freedom and equality of elections, even though the committeemen had been elected prior to the passage of the act. Each member of political parties is entitled to participate in the selection of committeemen who thereby become the legal representatives in their respective parties.<sup>55</sup>

But the legislature may not deprive the members of political parties of the right to participate in the selection of party candidates for office, in case of vacancies occurring which require a special election, by giving this power to the managing committee of parties, although such a provision would probably be sustained as to vacancies caused by the death or withdrawal of candidates since lack of time would make impracticable nomination by the convention method.<sup>56</sup>

**Section 19.** Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay.

**Certain remedy.** The refusal by the courts to entertain an action to recover damages alleged to have been sustained by the malicious institution of a civil suit, while such civil suit remains pending, is not a withholding of a certain remedy.<sup>57</sup> The workmen's compensation act provided for a hearing and the payment of compensation in the case of an employee injured by a person other than his employer. This provision was held not a deprivation of a remedy, since the act merely created an additional remedy and, in effect, permitted an election as to the remedy to be pursued.<sup>58</sup> This section does not guarantee a remedy for an injury to the political right to have election ballots lawfully counted since elections belong to the political branch of the government and in the absence of provision for contests by that branch, the courts have no jurisdiction.<sup>59</sup> An exception to this is found, however, in the case of elections relating to the removal of county seats.<sup>60</sup>

Statutory provisions which grant to one party to a suit the right to a review which is restricted or denied to the other party, do not afford the certain remedy which this section guarantees.<sup>61</sup>

This section does not require the Supreme Court to give a detailed opinion on every point raised or to answer every contention that may be made by counsel in the argument of a case.<sup>62</sup>

**Right to justice without being obliged to purchase it.** Statutes requiring cost bonds from litigants<sup>63</sup> or the payment in advance of jury fees<sup>64</sup>

<sup>54</sup> *People v Czarnecki*, 266 Ill. 372 (1915).

<sup>55</sup> *People v Sweitzer*, 282 Ill. 171 (1918).

<sup>56</sup> *Rouse v Thompson*, 228 Ill. 522 (1907).

<sup>57</sup> *Bonney v King*, 201 Ill. 47 (1903).

<sup>58</sup> *Johnson v Choate*, 284 Ill. 214 (1918).

<sup>59</sup> *Douglas v Hutchinson*, 183 Ill. 323 (1899).

<sup>60</sup> *Boren v Smith*, 47 Ill. 482 (1868).

<sup>61</sup> *Hecker v I. C. R. R. Co.*, 231 Ill. 574 (1908); *Hayward v Sencenbaugh*, 235 Ill. 580 (1908).

<sup>62</sup> *Speight v People*, 87 Ill. 595 (1877).

<sup>63</sup> *Gesford v Critzer*, 7 Ill. 698 (1845); *Casey v Horton*, 36 Ill. 234 (1864).

<sup>64</sup> *Morrison Hotel Co. v Kirsner*, 245 Ill. 431 (1910).

have been sustained in civil cases, as reasonable provisions to protect officers of justice against loss of compensation for their services. But the court has held invalid a law requiring a person to show he was not delinquent for taxes in order to question a tax title,<sup>65</sup> and a statute requiring the payment of redemption money and interest as a condition to attacking the validity of a tax deed.<sup>66</sup>

Section 20. A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

There has been no occasion for a construction or interpretation of this plain admonition to governmental authority. It has been referred to by the Supreme Court in holding unreasonable and oppressive a city ordinance which prohibits the getting on or off moving cars or trains of cars without first securing permission from persons in charge.<sup>67</sup> In another case, the court held invalid a statutory provision which conferred authority upon a court to direct a commissioner owning lands in a drainage district subject to assessment, to act with other commissioners in assessing benefits upon the land in the district. One of the fundamental principles referred to by this section, the court said, is that impartial tribunals shall be provided for the adjudication of rights.<sup>68</sup>

<sup>65</sup> *Wilson v McKenna*, 52 Ill. 43 (1869).

<sup>66</sup> *Reed v Tyler*, 56 Ill. 288 (1870); *Senichka v Lowe*, 74 Ill. 274 (1874).

<sup>67</sup> *Wice v C. & N. W. Ry. Co.*, 193 Ill. 351 (1901).

<sup>68</sup> *Drainage Commissioners v Smith*, 233 Ill. 417 (1908).



## ARTICLE III—DISTRIBUTION OF POWERS.

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The powers of the government of this State are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

In general. The powers of the three departments of government may be briefly defined as follows: The legislative department determines what the law shall be; the executive department executes or administers the law; and the judicial department construes and applies the law.

This article of the constitution does not mean that each department of government is absolutely separate and distinct from the others. The spheres of activity of each department overlap to a certain extent, and the action of one department within its own sphere will be sustained even though it may, to a certain degree, exercise powers primarily within the sphere of another department. In the early case of *Field v People*,<sup>1</sup> it was said: "The first and second sections of the first article of the constitution divide the powers of government into three departments, the legislative, executive and judicial, and declare that neither of these departments shall exercise any of the powers properly belonging to either of the others, except as expressly permitted. This is a declaration of a fundamental principle; and although one of vital importance, it is to be understood in a limited and qualified sense. It does not mean that the legislative, executive and judicial power, should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is, that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many. That this is the sense in which this maxim was understood by the authors of our government and those of the general and state governments, is evidenced by the constitutions of all. In every one, there is a theoretical or practical recognition of this maxim, and at the same time a blending and admixture of different powers. This admixture in practice, so far as to give each department a constitutional control over the other, is considered, by the wisest statesmen, as essential in a free government, as a separation. This clause, then, is the broad theoretical line of demarcation, between the three great departments of government."

In *State of Illinois v Illinois Central Railroad Company*<sup>2</sup> the court, in considering this article, said: "The legislative, executive and judicial powers are not to be kept so entirely separate and distinct as to have no connection or interdependence. In every constitution there is a blending and admixture of different powers. 'This admixture, in practice, so far as to give each department a constitutional control over the others, is considered by the wisest statesmen as essential in a free government as a separation.' In *Cooley on Torts* that author says: 'Official duties are supposed to be susceptible of classification under the three heads of legislative, executive and judicial, corresponding to the three departments of government bearing the same designations; but the classification cannot

<sup>1</sup> 3 Ill. 79 (1839).

<sup>2</sup> 246 Ill. 188 (1910).

be very exact and there are many officers whose duties cannot properly, or at least exclusively, be arranged under either of these heads.' Certain administrative officers are frequently charged with duties that partake of the character of all three of the departments but which cannot be classed as belonging essentially to either. Administrative and executive officers are frequently called upon, in the performance of their duties, to exercise judgment and discretion, to investigate, deliberate and decide, and yet it has been held that they do not exercise judicial power, within the meaning of the constitutional provision."

It is apparent, therefore, that one department is not usurping the powers of another department merely because that department in the performance of a certain act exercises powers similar to those exercised by one or both of the other departments. This does not mean, of course, that one department may exercise the powers that essentially belong to another department. But if a department in the performance of an act properly within its domain, must, incidentally, exercise a power belonging primarily to another department, it is not prevented from doing so by the doctrine of separation of powers. The power to regulate railroad rates is essentially legislative, but it is clear that in fixing such rates the General Assembly, in a measure, exercises judicial functions.<sup>3</sup> An administrative agency empowered to issue and revoke licenses to engage in a certain business or profession, must, necessarily, exercise *quasi* judicial powers in determining that a license shall be issued to a certain person, or that a license already issued shall be revoked, but this exercise of a *quasi* judicial power is only incidental to the function of administering the law relating to the regulation of a particular business or calling.<sup>4</sup> And a court is not exercising legislative power contrary to this provision of the constitution when it makes rules to govern the transaction of its business, although there can be no doubt that the making of rules is, in a certain sense, a legislative function.<sup>5</sup>

In some cases it is quite clear that one department is encroaching upon the powers of another. In other cases, however, it is difficult to determine whether the exercise by one department of a power primarily belonging to another department is a clear invasion of the sphere of another department or merely incidental to the performance of an act properly within the domain of the first department; and in such cases, the whole problem becomes largely a question of drawing the line—a question of degree. (See discussion subsequent subheadings.)

It should be noted, however, that this article provides that, "*except as hereinafter expressly directed or permitted,*" no person or persons in one department of government shall exercise any powers properly belonging to another department. By the words "*except as hereinafter expressly directed or permitted,*" the constitution recognizes the fact that certain exceptions are made in that instrument, itself, to the doctrine of separation of powers established by this article. A few illustrations may be of value. Section 9 of article 4 authorizes the General Assembly to imprison persons for contemptuous behavior in its presence. Section 24 of the same article provides that the senate shall hear and determine all impeachments returned or found by the house of representatives. Section 30 of article 6 gives the General Assembly the power to remove judges from office "for cause entered on the journals." All of these functions are judicial in nature but are conferred upon the legislative branch of the government by the constitution itself.

The power to enact laws is clearly a legislative power. But, under section 16 of article 5, the Governor may veto any bill passed by the General

<sup>3</sup> C. M. & St. P. Ry. Co. v. Public Utilities Commission, 268 Ill. 49 (1915).

<sup>4</sup> People v. Apfelbaum, 251 Ill. 18 (1911); Klafter v. State Board of Examiners, 259 Ill. 15 (1913); People v. Brady, 268 Ill. 192 (1915); People v. Stokes, 281 Ill. 159 (1917); see, also, Spiegler v. City of Chicago, 216 Ill. 114 (1905); Block v. City of Chicago, 239 Ill. 251 (1909).

<sup>5</sup> Dodge, Conservator v. Cole, 97 Ill. 338 (1881).



Assembly, in which event the bill cannot become a law unless passed over the veto by a vote of two-thirds of the members elected to each house of the General Assembly. The constitution also authorizes the Governor to call a special session of the General Assembly (article 5, section 8) and to adjourn the General Assembly in the event of a disagreement between the two houses as to the time of adjournment (article 5, section 9).

Section 12 of article 5 provides that "the Governor shall have power to remove any officer whom he may appoint in case of incompetency, neglect of duty or malfeasance in office."<sup>6</sup> Under section 13 of article 5 the Governor has the power to grant reprieves, commutations and pardons.<sup>7</sup> In determining that an officer should be removed because of incompetency, neglect of duty, or malfeasance in office, or that a reprieve, commutation or pardon should be granted, the Governor necessarily exercises powers similar to those granted to the judicial department, although his actions in no event are subject to judicial review.

**Encroachments by the legislative department.** The General Assembly cannot determine that a debt is owed by one person to another,<sup>8</sup> or that a person has a dower right in certain lands,<sup>9</sup> or declare the forfeiture of a contract or corporate charter,<sup>10</sup> or determine that the condition of a deed is broken,<sup>11</sup> for the reason that all of these are judicial questions with which the legislative body has no power to deal. The General Assembly, while it may pass laws prescribing rules of evidence in suits in the courts, and declare that the existence of a certain fact shall constitute *prima facie* evidence,<sup>12</sup> cannot declare what shall be conclusive evidence in a judicial proceeding for that would be to invade the province of the judiciary.<sup>13</sup> And, though the General Assembly may pass limitation laws barring the right to sue for the recovery of lands after the expiration of a certain number of years, it cannot provide that the title of land, after the expiration of the limitation period, shall vest in the person against whom a cause of action might have been brought prior to the running of the statute of limitations; the determination of the ownership of property is a judicial function.<sup>14</sup>

The passage of validating acts is not necessarily an assumption of judicial power by the General Assembly. Deeds at the time of their execution may be unenforceable because of defective acknowledgments, but the General Assembly may pass a law validating the defective acknowledgments and making the deeds valid, enforceable obligations, unless vested rights have attached in the meantime; and this "is not an exercise of judicial power since it does not purport to settle suits or controversies."<sup>15</sup> In the same manner the General Assembly may validate tax levies and the organization of high school districts without encroaching upon the power of the judiciary.<sup>16</sup> But once the Supreme Court has pronounced judgment with reference to a certain deed, or a certain high school district, the General Assembly cannot validate that deed or high school district, for the effect of such action by the General Assembly would be to vacate or nullify the action of one of the co-ordinate branches of the government.<sup>17</sup> Nor can the General

<sup>6</sup> Wilcox v. People, 90 Ill. 186 (1878).

<sup>7</sup> People v. La Buy, 285 Ill. 141 (1918).

<sup>8</sup> Lane v. Dorman, 4 Ill. 238 (1841); see, also, Shaw v. Dennis, 10 Ill. 405 (1849); County of Richland v. County of Lawrence, 12 Ill. 1 (1850).

<sup>9</sup> Edwards v. Pope, 4 Ill. 465 (1842).

<sup>10</sup> Bruffett v. G. W. R. R. Co., 25 Ill. 353 (1861); see, also, People v. Rose, 207 Ill. 352 (1904).

<sup>11</sup> Board of Education v. Bakewell, 122 Ill. 339 (1887).

<sup>12</sup> Burbank v. People, 90 Ill. 554 (1878).

<sup>13</sup> Shellabarger Elevator Co. v I. C. R. R. Co., 278 Ill. 333 (1917).

<sup>14</sup> Newland v. Marsh, 19 Ill. 376 (1857).

<sup>15</sup> Steger v. T. M. Bldg. & Loan Ass'n., 208 Ill. 236 (1904); U. S. Mortgage Co. v. Gross, 93 Ill. 483 (1879); see, also, Parmelee v. Lawrence, 48 Ill. 331 (1868).

<sup>16</sup> Cowgill v. Long, 15 Ill. 202 (1853); People v. Peltier, 275 Ill. 217 (1916).

<sup>17</sup> C. & E. I. R. R. Co. v. People, 219 Ill. 408 (1906); People v. N. Y. Central R. R. Co., 283 Ill. 334 (1918).

Assembly in a validating act direct the abatement of pending suits. "The legislature is without authority to direct what orders shall be entered by a court in pending actions. It may enact statutes and change the law, but the application of the law to particular cases is a judicial function, and the adjudication as to what orders shall be entered in such cases is the exercise of judicial power, which does not belong to the legislature." But this does not mean that the Supreme Court will not give effect to a validating act in a particular case, even though the act was passed after the rendition of judgment in the lower court. In *People v. Madison*,<sup>18</sup> the court said: "We must dispose of the case under the law in force at this time and not as it was when judgment was rendered in the circuit court."

In the case of *In re Day*,<sup>20</sup> it was held that an attorney at law is an officer of the court and that the power to prescribe the qualifications which will entitle an applicant to a license to practice law is judicial and not legislative. In that case the court said: "The function of determining whether one who seeks to become an officer of the courts and to conduct causes therein is sufficiently acquainted with the rules established by the legislature and the courts governing the rights of parties and under which justice is administered pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact and to bring the facts and law before the court so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualifications, under such restrictions and limitations as may be properly imposed by the legislature for the protection and welfare of the public. The fact that the legislature may prescribe the qualifications of doctors, plumbers, horseshoers and persons following other professions or callings not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings." (See discussion subheading, "Independence of departments.")

**Encroachments by the executive department.** The question of the exercise of legislative powers by the executive department usually arises in connection with statutes conferring such powers upon that department. No cases have arisen in which the executive department has attempted to exercise legislative powers except pursuant to a law passed by the General Assembly. The question then, in so far as the exercise of legislative power is concerned, is one of delegation of legislative power and that question is considered elsewhere in this volume. (See discussion article 4, section 1, subheading, "Delegation of legislative power.")

With reference to the exercise of judicial powers by the executive department, it has been held that the infliction of fines and penalties is a judicial function which cannot be conferred on a person who is in the executive department.<sup>21</sup> (See discussion article 6, section 1, subheading "Exercise of judicial powers.") But this does not mean that the General Assembly may not confer power on the board of pardons to recommend the release and discharge of prisoners in the penal institutions of the state, for the power to recommend is not essentially judicial. In determining whether or not a recommendation shall issue the members of the board of pardons exercise powers similar to those exercised by the judiciary, but the primary purpose

<sup>18</sup> *People v. Madison*, 280 Ill. 96 (1917); see, also, *People v. Wiley*, 289 Ill. 173 (1919).

<sup>19</sup> 280 Ill. 96 (1917).

<sup>20</sup> 181 Ill. 73 (1899).

<sup>21</sup> *People v. Mallary*, 195 Ill. 582 (1902); see, also, *Beesman v. City of Peoria*, 16 Ill. 484 (1855); *Bullock v. Geomble*, 45 Ill. 218 (1867); *C. C. C. & St. L. Ry. Co. v. People*, 212 Ill. 638 (1904).

of the recommendation is that of administering the parole law, a purely executive function.<sup>22</sup>

An act of the General Assembly conferring on the registrar of titles the power to hear and decide controversies with reference to land titles and to issue a certificate which shall be conclusive evidence of ownership, if not contested in the courts within a period of five years, was held void, on the ground that it granted judicial powers to the registrar of titles.<sup>23</sup> Shortly afterward, however, an act conferring substantially similar powers on the registrar of titles was sustained.<sup>24</sup> The workmen's compensation act does not confer judicial powers on the industrial board, although that board is given the power, subject to judicial review, to hear and determine claims of employees against their employers for compensation for personal injuries sustained in the course of employment.<sup>25</sup> And the General Assembly may authorize the removal of county officers and the review of assessments of property for the purposes of taxation by executive or administrative agencies, because the powers thus exercised are not essentially judicial.<sup>26</sup> (See discussion subsequent subheadings, "Appointment of officers" and "Independence of departments.")

**Encroachments by the judicial department.** The power to determine the boundaries of municipal corporations is purely a legislative power which cannot be conferred on the courts.<sup>27</sup> This, however, does not prevent the General Assembly from giving courts the power to ascertain the existence of certain preliminary facts before the question of organizing a drainage district is submitted to a vote of the people in the territory proposed to be organized as a drainage district.<sup>28</sup> And the General Assembly may designate three judges to sit as a board or commission to fix the boundaries of a sanitary district, for the judges, when sitting as a board or commission, are not acting in their judicial capacity.<sup>29</sup>

While the judiciary will pass on the question whether or not a railroad rate is confiscatory, and thus deprives the railroad owners of their property without due process of law, it has no power to fix such rates, for that is a legislative function.<sup>30</sup> The power to levy taxes is a legislative function which cannot be exercised by the judicial department.<sup>31</sup> And because elections are under legislative control, the courts will not take jurisdiction of election contests unless the power to do so is expressly conferred by statute.<sup>32</sup> (See discussion two following subheadings.)

**Appointment of officers.** The power to appoint to office is ordinarily regarded as an attribute of the executive or administrative branch of the

<sup>22</sup> *George v. People*, 167 Ill. 447 (1897); *People v. Joyce*, 246 Ill. 124 (1910).

<sup>23</sup> *People v. Chase*, 165 Ill. 527 (1897).

<sup>24</sup> *People v. Simon*, 176 Ill. 165 (1898).

<sup>25</sup> *Diebelkis v. Link-Belt Co.*, 261 Ill. 454 (1914). When this decision was rendered the workmen's compensation act was optional and not compulsory. The decision was based largely on the ground that when the parties elected to be bound by the act, they agreed and consented to the arbitration. Whether or not arbitrators under the present compulsory workmen's compensation act exercise judicial powers has not been decided. In view of the fact, however, that the actions of the arbitrators under the compulsory act are subject to judicial review, it would seem clear that the present workmen's compensation act is not subject to the constitutional objection that the arbitrators exercise judicial powers. See *Johnson v. Choate*, 284 Ill. 214 (1918).

<sup>26</sup> *Donahue v. Will County*, 100 Ill. 94 (1881); *People v. Nellis*, 249 Ill. 12 (1911); *Bureau County v. C. B. & Q. R. R. Co.*, 44 Ill. 229 (1867); *Owners of Lands v. People*, 113 Ill. 296 (1885); *Maxwell v. People*, 189 Ill. 546 (1901); see, also, *Rowe v. Bowen*, 28 Ill. 116 (1862).

<sup>27</sup> *City of Galesburg v. Hawkinson*, 75 Ill. 152 (1874); *Funkhouser v. Randolph*, 287 Ill. 94 (1919).

<sup>28</sup> *Blake v. People*, 109 Ill. 504 (1884).

<sup>29</sup> *People v. Nelson*, 133 Ill. 565 (1890).

<sup>30</sup> *C. M. & St. P. Ry. Co. v. Public Utilities Commission*, 268 Ill. 49 (1915); *Public Utilities Commission v. T. R. R. Ass'n.*, 281 Ill. 181 (1917); see, also, *C. B. & Q. R. R. Co. v. Jones*, 149 Ill. 361 (1894).

<sup>31</sup> *School Directors v. School Directors*, 232 Ill. 322 (1908).

<sup>32</sup> *Keating v. Stack*, 116 Ill. 191 (1886); *Lyons v. Becker*, 272 Ill. 333 (1916).

government, although the Supreme Court has said that the appointing power does not belong peculiarly to any one department. It has been held that article 3 of the constitution does not prevent the General Assembly from giving the courts the power to appoint park commissioners, drainage commissioners, election commissioners and county mine examining boards.<sup>33</sup> But the courts cannot be given the power to appoint or remove, directly or indirectly, officers of fire departments in cities.<sup>34</sup> It is difficult to perceive a distinction between officers of a fire department on the one hand and park and drainage commissioners on the other. If the appointment by a court of an officer of a fire department would constitute an encroachment on the power of the executive department, it would seem that the appointment by the courts of park and drainage commissioners would also be an exercise of executive power by the judicial department. The Supreme Court, however, distinguishes between the two classes of officers. In *City of Aurora v Schoeberlein*,<sup>35</sup> the court says: "It has been held competent for the legislature to confer on persons holding judicial offices the power to appoint officers whose selection or appointment cannot be classed as belonging to either of the departments of government; but we do not think there can be any doubt that officers of a fire department belong to the executive branch of the government."

It has also been held that probation officers cannot be appointed by any member of the executive department, but that they must be appointed by the courts or elected by the people. The basis of this holding is that probation officers perform judicial rather than executive or ministerial duties, and that if the power of appointment were vested in the executive department it would constitute an encroachment on the powers of the judiciary.<sup>36</sup> (See discussion last paragraph subheading, "Encroachments by the legislative department.")

**Independence of departments.** No department can exercise any control over another department. The courts will not issue a writ of *mandamus* against the Governor to compel him to perform any official duty, whether discretionary or ministerial.<sup>37</sup> And the writ will not issue against a board or a commission of which he is a member.<sup>38</sup> The writ will issue, however, if the Governor voluntarily submits to the jurisdiction of the court.<sup>39</sup> The question as to the power of the courts over the Governor seems to have arisen only in cases where it was sought to compel the Governor to perform a duty. Injunction suits have been filed against the Governor and disposed of on their merits without any point being raised as to the power of the courts to restrain an act of the Governor in his official capacity.<sup>40</sup> And it should be noted that the writ of *mandamus* will issue against other executive officers, such as the Secretary of State, State Treasurer and Auditor of Public Accounts.<sup>41</sup> (See discussion article 4, section 26, subheading "Suits against state officers.")

While the judicial department will declare acts of the General Assembly unconstitutional, if in violation of the constitution, it has frequently announced the theory that it will not attempt to tell the General Assembly that a certain law ought to be passed,<sup>42</sup> and that it will not question the

<sup>33</sup> *People v. Morgan*, 90 Ill. 558 (1878); *Owners of Land v. People*, 113 Ill. 296 (1885); *People v. Hoffman*, 116 Ill. 587 (1886); *Sherman v. People*, 210 Ill. 552 (1904); *People v. Evans*, 247 Ill. 547 (1910).

<sup>34</sup> *City of Aurora v. Schoeberlein*, 230 Ill. 496 (1907).

<sup>35</sup> 230 Ill. 496 (1907).

<sup>36</sup> *Witter v. Cook County Commissioners*, 256 Ill. 616 (1912); see, also, *In re Day*, 181 Ill. 73 (1899).

<sup>37</sup> *People v. Bissell*, 19 Ill. 229 (1857).

<sup>38</sup> *People v. Dunne*, 258 Ill. 441 (1913).

<sup>39</sup> *People v. Palmer*, 64 Ill. 41 (1872); but see *People v. Dunne*, 258 Ill. 441 (1913).

<sup>40</sup> *Hubbard v. Dunne*, 276 Ill. 598 (1917); *Mitchell v. Lowden*, 288 Ill. 327 (1919).

<sup>41</sup> *People v. Rose*, 167 Ill. 147 (1897); *People v. Brady*, 262 Ill. 578 (1914).

<sup>42</sup> *Correspondence between Governor and Supreme Court*, 243 Ill. 9 (1909).

reason or motive of the General Assembly in passing any law.<sup>43</sup> The courts declare that they will give no heed to an argument that a law is unjust and oppressive. If a law does not conflict with the constitution, it must be enforced, for questions of policy and expediency in connection with legislation are to be determined by the General Assembly alone.<sup>44</sup>

In accordance with this theory of the independence of each department, the judiciary will not permit the executive or legislative departments to exercise any control over it. The Supreme Court is under no obligation to draft a primary election bill even though requested by the Governor to do so.<sup>45</sup> (See article 6, section 31.) And the General Assembly cannot tell the courts how to construe a statute.<sup>46</sup>

In *People v McCullough*<sup>47</sup> the state civil service law was called into question on the ground that it limited the power of the elective executive state officers to appoint the employees in their offices, and was thus an attempt by the General Assembly to exercise control over the executive department. Three judges held that the state civil service law was not an encroachment by the legislative department on the powers of the executive department. Three judges held that it was. The seventh judge held that, in so far as the civil service act interfered with the powers of the executive state officers to appoint employees to assist them in the performance of their constitutional duties, as distinguished from duties imposed upon them by statute, it was an unconstitutional encroachment by the General Assembly upon the powers of these officers. The view of the seventh judge, of course, constituted the decision of the court in that case. In *People v Brady*<sup>48</sup> the court was called upon to consider the constitutionality of the civil service law as applied to the employees in the office of the clerk of the Supreme Court, who is an officer of the court and elected by the people of the state. Five judges held that the constitution did not prohibit the application of the civil service law to all of the employees in the office of the clerk of the Supreme Court, and made no distinction between constitutional and statutory duties. The apparent effect of this decision is to sustain the power of the General Assembly to provide that the civil service law shall be applicable to all of the employees in the executive and judicial departments regardless of the character of their duties.

**Incompatibility of offices.** The Attorney General has frequently rendered opinions that this article of the constitution may prevent one person from holding two offices at the same time. Thus, it has been held that a mayor of a city cannot hold the office of county judge or the office of state senator;<sup>49</sup> that a justice of the peace cannot hold the office of alderman in a city council, or member of the board of trustees of a village, or circuit clerk, or town clerk;<sup>50</sup> and that a member of the General Assembly cannot hold the office of probation officer.<sup>51</sup> The basis for these holdings is that in each case the two offices belong to different departments of government, and that to permit one person to hold both offices at the same time would be to authorize that person to exercise the powers of two departments of government contrary to the principle of separation of powers announced by article 3.

<sup>43</sup> *People v. Thompson*, 155 Ill. 451 (1895); *People v. Rose*, 203 Ill. 46 (1903).

<sup>44</sup> *Board of Supervisors v. State's Attorney*, 31 Ill. 68 (1863); *People v. Shedd*, 241 Ill. 155 (1909); *Town of Cicero v. Haas*, 244 Ill. 551 (1910).

<sup>45</sup> *Correspondence between Governor and Supreme Court*, 243 Ill. 9 (1909).

<sup>46</sup> *Rockhold v. Canton Benevolent Society*, 129 Ill. 440 (1889); but see *People v. Bowman*, 247 Ill. 276 (1910).

<sup>47</sup> 254 Ill. 9 (1912).

<sup>48</sup> 275 Ill. 261 (1916).

<sup>49</sup> *Report Attorney General* 1912, p. 1343; 1914, p. 1175.

<sup>50</sup> *Report Attorney General* 1916, p. 788; 1914, p. 1157; 1915, pp. 782, 789.

<sup>51</sup> *Report Attorney General* 1916, p. 931.



## ARTICLE IV—LEGISLATIVE DEPARTMENT.

Section 1. The legislative power shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both to be elected by the people.

In construing this section, two principal questions have presented themselves. These questions are (1) the extent of the legislative power of the General Assembly, and (2) the authority of the General Assembly to delegate the legislative power conferred upon it.

**Extent of power of General Assembly.** The General Assembly has all powers not denied to it by the Federal or State constitutions.<sup>1</sup> The state constitution is not a grant of power to the General Assembly but is merely a limitation on the power of the General Assembly, and that body is fully authorized to legislate on all subjects unless the constitutions of the United States or the state forbid.<sup>2</sup> Thus the General Assembly, since there is nothing in the constitution which denies it the power to regulate the practice of the courts, may pass a law requiring that an affidavit of merits shall be filed with the defendant's plea in certain classes of suits at law.<sup>3</sup> And for the same reason the General Assembly may provide for the removal, by the county board of supervisors, of county treasurers for misconduct in office,<sup>4</sup> or for the removal, by the Governor, of sheriffs for failure to do all in their power to prevent lynchings,<sup>5</sup> or for the disposal of land owned by a county,<sup>6</sup> or for the levy of a wheel tax by cities.<sup>7</sup> But the General Assembly cannot provide for more than one senatorial apportionment in any ten year period following a Federal census, because the constitution, as construed by the Supreme Court, forbids more than one such apportionment.<sup>8</sup> Nor can the General Assembly make appropriations for the maintenance of the Illinois and Michigan Canal, for the reason that such appropriations, in the opinion of the court, are forbidden by the constitution.<sup>9</sup>

The rule in connection with this matter is easily stated. The difficulty, however, arises in determining whether or not the constitution does in fact limit the power of the General Assembly with respect to certain things. The courts have frequently held that the power of the General Assembly with reference to a certain subject, is limited by the constitution, although the constitutional language contains no express limitation of power—that is, constitutional limitations on legislative power are not always to be found in the express language of the constitution but may arise by implication. For example, the constitution (article 4, section 6) provides that "the General

<sup>1</sup> *Harder's Storage Co. v City of Chicago*, 235 Ill. 58 (1908); *People v Board of Supervisors*, 223 Ill. 187 (1906); *People v McCormick*, 261 Ill. 413 (1914).

<sup>2</sup> *Harris v Board of Supervisors*, 105 Ill. 445 (1883); *People v Hutchinson*, 172 Ill. 486 (1898).

<sup>3</sup> *Honore v Home National Bank*, 80 Ill. 489 (1875).

<sup>4</sup> *Donahue v Will County*, 100 Ill. 94 (1881).

<sup>5</sup> *People v Nellis*, 249 Ill. 12 (1911).

<sup>6</sup> *Harris v Board of Supervisors*, 105 Ill. 445 (1883).

<sup>7</sup> *Harder's Storage Co. v City of Chicago*, 235 Ill. 58 (1908).

<sup>8</sup> *People v Hutchinson*, 172 Ill. 486 (1898).

<sup>9</sup> *Burke v Snively*, 208 Ill. 328 (1904).

Assembly shall apportion the state every ten years beginning with the year one thousand eight hundred and seventy-one." There is nothing in this language that expressly forbids more than one apportionment in each ten year period following a Federal census. But the Supreme Court has held that this language is a limitation on the power of the General Assembly and that only one apportionment can be made in each ten year period following a Federal census.<sup>10</sup> The whole problem of implied limitations on the power of the General Assembly is a difficult one, and it is not an easy matter to harmonize all of the judicial decisions on the subject.

The constitution (article 5, section 1) provides that the Attorney General "shall perform such duties as may be prescribed by law." It would seem that under this language the General Assembly would have full and complete power to regulate the duties of the Attorney General in any manner that was deemed necessary. But in *Fergus v Russel*<sup>11</sup> the court held that, even though the Attorney General was not a constitutional officer under the constitution of 1848, the constitution of 1870, in creating the office of Attorney General, endowed that officer with all of the powers and duties of the attorney general known to the common law; and that the General Assembly could not deprive the Attorney General of any of the powers and duties which were exercisable by that officer under the common law. And the same rule has been applied to sheriffs<sup>12</sup>, who are county officers created by the constitution (article 10, section 8). It should be pointed out, however, that with respect to the duties of sheriffs the constitution is absolutely silent.

Section 1 of article 7 expressly limits the right of suffrage to males. But it has been held that this section is a limitation of power on the General Assembly only with respect to the officers created by the constitution, and those questions which are required by that instrument to be submitted to the voters; and that the General Assembly may authorize women to vote for all officers created by statute, and on all questions required by statute to be submitted to a vote of the people.<sup>13</sup> On the other hand primary elections, which were unknown when the constitution of 1870 was adopted, and which are pure statutory innovations, are included within the meaning of the word "elections" as used in section 18 of article 2.<sup>14</sup>

Section 6 of article 7 provides that "no person shall be elected or appointed to any office in this state, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding the election or appointment." This section clearly prevents the General Assembly from providing that persons who have resided less than one year in this state shall be eligible to any office. And it would seem that this section does not deprive the General Assembly of the power to provide that no person shall be eligible to a certain office unless he has resided in the state for a period of *five years*. In *People v McCormick*,<sup>15</sup> however, the court held that the General Assembly, with respect to an office, eligibility to which is not prescribed by other provisions of the constitution, could not

<sup>10</sup> *People v Hutchinson*, 172 Ill. 486 (1898).

<sup>11</sup> 270 Ill. 304 (1915).

<sup>12</sup> *Dahnke v People*, 168 Ill. 102 (1897).

<sup>13</sup> *Scown v Czarnecki*, 264 Ill. 305 (1914); see, also, *People v Nelson*, 133 Ill. 565 (1890). The case of *People v Nellis*, 249 Ill. 12 (1911) involves a similar construction of constitutional language. The constitution (article 5, section 12) provides that "the Governor shall have power to remove any officer whom he may appoint . . .". Section 8 of article 10 creates the office of sheriff and provides that the sheriff shall hold office for four years. The first provision might well have been construed as denying to the Governor the power to remove any officer not appointed by him. The second provision could have been construed as denying the right to reduce the sheriff's term of four years. But it was held in the *Nellis* case that the General Assembly could authorize the Governor, under certain circumstances, to remove sheriffs from office.

<sup>14</sup> *People v Board of Election Commissioners*, 221 Ill. 9 (1906); *Rouse v Thompson*, 228 Ill. 522 (1907); *People v Strassheim*, 240 Ill. 279 (1909); *People v Deneen*, 247 Ill. 289 (1910).

<sup>15</sup> 261 Ill. 413 (1914).



provide that a person should be ineligible to that office unless he had resided in the state for a certain period, more than one year.

An interesting case in this connection arose under the constitution of 1848. That instrument (article 7, section 6) provided that "the General Assembly shall provide by a general law, for a township organization, under which any county may organize whenever a majority of the voters of such county at any general election shall so determine". No provision was made in the constitution with reference to the abandonment of township organization by a county which had adopted the township system. The General Assembly passed a law providing that any county, which had adopted the township system, could abandon it by a vote of a majority of those participating in a special election. In holding that this act was void the court said: "Although the constitution makes no express provision for the abandonment of the system, when once adopted according to its provisions, we are not prepared to say that it may not reasonably be construed to allow the legislature to provide for its abrogation; but if they do so, it must be done by pursuing the same course and adopting the same guarantees, to protect the rights of all, which the constitution requires to be observed in the adoption of the system; that is to say, it must be done at a general election, and by a majority of the voters."<sup>16</sup>

These cases may suffice to indicate that qualifications must be made to the statement that the General Assembly has all powers not denied by the constitution. The real question is that as to what powers the Supreme Court will find to be denied by the language of the constitution. In some cases the court has construed constitutional language as containing no denial of power beyond the express language of the constitutional text, as for example, with respect to woman suffrage; in other cases the court has found limitations to exist by implications which are not within the express terms of the constitutional language, as in the cases of *Fergus v Russel* and *People v McCormick*.

**Delegation of legislative power.** The whole of the legislative power of the state is vested in the General Assembly and this power may not be delegated.<sup>17</sup> This, however, does not prevent the General Assembly from delegating to municipalities such legislative power as it may lawfully exercise for the government and regulation of local affairs.<sup>18</sup>

The General Assembly is the law-making power, but it may authorize others to do things which it might properly but cannot understandingly or advantageously do itself. So, the General Assembly may authorize a civil service commission to hold and conduct examinations to determine the fitness and competency of persons seeking employment by the state or its municipalities,<sup>19</sup> or authorize the factory inspector to prescribe the number, location, material, kind, and manner of construction of fire escapes.<sup>20</sup> The General Assembly may also authorize a board or commission to fix and regulate railroad rates.<sup>21</sup>

The General Assembly cannot delegate the power to determine what a law shall be, but may confer authority or discretion as to its execution. Legislative power does not mean that every act of the officers created by the General Assembly must be expressly prescribed by the law-making power. Thus, the General Assembly may grant power to the board of pardons to make rules and regulations for the administration of the parole law;<sup>22</sup> or give to the board of dental examiners the power to make

<sup>16</sup> *People v Couchman*, 15 Ill. 142 (1853).

<sup>17</sup> *People v Board of Election Commissioners*, 221 Ill. 9 (1906); *Rouse v Thompson*, 228 Ill. 522 (1907).

<sup>18</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917); *City of Clinton v Wilson*, 257 Ill. 580 (1913).

<sup>19</sup> *People v Kipley*, 171 Ill. 44 (1898).

<sup>20</sup> *Arms v Ayer*, 192 Ill. 601 (1901).

<sup>21</sup> *C. B. & Q. R. R. Co. v Jones*, 149 Ill. 361 (1894).

<sup>22</sup> *People v Roth*, 249 Ill. 532 (1911).

reasonable rules and regulations pertaining to the administration of the dentistry act;<sup>23</sup> or authorize the board of examiners of architects to revoke licenses of architects for gross incompetency or recklessness in the construction of buildings.<sup>24</sup>

While the General Assembly may permit the exercise of some discretion by an administrative agency with reference to the execution of a law, it cannot vest such an agency with an absolute or arbitrary discretion. A law which vests in the discretion of a public officer, unregulated by any rules or conditions, whether it shall be enforced or not, is void, as being an unconstitutional delegation of legislative power. Thus, a law which confers upon a public officer the power, in his discretion, to issue or revoke licenses or permits to engage in a certain business or calling, or to determine, in his discretion, whether or not the law shall be enforced, is unconstitutional, because it delegates legislative power to such officer.<sup>25</sup> (See discussion article 2, section 2, sub-heading "Arbitrary discretion").

And a law must be complete in all its terms and conditions when it leaves the General Assembly. The primary election law of 1905 was held void, because it gave the county central committee of each political party the power to determine whether candidates for county offices should be nominated at a primary election, or by delegates chosen at the primary election, and also because it gave the central committee power to determine whether the candidates for county offices should be nominated by a majority or plurality vote.<sup>26</sup> In the opinion of the court, the law was not complete when it left the General Assembly but delegated to the county central committee the power to determine what the law should be.

This section of the constitution does not prevent the General Assembly from passing a law, the ultimate operation of which may, by its own terms, be made to depend upon some contingency, such as the affirmative vote of the electors in a given district,<sup>27</sup> or upon the action of some municipality, commission or other public agency,<sup>28</sup> provided that the law when it leaves the General Assembly is complete. It must be borne in mind, however, that the power to determine the contingency upon which a law shall go into effect cannot be given to a private person or agency, but must be given, if at all, to the people, or a public agency or officer.<sup>29</sup> The Attorney General has held that the General Assembly may pass a law and make its effectiveness depend upon a state wide referendum.<sup>30</sup>

**Section 2.** An election for members of the General Assembly shall be held on the Tuesday next after the first Monday in November, in the year of our Lord one thousand eight hundred and seventy, and every two years thereafter, in each county, at such places therein as may be provided by law. When vacancies occur in either house, the Governor, or person exercising the powers of Governor, shall issue writs of election to fill such vacancies.

<sup>23</sup> *Kettles v People*, 221 Ill. 221 (1906).

<sup>24</sup> *Klafter v Board of Examiners*, 259 Ill. 15 (1913); see, also, *Block v People*, 239 Ill. 251 (1909) and *People v Heise*, 257 Ill. 554 (1913).

<sup>25</sup> *People v Kane* 288 Ill. 235 (1919); *Kenyon v Moore*, 287 Ill. 233 (1919); *Sheldon v Hoyne*, 261 Ill. 222 (1914); *Noel v People*, 187 Ill. 587 (1900); *Veto Messages*, 1919 p. 9.

<sup>26</sup> *People v Board of Election Commissioners*, 221 Ill. 9 (1906).

<sup>27</sup> *People v McBride*, 234 Ill. 146 (1908); *Chicago Terminal R. R. Co. v Greer*, 223 Ill. 104 (1906); *People v Reynolds*, 10 Ill. 1 (1848); *Report Attorney General* 1915, p. 464.

<sup>28</sup> *Schweiker v Husser*, 146 Ill. 399 (1893); *Home Insurance Co. v Swigert*, 104 Ill. 653 (1882).

<sup>29</sup> *Rouse v Thompson*, 228 Ill. 522 (1907).

<sup>30</sup> *Report Attorney General* 1915, p. 464.

The Attorney General in 1916 held that it is a matter of serious doubt whether the Governor has the power to determine that there is a vacancy in the General Assembly because of the lack of qualifications of an incumbent. The basis for this holding is that section 9 of article 4 of the constitution provides that each house shall be the judge of the qualifications of its members. The case presented to the Attorney General was as follows: A senator was elected judge of the municipal court of Chicago, qualified and entered upon his duties. Section 3 of article 4 of the constitution provides that no judge of any court shall be a member of the General Assembly. The question was whether or not the Governor could determine that this senator, having entered upon his duties as a judge of a court, was, under section 3 of article 4, no longer eligible to sit in the Senate, that his office was vacant, and that a special election should be called to fill the vacancy. The Attorney General expressed a serious doubt as to whether or not such action on the part of the Governor would not be in contravention to section 9 of article 4, which gives each house the right to determine the qualifications of its members.<sup>31</sup> (See discussion article 4, section 9.)

Section 3. No person shall be a Senator who shall not have attained the age of twenty-five years, or a Representative who shall not have attained the age of twenty-one years. No person shall be a Senator or a Representative who shall not be a citizen of the United States, and who shall not have been for five years a resident of this State, and for two years next preceding his election a resident within the territory forming the district from which he is elected. No judge or clerk of any court, Secretary of State, Attorney General, State's Attorney, recorder, sheriff, or collector of public revenue, member of either House of Congress, or person holding any lucrative office under the United States or this State, or any foreign government, shall have a seat in the General Assembly: Provided, that appointments in the militia, and the offices of notary public and justice of the peace, shall not be considered lucrative. Nor shall any person holding any office of honor or profit under any foreign government, or under the government of the United States, (except postmasters whose annual compensation does not exceed the sum of three hundred dollars) hold any office of honor or profit under the authority of this State.

Qualifications of members of the General Assembly. The General Assembly has no power to add to the qualifications of the members of that body as fixed by the constitution. For example, the constitution provides that no person shall be a member of the General Assembly who shall not have been for two years next preceding his election, a resident of the territory forming the district from which he is elected. The primary election act of 1905 provided that "in senatorial districts consisting of two counties, no more than two persons of the same political party . . . shall be nominated from any one county . . ." This provision was held void on the ground that, by requiring candidates to come from particular counties of the senatorial district, the provision of the constitution which provides only for residence within the senatorial district was violated.<sup>32</sup>

The question whether or not a member of the General Assembly may hold certain other offices in the state has never been presented to the Su-

<sup>31</sup> Report Attorney General 1916, p. 135.

<sup>32</sup> People v Board of Election Commissioners, 221 Ill. 9 (1906).

preme Court but has been passed on in one appellate court decision and in several opinions of the Attorney General. It has been held that a member of the General Assembly cannot hold the office of judge of the circuit court, or clerk of the municipal court, or mayor of a city, or delegate to a constitutional convention, or member of the board of supervisors.<sup>33</sup> He must resign from one or the other. If a member of the General Assembly shall qualify and enter upon the duties of an office incompatible with his office as a member of the General Assembly, he will be deemed to have resigned his seat in the General Assembly.<sup>34</sup> It has also been held by the Attorney General that a justice of the peace may not, during his term of office, hold a seat in the General Assembly.<sup>35</sup> This holding would seem to be erroneous for the reason that the above section of the constitution expressly provides that the office of justice of the peace shall not be considered a lucrative office such as will bar membership in the General Assembly. In the opinion of the Attorney General an appointment in the militia of the state does not render the appointee ineligible as a member of the General Assembly;<sup>36</sup> and a member of the state central committee, because his office is political and not governmental, may have a seat in the General Assembly.<sup>37</sup> (See discussion article 4, section 2.)

**Office under foreign or United States government.** A person who holds an office of honor or profit under the government of the United States, is not eligible as a director of the Illinois Institution for the deaf and dumb, a private corporation created by an act of the General Assembly in 1839.<sup>38</sup> Under a decision of the appellate court a postmaster receiving a salary of more than \$300 per year, cannot hold the office of member of the board of trustees of a village.<sup>39</sup> In the opinion of the Attorney General a state's attorney cannot hold the office of member of Congress, and neither a postmaster receiving a salary of more than \$300 per year, nor a railway mail clerk, may hold the office of town clerk.<sup>40</sup> Acceptance of a commission in the army of the United States by the Lieutenant Governor or a state's attorney would, in the view of the Attorney General, operate to vacate their offices.<sup>41</sup>

**Section 4.** No person who has been, or hereafter shall be convicted of bribery, perjury or other infamous crime, nor any person who has been or may be a collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the General Assembly, or to any office of profit or trust in this State.

A person is not a defaulter or guilty of withholding public funds unless he has been adjudged guilty by a court or a competent authority. Until there has been a finding by a court, or other legal authority, that a person is a defaulter he may, if duly elected or appointed and otherwise qualified, hold a public office.<sup>42</sup>

<sup>33</sup> Report Attorney General 1917-18, p. 755; *People v Haas*, 145 Ill. App. 283 (1908); Report Attorney General 1914, p. 1175; Opinion of Attorney General, March 1, 1919; Report Attorney General 1914, p. 1177.

<sup>34</sup> *People v Haas*, 145 Ill. App. 283 (1908).

<sup>35</sup> Report Attorney General 1914, p. 1173.

<sup>36</sup> Report Attorney General 1916, p. 285.

<sup>37</sup> Report Attorney General, 1916, p. 333.

<sup>38</sup> *Dickson v People*, 17 Ill. 191 (1855).

<sup>39</sup> *People v Blake*, 144 Ill. App. 246 (1908).

<sup>40</sup> Report Attorney General 1915, pp. 785, 786, 788, 791; 1914, p. 1162.

<sup>41</sup> Report Attorney General 1917-18, pp. 757, 800, 811.

<sup>42</sup> *Cawley v People*, 95 Ill. 249 (1880).

Section 5. Members of the General Assembly, before they enter upon their official duties, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of Illinois, and will faithfully discharge the duties of Senator (or Representative) according to the best of my ability; and that I have not, knowingly or intentionally, paid or contributed anything, or made any promise in the nature of a bribe, to directly or indirectly influence any vote at the election at which I was chosen to fill the said office, and have not accepted, nor will I accept or receive directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence I may give or withhold on any bill, resolution or appropriation, or for any other official act." This oath shall be administered by a judge of the supreme or circuit court in the hall of the house to which the member is elected, and the Secretary of State shall record and file the oath subscribed by each member. Any member who shall refuse to take the oath herein prescribed shall forfeit his office, and every member who shall be convicted of having sworn falsely to or of violating, his said oath, shall forfeit his office and be disqualified thereafter from holding any office of profit or trust in this State.

(See article 5, section 25.)

Section 6. The General Assembly shall apportion the State every ten years, beginning with the year one thousand eight hundred and seventy-one, by dividing the population of the State, as ascertained by the federal census, by the number fifty-one, and the quotient shall be the ratio of representation in the Senate. The State shall be divided into fifty-one senatorial districts, each of which shall elect one senator, whose term of office shall be four years. The Senators elected in the year of our Lord one thousand eight hundred and seventy-two, in districts bearing odd numbers, shall vacate their offices at the end of two years, and those elected in districts bearing even numbers, at the end of four years; and vacancies occurring by the expiration of term shall be filled by the election of senators for the full term. Senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and contain as nearly as practicable an equal number of inhabitants; but no district shall contain less than four-fifths of the senatorial ratio. Counties containing not less than the ratio and three-fourths, may be divided into separate districts, and shall be entitled to two Senators, and to one additional senator for each number of inhabitants equal to the ratio, contained by such counties in excess of twice the number of said ratio.

The question whether the constitutional requirements with reference to compactness of territory and equality of population in senatorial districts have been applied at all, is one which the courts may finally determine. If it is clear that an apportionment act of the General Assembly does not take into consideration those requirements, the act will be held void. On the other hand, if it is apparent that those requirements were taken into consideration, the act will be held valid even though the nearest practicable approximation to perfect compactness of territory and equality of population has not been attained. Accordingly, an act which observed the senatorial ratio required by the constitution, but which provided for some senatorial districts having a population of 25,000 more than others, was sustained because the court was of the opinion that the requirements of compactness of territory and equality of population had not been completely ignored.<sup>43</sup> (See discussion article 6, section 5, sub-heading, "Changes in Supreme Court districts").

The General Assembly can make but one apportionment in each ten year period following a Federal census, but more than one apportionment may be made in a period of ten years. For example there was a Federal census in 1890. In 1893, the General Assembly passed an apportionment act. In 1898, the General Assembly passed another apportionment act. This act was held void because, in the opinion of the Supreme Court, the General Assembly, under this section, can apportion but once in each ten year period after a census, and having apportioned the state in 1893, it could not do so again in 1898.<sup>44</sup> In 1900, there was another census, and in 1901 the General Assembly passed an apportionment act. It was contended that the act of 1901 was void, because it was passed less than ten years after the adoption of the act of 1893, but the act of 1901 was upheld.<sup>45</sup>

There has been no apportionment since 1901, although the constitution expressly provides that the state shall be apportioned every ten years. (See Constitutional Convention Bulletin No. 8).

Sections 7 and 8. The House of Representatives shall consist of three times the number of the members of the Senate, and the term of office shall be two years. Three representatives shall be elected in each Senatorial district at the general election in the year of our Lord one thousand eight hundred and seventy-two, and every two years thereafter. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected.<sup>46</sup>

<sup>43</sup> People v Thompson, 155 Ill. 451, (1895); see, also, People v Carlock 198 Ill. 150 (1902).

<sup>44</sup> People v Hutchinson, 172 Ill. 486 (1898).

<sup>45</sup> People v Carlock, 198 Ill. 150 (1902).

<sup>46</sup> Under the terms of section 12 of the schedule, original sections 7 and 8 of this article were to be eliminated if the section relating to minority representation, which was submitted to a separate vote, was adopted by the voters. The separate section was adopted and accordingly replaced original sections 7 and 8, which were as follows:

#### REPRESENTATIVE.

"Section 7. The population of the State, as ascertained by the Federal census, shall be divided by the number one hundred and fifty-three, and the quotient shall be the ratio of representation in the House of Representatives. Every county or district shall be entitled to one representative, when its population is three-fifths of the ratio; if any county has less than three-fifths of the ratio, it shall be attached to the adjoining county having the least population, to which no other county has for the same reason been attached, and the two shall constitute a separate district. Every county or district having a population

In general. The provisions of the constitution relating to minority representation give the voter the right to cast three votes for one candidate for representative in the General Assembly, one vote for each of three candidates, one and one-half votes for each of two candidates, or one vote for one candidate and two votes for another.<sup>47</sup>

In *People v Nelson*,<sup>48</sup> it was contended that since the constitution expressly provided for cumulative voting in only two instances, (article 4, sections 7, 8; article 11, section 3) this was, in effect, a denial of power to the General Assembly to provide for cumulative voting in any other kind of an election. The court, however, refused to uphold the contention, and sustained an act of the General Assembly providing for cumulative voting in elections for drainage trustees.

Primary elections. The principal difficulty with reference to the provisions relating to minority representation has arisen in connection with the primary election laws. The primary election law of 1906 provided for the nomination in the primary election of only one candidate for representative in the General Assembly by each political party. If a political party desired to place more than one candidate in the field, the other candidate or candidates could be nominated only by convention. The act of 1906 was held void on the ground that it was in conflict with sections 7 and 8 of article 4. "The right to nominate candidates for representative in the General Assembly is as important a right to the voter as the right to vote for said candidates after they are nominated and is of the same character, and if the constitution, as it does, confers upon the voter the right to vote for one, two or three candidates for representative in the General Assembly, any primary election law, to be valid, which provides for the nomination of candidates for representative in the General Assembly, must give the voter the right to participate in the selection of all candidates of his party for representative in the General Assembly which are to be nominated by his party."<sup>49</sup>

The primary election act of 1908 authorized the senatorial committee of each political party to determine the number of candidates of its party to be nominated in its district for representative in the General Assembly and provided that the voter could cast one vote for each of as many candidates as were to be nominated in accordance with the determination of the senatorial committee. If the committee determined upon one candidate, the voter could vote for only one candidate. If the committee decided to have two candidates, the voter could cast one vote each for two candidates. This act was held void because it deprived the voter of his right to cumulate his votes.<sup>50</sup>

not less than the ratio and three-fifths, shall be entitled to two representatives, and for each additional number of inhabitants, equal to the ratio, one representative. Counties having over two hundred thousand inhabitants may be divided into districts, each entitled to not less than three nor more than five representatives. After the year one thousand eight hundred and eighty, the whole population shall be divided by the number one hundred and fifty-nine, and the quotient shall be the ratio of representation in the House of Representatives for the ensuing ten years, and six additional representatives shall be added for every five hundred thousand increase of population at each decennial census thereafter, and be apportioned in the same manner as above provided.

"Section 8. When a county or district shall have a fraction of population above what shall entitle it to one representative, or more, according to the provisions of the foregoing section, amounting to one-fifth of the ratio, it shall be entitled to one additional representative in the fifth term of each decennial period; when such fraction is two-fifths of the ratio, it shall be entitled to an additional representative in the fourth and fifth terms of said periods; when the fraction is three-fifths of the ratio, it shall be entitled to an additional representative in the first, second and third terms, respectively; when the fraction is four-fifths of the ratio, it shall be entitled to an additional representative in the first, second, third and fourth terms, respectively."

<sup>47</sup> *People v Taylor*, 257 Ill. 192 (1913).

<sup>48</sup> 133 Ill. 565 (1890).

<sup>49</sup> *Rouse v Thompson*, 228 Ill. 522 (1907).

<sup>50</sup> *People v Strassheim*, 240 Ill. 279 (1909).

In *People v Deneen*,<sup>51</sup> the act of 1910 relating to the nomination of members of the General Assembly was under consideration. Section 11 of that act is as follows: "At least thirty-three (33) days prior to the date of the April primary the senatorial committee of each political party shall meet and by resolution fix and determine the number of candidates to be nominated by their party at the primary for representative in the General Assembly. A copy of said resolution, duly certified by the chairman and attested by the secretary of the committee, shall, within five days thereafter, be filed in the office of the Secretary of State, and in the office of the county clerk of each county in the senatorial district. In all primaries for the nomination of candidates for representatives in the General Assembly each qualified primary elector may cast three votes for one candidate, or may distribute the same or equal parts thereof among two candidates or three candidates, as he shall see fit. And the said candidate or candidates for nomination highest in votes shall be declared nominated for the office to be filled." The democratic senatorial committee of a certain senatorial district decided that the democratic party should have but one candidate for representative in the General Assembly from that district. In the primary election held subsequent to this action by the democratic senatorial committee, one Espey received the third highest number of democratic votes. The state canvassing board refused to certify his name as a democratic candidate from that district. He, thereupon, filed in the Supreme Court an original petition for a writ of *mandamus* to compel the board to certify him as one of the democratic nominees whose name should be placed on the official ballot at the next election. By the decision of a divided court the writ was refused.

Three judges held that section 11 was unconstitutional because it was an attempt by the General Assembly to confer upon a senatorial committee the power to fix and determine the number of candidates for representatives to be nominated by a political party in a senatorial district, thus depriving the voters of their constitutional right to cast three votes for one candidate or to distribute their votes among two or three candidates. These judges were also of the opinion that, if section 11 were construed as not giving power to the senatorial committee to determine the number of candidates of the party, but merely empowering the committee to make a declaration of party policy which would not be binding upon the voters, it was void, because it would nullify the constitutional guaranty of minority representation. They held that, if the electors were at liberty to nominate a greater number of candidates than had been determined upon by the committee, and if in all districts where three candidates were voted for by the qualified electors of each political party, the names of three candidates were required to be placed on the official ballot, the practical effect would be that each political party in each senatorial district would have three candidates in the field and "if each party nominated three candidates, it would frequently, if not generally, happen that the dominant party in a senatorial district would elect three candidates and the minority party would be without representation." Being of the opinion that section 11 was unconstitutional, these judges held that the writ of *mandamus* should not issue.

A fourth judge concurred in the view that the writ of *mandamus* should be denied, but his opinion was based on an entirely different ground. He agreed that if the power of the senatorial committee under section 11 was that of merely making a declaration of party policy, which was not binding on the voters, then the section was unconstitutional, because it would nullify the constitutional guaranty of minority representation. But he was of the opinion that there was no constitutional limitation on the power of the General Assembly to empower the senatorial committee to determine the number of candidates of its party in its senatorial district. He held that a political party has the right to determine the number of its candidates. "The right to cumulate his vote on the question of the election of repre-

<sup>51</sup> 247 Ill. 289 (1910).



representatives in the General Assembly, is a right secured to the individual voter, while the right of minority representation is a right secured to political parties . . . . If the party decides to nominate one candidate for representative in the General Assembly and each member of such party has the right to give one candidate three votes, or if his party decides to nominate two or three candidates and he has the right to divide his three votes between such candidates . . . . he has not been deprived of any of his constitutional rights . . . .”

The other three judges held that section 11 was constitutional, but that the power of the senatorial committee was only that of declaring a party policy. It was their view that if the committee decided on one or two candidates, but the voters voted for three or more candidates, then the names of the three candidates receiving the highest number of votes must go on the official ballots for use in the election, and that the effect of this would not be to nullify the plan for minority representation. These judges held that the writ of *mandamus* should issue.

The different views of the judges makes it difficult to determine the full purport of the decision in *People v Deneen*. The court was definitely of the opinion that the General Assembly has no power to pass a law, the effect of which will be to nullify the constitutional provisions concerning minority representation. This seems to be the only point on which at least four judges agreed. The effect of the decision, however, has been to sustain the act of 1910. That act is still in force and nominations of candidates for representatives in the General Assembly are being made in accordance with the views of the fourth judge.

(For a discussion of the history and working out of the provisions relating to minority representation, see *Constitutional Conventions in Illinois*, Second Edition p. 26; *Constitutional Convention Bulletin No. 8*).

**Section 9.** The sessions of the General Assembly shall commence at twelve o'clock noon, on the Wednesday next after the first Monday in January, in the year next ensuing the election of members thereof, and at no other time, unless as provided by this Constitution. A majority of the members elected to each house shall constitute a quorum. Each house shall determine the rules of its proceedings, and be the judge of the election, returns and qualifications of its members, shall choose its own officers; and the Senate shall choose a temporary President to preside when the Lieutenant Governor shall not attend as President or shall act as governor. The Secretary of State shall call the House of Representatives to order at the opening of each new Assembly, and preside over it until a temporary presiding officer thereof shall have been chosen and shall have taken his seat. No member shall be expelled by either house, except by a vote of two-thirds of all the members elected to that house, and no member be twice expelled for the same offense. Each house may punish by imprisonment any person, not a member, who shall be guilty of disrespect to the house by disorderly or contemptuous behavior in its presence. But no such imprisonment shall extend beyond twenty-four hours at one time, unless the person shall persist in such disorderly or contemptuous behavior.

The Supreme Court has never been called upon to construe this section of the constitution. It has been interpreted, however, by the appellate court

and the Attorney General. Each house of the General Assembly is the sole judge of the qualifications of its members.<sup>52</sup> The right to a seat in either house of the General Assembly can be questioned only by the members of that house.<sup>53</sup> A majority of a quorum in either house may seat or unseat members as it sees fit, and its action is not subject to judicial review.<sup>54</sup> This, however, has been held not to deprive a court of the power to determine whether or not a member of the General Assembly has resigned. Thus in *People v Haas*,<sup>55</sup> a senator was elected clerk of the municipal court of the city of Chicago and entered upon his duties as clerk and the question presented was whether or not a writ of *mandamus* should issue against the county clerk of Cook County to compel that official to notify the Governor that there was a vacancy in the senate. The writ was awarded, the appellate court holding that, while the senate was the sole judge of the qualifications of its members, the courts could, nevertheless, determine whether or not a member of the General Assembly had resigned, and in view of the fact that section 3 of article 4 provides that no clerk of a court shall have a seat in the General Assembly, it was clear that the senator in accepting the office of clerk of the municipal court, resigned his seat in the senate. On the other hand, however, the Attorney General, in 1916, ruled that it was a matter of serious doubt whether or not the Governor had the power to determine that the seat of a senator, who was elected and qualified as a judge of the municipal court, was vacant, and that a special election to fill the vacancy should be called.<sup>56</sup> (See discussion article 4 section 2 and section 3, subheading, "Qualifications of members of the General Assembly.")

In 1915 the Attorney General rendered an opinion holding that the speaker of the house of representatives must be a member of that body.<sup>57</sup>

Section 10. The doors of each house and of committees of the whole shall be kept open, except in such cases as, in the opinion of the house, require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days, or to any other place than that in which the two houses shall be sitting. Each house shall keep a journal of its proceedings, which shall be published. In the Senate at the request of two members, and in the House at the request of five members, the yeas and nays shall be taken on any question, and entered upon the journal. Any two members of either house shall have liberty to dissent from and protest, in respectful language against any act or resolution which they think injurious to the public or to any individual, and have the reasons of their dissent entered upon the journals.

**Adjournment.** Neither house of the General Assembly can adjourn for more than two days without the consent of the other, and in the event of disagreement between the two houses as to the time of adjournment, the Governor, by virtue of the power conferred upon him by section 9 of article 5, "may, upon the same being certified to him by the house first moving the adjournment, adjourn the General Assembly to such time as he thinks proper, not beyond the first day of the next regular session." The Attorney

<sup>52</sup> Report Attorney General 1916, pp. 135, 178, 287; *People v Haas*, 145 Ill. App. 283 (1908).

<sup>53</sup> Report Attorney General 1912, pp. 662, 1356.

<sup>54</sup> Report Attorney General 1915, p. 455.

<sup>55</sup> 145 Ill. App. 283 (1908).

<sup>56</sup> Report Attorney General 1916, p. 135.

<sup>57</sup> Report Attorney General 1915, p. 144.

General has held that after the existence of a disagreement has been properly certified to the Governor, the latter is then the sole judge as to whether or not a disagreement exists, and his decision is not subject to review.<sup>58</sup>

In the case of *People v Hatch*,<sup>59</sup> which arose under the constitution of 1848, it appeared that there were no entries on the journals of either house for a period of ten days, and the journals failed to show any resolution authorizing an adjournment for that period of time. The court held that in view of the provision of the constitution of 1848 forbidding adjournment by one house for more than two days without the consent of the other, it must be presumed that the General Assembly had adjourned *sine die* and could not again convene unless called into special session by the Governor.

**Journals.** The case of *People v. Hatch*, above referred to, holds that each house must keep a journal, for the reason that a legislative proceeding cannot be established without a journal. If there is no journal, there is no legislative body. The *Hatch* case arose under the constitution of 1848, but the provisions of the constitutions of 1848 and 1870 on this subject are similar.

The constitution does not require that the officers of the General Assembly shall sign the journal or that the copying clerk shall certify to the accuracy of his work.<sup>60</sup>

The journals must show that every constitutional requirement in connection with the passage of a bill, has been complied with; otherwise, the bill will be void. In some instances, however, compliance with a constitutional requirement may be inferred from a recital in the journal. (For a more complete statement with reference to this question, see discussion article 4, section 13, subheading, "Necessity for journal entries")

**Section 11.** The style of the laws of this State shall be; "Be it enacted by the People of the State of Illinois, represented in the General Assembly."

A joint resolution cannot have the force of a law, because it does not have an enacting clause. Thus, a joint resolution which directed the commissioners of state contracts to purchase a certain number of books for distribution among the justices of the peace and township officers of the state, was held inoperative and void.<sup>61</sup> But an act consisting of several sections need not contain an enacting clause for each section. An enacting clause inserted just before the first section of an act, is no more a part of the first section than it is a part of the other sections.<sup>62</sup>

This section of the constitution was construed strictly by the Attorney General in 1910. In his judgment, a bill is unconstitutional if it contains an enacting clause which varies in any degree from the form specified in the constitution. Thus he held unconstitutional a bill with the following enacting clause: "Be it enacted by the People of the State of Illinois, represented in the *Forty-sixth* General Assembly".<sup>63</sup> (See discussion article 6, section 33.)

**Section 12.** Bills may originate in either house but may be altered, amended or rejected by the other; and on the final passage

<sup>58</sup> Report Attorney General 1912, p. 73.

<sup>59</sup> 33 Ill. 9 (1863).

<sup>60</sup> *Miller v Goodwin*, 70 Ill. 659 (1873).

<sup>61</sup> *Burritt v Commissioners of State Contracts*, 120 Ill. 322 (1887); see *Wenner v Thornton*, 98 Ill. 156 (1881).

<sup>62</sup> *Pierce v Vittum*, 193 Ill. 192 (1901).

<sup>63</sup> Report Attorney General 1910, p. 77.

of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of a majority of the members elected to each house.

**Yeas and nays.** While the constitution requires that the yeas and nays shall be entered on the journal on the final passage of a bill, the fact that the journal fails to state that there were no negative votes, will not render the bill unconstitutional, if the journal shows that it received a constitutional majority of votes. Under such circumstances, it will be presumed that there were no negative votes.<sup>64</sup>

(For a more complete statement with reference to the necessity for journal entries showing a compliance with constitutional requirements in connection with the passage of bills, see discussion article 4, section 13, subheading "Necessity for journal entries.")

**Separate vote on each bill.** This section does not require a separate vote on each section or provision of a bill. Thus, the bill providing for a system of hard roads which authorized an expenditure of several millions of dollars, and provided for a tax to defray the expenditures so authorized, is not unconstitutional because only one yea and nay vote was had thereon.<sup>65</sup>

**Concurrence by a majority elected.** If a bill which is passed by both houses, contains an amendment or a provision not concurred in by one house, it is unconstitutional. A bill cannot become a law without the concurrence of a majority of the members elected to each house.<sup>66</sup> However, it seems that this rule does not apply to titles of bills. On the theory that the title of a bill is not a part thereof but a mere convenience for the purposes of legislation, bills having titles which were not concurred in by a majority of the members elected to both houses, have been sustained.<sup>67</sup> For example, the house of representatives passed a bill entitled, "An Act to prevent the keeping of gaming houses." In the senate, the words, "and to prevent gaming," were added to the title. The house of representatives did not concur in the amendment to the title, but the bill was, nevertheless, sustained.<sup>68</sup>

What is a concurrence? It has been held that a concurrence may be had even though one house does not vote expressly on the question of passing the bill. In *People v Edmands*,<sup>69</sup> the facts were as follows: The house of representatives passed a bill. The senate adopted certain amendments to the bill and then passed the bill as amended. The house of representatives refused to concur in the senate amendments. The senate then receded from its amendments by a yea and nay vote of 30 to 2. The vote on the motion to recede was entered on the journals. Nothing more was done by either house with reference to the bill, and the bill, as it passed the house of representatives, was acted upon favorably by the Governor. The question presented was whether or not the bill as it passed the house of representatives was a valid law. The court held that it was valid on the ground that when the senate receded from the amendments by a yea and nay vote of more than a majority of the number of senators elected, the vote being entered on the journals, it evidenced an intention on the part of the sen-

<sup>64</sup> *People v Bowman*, 247 Ill. 276 (1910).

<sup>65</sup> *Mitchell v. Lowden*, 288 Ill. 327 (1919).

<sup>66</sup> *Veto Messages*, 1911, p. 16.

<sup>67</sup> *Larrison v P. A. and D. R. R. Co.*, 77 Ill. 11 (1875); *Johnson v People*, 83 Ill. 431 (1876).

<sup>68</sup> *Plummer v People*, 74 Ill. 361 (1874).

<sup>69</sup> 252 Ill. 108 (1911).

ate to pass the bill in the form that it passed the house of representatives, and that the vote on the motion to recede was, in effect, a vote by the senate on the final passage of the bill as it passed the house of representatives. Three judges, however, filed a vigorous dissenting opinion, on the ground, that there never was a vote on final passage in the senate and that, therefore, the bill as it passed the house of representatives never became a law. A similar situation arose in the case of *People v DeWolf*,<sup>70</sup> and the court reached an opposite conclusion, but in that case the motion to recede from amendments was adopted by the votes of less than a constitutional majority.

**Section 13.** Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill having passed both houses, shall be signed by the Speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act. And no act of the General Assembly shall take effect until the first day of July next after its passage, unless, in case of emergency, (which emergency shall be expressed in the preamble or body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct.

**Necessity for journal entries.** In some jurisdictions the journals cannot be resorted to for the purpose of showing that a bill duly signed by the presiding officers of the two houses of the legislative body was not passed in full compliance with the requirements of the constitution. The basis of this rule is that when a bill is signed by the presiding officers, they certify that all constitutional requirements have been complied with, and under such circumstances, compliance is conclusively presumed. The rule is well settled in Illinois, however, that the signing of a bill by the presiding officers of the two houses of the General Assembly does not raise a conclusive presumption as to its proper passage. The journals of the two houses may be consulted to ascertain whether or not constitutional requirements have been complied with in connection with the passage of bills, such as the requirements with reference to reading, printing, and yea and nay vote to be entered on the journal.<sup>71</sup> It is also well settled that the "parliamentary history of an act or bill in the legislative journals is the only evidence that is recognized by the courts in this state, and the journals cannot be aided or contradicted by other documents or evidence of any kind";<sup>72</sup> and that there is no necessity, in order to make the journals competent evidence, that they be signed by the presiding officers, or that the copying clerk certify as to the accuracy of his work.<sup>73</sup>

In the early case of *Spangler v Jacoby*,<sup>74</sup> which arose under the constitution of 1848, the court held that every constitutional requirement in

<sup>70</sup> 62 Ill. 253 (1871).

<sup>71</sup> *Spangler v Jacoby*, 14 Ill. 297 (1853); *Nieberger v McCullough*, 253 Ill. 312 (1912).

<sup>72</sup> *People v Brady*, 262 Ill. 578 (1914).

<sup>73</sup> *Miller v Goodwin*, 70 Ill. 659 (1873).

<sup>74</sup> 14 Ill. 297 (1853).

connection with the passage of a bill, must affirmatively appear from the journals to have been complied with, and in the event of the failure of the journals to show affirmatively a compliance with such requirements, it would be conclusively presumed that the bill was not passed in conformity with the constitution and was, therefore, unconstitutional. Some steps relating to the passage of bills are expressly required by the constitution to be entered on the journals. For example, the present constitution expressly provides that the yeas and nays vote on final passage shall be entered on the journals (article 4, section 12), but while the constitution requires that bills shall be read on three different days and shall be printed, together with all amendments, before final passage (article 4, section 13), it does not expressly require that the journals show the reading and printing of bills. The Spangler case made no distinction between these two classes of requirements. Seven years later, however, the court expressly held that only those acts in connection with the passage of bills which are by the constitution expressly required to be entered on the journals, such as the yeas and nays, need be entered on the journals, and that all other requirements will be presumed to have been complied with unless it appears affirmatively from the journals that there was no compliance with respect to them.<sup>75</sup> This later decision, however, was abandoned in the case of *Neiberger v McCullough*,<sup>76</sup> where the court held that unless it appears from the journals affirmatively that every constitutional requirement in connection with the passage of a bill, whether expressly required by the constitution to be entered on the journals or not, has been complied with, a conclusive presumption would arise that the bill was not passed in conformity with the constitution.

In 1915, the decision in the *Neiberger* case was modified. In *Dragovich v Iroquois Iron Company*,<sup>77</sup> the court held that "where the constitution does not expressly require a fact to be recorded on the journals, and it can be inferred from a recital in the journals that such fact existed or such step was taken, then the presumption will be indulged that such fact did exist or such step was taken," and this decision has been followed in the later cases.<sup>78</sup> In the *Dragovich* case a bill was amended in the house of representatives and the journal contained a statement that the amendments "were ordered printed and engrossed." This was the only entry in the journal concerning the printing of the amendments. The court held that it could be inferred from the entry "were ordered printed and engrossed", that this step had been taken. A somewhat similar situation is presented by the case of *People v Brady*.<sup>79</sup> There a bill was amended in the senate. The journal contained the following entry: "The bill having been printed was taken up and read at large a third time." The court held that the word "bill" as used in the journal entry, included amendments to the bill and that, therefore, the journal did show that the amendments were printed before final passage. However, if the journals show affirmatively that a certain constitutional requirement has not been complied with then the bill must be held not to have been passed in conformity with the constitution.<sup>80</sup>

The effect of these decisions is that (1) the journals are competent evidence to show that a bill was not passed in conformity with the constitution; (2) that no other evidence is admissible for that purpose; (3) that a step expressly required by the constitution to be entered on the journals must affirmatively appear from the journals to have been taken; and (4) that a step not expressly required by the constitution to be entered on the journals, will be presumed to have been taken, if there is a recital in the jour-

<sup>75</sup> *Board of Supervisors v People*, 25 Ill. 181 (1860).

<sup>76</sup> 253 Ill. 312 (1912); see, also, *McAuliffe v O'Connell*, 258 Ill. 186 (1913).

<sup>77</sup> 269 Ill. 478 (1915); see, also, *Chicago Telephone Co. v Northwestern Telephone Co.*, 199 Ill. 324 (1902).

<sup>78</sup> *People v LaSalle Street Bank*, 269 Ill. 518 (1915); *People v Board of Dental Examiners*, 278 Ill. 144 (1917).

<sup>79</sup> 262 Ill. 578 (1914).

<sup>80</sup> *People v Board of Dental Examiners*, 278 Ill. 144 (1917).

nals from which it may be inferred that the step was taken, and if the journals do not expressly show that the step was not taken.

The case of *People v Bowman*<sup>81</sup> raises some doubt as to the correctness of rule (3). The constitution expressly requires the yeas and nays vote on final passage to be entered on the journals (article 4, section 12). In that case a bill on final passage in the senate received 34 favorable votes, more than a constitutional majority. The journal failed to record any negative votes and failed to state that there were no negative votes. The court held, however, that the silence of the journal in that respect was evidence that there were no negative votes, and that the "effect of the record in the journal is that the bill was passed by a vote of thirty-four yeas and no nays."

**Reading.** Bills must be read on three different days in each house, and a failure to do so will render the bill unconstitutional.<sup>82</sup> This does not mean, however, that amendments to bills must be read on three different days in each house.<sup>83</sup> In *People v LaSalle Street Bank*,<sup>84</sup> however, the court, while holding that amendments to bills need not be read on three different days, intimates that if the amendments are not germane to the general subject of the bill as originally introduced, it might be necessary to read the bill as amended on three different days.

(For statement as to the necessity for journal entries showing compliance with constitutional requirement concerning reading, see discussion preceding sub-heading.)

**Printing.** Bills and amendments thereto must be printed before the vote is taken on final passage. Failure to comply with the constitution in this respect prevents the constitutional passage of a bill.<sup>85</sup> The rule with reference to printing applies to amendments contained in conference committee reports.<sup>86</sup> But the failure to print a conference committee amendment does not necessarily invalidate the whole bill. Unless the unprinted amendment and the remainder of the bill "are so connected and dependent upon each other that it cannot be presumed that the legislature would have passed the one without the other," only the amendment will be held void.<sup>87</sup>

This provision of the constitution, however, does not require the reprinting of a bill and amendments when it is returned to the house in which it originated for concurrence in amendments adopted by the other house. The constitutional provision is complied with when the bill and amendments thereto are printed before final passage in each house. If a bill which was properly printed in the senate before final passage in that branch of the General Assembly, is amended by the house of representatives and properly printed before final passage in the house of representatives, there is no need for reprinting the bill and the house amendments in the senate when the bill is returned to the senate for concurrence in the house amendments.<sup>88</sup>

(For statement as to the necessity for journal entries showing compliance with constitutional requirement concerning printing, see discussion preceding subheading, "Necessity for journal entries").

**Signatures of speakers.** The provision of the constitution requiring the signatures of the presiding officers is mandatory and not directory. Thus, a bill which is not signed by the Lieutenant Governor, the presiding officer or speaker of the senate, cannot become a law.<sup>89</sup>

<sup>81</sup> 247 Ill. 276 (1910).

<sup>82</sup> *I. C. R. R. Co. v People*, 143 Ill. 434 (1892); *People v Board of Dental Examiners*, 278 Ill. 144 (1917); Veto Message No. 12 (1899).

<sup>83</sup> *People v Wallace*, 70 Ill. 680 (1873); *People v Brady*, 262 Ill. 578 (1914).

<sup>84</sup> 269 Ill. 518 (1915).

<sup>85</sup> *Nieberger v McCullough*, 253 Ill. 312 (1912); *McAuliffe v O'Connell* 258 Ill. 186 (1913); *Richardson v Sears, Roebuck & Co.* 271 Ill. 325 (1916).

<sup>86</sup> *Nieberger v McCullough*, 253 Ill. 312 (1912).

<sup>87</sup> *People v LaSalle Street Bank*, 269 Ill. 518 (1915).

<sup>88</sup> *People v McWeeney*, 259 Ill. 161 (1913).

<sup>89</sup> *Lynch v Hutchinson*, 219 Ill. 193 (1906).

**Titles.** That part of section 13 of article 4 which will be considered in this sub-heading, is as follows: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." This constitutional limitation first made its appearance in the constitution of 1848 (article 3, section 23) but its application in the earlier constitution was limited to private and local laws. The purpose of the provision in the second constitution was to restrict the passage of private, local and special legislation. (See Constitutional Conventions in Illinois, Second Edition, pp. 14,18.) The same general rule of construction has been followed with reference to the two constitutional limitations, and for that reason, in the subsequent discussion, no mention will be made of the cases dealing with the provision of the constitution of 1848.

#### In General.

In most cases in which the validity of a statute is attacked on the ground that it violates this provision of the constitution, the basis of attack is that the body of the act contains provisions not covered by the title; that is, that the act contains a subject not expressed in the title. On this point the Supreme Court has held that an act does not contain a subject not expressed in the title "if all the provisions relate to the one subject indicated in the title and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view".<sup>90</sup> An act does not contain two subjects when all of its provisions are germane to its title. "Any matter or thing which may reasonably be said to be subservient to the general subject or purpose will be germane and may be properly included in the law."<sup>91</sup> "Every act must embrace but a single subject, but it may include other provisions not foreign to the general subject, which legitimately tend to accomplish the legislative purpose as to that subject. An act may contain many provisions and details for the carrying out of its purpose. The object of this provision of the constitution is to prevent the joining in one act of incongruous or unrelated matters. It was not its design to embarrass legislation by making laws unnecessarily restrictive in their scope and operation or to require that its title should set forth a detailed statement or index of the contents of the act."<sup>92</sup>

A provision authorizing a tax levy in an act entitled "An Act to revise the law in relation to firemen's pension funds," is germane to the title and is a subject expressed in the title.<sup>93</sup> Provisions prescribing the methods of assessing property and collecting taxes and fixing the tax rate are all included in the title, "An Act in regard to the assessment and collection of municipal taxes."<sup>94</sup> Provisions establishing a civil service system for counties of a certain class are germane to an act, the title of which is "An Act to revise the law in relation to counties."<sup>95</sup> The Criminal Code, "An Act to revise the law in relation to criminal jurisprudence," authorized a person losing money by gambling, or some third person, to sue for its recovery. It was contended that this provision of the Criminal Code related to civil suits and that the provision was not within the title, but the court held that it was a subject expressed in the title. The provision, in effect, prescribed a punishment for the gambler and, therefore, was within

<sup>90</sup> *Ritchie v People*, 155 Ill. 98 (1895); see, also, *Hudnall v Ham*, 172 Ill. 76 (1898); *Muel v People*, 198 Ill. 258 (1902); *People v Huff*, 249 Ill. 164 (1911); *Mitchell v Lowden*, 288 Ill. 327 (1919).

<sup>91</sup> *People v Sargent*, 254 Ill. 514 (1912); see, also, *People v Kirk*, 162 Ill. 138 (1896); *Boehm v Hertz*, 182 Ill. 154 (1899); *People v McBride*, 234 Ill. 146 (1908); *People v Price*, 257 Ill. 587 (1913); *People v Stokes*, 281 Ill. 159 (1917); *People v Ankrum*, 286 Ill. 319 (1919).

<sup>92</sup> *American Badge Co. v Lena Park Improvement Association*, 246 Ill. 589 (1910).

<sup>93</sup> *People v Huey*, 277 Ill. 561 (1917).

<sup>94</sup> *Manchester v People*, 178 Ill. 285 (1899).

<sup>95</sup> *Morrison v People*, 196 Ill. 454 (1902).



the meaning of the term "criminal jurisprudence."<sup>96</sup> And "An Act to provide for holding primary elections by political parties" may contain provisions for the election of managing committees for political parties, because the election of such committees is germane to the general subject expressed in the title.<sup>97</sup>

An Act entitled "An Act to provide for the holding of primary elections of delegates to nominating conventions" cannot contain a section providing for primary elections for candidates for office. Such a provision would constitute a subject not expressed in the title.<sup>98</sup> Provisions in an act, the title of which is "An Act providing for the payment by the County of Cook of further compensation to the State's Attorney of said county," depriving the State's Attorney of fees allowed him under another act, are unconstitutional, as being a subject not expressed in the title.<sup>99</sup> And a city cannot be given power to fix gas rates in an act bearing the title, "An Act in relation to gas companies" for that would be a subject not expressed in the title.<sup>1</sup>

The title of an act may be so restricted that it will not include a subject that might well have been included in a broader or more general title. Thus, an act entitled, "An Act to provide for the holding of primary elections of delegates to nominating conventions," was held not broad enough to include provisions authorizing the nomination of candidates for office in primary elections, although the court said that it would have been a simple matter to have framed a title which would have covered both the election of delegates to nominating conventions and the nomination of candidates for office. The court pointed out that while an act entitled, "An Act to define and punish larceny," could not include provisions relating to robbery, an act entitled, "An Act to revise the law in relation to criminal jurisprudence," would cover both larceny and robbery.<sup>2</sup>

A title, however, must not be so broad that it will not give a fair idea of the substance of the body of a bill. "The title to an act and the act must correspond, not literally but substantially, and while the title may be couched in general terms, to be sufficient it must fairly point out the subject matter of the act which is to follow it."<sup>3</sup> In other words, the subject of the act must be fairly expressed in the title. Thus, an act entitled, "An Act for the punishment of crimes against children," is unconstitutional, because "it does not contain an expression, even in the most general terms, of the body of the act . . . . One reading this title would have no conception of what might be expected in the body of the act."<sup>4</sup> Comprehensiveness in the title of an act is not objectionable, provided that it is "so framed and worded as fairly to apprise the legislators, and the public in general, of the subject matter of the legislation, so as to reasonably lead to an inquiry into the body of the bill."<sup>5</sup> Thus, the title of the Criminal Code, "An Act to revise the law in relation to criminal jurisprudence," is not objectionable because of its generality.<sup>6</sup>

If an act contains two distinct subjects, it is in violation of this constitutional provision. As has been suggested, the title of an act may be so restricted as to preclude the incorporation in the body of the act of provisions which might well have been included under a more general title. But an act cannot embrace two distinct subjects, irrespective of its title. Thus, an

<sup>96</sup> Larned v Tierman, 110 Ill. 173 (1884).

<sup>97</sup> People v Strassheim, 240 Ill. 279 (1909).

<sup>98</sup> Rouse v Thompson, 228 Ill. 522 (1907).

<sup>99</sup> Galpin v City of Chicago, 269 Ill. 27 (1915).

<sup>1</sup> Veto Message No. 3 (1874); see, also, Sutter v People's Gas Light Co., 284 Ill. 634 (1918); Bailey v People, 190 Ill. 28 (1901); Allardt v People, 197 Ill. 501 (1902); Kennedy v LeMoyné, 188 Ill. 255 (1900); Snell v City of Chicago, 133 Ill. 413 (1890); Leach v People 122 Ill. 420 (1887); People v Mellen 32 Ill. 181 (1863); Veto Messages 1919, p. 8.

<sup>2</sup> Rouse v Thompson, 228 Ill. 522 (1907).

<sup>3</sup> Rouse v Thompson, 228 Ill. 522 (1907).

<sup>4</sup> Milne v People, 224 Ill. 125 (1906).

<sup>5</sup> Milne v People 224 Ill. 125 (1906); People v Roth, 249 Ill. 532 (1911); Tarantina v L. & N. R. R. Co., 254 Ill. 624 (1912).

<sup>6</sup> Fuller v People, 92 Ill. 182 (1879).

act which conferred upon the city of Chicago the power and authority to sell surplus electricity and to fix the rates and charges for gas or electricity furnished to the people of that city by private individuals or corporations; was held void because it embraced two distinct subjects both of which were expressed in the title.<sup>7</sup> However, the mere fact that the title of an act is detailed, or in the nature of an index to the contents of the body of the act, does not necessarily mean that the act, even though it relates to and amplifies the details mentioned in the title, contains more than one subject. An act does not embrace two subjects merely because its subject matter is expressed in the title with more than necessary particularity; that is, each detail mentioned in such a title need not be construed as constituting a distinct subject in itself, if all the details have a reasonable relationship to one general subject. The motor vehicle law of 1911 contained the following title: "An Act defining motor vehicles and providing for the regulation of the same and of motor bicycles, and uniform rules regulating the use and speed thereof; prohibiting the use of motor vehicles without the consent of the owner and the offer or acceptance of any bonus or discount or other consideration for the purchase of supplies or parts for any such motor vehicle or for work or repairs done thereon by others, and defining chauffeurs and providing for the examination and licensing thereof, and to repeal certain acts therein named." It was contended that each clause of this title was a distinct subject and that since the body of the act dealt with all of the clauses, the act was void because it embraced more than one subject. The court, however, sustained the act. "The mere mentioning in the title of related particulars is not stating a generality of subjects. The act in question relates to one general subject [motor vehicles] and that subject is expressed perhaps, with unnecessary particularity in the title."<sup>8</sup>

What is the effect of including more than one subject in an act? If an act contains two subjects, only one of which is expressed in the title, the act is void only to the extent of the subject not contained in the title.<sup>9</sup> But if an act contains two subjects, both of which are expressed in the title, then the whole act is void. "The court being powerless to elect between the two subjects so as to preserve one while the other fails, the entire act must fall by reason of being in contravention of the constitutional limitation."<sup>10</sup>

If the title to an act expresses more than one subject, but the body of the act relates to only one subject, the subject expressed in the title and not embraced in the act may be regarded as surplusage. The constitutional prohibition against more than one subject is not directed against the title but is directed against the act.<sup>11</sup>

#### Amendatory Acts.

Much that has already been said with reference to titles of acts, applies to titles of acts which are expressly amendatory of existing acts. The subject matter of an express amendatory act must be germane to the title of the act amended. In other words, an act which expressly amends another act, may be as broad as the original act, and any provision that might have been inserted in the original act when it was passed, may be included in the amendatory act.<sup>12</sup> Apparently, however, this rule applies only in the event that the amendatory act purports to amend the whole of an existing act. If an act is entitled, "An Act to amend an act concerning local improvements," any provision may be included in the amendatory act which might have been inserted in the original act.<sup>13</sup> But if the act is entitled, "An Act to amend section 2 of 'An Act to revise the law in relation to township organization,'" its provisions must be germane not only to the title of

<sup>7</sup> *Sutter v People's Gas Light Co.*, 284 Ill. 634 (1918).

<sup>8</sup> *People v Sargent*, 254 Ill. 514 (1912).

<sup>9</sup> *People v Nelson*, 133 Ill. 565 (1890); *Ritchie v People*, 155 Ill. 98 (1895); *Sutter v People's Gas Light Co.*, 284 Ill. 634 (1918); but see *Galpin v City of Chicago*, 269 Ill. 27 (1915).

<sup>10</sup> *Sutter v People's Gas Light Co.*, 284 Ill. 634 (1918).

<sup>11</sup> *People v McBride*, 234 Ill. 146 (1908).

<sup>12</sup> *Sny Island Drainage District v Shaw*, 252 Ill. 142 (1911); *Gage v City of Chicago*, 203 Ill. 26 (1903).

<sup>13</sup> *Gage v City of Chicago*, 203 Ill. 26 (1903).

the original act, but to the subject matter of original section 2.<sup>14</sup> Provisions which are not germane to the title may not be included in an express amendatory act, but the title of the original act, if more restrictive than need be, may be amended so as to make it broad enough to include provisions which would not have been germane in the first instance.<sup>15</sup>

The title to an express amendatory act need not be absolutely correct. If the reference to the act to be amended is sufficient for identification, that is all that is required. The intention of the General Assembly will be given effect if possible.<sup>16</sup> Thus, "An Act to amend the Criminal Code," etc., is not void because there is no existing act entitled "Criminal Code." It is perfectly clear that the General Assembly referred to "An Act to revise the law in relation to criminal jurisprudence," which is generally spoken of as the Criminal Code.<sup>17</sup> References in a title to the paragraph or chapter numbers of Hurd's Revised Statutes instead of the correct section numbers of the act sought to be amended, will not defeat an amendatory act, if the intention to amend a certain act or sections of an act is clear.<sup>18</sup> And so an amendatory act is not unconstitutional merely because its title gives an incorrect date for the act to be amended. If it is clear what act was intended to be amended, the amending act will be given effect in accordance with the intention of the General Assembly.<sup>19</sup>

However, it has been held by the Attorney General that an amendatory act entitled, "An Act to amend sections 5 and 6 of an act entitled, 'An Act,' " etc., will not cover an amendment to section 3 of the act sought to be amended. The title expressly excludes the idea of amending section 3.<sup>20</sup> And, "An Act to amend section 2 of an act entitled 'An Act,' " etc., is a title not broad enough to permit the adding of additional sections to the old act.<sup>21</sup> Nor is it permissible, according to an opinion rendered by the Attorney General in 1908, in amending a section of an act which has already been amended, to refer in the title of the second amendatory act only to the title of the first amendatory act.<sup>22</sup>

An act which is independent in form but which will have the effect of amending an existing statute need not express in its title that its effect will be to amend an existing statute. It is only the subject of an act which is required by the constitution to be expressed in the title, and not the effect of the act.<sup>23</sup>

#### Municipal Ordinances.

The provisions of the constitution relating to titles of acts has no application to municipal ordinances.<sup>24</sup>

**Revival and amendment by reference.** The language of the constitution to be considered in this sub-heading is: "And no law shall be revived or amended by reference to its title only, but the law revived or the section amended, shall be inserted at length in the new act".

#### Revival by reference.

The provision of the constitution relating to the revival of a law by reference to its title only has caused no difficulty. There never has been

<sup>14</sup> *Donnersberger v Prendergast*, 128 Ill. 229 (1889); *Dolose v Pierce*, 124 Ill. 140 (1888).

<sup>15</sup> *People v City of Chicago*, 256 Ill. 558 (1912).

<sup>16</sup> *People v Braun*, 246 Ill. 428 (1910); *Otis v People*, 196 Ill. 542 (1902).

<sup>17</sup> *People v Van Bever*, 248 Ill. 136 (1911).

<sup>18</sup> *Patton v People*, 229 Ill. 512 (1907).

<sup>19</sup> *People v Penman*, 271 Ill. 82 (1915); *Patton v People*, 229 Ill. 512 (1907).

For other cases relating to this general subject see *School Directors v School Directors*, 73 Ill. 249 (1874); *L. & N. R. R. Co., v City of East St. Louis*, 134 Ill. 656 (1890); *Village of Melrose Park v Dunnebecke*, 210 Ill. 422 (1904).

<sup>21</sup> Report Attorney General 1899-1900, p. 86.

<sup>22</sup> Veto Message Senate Journal 1907-08, p. 1760.

<sup>23</sup> Report Attorney General 1908, p. 51.

<sup>24</sup> *Timm v Harrison*, 109 Ill. 593 (1884); *Mix v I. C. R. R. Co.*, 116 Ill. 502 (1886); *Board of Trade v Cowen*, 252 Ill. 554 (1911); but see Veto Message No. 8 (1893).

<sup>25</sup> *Harris v People*, 218 Ill. 439 (1905).

a direct violation of this provision. Governor Palmer held that if a law is repealed, the repeal of the repealing law will not have the effect of restoring the original law, because that would be to revive a law without setting it out at length as required by the constitution.<sup>25</sup> But if a law or a section of an act is repealed by an act which is subsequently held unconstitutional, the old law or section will stand unrepealed.<sup>26</sup>

#### Amendment by reference.

Prior to the adoption of the constitution of 1870, statutes were frequently amended by acts in substantially the following form: "Be it enacted, etc. That section 1 of an Act entitled, etc., is amended by inserting before the word 'county' the word 'city'." If the amendment desired was the substitution of one word for another or the striking out of a word or phrase, it was usually accomplished by an act of the same general character. Such an amendatory act was, of course, unintelligible unless compared with the section amended. The purpose of this constitutional provision was to remedy a defect in the form of express amendatory acts by requiring such acts to set forth at length the section or sections as amended. Confined to that purpose, this provision would have caused no difficulty. It makes trouble only when applied to acts which are independent in form and do not purport to amend existing laws.

From 1870 to 1900 the Supreme Court declined to apply this provision of the constitution to acts which were not expressly amendatory in form. In *People v Wright*,<sup>27</sup> the court in refusing to apply the provision to an independent act said: "The mischief designed to be remedied was, the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act, which purported only to insert certain words, or to substitute one phrase for another, in an act or section, which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act, complete in itself, is not within the mischief designed to be remedied by this provision, and can not be held to be prohibited by it without violating its plain intent." This rule was consistently adhered to<sup>28</sup> until the decision of the court in the case of *People v Knopf*.<sup>29</sup> In that case, the court laid down the rule that if an independent act constitutes a complete and entire act of legislation on the subject with which it purports to deal, it will be deemed not subject to the constitutional prohibition, notwithstanding the fact that it may repeal or modify existing laws, but if the purpose of the independent act is to amend the existing law or to add new provisions to the existing law, then it is clearly amendatory of statutes then in force, and the provisions of the laws then in force, which are so amended, must be set forth at length in the act as amended. This rule, however, was not applied in the *Knopf* case, although the independent act then under consideration was apparently in direct conflict with it. But in *People v Board of Election Commissioners*,<sup>30</sup> the court held void an independent act on the ground that it was not complete in itself, and that it amended an existing statute, without setting forth at length the provisions amended.

Since 1900, the court has applied this provision of the constitution to many independent acts. Some of the acts have been sustained;<sup>31</sup> others have

<sup>25</sup> Veto Message House Journal 1871, p. 484.

<sup>26</sup> *People v Butler Street Foundry and Iron Co.*, 201 Ill. 236 (1903).

<sup>27</sup> 70 Ill. 388 (1873).

<sup>28</sup> *Geisen v Heiderich*, 104 Ill. 537 (1882); *Timm v Harrison*, 109 Ill. 593 (1884); *School Directors v School Directors*, 135 Ill. 464 (1891); *People v Loefler*, 175 Ill. 585 (1898).

<sup>29</sup> 183 Ill. 410 (1900).

<sup>30</sup> 221 Ill. 9 (1906).

<sup>31</sup> *Erford v City of Peoria*, 229 Ill. 546 (1907); *People v Jones*, 242 Ill. 138 (1909); *Hollingsworth v C. & C. Coal Co.*, 243 Ill. 98 (1909); *People v Van Bever*, 248 Ill. 136 (1911); *People v C. W. & I. R. Co.*, 256 Ill. 388 (1912); *Scown v Czarnecki*, 264 Ill. 305 (1914); *People v Sweitzer*, 266 Ill. 89 (1914); *People v*

been held unconstitutional.<sup>32</sup> The decisions are based on the ground that the acts are or are not complete in themselves. In many cases it is difficult to distinguish between acts held void and acts held valid. In *People v Crossley*,<sup>33</sup> the court promulgated the following rules with reference to this matter: "(1) An Act which is complete within itself and does not purport, either in its title or in the body thereof, to amend or revive any other act, is valid even though it may by implication modify or repeal prior existing statutes. (2) An act, though otherwise complete within itself, which purports to amend or revive a prior statute by reference to its title only, and does not set out at length the statute amended or revived, is invalid, regardless of all other questions. (3) An Act which is incomplete in itself and in which new provisions are commingled with old ones, so that it is necessary to read the two acts together in order to determine what the law is, is an amendatory act and invalid under the constitution, and it is unimportant, in such case, that the act does not purport to amend or revive any other statute."

Unfortunately, these rules are not capable of definite application. Whether or not an act is a complete act of legislation on the subject with which it purports to deal, is, of course, a question for the court. No one can be sure that an independent act, which affects, in any degree, an existing act is not in violation of the constitutional provision until the court has determined that it is not.

An express amendatory act may violate this provision of the constitution, even though it sets forth in full the section amended or added. In *Galpin v City of Chicago*,<sup>34</sup> an act purported to add to an existing act a new section, to be known as section 9a. The additional section was set forth in full, but its effect was to amend section 8 of the original act, and the amendatory act was held unconstitutional because section 8 was not set forth in full in the new act.

An act may incorporate by reference, the provisions of another act, and this will not be in violation of this provision of the constitution. Thus, an act relating to the organization of high school districts may provide that the board of education for such districts shall be elected in accordance with the provisions of the general school law, a separate act.<sup>35</sup>

The constitution requires that an amended section shall be set out at length, as amended, but it does not require the original section to be set forth also in its original form in the amendatory act.<sup>36</sup> Nor does it require a repealed section to be set forth in full in the repealing act.<sup>37</sup>

In an opinion of the Attorney General it is held that an act designed to amend only a paragraph or subdivision of an existing section is void, unless the whole section, as amended, is set forth at length. The setting out of the

*School Directors*, 257 Ill. 172 (1913); *Holmgren v City of Moline*, 269 Ill. 248 (1915); *Mortell v Clark*, 272 Ill. 201 (1916); *Public Utilities Commission v C. & W. T. Ry. Co.*, 275 Ill. 555 (1916); *People v Day*, 277 Ill. 543 (1917); *People v Sweitzer*, 282 Ill. 171 (1918); *Monarch Discount Co., v C. & O. Ry. Co.*, 285 Ill. 233 (1918); *People v Ankrum*, 286 Ill. 319 (1919). See *City of Chicago v Reeves* 220 Ill. 274 (1906).

<sup>32</sup> *Badenoch v City of Chicago*, 222 Ill. 71 (1906); *O'Connell v McClenathan*, 248 Ill. 350 (1911); *Brooks v Hatch*, 261 Ill. 179 (1913); *People v Stevenson*, 272 Ill. 325 (1916); *Board of Education v Haworth*, 274 Ill. 538 (1916).

<sup>33</sup> 261 Ill. 78 (1913).

<sup>34</sup> 269 Ill. 27 (1915).

<sup>35</sup> *People v Stitt*, 280 Ill. 553 (1917); see, also, *People v McBride*, 234 Ill. 146 (1908); *People v Crossley*, 261 Ill. 78 (1913); *Zeman v Dolan*, 279 Ill. 295 (1917); but see *Veto Messages* 1917, p. 75.

<sup>36</sup> *Chambers v People*, 113 Ill. 509 (1885); *Manchester v People*, 178 Ill. 285 (1899); *City of Marion v Campbell*, 266 Ill. 256 (1915).

<sup>37</sup> *Freitag v Union Stock Yards*, 262 Ill. 551 (1914).

paragraph or subdivision, as amended, will not suffice. The constitution requires the section, as amended, to be inserted at length in the new act.<sup>38</sup>

(For further discussion of the subject of amendment by reference, see Constitutional Conventions in Illinois, Second Edition, pp. 112-125).

**Date of going into effect.** That part of section 13 of article 4 which will be considered in this subheading, reads as follows: "And no act of the General Assembly shall take effect until the first day of July next after its passage, unless, in case of emergency (which emergency shall be expressed in the preamble or body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct."

While a bill becomes a law as soon as it is signed by the Governor, it does not become effective until July 1 following its passage, unless it is passed as an emergency measure by a vote of two-thirds of all the members elected to each house,<sup>39</sup> and this rule applies to appropriation acts in just the same manner as it applies to other acts.<sup>40</sup> It has been held, however, that if an act not passed as an emergency measure, creates an office which is to be filled by the appointment of the Governor, the appointment by the Governor may be made at any time after he signs the bill creating the office, even though the date of the appointment is prior to July 1 following the passage of the bill.<sup>41</sup> And it has been held that persons, having notice of the passage and approval of an act, cannot evade its provisions by entering into a contract, forbidden by that act, during the period between the date of the approval of the act by the Governor and July 1 following its passage.<sup>42</sup>

There is one situation, however, in which a bill which is not passed as an emergency measure may go into effect as soon as it is acted upon favorably by the Governor, even though the date of the Governor's action is prior to July 1 following the passage of the bill. The constitution (article 6, section 13) provides that circuit court judicial districts shall be altered only at the session of the General Assembly next preceding the election of circuit judges. The constitution also provides that circuit judges shall be elected in June, 1873 and every six years thereafter (article 6, section 14). Since the General Assembly convenes in January of the odd numbered years (article 4, sections 2, 9), that body will always be in session in the same year as circuit judges are elected. The circuit court districts must be changed, if at all, at the session of the General Assembly beginning in January of the year in which circuit judges are elected.<sup>43</sup> If a law changing the boundaries of circuit court districts does not go into effect until July 1 following the passage thereof, it is clear that such boundaries can never be changed except by an emergency law, for the circuit judges must be elected in June. The constitution does not contemplate that a law changing the boundaries of circuit court districts shall be passed by an emergency vote of two-thirds of the members elected to each house of the General Assembly, and, therefore, such a law goes into effect as soon as it is acted upon favorably by the Governor, even though it is passed by less than a two-thirds vote.<sup>44</sup>

This clause of the constitution apparently does not prevent the General Assembly from providing in a law that it shall not go into effect until some time after July 1 following its passage. Thus, the public utilities act of 1913 and the motor vehicle act of 1919 both contain clauses providing that the acts shall not take effect until January 1 following passage. And the Attorney General has held that the General Assembly may pass a

<sup>38</sup> Veto Messages 1909, p. 43; see, also, Veto Message Senate Journal 1915, p. 1674.

<sup>39</sup> *People v Inglis*, 161 Ill. 256 (1896).

<sup>40</sup> Report Attorney General 1915, p. 195.

<sup>41</sup> *People v Inglis*, 161 Ill. 256 (1896).

<sup>42</sup> *Dunne v County of Rock Island*, 283 Ill. 628 (1918); see, also, Report Attorney General 1917-18, p. 872.

<sup>43</sup> *People v Rose*, 166 Ill. 422 (1897).

<sup>44</sup> *People v Rose*, 166 Ill. 422 (1897).

law and make its effectiveness subject to a referendum at an election to be held some months after July 1 following the passage of the law, without violating this provision of the constitution.<sup>45</sup> It should also be noted that under the terms of the constitution, itself, certain laws do not become effective until approved by a vote of the people. (See discussion article 4, section 18, subheading, "Debts"; see, also, discussion article 11, section 5, sub-heading, "Referendum requirements"; see, also, article 4, section 33; article 14, sections 1, 2; separate section relating to canals.)

This clause construed in connection with section 16 of article 5, has given rise to a rather serious controversy which has not been decided by the Supreme Court. Section 16 of article 5, after directing that all bills passed by the General Assembly, shall be presented to the Governor for his approval or veto, provides that "any bill which shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the General Assembly shall by their adjournment prevent its return, in which case it shall be filed with his objections in the office of the Secretary of State, within ten days after such adjournment, or become a law." The General Assembly passes a bill on June 25 and adjourns *sine die* on June 26. The Governor neither signs nor vetoes the bill and files it with the Secretary of State after July 1, but within ten days after June 26. When does such a law become effective? The Attorney General, in 1915, held that it became effective from the date on which the certificate of the Secretary of State was attached thereto.<sup>46</sup> Others, however, have contended that such a law does not become effective until July 1 following its filing with the Secretary of State. But suppose that the Governor neither signs nor vetoes the bill and files it with the Secretary of State on June 29. Does it then become an effective law on July 1? This, of course, depends on the question whether or not the Governor can waive the full ten days allowed him by the constitution for the consideration of bills. If he cannot waive the full ten days, then the bill cannot become effective until after July 1, although it is filed on June 29. In *People v Rose*,<sup>47</sup> the court held that the Governor cannot waive the full ten days, and this means ten days after the adjournment and not ten days after the passage of the bill, because the constitution provides that, in the event of the adjournment of the General Assembly before the expiration of the ten days, the Governor shall have ten days after adjournment. If this is true, it would seem that the Attorney General's opinion of 1915 is not necessarily correct. If such a bill cannot become a law until ten days after adjournment, even though filed with the Secretary of State before the expiration of the ten days, the Secretary of State cannot by immediately attaching his certificate to the bill, cause it to become an effective law before the expiration of the ten days. That would mean that a measure became effective before it became a law. (See discussion article 5, section 16, sub-heading, "Date of going into effect.")

**Section 14.** Senators and representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during the session of the General Assembly, 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.

This section of itself does not give the members of the General Assembly the right or privilege to be exempt from service of civil process,

<sup>45</sup> Report Attorney General 1915, p. 464.

<sup>46</sup> Report Attorney General 1915, p. 397; see, also Report Attorney General 1917-18, p. 573.

<sup>47</sup> 167 Ill. 147 (1897); but see *People v McCullough*, 210 Ill. 488 (1904).

but it does not deprive the General Assembly of the power to exempt from such service, by general law, members of the General Assembly and other persons in the same class.<sup>48</sup>

**Section 15.** No person elected to the General Assembly shall receive any civil appointment within this State from the Governor, the Governor and Senate, or from the General Assembly, during the term for which he shall have been elected; and all such appointments and all votes given for any such members for any such office or appointment, shall be void; nor shall any member of the General Assembly be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he shall have been elected, or within one year after the expiration thereof.

In the opinion of the Attorney General, a member of the General Assembly during his term of office cannot serve on a commission empowered to exercise executive functions.<sup>49</sup> Membership on such a commission, while it may not be an office,<sup>50</sup> is nevertheless, a civil appointment.<sup>51</sup> But in his view this section probably does not prohibit the General Assembly from creating by law, an investigation commission, composed of members of the General Assembly, charged with the duty of inquiring into certain subjects or questions and reporting the results of its investigations to the succeeding General Assembly, because such a commission in no proper sense exercises executive functions.<sup>52</sup>

In 1884 the Attorney General held that the appointment by the railroad and warehouse commission of a state senator as weigh-master was not in violation of the constitution.<sup>53</sup> It does not appear, however, that the Attorney General considered this section of the constitution in rendering his opinion. It seems that he merely held that such an appointment was not in violation of section 10 of article 5. (See article 4, section 25; article 8, section 4).

**Section 16.** The General Assembly shall make no appropriation of money out of the treasury in any private law. Bills making appropriations for the pay of members and officers of the General Assembly, and for the salaries of the officers of the government, shall contain no provision on any other subject.

**Private laws.** The provision relating to appropriations in private laws does not deprive the General Assembly of its power to pass acts making appropriations to pay just claims against the state. An act which does nothing more than make an appropriation to an individual to pay his claim against the state, does not violate this section of the constitution. "The meaning of the provision 'that the General Assembly shall make no appro-

<sup>48</sup> Phillips v Browne, 270 Ill. 450 (1915).

<sup>49</sup> Veto Messages 1907, p. 24; Report Attorney General 1915, p. 13.

<sup>50</sup> Bunn v People, 45 Ill. 397 (1867).

<sup>51</sup> Veto Messages Senate Journal (1st Spec. Session) 1915-16, p. 83.

<sup>52</sup> Report Attorney General 1915, p. 13.

<sup>53</sup> Report Attorney General 1884, p. 17.



appropriation of money out of the treasury in any private law' we do not understand to be that no appropriation can be made to a private person or individual, but it means that no appropriation for any purpose shall be made out of the treasury in any private law."<sup>54</sup>

**Pay of state officers.** Acts making appropriations for the salaries of members of the General Assembly and state officers, or any one of them, can contain no other provision. An act creating the office of state factory inspector, and prescribing the powers and duties of the office, cannot contain an appropriation to pay the salary of such officer, although it may contain an appropriation to defray the ordinary expenses of the office thus created.<sup>55</sup> And an act creating free employment agencies cannot contain an appropriation for the salaries of the superintendents of these agencies.<sup>56</sup> The prohibition as to other provisions in an act making an appropriation for the pay of state officers applies to appropriations for other purposes just as it does to any other substantive legislation. An act making an appropriation for the salaries of state officers cannot contain appropriations for the wages of state employees, or for the operating expenses of any state institution, and an act making appropriations for the ordinary and contingent expenses of the state government cannot include appropriations for the salaries of state officers.<sup>57</sup>

This provision of the constitution has caused considerable difficulty in making appropriations. It is oftentimes very difficult to determine whether a person engaged in the state service is an officer or employee. The constitution (article 5, section 24) defines an office as a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed, and an employment as an agency for a temporary purpose, which ceases when that purpose is accomplished. The Supreme Court in *Fergus v Russel*<sup>58</sup> lays down the rules by which it may be determined whether a person in the state service is an officer or employee, but the rules add little, if anything, to the constitutional definition.<sup>59</sup> (See discussion article 5, section 24, sub-heading, "Salaries of state officers.")

What is the effect of including other provisions in an act making appropriations for one or more state officers? If the appropriations are merely incidental to the other provisions, then only the appropriations are void.<sup>60</sup> If the main purpose of the bill is to make appropriations for state officers, then the other provisions are void and the appropriations for state officers will stand.<sup>61</sup> However, if the title of such an act expresses both subjects, the whole act will fall, because it will then violate the constitutional provision (article 4, section 13) relating to titles.<sup>62</sup>

A question sometimes arises as to whether or not an act dealing with other substantive legislation makes an appropriation for the salary of a state officer. Section 11 of the parole law of 1899 provided as follows. "There shall be allowed to each member of the board of pardons the sum of \$1,500 per year to compensate him for services performed under this act, said

<sup>54</sup> *Fergus v Russel*, 277 Ill. 20 (1917).

<sup>55</sup> *Ritchie v People*, 155 Ill. 98 (1895).

<sup>56</sup> *Mathews v People*, 202 Ill. 389 (1903); see, also, *People v Olson*, 280 Ill. 610 (1917); Report Attorney General 1910, pp. 195, 234; 1912, p. 1013; 1914, p. 285.

<sup>57</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>58</sup> 270 Ill. 304 (1915). The opinion of the Supreme Court in this case can be better understood by referring to the opinion of the lower court in the same case. The opinion of the lower court may be found in the Report of the Attorney General 1916 pp. 16-24.

<sup>59</sup> See Report Attorney General 1915, p. 47; *Bunn v People*, 45 Ill. 397 (1867); see, also, *State Board of Agriculture v Brady*, 266 Ill. 592 (1915); *Illinois Farmers' Institute v Brady*, 267 Ill. 98 (1915).

<sup>60</sup> *Ritchie v People*, 155 Ill. 98 (1895); *Mathews v People*, 202 Ill. 389 (1903); *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>61</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>62</sup> *Ritchie v People*, 155 Ill. 98 (1895); *People v Joyce*, 246 Ill. 124 (1910); *People v Olson*, 280 Ill. 610 (1917).

sum to be payable monthly on certificate of the board approved by the Governor, and payable out of any money in the treasury not otherwise appropriated." It was contended that this was an appropriation for the salary of a state officer, but the court held that section 11 was merely a direction and not an appropriation.<sup>63</sup> Three judges dissented from this view, however, on the ground that it was in conflict with the decision in *Mathews v People*.<sup>64</sup>

This section of the constitution applies only to appropriations payable out of the state treasury. It does not apply to appropriations made by a municipality.<sup>65</sup>

**Section 17.** No money shall be drawn from the treasury except in pursuance of an appropriation made by law, and on the presentation of a warrant issued by the Auditor thereon; and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The Auditor shall, within sixty days after the adjournment of each session of the General Assembly, prepare and publish a full statement of all money expended at such session, specifying the amount of each item, and to whom and for what paid.

**Appropriations by law.** Money cannot be withdrawn from the treasury under a joint resolution.<sup>66</sup> Money belonging to the state, no matter how acquired, whether as fees for services rendered by the state or otherwise, must be paid into the state treasury and can be withdrawn only in pursuance of an appropriation made by law. Fees collected by a state officer for services rendered by him as such officer cannot be expended by him for the maintenance and operation of his office but must be paid into the state treasury.<sup>67</sup> Money paid into the state treasury as a result of an error cannot, in the opinion of the Attorney General, be refunded except under an appropriation made by law.<sup>68</sup> And it has also been held by the Attorney General that money directed to be paid into the state treasury under an Act of Congress, can be withdrawn from the treasury only under an appropriation made by law, even though the money must be used for a specific purpose.<sup>69</sup>

**Auditor's warrant.** A provision of a statute authorizing the payment of money out of the state treasury on the warrant of a county judge is void.<sup>70</sup> Money can be withdrawn from the treasury only on the warrant of the Auditor of Public Accounts.

The Auditor of Public Accounts is the official examiner of the accounts and claims against the state, and "it is not within the power of the General Assembly to deprive the Auditor of Public Accounts of the power conferred upon him by the constitution to audit claims and charges against the state created in pursuance of an appropriation made by law."<sup>71</sup> If a sum of money is appropriated to a state agency, it has no right to demand that the Auditor of Public Accounts issue a warrant for the total amount payable to that

<sup>63</sup> *People v Joyce*, 246 Ill. 124 (1910).

<sup>64</sup> 202 Ill. 389 (1903).

<sup>65</sup> *City of Chicago v Wolf*, 221 Ill. 130 (1906).

<sup>66</sup> *Burritt v Commissioners of State Contracts*, 120 Ill. 322 (1887).

<sup>67</sup> *Whittemore v People*, 227 Ill. 453 (1907); *Board of Trade v Cowen*, 252 Ill. 554 (1911); *People v Sargent*, 254 Ill. 514 (1912); *Report Attorney General 1912*, pp. 929, 1013.

<sup>68</sup> *Report Attorney General 1910*, p. 196; 1914; p. 224.

<sup>69</sup> *Report Attorney General 1914*, p. 194.

<sup>70</sup> *People v. Evans*, 247 Ill. 547 (1910).

<sup>71</sup> *People v. Brady*, 277 Ill. 124 (1917).

agency. That would deprive the Auditor of his right to audit all claims against the state. The agency may incur obligations, and if approved by the Auditor, it will be his duty to issue his warrants against the appropriation for the payment thereof. But the General Assembly may provide that vouchers against appropriations shall be approved by the Governor, or some other officer, before being submitted to the Auditor for the latter's approval, and this in no way interferes with the power of the Auditor to audit all bills before the payment thereof by the state.<sup>72</sup>

**Diversion of appropriations.** An appropriation cannot be diverted by a joint resolution of the General Assembly,<sup>73</sup> and this clause, while it relates to the diversion of an appropriation by a joint or separate resolution, has been construed by the Attorney General to prevent the use of money for a purpose other than that for which the money was appropriated. Thus, an appropriation for \$200 for a secretary, cannot be used for any purpose except that of paying the salary of a secretary.<sup>74</sup>

Section 18. Each General Assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two-thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the State treasury, from funds belonging to the State, shall end with such fiscal quarter: Provided, the State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate two hundred and fifty thousand dollars; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other purpose; and no other debt except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war, (for payment of which the faith of the State shall be pledged), shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. The General Assembly shall provide for the publication of said law for three months, at least, before the vote of the people shall be taken upon the same; and provision shall be made, at the time, for the payment of the interest annually, as it shall accrue by a tax levied for the purpose, or from other sources of revenue; which law, providing for the payment of such interest by such tax, shall be irrevocable until such debt be paid: And, provided, further, that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted.

<sup>72</sup> *People v Lowden*, 285 Ill. 618 (1918).

<sup>73</sup> *Burritt v Commissioners of State Contracts*, 120 Ill. 322 (1887).

<sup>74</sup> Report Attorney General 1917-18, p. 40; 1914, p. 741.

**Appropriations for expenses of government.** It is the duty of the General Assembly to make appropriations for the expenses of the government of the state. A state officer cannot incur obligations beyond the amount of appropriations made for his office, and pay them out of fees collected by his office.<sup>75</sup>

**Increasing the aggregate amount of appropriations.** Appropriations made at a special session of the General Assembly obviously have the effect of increasing the aggregate amount of appropriations made at the preceding regular session of the General Assembly, and, in the opinion of the Attorney General, bills making such appropriations must, therefore, be passed by a two-thirds vote.<sup>76</sup> Under the same reasoning all deficiency appropriation bills must be passed by a two-thirds vote.

**Exceeding the revenue.** The word "revenue" as used in this section includes all sources of revenue, and is not limited to revenue raised by taxation.<sup>77</sup>

Appropriations must be for a specific sum; otherwise it would be impossible to ascertain whether or not the aggregate amount of appropriations exceeded the amount authorized to be raised. Thus, an appropriation to the State Treasurer of "such sums as may be necessary" to refund taxes, is void.<sup>78</sup> Moreover, section 16 of article 5 expressly requires appropriations to be made in specific sums. (See discussion article 5, section 16, subheading, "Necessity for itemization").

**Lapse of appropriations.** All appropriations whether general or special, cease or lapse at the expiration of the first fiscal quarter after the adjournment of the next General Assembly,<sup>79</sup> and the Auditor of Public Accounts has no authority, nor can he be compelled by a writ of *mandamus*, to issue a warrant against an appropriation after it has lapsed.<sup>80</sup> Continuing appropriations are, therefore, forbidden by this section of the constitution.

**Debts.** The General Assembly cannot contract a debt in excess of \$250,000 unless the law contracting the debt is submitted to and approved by the voters. Such a law must be published three months at least before the vote of the people thereon, but there is no need for a separate law providing for its publication. The General Assembly may provide for its publication in the law itself, by resolution or by a separate law.<sup>81</sup>

The General Assembly must provide for the payment of the interest on the debt proposed to be created, and it may do this by levying a tax for that purpose. But if a tax is levied, the law levying the tax must be submitted to the people with the law authorizing the creation of the debt. However, there is no need for two separate laws. The law creating the debt may also provide for the tax levy.<sup>82</sup>

A law creating a debt in excess of \$250,00, to be adopted, must receive a majority of the votes cast for members of the General Assembly at the general election at which it is submitted. Under the minority representation system (article 4, sections 7, 8) each voter has three votes for members of the

<sup>75</sup> *Whittemore v People*, 227 Ill. 453 (1907).

<sup>76</sup> *Veto Messages 1911-12*, p. 34.

<sup>77</sup> *Fergus v Brady*, 277 Ill. 272 (1917).

<sup>78</sup> *Fergus v Russel*, 270 Ill. 304 (1915). Report Attorney General 1910, p. 125.

<sup>79</sup> *People v Lippincott*, 64 Ill. 256 (1872); *People v Swigert*, 107 Ill. 494 (1883).

<sup>80</sup> *People v Brown*, 281 Ill. 390 (1917); *People v Board of Trustees*, 283 Ill. 494 (1918).

<sup>81</sup> *Mitchell v Lowden*, 288 Ill. 327 (1919).

<sup>82</sup> *Mitchell v Lowden*, 288 Ill. 327 (1919).

house of representatives. If the provision which requires that such a law, in order to be adopted, must receive a majority of all votes cast for members of the General Assembly is given a literal construction, it is apparent that no law creating a debt in excess of \$250,000 could be adopted. This provision, therefore, must be interpreted to mean that such a law is adopted if it receives a number of votes equal to a majority of the number of voters voting for members of the General Assembly.<sup>83</sup>

In 1908 an amendment to the constitution (separate section relating to the canal) was adopted authorizing a bond issue of \$20,000,000 to defray the cost of constructing a deep waterway. In the opinion of the Attorney General an act of the General Assembly authorizing the issuance of bonds under that amendment to the constitution need not be submitted to the people under the provisions of this section of the constitution.<sup>84</sup>

(For an historical statement with reference to the limitation on the power of the General Assembly to contract debts, see Constitutional Conventions in Illinois, Second Edition, pp. 13, 28, 42.)

**Section 19.** The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void: Provided, the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion.

**Extra compensation.** A firemen's pension law is not in violation of this provision of the constitution. Such a law does not authorize extra compensation even as to those persons who were in the service prior to its adoption. Payments made thereunder are in the nature of deferred payments to insure long continued service.<sup>85</sup>

**Express authority of law.** An agency or arm of the state government can incur only such obligations as it is authorized by law to create.<sup>86</sup> The authority of such an agency to incur obligations, even though within the general scope of the functions imposed upon it by law, is, with a few exceptions, limited to the amount of the existing appropriations made to that agency; and, generally if the appropriations are insufficient to meet the obligation incurred, the contract creating the obligation is void as being made without express authority of law.<sup>87</sup> What is express authority of law? "That authority is express which confers power to do a particular, identical thing set forth and declared exactly, plainly and directly, with well defined limits, and the only exception under which a contract exceeding the amount appropriated for the purpose may be valid is where it is so expressly authorized by law. An express authority is one given in direct terms, definitely and explicitly, and not left to inference or to implication, as distinguished from authority which is general, implied or not directly stated or given. An example of such express authority is found in one of the deficiency appropriations to the Southern Illinois penitentiary which has

<sup>83</sup> Mitchell v Lowden, 288 Ill. 327 (1919).

<sup>84</sup> Report Attorney General 1915, p. 62.

<sup>85</sup> People v Abbott, 274 Ill. 380 (1916); Hughes v Traeger, 264 Ill. 612 (1914).

<sup>86</sup> Townsend v Gash, 267 Ill. 578 (1915); Veto Message Senate Journal 1887, p. 974.

<sup>87</sup> Fergus v Brady, 277 Ill. 272 (1917); Report Attorney General 1914, p. 677.

been paid, and serves only as an illustration. The authorities in control of the penitentiary are required by law to receive, feed, clothe and guard prisoners convicted of crime and placed in their care, involving the expenditure of money, which may vary on account of the cost of clothing, food and labor, beyond the control of the authorities, and which could not be accurately estimated in advance for that reason or by determining the exact number of inmates. To extend the meaning of the constitutional requirement that there shall be express authority of law for the creation of a debt or the making of an agreement or contract in excess of an appropriation for the purpose beyond the meaning we have given to it would destroy and nullify the provisions of the constitution. The power of the General Assembly to make appropriations for any purpose is not exhausted by one appropriation but additional appropriations may be made before an indebtedness is incurred, as occasion may require."<sup>88</sup>

If a statute prescribes the methods and conditions under which a contract with the state shall be executed, the provisions must be complied with in every particular, or the contract will be void as not being made with express authority of law. Thus, if a statute requires that printing contracts with the state shall be let to the lowest bidder after a full opportunity for competition, no printing contract with the state will be valid unless there has been an opportunity for competition, and if one printer obtains such a contract as the result of an agreement or understanding with other printing establishments that there shall be no competition, the contract is void.<sup>89</sup>

**Section 20.** The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to, or in aid of any public or other corporation, association or individual.

This section does not prohibit appropriations from the state treasury to private corporations or associations, if the money appropriated is to be spent for a public purpose. The state may make use of private agencies in carrying out its governmental functions. Thus, an appropriation to the Illinois State Normal University, a private corporation, is valid,<sup>90</sup> and so is an appropriation to the State Beekeepers' Association.<sup>91</sup> But an appropriation for the expenses of a legislative committee created by resolution to sit after the adjournment *sine die* of the General Assembly is void, because the General Assembly has no legal existence after such adjournment, and the committee is but a group of private individuals whose expenses cannot be paid by the state without violating this provision of the constitution.<sup>92</sup>

The provisions of the road and bridge law authorizing the state, under certain terms and conditions, to pay one-half the cost of constructing roads in such counties as will avail themselves of the offer by paying the other half of the cost, does not violate this section of the constitution. The construction of roads is a public purpose and the state, if it saw fit, could construct the roads and pay the total cost out of the state treasury.<sup>93</sup>

<sup>88</sup> *Fergus v Brady*, 277 Ill. 272 (1917).

<sup>89</sup> *Dement v Rokker*, 126 Ill. 174 (1888).

<sup>90</sup> *Boehm v Hertz*, 182 Ill. 154 (1899); see, also, *State Board of Agriculture v Brady*, 266 Ill. 592 (1915); *Illinois Farmers' Institute v Brady*, 267 Ill. 98 (1915).

<sup>91</sup> Report Attorney General 1910, p. 114. See Report Attorney General 1910, p. 756; *Veto Messages* 1919, p. 31.

<sup>92</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>93</sup> *Martens v Brady*, 264 Ill. 178 (1914).

The wife abandonment act of 1913 is not unconstitutional, because it authorizes the court, in the event of the conviction of the defendant, to direct that a part or the whole of the fine imposed be paid to the abandoned wife. This section of the constitution was not intended to affect the disposition of money obtained as a result of the infliction of penalties for the violation of the criminal laws.<sup>94</sup>

The right of the General Assembly to authorize the payment of additional compensation to an officer for additional duties imposed upon him is not affected by this section, and the General Assembly may provide for such additional compensation, if other sections of the constitution, such as those forbidding an increase in salary during the term of office, are not violated.<sup>95</sup>

**Section 21.** The members of the General Assembly shall receive for their services the sum of five dollars per day, during the first session held under this Constitution, and ten cents for each mile necessarily traveled in going to and returning from the seat of government, to be computed by the Auditor of Public Accounts; and thereafter such compensation as shall be prescribed by law, and no other allowance or emolument, directly or indirectly, for any purpose whatever; except the sum of fifty dollars per session to each member, which shall be in full for postage, stationery, newspapers, and all other incidental expenses and perquisites; but no change shall be made in the compensation of members of the General Assembly during the term for which they may have been elected. The pay and mileage allowed to each member of the General Assembly shall be certified by the Speakers of their respective houses and entered on the journals, and published at the close of each session.

**In General.** The provisions of this section forbidding any change in the compensation of members of the General Assembly is one of a series of similar provisions in the constitution of 1870. Special laws changing the "fees, percentage or allowance of public officers during the term for which said officers are elected or appointed" are forbidden (article 4, section 22). The salaries of the elective executive state officers cannot be changed during their official terms (article 5, section 23). The salary or compensation of judges of the Supreme and circuit courts, and of the circuit and superior courts of Cook County, cannot be changed during the terms for which they are elected (article 6, sections 7, 16, 25.) And the same prohibition exists with reference to municipal (article 9, section 11) and county officers (article 10, section 10). The Supreme Court has said that when all of these provisions are construed together, it is apparent that the members of the convention of 1869-70 intended that the fees, salary or compensation of no public officer, who should be elected for a definite or fixed term, should be changed in any manner during his term of office.<sup>96</sup> If this was the intention of the framers of the constitution of 1870, it might have been accomplished by a single section designed to cover or embrace all public officers elected or appointed for a definite or fixed term. For example, when the constitutional framers agreed to prohibit the extension of the term of office of any public officer, they did not seek to accomplish their purpose by a series of prohibitions but merely provided (article 4, section

<sup>94</sup> *People v Heise*, 257 Ill. 443 (1913).

<sup>95</sup> *City of Chicago v Wolf*, 221 Ill. 130 (1906).

<sup>96</sup> *Wolf v Hope*, 210 Ill. 50 (1904).

28) that "no law shall be passed which shall operate to extend the term of any public officer after his election or appointment."

However, it must be remembered that while the Supreme Court has held that all officers "occupying offices created by the laws of the state in and for any of the political subdivisions of the state" are municipal officers whose salaries cannot be altered during their term of office (see discussion under subsequent subheading entitled "Municipal officers") it has not held that the salaries of appointive state officers, such as the directors of the several departments created by the "Civil Administrative Code," who are to hold office for a definite term of four years, may not be changed during their terms of office. And since the constitutional limitation on the power of the General Assembly to change the salaries of state officers (article 5, section 23) applies only to the elective state officers created by article 5, it is by no means certain that the salaries of appointive state officers may not be changed during their terms, even though they are appointed for a definite or fixed term.

Do these constitutional provisions mean that the salary of a public officer cannot be increased after his election or appointment, even though his term of office has not yet begun? The Supreme Court has said: "It must be conceded on principle, that there is just as much reason for a constitutional provision prohibiting an increase in the salaries of officers who have been elected to office, and who are sure of holding office, but whose terms have not commenced, as there is prohibiting an increase in salaries of those actually in office. The relators in this case had been elected before the bill increasing their salaries was passed by the legislature, and as to them and their associates elected at the same time it must be said that such enactment is clearly and unmistakably contrary to the spirit and intent of the constitution."<sup>97</sup> However, the court in that case also held that the bill increasing the salaries of the officers seeking to obtain the increase became a law after the terms of the officers had commenced. Hence, its statement that these constitutional limitations apply to an officer, who has been elected, but whose term has not yet begun, may not have been necessary to the decision. But regardless of the correct holding on this point, it has been held that, in so far as the judges of circuit courts and the judges of the circuit and superior courts of Cook County are concerned, the provisions forbidding changes in salaries apply to the terms of office and not to the individuals in office. (See discussion subsequent subheading "Judicial officers"). And it has also been held that the fixing of an officer's salary after he has actually entered upon the duties of his office, is not forbidden, if the salary was not fixed at all prior to the time of his election or appointment, or prior to the time that he entered upon his duties.<sup>98</sup>

The salary of an officer, who in an *ex officio* capacity, holds another office, cannot be increased during his term on the ground that his *ex officio* position carries with it additional duties.<sup>99</sup> Thus, the constitution forbids an increase in the salary of a county treasurer during his term, even though in the meantime he is called upon to perform *ex officio*, the duties of the office of supervisor of assessments,<sup>1</sup> although the county board probably could make additional allowances to the treasurer for the increased expenses of his office in connection with the performance of his new duties as supervisor of assessments.<sup>2</sup>

**Members of the General Assembly.** An appropriation of \$2,500 to the Secretary of State for the telephone tolls of members of the General Assembly is void, because it conflicts with the provisions of this section which

<sup>97</sup> *People v Sweitzer*, 280 Ill. 436 (1917).

<sup>98</sup> *Purcell v Parks*, 82 Ill. 346 (1876). See Report Attorney General 1914, p. 900.

<sup>99</sup> *Kilgore v People*, 76 Ill. 548 (1875); see, also, *Whittemore v People*, 227 Ill. 453 (1907).

<sup>1</sup> *Foot v Lake County*, 206 Ill. 185 (1903).

<sup>2</sup> *Parker v County of Richland*, 214 Ill. 165 (1905).



limit the incidental expenses of members of the General Assembly to \$50 each per session.<sup>3</sup> And a joint resolution, directing the payment (out of an appropriation for legislative expenses) to each member of the General Assembly of a sum equal to the cost of railroad fare for twenty-one round trips between his home and the state capital, is void for the reason that it has the effect of increasing the compensation of the members of the General Assembly during their official terms, as well as increasing the allowance of \$50 to each member for each session.<sup>4</sup>

In 1917, the Attorney General rendered an opinion in which he intimated that the attorney fees and other expenses of a member of the General Assembly in connection with an election contest for his seat in the General Assembly might well be considered the personal expenses of the member, the payment of which by the state would be in conflict with this section of the constitution.<sup>5</sup>

The Attorney General in 1910, held that this section did not prohibit a change in the time and manner of the payment of the compensation of members of the General Assembly.<sup>6</sup>

**Special laws changing fees, percentage or allowances of public officers.** In 1871, the General Assembly under the provisions of section 24 of the schedule, passed a bill authorizing the city of Quincy to issue bonds in aid of railroads. The bill provided for a tax levy and authorized the tax officials of the county in which Quincy is located to retain, as fees, a certain percentage of the taxes collected under the terms of the bill. The Governor vetoed the bill on the ground that the provision authorizing the tax officials to retain, as fees, a part of the taxes collected was in conflict with that provision of the constitution (article 4, section 22) prohibiting special laws "creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected or appointed."<sup>7</sup>

**Elective state officers.** The salaries of the elective state officers cannot be changed during their official terms.<sup>8</sup> But an appropriation to the Governor "for the care of the executive mansion and grounds, and for heating lighting, expenses of public receptions, wages and sustenance of employes, automobile and stable expense and other incidental expenses of the executive mansion," does not have the effect of increasing his salary, particularly when the appropriation act provides that no part of the appropriation may be expended except upon itemized vouchers showing that an obligation of the character contemplated by the appropriation has been incurred. And so appropriations to the Lieutenant Governor for traveling expenses, to the Secretary of State for editing the Blue Book and to the Superintendent of Public Instruction for conducting certain examinations, do not increase the salaries of these officers, when it is clear from the appropriation act that the money appropriated can be used only to pay obligations incurred pursuant to the purpose of the appropriations. Such appropriations are not intended as the personal compensation of these officers, but are intended to defray the cost of performing the duties required of them. Thus, with reference to the appropriation to the Secretary of State for editing the Blue Book, the court said: "That it was not contemplated or intended that the Secretary of State should personally edit the Blue Book and receive this compensation is too clear to admit of argument; and should he do so, this appropriation would not be available, as he must by his receipted vouchers

<sup>3</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>4</sup> *Fergus v Russel*, 270 Ill. 626 (1915).

<sup>5</sup> Veto Messages 1917, p. 85.

<sup>6</sup> Report Attorney General 1910, p. 90.

<sup>7</sup> Veto Message Senate Journal 1871, p. 377.

<sup>8</sup> *Estate of Ramsay v Whitbeck*, 183 Ill. 550 (1915); *Whittemore v People*, 227 Ill. 453 (1907).

show that the money secured from this appropriation has been expended by him for this purpose."<sup>9</sup>

The constitution does not expressly forbid a change in the salary of an appointive state officer during his term. There is some question whether or not the salary of an appointive state officer who is appointed for a definite term, may be increased during his term. The question has never been passed upon by the Supreme Court. (See discussion preceding sub-heading "In general").

**Judicial officers.** Section 25 of article 6, which provides that the compensation of the judges of the circuit and superior courts of Cook County "shall not be changed during their continuance in office" applies to the terms for which such judges are elected, and not to the individuals holding the offices. The fact that section 16 of article 6 provides that the salaries of circuit judges (other than those of Cook County) "shall not be increased or diminished during the terms for which such judges shall be respectively elected" does not show that the framers of the constitution intended a different meaning to be attached to section 25. While the language employed in the two cases is different, both mean the same, and both apply to the terms of office and not to the individuals. In *Foreman v People*,<sup>10</sup> the facts were as follows: A judge of the superior court was elected in 1899 for a term of six years. Before the expiration of his term, he resigned. In 1901, the General Assembly passed an act increasing the compensation of judges of the superior court. In 1902, another judge was elected to fill the vacancy, and the question presented was whether or not the second judge, having been elected after the passage of the act of 1901, was entitled to the increased compensation. The court held that he was not, for the reason that the constitutional limitation applied to the term of office and not to the continuance in office of the individual. (See article 6, sections 7, 16).

**Municipal officers.** Section 11 of article 9 in part provides that "the fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office shall be increased or diminished during such term." The word "municipal" has been given a broad interpretation. In *Wolf v Hope*,<sup>11</sup> the court said: "In our judgment the provision quoted from section 11 of article 9 of the constitution was intended to include all officers not specifically mentioned in other provisions of the constitution, occupying offices created by the laws of the state in and for any of the political subdivisions of the state, and within the meaning of that section the judge of a city court is a municipal officer." In accordance with this doctrine, the Supreme Court has held that county superintendents of schools, state's attorneys, clerks of the probate court, city treasurers and boards of election commissioners are municipal officers whose salaries or compensation cannot be changed during their terms of office.<sup>12</sup> And the Attorney General has held that the provision applies to village clerks, county commissioners, clerks of city courts, town assessors, county superintendents of highways, oil inspectors appointed by county judges, aldermen and drainage commissioners.<sup>13</sup> The Attorney General, in a recent opinion, has also held that the act of the General Assembly, passed in 1919, increasing the amount of the fees authorized to be charged and retained by justices of the peace, police magistrates and constables, does not apply to the justices, magistrates and constables now in office.<sup>14</sup>

<sup>9</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>10</sup> 209 Ill. 567 (1904); see, also, Report Attorney General 1912, pp. 525, 526.

<sup>11</sup> 210 Ill. 50 (1904).

<sup>12</sup> *Jimison v Adams County*, 130 Ill. 558 (1889); *People v Williams*, 232 Ill. 519 (1908); *Cook County v Sennott*, 136 Ill. 314 (1891); *City of Chicago v Wolf*, 221 Ill. 130 (1906); *People v Cook County Commissioners*, 260 Ill. 345 (1913).

<sup>13</sup> Report Attorney General 1908, p. 692; pp. 477, 564, 569, 570; 1914, p. 1239; 1915, pp. 318, 738; 1910, p. 900.

<sup>14</sup> Opinion Attorney General, August 1, 1919.

The Supreme Court has decided, however, that this section does not prevent the establishment of police pension funds.<sup>15</sup> And the Attorney General has ruled that it does not apply to the clerk of the house of representatives, the secretary of the senate or probation officers, for the reason that these officers do not hold their offices for a definite term.<sup>16</sup>

**County officers.** Section 10 of article 10 provides in part as follows: "The county board except as provided in section nine of this article, shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses . . . . Provided that the compensation of no officer shall be increased or diminished during his term of office." Section 9 of article 10 provides that the General Assembly shall fix the salaries of the clerks of all courts of record, the treasurer, sheriff, coroner and recorder of deeds of Cook County. Who are county officers within the meaning of section 10 of article 10? In section 8 of article 10 county judges, county clerks, sheriffs, treasurers, coroners, circuit clerks and recorders of deeds are expressly designated as county officers. It has been held that county superintendents of schools and state's attorneys are not county officers within the meaning of this section,<sup>17</sup> but that the members of the board of commissioners for Cook County are county officers.<sup>18</sup> And it has been held that this section does not include officers created by statute, but applies only to officers created by the constitution.<sup>19</sup>

It would seem that the question whether or not an officer is a county officer is relatively unimportant, in so far as changing his compensation is concerned, for, in any event, if he is an officer "in and for any of the political subdivisions of the state" his compensation cannot be changed during his term of office. (See discussion preceding sub-heading). But the words "with the amount of their necessary clerk hire, stationery, fuel and other expenses," which appear in section 10 of article 10, do have an important bearing in determining whether or not the compensation of a county officer has been altered, and it therefore becomes necessary to consider the decisions relating to the compensation of county officers, such as county clerks, treasurers, sheriffs, circuit clerks and coroners. (See discussion article 10, section 10, sub-heading "County officers").

With reference to these officers, it has been held that the county board in providing for their salaries and expenses may do one of two things. (1) The board may fix the personal salary of the officer, together with his necessary clerk hire and expenses, in one sum. (2) The board may fix the personal salary in one sum and the necessary clerk hire and expenses of his office in another sum. If the first method is followed, then the officer is limited to the amount allowed, and the county board can make no other allowances to him during his term whether for personal salary or expenses, for the reason that such additional allowances would operate to increase his compensation during his term.<sup>20</sup> If the second plan is followed, the county board, while it may not allow the officer an additional sum for personal salary, may, during the officer's term, make additional allowances to him for the expenses of his office, without violating the constitutional provision forbidding increases in salary during the term.<sup>21</sup> And, while a county officer cannot create a binding obligation against the county by making an expenditure for expenses in excess of the amount fixed by the county board

<sup>15</sup> *People v Abbott*, 274 Ill. 380 (1916).

<sup>16</sup> Report Attorney General 1912, p. 979; 1917-18, p. 425.

<sup>17</sup> *Jimison v Adams County*, 130 Ill. 558 (1889); *Butzow v Kern*, 264 Ill. 498 (1914).

<sup>18</sup> *Wulff v Aldrich*, 124 Ill. 591 (1888).

<sup>19</sup> *People v Chetlain*, 219 Ill. 248 (1906); *McAuliffe v O'Connell*, 258 Ill. 186 (1913).

<sup>20</sup> *Kilgore v People*, 76 Ill. 548 (1875); *Brissenden v County of Clay*, 161 Ill. 216 (1896).

<sup>21</sup> *Daggett v Ford County*, 99 Ill. 334 (1881); *Coles County v Messer*, 195 Ill. 540 (1902).

for that purpose,<sup>22</sup> the board may, if it sees fit, approve and order the payment of the obligation so incurred.<sup>23</sup> But if the expenses for an office are provided for in a separate, specific sum, the officer is entitled to only that portion of the sum which is actually used for the expenses of his office, and this rule will not operate to reduce the officer's compensation during his term.<sup>24</sup> Thus, if a circuit clerk is allowed \$2,500 per year as personal salary and \$4,000 per annum for expenses, he is not allowed to retain the whole amount of \$4,000, if as a matter of fact, he was required to expend only \$2,000 for expenses. If, however, personal salary and expenses are fixed in one sum, then the officer is entitled to the whole amount, irrespective of his expenditures for office expenses, for to reduce the amount thus fixed would be to reduce the salary of the officer, contrary to the constitutional provision.<sup>25</sup>

It must be remembered, however, that regardless of the method of fixing compensation and expenses adopted by the county board, the personal salary and expenses of the office cannot, in certain cases, exceed the fees collected by the office. (See discussion article 10, section 10, subheading, "Salaries").

**Section 22.** The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—

- Granting divorces;
- Changing the names of persons or places;
- Laying out, opening, altering and working roads or highways;
- Vacating roads, town plats, streets, alleys and public grounds;
- Locating or changing county seats;
- Regulating county and township affairs;
- Regulating the practice in courts of justice;
- Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables;
- Providing for changes of venue in civil and criminal cases;
- Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village;
- Providing for the election of members of the board of supervisors in townships, incorporated towns or cities;
- Summoning and empaneling grand or petit juries;
- Providing for the management of common schools;
- Regulating the rate of interest on money;
- The opening and conducting of any election, or designating the place of voting;
- The sale or mortgage of real estate belonging to minors or others under disability;
- The protection of game or fish;
- Chartering or licensing ferries or toll bridges;
- Remitting fines, penalties or forfeitures;

<sup>22</sup> *Daggett v Ford County*, 99 Ill. 334 (1881); *Coles County v Messer*, 195 Ill. 540 (1902); but see *Briscoe v Clark County*, 95 Ill. 309 (1880).

<sup>23</sup> *People v Fuller*, 238 Ill. 116 (1909).

<sup>24</sup> *Cullom v Doloff*, 94 Ill. 330 (1880); *Jennings v Fayette County*, 97 Ill. 419 (1881).

<sup>25</sup> *Jennings v Fayette County*, 97 Ill. 419 (1881); *Brissenden v County of Clay*, 161 Ill. 216 (1896).

Creating, increasing or decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed;

Changing the law of descent;

Granting to any corporation, association, or individual, the right to lay down railroad tracks, or amending existing charters for such purpose;

Granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever;

In all other cases where a general law can be made applicable, no special law shall be enacted.

In general. The constitution of 1848 contained certain provisions designed to restrict the power of the General Assembly to pass private, local or special laws. That instrument provided that "no private or local law shall embrace more than one subject and that shall be expressed in the title" (article 3, section 23), and in a few specific instances forbade the passage of special laws. Under the constitution of 1848, the General Assembly with respect to divorces, township organization and the formation of corporations, could enact general laws only (article 3, section 32; article 7, section 6; article 10, section 1.) These limitations, however, had little effect in reducing the number of private and special laws. The convention of 1862 sought to place additional restrictions on the power of the General Assembly in this respect, but the constitution proposed by that body was rejected by the people. It was for the purpose of checking the passage of a great number of private and special laws at each session of the General Assembly that this section of the present constitution was adopted by the convention of 1869-70. (See Constitutional Conventions in Illinois, Second Edition, pp. 14, 18, 21, 24, 44).

This section of the constitution forbids the enactment of special and local laws only to the extent of the subjects enumerated therein. As to all other subjects the General Assembly, unless forbidden by other provisions of the constitution, may pass special laws. Thus, the General Assembly may pass special laws with reference to drainage districts,<sup>26</sup> sanitary districts<sup>27</sup> parks,<sup>28</sup> or grain inspection.<sup>29</sup> This rule, however, must be construed in connection with that clause of this section which forbids the passage of local or special laws "granting to any corporation, association or individual any special or exclusive privilege." A law which relates to a subject not enumerated in this section may confer special privileges, in which event it will be void.<sup>30</sup> (See discussion subsequent subheadings, "Special privileges and immunities" and "Necessity for general laws in other cases").

This section does not necessarily prohibit legislation on a particular subject or with reference to a particular class; nor does it absolutely prevent the enactment of laws which may be operative in only a few localities, or even in a single locality. If a law is general in the sense that it applies without discrimination to all persons or localities similarly situated it is not a special law.<sup>31</sup> Thus, a law which confers a special power on boards of park commissioners in incorporated cities is not a local or special law merely because it does not apply to boards of park commissioners not

<sup>26</sup> *Owners of Lands v People*, 113 Ill. 296 (1886); *Herschbach v Kaskaskia Sanitary District*, 265 Ill. 388 (1914).

<sup>27</sup> *Wilson v Board of Trustees*, 133 Ill. 443 (1890); *People v Bowman*, 247 Ill. 276 (1910); *Rylands v Clark*, 278 Ill. 39 (1917).

<sup>28</sup> *Commissioners of Lincoln Park v Fahrney*, 250 Ill. 256 (1911).

<sup>29</sup> *People v Harper*, 91 Ill. 357 (1878).

<sup>30</sup> *People v Rinaker*, 252 Ill. 266 (1911).

<sup>31</sup> *People v Wright*, 70 Ill. 388 (1873); *Potwin v Johnson*, 108 Ill. 70 (1883); *Hawthorn v People*, 109 Ill. 302 (1883); *People v Hazelwood*, 116 Ill. 319 (1886); *Park v Modern Woodmen of America*, 181 Ill. 214 (1899); *City of Mt. Vernon v Evens Brick Co.*, 204 Ill. 32 (1903).

in incorporated cities; it does apply to all boards in incorporated cities and that is all that is necessary.<sup>32</sup> And an act, general in its terms, which purports to validate defective annexations of a city, village or town by another city, village or town is not special even though it may, as a matter of fact, apply only to one city in the state.<sup>33</sup> (See discussion subsequent subheading, "Special privileges and immunities").

A law is not special merely because it contains a provision that it shall be effective only in those communities in which the voters shall adopt it;<sup>34</sup> nor is a law which is limited as to the time of its duration in violation of this section.<sup>35</sup>

The constitutional provisions with respect to special legislation do not apply to municipal ordinances.<sup>36</sup>

**Laying out, opening, altering and working roads or highways.** "The laws for laying out and opening, altering or working roads or highways cannot be different in this state in counties under township organization from what they are in counties not under township organization, unless there is a substantial difference in the situation or circumstances of the two classes of counties when considered with reference to the purpose of the legislation in question."<sup>37</sup> An act of the General Assembly, which makes highway commissioners in counties not under township organization liable for damages sustained by reason of their negligence in failing to keep the roads under their jurisdiction in repair, but which does not impose the same liability on commissioners in counties under township organization, is void because there is no basis for discrimination between the two classes of commissioners in this respect.<sup>38</sup> On the other hand the act of the General Assembly providing for a system of hard roads is not void as being in violation of this clause because it places only a part of the roads of the state under the jurisdiction of the department of public works and buildings, since it is clear that, for the purposes of that act, there is a reasonable basis for the classification.<sup>39</sup>

**County and township affairs.** "County affairs are those relating to the county in its organic and corporate capacity and included within its governmental or corporate powers. When the constitution speaks of the affairs of a county it refers to the affairs which affect the people of that county."<sup>40</sup> The election of county officers is a county affair,<sup>41</sup> but the election of circuit judges is not, because circuit court districts, except in Cook County, embrace more than one county.<sup>42</sup> And laws providing for the assessment of property or creating forest preserve districts do not relate to county affairs.<sup>43</sup>

A law does not violate this clause merely because it classifies counties or townships on the basis of population, or on some other basis, if the classification, insofar as it relates to the subject matter of the law, is reasonable and not arbitrary; and this is true even though under the classification adopted by the General Assembly the law may apply to but one county or township.<sup>44</sup> Thus, the act providing for jury commissioners in counties

<sup>32</sup> West Chicago Park Commissioners v McMullen, 134 Ill. 170 (1890).

<sup>33</sup> People v City of Rock Island, 271 Ill. 412 (1916).

<sup>34</sup> People v Hoffman, 116 Ill. 587 (1886); People v Edmands, 252 Ill. 108 (1911).

<sup>35</sup> People v Wright, 70 Ill. 388 (1873).

<sup>36</sup> People v Cooper, 83 Ill. 585 (1876); City of Chicago v Weber, 246 Ill. 304 (1910).

<sup>37</sup> Kennedy v McGovern, 246 Ill. 497 (1910).

<sup>38</sup> Kennedy v McGovern, 246 Ill. 497 (1910).

<sup>39</sup> Mitchell v Lowden, 288 Ill. 327 (1919); Martens v Brady, 264 Ill. 178 (1914).

<sup>40</sup> People v Board of Election Commissioners, 221 Ill. 9 (1906).

<sup>41</sup> People v Board of Election Commissioners, 221 Ill. 9 (1906).

<sup>42</sup> People v Sweitzer, 282 Ill. 171 (1918).

<sup>43</sup> People v Commissioners of Cook Co., 176 Ill. 576 (1898); Perkins v Commissioners of Cook Co., 271 Ill. 449 (1916).

<sup>44</sup> People v Onahan, 170 Ill. 449 (1897); Kucera v West Chicago Park Commissioners, 221 Ill. 488 (1906).

having a population of more than 100,000 is not a special law even though at the time of its passage, it was apparent that it could apply only to one county in the state.<sup>45</sup> And the "Juul Law" which classifies counties into two classes, those having more and those having less than 300,000 population, is not a special law although it is apparent that only Cook County can be included in one of the classes created by the law.<sup>46</sup> In both of these cases the court took the view that for the purposes of the legislation then under consideration there was a reasonable basis for classifying counties on the basis of population. It must be admitted, however, that the Supreme Court in at least three cases<sup>47</sup> seems to take the view that a law which, though framed in general terms, can apply to only one county or township is void as being a special law, irrespective of other considerations. But when the cases are studied carefully it is apparent that the court does not hold that reasonable classifications with respect to counties and townships are not permitted but rather that the classifications in the laws considered in those cases were deemed unreasonable and arbitrary.

In accordance with the general rule that the General Assembly may make reasonable classifications for the purpose of legislating with respect to counties and townships, the court has held that it is permissible to make a distinction between counties under township organization and counties not under township organization if, for the purposes of the legislation in question, there is a reasonable basis for the distinction.<sup>48</sup> (See discussion subsequent sub-heading, "Special privileges and immunities.")

It must be borne in mind also that with reference to certain subjects the constitution itself authorizes the General Assembly to classify counties or to pass laws relating to but one county. Section 12 of article 10 provides "that the General Assembly may, by general law, classify the counties by population into not more than three classes and regulate the fees [of officers] according to class." Section 9 of article 10 directs the General Assembly to fix the salaries of certain Cook County officers. And section 7 of article 10, as construed by the Supreme Court, authorizes the General Assembly to pass special legislation for the management of the affairs of Cook County.<sup>49</sup> (See article 10, sections 7, 9, 12).

**Practice in courts of justice.** Laws regulating the practice in courts of justice which apply only to a particular subject or class are void under this clause, unless there is a reasonable basis for the classification. A law prescribing a special procedure in the courts with reference to the dissolution of insurance companies is valid, if it applies generally to all insurance companies,<sup>50</sup> but a law, which makes a special provision for the appointment of administrators of the estates of non-residents in counties having a population of more than 200,000, is void as being in violation of this clause, because in the opinion of the court, there is no reasonable basis for a distinction between counties having a population of more than 200,000 and counties having a population of less than 200,000, with respect to the subject matter of the law.<sup>51</sup> (See discussion subsequent sub-heading, "Special privileges and immunities.")

In the opinion of the Attorney General this clause prohibits the enactment of a law which applies to only two of the city courts in the state.<sup>52</sup>

The provisions of the constitution (article 4, section 34) concerning

<sup>45</sup> *People v Onahan*, 170 Ill. 449 (1897).

<sup>46</sup> *Booth v Opel*, 244 Ill. 317 (1910).

<sup>47</sup> *Devine v Commissioners of Cook Co.*, 84 Ill. 590 (1877); *Pettibone v West Chicago Park Commissioners*, 215 Ill. 304 (1904); *People v Board of Election Commissioners*, 221 Ill. 9 (1906).

<sup>48</sup> *Reynolds v Town of Foster*, 89 Ill. 257 (1878); *People v Board of Supervisors*, 223 Ill. 187 (1906); *Kennedy v McGovern*, 246 Ill. 497 (1910).

<sup>49</sup> *People v Day*, 277 Ill. 543 (1917).

<sup>50</sup> *Chicago Life Insurance Co. v Auditor of Public Accounts*, 101 Ill. 82 (1881).

<sup>51</sup> *Strong v Dignan*, 207 Ill. 385 (1904).

<sup>52</sup> Report Attorney General 1884, p. 21.

the practice and jurisdiction of the municipal court of Chicago constitute an exception to this clause. (See discussion article 6, section 29, subheading, "Constitutional exceptions to rule of uniformity.")

**Jurisdiction of justices of the peace.** In 1881 the General Assembly passed a law the effect of which was to make each county in the state except Cook County, a district in which justices of the peace elected therein could exercise jurisdiction. Cook County, however, was divided into two districts, and it was provided that a justice of the peace in one district in that county could not exercise jurisdiction in the other district. The Supreme Court held that the law was in conflict with this clause.<sup>53</sup> A constitutional amendment (article 4, section 34), adopted in 1904, has made it possible to abolish justices of the peace and police magistrates in the city of Chicago and to limit the territorial jurisdiction of the justices of the peace of Cook County outside the city of Chicago. (See discussion article 4, section 34; article 6, section 21.)

**Changes of venue.** The General Assembly has no power to make special provisions concerning changes of venue from the municipal court of the city of Chicago. While the constitution (article 4, section 34) gives the General Assembly the power to pass special laws with reference to the jurisdiction and practice of the municipal court, it was not intended to change the constitutional rule prohibiting special laws relating to changes of venue in civil and criminal cases. The right to a change of venue is not a matter of practice.<sup>54</sup>

**Incorporating cities, towns and villages or amending the charters thereof.** While the constitution does not have the effect of abrogating the charters of all cities, towns and villages organized under special acts passed prior to its adoption,<sup>55</sup> it does prevent the amendment of special charters by special laws, and such charters can be amended only by general laws.<sup>56</sup> It has been held, however, that a special act which repeals a section of a special charter is not prohibited, if the purpose and effect of the repealing act is to establish and promote uniformity with reference to the powers and duties of cities, towns and villages.<sup>57</sup>

An Act which gives to cities, at the option of their councils, the power to abolish or continue in office city assessors, is in conflict with this clause for the reason that the effect of such an act would be to promote dissimilarity in the character and organization of such municipalities.<sup>58</sup> But this does not deny to the General Assembly the power to classify cities, towns and villages for the purposes of legislation, if the classifications adopted are reasonable from the standpoint of the legislative purpose sought to be accomplished.<sup>59</sup> The rules with reference to the classification of cities, towns and villages are similar to those concerning the classification of counties and townships. (See discussion preceding sub-heading, "County and township affairs;" see, also, discussion subsequent sub-heading, "Special privileges and immunities").

By virtue of an amendment to the constitution the General Assembly may pass special laws with reference to the local government of the city of Chicago. (See discussion, article 4, section 34).

<sup>53</sup> *People v Meech*, 101 Ill. 200 (1882).

<sup>54</sup> *Fielen v Shaeffer*, 256 Ill. 493 (1913).

<sup>55</sup> *Covington v City of East St. Louis*, 78 Ill. 548 (1875).

<sup>56</sup> *Andrews v People*, 75 Ill. 605 (1874); *McCormick v People*, 139 Ill. 499 (1891).

<sup>57</sup> *People v Crawley*, 274 Ill. 139 (1916).

<sup>58</sup> *People v Cooper*, 83 Ill. 585 (1876).

<sup>59</sup> *People v Board of Trustees*, 170 Ill. 468 (1897); *Cummings v City of Chicago*, 144 Ill. 563 (1893); *Booth v Opel*, 244 Ill. 317 (1910); *People v Fox*, 247 Ill. 402 (1910).



**Grand and petit jurors.** In the case of *In re Scranton*<sup>60</sup> the court said that a law exempting city firemen in the city of Chicago from jury service would be unconstitutional under this clause because it would apply only to the firemen in one city. This clause, however, applies only to the summoning and impaneling of grand and petit juries. The jury commissioners act, which applies only to counties having a population of more than 100,000, was held not to be a special law relating to the summoning and impaneling of grand and petit juries because, while the jury commissioners are charged with the duty of preparing lists containing the names of persons available as jurors, they have nothing to do with the summoning and impaneling of juries.<sup>61</sup>

**Management of common schools.** This clause relates only to the management of the common schools. It does not forbid special laws with reference to the formation or support of school districts.<sup>62</sup> But this rule must be qualified to the extent that a special law with reference to the formation of school districts cannot arbitrarily discriminate between persons and communities similarly situated, for to do so would be to violate that clause of this section forbidding the enactment of special laws conferring special privileges.<sup>63</sup> (See discussion subsequent sub-headings, "Special privileges and immunities" and "Necessity for general laws in other cases.")

It is interesting to note in connection with this clause that, while the Supreme Court has said that this provision does not prohibit special legislation with reference to the support of the common schools,<sup>64</sup> the members of the convention intended that it should. When the clause was originally introduced in the convention it contained the words "management and support." On the suggestion of one of the members of the convention that the word "management" was broad enough to include support the author of the clause amended it by striking out the words "and support." (Debates, p. 608.)

**Interest rates.** An act of the General Assembly which authorizes the creation of building and loan associations with power to loan money to their members at the highest premium bid therefor, does not violate this clause.<sup>65</sup> And the General Assembly may fix the rate of interest to be charged on delinquent special assessments levied by parks for this is not a regulation of the rates of interest on money, but is in the nature of a penalty for failure to pay the assessments.<sup>66</sup> It has also been held that a law which, subject to certain conditions, authorizes persons making loans of \$300 or less to charge more than seven per cent interest, is not contrary to this clause, the decision apparently being based on the ground that the classification made by the law is a reasonable one in view of the legislative purpose sought to be accomplished.<sup>67</sup>

**Election and polling places.** A statute which provides that it shall not go into effect in any city or district until adopted by the voters of the city or district is not void because it contains provisions prescribing the manner in which the question of its adoption shall be submitted to the voters.<sup>68</sup>

<sup>60</sup> 74 Ill. 161 (1874).

<sup>61</sup> *People v Onahan*, 170 Ill. 449 (1897).

<sup>62</sup> *Speight v People*, 87 Ill. 595 (1877); *Commissioners of Kaskaskia v Trustees of Kaskaskia*, 249 Ill. 578 (1911).

<sup>63</sup> *People v Weis*, 275 Ill. 581 (1916).

<sup>64</sup> *Commissioners of Kaskaskia v Trustees of Kaskaskia*, 249 Ill. 578 (1911).

<sup>65</sup> *Winget v Quincy Building & Homestead Association*, 128 Ill. 67 (1889); but see *Veto Message House Journal* 1877, p. 829.

<sup>66</sup> *McChesney v People*, 99 Ill. 216 (1881).

<sup>67</sup> *People v Stokes*, 281 Ill. 159 (1917); but see *Report Attorney General* 1913, p. 30.

<sup>68</sup> *Perkins v Commissioners of Cook Co.*, 271 Ill. 449 (1916).

This provision of the constitution does not prohibit the General Assembly from making reasonable classifications with reference to the establishment of polling places. Thus, an act which directs the board of supervisors in counties where a soldier's or sailor's home is located "to fix and establish the place or places for holding such election . . . at some convenient . . . place or places, easy of access, on the ground . . . where such home . . . is located," was held not to contravene this clause because it applies to all persons in the same class and because there is a reasonable basis for the classification.<sup>69</sup>

**Sale or mortgage of real estate owned by minors.** In *Kingsbury v. Sperry*<sup>70</sup> it was said that a statute which would attempt to give the right to sue out a writ of error to the probate court in a proceeding relating to the sale of real estate owned by a minor, without giving the same right in a similar proceeding in a county court, would violate this clause. (See discussion article 6, sections 20, 29.)

**Fish and game.** In *People v. Wilcox*<sup>71</sup> it was held that the purpose of this clause was to prevent the enactment of laws for the protection of fish and game that would not "operate in all the territory subject to the jurisdiction of the state." In that case an act which forbade fishing in any of the waters of the state, except Lake Michigan, by means of a hoop net or seine, unless the persons desiring to use a hoop net or seine procured a license for that purpose from the county clerk, was held void because the exclusion of Lake Michigan from its operation rendered it a special law relating to the protection of fish and game. Three judges dissented, however, on the ground that this clause does not prevent the General Assembly from making reasonable classifications for the purpose of legislating on the subject of fish and game protection, and that the exclusion of Lake Michigan in the act under consideration was based on a reasonable distinction between that body of water and other waters in the state.

In the later case of *People v. Diekmann*<sup>72</sup> that portion of the fish and game act which authorized the fish and game commission to set aside "such waters within the jurisdiction of this state as they may judge best as state fish preserves," was sustained on the same reasoning as that adopted by the dissenting judges in the *Wilcox* case. The court in the *Diekmann* case said: "This provision applies equally to any of the waters under the jurisdiction of the state which the fish and game commission finds should be used for the preservation and propagation of fish. Such portions of the waters of the state may by them be set aside as a state fish preserve, as provided in said act. Such cannot be said to be a local or special law."

**Remitting fines and penalties.** This clause prevents the General Assembly from remitting any particular fine which has already been imposed. It is a limitation on the power of the General Assembly only and does not prevent courts from remitting fines and penalties; nor does it prevent the General Assembly from authorizing courts to remit fines. The wife abandonment act of 1913 which gives the court the power, in the event of a conviction, to direct that a part or the whole of the fine imposed shall be paid to the defendant's wife does not conflict with this provision.<sup>73</sup>

**Increasing fees and allowances of officers.** (See discussion article 4, section 21, subheading, "Special laws changing fees, percentage or allowances of public officers)."

<sup>69</sup> *People v. Board of Supervisors*, 185 Ill. 288 (1900); see Report Attorney General, 1917-18, pp. 300, 345.

<sup>70</sup> 119 Ill. 279 (1887).

<sup>71</sup> 237 Ill. 421 (1908).

<sup>72</sup> 285 Ill. 97 (1918); but see Veto Messages 1917, p. 27.

<sup>73</sup> *People v. Heise*, 257 Ill. 443 (1913).

**Changing the law of descent.** An act which prohibits alien non-residents from "acquiring title to or taking or holding lands or real estate in this state by descent, devise, purchase or otherwise," is not special merely for the reason that under certain treaties, between the United States and certain foreign governments, citizens of those governments not residing in Illinois may inherit lands in Illinois. It is true, of course, that treaties are the supreme law of the land and take precedence over acts of the General Assembly but the act is not special for that reason. It applies generally to all alien non-residents not protected by such treaties. "Moreover, a statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution. It is not clear, that the constitutional prohibition against special legislation was intended to refer to the operation of state laws upon different classes of foreigners, but only to their operation upon different classes among the citizens of the state. More especially is it not clear, that discrimination among different classes of non-resident aliens was intended to be forbidden by the prohibition of special legislation changing the law of descent."<sup>74</sup>

**Special privileges and immunities.** This clause is often construed in connection with the due process of law clause (article 2, section 2). Frequently the Supreme Court will cite cases construing this provision and the due process clause without distinction. The construction placed upon this provision by the Supreme Court makes it equivalent to that provision of the United States constitution (14th amendment) which forbids a state from denying to any person within its jurisdiction the equal protection of the laws. As a matter of fact the Illinois Supreme Court has probably given the clause under consideration a broader interpretation than has been given to the equal protection of the laws clause; that is, some laws which have been held in conflict with this provision of the constitution of Illinois probably would not have been held void under the 14th amendment of the constitution of the United States.

In the discussion in the first sub-heading under this section it has been pointed out that laws are not local or special merely because they may be operative in certain parts of the state only, or because they apply only to a certain class of persons. The discussion under other preceding sub-headings show that, even as to the subjects upon which the General Assembly is expressly forbidden to pass local or special legislation, that body may make reasonable classifications for the purposes of legislation. And so it is with reference to the clause now under consideration. A law does not confer special privileges merely because it applies only to certain parts of the state or to a certain class. There may be a sound basis for limiting its application, in which event it will not be in conflict with this clause. "A law is not to be denominated local simply because it may operate only in certain of the municipalities of the state, if, by its terms, it includes and operates uniformly throughout the state under like circumstances and situations. The cities and villages of the state may be classified for purposes of legislation on the basis of population, if such basis has some reasonable relation to the purposes and objects to be attained by the legislation and in some rational degree accounts for the variant provisions of the enactment. A classification of cities, towns, and villages by population cannot be arbitrarily adopted as a ground or reason for investing some of them with powers denied or not granted to others, if, though there be difference in population, there is no difference of situation or circumstances of the municipalities placed in the different classes, and the difference in population has no reasonable relation to the purposes and objects to be attained by the statute."<sup>75</sup>

"Legislation which applies only to a certain class in the community is not necessarily special legislation, within the meaning of the fundamental law of the state. Laws are general and uniform when alike in their operation upon all persons in like situation. When a law is made applicable

<sup>74</sup> Wunderle v Wunderle, 144 Ill. 40 (1893).

<sup>75</sup> L'Hote v Village of Milford, 212 Ill. 418 (1904).

only to one class of individuals, however, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the legislation. The class, if the law confers a benefit upon it, must be composed of individuals possessing in common some disability, attribute or qualification, or in some condition marking them as proper objects in whom to vest the specific right granted unto them. Members of the medical profession may properly be placed in one class, and constitutional laws applicable to that class alone, relating to the practice of medicine, may be enacted, but a statute regulating the descent of property could not be valid if it applied only to that class.<sup>76</sup>

"Not only must the law operate generally upon all the individuals composing a class to whom privileges are granted, but there must be a sound basis, in reason and principle, for regarding the class of individuals as a distinct and separate class . . . a class cannot be created by arbitrary declaration of the law-making power and endowed with special legislative favors. It is essential to the validity of the classification, in such instances, it shall be based on material distinctions in the situation and circumstances of the individuals who are to be embraced therein, and the grounds of distinction and classification must have relation, in reason and principle, to the privileges proposed to be granted to the individuals, as a class, by the proposed legislation."<sup>77</sup>

The General Assembly may pass a law regulating warehouses without violating this clause of the constitution for the operation of a warehouse is a separate and distinct business and constitutes a class in itself.<sup>78</sup> An act which bars a suit for damages for personal injuries against a city, town or village unless written notice of the claim for damages is given within six months after the cause of action accrues is not special, even though counties, townships and other municipal corporations are not included in the act for, with respect to this matter, there is, in the opinion of the court, a reasonable basis for classification as between the several kinds of municipalities.<sup>79</sup> A law regulating the business of plumbing may prescribe different rules and regulations with reference to that business in cities and villages of small population than in cities of greater population because a less complicated system of plumbing will be required in the smaller communities.<sup>80</sup> It is proper for the General Assembly to require that a bank in a large city, shall have a larger capital stock than a bank in a smaller community.<sup>81</sup> An act providing that women may not work more than ten hours in any one day in a hotel is not a special act merely because it does not include boarding houses.<sup>82</sup> And an act to regulate the practice of medicine does not confer special privileges because it exempts from the provisions thereof persons who have been continuously engaged in the practice of medicine for a period of ten years prior to the passage of the law.<sup>83</sup>

An act which grants to manufacturers of beer, soda and mineral water the right to have issued a search warrant for the purpose of recovering bottles and containers bearing the names of such manufacturers is special and void because other manufacturers of goods sold in similar bottles and

<sup>76</sup> Jones v C. R. I. & P. Ry. Co., 231 Ill. 302 (1907).

<sup>77</sup> People v Board of Supervisors, 185 Ill. 288 (1900).

<sup>78</sup> Munn v People, 69 Ill. 80 (1873).

<sup>79</sup> Erford v City of Peoria, 229 Ill. 546 (1907).

<sup>80</sup> Douglas v People, 225 Ill. 536 (1907); see, also L'Hote v Milford, 212 Ill. 418 (1904); C. T. R. R. Co., v Greer, 223 Ill. 104 (1906); People v Edmands, 252 Ill. 108 (1911); People v Grover, 258 Ill. 124 (1913).

<sup>81</sup> People v Adams State Bank, 272 Ill. 277 (1916).

<sup>82</sup> People v Elerding, 254 Ill. 579 (1912).

<sup>83</sup> Williams v People, 121 Ill. 84 (1887); see, also, Kettles v People, 221 Ill. 221 (1906); People v Evans, 247 Ill. 547 (1910); People v Logan, 284 Ill. 83 (1918). For other cases in which legislative classifications have been sustained, see Vogel v Pekoc, 157 Ill. 339 (1895); Arms v Ayer, 192 Ill. 601 (1901); People v Nellis, 249 Ill. 12 (1911); People v Kaelber, 253 Ill. 552 (1912); People v Brady, 262 Ill. 578 (1914); G. S. Johnson Co. v Belosky, 263 Ill. 363 (1914); Martens v Brady, 264 Ill. 178 (1914); People v Solomon, 265 Ill. 28 (1914); People v City of Rock Island, 271 Ill. 412 (1916); Perkins v Commissioners of Cook Co., 271 Ill. 449 (1916); People v Gordon, 274 Ill. 462 (1916); Casparis Stone Co. v Industrial Board, 278 Ill. 77 (1917); People v Stokes, 281 Ill. 159 (1917).

containers are denied the privileges conferred by the act on others of the same class.<sup>84</sup> An act which has the effect of prohibiting the sale of patented medicines by persons other than registered pharmacists, although it requires no inspection of patented medicines sold by such pharmacists, is void because it confers a special privilege on registered pharmacists.<sup>85</sup> An act which makes it a criminal offense for an employer to discharge an employe because the employe is a member of a labor union is void as creating an unwarrantable distinction between union and non-union men.<sup>86</sup> An act which requires employers of labor to disclose to prospective employes, residing in another state, or in some place in this state other than the place of the proposed employment, the existence of labor disputes at the proposed place of employment, is void because, in the opinion of the court, it discriminates against prospective employes residing in the immediate vicinity of the place of the contemplated employment.<sup>87</sup> An act which requires coal mine operators to maintain washrooms for their employes cannot be sustained, if it does not also apply to other employers engaged in businesses in which the employes become covered with dust and grease in much the same manner as mine workers, for the effect of such a law would be to impose special burdens on coal mine operators and thus confer special privileges on other employers in the same general class.<sup>88</sup> A law granting exemption from service of civil process to members of the General Assembly, and not to others similarly situated is unconstitutional as conferring special privileges on members of the General Assembly.<sup>89</sup> A law which prohibits the use of second hand material in mattresses, quilts and comforters manufactured for sale, and which does not apply to the manufacture of pillows, is class legislation forbidden by this clause of the constitution.<sup>90</sup> A law authorizing the formation of high school districts which is so worded that certain territory in the state, though similarly situated, cannot be organized as a high school district is void for the reason that it confers special privileges on the people residing in territory that may be so organized.<sup>91</sup> And an act which permits cities having a population of more than 20,000 to use, for general city purposes, all of the road and bridge taxes levied and collected on property within their respective limits is void because, with respect to the subject matter of the act, there is no basis for classifying cities on the basis of population, or for discriminating between cities on the one hand and towns and villages on the other.<sup>92</sup>

It is clear from the decisions of the Supreme Court just mentioned that a law is not necessarily local or special legislation conferring special privileges or immunities because it applies only to certain parts of the state or only to a certain class. The General Assembly may classify for the purposes of legislation and laws which contain classifications will be sustained if there is any reasonable basis for the classifications. But what is a reasonable classification is always a question for the court and it is oftentimes a difficult matter to distinguish between cases in which classifications are upheld and cases in which classifications are held void. (See discussion preceding sub-headings).

<sup>84</sup> *Lippmann v People*, 175 Ill. 101 (1898); *Horwich v Walker-Gordon Laboratory Co.*, 205 Ill. 497 (1903).

<sup>85</sup> *Noel v People*, 187 Ill. 587 (1900).

<sup>86</sup> *Gillespie v People*, 188 Ill. 176 (1900); see, also, *Fiske v People*, 188 Ill. 206 (1900); *Mathews v People*, 202 Ill. 389 (1903).

<sup>87</sup> *Josma v Western Steel Car and Foundry Co.*, 249 Ill. 508 (1911).

<sup>88</sup> *Starne v People*, 222 Ill. 189 (1906); but see *People v Solomon*, 265 Ill. 28 (1914).

<sup>89</sup> *Phillips v Browne*, 270 Ill. 450 (1918).

<sup>90</sup> *People v Weiner*, 271 Ill. 74 (1915).

<sup>91</sup> *People v Weis*, 275 Ill. 581 (1916); see, also, *People v Rinaker*, 252 Ill. 266 (1911). For other cases in which legislative classifications have been held void, see *Jones v C. R. I. & P. Ry. Co.*, 231 Ill. 302 (1907); *Manowsky v Stephan*, 233 Ill. 409 (1908); *Off & Co. v Moorehead*, 235 Ill. 40 (1908); *People v Schenck*, 257 Ill. 384, (1913); *Miller v Sincere*, 273 Ill. 194 (1916); *Board of Administration v Miles*, 278 Ill. 174 (1917); *People v Campbell*, 285 Ill. 557 (1918).

<sup>92</sup> *People v Fox*, 247 Ill. 402 (1910).

It should also be noted that this section of the constitution provides that "the General Assembly shall not pass local or special laws . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Apparently, two elements are necessary before this prohibition becomes operative: (1) The law must be a local or special law. (2) It must confer special privileges, immunities or franchises. The Supreme Court, however, as indicated by the foregoing discussion of cases, has practically disregarded the first element. If a law adopts a classification which the court regards as improper, it will be held to violate this section, although it is in reality a general law. Apparently, in the opinion of the court, a law making an improper classification is, by virtue of that fact, a local or special law.

With reference to special laws granting special franchises, also forbidden by this clause, it has been held that the power to appoint a state officer is a franchise, and that a law which authorizes private corporations to appoint the officers, who shall be charged with the duty of enforcing the provisions thereof, confers a special franchise on those corporations and is, to that extent, void.<sup>83</sup>

While this clause of the constitution expresses the public policy of the state as being opposed to any kind of a monopoly,<sup>91</sup> it does not declare the public policy of the state to be opposed to the elimination of competition in certain cases and the provision of the public utilities act which authorizes one public utility, subject to the approval of the public utilities commission, to acquire stock in another utility is not in conflict therewith. "The public policy of the state, as declared by section 22 of article 4 of the constitution, is not opposed to the elimination of competition in all cases, but only applies where a monopoly, in the sense in which that word was used in the common law, would be thereby created, viz., where competition is eliminated by conferring upon a specified person or corporation the right to exclude all others from engaging in the same business in the same field of operation, or by upholding the validity of contracts and agreements which place it within the power of certain individuals or corporations to control production and fix prices, thereby resulting in injury to the public."<sup>92</sup>

**Necessity for general laws in other cases.** This clause which requires the enactment of general laws in all cases where such laws are applicable addresses itself to the General Assembly alone. When that body concludes that a special law is necessary on a subject not expressly enumerated in this section, and with reference to which the constitution does not elsewhere forbid special laws, its determination of this question is final and not subject to review by the courts.<sup>93</sup> Thus, the General Assembly, because the constitution does not expressly forbid special laws on those subjects may, as pointed out in the first subheading under this section, pass special laws with reference to drainage and sanitary districts and parks. But it must be remembered that even with respect to subjects on which the constitution does not expressly forbid special legislation the provisions of the clause relating to special privileges, immunities and franchises must be observed. The constitution does not expressly forbid special laws with reference to the formation of school districts but a law relating to the formation of school districts may discriminate between persons and communities similarly situated, in which event it is void as conferring special privileges.<sup>97</sup> And a law authorizing the formation of forest preserve districts, if it is not applicable to all

<sup>83</sup> *Lasher v People*, 183 Ill. 226 (1899); but see *State Board of Agriculture v Brady*, 266 Ill. 592 (1915); *Illinois Farmers' Institute v Brady*, 267 Ill. 98 (1915); see, also, *Morrison v People*, 196 Ill. 454 (1902); *Report Attorney General 1910*, pp. 85, 125; 1912, p. 126.

<sup>84</sup> *People v Chicago Gas Trust Co.*, 130 Ill. 268 (1889); *Dunbar v American Telephone Co.*, 238 Ill. 456 (1909).

<sup>85</sup> *Public Utilities Commission v Romberg*, 275 Ill. 432 (1916).

<sup>90</sup> *Owners of Lands v People*, 113 Ill. 296 (1886); *People v Bowman*, 247 Ill. 276 (1910); *Commissioners of Lincoln Park v Farhney*, 250 Ill. 256 (1911); *Herschbach v Kaskaskia Sanitary District*, 265 Ill. 388 (1914).

<sup>97</sup> *People v Weis*, 275 Ill. 581 (1915).

persons and communities in substantially the same situation, is void even though the constitution does not expressly prohibit special legislation with reference to forest preserve districts.<sup>98</sup>

In connection with this clause it must be borne in mind, however, that other sections of the constitution require the enactment of general laws on subjects not enumerated in this section and that, in these cases, the question whether or not a law is general is a question for the courts.

(For appropriations in private laws, see discussion article 4, section 16. For uniformity relating to organization, jurisdiction, etc., of courts, justices of the peace, etc., see discussion article 6, sections 21, 29. For taxation and tax exemptions, see discussion article 9, sections 1, 3. For fees of state, county and township officers, see discussion article 10, sections 11, 12. For township organization, see discussion article 10, section 5. For corporations, see discussion article 11, sections 1, 2. See, also, discussion article 2, section 2; article 4, section 34; and see, also, article 6, section 18; article 10, section 4.)

**Section 23.** The General Assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this State or to any municipal corporation therein.

In the opinion of the Attorney General a law which would prevent the bringing of suits on the bonds of state officers after five years from the date of the expiration of their terms of office would be unconstitutional as being in violation of this section;<sup>99</sup> and the same officer has held that an act which merely authorizes a municipality, if it sees fit, to cancel contracts for public improvements and to pay more than the contract price to the original contractor is void, even though it is not mandatory.<sup>1</sup> But a municipality may release a liability in its favor for something deemed of an equal or greater value.<sup>2</sup>

**Section 24.** The House of Representatives shall have the sole power of impeachment; but a majority of all the members elected must concur therein. All impeachments shall be tried by the Senate; and when sitting for that purpose, the Senators shall be upon oath, or affirmation to do justice according to law and evidence. When the Governor of the State is tried, the Chief Justice shall preside. No person shall be convicted without the concurrence of two-thirds of the Senators elected. But judgment, in such cases, shall not extend further than removal from office, and disqualification to hold any office of honor, profit or trust under the government of this State. The party, whether convicted or acquitted, shall nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

(See article 5, section 15; article 6, section 30).

<sup>98</sup> *People v Rinaker*, 252 Ill. 266 (1911).

<sup>99</sup> Report Attorney General 1914, p. 783, Veto Message Senate Journal 1907-08, p. 1761.

<sup>1</sup> Veto Messages 1919, p. 40.

<sup>2</sup> *City of Chicago v P. C. C. & St. L. Ry. Co.*, 244 Ill. 220 (1910).

**Section 25.** The General Assembly shall provide, by law, that the fuel, stationery, and printing paper furnished for the use of the State; the copying, printing, binding and distributing the laws and journals, and all other printing ordered by the General Assembly shall be let by contract to the lowest responsible bidder; but the General Assembly shall fix a maximum price; and no member thereof, or other officer of the State, shall be interested, directly or indirectly, in such contract. But all such contracts shall be subject to the approval of the Governor, and if he disapproves the same there shall be a re-letting of the contract, in such manner as shall be prescribed by law.

(See article 4, section 15; article 8, section 4).

**Section 26.** The State of Illinois shall never be made defendant in any court of law or equity.

**Suits against the state in its own name.** The state cannot be made a party defendant in a proceeding to levy a special assessment to defray the cost of constructing a local improvement, even though it owns property that will be benefited by the improvement.<sup>3</sup> It is improper for the Attorney General to file a cross petition in a condemnation proceeding because a cross petitioner in such a proceeding is in effect a defendant;<sup>4</sup> and this seems to be true even though it has been held proper to require the state to pay the costs in an abandoned condemnation proceeding in which it was the petitioner.<sup>5</sup> But it is entirely proper for a defendant in a suit in equity brought by the state to file a cross bill.<sup>6</sup>

**Suits against state officers.** As long as a State officer is acting within the scope of his authority, a suit against him is a suit against the state and cannot be maintained. Thus, a suit cannot be maintained against the penitentiary commissioners to recover damages for breach of a contract to furnish convict labor, or to compel performance thereof.<sup>7</sup> Nor can a suit for damages for personal injuries sustained as a result of the falling down of a grandstand at the state fair grounds be maintained against the state board of agriculture.<sup>8</sup> But a state officer who attempts to transcend his authority, may be restrained by the courts. An officer who attempts to enforce the collection of fees under an improper interpretation of a statute,<sup>9</sup> or who is about to pay out money under an unconstitutional statute,<sup>10</sup> may be enjoined by the courts. A state officer, who attempts to deprive an individual of the free enjoyment of his property cannot set up as a defense to an injunction suit against him the fact that the suit against him is in effect a suit against the state, for by his actions in interfering with the use of another's property he is transcending his authority.<sup>11</sup> And a civil service employee

<sup>3</sup> In re City of Mt. Vernon, 147 Ill. 359 (1893); Report Attorney General 1900, p. 191; see, also, City of Chicago v City of Chicago, 207 Ill. 36 (1904).

<sup>4</sup> People v Sanitary District of Chicago, 210 Ill. 171 (1904).

<sup>5</sup> Deneen v Unverzagt, 225 Ill. 378 (1907).

<sup>6</sup> Brundage v Knox, 279 Ill. 450 (1917).

<sup>7</sup> People v Dulaney, 96 Ill. 503 (1880).

<sup>8</sup> Minear v State Board of Agriculture, 259 Ill. 549 (1913); but see State Board of Agriculture v Brady, 266 Ill. 592 (1915).

<sup>9</sup> G. A. Insurance Co. v Van Cleave, 191 Ill. 410 (1901).

<sup>10</sup> Burke v Snively, 208 Ill. 328 (1904).

<sup>11</sup> Joos v Illinois National Guard, 257 Ill. 138 (1913).



who has been discharged without cause is entitled to a writ of *mandamus* to compel the Auditor of Public Accounts to issue a warrant for the salary justly due him for the time that he was illegally prevented from performing the duties of his position.<sup>12</sup> (See discussion article 3, subheading, "Independence of departments").

**Claims against the state.** This section does not prevent the General Assembly from appropriating money to pay just claims against the state.<sup>13</sup> (See discussion article 4, section 16, subheading, "Private laws").

**Section 27.** The General Assembly shall have no power to authorize lotteries or gift enterprises, for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.

**Section 28.** No law shall be passed which shall operate to extend the term of any public officer after his election or appointment.

While a constitutional amendment may have the effect of extending the term of a public officer after his election,<sup>14</sup> the General Assembly has no power to add seven months to the terms of the county superintendents of schools then in office.<sup>15</sup> Nor can the General Assembly pass a law providing for the election in 1902 of a successor to a judge whose term of office expired in 1899.<sup>16</sup>

**Section 29.** It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper.

This section applies only to operative miners and not to a carpenter employed to work on buildings outside of a mine.<sup>17</sup> The purpose of this section is to protect the operative miner while he is working in a mine, and not after he has left it. And it relates not to the health of the miner but to his protection from personal injury while he is in the mine.<sup>18</sup> With respect to protection from personal injury, legislation for miners as a class is permitted by the constitution but beyond that the General Assembly may not go. Legislation for miners on other subjects is void unless it applies to all persons similarly situated.<sup>19</sup> Thus, the miner's wash room act was

<sup>12</sup> *People v Stevenson*, 272 Ill. 215 (1916).

<sup>13</sup> *Fergus v Russel*, 277 Ill. 20 (1917).

<sup>14</sup> *People v Board of Supervisors*, 100 Ill. 495 (1881).

<sup>15</sup> Report Attorney General 1913, p. 35.

<sup>16</sup> *People v Knopf*, 198 Ill. 340 (1902); Veto Message Senate Journal 1873, p. 413; but see *Crook v People*, 106 Ill. 237 (1883).

<sup>17</sup> *Rogers v Carterville Coal Co.*, 254 Ill. 104 (1912).

<sup>18</sup> *Starne v People*, 222 Ill. 189 (1906).

<sup>19</sup> *Millett v People*, 117 Ill. 294 (1886); *Harding v People*, 160 Ill. 459 (1896); *Cook v Big Muddy Mining Co.*, 249 Ill. 41 (1911).

held void as special legislation because it did not apply to foundry men and others engaged in employments in which contact with grease and dirt is unavoidable.<sup>20</sup>

Contributory negligence is no defense to an action for damages for personal injuries sustained as a result of a wilful violation of a statute passed pursuant to the command of this section of the constitution.<sup>21</sup> And mine owners may be required to pay fees for inspection services rendered by the state.<sup>22</sup>

**Section 30.** The General Assembly may provide for establishing and opening roads and cartways, connected with a public road, for private and public use.

It was held by the Supreme Court that under the constitution of 1848 the General Assembly had no power to provide for the establishment of a private roadway over the lands of another without his consent.<sup>23</sup> This section of the constitution was adopted for the purpose of overcoming the court's previous holding. (Debates, p. 889).

**Section 31.** The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for Agricultural, Sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by Special Assessments upon the property benefited thereby.<sup>24</sup>

**In general.** This section was amended in 1878. It was held that under the original section, drainage districts could not be vested with power to levy special assessments.<sup>25</sup> The purpose of the amendment was to give the General Assembly the power to authorize drainage districts to levy special assessments. (See discussion article 9, section 9, subheading, "Municipalities that may be authorized to make local improvements by special assessments or by special taxation").

While this section is not self-executing or mandatory upon the General Assembly to pass laws providing for the organization of drainage districts,<sup>26</sup> it is a general grant of power to the General Assembly, and confers upon that body, by implication, all other powers necessary to make the general

<sup>20</sup> *Starne v People*, 222 Ill. 189 (1906); *People v Solomon*, 265 Ill. 28 (1914).

<sup>21</sup> *Carterville Coal Co. v Abbott*, 181 Ill. 495 (1899); *Brunnworth v Kerens Coal Co.*, 260 Ill. 202 (1913).

<sup>22</sup> *C. W. & V. Coal Co. v People*, 181 Ill. 270 (1899).

<sup>23</sup> *Nesbitt v Trumbo*, 39 Ill. 110 (1866); *Crear v Crossly*, 40 Ill. 175 (1866).

<sup>24</sup> As amended by the first amendment to the constitution. The amendment was proposed by resolution of the General Assembly in 1877. It was ratified by the voters on November 5, 1878, and proclaimed adopted on November 29, 1878. The section as it originally appeared is as follows:

"Section 31. The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches, for agricultural and sanitary purposes, across the lands of others."

<sup>25</sup> *Udpike v Wright*, 81 Ill. 49 (1876).

<sup>26</sup> *Hollenbeck v Detrich*, 162 Ill. 388 (1896).

grant effective.<sup>27</sup> The power of the General Assembly with reference to drainage districts is practically unlimited. The General Assembly "has the right at all times to regulate and control them, their franchises and their funds, and to alter, modify or abolish them at pleasure so[provided] that their property is not diverted from the uses and objects for which it was given or purchased."<sup>28</sup> The General Assembly may authorize the annexation of unorganized lands benefited by the necessary drains of an organized district,<sup>29</sup> and it may require an upper district to contribute toward the cost of an outlet drain, constructed by a lower district, but used by both districts.<sup>30</sup> Laws may be passed creating special districts,<sup>31</sup> or directing the corporate authorities of cities,<sup>32</sup> or highway commissioners,<sup>33</sup> to act as drainage commissioners for a district comprised of the territory embraced within the limits of the municipality or political subdivision in which they have jurisdiction. (See discussion subsequent subheading, "Corporate authorities").

This section of the constitution probably does not deprive the General Assembly of the power to authorize the formation of drainage districts, with power to construct drains, ditches and pumping plants by general taxation.<sup>34</sup> As a matter of fact, a city which is organized as a drainage district, while it may install a pumping plant under a special assessment proceeding, cannot levy special assessments to defray the cost of the operation and maintenance thereof, but must do so by general taxation.<sup>35</sup> The ordinary drainage district, however, may levy special assessments to pay the cost of operating and maintaining a pumping plant.<sup>36</sup> The distinction is that a city has the power of levying general taxes, while an ordinary drainage district, under the law authorizing its creation, generally has no power to levy general taxes.

A drainage district may be given the power to acquire its right of way for ditches and drains by eminent domain proceedings.<sup>37</sup> (See article 2, section 13).

**Corporate authorities.** It is well settled that, under the provisions of sections 9 and 10 of article 9, only the corporate authorities of a municipal corporation may levy taxes for its needs, and that the corporate authorities of a municipality are those persons who are either elected by the people of the municipality or selected in some mode assented to by them. In the earlier drainage cases, the court took the view that this rule did not apply to drainage districts, and that unless the General Assembly deemed it necessary, there was no need that the corporate authorities of such districts should be elected by the people or selected in some mode to which the people had assented.<sup>38</sup> It must be admitted, however, that the court, in those cases was influenced by the view that, in the drainage law then under consideration, a drainage district could not be organized except on a petition of a majority of the land owners in the proposed district.<sup>39</sup> The court apparently was of the opinion that the assent of the people in a drain-

<sup>27</sup> *Kilgour v Drainage Commissioners*, 111 Ill. 342 (1884).

<sup>28</sup> *People v Bowman*, 247 Ill. 276 (1910); see also, *Hollenbeck v Detrich*, 162 Ill. 388 (1896); *City of Chicago v Town of Cicero*, 210 Ill. 290 (1904).

<sup>29</sup> *People v Swearingen*, 273 Ill. 630 (1916).

<sup>30</sup> *Drainage Commissioners v Rector Drainage District*, 266 Ill. 536 (1915). See *People v Block*, 276 Ill. 286 (1916).

<sup>31</sup> *Owners of Lands v People*, 113 Ill. 296 (1885); *Herschbach v Kaskaskia Sanitary District*, 265 Ill. 388 (1914).

<sup>32</sup> *Village of Hyde Park v Spencer*, 118 Ill. 446 (1886).

<sup>33</sup> *Kilgour v Drainage Commissioners*, 111 Ill. 342 (1884); see, also, *Huston v Clarke*, 112 Ill. 344 (1884).

<sup>34</sup> *Wilson v Board of Trustees*, 133 Ill. 443 (1890).

<sup>35</sup> *McChesney v Village of Hyde Park*, 151 Ill. 634 (1894).

<sup>36</sup> *Brooks v Hatch*, 261 Ill. 179 (1913).

<sup>37</sup> *C. C. C. & St. L. Ry. Co. v Polecat Drainage District*, 213 Ill. 83 (1904); see, also, *Veto Messages 1917*, p. 9.

<sup>38</sup> *Huston v Clarke*, 112 Ill. 344 (1884); *Owners of Lands v People*, 113 Ill. 296 (1885); *Sny Island Drainage District v Shaw*, 252 Ill. 142 (1911).

<sup>39</sup> *Owners of Lands v People*, 113 Ill. 296 (1885).

age district with reference to the appointment of its corporate authorities, was obtained when a majority of the land owners petitioned for the organization of the district. In *Herschbach v Kaskaskia Sanitary District*,<sup>40</sup> and *Funkhouser v Randolph*,<sup>41</sup> special acts creating drainage districts were held void, because no provision was made for the election or appointment of the corporate authorities in a manner approved by the people; and the earlier cases were expressly distinguished on the ground that the drainage law involved in those cases permitted the organization of a drainage district only on the petition of a majority of the land owners in the proposed district.

**Assessments and benefits.** Under this section, the General Assembly has the power to authorize the levy of special assessments against all property in a drainage district which is benefited thereby. The constitution does not limit such assessments to assessments against lands only.<sup>42</sup> But the assessments must not exceed the benefits,<sup>43</sup> and the owner of property assessed must be given an opportunity to be heard on the question whether his property is assessed more than it is benefited.<sup>44</sup> However, benefits other than those of an agricultural or sanitary nature, may be considered in spreading a special assessment.<sup>45</sup>

A district organized prior to 1878, may not levy special assessments to pay its outstanding obligations. It may levy such assessments for the construction and maintenance of new levees, drains and ditches and "to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state," but that is the full extent of the power conferred.<sup>46</sup>

(See discussion article 9, section 9).

**Section 32.** The General Assembly shall pass liberal Homestead and Exemption laws.

**Section 33.** The General Assembly shall not appropriate out of the State treasury, or expend on account of the new capitol grounds, and construction, completion, and furnishing of the State House, a sum exceeding, in the aggregate, three and a half millions of dollars, inclusive of all appropriations heretofore made, without first submitting the proposition for an additional expenditure to the legal voters of the State, at a general election; nor unless a majority of all the votes cast at such election shall be for the proposed additional expenditure.

The phrase "new capitol grounds" is not limited to such grounds as the state had at the time of the adoption of the constitution. It was intended "to cover and include all grounds belonging to the capitol without regard to when they were purchased."<sup>47</sup>

<sup>40</sup> 265 Ill. 388 (1914).

<sup>41</sup> 287 Ill. 94 (1919).

<sup>42</sup> *Spring Creek Drainage District v E. J. & E. Ry. Co.*, 249 Ill. 260 (1911).

<sup>43</sup> *Winkleman v M. & I. L. Drainage District*, 170 Ill. 37 (1897); *People v Whitesell*, 262 Ill. 387 (1914).

<sup>44</sup> *People v Brown*, 253 Ill. 578 (1912); *People v Schwartz*, 284 Ill. 159 (1918).

<sup>45</sup> *Commissioners of Highways v Drainage Commissioners*, 127 Ill. 581, (1889); *Vandalia Drainage District v Vandalia R. R. Co.*, 247 Ill. 114 (1910).

<sup>46</sup> *Winkleman v M. & I. L. Drainage District*, 170 Ill. 37 (1897).

<sup>47</sup> *People v Stuart*, 97 Ill. 123 (1880).

Section 34. The General Assembly shall have power, subject to the conditions and limitations hereinafter contained, to pass any law (local, special or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the city of Chicago. The law or laws so passed may provide for consolidating (in whole or in part) in the municipal government of the city of Chicago, the powers now vested in the city, board of education, township, park and other local governments and authorities having jurisdiction confined to or within said territory, or any part thereof, and for the assumption by the city of Chicago of the debts and liabilities (in whole or in part) of the governments or corporate authorities whose functions within its territory shall be vested in said city of Chicago, and may authorize said city, in the event of its becoming liable for the indebtedness of two or more of the existing municipal corporations lying wholly within said city of Chicago, to become indebted to an amount (including its existing indebtedness and the indebtedness of all municipal corporations lying wholly within the limits of said city, and said city's proportionate share of the indebtedness of said county and sanitary district which share shall be determined in such manner as the General Assembly shall prescribe) in the aggregate not exceeding five per centum of the full value of the taxable property within its limits, as ascertained by the last assessment either for State or municipal purposes previous to the incurring of such indebtedness (but no new bonded indebtedness, other than for refunding purposes, shall be incurred until the proposition therefor shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special); and may provide for the assessment of property and the levy and collection of taxes within said city for corporate purposes in accordance with the principles of equality and uniformity prescribed by this Constitution; and may abolish all offices, the functions of which shall be otherwise provided for; and may provide for the annexation of territory to or disconnection of territory from said city of Chicago by the consent of a majority of the legal voters (voting on the question at any election, general, municipal or special) of the said city and of a majority of the voters of such territory, voting on the question at any election, general, municipal or special; and in case the General Assembly shall create municipal courts in the city of Chicago it may abolish the offices of justices of the peace, police magistrates and constables in and for the territory within said city, and may limit the jurisdiction of justices of the peace in the territory of said county of Cook outside of said city to that territory, and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe; and the General Assembly may pass all laws which it may deem requisite to effectually provide a complete system of local government in and for the city of Chicago.

No law based upon this amendment to the Constitution, affecting the municipal government of the city of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special; and no local or special law based upon this amendment affecting specially any part of the city of Chicago shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question at any election, general, municipal or special. Nothing in this section contained shall be construed to repeal, amend or affect section four (4) of Article XI of the Constitution of this State.

This section was adopted as an amendment to the constitution in 1904. Under the constitution (article 4, section 22), the General Assembly is forbidden to pass special laws relating to cities. Chicago, the largest city in the state, had long felt the need for special laws with reference to its local affairs. One purpose of this amendment was to give the General Assembly the power to enact special laws with respect to the local government of that city. It was also deemed desirable to abolish justices of the peace in the city of Chicago and to limit the territorial jurisdiction of the justices of the peace residing outside of the city but within the county of Cook. However, the constitution (article 6, section 21) provides that the jurisdiction of justices of the peace shall be uniform. It was impossible to limit the territorial jurisdiction of justices of the peace in Cook County, without also limiting the territorial jurisdiction of justices of the peace in other counties in a similar manner.<sup>48</sup> In order to give the General Assembly the power to limit the territorial jurisdiction of justices of the peace in Cook County only, it was necessary to amend the constitution. To give the General Assembly this power was another purpose of this amendment. (See Constitutional Conventions in Illinois, Second Edition, pp. 38, 39). The legality of the amendment was challenged on the ground that it amended more than one article of the constitution, but it was sustained. (See discussion article 14, section 2, subheading, "Amendments to more than one article").

"Since the adoption of this amendment, the General Assembly is not restricted in the passage of local or special laws applicable alone to the city of Chicago in furtherance of the general purposes of the amendment, except such restrictions and conditions as are contained in the amendment itself . . . There being no limitations or restrictions in the constitutional amendment itself as to the form of the ballot to be used in voting upon any special law passed in pursuance of this amendment, and the legislature having express power to pass any law, local special or general, providing for a scheme or charter of local municipal government for the city of Chicago, there can be no valid objection to a provision incorporated in the law to be voted upon, providing for the form of the ballot to be used in the election to adopt or reject such law."<sup>49</sup>

In 1913, the Attorney General was called upon to construe the provision, "no local or special law . . . affecting specially any part of the city of Chicago, shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question . . ." A bill passed by the General Assembly sought to consolidate the several park districts in the city of Chicago. The parks were not co-extensive with the limits of the city, but the bill provided that if it received a majority of the total number of votes cast on the question in the entire city, it should be declared adopted. The Attorney General ruled that this provision of the bill was in conflict with the constitution, for the reason, that under its terms,

<sup>48</sup> *People v Meech*, 101 Ill. 200 (1882).

<sup>49</sup> *Swigart v City of Chicago*, 223 Ill. 371 (1906).

a park district comprising only a part of the city, might be forced into a consolidation, even though a majority of the voters in the park district voted against the adoption of the bill.<sup>50</sup>

This section seems to have contemplated that all special laws enacted under it should be submitted to the legal voters of the city of Chicago before taking effect. However, it should be noted that the part of the section relating to a local referendum is limited to laws "affecting the municipal government of the city of Chicago", and that the power to enact special legislation may be construed as broader than the requirement for a local popular vote. An act passed in 1919 (Laws 1919, p. 411) made certain changes with respect to officers of the municipal court, without providing for a local referendum. The validity of this law has not been passed upon by the Supreme Court.

A large number of cases construing this section have come up in connection with the act relating to the municipal court. Since all of these cases are discussed elsewhere, there will be no discussion concerning them at this time. References are given, however, to the articles and sections in connection with which these cases are discussed. (For discussion as to character and territorial jurisdiction of the municipal court, see statement article 6, section 1. With reference to concurrent jurisdiction of municipal court and criminal court of Cook County, see discussion article 6, section 26. With reference to the power of the General Assembly to fix the term of office of judges of the municipal court, see discussion article 6, section 32. For statement as to power of General Assembly to pass special laws relating to practice and jurisdiction of municipal court, see discussion article 4, section 22, sub-heading "Changes of venue" and article 6, section 29).

<sup>50</sup> Veto Message Senate Journal 1913, p. 2290.





## ARTICLE V—EXECUTIVE DEPARTMENT

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Section 1. The Executive Department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Superintendent of Public Instruction, and Attorney General, who shall, each, with the exception of the Treasurer, hold his office for the term of four years from the second Monday of January next after his election, and until his successor is elected and qualified. They shall, except the Lieutenant Governor, reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law.

In general. It seems obvious that the officers named in this section are constitutional officers and must, therefore, be elected by the electors prescribed in article 7, section 1. Thus an act giving women the right to vote for all officers to be elected under the general and special school laws was held invalid insofar as it purported to give women the right to vote for the Superintendent of Public Instruction.<sup>1</sup> (See discussion article 7, section 1, subheading, "Woman suffrage".)

The Supreme Court has apparently reached the view that a civil service act depriving the officers named in this section of their power to appoint subordinates does not violate this section.<sup>2</sup> (See discussion article 3, subheading, "Independence of Departments".)

**Secretary of State.** The Secretary of State has certain constitutional duties such as the duty to reside at the seat of government and keep the public records there, and the duty to keep and use the great seal of the state of Illinois. (See article 5, section 22). Concerning these duties Justice Dunn said in *People v. McCullough*:<sup>3</sup> "The legislature cannot absolve the Secretary of State from the performance of these duties or impose them upon another. So far as the constitution confers any power upon him, he is beyond the reach of the legislature. It cannot deprive him of the custody of the great seal of the state or authorize another officer to affix it to any document, and it cannot require the public records, books and documents to be kept elsewhere than at the capital. But the Secretary of State is not independent of the legislature in the performance even of these duties. He is subject to its control in all things connected with them, where the constitution has not imposed a limitation upon the power of the legislature. What are the public records, books and papers which are to be kept at the seat of government must be ascertained by an examination of the statutes. They are only such records, books and papers as some statute names. While they must be kept at the seat of government, the legislature may require them to be kept in the state house in offices provided for that purpose. While no other officer can be authorized to use the great seal, the Secretary of State

<sup>1</sup> *Plummer v Yost*, 144 Ill. 68 (1893).

<sup>2</sup> *People v McCullough*, 254 Ill. 9 (1912); *People v Brady*, 275 Ill. 261 (1916).

<sup>3</sup> *People v McCullough*, 254 Ill. 9 (1912).

can use it only as directed by law. The legislature may regulate the form in which the records and accounts shall be kept and reports shall be made, and, in general, control whatever the constitution has not prescribed."

**Attorney General.** In the case of *Fergus v Russel*,<sup>4</sup> the Supreme Court took the view that the provision of this section that the Attorney General "shall perform such duties as may be prescribed by law" conferred upon the Attorney General all of the duties which the English Attorney General had at common law, and since the English Attorney General was the sole officer authorized to represent the British Crown, the Attorney General of the state of Illinois must conduct all of the litigation and do all of the legal business for the state. In that case the court said: "The Attorney General is the chief law officer of the state, and the only officer empowered to represent the people in any suit or proceeding in which the state is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers and of all boards, commissions and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts. The appropriation to the Insurance Superintendent for legal services and for traveling expenses of attorneys and court costs in prosecutions for violations of insurance laws is unconstitutional and void." (See Constitutional Convention Bulletin No. 1, pp. 13, 16.)

**Auditor of Public Accounts.** It has been held that the Auditor of Public Accounts is vested with certain powers of which the General Assembly may not deprive him. In the case of *People v. Brady*<sup>5</sup> the court said: "It is not within the power of the General Assembly to deprive the Auditor of Public Accounts of the power conferred upon him by the constitution to audit claims and charges against the state created in pursuance of an appropriation made by law." But it has been held that it is within the power of the General Assembly to require that claims or charges against the state be approved by some official before they are presented to the Auditor.<sup>6</sup> (See discussion article 4, section 17, subheading, "Auditor's Warrant".)

**Section 2.** The Treasurer shall hold his office for the term of two years, and until his successor is elected and qualified; and shall be ineligible to said office for two years next after the end of the term for which he was elected. He may be required by the Governor to give reasonable additional security, and in default of so doing his office shall be deemed vacant.

**Section 3.** An election for Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, and Attorney General, shall be held on the Tuesday next after the first Monday of November, in the year of our Lord one thousand eight hundred and seventy-two, and every four years thereafter; for Superintendent of

<sup>4</sup> 270 Ill. 304 (1915). And see *Dahnke v People*, 168 Ill. 102 (1897).

<sup>5</sup> 277 Ill. 124 (1917).

<sup>6</sup> *People v Lowden*, 285 Ill. 618 (1918).

Public Instruction on the Tuesday next after the first Monday of November, in the year one thousand eight hundred and seventy, and every four years thereafter; and for Treasurer on the day last above mentioned, and every two years thereafter, at such places and in such manner as may be prescribed by law.

Section 4. The returns of every election for the above named officers shall be sealed up and transmitted, by the returning officers, to the Secretary of State, directed to the "The Speaker of the House of Representatives," who shall, immediately after the organization of the House, and before proceeding to other business, open and publish the same in the presence of a majority of each House of the General Assembly, who shall, for that purpose, assemble in the hall of the House of Representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more have an equal, and the highest number of votes, the General Assembly shall, by joint ballot, choose one of such persons for said office. Contested elections for all of said offices shall be determined by both houses of the General Assembly, by joint ballot, in such manner as may be prescribed by law.

The Attorney General has ruled that the requirements of this section as to canvass of the votes must be complied with before the officers are entitled to assume office. Thus, where both houses of the legislature were deadlocked in organizing and for that reason could not hold the joint meeting required by this section, the inauguration of the state officers was necessarily postponed until this joint meeting had been held and the votes canvassed, although it will be noticed that section 1 of this article fixes a definite date for the inauguration.<sup>7</sup> The Attorney General has also held that, while this section precludes the House of Representatives from engaging in other business prior to the joint meeting required by this section, it does not prevent the Senate from transacting other business.<sup>8</sup>

Section 5. No person shall be eligible to the office of Governor, or Lieutenant Governor, who shall not have attained the age of thirty years, and been, for five years next preceding his election, a citizen of the United States and of this State. Neither the Governor, Lieutenant Governor, Auditor of Public Accounts, Secretary of State, Superintendent of Public Instruction nor Attorney General shall be eligible to any other office during the period for which he shall have been elected.

The last sentence of this section does not prevent the General Assembly from imposing *ex officio* duties upon the officers named. Thus the Supreme

<sup>7</sup> Report Attorney General 1912, p. 1237.

<sup>8</sup> Report Attorney General 1912, p. 1240.

Court has held that a statute making the Superintendent of Public Instruction *ex officio* trustee of a state normal school does not violate this section, since it merely prescribes additional duties for that officer and does not require him to hold any other office than that of Superintendent of Public Instruction.<sup>9</sup>

**Section 6.** The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed.

**In general.** Article 3 provides that the powers of the government shall be divided into three distinct departments,—the legislative, executive, and judicial, and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to another, except as otherwise provided in the constitution. Under this provision, it is held that the investiture of the Governor with supreme executive power makes the chief executive independent of the judiciary and the courts can not, therefore, control his actions.<sup>10</sup> (See discussion article 3, subheading, "Independence of departments".)

**Governor's power to execute laws.** In the early case of *Field v People*<sup>11</sup>, the Supreme Court, in construing a similar section of the constitution of 1818, laid down the far reaching principle that the constitution is a limitation upon the power of the General Assembly, but a grant of power to the executive and judicial branches of the government. The court held that it followed from this principle that the Governor has no implied powers except such as are necessarily incidental to the execution of his express powers. And since no specific power is granted by this section, none can be implied. The Attorney General, on at least three occasions, has advised the Governor that the chief executive may exercise no power by virtue of this clause. Thus the Attorney General has said that the Governor has no power by virtue of this section to enforce the Sunday closing law or dram shop act,<sup>12</sup> nor has the Governor power to aid the courts in the execution of their process, except by virtue of his power to use the militia in case the courts are obstructed in enforcing their process.<sup>13</sup>

**Section 7.** The Governor shall, at the commencement of each session, and at the close of his term of office, give to the General Assembly information, by message, of the condition of the State, and shall recommend such measures as he shall deem expedient. He shall account to the General Assembly, and accompany his message with a statement of all moneys received and paid out by him from any funds subject to his order, with vouchers, and, at the commencement of each regular session present estimates of the amount of money required to be raised by taxation for all purposes.

<sup>9</sup> *People v Inglis*, 161 Ill. 256 (1896).

<sup>10</sup> *People v Dunne*, 258 Ill. 441 (1913).

<sup>11</sup> 3 Ill. 79 (1839).

<sup>12</sup> Report Attorney General 1906, p. 54; 1915, p. 78.

<sup>13</sup> Report Attorney General 1918, p. 805.

Section 8. The Governor may, on extraordinary occasions, convene the General Assembly, by proclamation, stating therein the purpose for which they are convened; and the General Assembly shall enter upon no business except that for which they were called together.

The Attorney General has said that the Governor might issue an additional proclamation, during a special session of the General Assembly, naming additional subjects for legislative consideration. But such a message should be in the form of an independent proclamation, and not an amendment to the original proclamation.<sup>14</sup>

It is a direct violation of this section of the constitution for the General Assembly, at a special session, to pass an act upon a subject matter not mentioned in the governor's proclamation convening the special session.<sup>15</sup> However, it was the opinion of the Attorney General that an amendment to the federal constitution might be ratified at a special session of the General Assembly, despite the fact that this purpose was not mentioned in the Governor's proclamation. This opinion was based upon the view that the provision of this section that the "General Assembly shall enter upon no business except that for which they were called together" merely prohibits that body from performing legislative acts other than those mentioned in the proclamation convening the General Assembly. In the opinion of the Attorney General the ratification of the amendment to the federal constitution was not a legislative act. But the Attorney General in the same opinion, suggests the advisability of avoiding all doubt by permitting a regular session of the General Assembly to ratify such an amendment.<sup>16</sup>

Section 9. In case of a disagreement between the two houses with respect to the time of adjournment, the Governor may, on the same being certified to him by the house first moving the adjournment, adjourn the General Assembly to such time as he thinks proper, not beyond the first day of the next regular session.

The principal difficulty arising under this section is the determination of when a disagreement exists between the two houses, with respect to the time of adjournment. Mr. Elliott Anthony, in introducing this section in the constitutional convention of 1869-70 said: "The term 'disagreement' is a technical term and consists of five steps; (1) The originating house non-concurs; (2) the amending house insists; (3) the originating house insists; (4) the amending house adheres; (5) the originating house adheres". (Debates p. 748).

In this connection the case of *People v Hatch*<sup>17</sup> is interesting. That case arose under the constitution of 1848, which contained a provision similar to this, except that the certificate of the house first moving the adjournment was not a prerequisite to the Governor's power to act. The facts of that case were as follows: On the 6th day of June, 1863, the Senate adopted a resolution for final adjournment at 6 o'clock in the afternoon of that day. The House amended this resolution by inserting the 22nd day of

<sup>14</sup> Report Attorney General 1912, pp. 964, 966.

<sup>15</sup> Veto Messages 1911, pp. 31, 33.

<sup>16</sup> Report Attorney General 1912, p. 83.

<sup>17</sup> 33 Ill. 9 (1863).

June and, when the senate refused to concur in this amendment, and, before the House had taken any further action, Governor Yates, by proclamation, declared the legislature adjourned. When this matter was brought before the Supreme Court, the court scrupulously refrained from expressing an opinion as to the legality of the Governor's action. However, Justice Breese, in a separate opinion, expressed the view that it was for the General Assembly to determine whether the Governor had cause to take this action but that the subsequent actual departure of the General Assembly was an acquiescence in the Governor's action. It will be observed that all of the steps mentioned in Mr. Anthony's definition of a disagreement did not occur in this case.

It seems to have been the consensus of opinion, in the convention of 1869-70 that some alteration of the section, as it stood in the constitution of 1848, was desirable to prevent a recurrence of the prorogation of 1863. (Debates p. 776-779.) There was some disagreement as to how this could best be accomplished. The expedient of requiring the certificate of the House first moving the adjournment that the disagreement actually existed was finally adopted as the most effective safeguard against arbitrary action by the Governor.

In 1911, the Attorney General rendered an opinion that when the Governor had received the certificate of disagreement from the house first moving the adjournment, the Governor was the sole judge of whether or not a disagreement actually existed and his discretion was not reviewable by the courts. The Attorney General also took the view that if the Governor should adjourn the General Assembly to a specified date, he might, before that date, exercise his constitutional power to call a special session, if an emergency requiring such a session should arise.<sup>18</sup>

**Section 10.** The Governor shall nominate, and by and with the advice and consent of the Senate, (a majority of all the Senators elected concurring, by yeas and nays), appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the General Assembly.

While this section deprives the General Assembly of the power to appoint to office it does not mean that all state officers whose offices are created by the constitution or by law, must be appointed by the governor.<sup>19</sup> The General Assembly may create offices and provide that they shall be filled by the appointment of some officer other than by the Governor. Thus, the General Assembly may authorize the courts to appoint boards of election commissioners, election judges, county mine examining boards and park commissioners.<sup>20</sup> But it has been held that the power to appoint and remove city fire marshalls can not be vested in the courts, since this power is an executive power, which the separation of the departments of the government precludes the courts from exercising.<sup>21</sup> Likewise it has been held that the power to appoint probation officers is a judicial function and

<sup>18</sup> Report Attorney General 1912, p. 73.

<sup>19</sup> *People v Evans*, 247 Ill. 547 (1910), but see Veto Message, No. 16.

<sup>20</sup> *People v Board of Supervisors*, 223 Ill. 187 (1906); *People v Hoffman*, 116 Ill. 587 (1886); *People v Evans*, 247 Ill. 547 (1910); *People v Morgan*, 90 Ill. 558 (1878); see *People v Kipley*, 171 Ill. 44 (1898).

<sup>21</sup> *City of Aurora v Schoeberlein*, 230 Ill. 496 (1907).

can not be vested otherwise than in the courts.<sup>22</sup> And, while the General Assembly may confer the power of appointment upon other officers than the Governor, it cannot give to a private individual, association or corporation the power to make appointments to office, for this would be, in effect, a grant of a special franchise to such private individual, association or corporation.<sup>23</sup> (See discussion, article 4, section 22, sub-heading, "Special privileges and immunities;" article 3, sub-heading, "Appointment of officers;" article 9, section 9, sub-heading, "Corporate authorities.")

It must be remembered, however, that not every position is an office within the meaning of this section. In the case of *Bunn v People*,<sup>24</sup> which was decided prior to the adoption of the constitution of 1870, it was held that a similar provision in the constitution of 1848 did not prevent the General Assembly from appointing the commissioners who were to be charged with the duty of supervising the construction of the new state house. The basis of this decision was that the commissioners were not officers within the meaning of the constitutional provision, but were mere agents or employees, for a single and special purpose, whose powers and duties ceased upon the completion of their task. In this connection, it may be noted that section 24 of article 5 provides that an office is a public position, created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed.

And it has been held that this provision of the constitution is not violated merely because the General Assembly imposes *ex officio* duties upon an existing officer. Thus, the General Assembly may provide that the highway commissioners of a township shall be *ex officio* drainage commissioners of that township.<sup>25</sup> The mere imposition of *ex officio* duties does not, in the opinion of the Supreme Court, constitute the creation of a new office.

Section 11. In case of a vacancy, during the recess of the Senate, in any office which is not elective, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate (a majority of all the Senators elected concurring by yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. No person, after being rejected by the Senate, shall be again nominated for the same office at the same session, unless at the request of the Senate, or be appointed to the same office during the recess of the General Assembly.

What is a "vacancy" within the meaning of this section? If an officer dies, or resigns, or is removed it is clear that his office thereby becomes vacant. But does a vacancy exist when there is an office which has never been filled? The only case bearing upon this question is the case of *People v Forquer*<sup>26</sup> arising under the constitution of 1818. Article 3, section 8 of the constitution of 1818 reads as follows: "When any officer, the right of whose appointment is by this constitution, vested in the General Assembly, or in the Governor and senate shall, during the recess, die or his

<sup>22</sup> *Witter v Cook County Commissioners*, 256 Ill. 616 (1912).

<sup>23</sup> *Lasher v People*, 183 Ill. 226 (1899).

<sup>24</sup> 45 Ill. 397 (1867).

<sup>25</sup> *Kilgour v Drainage Commissioners*, 111 Ill. 342 (1884); *Owners of Lands v People*, 113 Ill. 296 (1885).

<sup>26</sup> 1 Ill. 104 (1825).

office by any means become vacant, the Governor shall have power to fill such vacancy by granting a commission which shall expire at the end of the next session of the General Assembly." Claiming to act under this section, the acting Governor, in 1825, during a recess of the senate, appointed William Ewing, Paymaster General in the militia. This office had been created by statute in 1821 but the position had never been filled. The Supreme Court held that this appointment was not justified under the constitution, since the vacancy must arise during the recess of the senate in order to give the Governor the power to make such an appointment. Just how far this decision is applicable as a precedent in construing the present constitution is a doubtful matter, in view of the differences between the language of the constitution of 1818 and that of 1870.

One difficulty involved in construing this section of the constitution is illustrated by the following hypothetical case: Suppose the General Assembly passed an act on June 25, creating an office to be filled by appointment of the Governor with the consent of the senate. Suppose, then, the General Assembly adjourned *sine die* on June 26, and the act was approved by the Governor on June 27, so that it took effect on July 1. Would the Governor, have the right to assume that there was then a vacancy arising during the recess of the senate so that he might make a temporary appointment under this section of the constitution? It is common in the drafting of bills to make express provision regarding this matter. For example the Civil Administrative Code (Hurd's Revised Statutes 1917, Chap. 24½, sec. 12) provides that "If the senate is not in session at the time this act takes effect, the Governor shall make a temporary appointment as in case of a vacancy".

The Attorney General has held that "an office does not become vacant on the expiration of the fixed term of the incumbent of the office where under the law he holds until his successor is elected or appointed and qualified." Thus, where the term of a public administrator expired during a recess of the senate the Governor had no power immediately to appoint his successor, since the incumbent holds office until his successor is appointed and qualified.<sup>27</sup>

This section applies to offices which are not elective, but it may be noted that section 20 of article 5, provides for appointment in several cases to fill vacancies in elective offices.

**Section 12.** The Governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same as is herein provided in other cases of vacancy.

**In general.** The constitution of 1818 contained no such provision as this, and it was held by the Supreme Court in the early case of *Field v. People*<sup>28</sup> that the Governor had no power of removal as an incident to his power of appointment. This section was inserted in the constitution of 1870 to insure the nullification of that decision.<sup>29</sup> (Debates, p. 748).

**Power of Governor.** The power of the Governor to remove an officer under this section, for the causes specified, is absolute.<sup>30</sup> He is not limited

<sup>27</sup> Report Attorney General 1919, p. 172; see Report Attorney General 1900, p. 238.

<sup>28</sup> 3 Ill. 79 (1839).

<sup>29</sup> *Wilcox v People*, 90 Ill. 186 (1878).

<sup>30</sup> *Wilcox v People*, 90 Ill. 186 (1878).



to any particular mode of removal; he may remove an officer without notice or hearing and his discretion in such a removal is not reviewable by the courts.<sup>31</sup>

In the case of *Wilcox v People*<sup>32</sup> it was contended that the Governor's power of removal under this section was limited to officers whom he had appointed with the consent of the senate, but the court held that the Governor may remove any officer whom he appoints. However, the power of removal is limited to officers appointed by the Governor and has no application to elective officers, unless the General Assembly shall, by a constitutional statute, give the Governor the power to remove such elective officers. Thus, while the Governor may remove a notary public for incompetence,<sup>33</sup> he may not under this section of the constitution, remove a justice of the peace or a state's attorney since the latter are elective officers.<sup>34</sup> Indeed, it seems that a statute, giving the Governor power to remove a justice of the peace or a state's attorney would be unconstitutional, since section 30 of article 6 appears to specify the only method by which these officers may be removed. (See article 6, section 30). But, as previously noted, the section now under consideration does not preclude the General Assembly from vesting the Governor with power to remove elective officers. A statute giving the Governor power to remove a sheriff who permits a prisoner to be taken from him by the action of a mob, is constitutional.<sup>35</sup>

**Section 13.** The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.

In general. This provision vests in the Governor the exclusive power to grant reprieves, commutations and pardons and a statute granting this power to another is invalid. Thus the Supreme Court has held that an act allowing a judge, who has committed a prisoner to the House of Correction, to vacate the order of commitment, thereby discharging the prisoner, is invalid as an infringement upon the Governor's pardoning power.<sup>36</sup> Similarly, where a prisoner entered a plea of guilty, but no judgment was entered upon this plea until three years later, it was held that this indefinite suspension of the punishment amounted to a reprieve which it was beyond the power of the court to grant.<sup>37</sup>

The Governor's pardoning power extends to all offenses. An offense is defined as a "transgression of law" and it follows that the pardoning power applies to misdemeanors as well as felonies.<sup>38</sup>

**Convictions.** But it will be noticed that the Governor has power to pardon only after conviction. Some doubt exists as to what amounts to a conviction. The Supreme Court, under the constitution of 1848, held that a sentence of the court, and not a mere finding of guilt by a jury, constituted a conviction.<sup>39</sup> But that decision rested upon the provision of the constitu-

<sup>31</sup> *Wilcox v People*, 90 Ill. 186 (1878).

<sup>32</sup> 90 Ill. 186 (1878).

<sup>33</sup> Report Attorney General 1914, p. 164.

<sup>34</sup> Report Attorney General 1914, p. 161; 1915, p. 92.

<sup>35</sup> *People v Nellis*, 249 Ill. 12, (1911).

<sup>36</sup> *People v LaBuy*, 285 Ill. 141 (1918); see, also, Report Attorney General 1915, p. 466; 1908, p. 56.

<sup>37</sup> *People v Allen*, 155 Ill. 61 (1895); see Report Attorney General 1910, p. 299.

<sup>38</sup> Report Attorney General 1913, p. 739; see *People v LaBuy*, 285 Ill. 141 (1918).

<sup>39</sup> *Faunce v People*, 51 Ill. 311 (1869).

tion of 1848 requiring the Governor to report to the General Assembly the pardons granted, reporting among other things the sentence. On the other hand the Attorney General has taken the view that a plea of guilty or a finding of guilt by a jury constitutes a conviction under the present constitution. Thus, it was the opinion of the Attorney General that the present probation system (act of June 19, 1911,) violates this section of the constitution, since it gives a court power to suspend sentence after a plea of guilty or a finding of guilt by a jury, thereby infringing the Governor's pardoning power.<sup>40</sup>

**Parole law.** The Supreme Court has held that the parole law providing for the establishment of a board of pardons does not encroach upon the province of the Governor since the board of pardons has power only to investigate, and the final discharge or commutation must be made by the Governor.<sup>41</sup> Indeed, the Attorney General has said that, so far from being in conflict with this section of the constitution, the parole law was passed in pursuance of the constitutional provision that the Governor may grant pardons "subject to such regulations as may be provided by law relative to the manner of applying therefor."<sup>42</sup>

**Reprieves, commutations and pardons.** The Attorney General has stated that, under a grant of the pardoning power in this form the Governor may grant any form of pardon known to the common law. It may be full and absolute or partial and conditional. If the pardon be full and absolute it blots out entirely the judgment of conviction and the offense. But a conditional pardon or a commutation does not blot out the judgment of conviction. It operates merely on the punishment. So while the Governor may shorten a sentence, he has no power in the opinion of the Attorney General, to change a judgment of conviction of murder to one of manslaughter so as to make the parole law applicable.<sup>43</sup>

And it has been held that a pardon can not remit the court costs, since the right to such costs is vested in those who are to receive them,<sup>44</sup> nor may a pardon remit an informer's right to a portion of the fine where a part of the fine is given, by statute, to an informer.<sup>45</sup>

**Section 14.** The Governor shall be commander-in-chief of the military and naval forces of the State (except when they shall be called into the service of the United States); and may call out the same to execute the laws, suppress insurrection, and repel invasion.

In the case of *City of Chicago v Chicago Ball Club*<sup>46</sup> the court held that this section prevents the General Assembly from giving to cities, or their governing authorities, any control whatever over the state militia.

(For other provisions relating to militia, see article 12.)

<sup>40</sup> Report Attorney General 1912, p. 109; see *People v Allen*, 155 Ill. 61 (1895).

<sup>41</sup> *People v Joyce*, 246 Ill. 124 (1910).

<sup>42</sup> Report Attorney General 1914, p. 440.

<sup>43</sup> Report Attorney General 1912, p. 1134.

<sup>44</sup> *Holliday v People*, 10 Ill. 215 (1848).

<sup>45</sup> *Meul v People*, 198 Ill. 258 (1902).

<sup>46</sup> 196 Ill. 54 (1902).

Section 15. The Governor, and all civil officers of the State, shall be liable to impeachment for any misdemeanor in office.

The Supreme Court has said that the term "all civil officers of the state" as used in this section does not include those officers who are mentioned as county officers in article 10, section 8, viz,—the county judge, county clerk, sheriff, treasurer, coroner, clerk of the circuit court and recorder of deeds.<sup>47</sup>

(For other provisions of the constitution relating to impeachment or removal of officers, see article 6, section 30; article 4, section 24; article 5, section 12)

Section 16. Every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it with his objections, to the House in which it shall have originated, which house shall enter the objections at large upon its journal and proceed to reconsider the bill. If then two-thirds of the members elected agree to pass the same, 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 the members elected to that house, it shall become a law notwithstanding the objections of the Governor; but in all such cases the vote of each house shall be determined by yeas and nays to be entered upon the journal.

Bills making appropriations of money out of the Treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections, and if the Governor shall not approve any one or more of the items or sections contained in any bill, but shall approve the residue thereof, it shall become a law as to the residue in like manner as if he had signed it. The Governor shall then return the bill, with his objections to the items or sections of the same not approved by him, to the house in which the bill shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider so much of said bill as is not approved by the Governor. The same proceedings shall be had in both houses in reconsidering the same as is hereinbefore provided in case of an entire bill returned by the Governor with his objections; and if any item or section of said bill not approved by the Governor shall be passed by two-thirds of the members elected to each of the two houses of the General Assembly, it shall become part of said law notwithstanding the objections of the Governor. Any bill which shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him

<sup>47</sup> Donahue v County of Will, 100 Ill. 94 (1881).

shall become a law in like manner as if he had signed it, unless the General Assembly shall, by their adjournment prevent its return, in which case it shall be filed with his objections, in the office of the Secretary of State, within ten days after such adjournment, or become a law.<sup>48</sup>

In general. The Governor is under no duty to ascertain that a bill presented to him has been passed in compliance with the constitutional requirements relating to the passage of bills. It follows, that when he signs a bill no inference arises as to the regularity of its passage.<sup>49</sup> (See discussion article 4, section 13, sub-heading, "Necessity for journal entries.")

A bill signed by the Governor does not become a law unless it is a bill passed by both houses of the General Assembly. Thus in the case of *People v Lueders*<sup>50</sup> the central registration act was held void because, as signed by the Governor, it omitted several amendments to the original bill which were concurred in by both houses.

**Date of going into effect.** While a bill signed by the Governor becomes a law as soon as it is signed by him, it does not become effective until July 1st following its passage, unless passed as an emergency measure by a vote of two-thirds of all members elected to each house. If a bill is neither signed nor vetoed by the Governor within ten days after its presentation to him, it becomes a law at the expiration of the 10 days and under ordinary circumstances goes into effect on July 1 following. A serious question arises, however, in a case where the ten days begin before July 1st, but do not expire until after July 1st, following the passage of the bill by the two houses. As a matter of practice the General Assembly never continues in session after July 1st and in any case when the ten days expires after July 1st the situation is always accompanied by the adjournment of the General Assembly before the expiration of the ten days, in which event, the Governor, under the terms of this section, has ten days from the date of adjournment in which to consider the bill. Under such circumstances if the Governor retains the bill for the full period of ten days after adjournment it is not clear when the bill becomes an effective law. If he files it with the Secretary of State without objection before July 1st it is not only not clear as to when it becomes an effective law, but it is also uncertain as to when it becomes a law. (See discussion article 4, section 13, sub-heading, "Date of going into effect.")

<sup>48</sup> As amended by the third amendment to the constitution. The amendment was proposed by resolution of the general assembly in 1883. It was ratified by the people on November 4, 1884, and proclaimed adopted on November 28, 1884. The section as it originally appeared is as follows:

"Section 16. Every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it, and thereupon it shall become a law; but if he do not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If, then, two-thirds of the members elected agree to pass the same, 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 the members elected to that house, it shall become a law, notwithstanding the objections of the Governor. But in all such cases the vote of each house shall be determined by yeas and nays, to be entered on the Journal. Any bill which shall not be returned by the Governor within ten days (Sundays excepted), after it shall have been presented to him, shall become a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return; in which case it shall be filed with his objections, in the office of the Secretary of State, within ten days after such adjournment, or become a law."

<sup>49</sup> *Neiberger v McCullough*, 253 Ill. 312 (1912).

<sup>50</sup> 283 Ill. 287 (1918); see *Cook County v Healy*, 222 Ill. 310 (1906).

Time allowed Governor to consider bills. It will be noticed that there are two ten day periods given the Governor for his consideration of bills. When a bill is presented to the Governor during a session of the General Assembly the Governor has ten days from the date when the bill is presented to him in which to consider the bill. If, however, the General Assembly adjourns during this ten day period, the Governor has an additional ten days from the date of the adjournment. From the first ten day period, Sundays are expressly excluded and the Supreme Court has held that, by implication, Sundays are to be excluded from the second ten day period.<sup>51</sup>

In the opinion of the Attorney General holidays other than Sundays are not to be deducted in computing the ten day periods. The Attorney General has stated that the Governor may not veto or approve a bill on Sunday, but he may approve or veto a bill on holidays other than Sunday. The Attorney General has likewise held that the day upon which the bill is presented to the Governor should be excluded and the day upon which the Governor exercises his powers should be included in determining the ten day period.<sup>52</sup>

The Supreme Court has stated that after the Governor has actually approved or disapproved a bill and has filed it with the Secretary of State, it is beyond his power to take any further action with respect to that bill, even though the time allowed him by the constitution for his consideration of the bill has not yet expired.<sup>53</sup> But the Governor may revoke his approval or disapproval of a bill, provided he has not yet filed the bill in the office of the Secretary of State. Thus in *People v McCullough*<sup>54</sup> it was held that the Governor might, after approving a bill, revoke his approval and veto the bill, if it had not yet been filed in the office of the Secretary of State.

It appears from the case of *People v Rose*<sup>55</sup> however, that if the Governor has filed a bill with the Secretary of State without either his approval or disapproval, within the ten day period, the Governor's power to act with respect to that bill has not been exhausted. In that case the Supreme Court refused to issue a writ of *mandamus* to compel the Secretary of State to authenticate as a law a bill so filed by the Governor with the Secretary of State, until the expiration of the ten days allowed the Governor for his consideration.

**Appropriations.** That part of section 16 which will be considered in this subheading is as follows: "Bills making appropriations of money out of the treasury shall specify the objects and purposes for which the same are made, and appropriate to them respectively their several amounts in distinct items and sections. And if the Governor shall not approve any one or more of the items or sections contained in any bill, but shall approve the residue thereof, it shall become a law, as to the residue, in like manner as if he had signed it. The Governor shall then return the bill, with his objections to the items or sections of the same not approved by him, to the house in which the bill shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider so much of said bill as is not approved by the Governor."

#### Governor's power to veto items.

"The purpose of the amendment was to enlarge the veto power by authorizing the Governor to veto items in appropriation bills. Prior to the

<sup>51</sup> *People v Rose*, 167 Ill. 147 (1897).

<sup>52</sup> Report Attorney General 1918, p. 571.

<sup>53</sup> *People v McCullough*, 210 Ill. 488 (1904); *People v Hatch*, 19 Ill. 283 (1857).

<sup>54</sup> 210 Ill. 488 (1904).

<sup>55</sup> 167 Ill. 147 (1897).

adoption of the amendment, the Governor was forced to treat an appropriation bill as any other bill. He had to accept such a bill as a whole or veto it as a whole. If the Governor disapproved of one or two items in an appropriation measure consisting of several items, he was compelled to accept the measure as presented to him, or reject it in its entirety. The difficulties attending the passage of an extensive appropriation bill had the effect of causing the chief executive to refrain from rejecting such a bill *in toto*, even if he strongly disapproved of certain items of appropriations therein contained. For example, a bill making appropriations for the expenses of the state government could hardly be rejected as a whole merely because it contained one or two undesirable items. For this reason the Governor's power to veto appropriation bills was decidedly limited." (Constitutional Conventions in Illinois, Second Edition, pp. 36-7.)

The principal question relating to the Governor's power in this connection is the question of what constitutes an item which the Governor may veto. Thus where an appropriation read "To the State Board of Agriculture \$153, 150" followed by an enumeration of the various purposes for which this sum was to be expended with an amount for each purpose, the total being \$153, 150, the Supreme Court held that each of the constituent amounts were items and the Governor might legally veto one of them.<sup>56</sup> On the other hand, the court has held that the Governor might not, where the biennial appropriation read \$2,500 per annum, veto the words "per annum," nor might the Governor cut a figure in this manner,—“I approve in the sum of \$3,500 and veto all in excess of said sum of \$3,500.”<sup>57</sup>

#### Necessity for itemization.

It is apparent both from the context of this amendment to the constitution and from a consideration of the purpose for which it was adopted that an appropriation must be for a definite amount. Otherwise the power of the Governor to veto items in appropriation bills would be defeated. The Supreme Court has therefore held that an appropriation of "such sums as may be necessary to refund the taxes on real estate" is invalid, since no definite amount is appropriated.<sup>58</sup>

The determination of when an appropriation bill is sufficiently itemized to satisfy this section of the constitution is a difficult problem. In the case of *People v Brady*,<sup>59</sup> the Supreme Court said: "The word 'item' is in common use and well understood as a separate entry in an account or a schedule, or a separate particular in an enumeration of a total which is separate and distinct from other particulars or entries." This definition, however, throws no light upon the question of the extent to which itemization is necessary in order to comply with the constitution. It seems clear that the General Assembly must have a reasonable discretion to determine what shall constitute items. Thus in the case of *Martens v Brady*<sup>60</sup> it was contended that an appropriation of \$400,000 for the construction and maintenance of roads could not be made in one item. But the court held that these matters were so related as properly to constitute a single item. "It is not to be supposed that the Governor would veto one of these items and approve the other." Again in the case of *Mitchell v Lowden*<sup>61</sup> it was urged that the appropriation of \$60,000,000 for the construction of hard roads was not sufficiently itemized. In that case the court said: "The single purpose for which the money appropriated is to be used is the construction of the system of roads. There will, perhaps be many contracts for the construction of parts of the roads, but each contract is not an item which

<sup>56</sup> *People v Brady*, 277 Ill. 124 (1917).

<sup>57</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>58</sup> *Fergus v Russel*, 270 Ill. 304 (1915).

<sup>59</sup> 277 Ill. 124 (1917).

<sup>60</sup> 264 Ill. 178 (1914).

<sup>61</sup> 288 Ill. 327 (1919).

can be separately stated and for which a definite amount can be appropriated. There will, perhaps, be many contracts for the purchase of materials and tools, but each contract of purchase is not an item which can be separately stated and for which a definite sum can be appropriated. Nor is the purchase of all of one kind of material such an item. All are items of the aggregate, but the constitution does not require an itemization in minute detail of every expenditure of money in connection with the general purpose for which an appropriation is made. The legislature could not know at the time of making the appropriation, even, approximately, the amount required for each of the various contracts or purchases." On the other hand, the Attorney General has said that a bill giving the board of commissioners of the deep waterway the right to expend \$500,000 for the purchase of lands, machinery, supplies salaries, wages, and materials is in direct violation of the injunction to itemize contained in this section.<sup>62</sup> (See Constitutional Convention Bulletin No. 4, pp. 269-287.)

(For an historical discussion relating to the development of the veto power of the Governor of Illinois see Debel, "The Veto Power of the Governor of Illinois," University of Illinois Studies in the Social Sciences, 1917.)

**Section 17.** In case of the death, conviction or impeachment, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the Lieutenant Governor.

**Section 18.** The Lieutenant Governor shall be President of the Senate, and shall vote only when the Senate is equally divided. The Senate shall choose a President, pro tempore, to preside in case of the absence or impeachment of the Lieutenant Governor, or when he shall hold the office of Governor.

**Section 19.** If there be no Lieutenant Governor, or if the Lieutenant Governor shall, for any of the causes specified in section seventeen of this article, become incapable of performing the duties of the office, the President of the Senate shall act as Governor until the vacancy is filled or the disability removed; and if the President of the Senate, for any of the above named causes, shall become incapable of performing the duties of Governor, the same shall devolve upon the Speaker of the House of Representatives.

**Section 20.** If the office of Auditor of Public Accounts, Treasurer, Secretary of State, Attorney General, or Superintendent of

<sup>62</sup> Report Attorney General 1912, p. 960; and see Report Attorney General 1912, p. 1013; *People v Brady*, 277 Ill. 124 (1917).

Public Instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the Governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law. An account shall be kept by the officers of the Executive Department, and of all the public institutions of the State, of all moneys received or disbursed by them, severally, from all sources, and for every service performed, -and a semi-annual report thereof be made to the Governor, under oath; and any officer who makes a false report shall be guilty of perjury, and punished accordingly.

In 1910 the Attorney General, rendered an opinion that the state board of agriculture<sup>63</sup> and the state horticultural society<sup>64</sup> were public institutions within the meaning of this section and must therefore submit a semi-annual report to the Governor. It is the opinion of the Attorney General that this section applies not only to state officers who receive fees for services performed in their official capacities, but includes as well officers who merely disburse appropriations made to them by the General Assembly through warrants drawn by the auditor on the treasurer.<sup>65</sup>

It has been held that the approval of a report by the Governor does not operate to relieve the officer making the report from liability in the event that he has made an incorrect report.<sup>66</sup>

Section 21. The officers of the Executive Department, and of all the public institutions of the State, shall, at least ten days preceding each regular session of the General Assembly, severally report to the Governor, who shall transmit such reports to the General Assembly, together with the reports of the Judges of the Supreme Court of defects in the Constitution and laws; and the Governor may at any time require information, in writing, under oath, from the officers of the Executive Department, and all officers and managers of State institutions, upon any subject relating to the condition, management and expenses of their respective offices.

(See discussion article 5, section 20.)

Section 22. There shall be a seal of the State, which shall be called the "Great Seal of the State of Illinois," which shall be kept by the Secretary of State, and used by him, officially, as directed by law.

(See discussion article 5, section 1, sub-heading "Secretary of State".)

<sup>63</sup> Report Attorney General 1910, p. 666.

<sup>64</sup> Report Attorney General 1910, p. 163.

<sup>65</sup> Report Attorney General 1904, p. 385.

<sup>66</sup> *People v Whittemore*, 253 Ill. 378 (1912).



Section 23. The officers named in this article shall receive for their services a salary, to be established by law, which shall not be increased or diminished during their official terms, and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites of office, or other compensation. And all fees that may hereafter be payable by law for any services performed by any officer provided for in this article of the constitution, shall be paid in advance into the State treasury.

**Disposition of fees collected by state officers in their official capacities.** Fees collected by the officers named in this article for services performed in their official capacities must be paid into the state treasury without any deduction whatever.<sup>67</sup>

It has been held that a contract whereby the state treasurer was to deposit money in certain banks, the interest on such money to be paid to that officer personally, is illegal as contrary to the public policy of the state declared by this provision of the constitution.<sup>68</sup>

**Changes in salaries during terms of office.** (See discussion article 4, section 21, subheadings, "In general" and "Elective state officers".)

Section 24. An office is a public position, created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.

**In general.** The question whether a person performing services for the state was an officer or an employee first arose under the constitution of 1848. That constitution did not define the words "office" or "employment". It did provide, however, that the General Assembly should not make appointments to office. In *Bunn v People*<sup>69</sup> the question presented was whether or not the commissioners charged with the duty of supervising the construction of the new state house were officers whose appointments by the General Assembly was forbidden by the constitution. In holding that the commissioners were not officers, and that they therefore might be appointed by the General Assembly, the court defined the words "office" and "employment" and this definition was, in substance, carried forward into this section of the present constitution.

**Salaries of state officers.** Section 16 of article 4 provides that bills making appropriations for the salaries of state officers shall contain no provision on any other subject. In making appropriations for the salaries and wages of the officers and employees of the state it becomes necessary

<sup>67</sup> *People v Sargent*, 254 Ill. 514 (1912); Report Attorney General 1914, p. 225; *Board of Trade v Cowen*, 252 Ill. 554 (1911); *Whittemore v People*, 227 Ill. 453 (1907).

<sup>68</sup> *Estate of Ramsey v Whitbeck*, 183 Ill. 550 (1900).

<sup>69</sup> 45 Ill. 397 (1867).

to determine who are officers and who are employees, and this is often a difficult question. In *Fergus v Russel*<sup>70</sup> several items of appropriations for certain persons performing services for the State were held invalid because these persons in the opinion of the court were officers and the items were included in a bill making appropriations for purposes other than that of salaries of state officers. In that case the court, in referring to this section of the constitution, said: "This definition contains two essential elements, both of which must be present in determining any given position to be an office: (1) The position must be a public one, created either by the constitution or by law; and (2) it must be a permanent position with continuing duties. To determine whether the first element is present we have but to look to our constitution and our statutes to see whether the particular position under consideration has been created by the constitution or by law. An office is created by law only as a result of an act passed for that purpose. The mere appropriation by the General Assembly of money for the payment of compensation to the incumbent of a specified position does not have the effect of creating an office or of giving such incumbent the character of an officer, as an office cannot be created by an appropriation bill. To ascertain whether the second element is present it is necessary to determine the character of the position. This is not determined by the method in which the occupant or holder of the position is selected—whether by appointment or election. If the duties of the office are continuing and it is necessary to elect or appoint a successor to the several incumbents, then the second element is present whether the incumbent be selected by appointment or by election, and whether the incumbent be appointed during the pleasure of the appointing power or be elected for a fixed term." Applying the rule thus laid down the court held that the following persons were officers whose salaries could not be appropriated in a bill dealing with another subject: assistant attorney generals in charge of the inheritance tax office, the chief and deputy grain inspectors, members of the board of veterinary examiners, the secretary of the board of pardons, the executive officer of the state board of health, the secretary of the civil service commission, the director of the state geological commission, members and secretary of the board of examiners of architects, members and secretary of the board of dental examiners, members of the board of barber examiners, the state inspector of apiaries, members of the state board of pharmacy, deputy fire marshals, members and secretary of the state board of registered nurses, members and secretary of the Illinois stallion registration board, secretary of the industrial commission, members and secretary of the board of examiners of horse shoers and members and secretary of the optometry board.<sup>71</sup> It has also been held that factory inspectors and superintendents of free employment agencies are officers whose salaries must be appropriated in a bill relating to no other subject.<sup>72</sup>

**Removal of state officers.** This definition has also been applied in construing section 12 of article 5 which relates to the Governor's power to remove state officers. In the case of *People v. Wilcox*<sup>73</sup> it was held that the West Chicago Park Commissioners were officers of the state within this definition and that the Governor might therefore remove them from office under section 12 of article 5. In that case the court said: "The members of the board of West Chicago Park Commissioners are agents, by whom in part the people of the state carry on the government. Their functions are essentially political and concern the state at large although they are to be discharged within the town of West Chicago. . . . And whether tested by

<sup>70</sup> 270 Ill. 304 (1915).

<sup>71</sup> Report Attorney General 1916, pp. 17-21. Most of these offices were abolished by the Civil Administrative Code (1917).

<sup>72</sup> *Ritchie v People*, 155 Ill. 98 (1895); *Mathews v People*, 202 Ill. 389 (1903). For definition of the word office as used in a statute see *People v Coffin*, 282 Ill. 599 (1918).

<sup>73</sup> 90 Ill. 186 (1878).

the decision in the Bunn case or by the constitutional definition we can not doubt that these park commissioners come fully within the term officers."

**Tenure of office.** In the case of *People v Loeffler*<sup>74</sup> it was contended that the city civil service act was invalid since it created a tenure of office unknown to the constitution,—tenure during good behavior or until the incumbent is removed,—thereby violating this section of the constitution. But the court said that the positions to which the civil service act applies are more in the nature of employments than offices, and, at any rate, when offices are created by statute those offices are wholly within the control of the legislature which created them.

**Section 25.** All civil officers, except members of the General Assembly and such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of . . . . . according to the best of my ability."

And no other oath, declaration or test shall be required as a qualification.

**Necessity for an oath.** In 1875 in the case of *School Directors v People*,<sup>75</sup> the Supreme Court held that where a statute prescribes the prerequisites to the assumption of office by a township treasurer and does not name an oath as one of the necessary formalities, the treasurer is thereby exempted from taking an oath. In that case the court said: "It certainly has not been understood by the legislative department that this constitutional provision is self-executing, as express provisions of law have been enacted, prescribing with particularity every essential step to be taken by each person elected or appointed to an office, the mode of election or appointment, the giving of bonds, the manner, time, etc., of taking the oath of office (where such oath is required) in order to become qualified to perform the duties of the office. If it were supposed that this constitutional provision was self-enforcing, all the numerous laws requiring the taking of official oaths would be supererogatory. But the section of the constitution referred to expressly leaves it in the discretion of the legislature to exempt 'inferior officers' from taking the prescribed oath of office. The township treasurer is appointed by the board of trustees of schools and falls within the designation of 'inferior officers'. As the legislature, in prescribing the prerequisites to the right to perform his official duties, has required only that the township treasurer shall be a resident of the township, and neither a trustee nor a director, and be appointed by the trustees, and give an official bond in a sufficient amount to cover all liabilities, it is not unreasonable to infer the legislative intention that he should not take an oath of office. . . . Not requiring an oath of office to be taken, is the dispensing with it by the legislature in this case." Similarly, it has been held that where a statute pre-

<sup>74</sup> 175 Ill. 585 (1898).

<sup>75</sup> 79 Ill. 511 (1875).

scribes for drainage commissioners an oath different from the constitutional oath, only the statutory oath need be taken.<sup>76</sup>

**Other oaths or tests.** The word "test", as used in this section, is synonymous with the word "oath". Thus, a statute requiring election commissioners to be selected from members of the two leading political parties, does not violate this section of the constitution as imposing an additional test.<sup>77</sup> Similarly, a civil service act is not invalid as requiring an additional test, when it requires an examination as a criterion of fitness to office.<sup>78</sup>

The Attorney General has held that the word oath, as used here, refers only to an oath concerning religion or politics. The Attorney General has held that a statute requiring an election commissioner, in assuming office, to take oath that he has resided in the city for ten years, does not violate this section.<sup>79</sup>

<sup>76</sup> People v Gary, 196 Ill. 310 (1902).

<sup>77</sup> People v Hoffman, 116 Ill. 587 (1886).

<sup>78</sup> People v Kipley, 171 Ill. 44 (1898).

<sup>79</sup> Report Attorney General 1913, p. 220.

## ARTICLE VI—JUDICIAL DEPARTMENT

Section 1. The judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns.

**Exercise of judicial powers.** This section vests all of the judicial powers of the state in the courts established and authorized to be created by the provisions of article 6 of the constitution. The exception in this section has been held to refer to the provisions of sections 11 and 20 of this article, relating to the appellate and probate courts, respectively.<sup>1</sup> The General Assembly is, therefore, prohibited from authorizing a person who is not a judge of one of these courts to perform a judicial function. Thus, a clerk of a court may not be authorized by statute to enter a default judgment in vacation.<sup>2</sup> A mayor of a city may not be empowered by statute to hear and decide cases involving the violation of city ordinances.<sup>3</sup> The General Assembly may not authorize a recorder of deeds to adjudicate titles to real estate, the adjudication to be complete unless attacked within five years.<sup>4</sup> An attorney at law who has not been elected or appointed as a judge, in the manner prescribed by the constitution, cannot by mere agreement of the parties, act as a judge of the circuit court.<sup>5</sup> Three citizens may not be authorized by municipal ordinance to ascertain and assess damages for injuries to property caused by stray cattle.<sup>6</sup> A county clerk may not be empowered by statute to impose penalties upon persons violating a statute requiring the cleaning of streams running through their property.<sup>7</sup> Nor may an administrative agency, such as a civil service commission or the industrial board, be authorized by statute to punish for contempt witnesses who neglect or refuse to obey the agency's subpoenas.<sup>8</sup> Such powers, being judicial, can only be exercised by judges of the courts created by the constitution.

However, neither the section under consideration, nor article 3, prevents the exercise of powers involving discretion and judgment which are in their nature judicial, by administrative agencies charged primarily with the enforcement of the laws. For example, executive boards administering the laws regulating the practice of medicine or of architecture, may be empowered by statute to revoke a practitioner's license, after a notice and hearing, for violation of the statutory provisions. The exercise of such

<sup>1</sup> Berkowitz v Lester, 121 Ill. 99 (1887).

<sup>2</sup> Hall v Marks, 34 Ill. 358 (1864); Veto Messages 1919, p. 42.

<sup>3</sup> People v Maynard, 14 Ill. 419 (1853); Beesman v City of Peoria, 16 Ill. 484 (1855).

<sup>4</sup> People v Chase, 165 Ill. 527 (1897); compare People v Simon, 176 Ill. 165 (1898).

<sup>5</sup> Davis v Wilson, 65 Ill. 525 (1872); Hoagland v Creed, 81 Ill. 506 (1876).

<sup>6</sup> Bullock v Geomble, 45 Ill. 218 (1867).

<sup>7</sup> C. C. & St. L. Ry. Co. v People, 212 Ill. 638 (1904).

<sup>8</sup> People v Kipley, 171 Ill. 44 (1898); McIntyre v People, 227 Ill. 26 (1907); Report Attorney General 1914, p. 639; Veto Message No. 1.

powers, since it involves the hearing of evidence, the application of the law to the facts determined, and the adjudication of private rights, may perhaps be said to be the exercise of judicial powers. Nevertheless, such statutes have been upheld on the ground that the exercise of these *quasi-judicial* powers is merely incidental to the primary function of the administrative agencies, namely, the administration and enforcement of the laws.<sup>9</sup> (See discussion article 3, subheading, "In general.")

**Jurisdiction of city courts.** The clause "in and for cities and incorporated towns" has been construed to confine the territorial jurisdiction of city courts to the cities in which they are created. For example, it has been held that the General Assembly is prohibited from authorizing a city court to send its original process outside of the city.<sup>10</sup> The municipal court of Chicago, which is a city court created pursuant to the provisions of the clause under consideration,<sup>11</sup> may not be empowered to try criminal cases, transferred to it from the criminal court of Cook County, which arise outside of the city.<sup>12</sup> A similar provision in section 1 of article 5 of the constitution of 1848 was construed to prevent the General Assembly from conferring jurisdiction upon a city court over civil and criminal cases arising in towns outside of the city.<sup>13</sup>

This limitation upon the territorial jurisdiction of city courts, however, has been held not to apply to the performance by the judge of a city court, of purely ministerial functions, such as authorizing the sale of a ward's real estate by a guardian, in a case where the real estate was located outside of the city.<sup>14</sup> Moreover, once a city court has acquired jurisdiction and has rendered judgment, it may send its process outside of the city to enforce that judgment,<sup>15</sup> and a city court may send its process outside of the city, into the county, to summon witnesses and grand and petit jurors.<sup>16</sup> (See discussion article 2, section 5, and section 9, subheading, "Locality from which jury is to come.")

The provisions of sections 23 to 26 of this article do not so limit the provisions of this section or so exhaust the grant of judicial powers with reference to Cook County as to preclude the establishment of city courts in that county.<sup>17</sup> However, the clause under consideration is so limited by the requirements of sections 5 and 9 of article 2, relating to jury trials, and of section 29 of this article, relating to uniformity, as to prohibit the application of a general city court act to a city located in two counties.<sup>18</sup> (See discussion article 6, section 29, subheading, "Provisions mandatory;" article 2, section 5, and section 9, subheading, "Locality from which jury is to come.")

(As to the qualifications of electors voting for city judges, see discussion article 7, section 1, subheading, "Woman suffrage." As to the qualifications of judges of city courts, see discussion article 6, section 17, subheading, "Judges of courts." As to whether the compensation of a city judge may be increased or diminished during his term of office, see discussion article 4, section 21, subheading, "Municipal officers." As to whether the General Assembly may prescribe the terms of office of city judges, see discussion article 6, section 32, subheading, "Term of office." As to the requirements of uniformity in the organization, jurisdiction pro-

<sup>9</sup> *People v Apfelbaum*, 251 Ill. 18 (1911); *Klafter v Board of Examiners*, 259 Ill. 15 (1913).

<sup>10</sup> *Ladies of Maccabees v Harrington*, 227 Ill. 511 (1907); *Wilcox v Conklin*, 255 Ill. 604 (1912).

<sup>11</sup> *Israelstam v U. S. Casualty Co.*, 272 Ill. 161 (1916); *People v Olson*, 245 Ill. 288 (1910).

<sup>12</sup> *Miller v People*, 230 Ill. 65 (1907).

<sup>13</sup> *People v Evans*, 18 Ill. 361 (1857); *People v Lippincott*, 67 Ill. 333 (1873); *Reid v Morton*, 119 Ill. 118 (1886).

<sup>14</sup> *Reid v Morton*, 119 Ill. 118 (1886).

<sup>15</sup> *People v Barr*, 22 Ill. 241 (1859); *Miller v People*, 230 Ill. 65 (1907).

<sup>16</sup> *Miller v People*, 183 Ill. 423 (1900); *City of Chicago v Knobel*, 232 Ill. 112 (1908).

<sup>17</sup> *Chicago Terminal Ry. Co. v Greer*, 223 Ill. 104 (1906).

<sup>18</sup> *People v Rodenberg*, 254 Ill. 386 (1912).

ceedings and practice of city courts, including the municipal court of Chicago, see discussion article 6, section 29).

**Section 2.** The Supreme Court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus, and habeas corpus, and appellate jurisdiction in all other cases. One of said judges shall be chief justice; four shall constitute a quorum, and the concurrence of four shall be necessary to every decision.

**Original jurisdiction.** The specification in this section of the three classes of cases in which the Supreme Court may exercise original jurisdiction has been construed to deny to that court the power to exercise original jurisdiction in any other class of cases, such as election contests,<sup>19</sup> or cases of *certiorari*,<sup>20</sup> injunction,<sup>21</sup> or prohibition.<sup>22</sup>

There have been no judicial interpretations of the clause, "cases relating to the revenue," as used in this section of the constitution. However, the construction placed upon the same words, as used in a statute, may be of interest. Under the statute permitting cases "relating to the revenue" to be brought direct to the Supreme Court from the trial court for review, it has been held that such a case is not presented when all that appears is that taxes have been collected and that two or more governmental agencies are claiming them.<sup>23</sup> A case does relate to the revenue, within the meaning of the statute, when a controversy, in which the revenue is directly and not incidentally affected, arises between a tax authority and a taxpayer, such as a *mandamus* proceeding to compel the listing of property for assessment,<sup>24</sup> or a proceeding to enjoin the collection of taxes.<sup>25</sup>

The Supreme Court takes jurisdiction of so-called "appeals" from boards of review, pursuant to statute, in cases where property is alleged to be exempt from taxation, not by virtue of its appellate jurisdiction, for there can not be an appeal in the strict sense of the term from a non-judicial body, but by virtue of its original jurisdiction in cases "relating to the revenue."<sup>26</sup> (See discussion article 6, section 12, subheading, "Original jurisdiction.")

The original jurisdiction of the Supreme Court in *mandamus* is not exclusive. As far as it extends, it is concurrent with that of the circuit courts. Since 1907, however, it has been held that this jurisdiction is not a general one, but that it is limited to cases where the rights, interests or franchises of the state or of the whole people are involved or where high official duties affecting the public at large are to be enforced, and to emergency cases relating to local public interests or private rights. Whether a given case is of such a character is to be determined by the Supreme Court, in the exercise of its discretion.<sup>27</sup>

<sup>19</sup> *Canby v Hartzell*, 167 Ill. 628 (1897); *Baird v Hutchinson*, 179 Ill. 435 (1899).

<sup>20</sup> *People v Superior Court*, 234 Ill. 186 (1908); *Courter v Simpson Construction Co.*, 264 Ill. 488 (1914).

<sup>21</sup> *Bryant v People*, 71 Ill. 32 (1873).

<sup>22</sup> *People v Circuit Court*, 169 Ill. 201 (1897); *People v Circuit Court*, 173 Ill. 272 (1898).

<sup>23</sup> *Reed v Village of Chatsworth*, 201 Ill. 480 (1903); *People v Holten*, 259 Ill. 219 (1913).

<sup>24</sup> *People v Webb*, 256 Ill. 364 (1912).

<sup>25</sup> *Mushbaugh v Village of East Peoria*, 260 Ill. 27 (1913)

<sup>26</sup> *Maxwell v People*, 189 Ill. 546 (1901); *City of Aurora v Schoeberlein*, 230 Ill. 496 (1907).

<sup>27</sup> *People v City of Chicago*, 193 Ill. 507 (1901); *People v Board of Trade*, 193 Ill. 577 (1901); *People v Board of Education*, 197 Ill. 43 (1902).

The original jurisdiction of the Supreme Court in *habeas corpus* is not exclusive, but is concurrent with that of the other courts.<sup>28</sup>

**Appellate jurisdiction.** A statement of the judicial interpretation of the constitutional provisions relating to the appellate jurisdiction of the Supreme Court, involves a consideration of sections 2 and 11 of this article. Before the establishment of the appellate courts in 1877, the Supreme Court was of the opinion that the clause of section 2, "and appellate jurisdiction in all other cases," operated to vest in the Supreme Court appellate jurisdiction in all cases other than those in which it was given original jurisdiction.<sup>29</sup> However, for many years this phrase has been held to mean merely that whenever jurisdiction is conferred upon the Supreme Court, whether by the constitution or by statute, in cases other than those relating to the revenue, in *mandamus* and *habeas corpus*, that jurisdiction must be appellate.

The only provisions of the constitution which vest an appellate jurisdiction in the Supreme Court are those of section 11 of this article, which provide, in part, that: "After the year of our Lord one thousand eight hundred and seventy-four, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases, and cases in which a franchise, or freehold, or the validity of a statute is involved." Construing the section under discussion and these provisions of section 11, together, the constitution confers appellate jurisdiction upon the Supreme Court, in but the four classes of cases referred to, namely, "criminal cases, and cases in which a franchise, or freehold, or the validity of a statute is involved." Of this appellate jurisdiction, in these cases, the Supreme Court may not be deprived. In all other cases, the appellate jurisdiction of the Supreme Court depends entirely upon statute.<sup>30</sup>

The provisions quoted from section 11 do not, however, require that the four classes of cases mentioned shall be brought direct from the trial courts to the Supreme Court for review. The General Assembly may provide that any one, or more, or all of these cases shall first be taken to the appellate court, or it may provide that any one, or more, or all of them shall be taken direct to the Supreme Court from the trial courts.<sup>31</sup> Where one of these four classes of cases may be taken direct to the Supreme Court, it has been held that the right to a review in that court of a question relating to a franchise, a freehold or the validity of a statute, is waived, if the party first takes the case to the appellate court for a review of other questions.<sup>32</sup> This rule does not apply, however, if the question as to the validity of a statute does not arise until an attempt is made to obtain a review in the Supreme Court of a decision of the appellate court.<sup>33</sup> Inasmuch as in cases other than the four classes of cases referred to in section 11, the appellate jurisdiction of the Supreme Court is entirely dependent upon statute, the General Assembly might, if it desired, deny to litigants a right to a review of such cases in the Supreme Court, and might make the decisions of the appellate court, in such cases, final. Therefore, it may limit the appellate jurisdiction of the Supreme Court, in such cases, either to questions of law or of fact.<sup>34</sup>

<sup>28</sup> *People v Siman*, 284 Ill. 28 (1918).

<sup>29</sup> *Schlattweiler v St. Clair Co.*, 63 Ill. 449 (1872); *Peak v People*, 76 Ill. 289 (1875).

<sup>30</sup> *Chicago & Alton Ry. Co. v Fisher*, 141 Ill. 614 (1892); *Freitag v U. S. Y. Co.*, 262 Ill. 551 (1914); *Courter v Simpson Construction Co.*, 264 Ill. 488 (1914).

<sup>31</sup> *Young v Stearns*, 91 Ill. 221 (1878); *Fleischman v Walker*, 91 Ill. 318 (1878).

<sup>32</sup> *Millers Ins. Co. v People*, 170 Ill. 474 (1898); *Case v City of Sullivan*, 222 Ill. 56 (1906); *Town of Scott v Artman*, 237 Ill. 394 (1908).

<sup>33</sup> *Sixby v Chicago City Ry. Co.*, 260 Ill. 478 (1913); *Freitag v U. S. Y. Co.*, 262 Ill. 551 (1914).

<sup>34</sup> *Kerfoot v Cromwell Mound Co.*, 115 Ill. 502 (1884); *Chicago & Alton Ry. Co. v Fisher*, 141 Ill. 614 (1892); *Lake Shore Michigan Southern Ry. Co. v Richards*, 152 Ill. 59 (1894).



There appear to have been no judicial interpretations of the phrases quoted above from section 11, "cases in which a franchise, or freehold, or the validity of a statute is involved," as they are used in the constitution. However, the construction placed upon these terms as used in a statute permitting such cases to be taken direct to the Supreme Court for review, may have a bearing upon the meaning of the constitutional provisions.

The word "involved" as used in this statute, does not necessarily mean that the proceeding must have been instituted for the express purpose of determining the question relating to a franchise, freehold, or validity of a statute.<sup>35</sup>

The term "franchise" in this statute, is used, not in the broad, popular sense, but, rather, in the strict legal sense of a special privilege, not enjoyed as of common right, which is conferred by the sovereign power or derived from prescription. This privilege need not, however, be exclusive. The term includes the power to exist as a corporation,<sup>36</sup> the power to exercise the right of eminent domain,<sup>37</sup> the power to collect tolls on ferries, bridges and wharves,<sup>38</sup> the constitutional privilege of a portion of the people to vote for candidates for public office,<sup>39</sup> and perhaps the power to issue bank notes.<sup>40</sup> The term has been held not to include the privilege of a foreign corporation to do business in this state,<sup>41</sup> the privilege granted by a city to use certain streets in the operation of a street railroad,<sup>42</sup> the privilege given by a city to run a dramshop,<sup>43</sup> or privileges such as that of membership in a private corporation,<sup>44</sup> that of a citizen to sue in certain cases in the name of the People on his own relation,<sup>45</sup> or the privilege of holding public office.<sup>46</sup>

A "freehold" is involved, within the meaning of the statute, in a case where the title to a freehold estate in real property is so put in issue by the pleadings, that the decision of the case makes necessary a determination of that question, or where the necessary result of a judgment or decree, such as a judgment in condemnation proceedings, is that one party loses and another gains a freehold estate in real property. That is, the title to the freehold must be directly and not incidentally affected.<sup>47</sup> Thus, a freehold is not involved in a suit to remove a cloud upon title.<sup>48</sup>

The "validity of a statute" is not involved in a case where the determination of that question is not pertinent to a decision of the case, as, for example, in a proceeding to construe a will, where it is alleged that the statute creating the corporation appointed as trustee, is invalid.<sup>49</sup> It is involved when plaintiff in error or appellant, to obtain a reversal, must show that certain statutes, if applicable, were passed as a valid exercise of legislative power, even though, in view of the other questions, it is not necessary for the Supreme Court to determine that question in order to decide the case.<sup>50</sup>

**Appeals and writs of error.** A statement of the judicial interpretation of the constitutional provisions relating to appeals to and writs of error

<sup>35</sup> C. & W. I. Ry. Co. v Dunbar, 95 Ill. 571 (1880).

<sup>36</sup> People v Holtz, 92 Ill. 426 (1879); People v Continental Benefit Ass'n., 280 Ill. 113 (1917).

<sup>37</sup> C. & W. I. Ry. Co. v Dunbar, 95 Ill. 571 (1880).

<sup>38</sup> People v Holtz, 92 Ill. 426 (1879).

<sup>39</sup> People v Holtz, 92 Ill. 426 (1879); U. S. v Hraskey, 240 Ill. 560 (1909).

<sup>40</sup> C. & W. I. Ry. Co. v Dunbar, 95 Ill. 571 (1880).

<sup>41</sup> People v Continental Benefit Ass'n., 280 Ill. 113 (1917).

<sup>42</sup> C. & W. I. Ry. Co. v Dunbar, 95 Ill. 571 (1880).

<sup>43</sup> People v City of Chicago, 257 Ill. 380 (1913).

<sup>44</sup> Board of Trade v People, 91 Ill. 80 (1873).

<sup>45</sup> Hering v Attorney General, 104 Ill. 292 (1882).

<sup>46</sup> People v Holtz, 92 Ill. 426 (1879); People v Welch, 260 Ill. 532 (1913).

<sup>47</sup> Skinner v Lake View Ave Co., 57 Ill. 151 (1870); Perry v Bozarth, 198 Ill. 328 (1902); Town of Mattoon v Elliott, 259 Ill. 72 (1913); see discussion of this same question by E. M. Liessmann in the Illinois Law Review, VIII, pp. 176-86; XIV, pp. 223-25.

<sup>48</sup> Hockett v Logan, 257 Ill. 326 (1913).

<sup>49</sup> Dean v Northern Trust Co., 259 Ill. 148 (1913).

<sup>50</sup> Rittenhouse & Embree Co. v Brown, 254 Ill. 549 (1912); Barrett Mfg. Co. v City of Chicago, 259 Ill. 578 (1913).

from the Supreme Court, necessarily involves a consideration of sections 2, 8, 11 and 19 of this article. These sections contain the following provisions:

Sec. 2. "The Supreme Court shall . . . have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases."

Sec. 8. "Appeals and writs of error may be taken to the Supreme Court held in the grand division in which the case is decided, or by consent of the parties, to any other grand division."

Sec. 11. "After the year of our Lord one thousand eight hundred and seventy-four, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide, may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases, and cases in which a franchise, or freehold, or the validity of a statute is involved, and in such other cases as may be provided by law."

Sec. 19. "Appeals and writs of error shall be allowed from final determinations of county courts, as may be provided by law."

It has been held that none of these constitutional provisions, in the absence of further legislation, grants to litigants a right to an appeal, in the strict sense, as distinguished from other methods of obtaining a review, to the Supreme Court. An appeal, in that sense, is entirely a creature of statute and until legislation has been enacted granting a right to an appeal and prescribing the conditions upon which it shall be available, an appeal does not lie.<sup>51</sup> (See discussion article 6, section 12, subheading, "Appellate jurisdiction".)

The remainder of the discussion, under this subheading, will be devoted to the subject of writs of error. It has already been suggested (see discussion preceding subheading, "Appellate jurisdiction") that before the appellate courts were established, in 1877, the Supreme Court had construed section 2 of this article as vesting in that court appellate jurisdiction in all cases other than those in which it was given original jurisdiction. Similarly, it was then held that section 2, in connection with sections 8 and 19, made a writ of error, from the Supreme Court to the trial court, a constitutional writ of right in every case, whether it was a case known to the common law, or a statutory proceeding conducted according to the course of the common law, or a statutory proceeding conducted in a summary manner, such as a condemnation proceeding. That is, the constitution was construed to have extended the common law rule under which a writ of error was a writ of right only in common law cases or in statutory proceedings conducted according to the course of the common law.<sup>52</sup> However, it is now held that, construing section 2 with section 11 of this article, there are only four cases in which the constitution confers appellate jurisdiction upon the Supreme Court, namely, "criminal cases, and cases in which a freehold, a franchise or the validity of a statute is involved." In all other cases, the appellate jurisdiction of the Supreme Court is entirely dependent upon statute. (See discussion preceding subheading, "Appellate jurisdiction"). Similarly, it is now held that under sections 2, 8, 11 and 19 of this article, it is only in these four classes of cases that there is a constitutional right to a writ of error from the Supreme Court. In all other cases, that right depends upon the common law as modified by statute.

However, this constitutional right to a writ of error from the Supreme Court in criminal cases, and cases in which a franchise, a freehold or the validity of a statute is involved, is not necessarily that of a

<sup>51</sup> *Smith v People*, 98 Ill. 407 (1881); *Gallagher v People*, 207 Ill. 247 (1904); *Drainage Commissioners v Harms*, 238 Ill. 414 (1909); *Andrews v Rumsey*, 75 Ill. 598 (1874).

<sup>52</sup> *Schlattweiler v St. Clair County*, 63 Ill. 449 (1872); *St. L. & S. E. Ry. Co. v Lux*, 63 Ill. 523 (1872); *Peak v People*, 76 Ill. 289 (1875); *Haines v People*, 97 Ill. 161 (1880).

right to a writ of error direct from the Supreme Court to the trial court. As has been suggested, (see discussion preceding sub-heading, "Appellate jurisdiction"), the General Assembly may require any one or more or all of these cases to be taken first to the appellate court.<sup>53</sup> On the other hand when one of these four cases, such as a criminal case, is required to be taken first to the appellate court, a writ of error from the Supreme Court to the appellate court to obtain a review of the latter courts' decision, is a constitutional writ of right and must be allowed when claimed.<sup>54</sup> Moreover, it has been intimated by the Supreme Court that the provisions of section 11 of this article deny to the General Assembly the power to provide for any method, other than that of writ of error or appeal, of bringing one of these four classes of cases up from the appellate court to the Supreme Court, for review. Nevertheless, the General Assembly may provide that a writ of *certiorari* may issue from the Supreme Court to the appellate court for the purpose of determining whether or not one of these four classes of cases merits review, when the writ actually awarded to bring up the record, after the case is deemed worthy of review, is a writ of error.<sup>55</sup>

It should be noted that a constitutional right to a writ of error does not include a right to have the writ of error made a *supersedeas*.<sup>56</sup>

Although sections 8 and 19 of this article have often been referred to by the court, the principal basis for the determination of the question as to when a writ of error from the Supreme Court was available, in the great majority of the cases, has been, not the constitution, but the common law, as modified by statute. That is, the constitutional provisions authorize the use of writs of error as a means of obtaining a review of cases by the Supreme Court, but, except in the four classes of cases of which mention has been made, the actual availability of a writ of error in a particular case has been determined, not by the constitution, but by the common law, as extended or changed by legislation.<sup>57</sup>

Very little has been said, in this note, with reference to sections 8 and 19 of this article. Section 8 appears to have been intended merely to require that appeals and writs of error, which were available because of some body of law other than that section, should be taken to the Supreme Court in the particular grand division in which the trial court was located, unless the parties agreed otherwise. That is, that section probably was not intended to have any bearing upon the question as to when a writ of error from the Supreme Court was or was not available in a particular case. Rather, it appears to have been inserted in the constitution for the purpose of directing to which grand division cases should be sent for review. The three grand divisions, however, were abolished, the state as a whole constituted one grand division, and the Supreme Court required to meet at Springfield, by an act of 1897.<sup>58</sup> Perhaps it may be said that since the enactment of that statute, section 8 is inoperative. There has been but one case in which the Supreme Court has really discussed the meaning, insofar as writs of error are concerned, of section 19. In that case the court said: "Plainly, this does not confer the right to a writ of error from this court in all cases decided by the county court. Whether the case shall be taken, by appeal or by writ of error, to this court, or to some other court, must be provided by law. It is but a direction to the General Assembly to prescribe, by law, how appeals and writs of error shall be allowed from final determinations of county courts . . ."<sup>59</sup>

<sup>53</sup> Young v Stearns, 91 Ill. 221 (1878); George v George, 250 Ill. 251 (1911); Public Utilities Commission v C. & W. T. Ry. Co., 275 Ill. 555 (1916).

<sup>54</sup> Smith v People, 98 Ill. 407 (1881); Gallagher v People, 207 Ill. 247 (1904).

<sup>55</sup> Freitag v U. S. Y. Co., 262 Ill. 551 (1914).

<sup>56</sup> Public Utilities Commission v C. & W. T. Ry. Co., 275 Ill. 555 (1916).

<sup>57</sup> Haines v People, 97 Ill. 161 (1880); Hart Bros. v West Chicago Park Commissioners, 186 Ill. 464 (1900); George v George, 250 Ill. 251 (1911); Sweeney v Chicago Telephone Co., 212 Ill. 475 (1904); Peak v People, 76 Ill. 289 (1875); Kingsbury v Sperry, 119 Ill. 279 (1887); Loomis v Hodson, 224 Ill. 147 (1906); Hall v Thode, 75 Ill. 173 (1874).

<sup>58</sup> Hurd's Revised Statutes, 1917, chap. 37, secs. 2-3d.

<sup>59</sup> Kingsbury v Sperry, 119 Ill. 279, 282 (1887).

Section 3. No person shall be eligible to the office of judge of the Supreme Court unless he shall be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in this State five years next preceding his election, and be a resident of the district in which he shall be elected.

Section 4. Terms of the Supreme Court shall continue to be held in the present grand divisions at the several places now provided for holding the same; and until otherwise provided by law, one or more terms of said court shall be held, for the Northern Division, in the City of Chicago, each year, at such times as said court may appoint, whenever said city or the county of Cook shall provide appropriate rooms therefor, and the use of a suitable library, without expense to the State. The judicial divisions may be altered, increased or diminished in number, and the times and places of holding said court may be changed by law.

The three grand divisions were abolished, the state as a whole constituted one grand division, and the Supreme Court was required to sit at Springfield, by an act of 1897.<sup>60</sup>

Section 5. The present grand divisions shall be preserved, and be denominated Southern, Central and Northern, until otherwise provided by law. The State shall be divided into seven districts for the election of judges, and, until otherwise provided by law, they shall be as follows:

First District—The counties of St. Clair, Clinton, Washington, Jefferson, Wayne, Edwards, Wabash, White, Hamilton, Franklin, Perry, Randolph, Monroe, Jackson, Williamson, Saline, Gallatin, Hardin, Pope, Union, Alexander, Pulaski and Massac.

Second District—The counties of Madison, Bond, Marion, Clay, Richland, Lawrence, Crawford, Jasper, Effingham, Fayette, Montgomery, Macoupin, Shelby, Cumberland, Clark, Greene, Jersey, Calhoun and Christian.

Third District—The counties of Sangamon, Macon, Logan, Dewitt, Piatt, Douglas, Champaign, Vermilion, McLean, Livingston, Ford, Iroquois, Coles, Edgar, Moultrie and Tazewell.

Fourth District—The counties of Fulton, McDonough, Hancock, Schuyler, Brown, Adams, Pike, Mason, Menard, Morgan, Cass and Scott.

Fifth District—The counties of Knox, Warren, Henderson, Mercer, Henry, Stark, Peoria, Marshall, Putnam, Bureau, LaSalle, Grundy and Woodford.

<sup>60</sup> Hurd's Revised Statutes, 1917, Chap. 37, secs. 2-3d.

Sixth District—The counties of Whiteside, Carroll, Jo Daviess, Stephenson, Winnebago, Boone, McHenry, Kane, Kendall, DeKalb, Lee, Ogle and Rock Island.

Seventh District—The counties of Lake, Cook, Will, Kankakee and DuPage.

The boundaries of the districts may be changed at the session of the General Assembly next preceding the election for judges therein, and at no other time; but whenever such alterations shall be made, the same shall be upon the rule of equality of population, as nearly as county boundaries will allow; and the districts shall be composed of contiguous counties; in as nearly compact form as circumstances will permit. The alteration of the districts shall not affect the tenure of office of any judge.

Grand divisions. The three grand divisions were abolished, the state as a whole constituted one grand division, and the Supreme Court was required to sit at Springfield, by an act of 1897.<sup>61</sup>

Changes in Supreme Court districts. Under the provisions of section 6 of this article, five Supreme Court judges are elected at one time, one at another time, and one at still another time. (See discussion article 6, section 6).

It has been held that the General Assembly is empowered by the provisions of the last paragraph of this section and those of section 6 of this article, construed together, to change the boundaries of a particular Supreme Court district at the session which convenes next preceding the election of a judge in that district, even though that change results incidentally in the alteration of the boundaries of other districts in which no judges are to be elected that year. Moreover, the General Assembly is authorized by these two sections to change the boundaries of any one or more of the five districts in which judges of the Supreme Court are elected at the same time, at the session which convenes next preceding that election, even though such change or changes may result incidentally in the alteration of the boundaries of other districts in which no judges are to be elected that year. The Supreme Court has denied that the section under consideration necessarily requires all seven districts to be changed at the time of the election of the five judges. The Supreme Court will not review the discretion of the General Assembly as to the equality of population, or the compactness or contiguity of the territory of the new districts, if it can see that any attempt at all was made to comply with these requirements.<sup>62</sup> (See article 6, section 13; and discussion, article 4, section 6.)

(As to whether an act creating new circuits or changing boundaries of circuits may be made to go into effect prior to the first day of July, without the necessity of an emergency clause and a two-thirds vote, see discussion article 4, section 13, subheading, "Date of going into effect.")

Section 6. At the time of voting on the adoption of this Constitution, one judge of the Supreme Court shall be elected by the electors thereof, in each of said districts numbered two, three, six,

<sup>61</sup> Hurd's Revised Statutes 1917, chap. 37, secs. 2-3d.

<sup>62</sup> People v Rose, 203 Ill. 46 (1903).

and seven, who shall hold his office for the term of nine years from the first Monday of June, in the year of our Lord one thousand eight hundred and seventy. The term of office of judges of the Supreme Court, elected after the adoption of this Constitution, shall be nine years; and on the first Monday of June of the year in which the term of any of the judges in office at the adoption of this Constitution or of the judge then elected, shall expire, and every nine years thereafter, there shall be an election for the successor or successors of such judges, in the respective districts wherein the term of such judges shall expire. The Chief Justice shall continue to act as such until the expiration of the term for which he was elected, after which the Judges shall choose one of their number Chief Justice.

On May 13, 1870, when the Constitution of 1870 was adopted by the constitutional convention, the Supreme Court consisted of three judges. The term of one of these three judges expired on the first Monday in June, 1870. Section 2 of article 6 of the new constitution provided that "The Supreme Court shall consist of seven judges." The section under consideration provided for the election of the four new judges on July 2, 1870, when the question of the ratification of the new constitution was submitted to the people. (See, also, section 7 of the schedule.) Five judges, therefore, were elected in 1870, and, pursuant to this section, five judges are to be elected every nine years thereafter, on the first Monday in June. The terms of the other two judges in office at the time of the adoption of the constitution of 1870 by the constitutional convention, expired, respectively, in 1873 and 1876. Therefore, under the provisions of this section, one Supreme Court judge is to be elected every nine years after 1873 and 1876, respectively, on the first Monday in June. Thus, elections for judges of the Supreme Court are held every three years. The provisions of the present statute are as follows: "The judges of the Supreme Court shall hereafter be elected as follows, to-wit: In the first, second, third, sixth and seventh districts on the first Monday of June, in the year of our Lord 1879, and every nine years thereafter. In the fourth district, on the first Monday of June, in the year of our Lord 1876, and every nine years thereafter. In the fifth district, on the first Monday of June, in the year of our Lord 1873, and every nine years thereafter."<sup>63</sup>

Section 7. From and after the adoption of this Constitution, the judges of the Supreme Court shall each receive a salary of four thousand dollars per annum, payable quarterly, until otherwise provided by law. And after said salaries shall be fixed by law, the salaries of the judges in office shall not be increased or diminished during the terms for which said judges shall have been elected.

(As to the meaning of the last sentence of this section, see discussior article 4, section 21, subheading "Judicial officers.")

<sup>63</sup> People v Rose, 203 Ill. 46 (1903); Hurd's Revised Statutes, 1917, chap 46, sec. 10.

Section 8. Appeals and writs of error may be taken to the Supreme Court, held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division.

(See discussion article 6, section 2, subheading, "Appeals and writs of error.")

Section 9. The Supreme Court shall appoint one reporter of its decisions, who shall hold his office for six years, subject to removal by the Court.

Section 10. At the time of the election for representatives in the General Assembly, happening next preceding the expiration of the terms of office of the present clerks of said court, one clerk of said court for each division shall be elected, whose term of office shall be six years from said election, but who shall not enter upon the duties of his office until the expiration of the term of his predecessor, and every six years thereafter one clerk of said court for each division shall be elected.

The three grand divisions were abolished, the state constituted one grand division, the Supreme Court required to sit at Springfield, and the election of but one Supreme Court clerk provided for, by an Act of 1897.<sup>64</sup>

Section 11. After the year of our Lord one thousand eight hundred and seventy-four, inferior Appellate Courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the General Assembly may provide, may be prosecuted from Circuit and other courts, and from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases, and cases in which a franchise, or freehold, or the validity of a statute is involved, and in such other cases as may be provided by law. Such Appellate Courts shall be held by such number of Judges of the Circuit Courts, and at such times and places, and in such manner, as may be provided by law; but no Judge shall sit in review upon cases decided by him; nor shall said Judges receive any additional compensation for such services.

(As to the meaning of the clause of this section, "and from which appeals and writs of error shall lie to the Supreme Court, in all criminal cases,

<sup>64</sup> Hurd's Revised Statutes 1917, chap. 37, secs. 2-3d.

and cases in which a franchise, or freehold, or the validity of a statute is involved," see discussion article 6, section 2, subheadings, "Appellate jurisdiction," and "Appeals and writs of error.")

**Branch Appellate Courts.** The General Assembly is not prohibited by the provisions of this section from creating branch appellate courts, even though they are auxiliary to the main appellate courts. The organization, jurisdiction and districts of these branch courts, however, must comply with the requirements of this section.<sup>65</sup>

**Jurisdiction.** The appellate courts have no original jurisdiction in any case. They are merely intermediate courts of review, and have appellate jurisdiction only. Therefore, the appellate courts may not be empowered to issue writs of *mandamus*,<sup>66</sup> prohibition<sup>67</sup> or *certiorari*,<sup>68</sup> except in aid of their appellate jurisdiction. Nor, in the opinion of the Attorney General, may an appellate court issue a summons in garnishment, for to do so would be to exercise an original jurisdiction.<sup>69</sup>

**Trial judge sitting in review.** In the case of *Provident Assurance Society v King*,<sup>70</sup> the facts were these: The case had been assigned by the appellate court for the first district, to the branch appellate court, in that district, for review. Judge Stein, who had heard the case below, in the circuit court, had become a justice of that branch court, and for that reason, a motion was made to have the case reassigned to the main appellate court. The motion was not allowed. The Supreme Court held that the provision of the section of the constitution under consideration, "but no judge [of a circuit court] shall sit in review upon cases decided by him," prohibited Judge Stein from taking part in the hearing or decision of the case on appeal, and that, for the reason that the party was entitled to a hearing by a full court, it was error not to reassign the case, when such a court, namely, the main appellate court, was available in that district.

**Section 12.** The Circuit Courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law, and shall hold two or more terms each year in every county. The terms of office of Judges of Circuit Courts shall be six years.

**Original jurisdiction.** The term "causes in law and equity" has been held to include the "prosecution of every claim or demand in a court of justice which was known, at the adoption of the constitution, as an action at law or a suit in chancery. It also includes all actions since provided for, in which personal or property rights are involved, which belong to the same class or are of the same nature as previously existing actions at law or in equity. Such are cases where the legislature creates a new statutory remedy for the recovery of property or for damages occasioned by the infringement

<sup>65</sup> *Birkenfield v People*, 191 Ill. 272 (1910).

<sup>66</sup> *Hawes v People*, 124 Ill. 560 (1888); *People v Hoyne*, 262 Ill. 82 (1914).

<sup>67</sup> *People v Circuit Court*, 169 Ill. 201 (1897).

<sup>68</sup> *People v Hoyne*, 262 Ill. 82 (1914); *People v Pam*, 276 Ill. 181 (1916).

<sup>69</sup> Report Attorney General 1916, p. 671.

<sup>70</sup> *Provident Assurance Society v King*, 216 Ill. 416 (1905).



of a right." The term "causes in law and equity" does not, therefore, include election contests.<sup>71</sup> However, it has been held that the General Assembly is not prohibited from conferring jurisdiction upon circuit courts to hear election contests,<sup>72</sup> and it has been held that section 4 of article 10 of the constitution, by implication, confers jurisdiction upon the circuit courts to hear election contests relating to the removal of county seats.<sup>73</sup> (See discussion article 10, section 4.)

The General Assembly is without power to deprive the circuit courts of this original jurisdiction in any cause at law or in equity, as for instance, by conferring exclusive jurisdiction in criminal cases or the enforcement of trusts, upon other courts. It may, however, confer concurrent jurisdiction in such cases upon other courts.<sup>74</sup> Section 26 of this article merely conferred concurrent jurisdiction in criminal and *quasi*-criminal matters upon the criminal court of Cook County and so did not operate to divest the circuit or superior court of Cook county of jurisdiction in such matters.<sup>75</sup>

The circuit courts take jurisdiction of so-called statutory "appeals" from non-judicial bodies, such as highway commissions, only when they have original jurisdiction over the subject matter involved, and not in the exercise of any appellate jurisdiction, for there cannot be an appeal, in the strict sense of the term, from a non-judicial body.<sup>76</sup> (See discussion article 6, section 2, subheading, "Original jurisdiction.")

**Appellate jurisdiction.** The circuit courts have no appellate jurisdiction by virtue of the section under consideration, in the absence of enabling legislation.<sup>77</sup> (See discussion article 6, section 2, subheading, "Appeals and writs of error.")

**Terms of office of judges.** The General Assembly is prohibited by this section from fixing the term of office for which circuit judges are to be elected at any period other than one of six years, even though, in a particular case, the judges are the first to be elected after an increase in the number of circuit judges in Cook county.<sup>78</sup> Apparently, however, section 15 of this article authorized the General Assembly to provide for the election of additional judges at the time of the adoption of the alternative system of judicial circuits therein provided for, for terms of less than six years each.<sup>79</sup> The regular terms of office of circuit judges have been held to begin upon the day of election.<sup>80</sup> (See discussion article 6, section 14, subheading, "Judicial elections.")

**Section 13.** The State, exclusive of the county of Cook and other counties having a population of one hundred thousand, shall be divided into judicial circuits, prior to the expiration of the terms of office of the present judges of the Circuit Courts. Such circuits shall be formed of contiguous counties, in as nearly compact form

<sup>71</sup> *Douglas v Hutchinson*, 183 Ill. 323 (1899).

<sup>72</sup> *Kerr v Flewelling*, 235 Ill. 326 (1908).

<sup>73</sup> *Douglas v Hutchinson*, 183 Ill. 323 (1899).

<sup>74</sup> *Myers v People*, 67 Ill. 503 (1873); *Mapes v People*, 69 Ill. 523 (1873); *Wilson v People*, 94 Ill. 426 (1880); *Howell v Moores*, 127 Ill. 67 (1889); *Frackelton v Masters*, 249 Ill. 30 (1911).

<sup>75</sup> *Berkowitz v Lester*, 121 Ill. 99 (1887).

<sup>76</sup> *Drainage Commissioners v Harms*, 238 Ill. 414 (1909).

<sup>77</sup> *City of Aurora v Schoeberlein*, 230 Ill. 496 (1907); *Maxwell v People*, 189 Ill. 546 (1901).

<sup>78</sup> *People v Knopf*, 198 Ill. 340 (1902).

<sup>79</sup> *People v Wall*, 88 Ill. 75 (1878); *People v Knopf*, 198 Ill. 340 (1902).

<sup>80</sup> *People v Sweitzer*, 280 Ill. 436 (1917).

and as nearly equal as circumstances will permit, having due regard to business, territory and population, and shall not exceed in number one circuit for every one hundred thousand of population in the State. One judge shall be elected for each of said circuits by the electors thereof. New circuits may be formed and the boundaries of circuits changed by the General Assembly, at its session next preceding the election for circuit judges, but at no other time: Provided, that the circuits may be equalized or changed at the first session of the General Assembly, after the adoption of this Constitution. The creation, alteration or change of any circuit shall not effect the tenure of office of any judge. Whenever the business of the Circuit Court of any one, or of two or more contiguous counties, containing a population exceeding fifty thousand, shall occupy nine months of the year, the General Assembly may make of such county, or counties, a separate circuit. Whenever additional circuits are created, the foregoing limitation shall be observed.

(See discussion article 6, section 15).

**Section 14.** The General Assembly shall provide for the times of holding court in each county; which shall not be changed, except by the General Assembly next preceding the general election for judges of said courts; but additional terms may be provided for in any county. The election for judges of the Circuit Courts shall be held on the first Monday in June, in the year of our Lord one thousand eight hundred and seventy-three, and every six years thereafter.

**Time of holding court.** The Supreme Court has held that, under this section, the General Assembly may prescribe the time for holding the circuit court in a particular county, in an act applicable only to that one county.<sup>81</sup> The only General Assembly which has the power to change the time of holding court is that which convenes just prior to the judicial election. Any General Assembly, however, may provide for additional terms of court in any county.<sup>82</sup>

**Judicial elections.** This section prohibits the General Assembly from fixing any time other than that specified, for the election of circuit judges, even though in a particular case, they are the first to be elected after an increase in the number of circuit judges in Cook county.<sup>83</sup> Apparently, however, this rule did not apply to the first election of judges after the adoption of the alternative system provided for by section 15 of this article. Nor does it apply to the election of judges of the superior court of Cook County.<sup>84</sup> (See discussion article 6, section 12, subheading, "Terms of office of judges.")

<sup>81</sup> *Karnes v People*, 73 Ill. 274 (1874); *City of Mt. Vernon v Fire Brick Co.*, 204 Ill. 32 (1903).

<sup>82</sup> *Kepley v People*, 123 Ill. 367 (1888).

<sup>83</sup> *Kepley v People*, 123 Ill. 367 (1888).

<sup>84</sup> *People v Wall*, 88 Ill. 75 (1878); *People v Knopf*, 198 Ill. 340 (1902).

**Section 15.** The General Assembly may divide the State into judicial circuits of greater population and territory, in lieu of the circuits provided for in section thirteen of this article, and provide for the election therein, severally, by the electors thereof, by general ticket of not exceeding four judges, who shall hold the circuit courts in the circuit for which they shall be elected, in such manner as may be provided by law.

**Adoption of alternative system.** The Supreme Court held, in the case of *People v Wall*,<sup>85</sup> that the alternative system of judicial circuits provided for by this section could be adopted by the General Assembly, in lieu of the system provided for by section 13 of this article, at any time. This alternative system was adopted in 1877. (As to the first judges elected under this plan, see discussion article 6, section 12, subheading, "Terms of office of judges;" article 6, section 14, subheading, "Judicial elections").

**Alterations in circuits.** It was held that once the alternative system of judicial circuits provided for by this section was adopted, the provisions of section 13 of this article, that "new circuits may be formed and the boundaries of circuits changed by the General Assembly, at its session next preceding the election for circuit judges therein, but at no other time," applied as limitations upon the time when alterations in circuits could be made. The session of the General Assembly referred to is that which convenes, and not necessarily that which regularly adjourns, next prior to the judicial election.<sup>86</sup> (As to whether an act creating new circuits or changing boundaries of circuits may be made to go into effect prior to the first day of July without being passed as an emergency act, see discussion article 4, section 13, subheading, "Date of going into effect").

**Section 16.** From and after the adoption of this Constitution, Judges of the Circuit Courts shall receive a salary of three thousand dollars per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be, respectively, elected; and from and after the adoption of this Constitution, no judge of the Supreme or Circuit Court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments.

(As to the meaning of the first clause of the second sentence of this section, see discussion article 4, section 21, subheading, "Judicial officers.")

It has been suggested that the General Assembly is without power, under this section, to provide for extra compensation for a circuit judge holding court for another judge outside of his own district.<sup>87</sup> (See discussion article 6, sections 17, 18, 23, subheadings, "Interchange of judges.")

<sup>85</sup> *People v Wall*, 88 Ill. 75 (1878); *People v Knopf*, 198 Ill. 340 (1902).

<sup>86</sup> *People v Wall*, 88 Ill. 75 (1878); *People v Rose*, 166 Ill. 422 (1897).

<sup>87</sup> *Hall v Hamilton*, 74 Ill. 437 (1874).

This section merely prohibits the performance of duties imposed by law, other than judicial duties, for a compensation. Thus, it does not prevent a judge of the Supreme Court from practicing law, under a private contract, for a remuneration.<sup>88</sup>

**Section 17.** No person shall be eligible to the office of Judge of the circuit or any inferior court, or to membership in the "Board of County Commissioners," unless he shall be at least twenty-five years of age, and a citizen of the United States, nor unless he shall have resided in this State five years next preceding his election, and be a resident of the circuit, county, city, cities, or incorporated town in which he shall be elected.

**Judges of courts.** The Supreme Court held that a provision similar to this, in section 11 of article 5 of the constitution of 1848, did not apply to judges of city courts. The Attorney General has placed the same construction upon the present provision. The Supreme Court, however, now seems inclined to hold that the section under consideration does apply so as to fix the qualifications of judges of city courts.<sup>89</sup> The Attorney General has ruled that the provisions of this section apply so as to fix the qualifications of judges of county courts.<sup>90</sup>

**County commissioners.** The term "board of county commissioners", as used in this section, refers only to the three officers of that name elected in counties not under township organization, and does not refer to the board of commissioners of Cook County. This section does not, therefore, require the members of that board to possess the specified qualifications.<sup>91</sup> (See discussion article 7, section 6; article 10, section 7.)

**Interchange of judges.** There is nothing in this section to prohibit the General Assembly from authorizing a judge of a circuit court to hold court for another judge, outside of his own county.<sup>92</sup> (See discussion article 6, section 16, and sections 18 and 23, subheadings, "Interchange of judges.")

**Section 18.** There shall be elected in and for each county, one county judge and one clerk of the county court, whose term of office shall be four years. But the General Assembly may create districts of two or more contiguous counties, in each of which shall be elected one judge, who shall take the place of and exercise the powers and jurisdiction of county judges in such districts. County Courts shall be courts of record, and shall have original jurisdiction in all matters of probate; settlement of estates of deceased persons; appointment

<sup>88</sup> *Town of Bruce v Dickey*, 116 Ill. 527 (1886).

<sup>89</sup> *People v Wilson*, 15 Ill. 388 (1854); *People v Lippincott*, 67 Ill. 333 (1873); *People v Olson*, 245 Ill. 288 (1910); Report Attorney General 1914, p. 975; but see *Franklin v Westfall*, 273 Ill. 402 (1916).

<sup>90</sup> Report Attorney General 1914, p. 1169.

<sup>91</sup> *People v McCormick*, 261 Ill. 413 (1914).

<sup>92</sup> *Jones v Albee*, 70 Ill. 34 (1873).

of guardians and conservators, and settlements of their accounts; in all matters relating to apprentices; and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law.

**Interchange of judges.** The General Assembly is not prohibited from authorizing one county judge to hold county court in another county, even though he may thus hold a branch court, while the regular county judge is sitting.<sup>93</sup> Nor is the General Assembly without power to authorize a county judge to hold a city court.<sup>94</sup> (See discussion article 6, section inability of the probate judge. Similarly, under these conditions the judge of a probate court may be empowered by statute to sit in the county court.<sup>94</sup> In the opinion of the Attorney General, the General Assembly may authorize a county judge to hold a city court.<sup>95</sup> (See discussion article 6, section 16, and sections 17 and 23, subheadings, "Interchange of judges.")

**Effect of establishment of probate courts.** The establishment of a probate court in a particular county, pursuant to section 20 of this article, operates to deprive the county court of that county of jurisdiction over the matters embraced in that section, namely, "all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlements of their accounts; in all matters relating to apprentices, and in cases of sales of real estate of deceased persons for the payment of debts." As to such matters, the jurisdiction of the probate courts, once established, is exclusive.<sup>96</sup> However, the establishing of a probate court in a particular county does not operate to divest the county court of that county of a statutory jurisdiction not included within these terms.<sup>97</sup>

Thus, the constitution contemplates two classes of county courts; one having jurisdiction over all of the matters embraced in section 18, and the other, composed of the county courts in counties in which probate courts have been established, having jurisdiction over "proceedings for the collection of taxes and assessments" and "such other jurisdiction as may be provided by general law." To this extent, by virtue of the constitution itself, the jurisdiction of the county courts is not uniform.<sup>98</sup> (See discussion article 6, section 29, subheading, "Constitutional exceptions to rule of uniformity.")

**Jurisdiction not exclusive.** The section under consideration does not operate to vest in county courts exclusive original jurisdiction over "proceedings for the collection of assessments and taxes." The General Assembly may, therefore, confer a concurrent jurisdiction over such matters upon circuit courts.<sup>99</sup> The Supreme Court suggested, in the case of *Shaw v Moderwell*,<sup>1</sup> that under this section county courts, in counties wherein probate courts have not been established, do not have exclusive jurisdiction of "matters of probate", and that concurrent jurisdiction over such matters might be conferred upon other courts. This case was decided, however, on the basis of the fact that in authorizing circuit courts to hear will contests, the General Assembly had not conferred upon circuits courts an orig-

<sup>93</sup> *Pike v City of Chicago*, 155 Ill. 656 (1895).

<sup>94</sup> *City of Moline v C. B. & Q. Ry. Co.*, 262 Ill. 52 (1914).

<sup>95</sup> Report of Attorney General 1912, p. 283.

<sup>96</sup> *Klokke v Dodge*, 103 Ill. 125 (1882); *Meserve v Delaney*, 105 Ill. 53 (1882).

<sup>97</sup> *People v Loomis*, 96 Ill. 377 (1880).

<sup>98</sup> *Klokke v Dodge*, 103 Ill. 125 (1882); *Meserve v Delaney*, 105 Ill. 53 (1882).

<sup>99</sup> *Hundley v Commissioner's of Lincoln Park*, 67 Ill. 559 (1873).

<sup>1</sup> *Shaw v Moderwell*, 104 Ill. 64 (1882).

inal jurisdiction in a "matter of probate." That is, this proceeding is not one to establish, but rather, to impeach a will. (As to the meaning of the terms, "matters of probate," "appointment of guardians and conservators and settlement of their accounts", see discussion article 6, section 20, subheadings, "Probate matters," "Appointment of guardians and conservators.")

**Estates of deceased persons.** The provisions of this section, vesting in the county courts in counties wherein probate courts have not been established, jurisdiction over the "settlement of estates of deceased persons" excludes the possibility that such courts may settle the estates of persons not actually dead.<sup>2</sup> However, the General Assembly may confer jurisdiction upon these courts to settle the estates of persons presumed in law to be dead, when the distributees are required to give bond to protect those persons, if, actually, they are then alive.<sup>3</sup>

Under this clause the General Assembly may regulate the procedure of a probate court relating to the sale of the real estate of deceased persons for the payment of debts, so as to authorize probate courts to adjudicate the rights of claimants to the land prior to the sale.<sup>4</sup>

**Statutory jurisdiction.** There is no limitation in the last clause of this section as to the type of jurisdiction that may be conferred upon county courts "by general law." However, in view of the provisions of section 12 of this article, the jurisdiction of county courts in "causes in law or equity," other than those enumerated in section 18, such as criminal cases and cases relating to the enforcement of testamentary trusts, may not be made exclusive so as to deprive circuit courts of jurisdiction over such cases.<sup>5</sup> (See discussion article 6, section 12, subheading "Original jurisdiction.")

An act which confers a particular jurisdiction upon all county courts except that of Cook County, is not a "general law" within the meaning of this section.<sup>6</sup> Similarly, under section 29 of this article, it has been held that the General Assembly may not confer a particular jurisdiction upon county courts in counties wherein probate courts have not been established, unless the same jurisdiction is conferred upon the other county courts. Although the constitution itself creates a lack of uniformity in the jurisdiction of county courts, (see discussion preceding subheading "Effect of establishment of probate courts"), this exception does not go to the extent of authorizing the General Assembly to confer a jurisdiction upon county courts in counties wherein probate courts have been established, which is not conferred upon county courts in the other counties.<sup>7</sup> (See discussion article 6, section 29, subheading, "Constitutional exceptions to rule of uniformity.")

The last clause of this section, as to counties that have adopted township organization, was held to be so modified by the provision of section 4 of the schedule, as not to be self-executing. That is, it did not operate to repeal, without further legislation, the jurisdiction of these county courts, which had been conferred by special act.<sup>8</sup> (See discussion, section 4 of the schedule.)

<sup>2</sup> Thomas v People, 107 Ill. 517 (1883).

<sup>3</sup> Stevenson v Montgomery, 263 Ill. 93 (1914).

<sup>4</sup> Newell v Montgomery, 129 Ill. 58 (1889).

<sup>5</sup> Myers v People, 67 Ill. 503 (1873); Mapes v People, 69 Ill. 523 (1873); In re Estate of Mortenson, 248 Ill. 520 (1911); Frackelton v Masters, 249 Ill. 30 (1911).

<sup>6</sup> Myers v People, 67 Ill. 503 (1873).

<sup>7</sup> Klokke v Dodge, 103 Ill. 125 (1882); Meserve v Delaney, 105 Ill. 53 (1882).

<sup>8</sup> Blake v Peckham, 64 Ill. 362 (1872).

**Section 19.** Appeals and writs of error shall be allowed from final determinations of county courts, as may be provided by law.

(See discussion article 6, section 2, subheading, "Appeals and writs of error").

**Section 20.** The General Assembly may provide for the establishment of a Probate Court in each county having a population of over fifty thousand, and for the election of a judge thereof, whose term of office shall be the same as that of the county judge, and who shall be elected at the same time in the same manner. Said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlements of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts.

**Establishment of probate courts.** The Supreme Court held that under this section the General Assembly was not required, at the time it first established probate courts, to establish one at that time in each county having a population in excess of 50,000 inhabitants, and that the General Assembly was not prohibited from limiting the original act establishing probate courts to counties having a population of 100,000 inhabitants. It was suggested, moreover, in this case, that under this section the General Assembly might have gone so far as to establish a probate court in one county, by a special act, applicable to that one county, alone.<sup>9</sup> (The present probate court act is applicable to counties having a population of 70,000, or more.)<sup>10</sup>

(As to interchange of judges, see discussion article 6, section 18, subheading, "Interchange of judges." As to whether the jurisdiction of probate courts is exclusive, see discussion article 6, section 18, subheading, "Effect of establishment of probate courts.")

**Jurisdiction limited.** The section under consideration has been construed to confine the jurisdiction of probate courts to the subjects named. Thus, the General Assembly is without power to confer upon probate courts a jurisdiction not embraced within the terms used in this section, such as the foreclosure of mortgages executed by guardians on their ward's property, testamentary trusts, and, perhaps, the levying of inheritance taxes.<sup>11</sup>

**Probate matters.** It was suggested in an early case that the term "probate matters" was used in this section in its broadest and most general sense. However, it was later held that this term merely embraces "all matters necessarily involved in the disposition of the estates of deceased persons from the time of the owners' death until the property has been

<sup>9</sup> *Knickerbocker v People*, 102 Ill. 218 (1882).

<sup>10</sup> *Hurd's Revised Statutes 1917*, chap. 37, p. 882.

<sup>11</sup> *People v Loomis*, 96 Ill. 377 (1880); *In re Estate of Mortenson*, 248 Ill. 520 (1911); *Frackelton v Masters*, 249 Ill. 30 (1911); *Report Attorney General 1915*, p. 334.

placed in the possession of those to whom it devolves;" and that it does not, therefore, include the enforcement of testamentary trusts. Nor does it include any of the matters embraced in the other terms used in the section under discussion, such as "the appointment of guardians and conservators," except that of "the settlement of the estates of deceased persons." With this latter term, it was held the term "probate matters" is coextensive.<sup>12</sup>

(As to the nature of a will contest in the circuit court, see discussion article 6, section 18, subheading, "Jurisdiction not exclusive." As to estates of deceased persons, see discussion article 6, section 18, subheading, "Estates of deceased persons").

**Appointment of guardians and conservators.** Under this clause, the General Assembly may empower probate courts to authorize guardians to sell their minor wards' real estate.<sup>13</sup> Probate courts, under this clause, may be given jurisdiction to adjudge persons to be drunkards or spendthrifts, and to appoint conservators for them.<sup>14</sup> However, the jurisdiction of probate courts with reference to the settlement of accounts of guardians, under the constitution, is limited to that specific subject and does not extend to the settlement of the equities between the guardian and ward, arising outside of the guardianship.<sup>15</sup>

**Section 21.** Justices of the peace, police magistrates, and constables shall be elected in and for such districts as are, or may be, provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform.

**Officers to be elected.** This section requires the officers named therein to be elected. For instance, the General Assembly is prohibited by this section from authorizing the appointment of constables by the board of trustees of a village.<sup>16</sup>

**Jurisdiction of justices of the peace and police magistrates.** This section operated to abrogate all laws in force at the time of the adoption of the constitution of 1870, which had clothed police magistrates with powers not generally possessed by justices of the peace. It placed justices of the peace and police magistrates, so far as their jurisdiction is concerned, upon the same footing. They are to exercise the same powers and jurisdiction. For example, a statute enacted since 1870, which conferred a particular jurisdiction upon justices of the peace was held to have impliedly conferred the same jurisdiction upon police magistrates.<sup>17</sup>

Section 27 of article 5 of the constitution of 1848 provided as follows: "There shall be elected in each county in this State, in such districts as the General Assembly may direct, by the qualified electors thereof, a competent number of justices of the peace, who shall hold their offices for the term of four years, and until their successors shall have been elected and

<sup>12</sup> *Winch v Tobin*, 107 Ill. 212 (1883); *In re Estate of Mortenson*, 248 Ill. 520 (1911); *Frackelton v Masters*, 249 Ill. 30 (1911).

<sup>13</sup> *Winch v Tobin*, 107 Ill. 212 (1883).

<sup>14</sup> *Ure v Ure*, 223 Ill. 454 (1906).

<sup>15</sup> *People v Seelye*, 146 Ill. 189 (1892).

<sup>16</sup> *People v Bollam*, 182 Ill. 528 (1899).

<sup>17</sup> *Brown v Jerome*, 102 Ill. 371 (1882); *Commissioners of Highways v Jackson*, 165 Ill. 17 (1897).



qualified, and who shall perform such duties, receive such compensation, and exercise such jurisdiction as may be prescribed by law." The Supreme Court held in construing this section that: "As to these officers there is no limit placed by the constitution as to legislative power. They may create as many as they please, in such districts as they please, and prescribe their jurisdiction as they please, nor is it necessary that all the justices of the peace of the state should have a uniform jurisdiction."<sup>18</sup>

The section of the constitution of 1870 under consideration and section 29 of this article, however, were construed to have abrogated all laws enacted prior to 1870, which conferred a varied jurisdiction upon different justices of the peace, leaving the jurisdiction of all justices of the peace to be defined by a general law then in force.<sup>19</sup> Moreover, the requirement of uniformity in the jurisdiction of justices of the peace and police magistrates has been held to extend to territorial jurisdiction. That is, an act was held void which created two districts for justices of the peace in Cook county, when the districts downstate were co-extensive with the counties.<sup>20</sup>

**Section 22.** At the election for members of the General Assembly in the year of our Lord one thousand eight hundred and seventy-two, and every four years thereafter, there shall be elected a State's Attorney in and for each county, in lieu of the State's Attorneys now provided by law, whose term of office shall be four years.

(As to salaries of state's attorneys, generally, see discussion article 6, section 32, subheading, "Compensation of state's attorneys"; article 10, section 10, subheading "County officers." As to the salaries of state's attorneys in Cook County, see discussion article 6, section 25. As to increases in the compensation of state's attorneys during their term of office, see discussion article 4, section 21, subheading, "Municipal officers." As to the qualifications of state's attorneys, see discussion article 7, section 6.)

**Section 23.** The county of Cook shall be one judicial circuit. The Circuit Court of Cook county shall consist of five judges, until their number shall be increased, as herein provided. The present Judge of the Recorder's Court of the city of Chicago, and the present Judge of the Circuit Court of Cook county, shall be two of said judges, and shall remain in office for the terms for which they were respectively elected, and until their successors shall be elected and qualified. The Superior Court of Chicago shall be continued, and called the Superior Court of Cook County. The General Assembly may increase the number of said judges, by adding one to either of said courts for every additional fifty thousand inhabitants in said county over and above a population of four hundred thousand. The terms of office of the judges of said courts hereafter elected, shall be six years.

**Jurisdiction.** The superior court of Cook County, under the provisions of this section and those of section 24 of this article, has the same

<sup>18</sup> In re Welsh, 17 Ill. 161 (1855).

<sup>19</sup> Phillips v Quick, 63 Ill. 445 (1872).

<sup>20</sup> People v Meech, 101 Ill. 200 (1882).

jurisdiction as a circuit court. Moreover, the superior and circuit courts of Cook County are of the same class and grade and they have the same jurisdiction as all other circuit courts. (See discussion article 6, section 29, subheading, "Provisions mandatory.") A special statutory jurisdiction expressly conferred upon circuit courts, has been held to have been impliedly conferred upon the superior court of Cook County.<sup>21</sup>

However, the superior court of Cook county is actually a separate court, existing independently of the circuit court of that county. One of these courts, therefore, may not exercise revisory powers over the judgments and decrees of the other.<sup>22</sup>

The provisions of section 26 of this article did not operate to vest an exclusive jurisdiction over criminal and *quasi*-criminal matters in the criminal court of Cook county, so as to divest the circuit and superior courts of that county of jurisdiction over those matters. Rather, the constitution contemplated that as to these matters, the three courts just mentioned should have concurrent jurisdiction.<sup>23</sup> (See discussion article 6, section 12, subheading, "Original jurisdiction;" article 6, section 26, subheading, "Original jurisdiction not exclusive.")

(As to the power of a circuit or superior court judge, sitting in the criminal court, to act as a judge of the circuit or superior court, see discussion article 6, section 26, subheading, "Judges.")

**Elections and terms.** Although the constitution, (article 6, section 14), fixes the day of election of circuit judges as the first Monday in June, in 1873, and every sixth year thereafter, it does not fix the day of election of judges of the superior court of Cook county. Therefore, the General Assembly, although it may not prescribe another day for the election of circuit judges, may provide for the election of judges of the superior court at any time. (See discussion article 6, section 14, subheading, "Judicial elections"). The section under consideration, however, does fix the terms of office of the judges of the superior court as well as those of judges of the circuit court, at six years. Hence, even as to the first judges elected after an increase in the number thereof pursuant to this section, the General Assembly is without power to provide that either circuit or superior court judges may be elected for terms of less than six years each. These terms begin upon the day of election.<sup>24</sup> (See discussion article 6, section 12, subheading, "Terms of office of judges.")

**Branch courts.** The provisions of the section under consideration and those of section 24 of this article, do not require the judges of either the circuit or superior court to sit *en banc*. Rather, the constitution contemplates that each judge shall hold a branch court independently of the others, and while thus engaged, shall have all of the powers of a circuit court.<sup>25</sup>

**Interchange of judges.** The General Assembly is not prohibited from authorizing downstate judges of courts of record to sit as judges of the superior or circuit court of Cook County.<sup>26</sup> (See discussion article 6, section 16, and sections 17 and 18, subheadings, "Interchange of judges.")

<sup>21</sup> Jones v Albee, 70 Ill. 34 (1873); Berkowitz v Lester, 121 Ill. 99 (1887); Cobe v Guyer, 237 Ill. 516 (1909).

<sup>22</sup> Mathias v Mathias, 202 Ill. 125 (1903).

<sup>23</sup> Berkowitz v Lester, 121 Ill. 99 (1887).

<sup>24</sup> People v Knopf, 198 Ill. 340 (1902); People v Sweitzer, 280 Ill. 436 (1917).

<sup>25</sup> Jones v Albee, 70 Ill. 34 (1873); Hall v Hamilton, 74 Ill. 437 (1874).

<sup>26</sup> Jones v Albee, 70 Ill. 34 (1873); Hall v Hamilton, 74 Ill. 437 (1874).

Section 24. The judge having the shortest unexpired term shall be Chief Justice of the court of which he is a judge. In case there are two or more whose terms expire at the same time, it may be determined by lot which shall be chief justice. Any judge of either of said courts shall have all the powers of a circuit judge, and may hold the court of which he is a member. Each of them may hold a different branch thereof at the same time.

(As to the construction placed upon the last two sentences of this section, see discussion article 6, section 23.)

Section 25. The judges of the Superior and Circuit Courts, and the State's Attorney, in said county, shall receive the same salaries, payable out of the State treasury, as is or may be paid from said treasury to the circuit judges and State's Attorney's of the State, and such further compensation, to be paid by the county of Cook, as is or may be provided by law; such compensation shall not be changed during their continuance in office.

The words "salary" and "compensation," in this section, are used interchangeably. They refer, not to the fees incident to the office of state's attorney of Cook county, but to the sums of money paid to the state's attorney of that county by the state and county, as a salary. Were it not for the long continued legislative practice of allowing to the state's attorney of Cook county the fees incident to his office, the view that the salaries paid by the state and county should constitute the sole source of that officer's official compensation, would, the court said, have prevailed. However, in view of that practice, it was held that the compensation of the state's attorney of Cook county was not confined to his salary, and that he might retain the fees of his office which exceeded the amount of the salary.<sup>27</sup> (As to whether a down state state's attorney's salary must be fixed by the General Assembly or by the county board, see discussion article 6 section 32, subheading, "Compensation of state's attorneys"; article 10, section 10, subheading, "County officers.")

This section, it has been held, does not require that whenever the compensation of the circuit or superior court judges is increased, that of the state's attorney must also be increased at the same time.<sup>28</sup> However, the power of the General Assembly, under the last clause of this section, to increase the compensation of these officers, either that which is paid by the state or that which is paid by the county, is subject to two limitations as to time. In the first place, it has been held that the last clause of this section, though slightly different in language, constitutes one of a series of statements in the constitution which establishes a policy prohibitive of changes in an officer's compensation during the official term for which he has been elected, without regard to the actual tenure of the individual.<sup>29</sup> (See discussion article 4, section 21, subheading, "Municipal officers.") In the second place, in the case of judges of the circuit and superior courts of Cook County, this term of office, in the absence of other constitutional provisions, begins upon the day of election, without regard to the day upon

<sup>27</sup> Cook County v Healy, 222 Ill. 310 (1906).

<sup>28</sup> People v Olsen, 222 Ill. 117 (1906).

<sup>29</sup> Foreman v People, 209 Ill. 567 (1904).

which the votes are canvassed, the commission issued, or the time when the judge qualifies.<sup>30</sup>

(As to the time when the provisions of this section relating to judges' compensation became operative, see discussion, section 21 of the schedule.)

Section 26. The Recorder's Court of the city of Chicago shall be continued and shall be called the "Criminal Court of Cook County." It shall have the jurisdiction of a circuit court, in all cases of criminal and quasi criminal nature, arising in the county of Cook, or that may be brought before said court pursuant to law; and all recognizances and appeals taken in said county, in criminal and quasi criminal cases shall be returnable and taken to said court. It shall have no jurisdiction in civil cases, except in those on behalf of the people, and incident to such criminal or quasi criminal matters, and to dispose of unfinished business. The terms of said Criminal Court of Cook County shall be held by one or more of the judges of the Circuit or Superior Court of Cook county, as nearly as may be in alteration, as may be determined by said judges, or provided by law. Said judges shall be ex-officio, judges of said court.

**Provisions self-executing.** This section became operative immediately upon the adoption of the constitution. All statutes relating to the Recorder's Court which were inconsistent with the new constitution, were abrogated, and all those not inconsistent therewith, were continued in force. Thus, the act requiring grand and petit jurors for the Recorder's Court to be drawn from within the city of Chicago was repealed, for the jurors in this court are to come from the county as a whole.<sup>31</sup>

**Jurisdiction in habeas corpus.** The clauses of the section under consideration, limiting the jurisdiction of the criminal court in civil cases, and creating the exceptions thereto, retained for the criminal court the jurisdiction of the Recorder's Court in *habeas corpus* proceedings. In addition, this jurisdiction is vested in the criminal court by the clause conferring the jurisdiction of a circuit court upon that court in all cases of a criminal and *quasi*-criminal nature.<sup>32</sup>

**Original jurisdiction not exclusive.** Although a contrary doctrine was suggested in an early case, it has been held that the original jurisdiction vested by this section in the criminal court of Cook county in criminal and *quasi*-criminal cases, is not exclusive. The superior and circuit courts of Cook county, being of the same class and grade and having the same jurisdiction as other circuit courts, have concurrent jurisdiction in such cases, because they are cases embraced within the term "causes in law and equity" as used in the provisions of section 12 of this article defining the jurisdiction of circuit

<sup>30</sup> *People v Sweitzer*, 280 Ill. 436 (1917).

<sup>31</sup> *People v Bradley*, 60 Ill. 390 (1871); *Peri v People*, 65 Ill. 17 (1872).

<sup>32</sup> *People v Bradley*, 60 Ill. 390 (1871).

courts. (See discussion article 6, section 12, subheading, "Original jurisdiction"; article 6, section 23, subheading, "Jurisdiction.") The General Assembly may, also, confer a concurrent jurisdiction in such cases upon the municipal court of Chicago.<sup>33</sup>

**Jurisdiction of recognizances and appeals exclusive.** The jurisdiction of the criminal court of Cook county over statutory recognizances and appeals taken in Cook county in criminal and *quasi*-criminal cases, is exclusive. To this extent, the appellate jurisdiction of the Cook County courts is not uniform with that of other circuit courts. However, this merely means that whenever a statute gives a right to take a recognizance or an appeal in such a case, that statute must require the recognizance or appeal to be taken to the criminal court. The General Assembly may, therefore, provide for a writ of error from either the appellate or Supreme Court, to review a judgment of the municipal court of Chicago in a criminal or *quasi*-criminal case, without violating this section, for a writ of error is not a statutory recognizance or appeal.<sup>34</sup>

**Quasi-criminal cases.** The term "*quasi*-criminal" cases, as used in the clause of this section relating to recognizances and appeals in such cases, embraces all acts which are neither crimes nor misdemeanors, but which are in the nature of crimes and which are punishable by forfeitures and penalties in civil or criminal proceedings. It thus includes cases involving the imposition of a penalty for violation of a city ordinance licensing auctioneers, for violation of a statute relating to gambling, and for violation of a statute regulating the practice of medicine.<sup>35</sup>

**Branch courts.** This section does not require that the judges of the criminal court of Cook County shall sit *en banc*. Rather, it contemplates that the individual judges shall hold branch courts.<sup>36</sup>

**Judges.** Under this section, every judge of the circuit or superior court of Cook county is, *ex officio*, a judge of the criminal court. Any one of them has the power and the right to sit as a judge of that court, even though he has not been designated so to act by the judges, for the provision of this section as to the designation of the judges in alternation is a mere regulation for the convenience of the judges themselves.<sup>37</sup>

However, when such a judge does sit in the criminal court, he does so as *ex officio* judge of the court, and not as judge of the circuit or superior court. While so acting, he is without power to enter an order in a case heard by him in the circuit or superior court. The term "unfinished business," as used in this section, referred only to the unfinished business of the old Recorder's Court, and not to that of a superior or circuit judge sitting in the criminal court.<sup>38</sup>

**Section 27.** The present Clerk of the Recorder's Court of the city of Chicago, shall be the Clerk of the Criminal Court of Cook

<sup>33</sup> City of Chicago v O'Hara, 60 Ill. 413 (1871); Berkowitz v Lester, 121 Ill. 99 (1887); People v Jacobson, 247 Ill. 394 (1910).

<sup>34</sup> Bratsch v People, 195 Ill. 165 (1902); People v Jacobson, 247 Ill. 394 (1910); People v Gartenstein, 248 Ill. 546 (1911).

<sup>35</sup> Wiggins v City of Chicago, 68 Ill. 372 (1873); Berkowitz v Lester, 121 Ill. 99 (1887); Bratsch v People, 195 Ill. 165 (1902).

<sup>36</sup> Cahill v People, 106 Ill. 621 (1883).

<sup>37</sup> Greene v People, 182 Ill. 278 (1899).

<sup>38</sup> U. S. Life Ins. Co. v Shattuck, 159 Ill. 610 (1896).

county, during the term for which he was elected. The present Clerks of the Superior Court of Chicago, and the present Clerk of the Circuit Court of Cook County, shall continue in office during the terms for which they were respectively elected; and thereafter there shall be but one Clerk of the Superior Court, to be elected by the qualified electors of said county, who shall hold his office for the term of four years, and until his successor is elected and qualified.

This section did not repeal the statute in force in 1870 relating to the liability of the city of Chicago for the fees of the clerk of the Recorder's Court. It continued in force for the benefit of the clerk of the new criminal court, until the General Assembly provided otherwise, even though the criminal court was given jurisdiction by section 26 of this article throughout the county, unlike that of its predecessor, the Recorder's Court, whose territorial jurisdiction was limited to the city.<sup>39</sup>

**Section 28.** All justices of the peace in the city of Chicago shall be appointed by the Governor, by and with advice and consent of the Senate, (but only upon the recommendation of a majority of the judges of the circuit, superior and county courts), and for such districts as are now or shall hereafter be provided by law. They shall hold their offices for four years, and until their successors have been commissioned and qualified, but they may be removed by summary proceeding in the circuit or superior court, for extortion or other malfeasance. Existing justices of the peace and police magistrates may hold their offices until the expiration of their respective terms.

The sixth amendment to the constitution of 1870, section 34 of article 4, adopted in 1904, authorized the abolition by the General Assembly of the offices of justices of the peace, police magistrates, and constables, within the city of Chicago, should a municipal court be established. A municipal court was established and these offices, within the city, abolished, by an act of 1905.<sup>40</sup>

However, before that constitutional amendment was adopted, it was held that the section under consideration abolished the office of police magistrate in the city of Chicago; that it required justices of the peace in Chicago to be appointed by the Governor, and prevented their election by the people; and that it prevented the Governor from appointing anyone as a successor to a justice of the peace in Chicago who had not been recommended for that particular position by the judges.<sup>41</sup>

**Section 29.** All judicial officers shall be commissioned by the Governor. All laws relating to courts shall be general, and of uni-

<sup>39</sup> *City of Chicago v O'Hara*, 60 Ill. 413 (1871).

<sup>40</sup> *Laws 1905*, p. 157, at p. 183.

<sup>41</sup> *People v Palmer*, 64 Ill. 41 (1872); *People v O'Toole*, 164 Ill. 344 (1897); *Kaufman v People*, 185 Ill. 113 (1900).

form operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform.

**Purpose of the section.** The constitution of 1848, as interpreted by the court, did not require uniformity in the jurisdiction, forms of action, practice or process of either the justices of the peace, the county courts, or the circuit courts. The provision of section 1 of article 5 of that instrument, that city courts "shall have a uniform organization and jurisdiction, in such cities," was construed to require uniformity in those matters only as between city courts in the same city and not as between city courts in different cities.<sup>42</sup>

The section under consideration is one of several by which the framers of the constitution of 1870 sought to remedy and to prevent the recurrence of the evils growing out of the special legislation relating to courts, enacted under the constitution of 1848. For instance, section 21 of this article requires the jurisdiction of justices of the peace and police magistrates to be uniform. Section 18 of this article permits county courts to have "such other jurisdiction as may be provided for by general law," and section 22 of article 4 prohibits the enactment of local or special laws "regulating the practice in courts of justice" and "the jurisdiction and duties of justices of the peace, police magistrates and constables."

**Provisions self executing.** This section was held to be self executing, so as to repeal, immediately upon the adoption of the constitution of 1870, all special and local laws regulating the organization, jurisdiction, powers, proceedings, practice, and the force and effect of the process, decrees and judgments of courts of the same class or grade.<sup>43</sup> (See, however, as to county courts, discussion article 6, section 18, subheading, "Statutory jurisdiction," and section 4 of the schedule.)

**Provisions mandatory.** The provisions of this section have been construed to be mandatory as to legislation enacted since 1870. For instance, the Supreme Court has held that since the circuit courts and the circuit and superior courts of Cook county are courts of the same class and grade, they must, under this section, be given the same jurisdiction.<sup>44</sup> A general city court act is prohibited by the section under consideration, from being applicable to a city located in two counties, for the reason that a city court in that city would, unlike all other city courts, be required to have the machinery for making available a grand and petit jury from both counties.<sup>45</sup> (See discussion article 6, section 1, subheading, "City courts.")

**Constitutional exceptions to rule of uniformity.** There are several provisions of the constitution which have been construed to create exceptions to the requirements as to uniformity, prescribed by the section under consideration.

For instance, the clause in this section, "all laws relating to courts shall be general and of uniform operation," has been construed to be limited to the matters specifically enumerated in the rest of the section. Therefore, special laws authorizing circuit judges to appoint court reporters or regulating the making up of the jury list, inasmuch as these laws do not

<sup>42</sup> *McDonnell v Olwell*, 17 Ill. 375 (1856); *Stow v People*, 25 Ill. 81 (1860); *People v Rumsey*, 64 Ill. 44 (1872).

<sup>43</sup> *People v Rumsey*, 64 Ill. 44 (1872); *Hart v People*, 89 Ill. 407 (1878).  
<sup>44</sup> *Ferguson v People*, 90 Ill. 510 (1878); *Berkowitz v Lester*, 121 Ill. 99 (1887).

<sup>45</sup> *People v Rodenberg*, 254 Ill. 386 (1912).

relate to the organization, jurisdiction, powers, proceedings or practice of courts, are not invalid.<sup>46</sup> (See discussion section 6 of the schedule.)

It has been held that section 14 of article 6 authorizes the General Assembly to pass special and local legislation with reference to the time of holding terms of court in different counties, and that acts of that character enacted prior to 1870 were, therefore, not repealed by the section under discussion.<sup>47</sup>

Section 20 of this article has been construed to deprive county courts in counties wherein probate courts have been established, of jurisdiction over the matters embraced in that section, and of itself, to disrupt the uniformity of the jurisdiction of county courts. This exception does not extend, however, to authorizing the General Assembly further to destroy the uniformity of jurisdiction of county courts by legislation applicable only to those county courts in counties wherein probate courts have been established.<sup>48</sup>

The provision of section 26 of this article, that all recognizances and appeals in Cook County in criminal and *quasi*-criminal cases shall be taken to the criminal court of that county, has been held to make the jurisdiction of the criminal court over those matters exclusive and to create an exception to what otherwise might be a requirement of the section under consideration, that the appellate jurisdiction of the circuit courts must be uniform.<sup>49</sup>

The sixth amendment to the constitution of 1870, section 34 of article 4, adopted in 1904, provided that if municipal courts should be created in Chicago, "the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe." The municipal court of Chicago was established in 1905. The Supreme Court has held that this provision authorized special legislation as to these matters with reference to the municipal court of Chicago, and so created an exception to the requirements as to uniformity of the section under discussion. For instance, as coming within this exception, the Supreme Court has held valid special acts, applicable alone to the municipal court, relating to pleadings, charges to juries, judicial notice, the conditions under which judgments may become liens, and the power of that court to make rules of procedure. It has been held, however, that the term "practice" as used in section 34 of article 4, does not embrace changes of venue, so as to authorize special legislation, applicable alone to the municipal court, on that subject.<sup>50</sup> (See discussion article 4, section 22, subheading, "Changes of venue.") This exception in favor of special legislation applicable to the municipal court of Chicago however, has been held not to extend to authorizing the General Assembly to pass special laws regulating the practice in the appellate and Supreme Courts with reference to cases brought thereto on either appeal or writ of error from the municipal court of Chicago. Uniformity in the jurisdiction, practice and procedure of either the appellate or Supreme Court as required by section 29 of this article, it was held, means that the powers of those courts shall be exercised alike in all cases from all courts of the same class. The municipal court of Chicago and city courts, on the one hand, and probate courts and county courts exercising probate jurisdiction on the other hand, have been held to be in the same classes, within this rule.<sup>51</sup>

<sup>46</sup> *People v Raymond*, 186 Ill. 407 (1900); compare *People v Rumsey*, 64 Ill. 44 (1872); *People v Onahan*, 170 Ill. 449 (1897).

<sup>47</sup> *Karnes v People*, 73 Ill. 274 (1874).

<sup>48</sup> *Klokke v Dodge*, 103 Ill. 125 (1882).

<sup>49</sup> *Bratsch v People*, 195 Ill. 165 (1902).

<sup>50</sup> *Weil v Federal Life Ins. Co.*, 264 Ill. 425 (1914); *Morton v Pusey*, 237 Ill. 26 (1908); *City of Chicago v Williams*, 254 Ill. 360 (1912); *Lott v Davis*, 264 Ill. 272 (1914); *Hopkins v Levandowski*, 250 Ill. 372 (1911); *Feigen v Shaeffer*, 256 Ill. 493 (1912).

<sup>51</sup> *Morton v Pusey*, 237 Ill. 26 (1908); *Clowry v Holmes*, 238 Ill. 577 (1909); *David v Commercial Accident Co.*, 243 Ill. 43 (1909); *People v Hibernian Banking Ass'n.*, 245 Ill. 522 (1910); *Sixby v Chicago City Ry. Co.*, 260 Ill. 478 (1913); *Kingsbury v Sperry*, 119 Ill. 279 (1887); *Dawson v Eustice*, 148 Ill. 346 (1894).



**Class legislation.** This section does not operate to prohibit the General Assembly from enacting laws relating to courts which are applicable only to situations within a particular class, provided that the law applies alike to all in that class, and that there is a reasonable basis for the classification. For instance, an act prescribing a special rule of evidence in proceedings under the Torrens Land Title Act was sustained because it applied equally to all cases in that system of adjudicating titles to real estate. Conversely, an act requiring the public administrator to be appointed as administrator of the estate of non-resident intestates leaving property in counties having a population of more than 200,000 inhabitants, while any person might receive such an appointment in other counties, was held void as being based upon an arbitrary and unreasonable classification.<sup>52</sup> (See discussion article 4, section 22, subheading, "Special privileges and immunities.")

**Rules of court.** The provisions of this section apply only to legislation, and not to rules of court regulating practice.<sup>53</sup>

**Section 30.** The General Assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three-fourths of all the members elected, of each house. All other officers in this article mentioned, shall be removed from office on prosecution and final conviction, for misdemeanor in office.

The Attorney General has ruled that the last clause of this section includes justices of the peace and police magistrates.<sup>54</sup> (See discussion article 5, section 12, subheading, "Power of Governor").

**Section 31.** All judges of courts of record, inferior to the Supreme Court, shall, on or before the first day of June, of each year, report in writing to the judges of the Supreme Court, such defects and omissions in the law as their experience may suggest; and the judges of the Supreme Court shall, on or before the first day of January, of each year, report in writing to the Governor such defects and omissions in the Constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws. And the judges of the several circuit courts shall report to the next General Assembly the number of days they have held court in the several counties composing their respective circuits, the preceding two years.

<sup>52</sup> *Waugh v Glos*, 246 Ill. 604 (1910); *Strong v Dignan*, 207 Ill. 385 (1904); *Knickerbocker v People*, 102 Ill. 218 (1882); *Tissier v Rhein*, 130 Ill. 110 (1889); *Chicago Terminal Ry. Co. v Greer*, 223 Ill. 104 (1906); *People v McGoorty*, 270 Ill. 610 (1915).

<sup>53</sup> *Hinckley v Dean*, 104 Ill. 630 (1882).

<sup>54</sup> Report Attorney General 1914, pp. 161, 1200.

In January, 1869, the General Assembly passed an act requiring the judges of the circuit courts to report to the judges of the Supreme Court, by September of that year, the redundancies, omissions, inconsistencies and imperfections in the statutes, together with bills remedying these defects. The Supreme Court judges were to examine these reports and bills, and to submit those which they approved either to the General Assembly or to the statutory revision commission, should one be established. The circuit judges were to receive \$1,000 each, for these services. It was understood, at the time, that the arrangement was primarily a scheme to increase the salaries of the circuit judges, which, as fixed by the constitution of 1848, were very low. A statutory revision commission was established in March, 1869. Sixteen of the twenty-nine circuit judges reported defects in the laws and suggested remedies therefor. All of the judges received the extra compensation. The Supreme Court judges approved some of these reports and bills and forwarded nearly all of them to the statutory revision commission. Most of this material dealt with substantive changes in the practice act and criminal code. The commission complied with some of the proposed changes, and disregarded those which, in their opinion, embodied undesirable innovations.<sup>55</sup>

The constitutional convention of 1869-70, by the provisions of the section under consideration, intended to perpetuate these functions of the courts.<sup>56</sup> The judges have not, however, complied therewith, to any great extent. One of the few instances when the judges have done so, occurred in March, 1919, when Justice James H. Cartwright of the Supreme Court sent two communications, one his own, and the other that of Judge Charles M. Thomson, of the circuit court of Cook County, to the Governor, indicating defects in the real estate and divorce statutes, together with bills embodying suggested remedies. These the Governor forwarded to the General Assembly.<sup>57</sup>

In 1909, after several primary election laws had been held unconstitutional, the Governor requested the judges of the Supreme Court either to indicate the defects and omissions in the laws relating to the nomination of candidates for public office, and to submit bills to remedy these defects, or to draft a new primary election bill which would, in their opinion, be constitutional. The judges replied that under the provisions of this section the Governor was without power to require either the judges of the Supreme Court as individuals, or the Supreme Court, as a court, to furnish information or bills of this character. The judges said that under these provisions the responsibility of determining when it becomes the duty of the judges of the Supreme Court to make a report of defects and omissions in the laws rests with the judges themselves, and that such a duty does not arise except when a case has come before the court in regular course, and an act of the General Assembly has been held to be either invalid, inoperative or ineffective. Then the judges may, in their discretion determine to advise the General Assembly, through the Governor, of the defects and omissions in that act, and of the changes necessary to remedy them. The judges said that it is not the duty of the judges to aid in originating legislation, either by determining the constitutionality thereof or by preparing bills therefor. An opinion of the type requested, it was said, would, in any event, be of no binding effect, should a case come before the Supreme Court, in due course, involving the questions considered in that opinion.<sup>58</sup>

**Section 32.** All officers provided for in this article shall hold their offices until their successors shall be qualified, and they shall,

<sup>55</sup> See Statutory Revision in Illinois, pp. 26, 27-28, 32.

<sup>56</sup> Debates, p. 1185.

<sup>57</sup> Senate Journal, March 25, 1919.

<sup>58</sup> Correspondence between Governor and Supreme Court, 243 Ill. 9 (1909).

respectively, reside in the division, circuit, county or district for which they may be elected or appointed. The terms of office of all such officers, where not otherwise prescribed in this article, shall be four years. All officers, where not otherwise provided for in this article, shall perform such duties and receive such compensation as is, or may be, provided by law. Vacancies in such elective offices shall be filled by election; but where the unexpired term does not exceed one year the vacancy shall be filled by appointment, as follows: Of judges, by the Governor; of clerks of courts, by the court to which the office appertains, or by the judge or judges thereof; and of all such other offices, by the board of supervisors, or board of county commissioners, in the county where the vacancy occurs.

**Officers holding over.** The Supreme Court has suggested, and the Attorney General has ruled that the first clause of this section authorizes and requires state's attorneys, justices of the peace, police magistrates, and constables to hold office and to exercise the powers thereof after either their resignation or the expiration of the official term, until the successor has qualified.<sup>59</sup>

**Terms of office.** It has been held that the General Assembly is free to prescribe the length of the terms of office of judges of city courts, for the reason that judges of city courts are not officers whose terms of office are otherwise provided for in this article, within the meaning of this section. Apparently, the provision of this section, with reference to four year terms, applies only to justices of the peace, police magistrates and constables.<sup>60</sup>

**Compensation of state's attorneys.** This section has been construed to authorize the General Assembly to fix the compensation of state's attorneys, since their compensation is not otherwise provided for in this article.<sup>61</sup> (See discussion article 10, section 10, subheading, "County officers").

**Filling vacancies.** The Attorney General has ruled that the provisions of this section as to the filling of vacancies are mandatory; that the clause relating to the method of filling vacancies in the offices "of judges" applies to judges of the superior court of Cook County and of county courts; and that the clause relating to the method of filling vacancies "of all such other offices," applies to state's attorneys, justices of the peace and police magistrates.<sup>62</sup>

In 1917, a bill was passed by the General Assembly authorizing the Governor to fill vacancies in the office of probate judge by appointment where the unexpired term was for more than one year and for less than two years. The Attorney General expressed a doubt as to the constitutionality of this bill, in view of the provision of the section under consideration, that "vacancies in such elective offices shall be filled by election; but where the unexpired term does not exceed one year the vacancy shall be filled by appointment." He suggested, however, that the Supreme Court might hold the bill valid, on the

<sup>59</sup> *People v Supervisors*, 100 Ill. 33 (1881); Report Attorney General 1912, p. 1290; 1914, pp. 436, 1065; 1916, p. 926.

<sup>60</sup> *People v Sweitzer*, 280 Ill. 436 (1917); *People v Olson*, 245 Ill. 288 (1910).

<sup>61</sup> *Hoynes v Danish*, 264 Ill. 467 (1914); *Butzow v Kern*, 264 Ill. 498 (1914).

<sup>62</sup> Report Attorney General 1910, p. 171; 1916, p. 122; 1915, p. 785; 1914, p. 165; 1900, p. 239; 1912, p. 693; 1912, pp. 694, 699.

ground that a judge of a probate court held an office created, not by the constitution, but by the legislature, to which, therefore, this constitutional provision would not apply. The Governor vetoed the bill because, in his view, it clearly contravened the provision quoted from the section under discussion.<sup>63</sup>

**Section 33.** All process shall run; In the name of the People of the State of Illinois; and all prosecutions shall be carried on; In the name and by the authority of the People of the State of Illinois; and conclude; Against the peace and dignity of the same.

“Population,” whenever used in this article, shall be determined by the next preceding census of this State, or of the United States.

**In general.** The provisions of the first paragraph of this section appeared, substantially in their present form, in section 7 of article 4 of the constitution of 1818, and in section 26 of article 5 of the constitution of 1848. The following discussion, therefore, is based upon the judicial interpretations of similar provisions in all three constitutions.

**Process.** The term “all process,” as used in this section, has been construed to include writs of *scire facias*, summons, judgment, execution, fee bills, the final process of courts of equity, such as executions, writs of attachment, sequestration and assistance, and an order of a court of equity directing a person’s arrest for contempt of court.<sup>64</sup> The Supreme Court has said that the term included all writs issued at the common law in the name of the King and all writs since created as the equivalent thereof, but that the term did not include writs issued in a purely statutory proceeding unknown to the common law. In this case the court held that the term “process” did not include a copy of a tax judgment certified to the collector as authority for the sale of real estate for taxes.<sup>65</sup> The Attorney General has ruled, however, that the term includes an order issued by the Governor to carry out his commutation of the sentence of a person convicted of murder, which is directed to a sheriff, commanding him to remove the prisoner from a county jail to a penitentiary, and commanding the warden thereof to receive and confine him for life.<sup>66</sup>

The first clause of this section has been construed to be mandatory. Process which does not comply therewith is void.<sup>67</sup> A writ has been held to comply with this provision, however, which omitted the words “In the name of the.” It has also been held that the required words need not necessarily appear on the margin of the writ but that it is sufficient if they appear in the body of the writ.<sup>68</sup> (See discussion article 4, section 11.)

**Prosecutions.** It has been held that the term “prosecutions,” as used in this section, is limited to prosecutions of a public or criminal nature, where the formal accusation of offenders is made either by presentment, informa-

<sup>63</sup> Report Attorney General 1918, p. 193; Veto Messages 1917, p. 32.

<sup>64</sup> *McFadden v Fortier*, 20 Ill. 509 (1858); *Knott v Pepperdine*, 63 Ill. 219 (1872); *I. C. Ry. Co. v Herr*, 54 Ill. 356 (1870); *Reddick v Administrators*, 7 Ill. 670 (1845); *Armsby v People*, 20 Ill. 155 (1858); *Leighton v Hall*, 31 Ill. 108 (1863).

<sup>65</sup> *Curry v Hinman*, 11 Ill. 420 (1849).

<sup>66</sup> Report Attorney General 1900, p. 186.

<sup>67</sup> *Sidwell v Schumacker*, 99 Ill. 426 (1881).

<sup>68</sup> *Knott v Pepperdine*, 63 Ill. 219 (1872); *Harris v Jenks*, 3 Ill. 475 (1840).

tion or indictment. It includes an information in the nature of *quo warranto*.<sup>69</sup> The Supreme Court held that the term does not include a so-called "information" in a statutory proceeding before a justice of the peace to collect a penalty for malfeasance in office, where the statute merely required a complaint which could have been made orally.<sup>70</sup> Nor does it include an action of debt to recover a penalty for violation of an act regulating the practice of medicine.<sup>71</sup> Similarly, a special statutory proceeding in equity, begun by the Attorney General upon information, to dissolve a mutual benefit association,<sup>72</sup> and a proceeding to disbar an attorney from practice in the circuit court,<sup>73</sup> have been held not to be embraced within the term.

The second clause of this section, like the first, has been held to be mandatory. Prosecutions which do not comply therewith, as to both beginning and ending, are void.<sup>74</sup> An information has been held to comply with this provision, however, which began as follows: "who sues for the People of the State of Illinois in this behalf and for said people, and in the name and by the authority thereof, etc."<sup>75</sup> Indictments have been held sufficient which concluded "Against the peace and dignity of the same People of the State of Illinois," and "Against the peace and dignity of the People of the State of Illinois."<sup>76</sup> (See discussion article 4, section 11.)

<sup>69</sup> *Donnelly v People*, 11 Ill. 552 (1850); *Parris v People*, 76 Ill. 274 (1875); *People v Larsen*, 265 Ill. 406 (1914).

<sup>70</sup> *Newton v People*, 72 Ill. 507 (1874).

<sup>71</sup> *People v Gartenstein*, 248 Ill. 546 (1911).

<sup>72</sup> *Indemnity Association v Hunt*, 127 Ill. 257 (1889).

<sup>73</sup> *Moutray v People*, 162 Ill. 194 (1896).

<sup>74</sup> *Whitesides v People*, 1 Ill. 21 (1819); *Donnelly v People*, 11 Ill. 552 (1850); *Parris v People*, 76 Ill. 274 (1875).

<sup>75</sup> *People v Larsen*, 265 Ill. 406 (1914).

<sup>76</sup> *Chesshire v People*, 116 Ill. 493 (1886); *Zarresseler v People*, 17 Ill. 101 (1855).



## ARTICLE VII—SUFFRAGE

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Section 1. Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord one thousand eight hundred and forty-eight, or obtained a certificate of naturalization, before any court of record in this State, prior to the first day of January, in the year of our Lord one thousand eight hundred and seventy, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote at such election.

Guaranty of right to vote. This section guarantees the right to vote of every person, possessing the qualifications named herein, who has not been disfranchised by conviction for an infamous crime under section 7 of this article. Any deprivation of this right violates this provision of the constitution. Thus in the case of *People v Strassheim*,<sup>1</sup> a primary election act was held invalid, when construed in connection with the registration law, because, in effect, it deprived persons becoming 21 within four months before the election, or persons naturalized within that period, or their right to vote.<sup>2</sup> But in the case of *People v Hoffman*<sup>3</sup> it was held that the requirement of registration three weeks before an election was not an unconstitutional requirement, although voters becoming qualified in this period would thereby be deprived of their vote. The reasoning of the court in this case was that the fact that the constitution mentioned several qualifications for electors implies that the General Assembly should have the power to provide machinery for the determination of these qualifications, and the registration act is a reasonable means of determining who are qualified voters.<sup>4</sup>

It may here be noted however, that an idiot or distracted person cannot vote, although he may possess all of the qualifications named in the constitution.<sup>5</sup>

In this connection it must be noted that section 18 of article 2 provides that all elections shall be free and equal and this provision is, to some extent, a guaranty similar to that contained in the section under discussion. (See discussion article 2, section 18; article 7, section 7.)

<sup>1</sup> 240 Ill. 279 (1909); see *Sanner v Patton*, 155 Ill. 553 (1895).

<sup>2</sup> See *Rouse v Thompson*, 228 Ill. 522 (1907).

<sup>3</sup> 116 Ill. 587 (1886).

<sup>4</sup> For other cases holding that qualified voters were not denied the right of suffrage, see *People v Nelson*, 133 Ill. 565 (1890); *People v Edmands*, 252 Ill. 108 (1911); *Christie v People*, 206 Ill. 337 (1903); *Choisser v York*, 211 Ill. 56 (1904).

<sup>5</sup> *Behrensmeyer v Kreitz*, 135 Ill. 591 (1891); *Welsh v Shumway*, 232 Ill. 54 (1908).

**Residence.** The word "resided", as used in this section, means "having a permanent abode".<sup>6</sup> Whether or not an abode is permanent is largely a question of intention,—that is when a person has a home at a given place, with no present intention of removing therefrom, he is generally held to be a resident of that place.<sup>7</sup> His temporary absence, without any intention of removing permanently, will not deprive him of his residence there.<sup>8</sup> Nor will an intention to move to another place, if certain events occur, operate to deprive a person of his residence. Thus a man was held to be a resident of a town even though he intended to move away, if he should not be able to find work in that town.<sup>9</sup>

The question of the residence of married women for purposes of suffrage has given rise to some difficulty because of the common law principle that the wife's domicile is constructively that of her husband. The Attorney General has said that this common law rule has no application to the problem of determining the wife's residence for the purposes of suffrage.<sup>10</sup> In one case a husband resided in the county for more than ninety days but his wife resided in the county but 65 days prior to the election. The Supreme Court held that the wife's vote should be rejected in this case, since, while the husband's domicile is constructively the wife's, actual residence is necessary for suffrage purposes.<sup>11</sup> But it must be noted that a married woman cannot have the intention to acquire a residence apart from that of her husband, if she intends to return to the residence of her husband. Thus where a married woman lived in an election district more than thirty days but her husband resided elsewhere in the county it was held that she could not vote in the district where she was living since she intended to return to her husband and her residence was therefore not in this election district.<sup>12</sup>

The Attorney General has pointed out that it is not necessary that an elector shall have been naturalized for one year or for any period before he may vote. All that is necessary is that he shall have resided in the political subdivisions for the periods named in the constitution.<sup>13</sup>

**Absentee voting law.** The question has arisen whether this section of the constitution prohibits an absentee voting law. The specific question is whether the provision as to residence contemplates that suffrage shall be exercised by the voter in person, at the voting place in the precinct or district in which he resides. The Supreme Court has never passed upon this question. In 1912 the Attorney General indicated that he felt some doubt as to whether or not an absentee voting law would be constitutional under this section, although, upon the consideration of decisions from other states, he was perhaps inclined to the view that such an act would be a valid enactment.<sup>14</sup> In 1917 the General Assembly passed an act providing for absentee voting by persons in the military or naval service of the United States. Upon that occasion the Attorney General said that while he had some doubts as to the constitutionality of such a measure, his doubts were not serious enough to compel him to advise against the passage of the act.<sup>15</sup> It has been suggested that section 4 of this article authorizes an absentee voting law so far as such a law respects soldiers and sailors in the service of the federal government.<sup>16</sup>

<sup>6</sup> Johnson v People, 94 Ill. 505 (1880); Spragins v Houghton, 3 Ill. 377 (1840).

<sup>7</sup> Welsh v Shumway, 232 Ill. 54 (1908); Beardstown v Virginia, 81 Ill. 541 (1876); Dorsey v Brigham, 177 Ill. 250 (1898).

<sup>8</sup> Behrensmeier v Kreitz, 135 Ill. 591 (1891).

<sup>9</sup> Welsh v Shumway, 232 Ill. 54 (1908).

<sup>10</sup> Report Attorney General 1918, p. 283.

<sup>11</sup> Dorsey v Brigham, 177 Ill. 250 (1898).

<sup>12</sup> Dorsey v Brigham, 177 Ill. 250 (1898).

<sup>13</sup> Report Attorney General (1912), p. 413.

<sup>14</sup> Report Attorney General 1912, p. 1266.

<sup>15</sup> Report Attorney General 1918, pp. 300, 345.

<sup>16</sup> Report Attorney General 1918, p. 300.



**Election district.** The Supreme Court has said that the words "election district" have acquired no settled meaning. Sometimes these words are used to designate a voting precinct and at times they are used to describe a larger or a smaller district than a voting precinct.<sup>17</sup> In the case of *People v Markiewicz*<sup>18</sup> it was held that for the purposes of town elections, the entire town is to be considered as one voting district as respects the qualifications, of voters, although there may be several polling places in the town. A voter who has resided in the town for thirty days and who has all the other qualifications necessary to make him a legal voter may vote in the town, regardless of the fact that he has not resided in the particular election district or voting precinct for that period. The reasoning of the court in this case was that it was never intended that any voter should be qualified to take part in a town meeting and not be qualified to assist in the election of town officers.

**Unnaturalized aliens.** The clause giving the suffrage to persons who were electors in this state on the first day of April, 1848 was inserted to provide for the cases of certain unnaturalized aliens, who were permitted to vote under the constitution of 1848. Under the constitution of 1818 citizenship was not a requisite to suffrage.<sup>19</sup> Under that constitution, an unnaturalized alien, with the requisite residential qualifications might vote. When the constitution of 1848 (article 6, section 1) made citizenship a qualification for suffrage it provided that unnaturalized aliens who were residents of the state at the time of the adoption of that constitution (April 1, 1848) might vote and this provision was carried forward into the constitution of 1870. However, it has been held that persons who were foreign born, minor children of such unnaturalized alien electors on April 1, 1848 may not vote under this provision of the constitution, since these minors were not electors on that date.<sup>20</sup>

**Naturalization in county courts.** When the constitutional convention of 1869-70 assembled, some doubt existed as to whether naturalization certificates which had been granted by county courts were effectual. The provision giving the suffrage to those who had obtained certificates of naturalization before any court of record in the state before January 1, 1870 was adopted to remove this doubt so far as the right of these persons to vote was concerned. (Debates, p. 1289.) But in 1875 it was held that naturalization before a county court was valid and legal for all purposes without reference to this provision of the constitution.<sup>21</sup>

**Woman Suffrage.** The provision of this section limiting the suffrage to male citizens is held to apply only to officers created by, or elections prescribed by the constitution. The General Assembly may authorize women to vote for all other officers and in all other elections. In 1891 the General Assembly passed an act authorizing women to vote for any school officer elected under the general or special school laws of the state. In *People v English*<sup>22</sup> it was held that this act could not constitutionally give women the right to vote for county superintendents of schools, since

<sup>17</sup> *People v Markiewicz*, 225 Ill. 563 (1907); Report Attorney General 1916, p. 780.

<sup>18</sup> 225 Ill. 563 (1907); but see *Fahey v City of Bloomington* 268 Ill. 386 (1915); *People v Simpson* 168 Ill. 127 (1897).

<sup>19</sup> *Spragins v Houghton*, 3 Ill. 377 (1840).

<sup>20</sup> *Beardstown v Virginia*, 76 Ill. 34 (1875).

<sup>21</sup> *People v McGowan*, 77 Ill. 644 (1875); but see *Knox County v Davis*, 63 Ill. 405 (1872); *Beardstown v Virginia* 76 Ill. 34 (1875)

<sup>22</sup> 139 Ill. 622 (1892).

that officer was named in section 5 of article 8 of the constitution and, must therefore be elected by the male electors prescribed in section 1 of article 7 of the constitution. In the case of *Plummer v Yost*,<sup>23</sup> decided in 1893, it was held that this act was valid insofar as it gave women the right to vote for a member of the board of education, since that office is purely a creation of the General Assembly and is not mentioned in the constitution.

In 1913 the General Assembly passed an act providing that women might vote for presidential electors, members of the state board of equalization, clerk of the appellate court, county collector, county surveyor, members of the board of assessors, members of the board of review, sanitary district trustees, and for all officers of cities, villages and towns (except police magistrates), and upon all questions or propositions submitted to a vote of the electors of such municipalities or other political subdivisions of the state. The same act provided that women might vote for the following township officers: supervisor, town clerk, assessor, collector and highway commissioner, and might also participate and vote in all annual and special town meetings. In the case of *Scown v Czarnecki*<sup>24</sup> this act was upheld insofar as it concerned the qualifications of electors for the several officers named, since these officers are not mentioned in the constitution. But the court held that the provision authorizing women to vote upon all questions or propositions submitted to a vote of the electors of municipalities or political subdivisions of the state was invalid insofar as it purported to give women the right to vote in referendum elections prescribed by the constitution, such as the division of a county or the removal of a county seat. As to referendum elections not prescribed by the constitution the act was held valid. Later it was held that women were not entitled under this act to vote for judges of city courts or judges of the municipal court of Chicago, since the creation of these offices is authorized by the constitution.<sup>25</sup> It will thus be seen that while women may be authorized to vote for the officers named in the act of 1913, they may not be authorized to vote for constitutional officers, such, for example, as the Governor, and members of the General Assembly.

In the case of *People v Byers*<sup>26</sup> the Supreme Court held that the woman suffrage act did not authorize women to vote for delegates to national nominating conventions or party committeemen, although it might well have done so, under the constitution.

As previously noted, the woman suffrage act of 1913 gives women the right to vote for presidential electors. The General Assembly has the power to give women this right, since the constitution of the United States prescribes that presidential electors shall be chosen in such manner as the several state legislatures shall direct. (United States Constitution, article 2, section 2). However, women may not be authorized to vote for United States Senators or members of the federal House of Representatives since these officers must be elected by electors, having the "qualifications requisite for electors of the most numerous branch of the state legislatures." (United States Constitution, article 1, section 2, and the seventeenth amendment.)

## Section 2. All votes shall be by ballot.

The essential right guaranteed by this section is not written or printed ballots, but secrecy in voting. It is therefore held that a statute providing for voting machines does not violate this section, since this method of voting

<sup>23</sup> 144 Ill. 63 (1893).

<sup>24</sup> 264 Ill. 305 (1914).

<sup>25</sup> *Franklin v Westfall*, 273 Ill. 402 (1916); *Wells v Robertson*, 277 Ill. 534 (1917).

<sup>26</sup> 271 Ill. 600 (1916); see *People v Militzer*, 272 Ill. 387 (1916).

preserves the essential element of secrecy.<sup>27</sup> It has been held, however, that the production of ballots for the inspection of a grand jury does not violate the secrecy of the ballot required by this section of the constitution since this provision does not contemplate secrecy after the ballots have been deposited in the ballot box.<sup>28</sup>

Section 3. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from the same. And no elector shall be obliged to do military duty on the days of election, except in time of war or public danger.

Section 4. No elector shall be deemed to have lost his residence in this State by reason of his absence on the business of the United States, or of this State, or in the military or naval service of the United States.

In the opinion of the Attorney General this section does not prevent a government employee who desires to abandon his residence in the state and acquire a residence elsewhere from doing so. It merely provides that the fact of his absence on government or military service shall not in itself operate as an abandonment of residence in this state.<sup>29</sup>

The Attorney General has also suggested that the absentee voting law for soldiers and sailors may be justified under this section.<sup>30</sup> (See discussion article 7, section 1, subheading, "Absentee voting law.")

Section 5. No soldier, seaman or marine in the army or navy of the United States, shall be deemed a resident of this State in consequence of being stationed therein.

Section 6. No person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding the election or appointment.

Except as otherwise provided in the constitution,<sup>31</sup> this section fixes the qualifications of all officers provided for in that instrument. The Supreme Court has held that this provision is a limitation upon the power of the

<sup>27</sup> *Lynch v Malley*, 215 Ill. 574 (1905); but see Veto Message No. 10.

<sup>28</sup> *People v Lueders*, 269 Ill. 205 (1915).

<sup>29</sup> Report Attorney General 1916, p. 830.

<sup>30</sup> Report Attorney General 1918, pp. 300, 345.

<sup>31</sup> See *People v Election Commissioners*, 221 Ill. 9 (1906).

General Assembly and that body has no power or authority except as otherwise provided in the constitution to add any further qualifications for constitutional officers. Thus, in the case of *People v McCormick*<sup>32</sup> it was held that a statute, requiring a person elected county commissioner of Cook County to have been a resident of the county for five years preceding his election, violated this section of the constitution, since it imposed additional qualifications for a constitutional office. (See discussion article 6, section 17; article 10, section 6; article 4, section 3, subheading, "Qualifications of members of the General Assembly".)

The Attorney General has taken the view that a license to practice law is not a necessary qualification for the office of state's attorney, since that officer is a constitutional officer, and his sole qualifications are those specified by this section.<sup>33</sup>

When an office is created by statute, however, it is wholly within the power of the General Assembly and additional qualifications may be imposed by that body.<sup>34</sup> However, the Attorney General has ruled that statutory officers must have the qualifications of citizenship and residence mentioned in this section. Thus the Attorney General has held that notaries public, and overseers of the poor must have these qualifications.<sup>35</sup>

### Section 7. The General Assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes.

This section is a limitation upon the power of the General Assembly and that body has no power to exclude any qualified elector from the right of suffrage except for the cause mentioned in this section,—conviction for an infamous crime.<sup>36</sup>

In pursuance of this provision of the constitution, the General Assembly has passed laws excluding from the right of suffrage persons convicted of infamous crimes. (Hurd's Revised Statutes 1917, chap. 38, sec. 279; chap. 46, sec. 70)<sup>37</sup>

<sup>32</sup> 261 Ill. 413 (1914).

<sup>33</sup> Report Attorney General 1900, p. 233; but see Report Attorney General 1916, p. 762.

<sup>34</sup> *People v McCormick*, 261 Ill. 413 (1914).

<sup>35</sup> Report Attorney General 1900, p. 237; Report Attorney General 1915, p. 593; Report Attorney General 1918, p. 109; but see *State Public Utilities Commission v Early*, 285 Ill. 469 (1919).

<sup>36</sup> *Sanner v Patton*, 155 Ill. 553 (1895); *Christie v People*, 206 Ill. 337 (1907).

<sup>37</sup> See Report Attorney General 1916, p. 831; Report Attorney General 1914, p. 721; Report Attorney General 1912, p. 1266.

## ARTICLE VIII—EDUCATION

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Section 1. The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education.

In general. A common school education may include a high school course<sup>1</sup> and the fact that foreign languages, the higher mathematics, and the sciences are taught in the high school does not change its character from that of a common school.<sup>2</sup> But a school "devoted exclusively to teaching advanced pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges" is not a common school.<sup>3</sup>

Power and duties of the General Assembly. The provision of this section that the General Assembly shall provide a thorough and efficient system of free schools gives the General Assembly a broad discretion as to the manner in which it will carry out the duty thus enjoined. In the case of *Plummer v Yost*<sup>4</sup> the court said: "The mode in which the system of free schools, prescribed by the constitution is to be organized is left entirely to the discretion of the legislature."

Section 22 of article 4, provides that the General Assembly shall not pass special laws relating to the management of the common schools, but it has been held that the broad grant of power given to the General Assembly by the section now under discussion limits the effect of section 22 of article 4 strictly to a denial of the power to pass special laws relating to the *management* of the common schools. This is illustrated by the case of *Land Commissioners v Kaskaskia Commons*.<sup>5</sup> In that case it was urged that an act authorizing the sale of the Kaskaskia commons and the use of the proceeds for school purposes on the island of Kaskaskia was a special law in violation of section 22 of article 4. But the court held that the more comprehensive language of section 1 of article 8 limited the scope of section 22 of article 4 to laws relating strictly to the management of the common schools and that this act in no sense related to the management of the schools.

The power given the General Assembly to create a system of free schools is qualified, however, by the provision that the system created must be a system "whereby all children of this state may receive a good common school education". This qualification requires that the legislative plan for the creation of the school system must be uniform in its operation. "The same privileges of attendance upon the schools must in all cases be extended

<sup>1</sup> *Cook v Board of Directors*, 266 Ill. 164 (1914); *Richards v Raymond*, 92 Ill. 612 (1879); *Russell v High School Board*, 212 Ill. 327 (1904); *People v C. & N. W. Ry. Co.*, 286 Ill. 384 (1919).

<sup>2</sup> *People v Moore*, 240 Ill. 408 (1909).

<sup>3</sup> *Powell v Board of Education*, 97 Ill. 375 (1881); but see *Boehm v Hertz*, 182 Ill. 154 (1899).

<sup>4</sup> 144 Ill. 68 (1893).

<sup>5</sup> 249 Ill. 578 (1911); *Fuller v Heath*, 89 Ill. 296 (1878); *Speight v People*, 87 Ill. 595 (1877); *Boehm v Hertz*, 182 Ill. 154 (1899).

equally to all children similarly situated."<sup>6</sup> Thus in the case of *People v Weis*,<sup>7</sup> a township high school act which allowed certain townships to organize township high schools was held invalid, both as a special law in contravention of section 22 of article 4 and because such an act violated the requirements of uniformity contained in section 1 of article 8, since by virtue of this act "some may be denied the privilege of organizing the territory in which they reside into a township high school district, and thus be denied the opportunity to receive a free education at such an institution." (See discussion article 4, section 22, subheading, "Management of the common schools").

This requirement of uniformity has also been applied in holding that colored children cannot be segregated in the schools. It is held that colored children can not be excluded from the schools nearest their homes, even though equal educational facilities are given in more distant schools.<sup>8</sup>

It has been held that this section of the constitution prevents the exclusion of children from the public schools because of their refusal to be vaccinated, but in a case of existing or threatened epidemic children who have not been vaccinated may be excluded during the period of the epidemic.<sup>9</sup> The Supreme Court has several times declined to sanction a rule making vaccination a prerequisite, under all circumstances, to public school attendance.<sup>10</sup>

**Section 2.** All lands, moneys, or other property, donated, granted or received for school, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gift or grants were made.

The primary purpose of this section is to prevent the use, for purposes other than school purposes, of school lands, granted to the state by the federal government. In the case of *Grosse v People*,<sup>11</sup> the court said: "From an inspection of this section it is apparent that it applies only to gifts or grants made prior to the adoption of the constitution of 1870. Its language plainly indicates that lands, money and other property had been theretofore donated, granted and received for schools, colleges, seminary and university purposes, and directs that such gifts or grants shall be faithfully applied to the objects for which they were made; and when it is considered that the federal government had, prior to the adoption of the constitution 1870, granted section 16 in each township, or lands equivalent thereto, to the state for the use of the inhabitants of such township for the use of schools, and had also granted lands and donated funds to the State for the establishment and maintenance of a state college or university and for the founding and support of a state seminary, it becomes apparent that the section of the constitution had reference primarily to these gifts and grants from the federal government. It manifestly does not extend to gifts or grants made subsequent to the adoption of the constitution."

This section finds its principal application in the rule that certain school property is exempt from taxation, since to tax such property would divert it to purposes other than school purposes. While school property in general is

<sup>6</sup> *People v C. & N. W. Ry. Co.*, 286 Ill. 384 (1919).

<sup>7</sup> 275 Ill. 581 (1916).

<sup>8</sup> *People v Mayor of Alton*, 193 Ill. 309 (1901); *People v Board of Education*, 101 Ill. 308 (1882); *Chase v Stephenson*, 71 Ill. 383 (1874); *People v Board of Education*, 127. Ill. 613 (1889).

<sup>9</sup> *Potts v Breen*, 167 Ill. 67 (1897); *Hagler v Larner*, 284 Ill. 547 (1918).

<sup>10</sup> *People v Board of Education*, 234 Ill. 422 (1908); *Lawbaugh v Board of Education*, 177 Ill. 572 (1899); *Hagler v Larner*, 284 Ill. 547 (1918).

<sup>11</sup> 218 Ill. 342 (1905).

not exempt from taxation under this section of the constitution,<sup>12</sup> the Supreme Court has held that school lands which are part of the original federal grants for school purposes, or which were purchased with the proceeds of such grants, are exempt, under the provisions of this section, from both general taxation and special assessment.<sup>13</sup> It has also been held that a tax can not be assessed upon the rents received from these lands since such rents are "proceeds" of the grants within the language of this section.<sup>14</sup> However, this section was intended to secure only gifts made for public school purposes and has no reference to private donations to educational institutions, which are not a part of the public school system. Thus, land granted by individuals to the University of Chicago is subject to special assessments, since the University of Chicago is not a part of the public school system of the state.<sup>15</sup> In this connection it may be noted that section 3 of article 9 authorizes the General Assembly to exempt from taxation property used exclusively for school purposes. (See discussion article 9, section 3, subheading, "Power of General Assembly.")

In the case of *Cravener v Board of Education*<sup>16</sup> it was contended that this section of the constitution would prevent the board of education of the city of Chicago from assuming control of valuable school lands in the town of Lake upon the annexation of that town to the city of Chicago. But the court held that this section did not prevent the General Assembly from vesting legal title in a different agency, provided that the lands were to be devoted to school purposes.

The Attorney General has held that an act permitting the use of the proceeds or rents of school lands, (part of the original federal grants for school purposes), to pay for draining such lands, is in violation of this section of the constitution.<sup>17</sup>

**Section 3.** Neither the General Assembly nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

In the case of *County of Cook v Industrial School*,<sup>18</sup> decided in 1888, it was held that this section prohibited the payment of money to sectarian institutions for the care of delinquent children committed to such schools by the courts of this state. However, in *Dunn v Chicago Industrial School*,<sup>19</sup> decided in 1917, the court held that such payments might be made to sectarian schools where it appeared that the amount paid was less than the cost of the actual care of the children. The court took the view that where the amount

<sup>12</sup> *Grosse* People, 218 Ill. 342 (1905); *City of Chicago, v City of Chicago*, 207 Ill. 37 (1904).

<sup>13</sup> *City of Chicago v People*, 80 Ill. 384 (1875); *People v Trustees*, 118 Ill. 52 (1886).

<sup>14</sup> *People v City of Chicago*, 216 Ill. 537 (1905).

<sup>15</sup> *University of Chicago v People*, 118 Ill. 565 (1886).

<sup>16</sup> 133 Ill. 145 (1890).

<sup>17</sup> Report Attorney General 1908, p. 61.

<sup>18</sup> 125 Ill. 540 (1888); see *County of McLean v Humphreys*, 104 Ill. 378 (1882).

<sup>19</sup> 280 Ill. 613 (1917).

paid was less than the amount required to maintain the children in a state institution, it could not be said that a donation had been made for a sectarian purpose. The decision has been followed in later cases.<sup>20</sup>

It has been held that this section does not prohibit a church from erecting a church building on a poor farm, since such an arrangement results in a gift of the building, by the church, to the county, rather than any gift by the county to the church.<sup>21</sup>

It has also been held that this section does not prevent the use of a public school house for religious meetings, since this use in no way interferes with the use of the building for school purposes and is consistent with the faithful application of the property to school purposes.<sup>22</sup>

This section is frequently construed in connection with section 3 of article 2, which provides that no preference shall be given by law to any religious denomination or mode of worship. (See discussion article 2, section 3.)

**Section 4.** No teacher, State, county, township, or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture, used or to be used, in any school in this State, with which such officer or teacher may be connected, under such penalties as may be provided by the General Assembly.

(See article 4, sections 15, 25.)

**Section 5.** There may be a County Superintendent of Schools in each county whose qualifications, powers, duties, compensation, and time and manner of election, and term of office, shall be prescribed by law.

It has been held that the provision of this section that the "time and manner of election" of the county superintendent of schools "shall be prescribed by law" does not give the General Assembly the power to fix the qualifications of electors so as to permit women to vote for that officer.<sup>23</sup> (See discussion article 7, section 1, subheading, "Woman suffrage.")

Since 1870, the county superintendent of schools has been elected by popular vote. It has been suggested, however, that this section does not necessarily require a popular election. Some have thought that an election of the county superintendent of schools by the county board would suffice to satisfy this section of the constitution. There is, however, no authoritative construction as to this.

The Attorney General has said that women might be permitted, by statute, to hold the office of county superintendent of schools, since the General Assembly has the power to fix the qualifications of that officer.<sup>24</sup>

<sup>20</sup> *Dunn v Addison School*, 281 Ill. 352 (1917); *Trost v Ketteler Manual Training School*, 282 Ill. 504 (1918); *St. Hedwig's School v Cook County*, 289 Ill. 432 (1919).

<sup>21</sup> *Reichwald v Catholic Bishop*, 258 Ill. 44 (1913).

<sup>22</sup> *Nichols v School Directors*, 93 Ill. 61 (1879).

<sup>23</sup> *People v English*, 139 Ill. 622 (1892); but see *Scown v Czarnecki*, 264 Ill. 305 (1914).

<sup>24</sup> Report Attorney General 1914, p. 1162.



## ARTICLE IX—REVENUE

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Section 1. The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor-dealers, toll bridges, ferries, insurance, telegraph and express interests or business, venders of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates.

The general property tax. The first clause of this section and sections 9 and 10 of article 9 establish the general property tax in this state. This section relates to state taxes and sections 9 and 10 refer to municipal taxes.

### In General.

The basic principle of the general property tax is that *all* property, irrespective of its character, whether real or personal, tangible or intangible, shall be taxed at the same rate and in proportion to its value. The general property tax was established in this state by the constitution of 1818<sup>1</sup> (article 8, section 20), and the principle was carried forward into the constitution of 1848 (article 9, section 2) and the present constitution. In construing the section of the constitution of 1870 now under consideration the Supreme Court has said: "Under section 1 of article 9 of the constitution we think it is plain that the burdens of taxation were intended to be cast equally upon all the property of the state, of every description. Where revenue was needed a tax is required to be levied, on a valuation, so that every person and corporation shall be required to pay a tax in proportion to the value of his, her or its property. Uniformity of taxation on all property was the cardinal principle of that section of the constitution . . . ."<sup>2</sup>

Under the last clause of this section of the constitution the General Assembly is given the power to tax occupations and persons or corporations owning or using franchises and privileges "in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates". The constitution of 1848 contained a similar provision but the constitution of 1818 did not confer any such power upon the General As-

<sup>1</sup>Sawyer v City of Alton, 4 Ill. 127 (1841). Although the framers of the first constitution contemplated the establishment of the general property tax there was no serious attempt to apply that system of taxation until 1839. In that year, however, the General Assembly passed a law which fully established the general property tax in this state. See Rhinehart v Schuyler, 7 Ill. 473 (1843).

<sup>2</sup>Loan and Homestead Association v Keith, 153 Ill. 609 (1894).

sembly. Since 1848 the General Assembly, with respect to occupations, franchises and privileges has been empowered to impose taxes otherwise than in proportion to the value of property, although the principle of uniformity as to class is expressly enjoined upon the taxing authorities. This clause has given rise to much litigation and it is not an easy matter to reconcile all of the judicial decisions on this subject. (See discussion subsequent subheading, "Taxation of occupations, franchises and privileges.")

In recent years there has been much criticism of the general property tax in this and in other states. Many states have already abandoned the principle of the general property tax. The proposed tax amendment of 1916, would have permitted the General Assembly of this state to classify property for the purposes of taxation—that is, would have authorized the General Assembly to provide for the taxation of personal property otherwise than in proportion to value, or, at least, on a different basis than real estate.

(For a discussion concerning the history and criticisms of the general property tax, see Constitutional Conventions in Illinois, Second Edition, pp. 76-89; Constitutional Convention Bulletin No. 4, pp. 220-244).

### Property subject to taxation.

Obviously real estate and tangible personal property, such as furniture and farm implements, are property within the meaning of the constitutional provisions relating to taxation. And while it has been contended that intangible personal property, such as notes, mortgages and bonds, is not subject to taxation, the courts have declined to adopt that view. "The word property is not alone used in our language to denote tangible things, but is properly applied to denote intangible rights of value. One may have a property in a patent right or a copy right, which is as much ideal as is a right of action. We may safely assume that it was the policy of the convention which framed this clause of the constitution, that each person pay a direct tax in proportion to the pecuniary interests which he has in the state, and to be protected and defended by the laws."<sup>3</sup>

A person who loans money to another must pay taxes on the money loaned by him.<sup>4</sup> If a note and mortgage are taken to secure the purchase price of a tract of land both the note and the land are subject to taxation.<sup>5</sup> Leasehold estates in state lands, city warrants and certificates of purchase at mortgage foreclosure sales are taxable.<sup>6</sup> The capital stock and franchise of a corporation are property within the meaning of the constitution and, as such, are subject to taxation.<sup>7</sup> The General Assembly also has the power to provide for the taxation of shares of stock in the hands of the stockholder.<sup>8</sup> And, in *Huck v Chicago and Alton Railroad Company*<sup>9</sup> it was held that, under the peculiar facts in that case, railroad lines leased by a railroad company were taxable in the hands of the lessee.

Coal rights are taxable either as a part of the land or separately. If the same person owns both the land and the coal rights it is proper, in assessing the land, to add thereto the value of the coal rights. But if the land and the coal rights are owned by different persons then each should be assessed and taxed separately.<sup>10</sup>

<sup>3</sup> *People v Worthington*, 21 Ill. 171 (1859).

<sup>4</sup> *People v McConnell*, 12 Ill. 138 (1850).

<sup>5</sup> *People v Worthington*, 21 Ill. 171 (1859); see, also, *People v Rhodes*, 15 Ill. 305 (1853).

<sup>6</sup> *Carrington v People*, 195 Ill. 484 (1902); *Easton v Board of Review*, 183 Ill. 255 (1899); *Wedgbury v Cassell*, 164 Ill. 622 (1897).

<sup>7</sup> *Porter v R. R. I. & St. L. R. R. Co.*, 76 Ill. 561 (1875); *Ottawa Glass Co. v McCaleb*, 81 Ill. 556 (1876).

<sup>8</sup> *Ottawa Glass Co. v McCaleb*, 81 Ill. 556 (1876); *Danville Banking and Trust Co. v Parks*, 88 Ill. 170 (1878); *In re St. Louis L. & I. Co.*, 194 Ill. 609 (1902); *Illinois National Bank v Kinsella*, 201 Ill. 31, (1903); *First National Bank of Urbana v Holmes*, 246 Ill. 362 (1910).

<sup>9</sup> 86 Ill. 352 (1877).

<sup>10</sup> *Consolidated Coal Co. v Baker*, 135 Ill. 545 (1895).

Property in the course of transportation from one state to another is not subject to taxation in this state.<sup>11</sup>

### Uniformity.

It has been emphasized by the courts that the principles sought to be established by the framers of the present constitution, in providing for the taxation of property in proportion to value, were those of equality and uniformity. "The great central idea of the constitution and of its framers, was not a system of revenue based on the valuation of property, but uniformity and equality in the assessment of the tax upon it when valued, so that every person should pay a tax in proportion to it. That is the leading idea."<sup>12</sup> The requirement that all property shall be taxed in proportion to value is, therefore, but a means of attaining uniformity and equality of taxation, and that this was the intention of the framers of the constitution cannot be doubted. It is probably true that in 1870 a system of taxation in proportion to value established a standard by which substantial equality and uniformity of taxation was attained. Regardless of that question, however, there can be but little doubt that the means, prescribed by the convention of 1869-70, of obtaining equality and uniformity—that is, taxation in proportion to value—does not today have the effect of securing equality and uniformity of taxation. (See Constitutional Convention Bulletin No. 4, pp. 232-244.)

It can probably be safely said that under the earlier constitutions the courts were inclined to take a more liberal view as to what was a sufficient compliance with the rule of uniformity. Thus, in *Rhinehart v Schuyler*<sup>13</sup> it was held that a statute which classified all lands of the state into three classes, and fixed the value of each class, was not in violation of the principle of uniformity. This case involved primarily the revenue law of 1827, and it must be admitted that the decision turned largely on the point of practical necessity. In the early years of the history of the state it would have been a difficult matter to have provided for the assessment or fixing of the value of each tract of land separately. In another early case it was held that an act which provided for the assessment of bank shares on a later date than that for the assessment of other property was not in violation of the constitutional requirement with respect to uniformity.<sup>14</sup> However, it was held that under the constitution of 1848 the General Assembly could not direct the imposition of a five per cent penalty for failure to pay taxes on or before a specified date because that would have resulted in lack of uniformity.<sup>15</sup>

With reference to the rule of uniformity prescribed by the present constitution it has been said: "To secure that uniformity, two things are essential: First, the assessments shall be just and equal, in proportion to the value of the property liable to assessment; and, secondly, when thus assessed, the rate shall be uniform as to every person, and on every species of property returned by the assessor for taxation."<sup>16</sup> This does not mean, however, that assessments must always be made by the same officer or class of officers or that the same methods of ascertaining values must be followed for all classes of property. Thus, the General Assembly may provide for the assessment of the capital stock of some corporations by the State Board of Equalization and the capital stock of other corporations by the local asses-

<sup>11</sup> *Burlington Lumber Co. v Willetts*, 118 Ill. 559 (1886).

<sup>12</sup> *People v Salomon*, 46 Ill. 333 (1868).

<sup>13</sup> 7 Ill. 473 (1845); see, also, *Sawyer v City of Alton*, 4 Ill. 127 (1841); *Town of Pleasant v Kost*, 29 Ill. 490 (1863).

<sup>14</sup> *McVeagh v City of Chicago*, 49 Ill. 318 (1868).

<sup>15</sup> *Scammon v City of Chicago*, 44 Ill. 269 (1867); but see *Chambers v People*, 113 Ill. 509 (1885); For other early cases with reference to uniformity see *O'Kane v Treat*, 25 Ill. 557 (1861); *Darling v Dunn*, 50 Ill. 424 (1869); *Livingston County v Weider*, 64 Ill. 427 (1872); *Burr v City of Carbondale*, 76 Ill. 455 (1875).

<sup>16</sup> *Sherlock v Village of Winnetka*, 68 Ill. 530 (1873).

sors.<sup>17</sup> And the constitution does not prevent the State Board of Equalization from ascertaining the value of the capital stock of corporations by a method which requires the adding together the market value of the stock and the amount of the corporate indebtedness (exclusive of current obligations) and deducting from that total the value of the corporate tangible property.<sup>18</sup> The General Assembly may also classify counties and provide for different assessing officers in one class of counties than in other classes.<sup>19</sup> But it is improper to tax property assessed by the State Board of Equalization at a different rate than the property assessed by other assessment officers.<sup>20</sup>

"The fact that certain credits and deductions may be allowed in the assessment of personal property does not establish want of uniformity"<sup>21</sup> Nor is the principle of uniformity violated when two overlapping taxing districts are authorized to levy taxes for the same purpose. Thus, the town of Bloomington and the city of Bloomington may both levy taxes for road and bridge purposes, even though the two municipalities overlap.<sup>22</sup> But a statute which creates the office of commissioner of Canada thistles and provides for his compensation by the imposition of a tax on the lands from which the commissioner removes thistles is void because it is in violation of that provision of the constitution which requires that taxes on property shall be levied in proportion to value, and thus contravenes the principle of uniformity secured by that instrument.<sup>23</sup>

While the general rule is that all taxes on property must be levied in proportion to the value of the property taxed, the opinion of the court in *Raymond v Hartford Fire Insurance Company*<sup>24</sup> implies that this rule is not without exception. In that case the court said that the second clause of section 1 of article 9 is not limited to taxes on occupations or franchises and privileges as distinguished from taxes on property. "The contention that the statute violates the first section above set out is, that the second clause of that section does not relate to property taxes strictly so called, but to taxes which the legislature may authorize to be levied on different kinds of business or occupations, and that such taxes were intended by the framers of the constitution to be in addition to, and not in lieu of, the tax on property by valuation provided for in the first clause, and that although the legislature has the power to impose the tax authorized by the act of 1899 on foreign insurance corporations as a class, for the privilege of doing business in this State, it has no power to relieve them of their personal property tax imposed by the general revenue law, enacted under the first clause. There is no substantial difference between this section of the present constitution and section 2 of article 9 of the constitution of 1848, and this court has held that said second clause is not confined to occupations, but applies also to property interests, which may be included in the method of taxation adopted by the legislature, and which method may be different from that prescribed by the first clause of said section 1."

This opinion clearly implies that, with respect to the objects and subjects enumerated in the last clause of section 1 of article 9, the General Assembly may provide for the taxation of property otherwise than in proportion to value. However, it must be remembered that the statements of the court on this point were not necessary to the decision. The court said that the act of the General Assembly then under

<sup>17</sup> *Coal Run Coal Co. v Finlen*, 124 Ill. 666 (1888); *Sterling Gas Co. v Higby*, 134 Ill. 557 (1890); *Hub v Hanberg*, 211 Ill. 43 (1904); see, also, *People v Salomon*, 46 Ill. 323 (1868).

<sup>18</sup> *Porter v R. R. I. & St. L. R. R. Co.*, 76 Ill. 561 (1875); see, also, *C. & A. R. R. Co., v People*, 98 Ill. 350 (1881). The case of *In re St. Louis L. & I. Co.* 194 Ill. 609 (1902) involves the same principle.

<sup>19</sup> *People v Commissioners of Cook County* 176 Ill. 576 (1898).

<sup>20</sup> *C. C. C. & St. L. Ry. Co., v People*, 223 Ill. 17 (1906).

<sup>21</sup> *Edwards v People*, 88 Ill. 340 (1878).

<sup>22</sup> *Highway Commissioners v City of Bloomington*, 253 Ill. 164 (1912).

<sup>23</sup> *People v Board of Commissioners*, 221 Ill. 493 (1906); see, also, *Cook County v Fairbank*, 222 Ill. 576 (1906).

<sup>24</sup> 196 Ill. 329 (1902); see, also, *Hub v Hanberg*, 211 Ill. 43 (1904).

consideration, which provided that all foreign fire insurance companies should pay into the state treasury two per cent of the gross amount of premiums received for business done in this state in lieu of all other personal property taxes, was not in conflict with section 1 of article 9, but held that it was in conflict with sections 9 and 10 of the same article. (See discussion article 9, section 9, subheading, "Commutation of municipal taxes"). The main purpose of the second clause of the section of the constitution under consideration was to permit the imposition of occupation and franchise taxes in addition to the general property tax and not in lieu thereof. If the issue is ever squarely presented it may well be doubted that the Supreme Court will hold that under this clause the General Assembly may provide for the taxation of any property otherwise than in proportion to value. (For a further consideration of this case see discussion article 9, section 3, subheading, "Commutations—Illinois Central Railroad Company" and article 9, section 6, sub-heading "Commutation of state taxes").

In 1915 the General Assembly passed a law providing for the payment of the tuition of high school pupils residing in districts having no high schools. The general school law provides for the distribution of the state school fund to each county on the basis of the number of persons under the age of 21, and for the distribution of the share of each county to the several townships in that county on the same basis. The act of 1915 directed the county superintendent of schools of each county, before distributing that county's share of the state school fund among the townships therein, to deduct from the total amount received from the state school fund, an amount sufficient to pay the cost of the tuition of all pupils of that county residing in school districts having no high school but attending a high school in some other school district. In *Board of Education v Haworth*<sup>25</sup> this act was held void on the ground that its effect was to compel tax payers in school districts maintaining a high school to contribute indirectly to the cost of giving a high school education to pupils residing in districts not maintaining a high school, thus violating the fundamental principle of uniformity of taxation secured by this section of the constitution. The effect of this decision is far reaching. The act of 1915 did not relate in any manner to the levy or collection of taxes. Its only purpose was to make certain provisions concerning the distribution of public moneys. It seems that the *Haworth* case must be accepted as a decision to the effect that the principle of uniformity applies not only to the levy and collection of taxes but as well to the distribution of public moneys raised by taxation.

(For a further consideration of the question of uniformity of taxation see discussion under the four following center subheadings).

#### Assessment of property for the purposes of taxation.

One of the most difficult questions in connection with the whole problem of uniformity of taxation relates to the assessment of property for the purpose of levying taxes. The courts realize, of course, that absolute or perfect uniformity and equality in assessing property for taxation is impossible. All that can be expected is a reasonable effort to carry out the principles enjoined by the constitution. Individuals will necessarily differ in opinion as to the value of property. Accordingly it has been held that the courts will not interfere with the assessment of property for the purposes of taxation unless it appears that in fixing the value of the property the assessing authorities acted fraudulently.<sup>26</sup> If, by fraud, property has been valued excessively the courts will restrain the collection of taxes

<sup>25</sup> 274 Ill. 538 (1916); but see *People v C. & N. W. Ry. Co.*, 286 Ill. 384 (1919). See *Sangamon County v City of Springfield*, 63 Ill. 66 (1872).

<sup>26</sup> *Republic Life Insurance Co. v Pollak*, 75 Ill. 292 (1874); *Ottawa Glass Co. v McCaleb*, 81 Ill. 556 (1876); *Burton Stock Car Co. v Traeger*, 187 Ill. 9 (1900).

on such property to the extent that the assessment is excessive.<sup>27</sup> Courts will, of course, restrain the collection of taxes if the taxes are not authorized by law, or if the property sought to be taxed is not subject to taxation, but in those cases the principles of equality and uniformity are not involved.<sup>28</sup> But, if the tax is authorized and the property is subject to taxation, the courts will interfere only in the event that there has been fraud in valuing the property.

The question then arises as to what is fraud in the assessment of property. Overvaluation, while it may be evidence of fraud, does not necessarily establish fraud.<sup>29</sup> An assessment will not be interfered with by the judiciary merely because the assessing authorities have committed an error of judgment. If the tax payer has received the honest judgment of the assessing officers the courts have no power to intervene.<sup>30</sup> But "where . . . the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part against the taxpayer and the court will interpose."<sup>31</sup> And the objection of fraudulent over-valuation may be raised even though the property of the objector has not been assessed at its full value; if it is fraudulently assessed at a higher rate than other property of the same class the courts will restrain the collection of taxes on that part of the assessment which is excessive as compared with the assessment of other property in the same class.

The necessity for the assessment of all property in the same class on a similar basis was first pointed out by the Supreme Court of the United States. In *Raymond v Chicago Union Traction Company*<sup>32</sup> that court held that, unless all property in the same class was so assessed, the fourteenth amendment to the constitution of the United States would be violated. The courts of this state have since established the same rule. Thus, the State Board of Equalization cannot arbitrarily assess the capital stock of one corporation at a higher rate, and on a different basis of estimating its value, than the capital stock of other corporations.<sup>33</sup> But it seems that an arbitrary distinction between different classes of property does not warrant the interposition of the courts. Thus, in a case where the assessor valued personal property at seventy-five per cent of its true value and real estate at forty-three per cent of its true value the court held that an owner of a particular class of personal property was not entitled to a reduction in his taxes.<sup>34</sup>

Generally, the objection that the assessing authorities have acted in a fraudulent manner arises in connection with an alleged over-valuation. But the courts have power to interfere in the case of fraudulent undervaluation by compelling the assessing authorities to assess in the manner prescribed by law all property so undervalued, or not valued at all.<sup>35</sup>

With respect to the whole problem of judicial revision of assessments it may be stated that the courts will not interfere with the action of the assessing authorities unless the proof of fraud on the part of those authorities is clear and convincing,<sup>36</sup> and the burden of showing fraud is upon the tax payer.<sup>37</sup> As has been suggested this rule is based largely on the ground that perfect uniformity in taxation, because of the difference of opinion as to

<sup>27</sup> *People's Gas Light Co. v Stuckhart*, 286 Ill. 164 (1919).

<sup>28</sup> *Lowenthal v People*, 192 Ill. 222 (1901).

<sup>29</sup> *People v Bourne*, 242 Ill. 61 (1907).

<sup>30</sup> *First National Bank of Urbana v Holmes*, 246 Ill. 362 (1910).

<sup>31</sup> *Pacific Hotel Co. v Lieb*, 83 Ill. 602 (1876); see, also, *People's Gas Light Co. v Stuckhart*, 286 Ill. 164 (1919); *People v K. and H. Bridge Co.*, 287 Ill. 246 (1919).

<sup>32</sup> 207 U. S. 20 (1907).

<sup>33</sup> *People's Gas Light Co. v Stuckhart*, 286 Ill. 164 (1919); see, also, *Bureau County v C. B. & Q. R. R. Co.*, 44 Ill. 229 (1867).

<sup>34</sup> *First National Bank of Urbana v Holmes*, 246 Ill. 362 (1910).

<sup>35</sup> *People v State Board of Equalization*, 191 Ill. 528 (1901).

<sup>36</sup> *Sanitary District of Chicago v Gifford*, 257 Ill. 424 (1913).

<sup>37</sup> *Consolidated Coal Co. v Baker*, 135 Ill. 545 (1891).

the value of property, is impossible. But it has also been based on the ground that the judiciary has no power to assess property for the purposes of taxation. This section of the constitution provides that the value of property for the purposes of taxation shall "be ascertained by some person or persons to be appointed in such manner as the General Assembly shall direct and not otherwise," and this provision denies the courts the power to assess property. (See discussion subsequent center subheading, "Assessment officers.").

#### Exemptions.

The rule of uniformity with respect to taxation prescribed by the constitution requires that all property shall pay taxes in proportion to value. Except as permitted by the constitution itself the General Assembly has no power to exempt any property from taxation. (See discussion article 9, section 3).

#### Commutations.

Under the earlier constitutions it was held that the rule of uniformity did not prevent the commutation of taxes—that is, that rule did not operate to deny the General Assembly the power to authorize the acceptance of a specific sum of money or something else of value in lieu of taxes in proportion to the value of the property owned by the person or corporation whose taxes were commuted. And there is perhaps a possibility that, even under the present constitution, commutation of state taxes as to certain persons or corporations is not forbidden. (See discussion article 9, section 3, subheading, "Commutations—Illinois Central Railroad Company," and article 9, section 6, sub-heading "Commutation of state taxes.")

#### Special assessments and special taxation.

The application of the rule of uniformity with reference to special assessments and special taxation is considered elsewhere in this volume. It will not be necessary, therefore, to consider the subject at this time. (See discussion article 9, section 9, sub-heading "Special assessments and special taxation for local improvements," center subheading, "In general.")

#### Assessment officers.

This section of the constitution expressly requires that the value of property for the purposes of taxation shall "be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct and not otherwise." No person can act as an assessor unless he is appointed or elected to that office in the manner prescribed by the General Assembly. And the General Assembly cannot confer on the courts the power to assess property for the purposes of taxation. "In the creation of the three departments of government the authority to tax has necessarily been given to the legislative branch. 'The power to tax is not judicial' . . . It is incompetent for the legislature to confer the power to tax upon the judiciary or the executive branch of government. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character."<sup>33</sup>

The courts, therefore, have no power to fix the value of property for the purposes of taxation. And it is largely for this reason that the courts will not interfere with an assessment of property unless there is a clear

<sup>33</sup> *School Directors v School Directors*, 232 Ill. 322 (1908).

showing of fraudulent conduct on the part of the assessor with respect to the objecting tax payer. If the courts should raise or lower assessments of property according to their views as to the value of the property in controversy they would be substituting their judgment for that of the assessor and the effect of such action would be to make the courts the assessing officers contrary to that provision of the constitution which requires the assessing officers to be elected or appointed in such manner as the General Assembly shall prescribe.<sup>39</sup> But the courts will interfere if an assessment has been made with the intention of committing a fraud against a tax payer<sup>40</sup> and will also issue writs of *mandamus* to compel the assessing authorities to observe the requirements of law with reference to property assessments.<sup>41</sup> (See preceding center subheading, "Assessment of property for the purposes of taxation.")

However, the General Assembly may provide that different officers shall assess different classes of property. This provision of the constitution does not mean that the same officer or same class of officers shall assess all property for the purposes of taxation. Thus, the General Assembly may provide that the State Board of Equalization shall assess railroad property and the capital stock and franchises of certain corporations, and that the local assessors shall assess all other property.<sup>42</sup> And no assessor may assess property required by law to be assessed by some other officer. If a statute requires the assessment of railroad property by the State Board of Equalization, an assessment of such property by local assessors is void.<sup>43</sup>

#### Necessity for assessment of property.

Under this section of the constitution there can be no lawful levy of a tax on property without an assessment or valuation.<sup>44</sup> And it has been intimated in some of the judicial decisions that there must be an assessment for each tax—that is, if taxes are levied yearly, there must be yearly assessments.<sup>45</sup> In *Crozer v People*,<sup>46</sup> however, it was held that the provisions of the present revenue law which provide for the annual levy of taxes but require only quadrennial assessments of real estate are valid. But it must be admitted that the revenue law provides for the yearly revision of the assessment of real estate. The assessment officers are authorized to add to or lower the assessment on any particular parcel of real estate in any year between the years of the quadrennial assessments. Under these circumstances it might well be said that the revenue law provides for yearly assessments of real estate as well as yearly tax levies.

**Taxation of occupations, franchises and privileges.** The last clause of this section of the constitution authorizes the levy of taxes in certain cases otherwise than in proportion to the value of property.

<sup>39</sup> *Spencer and Gardner v People*, 68 Ill. 510 (1873); *Republic Life Insurance Co. v Pollak*, 75 Ill. 292 (1874); *Hulbert v People*, 189 Ill. 114 (1901); *People's Gas Light Co. v Stuckhart*, 286 Ill. 164 (1919).

<sup>40</sup> *Pacific Hotel Co. v Lieb*, 83 Ill. 602 (1876); *People v K. & H. Bridge Co.*, 287 Ill. 246 (1919).

<sup>41</sup> *State Board of Equalization v People*, 191 Ill. 528 (1901); see, also, *First National Bank of Urbana v Holmes*, 246 Ill. 362 (1910).

<sup>42</sup> *Sterling Gas Co. v Higby*, 134 Ill. 557 (1890); *Hub v Hanberg*, 211 Ill. 42 (1904).

<sup>43</sup> *C. & A. R. R. Co. v People*, 98 Ill. 350 (1881); *People v Wiggins Ferry Co.*, 257 Ill. 452 (1913); see, also, *DuPage County v Jenks*, 65 Ill. 275 (1872).

<sup>44</sup> *Hodges v Crowley*, 186 Ill. 305 (1900); *Howe v People*, 86 Ill. 288 (1877); but see *Raymond v Hartford Fire Insurance Co.*, 196 Ill. 329 (1902).

<sup>45</sup> *Hodges v Crowley*, 186 Ill. 305 (1900); *Pettibone v W. Chicago Park Commissioners*, 215 Ill. 304 (1905); *Town of Lebanon v O. & M. Ry. Co.*, 77 Ill. 539 (1875).

<sup>46</sup> 206 Ill. 464 (1904).



## In general.

The first clause of this section, as has already been pointed out, relates to taxes upon property. The general rule with respect to property taxes is that such taxes must be uniform and equal. And for the purpose of maintaining uniformity and equality the constitution requires that all property taxes shall be levied in proportion to the value of the property taxed and that all property, except as exempted by the constitution, shall be taxed in proportion to value. It is true that the opinion of the court in the case of *Raymond v Hartford Fire Insurance Company*<sup>47</sup> intimates that under certain circumstances property taxes for state purposes may be imposed otherwise than in proportion to value. (See discussion of that case preceding center subheading "Uniformity"). But the general rule is that property taxes are not uniform unless levied on *all* property in proportion to value. Under the last clause of this section, however, the General Assembly may tax occupations, franchises and privileges otherwise than in proportion to value, and such taxes are generally imposed in addition to taxes on property. Occupation and franchise taxes are not void for want of uniformity merely because they may be imposed on some other basis than value.<sup>48</sup> The only rule of uniformity required with respect to such taxes is that they shall be uniform upon the class upon which they operate.<sup>49</sup>

The power of the General Assembly to levy occupation and franchise taxes is not limited to the objects and subjects mentioned in the last clause of this section. Under the provisions of section 2 of article 9 the General Assembly may impose such taxes on any and all occupations and franchises.<sup>50</sup> And this power may be delegated to cities and villages by the General Assembly.<sup>51</sup> But, while the General Assembly may tax all occupations and franchises, subject only to the rule of uniformity as to class, cities and villages, although they may be given the same general power as the General Assembly, can tax only such occupations and franchises as are expressly included in the statute delegating the power to impose such taxes.<sup>52</sup> (See discussion article 9, section 2)

## License fees.

The power of the General Assembly, and of municipalities, under a proper delegation of power, to impose license fees as a condition precedent to the right to engage in certain callings or occupations, or to exercise franchises and privileges, has generally been sustained. Sometimes the license fee has been sustained, not as a tax, but as a regulation of an occupation or franchise under the police power of the state. In other cases such license fees have been upheld as taxes imposed in accordance with this provision of the constitution. There is, of course, a definite distinction between a license fee imposed as a means of regulation and a fee imposed for the purpose of revenue. If the fee is exacted as a means of regulation there is no need for compliance with the constitutional requirements concerning uniformity of taxation. But, if the fee is exacted for revenue pur-

<sup>47</sup> 196 Ill. 329 (1902); see also, *Sterling Gas Co. v Higby*, 134 Ill. 557 (1890).

<sup>48</sup> *Metropolis Theatre Co. v City of Chicago*, 246 Ill. 20 (1910).

<sup>49</sup> *Harder's Storage Co v City of Chicago*, 235 Ill. 58 (1908).

<sup>50</sup> *Price v People*, 193 Ill. 114 (1901); *Bessette v People*, 193 Ill. 334 (1901).

<sup>51</sup> *City of East St. Louis v Wehrung*, 46 Ill. 392 (1862); *Wiggins v City of Chicago*, 68 Ill. 372 (1873); *Walker v City of Springfield*, 94 Ill. 364 (1880). There has been some confusion as to the source of the power of cities and villages to levy occupation and franchise taxes. In *Braun v City of Chicago*, 110 Ill. 186 (1884) it was held that this section of the constitution had no bearing on the power of cities and villages to impose such taxes, and that the power of such municipalities to impose them was controlled solely by sections 9 and 10 of article 9. In *Banta v City of Chicago*, 172 Ill. 204 (1898) the court held that cities and villages had no power under sections 9 and 10 of article 9 to levy such taxes, and that the power to do so is derived only as a delegation from the General Assembly of its powers under this section of the constitution.

<sup>52</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917).

poses then it appears that the constitutional requirement that occupation and franchise taxes shall be uniform as to the class upon which they operate must be observed. Sometimes it is difficult to ascertain whether a license fee is imposed as a means of regulation or for the purposes of revenue. In such a case it would seem that the right to impose the license fee will be sustained as being for regulation purposes, regardless of other considerations, if the subject of the fee is properly a subject for police regulation.<sup>53</sup> But sometimes the subject is not within the police power and in that event the fee must stand or fall as a tax under the last clause of this section.<sup>54</sup>

In a large number of early cases, both under the constitution of 1848 and the constitution of 1870, the court took the view that license fees, even if exacted for the purposes of revenue, were not taxes in a constitutional sense, and that there was no need to observe the rule of uniformity as to class. Thus, it has been held that license fees imposed upon foreign insurance companies,<sup>55</sup> liquor dealers,<sup>56</sup> auctioneers,<sup>57</sup> real estate brokers,<sup>58</sup> and itinerant merchants<sup>59</sup> are not taxes in a constitutional sense. But it must be admitted that in some of these cases the legislative acts might have been sustained as police measures. In the later cases, however, the court points out that, unless a measure imposing a license fee can be sustained as a police regulation, it must be regarded as a tax and conform to the constitutional requirements with reference to uniformity as to class. "Although it has sometimes been said that a license fee exacted for the purpose of revenue is not a tax, such statement must be understood as meaning that it is not a tax in the sense of the property tax authorized by the constitution, which must be levied according to valuation, since it is a tax and is levied by virtue of paragraph 41. The question here is whether this ordinance is valid either as an exercise of the police power or the power of taxation granted to municipalities by the paragraph in question."<sup>60</sup>

With respect to a statute or ordinance imposing a license fee for revenue purposes the question to be determined is whether or not the measure will operate uniformly upon all in the same class. When is the constitutional provision complied with? "The only limitation found in our constitution upon the power of the legislature to tax occupations is, that the tax shall be 'uniform as to the class upon which it operates.' The power given to cities and villages to tax and regulate theatrical and other exhibitions, shows and amusements, carries with it the power to classify the subjects and to fix a different license fee for each class. The power to classify must be exercised in a reasonable manner, but a very wide range of discretion is allowed legislative bodies in the exercise of this power. Classification of subjects for taxation may not be made arbitrarily, but necessarily there must be great freedom of discretion, even though it results in ill-advised, unequal and oppressive legislation. A classification will be sustained where it is based upon a reasonable difference of situations or conditions."<sup>61</sup> No case has been found in which the courts of this state have held a licensing measure in conflict with the requirement of uniformity as to class. On the other hand it has been held that the imposition of a larger license fee on a foreign insurance company than a

<sup>53</sup> *City of Paxton v Fitzsimmons*, 253 Ill. 355 (1912); see, also, *C. W. & V. Coal Co. v People*, 181 Ill. 270 (1899).

<sup>54</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917).

<sup>55</sup> *People v Thurber*, 13 Ill. 554 (1852); *Walker v City of Springfield*, 94 Ill. 364 (1880).

<sup>56</sup> *City of East St. Louis v Wehrung*, 46 Ill. 392 (1868); *Timm v Harrison*, 109 Ill. 593 (1884); *U. S. Distilling Co. v City of Chicago*, 112 Ill. 19 (1884).

<sup>57</sup> *Wiggins v City of Chicago*, 68 Ill. 372 (1873).

<sup>58</sup> *Braun v City of Chicago*, 110 Ill. 186 (1884).

<sup>59</sup> *City of Carrollton v Bazzette*, 159 Ill. 284 (1896); see, also, *Bessette v People*, 193 Ill. 334 (1901).

<sup>60</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917); see, also, *Banta v City of Chicago*, 172 Ill. 204 (1898); *Price v People*, 193 Ill. 114 (1901); *Harder's Storage Co. v City of Chicago*, 235 Ill. 58 (1908); *Metropolis Theatre Co. v City of Chicago*, 246 Ill. 20 (1910).

<sup>61</sup> *Metropolis Theatre Co. v City of Chicago*, 246 Ill. 20 (1910).

domestic insurance company is not forbidden;<sup>62</sup> and that dram shops in one part of a city may be required to pay a larger license fee than dram shops in other parts of the same city.<sup>63</sup> (See discussion article 9, section 2).

#### Inheritance taxes.

The inheritance tax act of 1895 which provides for certain exemptions and prescribes different rates of taxation for different classes of heirs was challenged on two grounds: (1) That it imposed a property tax otherwise than in proportion to value; and (2) that if it did not impose a property tax, it did not operate uniformly upon all persons in the same class. The court held that the inheritance tax act did not impose a property tax, but a tax upon the right to succeed to property. With reference to the second point the court held that the classifications prescribed by the act were reasonable and that therefore the rule of uniformity as to class was not violated.<sup>64</sup>

#### Property taxes otherwise than in proportion to value.

The second clause of this section of the constitution has generally been held not to give authority to levy property taxes. Its main purpose is to authorize with respect to certain subjects, the imposition of taxes otherwise than in proportion to value, and in addition to taxes on property. However, the opinion of the court in the case of *Raymond v Hartford Fire Insurance Company*<sup>65</sup> seems to hold that the General Assembly, with reference to the property of any person or corporation subject to an occupation, franchise or privilege tax, may provide a method of imposing taxes for state purposes otherwise than in proportion to value. (See discussion of that case preceding center subheading, "Uniformity"). And it has also been held in several cases that a tax on the capital stock of corporations is levied under the second clause of this section of the constitution, even though such a tax is regarded as a property tax.<sup>66</sup> However, it would seem that these cases are necessarily overruled by the decision in *Consolidated Coal Company v Miller*.<sup>67</sup> In that case the question involved was whether or not the General Assembly could exempt from taxation the capital stock of certain corporations. It was contended that, if capital stock taxes were imposed under the last clause of this section, the only question for the court to determine was whether or not the law providing for the taxation of capital stock was uniform as to class—that is, whether or not there was a reasonable basis for distinction between the corporations whose capital stock was taxable and those whose capital stock was exempt from taxation. The court held, however, that the question of uniformity as to class, or the reasonableness of the legislative classification of corporations for the purpose of imposing capital stock taxes, had no application; that the only question to determine was whether or not the General Assembly had the power, under section 3 of article 9 of the constitution, to exempt from taxation the capital stock of certain corporations; and that, since section 3 of article 9 did not authorize the exemption, the General Assembly had no such

<sup>62</sup> *Hughes v City of Cairo*, 92 Ill. 339 (1879); *Home Insurance Co. v Swigert*, 104 Ill. 653 (1882).

<sup>63</sup> *City of East St. Louis v Wehrung*, 46 Ill. 392 (1868); see, also *Timm v Harrison*, 109 Ill. 593 (1884); *Wiggins Ferry Co. v City of East St. Louis*, 102 Ill. 560 (1882); *Hewland v City of Chicago*, 108 Ill. 496 (1884).

<sup>64</sup> *Kochersperger v Drake*, 167 Ill. 122 (1897); *Magoun v Illinois Trust and Savings Bank*, 170 U. S. 283 (1897); see, also *In re Estate of Speed*, 216 Ill. 23 (1905); *In re Estate of Benton*, 234 Ill. 366 (1908); *People v Tatge*, 267 Ill. 634 (1915).

<sup>65</sup> 196 Ill. 329 (1902).

<sup>66</sup> *Porter v R. R. I. & St. L. R. R. Co.*, 76 Ill. 561 (1875); *Sterling Gas Co. v Highby*, 134 Ill. 557 (1890); see, also, *Hub v Hanberg*, 211 Ill. 43 (1904).

<sup>67</sup> 236 Ill. 149 (1908); see, also, *People v National Box Co.* 248 Ill. 141 (1911).

power. If the question of uniformity as to class has no application to such a case it seems necessarily to follow that capital stock taxes are imposed under the first clause of section 1 of this article and not the last clause.

**Section 2.** The specification of the objects and subjects of taxation shall not deprive the General Assembly of the power to require other subjects or objects to be taxed, in such manner as may be consistent with the principles of taxation fixed in this Constitution.

In the case of *Banta v City of Chicago*<sup>68</sup> the court said that taxes on occupations, franchises and privileges could be imposed only on those occupations, franchises and privileges that were expressly enumerated in section 1 of this article. But in a later case it was said: "The familiar canon of construction that such enumeration should be held by implication to inhibit the taxation of any occupation not specified in the section, cannot be given application, for the reason such construction is expressly forbidden by section 2 of article 9 of the organic law. Expressions in *Banta v City of Chicago*, *supra*, that such canon of construction is applicable were made inadvertently."<sup>69</sup> In accordance with that rule the right of the state to exact a license fee from persons engaged in operating private employment agencies was sustained, although that occupation or business is not enumerated in section 1 of article 9. And so the General Assembly may authorize cities and villages to levy or impose a license fee on livery stable keepers, or a wheel tax on vehicles using the public streets.<sup>70</sup>

**Section 3.** The property of the State, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.

**Necessity for legislation.** This section of the constitution is not self-executing. No property is entitled to exemption from taxation by virtue of the constitution itself. Exemptions from taxation can be had only under legislative enactments.<sup>71</sup> The constitution authorizes the General Assembly to pass laws exempting certain classes of property from taxation. But the General Assembly need not act, or if it does act, it need not exempt all property authorized by the constitution to be granted exemption. Frequently the courts have denied the right of exemption from taxation to certain property not because there was no constitutional authority for the

<sup>68</sup> 172 Ill. 204 (1898).

<sup>69</sup> *Price v People*, 193 Ill. 114 (1901); see, also, *Bessette v. People*, 193 Ill. 341 (1901); *Report Attorney General 1916*, p. 390.

<sup>70</sup> *Howland v City of Chicago*, 103 Ill. 496 (1884); *Harder's Storage Co. v City of Chicago*, 235 Ill. 58 (1908).

<sup>71</sup> *People v Anderscn*, 117 Ill. 50 (1886); *In re Walker*, 200 Ill. 566 (1903).

exemption thereof, but because the General Assembly, while it might have extended the right of exemption to that property, had not seen fit to do so.<sup>72</sup> And the courts have always taken the position that statutes granting tax exemptions should be construed strictly in favor of the state. Property will not be entitled to exemption from taxation unless it is clearly within, not only the constitutional authorization, but the terms of the statute under which the right to exemption is claimed.<sup>73</sup> And the burden is on the person asserting the claim of exemption from taxation with respect to certain property to prove clearly and conclusively that the property in question is exempt under the provisions of a constitutional statute.<sup>74</sup>

Because of the fact that all exemptions from taxation should be construed strictly, a statute providing for tax exemptions will not be given a retrospective effect unless it is clear that the General Assembly so intended. And so it was held in *People v Deutsche Gemeinde*<sup>75</sup> that property, which became exempt under a statute effective July 1, 1909, was liable for the taxes levied thereon prior to that date.

**Power of the General Assembly.** This section of the constitution is a limitation on the power of the General Assembly. "The enumeration in the constitution of certain specified property which may be exempted is a limitation upon the power of the legislature to exempt any other property, under the well known rule that an enumeration of certain specified things excludes all others not therein mentioned."<sup>76</sup> In accordance with the rule thus announced it has been held that the General Assembly has no power to exempt from taxation promissory notes held by a building and loan association and executed by its members, moneys held by fraternal beneficiary societies, and the capital stock of corporations.<sup>77</sup> And the Attorney General has held that there is no constitutional authority to exempt the property of the state masonic home for aged masons, the Grand Army of the Republic, or war veterans, or to exempt shares of bank stock.<sup>78</sup> In *Easton v Board of Review*<sup>79</sup> it was held that city warrants in the hands of a purchaser were not exempt from taxation. The decision was based on the fact that there was no law authorizing the exemption of such warrants but the court was evidently of the opinion that the General Assembly would have no constitutional power to provide for their exemption.

The constitution provides that "such . . . property as may be used exclusively for . . . school, religious, cemetery and charitable purposes may be exempted from taxation . . . by general law." This is a limitation on the power of the General Assembly. Property used in connection with any one or more of these purposes cannot be granted exemption from taxation unless used *exclusively* for such purpose or purposes.

<sup>72</sup> *Cook County v City of Chicago*, 103 Ill. 646 (1882); In the matter of *Swigert*, 123 Ill. 267 (1887); *People v City of Chicago*, 124 Ill. 636 (1888); *Sanitary District of Chicago v Martin*, 173 Ill. 243 (1898); *People v St. Francis Academy*, 233 Ill. 26 (1908).

<sup>73</sup> *People v Seaman's Friend Society*, 87 Ill. 246 (1877); *Monticello Seminary v People*, 106 Ill. 398 (1883); *People v Anderson*, 117 Ill. 50 (1886); *Montgomery v Wyman*, 130 Ill. 17 (1889); *McCullough v Board of Review*, 186 Ill. 15 (1900); *Sanitary District of Chicago v Hanberg*, 226 Ill. 480 (1907); *Board of Directors v Board of Review*, 248 Ill. 590 (1911).

<sup>74</sup> *People v Deutsche Gemeinde*, 249 Ill. 132 (1911).

<sup>75</sup> 249 Ill. 132 (1911).

<sup>76</sup> *People v Deutsche Gemeinde*, 249 Ill. 132 (1911). The same rule was applied under the constitution of 1848; see *People v Barger*, 62 Ill. 452 (1872). The property of the University of Illinois is State property and may, therefore, be granted exemption from taxation. See *Board of Trustees v Board of Supervisors*, 76 Ill. 184 (1875).

<sup>77</sup> *Loan and Homestead Association v Keith*, 153 Ill. 609 (1894); In re *St. Louis L. & I. Co.*, 194 Ill. 609 (1902); *Supreme Lodge v Board of Review*, 223 Ill. 54 (1906); *Consolidated Coal Co. v Miller*, 236 Ill. 149 (1908); *People v National Box Co.*, 248 Ill. 141 (1911).

<sup>78</sup> Report Attorney General, 1908, p. 436; 1910, pp. 60, 62; 1912, p. 742; see, also, Report Attorney General 1910, pp. 59, 566, 576.

<sup>79</sup> 183 Ill. 255 (1899).

When is property used *exclusively* for any one or more of these purposes? This question has caused considerable difficulty and very few of the decisions of the Supreme Court on this point have been concurred in by all of the judges of that court; in fact most of the decisions have been made by a bare majority of the judges. The effect of the decisions however, is to place a strict construction on the word "exclusively."

With reference to the exemption from taxation of property used exclusively for school purposes it has been held that a school "is a place where systematic instruction in useful branches is given by methods common to schools and institutions of learning, which would make the place a school in the common acceptation of the word", and that the property of dancing, riding and deportment schools can, under no circumstances, be released from its liability to pay taxes.<sup>80</sup> But when is property owned by a school, such as is contemplated by the constitution, used exclusively for school purposes? Land owned by a school but not used for any purpose is not a proper subject for exemption from taxation.<sup>81</sup> "The fact that the rents and revenues of property are devoted to school purposes does not exempt the property from taxation. The property itself must be directly used for school purposes before it is entitled to be exempted."<sup>82</sup> But lands owned by a private educational institution and used for the purpose of growing vegetables and fruits for the use of those attending the institution, and not with a view to profit, are used exclusively for school purposes and, as such, are subject to exemption from taxation.<sup>83</sup>

"As applied to the uses of property, a religious purpose means a use of such property by a religious society or body of persons as a stated place for public worship, Sunday schools and religious instruction."<sup>84</sup> It has been held that there is no constitutional authority for the exemption of "parsonages or residences actually and exclusively used by persons devoting their entire time to church work." In *People v First Congregational Church*<sup>85</sup> it was said: "Where a building is used primarily for religious purposes and secondarily for some secular purpose, as for the business meetings of the church corporation, or if there should be in the church building some room used as a lodging room for the sexton or some other person employed by the organization, the building would not thereby lose its character as one used for religious purposes, but where the property is used primarily for a family residence by the pastor it cannot be held that it is used exclusively for religious purposes. The legislature cannot, by its enactment, make that a religious purpose which in fact is not a religious purpose."

A private hospital which receives free of charge all who apply for admission, but which maintains more desirable rooms for those who are willing to pay for them, is, nevertheless, an institution for charitable purposes, if the money that it receives is used for the enlargement and betterment of the hospital and not with a view to profit.<sup>86</sup>

(As to the power of the General Assembly to exempt property from special assessments and special taxation, see discussion subsequent sub-heading, "Special assessments and special taxation")

**Property donated for school purposes.** Section 2 of article 8 of the constitution provides that "all lands, moneys, or other property, donated granted or received for school, college, seminary or university purposes,

<sup>80</sup> *People v Deutsche Gemeinde*, 249 Ill. 132 (1911).

<sup>81</sup> *People v Deutsche Gemeinde*, 249 Ill. 132 (1911); *Theological Seminary v People*, 101 Ill. 578 (1882); *Monticello Seminary v Board of Review*, 242 Ill. 477 (1909).

<sup>82</sup> *Monticello Seminary v Board of Review*, 249 Ill. 481 (1911).

<sup>83</sup> *Monticello Seminary v People*, 106 Ill. 398 (1883).

<sup>84</sup> *People v Deutsche Gemeinde*, 249 Ill. 132 (1911).

<sup>85</sup> 232 Ill. 158 (1908); see, also, *First Congregational Church v Board of Review*, 254 Ill. 220 (1912); but see *In re Walker*, 200 Ill. 566 (1903).

<sup>86</sup> *Sisters of St. Frances v Board of Review*, 231 Ill. 317 (1907). See *People v Seaman's Friend Society*, 87 Ill. 246 (1877).

and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made." This section of article 8 relates to donations of property for school purposes made prior to the adoption of the present constitution. But the property of schools, which is included within the meaning of section 2, is, by virtue of the section itself, exempt from general taxation and from special assessments and special taxation. (See discussion article 8, section 2.)

**Effect of the exemption provisions in special charters granted prior to 1870.** Section 3 of article 9 of the constitution of 1848 provided that "the property of the state and counties, both real and personal, and such other property as the General Assembly may deem necessary for school, religious and charitable purposes, may be exempted from taxation." Under this provision the General Assembly in granting special charters to school, religious and charitable corporations, frequently inserted provisions therein exempting such corporations from all or a part of their taxes. In the early cases after the adoption of the constitution of 1870 the Supreme Court of Illinois held that the General Assembly under the constitution of 1848 had no power to "exempt from taxation property owned by educational, religious, or charitable corporations which was not itself used directly in aid of the purposes for which such corporations were created, but which was held for profit merely, although the profits were devoted to the proper purposes of such corporations."<sup>87</sup> But this holding was reversed by the United States Supreme Court which held that the General Assembly, under the constitution of 1848, had full power to exempt from taxation any or all property owned by such corporations, and that having done so in their charters a binding contract was created.<sup>88</sup> The Supreme Court of this state then adopted the view of the United States Supreme Court.<sup>89</sup> The provisions of these special charters relating to exemption from taxation are construed strictly, however, and unless it clearly appears that the property claimed to be exempt is included within the exemption provisions of the charters the claim will be denied.<sup>90</sup>

However, there was no authority, under the constitution of 1848, to exempt the property of school, religious and charitable corporations from special assessments. (See discussion subsequent subheading, "Special assessments and special taxation").

**Commutations—Illinois Central Railroad Company.** Commutation of taxes means the right, privilege or duty of paying a specific sum of money or something else of value in lieu of taxes on property in proportion to the value of the property. Since the effect of commutation of taxes is to relieve certain property from the liability to pay taxes in proportion to value, the obvious effect is to exempt that property from taxation in the ordinary and usual sense of that word. Under the constitution of 1848 it was held that there was no prohibition on the power of the General Assembly to provide for the commutation of taxes. (See discussion article 9, section 6, subheading, "Commutation of state taxes"). And, while section 6 of this article apparently forbids the commutation of state taxes, it must be conceded that the opinion of the court, in the case of *Raymond v Hartford Fire Insurance Company*,<sup>91</sup> seems to hold that the General Assem-

<sup>87</sup> *Northwestern University v People*, 86 Ill. 141 (1877).

<sup>88</sup> *Northwestern University v People*, 99 U. S. 309 (1878).

<sup>89</sup> *People v Soldier's Home*, 95 Ill. 561 (1880); *In re Northwestern University*, 206 Ill. 64 (1903); *Northwestern University v Hanberg*, 237 Ill. 185 (1908).

<sup>90</sup> *Bloomington Cemetery Association v People*, 170 Ill. 377 (1897); *People v Theological Union*, 171 Ill. 304 (1898); *People v Bennett Medical College*, 248 Ill. 608 (1911); *Chicago Theological Seminary v Illinois*, 188 U. S. 662 (1903).

<sup>91</sup> 196 Ill. 329 (1902).

bly, under the last clause of section 1 of article 9, may nevertheless provide for the taxation of the property of certain persons and corporations for state purposes by a method otherwise than in proportion to value. (See discussion of that case article 9, section 1, center subheading "Uniformity"; see, also, discussion article 9, section 6, subheading "Commutation of state taxes," and discussion article 9, section 9, subheading, "Commutation of municipal taxes").

The Illinois Central Railroad Company was incorporated under a special act of the General Assembly in 1851. The special charter, while making detailed provision for the taxation of the property of the railroad company, expressly provides that the company shall pay not less than seven per cent of its gross receipts into the state treasury in lieu of all other taxes. (Private Laws 1851, p. 61). The effect of these provisions was to exempt the property of the railroad company from property taxes. The special charter of the railroad was expressly affirmed and recognized by the present constitution. (See separate section relating to the Illinois Central Railroad).

The exemption from ordinary taxes applies, however, only to the charter lines mentioned in the special charter. Other lines of the railroad not mentioned in the charter and not necessarily incidental to the operation of the charter lines are subject to taxation in the same manner as other property.<sup>92</sup> But switch tracks, turn-outs and bridges necessary to the proper operation of the charter lines are property within the exemption provisions of the special charter no matter when constructed, and are not subject to taxation in the usual manner.<sup>93</sup> And it would seem that any other property of the company, even though not used directly in the transportation of persons or freight, is exempt if that property is reasonably necessary for the proper and efficient operation of the charter lines. Thus, a stone quarry belonging to the railroad company, and used for the purpose of acquiring necessary stone in the repair of the roadbed of the charter lines is exempt from ordinary taxation.<sup>94</sup> But a grain elevator of the company leased to private parties, and apparently not necessary for the efficient operation of the charter lines, is subject to taxation in the same manner as other property.<sup>95</sup> Nor is a steamboat of the company used for transporting passengers and freight across the Ohio river exempt from the usual tax on property even though the only purpose of the boat was to facilitate the business of the charter lines south of the Ohio river. The court took the view that the charter of the company did not contemplate transportation by water and that, therefore, the operation of the steamboat was not incidental or indispensable to the efficient conduct of the charter lines.<sup>96</sup> (See discussion article 9, section 6, subheading, "Commutation of state taxes").

The property of the Illinois Central Railroad Company, however, is not exempt from special assessments and special taxation. (See discussion following subheading.)

<sup>92</sup> State of Illinois v I. C. R. R. Co., 246 Ill. 188 (1910). The charter lines and non-charter lines of the railroad company are operated as one system, and it is sometimes very difficult to determine the gross receipts of the charter lines. This case also discusses the methods by which the gross receipts of the charter lines are to be ascertained. See, also, People v I. C. R. R. Co., 273 Ill. 220 (1916).

<sup>93</sup> State Board of Equalization v People, 229 Ill. 430 (1907).

<sup>94</sup> People v I. C. R. R. Co. 231 Ill. 151 (1907).

<sup>95</sup> In re Swigert, 119 Ill. 83 (1836); I. C. R. R. Co. v People, 119 Ill. 137 (1886).

<sup>96</sup> I. C. R. R. Co. v Irvin, 72 Ill. 452 (1874). The special charter also granted large tracts of land to the railroad company and with reference to these lands it was provided that "the lands selected under said act of Congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state until sold and conveyed by said corporation or trustees." For judicial decisions construing this provision, see Gilkerson v Brown, 61 Ill. 486 (1871); I. C. R. R. Co. v Goodwin, 94 Ill. 262 (1880); Champaign County v Reed, 100 Ill. 304 (1881); Champaign County v Reed, 106 Ill. 389 (1883).



**Special assessments and special taxation.** This section of article 9, expressly authorizes the exemption from taxation of the property of the state, counties and other municipal corporations, property used exclusively by agricultural and horticultural societies, and property used exclusively for school, religious, cemetery and charitable purposes. But what is meant by "taxation"? Does that term include special assessments and special taxation? It has been held that there is no constitutional authority for the exemption of such property from special assessments and special taxation.<sup>97</sup> The property of the state, however, is exempt from special assessments and special taxation, because section 26 of article 4 provides that the state "shall never be made defendant in any court of law or equity."<sup>98</sup> (See discussion article 4, section 26, subheading, "Suits against the state in its own name.")

The General Assembly under the constitution of 1848 had no power to exempt property from special assessments.<sup>99</sup> (See discussion preceding subheading "Effect of the exemption provisions in special charters granted prior to 1870.")

The property of the charter lines of the Illinois Central Railroad Company may be granted exemption from general taxation but not from special assessments or special taxation.<sup>1</sup> (See discussion preceding sub-heading.)

Property donated to schools prior to 1870, and included within the meaning of section 2 of article 8, is exempt from general taxation and special assessments or special taxation. (See discussion article 8, section 2.)

**Section 4.** The General Assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments, for State, county, municipal, or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer, of the county, having authority to receive State and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order of judgment of some court of record.

**Effect on existing legislation.** This section of the constitution had the effect of abrogating all existing statutes in conflict with it. Thus, that portion of the special charter of the city of Chicago which authorized the city collector to sell real estate for the non-payment of taxes was held inapplicable with respect to taxes levied after the adoption of the constitution, for the reason that the city collector was not a general county officer.<sup>2</sup>

**Property subject to sale.** While there is no constitutional authority for the exemption of property owned by counties from special assessments (see discussion article 9, section 3, subheading, "Special assessments and special taxation,") such property is not subject to sale for failure to pay delinquent assessments.<sup>3</sup>

<sup>97</sup> *South Park Commissioners v Wood*, 270 Ill. 263 (1915); see, also, *County of McLean v City of Bloomington*, 106 Ill. 209 (1883); *County of Adams v City of Quincy*, 130 Ill. 566 (1889); *City of Chicago v City of Chicago*, 207 Ill. 37 (1904); Report Attorney General 1914, p. 779.

<sup>98</sup> *In re City of Mt. Vernon*, 147 Ill. 359 (1893).

<sup>99</sup> *City of Chicago v Baptist Theological Union*, 115 Ill. 245 (1885).

<sup>1</sup> *Illinois Central Railroad Co. v City of Decatur*, 126 Ill. 92 (1888); *Illinois Central Railroad Co. v City of Decatur*, 147 U. S. 190 (1893).

<sup>2</sup> *Hills v City of Chicago*, 60 Ill. 86 (1871); *Garrick v Chamberlain*, 97 Ill. 620 (1881).

<sup>3</sup> *County McLean v City of Bloomington*, 106 Ill. 209 (1883); Report Attorney General 1910, p. 583.

**Power of the General Assembly.** While this section is a limitation upon the power of the General Assembly, it does not prevent that body from making such regulations as may be deemed necessary regarding the terms of court at which applications for judgments against delinquent real estate shall be made; and the General Assembly may provide that applications for judgments against real estate for the non-payment of special assessments shall be made at a term of court other than that at which applications are made for judgments against real estate for the non-payment of general taxes.<sup>4</sup>

The General Assembly may also provide that when real estate is sold for the failure to pay taxes a penalty prescribed by statute may be added to the amount due for unpaid taxes.<sup>5</sup> And, while no real estate can be sold for the non-payment of taxes except upon the order of a court of record, the General Assembly may provide for the extension of a fixed statutory penalty against delinquent real estate by a ministerial officer.<sup>6</sup>

This section applies only to sales of real estate for the non-payment of taxes. It does not apply to a sale of real estate under an execution even though the execution was issued on a judgment obtained in an action *in personam* for failure to pay taxes on the land sold under the execution. In such a case a sale by the sheriff, although he is not, under the revenue laws, a general county officer "having authority to receive state and county taxes", is valid.<sup>7</sup> An owner of property, however, cannot be made personally liable for special assessments or special taxation for local improvements.<sup>8</sup>

According to an opinion of the Attorney General rendered in 1917 it would seem that this section of the constitution prevents the elimination of the so-called "tax buyer". In the view of that officer there can be no valid tax sale unless an opportunity for competitive bidding is afforded.<sup>9</sup>

**Section 5.** The right of redemption from all sales of real estate, for the non-payment of taxes or special assessments of any character, whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the General Assembly shall provide, by law, for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

**Period of redemption.** In all cases of the sale of real estate for the non-payment of taxes or special assessments the owners or persons interested must be allowed two years from the date of the sale in which to redeem the property.<sup>10</sup> But this is true only in case the proceeding against the real estate is a proceeding *in rem*—that is, an application for judgment against the real estate itself for the unpaid taxes levied against it, and not a proceeding against the owner of the real estate personally to enforce the payment of the unpaid taxes levied against his land. And so, if the General Assembly provides for an action *in personam* against an owner of real estate for fail-

<sup>4</sup> Leindecker v People, 98 Ill. 21 (1881).

<sup>5</sup> Chambers v People, 113 Ill. 509 (1885). This was not the rule under the constitution of 1848. See Scammon v City of Chicago, 44 Ill. 269 (1867).

<sup>6</sup> Chambers v People, 113 Ill. 509 (1885).

<sup>7</sup> Douthett v Kettle, 104 Ill. 356 (1882); Langlois v People, 212 Ill. 75 (1904); see, also, Clark v Zaleski, 253 Ill. 63 (1912); Ziccarelli v Stuckhart, 277 Ill. 26 (1917).

<sup>8</sup> Crow v Village of Tolono, 96 Ill. 255 (1880).

<sup>9</sup> Veto Messages 1917, p. 34.

<sup>10</sup> Gage v Bailey, 100 Ill. 530 (1881); Gage v Davis, 129 Ill. 236 (1889).

ure to pay the taxes on his real estate, that same real estate may be sold by the sheriff under an execution issued on the judgment *in personam* against the owner, and the owner has no constitutional right to a two year period of redemption from the sale on execution.<sup>11</sup>

There is, however, no personal liability against an owner of property for special assessments or special taxes for local improvements levied against his property.<sup>12</sup>

**Persons entitled to redeem.** Obviously the owner of real estate sold for the non-payment of taxes is entitled to redeem from the tax sale. But who are "parties interested in such real estate" that may redeem? A mere stranger to the property cannot redeem.<sup>13</sup> But a mortgagee of land sold for unpaid taxes may redeem, and may even file a bill in equity to set aside a defective tax deed.<sup>14</sup> And this is true even though there is apparently no constitutional requirement that mortgagees of real estate sold for non-payment of taxes shall be notified of the date when the period of redemption expires. (See discussion following sub-heading.)

**Notice of expiration of period of redemption.** There can be no valid tax deed unless, before the expiration of the period of redemption, personal notice has been served on the occupant or occupants of the real estate sought to be conveyed by the deed.<sup>15</sup> And a tax deed based on a notice which incorrectly states the date on which the period of redemption expires cannot be sustained, although it must be admitted that the decisions turn on the point that the statute regulating the giving of such notices requires that the date of expiration of the redemption period be correctly set forth.<sup>16</sup>

The constitution contemplates that the notice shall be served on the owners, occupants or parties interested at the time of the service of the notice and not on those who were owners, occupants or parties interested at the time of the sale for unpaid taxes.<sup>17</sup> But, while the court has not expressly passed on the point, it seems that the General Assembly has full discretion to determine who shall be regarded as "parties interested" requiring notice, and that the General Assembly may provide that only owners and occupants shall be notified. Thus, it has been held that a mortgagee of land sold for unpaid taxes is not, under present statutes, entitled to notice of the date of the expiration of the redemption period.<sup>18</sup>

The service on owners and occupants of reasonable notice as to when the time for redemption expires is indispensable under the constitution. But, except as to occupants, who must be served with personal notice, the General Assembly is unrestricted as to the form of notice or the manner of the service thereof. As to those who are not occupants the General Assembly may provide for personal notice, or notice by publication, or any other form of reasonable notice.<sup>19</sup>

The question as to the sufficiency of the notice required by the constitution usually arises in connection with suits to set aside tax deeds. And, since the statutes with reference to notice generally contain conditions in addition to those required by the constitution, the validity of a tax deed

<sup>11</sup> Douthett v Kettle, 104 Ill. 356 (1882); Langlois v People 212 Ill. 75 (1904); see, also, Clark v Zaleski, 253 Ill. 63 (1912); Zicarelli v Stuckhart, 277 Ill. 26 (1917).

<sup>12</sup> Crow v Village of Tolono, 96 Ill. 255 (1880).

<sup>13</sup> Houston v Buer, 117 Ill. 324 (1886).

<sup>14</sup> Miller v Cook, 135 Ill. 190 (1890); Burton v Perry, 146 Ill. 71 (1893); Glos v Evanston Building and Loan Ass'n., 186 Ill. 586 (1900).

<sup>15</sup> Palmer v Riddle, 180 Ill. 461 (1899); Frew v Taylor, 106 Ill. 159 (1883).

<sup>16</sup> Wilson v McKenna, 52 Ill. 43 (1869); Wisner v Chamberlain, 117 Ill. 568 (1886). In Gage v Davis, 129 Ill. 236 (1889) it was held, under a certain statute, that, if the last day of the period of redemption falls on Sunday, that day must be excluded in computing the two years.

<sup>17</sup> Gonzalia v Bartelsman, 143 Ill. 634 (1892).

<sup>18</sup> Smyth v Neff, 123 Ill. 310 (1888); Glos v Evanston Building and Loan Ass'n., 186 Ill. 586 (1900).

<sup>19</sup> Garrick v Chamberlin, 97 Ill. 620 (1881); Frew v Taylor, 106 Ill. 159 (1883).

most frequently turns upon the construction of the statutes. The rule is well settled that a tax deed will be set aside unless the statute under which it was obtained has been complied with strictly. "A tax title is *stricti juris*. It is a purely technical, as contradistinguished from a meritorious title, and depends for its validity upon a strict compliance with the statute, and . . . a court of chancery will not aid a purchaser at a tax sale."<sup>20</sup>

However, the person seeking to set aside a tax deed may be required to reimburse the holder thereof for all legal taxes paid by the latter.<sup>21</sup>

Section 6. The General Assembly shall have no power to release or discharge any county, city, township, town or district, whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

Release and discharge from state taxes. Prior to the adoption of the constitution of 1870 the General Assembly had, in some instances, passed acts releasing and discharging the persons and property in certain counties or municipalities from state taxes. For example, in 1861 the General Assembly passed an act providing that all property in the city of Shawneetown should be exempt from state taxes for a period of twenty years, and authorized the city council of that city to levy, during that period, taxes equal to the amount of the state taxes, the proceeds to be used in constructing embankments to protect the city against overflow. When the convention of 1869-70 assembled, the Supreme Court had not yet expressly passed on the question of the validity of such legislation. It is true that in 1868 the court had sustained an act which directed that, for a period of five years, all state taxes in a certain part of St. Clair county should, after the collection thereof as state taxes but before the same were paid into the state treasury, be turned over to the treasurer of a certain corporation, and used to defray the cost of constructing levees and embankments for the protection of the lands in that part of St. Clair county so released from state taxes, in the event of the overflow of the Mississippi river.<sup>22</sup> But the decision was based on the express ground that there was no release from state taxes. The court took the view that the effect of the act was merely to divert state taxes after the collection thereof, and before the same were paid into the state treasury, and not to release any persons or property from the payment of state taxes. (See discussion article 9, section 7). And in 1872, shortly after the adoption of the present constitution, the act of 1861 in aid of the city of Shawneetown, was held void, as being in conflict with the constitution of 1848.<sup>23</sup> But the provision of the present constitution forbidding the release and discharge from state taxes was adopted for the express purpose of forbidding such legislation. (Debates, p. 1196-8).

Irrespective, however, of the validity, under the constitution of 1848, of legislation which sought to release state taxes, the effect of this provision of the present constitution was to nullify all legislation of that character.<sup>24</sup>

<sup>20</sup> Miller v Cook, 135 Ill. 190 (1890); see, also, People v Banks, 272 Ill. 502 (1916); Gage v Reid, 118 Ill. 35 (1886).

<sup>21</sup> Miller v Cook, 135 Ill. 190 (1890); Kuhn v Glos, 257 Ill. 289 (1913). See Reed v Tyler, 56 Ill. 288 (1870).

<sup>22</sup> People v Miner, 46 Ill. 384 (1868).

<sup>23</sup> People v Barger, 62 Ill. 452 (1872).

<sup>24</sup> People v Lippincott, 65 Ill. 548 (1872); Ramsey v Hoeger, 76 Ill. 432 (1875).

In *Board of Education v Haworth*,<sup>25</sup> the facts were as follows: The general school law provided for the levy of a state tax for school purposes, to be known as the state school fund. After making certain deductions, the law provided for the distribution of the state taxes so collected, to the several counties of the state, on the basis of the number of persons under the age of twenty-one years in each county, and for the distribution of the share of each county to the several townships in that county on the same basis. In 1915 the General Assembly passed a law providing for the payment of the tuition of high school pupils residing in districts having no high schools. The act of 1915 directed the county superintendent of schools of each county, before distributing that county's share of the state school fund among the townships therein, to deduct from the total amount received from the state school fund, an amount sufficient to pay the cost of the tuition of all pupils of that county residing in school districts having no high school, but attending a high school in some other school district. In holding void the act of 1915, the court said: "The effect of the act is to exempt owners of property in districts not providing four years of recognized high school work from paying taxes proportionate to the value of their taxable property as compared with the taxable property of other districts, to the extent that the state tax is appropriated to a local and corporate purpose. The result is to release the districts from the payment of taxes for such purpose, and that is a violation of section 6 of article 9 of the constitution, which provides that the General Assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof or the property therein, of their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever. The state-wide school tax is a tax for a state purpose, to be apportioned to and distributed by the Auditor among the counties and by the county superintendent of schools among the districts in the county, and by the act in question the school district maintaining no high school is released from taxation for the local and corporate purpose of paying tuition of its pupils residing in the district and attending schools outside of the district."

**Commutation of state taxes.** By commutation of state taxes is meant the duty, right or privilege of paying a specific sum of money or something else of value in lieu of state taxes levied and collected in the usual mode. It is not an exemption from all taxes but is an exemption from paying taxes in accordance with the rule under which persons and corporations generally pay taxes. And, since the general property tax is established in this state, it is an exemption from the payment of taxes in proportion to the value of property.

Under the constitution of 1818 it was held that the General Assembly had full and complete power to commute state and local taxes, and the act exempting the state bank of Illinois from all taxation, state and local, in consideration of the payment annually into the state treasury of a sum of money equal to one-half of one per cent of the bank's capital stock was sustained.<sup>26</sup> And the General Assembly had the same power under the constitution of 1848. In *Illinois Central Railroad Company v McLean County*,<sup>27</sup> the provision of the special charter of the Illinois Central Railroad Company exempting the corporation from the payment of all taxes, state and local, in consideration of the payment by it into the state treasury of a certain percentage of its gross receipts, was held valid. The effect of these decisions was to give the General Assembly the power to commute local taxes in consideration of the payment of money into the state treasury,

<sup>25</sup> 274 Ill. 538 (1916). See *People v C. & N. W. Ry. Co.* 236 Ill. 384 (1919); *Veto Messages* 1919, p. 39.

<sup>26</sup> *State Bank of Illinois v People*, 5 Ill. 303 (1843).

<sup>27</sup> 17 Ill. 291 (1855).

without providing that the municipalities which lost their right to tax the property of these corporations should receive any thing to compensate them for their loss.

It was also held under the constitution of 1848 that the General Assembly could commute local taxes without at the same time commuting the state taxes of the same persons or property. In *Hunsaker v Wright*,<sup>28</sup> an act of the General Assembly was sustained which provided that the inhabitants of the city of Cairo should be exempt from performing labor on the roads beyond the city limits, or taxes to procure labor for that purpose, and that the property in the city should be released from taxes for county purposes, if the city should care for its own paupers and pay the expenses of the circuit court of Alexander county in connection with the trial of criminal cases in which residents or citizens of the city of Cairo were defendants. And the court, in that case, made it clear that, while the General Assembly was the sole judge as to whether or not the value of the burden imposed in lieu of taxes was equivalent to the amount of taxes released, the legislative authority could not exempt persons and property in certain communities from the burden of paying local taxes without exacting something in the nature of an equivalent burden.

The purpose of this section of the constitution was to prohibit the commutation of state taxes. It does not prohibit the commutation of municipal taxes.<sup>29</sup> However, the Supreme Court in a comparatively recent case, intimated that sections 9 and 10 of this article have the effect of denying to the General Assembly the power to commute any municipal taxes, except county taxes; or, at least, of preventing the commutation of municipal taxes without providing that the municipalities thus deprived of their right to tax certain property, shall receive something in return for the loss of property taxes.<sup>30</sup>

And while this section seems to forbid absolutely the commutation of state taxes, the court, in its opinion in *Raymond v Hartford Fire Insurance Company*,<sup>31</sup> said that the property of any person or corporation included within the last clause of section 1 of this article, may be taxed otherwise than in proportion to value, the rule by which other property generally is taxed. In that case it was said that an act of the General Assembly, which provided that foreign fire insurance companies should pay two per cent of their gross premiums received for business done in this state in lieu of all taxes on personal property, both state and local, was not in conflict with this section. However, the statements of the court in this regard were not necessary to the decision in that case for the act of the General Assembly was held to be in violation of sections 9 and 10 of this article. (See discussion article 9, section 9, sub-heading, "Commutation of municipal taxes").

This section does not abrogate the provisions of the special charter of the Illinois Central Railroad Company relating to commutation of taxes with respect to the property used in connection with the charter lines of that company. The separate section of the present constitution relating to the Illinois Central Railroad Company expressly re-affirms those provisions. (See discussion article 9, section 3, subheading "Commutation—Illinois Central Railroad Company").

The Attorney General has held that this section prohibits any state officer in charge of the collection of state taxes from releasing any person or corporation of any portion of the total amount of state taxes due on his or its property.<sup>32</sup>

<sup>28</sup> 30 Ill. 146 (1863); see, also, *Board of Supervisors v Campbell*, 42 Ill. 490 (1867). See *O'Kane v Treat* 25 Ill. 557 (1861); *Town of Pleasant v Kost*, 29 Ill. 490 (1863); *Cooper v Ash*, 76 Ill. 11 (1875); *Hayward v People*, 145 Ill. 55 (1893).

<sup>29</sup> *Wetherell v Devine*, 116 Ill. 631 (1886); *Raymond v Hartford Fire Insurance Co.* 196 Ill. 329 (1902).

<sup>30</sup> *Raymond v Hartford Fire Insurance Co.* 196 Ill. 329 (1902).

<sup>31</sup> 196 Ill. 329 (1902).

<sup>32</sup> Report Attorney General 1917-18, p. 1081.

**Section 7.** All taxes levied for State purposes shall be paid into the State treasury.

Prior to 1870, the General Assembly had sometimes passed laws releasing and discharging the persons and property in certain counties or municipalities from state taxes. Section 6 of this article was adopted for the purpose of preventing such legislation. However, in 1868 the Supreme Court had held that an act, which provided for the return to a certain community of the state taxes collected in that community, before the same were paid into the state treasury, was not a release from state taxes, but merely a diversion of such taxes before the payment thereof into the state treasury.<sup>33</sup> (See discussion article 9, section 6, sub-heading "Release and discharge from state taxes"). This section of the constitution, no doubt, was adopted for the purpose of nullifying that decision and to prevent the evasion of the provisions of section 6 of this article. (Debates, pp. 1196-8.)

In 1872 the Supreme Court held that an act of the General Assembly, passed in 1869, which directed that the state taxes collected in certain townships in Randolph county should, before the payment thereof into the state treasury, be turned over to a certain navigation company, to be used for the purpose of making improvements on the Mississippi river, was in direct conflict with this section of the constitution and, therefore, void.<sup>34</sup>

**Section 8.** County authorities shall never assess taxes, the aggregate of which shall exceed seventy-five cents per one hundred dollars' valuation, except for the payment of indebtedness existing at the adoption of this Constitution, unless authorized by a vote of the people of the county.

*In general.* This section of the constitution is not a limitation on the power of counties to incur debts. The only constitutional limitation on the power of counties to become indebted is found in section 12 of this article.<sup>35</sup> (See discussion article 9, section 12). Nor does it impose any limitation on the power of the General Assembly to provide for the assessment of property, or to determine the manner of ascertaining the valuation of property against which county taxes may be levied.<sup>36</sup>

And this section does not make it incumbent upon the county board, in levying a tax for county purposes, to specify in the tax levy resolution the purposes for which the proceeds of the tax are to be used.<sup>37</sup>

*Power of counties to levy taxes.* Without a favorable vote of the people, counties cannot levy taxes in excess of seventy-five cents on the one hundred dollars valuation, except for an indebtedness existing at the time of the adoption of the constitution. But this does not mean that counties have unrestricted power to levy taxes equal to seventy-five cents on each one hundred dollars valuation. County taxes can be levied only under legislative authorization. While the General Assembly cannot, except for pre-existing indebtedness, authorize the levy of county taxes in excess of the limitation of seventy-five cents, without a vote of the people, that

<sup>33</sup> *People v Miner*, 46 Ill. 384 (1868).

<sup>34</sup> *People v Lippincott*, 65 Ill. 548 (1872).

<sup>35</sup> *Coles County v Goehring*, 209 Ill. 142 (1904).

<sup>36</sup> *C. B. & Q. R. R. Co. v People*, 213 Ill. 458 (1905)

<sup>37</sup> *People v W. C. R. R. Co.*, 219 Ill. 94 (1905).

body may, if it sees fit, provide that the county boards shall have no power to levy taxes in excess of a certain amount which is less than seventy-five cents on the one hundred dollars valuation.<sup>38</sup> However, a levy of county taxes in excess of the amount permitted by the constitution or statute does not render the whole levy void; only the excess is illegal.<sup>39</sup>

What are county taxes within the meaning of the constitution? The mother's pension fund tax is a county tax and must be included within the limitation of seventy-five cents on the one hundred dollars valuation; county boards cannot impose the mother's pension fund tax in addition to a tax levy of seventy-five cents on the one hundred dollars valuation without a vote of the people.<sup>40</sup> It is a county tax because under the law the mother's pension fund is administered by the county. Town taxes do not become county taxes merely because the amount of town taxes required to be levied is certified by the town authorities to the county board and ordered by that body to be extended by the county clerk on the tax books.<sup>41</sup> But road and bridge taxes in counties not under township organization and not divided into road districts, are county taxes, although in counties under township organization such taxes are town taxes and are not included in the limitation of seventy-five cents on the one hundred dollars valuation;

In ordering the submission to the voters of the question of levying taxes in excess of the limitation of seventy-five cents, the county board should state either the number of years that taxes are proposed to be levied at a certain rate in excess of seventy-five cents on the one hundred dollars valuation, or the amount of money desired to be raised by taxes in excess of the usual rate. "It is indispensable to a good and valid order of the board that it should disclose to the voters either the length of time the levies at the excessive rate shall continue, or the amount which is to be raised by such excess in the rate of taxation."<sup>42</sup>

In 1915 the General Assembly passed an act authorizing county boards to establish county tuberculosis sanitariums in counties where the proposition of establishing such sanitariums was voted on favorably by the people. The act also provided for a tax levy to obtain funds for the operation and maintenance of such sanitariums. In *People v Wabash Railway Company*,<sup>43</sup> the question was presented whether or not a favorable vote on the question of adopting the act of 1915 was equivalent to a favorable vote on the question of levying the taxes authorized by the act of 1915, in addition to seventy-five cents on the one hundred dollars valuation. The court held that the vote on the question of establishing a county tuberculosis sanitarium could not be regarded as a vote on the question of levying taxes in excess of the limitation of seventy-five cents and that, therefore, the tax authorized by the act of 1915 must be included in the limitation of seventy-five cents, unless the people later voted favorably on the question of levying the sanitarium tax in addition to the usual rate.

Women cannot vote on the question of levying county taxes in excess of seventy-five cents on the one hundred dollars valuation.<sup>45</sup> (See discussion article 7, section 1, subheading, "Woman suffrage").

**Indebtedness existing at the time of the adoption of the constitution.** Except for indebtedness existing at the time of the adoption of the present constitution counties cannot levy taxes in excess of the limitation of seventy-five cents, unless authorized by a vote of the people. An obligation which was authorized and created before the adoption of the constitution of 1870 is a pre-existing indebtedness, even though the bonds or

<sup>38</sup> *Booth v Opel*, 244 Ill. 317 (1910).

<sup>39</sup> *Mix v People*, 72 Ill. 241 (1874).

<sup>40</sup> *People v C. V. & C. Ry. Co.*, 266 Ill. 557 (1915).

<sup>41</sup> *W. St. L. & P. Ry. Co. v McCleave*, 108 Ill. 368 (1884).

<sup>42</sup> *Wright v W. St. L. & P. Ry. Co.*, 120 Ill. 541 (1887).

<sup>43</sup> *P. & P. U. Ry. Co. v People*, 198 Ill. 318 (1902).

<sup>44</sup> 286 Ill. 15 (1918).

<sup>45</sup> Report Attorney General 1915, p. 310.



other evidences of the obligation were not issued until after its adoption.<sup>46</sup> With reference to pre-existing indebtedness the power to levy taxes in excess of the limitation of seventy-five cents continues until the indebtedness is extinguished. The mere fact that, in the years immediately after the adoption of the constitution, taxes in excess of the limitation of seventy-five cents were levied in an amount sufficient to satisfy the pre-existing indebtedness of a county but were, after their collection, diverted to other purposes, does not prevent the county board from again levying taxes in excess of seventy-five cents on the one hundred dollars valuation for the purpose of paying such indebtedness.<sup>47</sup>

**Section 9.** The General Assembly may vest the corporate authorities of cities, towns, and villages, with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform, in respect to persons and property, within the jurisdiction of the body imposing the same.

Municipalities that may be authorized to levy taxes. Under the constitution of 1818 the General Assembly had the power arbitrarily to create municipal corporations of any kind or character and to invest such municipal corporations with the power to levy taxes.<sup>48</sup> Section 5 of article 9 of the constitution of 1848 provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same," and it was held that, under that section, the General Assembly could not confer the power to levy municipal taxes on any corporate authorities other than those of counties, townships, school districts, cities, towns and villages. The enumeration of certain municipal corporations was held to be an exclusion of all municipal corporations not mentioned in that section.<sup>49</sup> But this section of the present constitution expressly provides that (except as to local improvements) "all municipal corporations may be vested with authority to assess and collect taxes." There is, in this section, no enumeration of municipal corporations that may be given the power to impose general taxes for corporate purposes. The rule established under the constitution of 1848, therefore, has no application at this time, and the General Assembly, in so far as the creation of different types or classes of municipal corporations with power to levy

<sup>46</sup> *Chiniquy v People*, 78 Ill. 570 (1875).

<sup>47</sup> *County of Pope v Sloan*, 92 Ill. 177 (1879).

<sup>48</sup> *Shaw v Dennis*, 10 Ill. 405 (1849); see discussion of this case in *Wilson v Board of Trustees*, 133 Ill. 443 (1890), pp. 459-65.

<sup>49</sup> *People v Salomon*, 51 Ill. 37 (1869). This case is interesting because, while the court announced the rule that only the corporate authorities of the municipalities enumerated in section 5 of article 9 of the constitution of 1848 could be given the power to levy taxes for corporate purposes, it nevertheless sustained an act establishing three towns as a park district and authorizing a board of park commissioners appointed by the Governor to levy taxes for park purposes on the property in the park district. The court took the view that this was not an attempt to confer a taxing power on a park district, a municipality not mentioned in section 5 of article 9, but that the act merely created the board of park commissioners the corporate authorities for the park purposes of the towns formed into a park district, and that, since towns were enumerated in section 5 of article 9, the constitutional provision was not violated. See discussion of this case in *Wilson v Board of Trustees*, 133 Ill. 443 (1890) pp. 459-65; see, also, *Madison County v People*, 58 Ill. 456 (1871); *People v McAdams*, 82 Ill. 356 (1876).

and collect general taxes for corporate purposes is concerned, is completely unrestricted. Thus, the General Assembly may authorize the establishment of sanitary districts with the power to levy general taxes for corporate purposes.<sup>50</sup>

**Corporate purposes.** This section of the constitution provides that municipal corporations *may* be vested with the power to levy taxes for corporate purposes. The constitutional provision is not self-executing, and the power of municipalities to levy taxes for corporate purposes depends upon legislation. Municipal corporations can not levy taxes unless authorized to do so by an act of the General Assembly.<sup>51</sup> This section of the constitution, however, is a limitation on the power of the General Assembly. The legislative authority cannot authorize the levy of local taxes except for corporate purposes. The question then arises as to what is a corporate purpose. "A tax for a corporate purpose is one to be expended in a manner which will promote the general prosperity and welfare of the municipality which levies it."<sup>52</sup> "Those purposes have been defined to be such purposes as are germane to the objects of the welfare of the municipality, or, at least, have a legitimate connection with those objects and a manifest relation thereto."<sup>53</sup>

Under the constitution of 1848 it was held that taxes levied by counties and townships for the payment of bounties to volunteer soldiers in the Civil War were taxes for corporate purposes.<sup>54</sup> And, under that constitution taxes levied by counties, townships, cities, towns and villages to pay bonds issued by such municipalities in aid of railroads were held to be taxes for corporate purposes,<sup>55</sup> although taxes levied by a school district for a similar purpose were not for corporate purposes.<sup>56</sup> But taxes levied by municipal corporations to obtain money for donations to private manufacturing corporations, or for the purchase of the capital stock of such private corporations, were held to be not for corporate purposes.<sup>57</sup> The separate section of the present constitution relating to municipal subscriptions to railroads or private corporations prohibits donations to or subscriptions to the capital stock of railroad and private corporations by municipal corporations.

In *Livingston County v Weider*<sup>58</sup> it was held that the constitution of 1848 forbade the levy of taxes by a county to obtain funds to aid the construction of the state reform school even though the purpose of the donation of funds was to secure the location of the institution in that county. Two years later, however, the court held that a tax levied by the city of Carbondale to pay bonds issued in aid of the construction of a state normal school to be located in that city was for a corporate purpose and, therefore, not forbidden by the constitution of 1848.<sup>59</sup> The court drew a distinction

<sup>50</sup> *Wilson v Board of Trustees*, 133 Ill. 443 (1890).

<sup>51</sup> *Condon v Village of Forest Park*, 278 Ill. 218 (1917); *Bissell v City of Kankakee*, 64 Ill. 249 (1872).

<sup>52</sup> *Taylor v Thompson*, 42 Ill. 9 (1866).

<sup>53</sup> *Stone v City of Chicago*, 207 Ill. 492 (1904).

<sup>54</sup> *Taylor v Thompson*, 42 Ill. 9 (1866); *State of Illinois v Sullivan*, 43 Ill. 412 (1867).

<sup>55</sup> *Johnson v County of Stark*, 24 Ill. 75 (1860); *C. D. & V. R. Co. v Smith*, 62 Ill. 268 (1871).

<sup>56</sup> *People v Dupuyt*, 71 Ill. 651 (1874); *People v Trustees of Schools*, 78 Ill. 136 (1875).

<sup>57</sup> *Mather v City of Ottawa*, 114 Ill. 659 (1885); see, also, *Bissell v City of Kankakee*, 64 Ill. 249 (1872); *English v People*, 96 Ill. 566 (1880). It is interesting to note that while all of these cases were based on the constitution of 1848, the decisions were rendered after the adoption of the present constitution which forbids municipal aid to private corporations. (See separate section relating to municipal subscriptions to railroads or private corporations).

<sup>58</sup> 64 Ill. 427 (1872).

<sup>59</sup> *Burr v City of Carbondale*, 76 Ill. 455 (1875).

between the state reform school case and the state normal school case on the ground that, in the former, the question of donating funds had not been submitted to the voters, while, in the latter, the people of the city of Carbondale had voted favorably on the question of issuing bonds in aid of the normal schools.

The question whether or not a certain local tax is a tax for a corporate purpose under the constitution of 1870 has not often arisen. It has been held that a tax levied in a school district not maintaining a high school to pay the tuition of pupils residing in that district but attending a high school in another school district, is a tax for a corporate purpose, which may be authorized by the General Assembly.<sup>60</sup> A city may levy a tax to defray the cost of holding elections in the city, or to pay judgments obtained against it in the courts.<sup>61</sup> A statute which authorizes the collection of municipal taxes, previously held invalid, is not void as authorizing a local tax for other than a corporate purpose, although such back taxes, when collected, cannot possibly be used for the purposes for which they were originally intended. "Because the taxes are not now needed for, and will not be applied to, the particular corporate purpose for which they were required at the time they were attempted to be levied and collected . . . it does not follow that when collected they will not be applied to some municipal purpose. They would belong to the corporation, and would, like any other surplus, remain in the treasury subject to future appropriations for municipal purposes, and thereby lighten future taxation and thus operate in the equalization of the burden of taxation."<sup>62</sup> And municipalities may be authorized to include in their tax levies an item to cover the cost of collection and probable losses in collection, for an item of that character constitutes a corporate purpose.<sup>63</sup>

**Corporate authorities.** This section of the constitution expressly provides that the General Assembly may vest the corporate authorities of cities, towns and villages with the power to make local improvements by special assessments or by special taxation of contiguous property. But with respect to general taxes, it provides that "for all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes." In providing for the levy of general taxes by municipal corporations the constitutional provision does not refer to corporate authorities. It is probable, however, that the framers of the constitution did not intend to distinguish between special assessments and special taxation on the one hand, and general taxation on the other, with respect to the persons who could be authorized to impose them. In any event the courts have made no distinction in this regard. The constitution of 1848 (article 9, section 5) provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." Under this provision it was held in many cases that only the corporate authorities of the municipalities therein enumerated could be empowered to levy general taxes for corporate purposes.<sup>64</sup> And the same general rule has been applied in all cases arising under the constitution of 1870. Only the corporate authorities of a municipal corporation may levy taxes for corporate purposes.<sup>65</sup>

<sup>60</sup> *Cook v Board of Directors*, 266 Ill. 164 (1914).

<sup>61</sup> *Wetherell v Devine*, 116 Ill. 631 (1886); *Stone v City of Chicago*, 267 Ill. 492 (1904).

<sup>62</sup> *Fairfield v People*, 94 Ill. 244 (1879).

<sup>63</sup> *Village of Hyde Park v Ingalls*, 87 Ill. 11 (1877); see, also, *Ryan v People*, 117 Ill. 486 (1886).

<sup>64</sup> *People v Mayor of City of Chicago*, 51 Ill. 17 (1869); *Harward v St. Clair Drainage Co.*, 51 Ill. 130 (1869).

<sup>65</sup> *Cornell v People*, 107 Ill. 372 (1883); *People v Block*, 276 Ill. 286 (1916).

Who are corporate authorities? "As the object of this constitutional clause was to prevent the legislature from granting the power of local taxation to persons over whom the population to be taxed could exercise no control, it is evident that, by the phrase 'corporate authorities,' must be understood those municipal officers who are either directly elected by such population, or appointed in some mode to which they have given their assent."<sup>66</sup> Under the constitution of 1848 it was held that the General Assembly could not create a drainage district and vest the power to levy taxes for the corporate purposes of that district in a private corporation designated in the act establishing the district.<sup>67</sup> It was also held that the General Assembly could not create a park district in a town and vest the taxing power in a board of commissioners appointed by the General Assembly.<sup>68</sup> Nor could it arbitrarily provide that five persons should constitute a body corporate to conduct a primary school with power to levy taxes on the property within a certain district.<sup>69</sup> However, it was not necessary, under the constitution of 1848, that the corporate authorities of a municipal corporation should be directly elected by the people of that municipality. The General Assembly could provide for the appointment of the taxing authorities of a municipality and, if the people of the municipality assented to the mode of appointment prescribed, the taxing authorities designated became corporate authorities within the meaning of the constitution. In *People v Salomon*<sup>70</sup> an act of the General Assembly providing that the taxing authorities of a certain park district composed of three towns should be appointed by the Governor was sustained because the people of the park district had voted favorably on the question of adopting the act. In that case the people subject to taxation consented to the appointment by the Governor of the taxing authorities. But once the mode of appointment of corporate authorities was approved by the people to be taxed, it was not within the power of the General Assembly, at a later time, to change the method of appointment without the consent of the people interested.

In *Cornell v People*<sup>71</sup> the facts were as follows: An Act of the General Assembly provided that the taxing authorities of a park district composed of three towns should be appointed by the judges of the circuit court. This act was submitted to the people of the proposed park district and adopted. Later the General Assembly passed an act providing that the taxing authorities of the park district should be appointed by the Governor. The later act was not submitted to the people subject to taxation, and was held void on the ground that it provided for the appointment of taxing authorities in a manner not assented to by the people of the park district. "It may be that the Governor is quite as competent to select honest and capable commissioners as the circuit judge of Cook County; but that does not affect the question. Had the people of the district seen proper to reject the act when it was submitted for their adoption or rejection, the act could not have been imposed upon them. They saw proper to adopt it as it was, with the plain provision that the corporate authorities should be appointed by the circuit judge of Cook County. It cannot be said they would have given their assent to the act if the appointing power had been left in the hands of the Governor. They may have had the most cogent reasons for consenting to an act where the appointing power was left in the hands of a public officer residing in their own county, occupying a position which of itself would place him above any and all political influences which might be brought to bear upon a political officer of the

<sup>66</sup> *Harward v St. Clair Drainage Co.*, 51 Ill. 130 (1869).

<sup>67</sup> *Harward v St. Clair Drainage Co.*, 51 Ill. 130 (1869); *Board of Directors v Houston*, 71 Ill. 318 (1874).

<sup>68</sup> *People v Mayor of City of Chicago*, 51 Ill. 17 (1869).

<sup>69</sup> *People v McAdams*, 82 Ill. 356 (1876). For other similar cases see *Hessler v Drainage Commissioners*, 53 Ill. 105 (1870); *Lovingston v Wider*, 53 Ill. 302 (1870); *Wider v City of East St. Louis*, 55 Ill. 133 (1870); *Gage v Graham*, 57 Ill. 144 (1876); *Snell v City of Chicago*, 133 Ill. 413 (1870).

<sup>70</sup> 51 Ill. 37 (1869).

<sup>71</sup> 107 Ill. 372 (1883).

state entrusted with the appointing power. But however this may be, they never assented to any other or different mode of appointment of the corporate authorities, and until they have done so they can not be bound to accept them."

The rule with reference to corporate authorities is the same under the constitution of 1870 as it was under the constitution of 1848. "The clause in the constitution of 1870, adopted in the light of this construction, must be construed in the same manner as was construed the kindred clause in the constitution of 1848."<sup>72</sup> Corporate authorities must be elected by the people to be taxed or appointed in some mode to which the people subject to taxation have given their assent, and the method of appointment, once approved by the people, cannot be changed without their consent.<sup>73</sup> The board of election commissioners in a city which has, by popular vote, adopted the city election act may incur obligations pursuant to that act and require the city to pay the same, even though the commissioners are appointed by the county judge of the county in which the city is situated.<sup>74</sup> By adopting the act creating the election commissioners, the people of the city consent to the appointment of these officers by the county judge, and they are, therefore, the corporate authorities of that city for the purpose of incurring election expenses to be paid by that municipality. But the General Assembly cannot authorize a drainage district to construct a ditch or channel across a highway and require the highway commissioners of the township or road district in which the highway is located to build a bridge across the channel of the drainage district at the expense of the township or road district.<sup>75</sup> The effect of a law of that character would be to authorize the drainage commissioners, who are not the corporate authorities of the township or road district, to impose taxes for corporate purposes on the people of the township or road district. The mere fact that in this case the drainage commissioners do not levy a tax for road and bridge purposes on the property within the township or road district does not alter the situation. The drainage commissioners are given the power to impose a debt upon the township or road district, and the township or road district could not satisfy that debt without levying a tax for that purpose. The effect is the same as if the drainage commissioners were given the express power to levy a tax on the property in the township or road district for road and bridge purposes. In either event the people in the township or road district would be called upon to pay a tax not levied as an exercise of the judgment and discretion of the duly constituted corporate authorities of the township or road district. Debts for corporate purposes which can be met only by funds raised by taxation cannot be imposed upon any municipal corporation against the will or without the consent of either the people of the municipality or its corporate authorities.<sup>76</sup>

(For a further statement with reference to this subject, see discussion following subheading.)

**Power of General Assembly to impose taxes on municipal corporations for corporate purposes.** Taxes for the corporate purposes of a municipality can be levied only by the corporate authorities of the municipality. (See discussion under preceding subheading). Section 10 of this article provides that "the General Assembly shall not impose taxes upon municipi-

<sup>72</sup> *Cornell v People*, 107 Ill. 372 (1883).

<sup>73</sup> *Cornell v People*, 107 Ill. 372 (1883). See *People v Knopf*, 171 Ill. 191 (1898).

<sup>74</sup> *Wetherell v Devine*, 116 Ill. 631 (1886). See *City of Chicago v Wolf*, 221 Ill. 130 (1906).

<sup>75</sup> *Morgan v Schusselle*, 228 Ill. 106 (1906); *People v Block*, 276 Ill. 286 (1916); but see *Drainage Commissioners v Rector Drainage District*, 266 Ill. 536 (1915).

<sup>76</sup> *People v Block*, 276 Ill. 286 (1916). See *People v County of Williamson*, 286 Ill. 44 (1918).

pal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same." The evident purpose of this provision was to make doubly sure that taxes for corporate purposes should be levied only by the corporate authorities of the municipal corporation imposing them. The constitution of 1848 contained no similar provision, but it was held, nevertheless, that under that instrument the General Assembly could not levy taxes on municipalities for the corporate purposes of those municipalities.<sup>77</sup> In *Marshall v Silliman*<sup>78</sup> the facts were as follows: An election was held in a certain township to determine whether or not the township should issue bonds in aid of a certain railroad, and the result was favorable to the proposed issue of bonds. The election, however, was illegal because there was no statutory authorization for holding it. The General Assembly then passed an act purporting to validate the illegal election and the bonds issued thereunder. But the court held that the validating act, in so far as the bonds were concerned, was unconstitutional because it permitted the General Assembly indirectly to levy taxes on the property of the township for corporate purposes. The court took the view that the bonds, having been issued pursuant to an unauthorized election, were null and void; that the township was not bound to levy taxes to pay the bonds; that to permit the General Assembly to validate the bonds would be to sanction the creation by the General Assembly of a debt against the township which could be met only by money raised by taxation; and that, since the debt could be paid only by taxes levied for that purpose, the validating act in effect authorized the General Assembly to impose taxes upon the township for corporate purposes, contrary to that provision of the constitution of 1848 which required that taxes for corporate purposes should be imposed by the corporate authorities of the taxing district. In 1918, however, it was held by a divided court that an act of the General Assembly purporting to validate the proceedings of high school districts organized under an unconstitutional law, had the effect of validating all tax levies in such districts even though the levies were made prior to the enactment of the validating act.<sup>79</sup>

There is, however, a clear distinction between the imposition on a municipality, without its consent or that of its duly constituted corporate authorities, of an original debt which cannot be discharged except by funds acquired through taxation, and the levy of a tax to pay a debt of a municipality contracted under full authority of law. If a municipality with the consent of its people, or of its corporate authorities, incurs a binding obligation, the General Assembly has full power to levy taxes on the property in that municipality, for the purpose of discharging the debt, and need not provide that the taxes necessary to meet the obligation be imposed by the corporate authorities of the indebted municipal corporation. The reason for this holding is that section 10 of this article expressly provides that the General Assembly "shall require that all taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law." So, in a case where bonds, issued in compliance with the vote of the people of a municipality, are registered with the Auditor of Public Accounts under a certain statute, the General Assembly may require the Auditor of Public Accounts to levy taxes on the property in that municipality in such an amount as will be sufficient to discharge the bonds as they become due, together with the interest thereon.<sup>80</sup>

<sup>77</sup> *Marshall v Silliman*, 61 Ill. 218 (1871); *Gaddis v Richland County*, 92 Ill. 119 (1879).

<sup>78</sup> 61 Ill. 218 (1871); see, also, *C. B. & Q. R. R. Co. v Aurora*, 99 Ill. 205 (1881).

<sup>79</sup> *People v Mathews*, 282 Ill. 85 (1918).

<sup>80</sup> *Dunnovan v Green*, 57 Ill. 63 (1870); *Decker v Hughes*, 68 Ill. 33 (1873).

It must also be remembered that the constitution merely prohibits the General Assembly from imposing taxes on municipal corporations for corporate purposes. It does not deprive the General Assembly of the power to impose taxes on municipal corporations for purposes not merely local in their character. "The General Assembly may compel a municipal corporation to perform any duty which relates to the general welfare and security of the state although the performance of the duty will result in taxation or create a debt to be paid by taxation. It may require a county to build a court house for the administration of justice and provide offices and agencies for the collection of the revenue of the state, to build and maintain a jail for the confinement of offenders against the laws of the state, to support paupers, or to establish such regulations as are necessary for the public health and safety and to provide a force to make the regulations effective, although the requirement in either case would result in the levy of a tax."<sup>81</sup> And so it has been held that "roads and bridges are not merely for local use but are for the use and accommodation of all citizens of the state, and it is within the power of the General Assembly to provide that counties shall build roads and bridges and that a county shall pay its proportionate share of the cost of a bridge across a stream on the boundary line between it and another county."<sup>82</sup> The General Assembly may direct a county to pay one-half the cost of constructing a bridge across a stream in a township in that county.<sup>83</sup> On the same theory counties may be required to pay election expenses,<sup>84</sup> a part of the expenses of city courts,<sup>85</sup> and a part of the cost of changing a railroad grade crossing to an elevated or subway crossing.<sup>86</sup> Counties may also be required to pay for the maintenance and care of dependent children.<sup>87</sup> Townships may be required to support paupers<sup>88</sup> and pay a part of the cost of separating a railroad grade crossing.<sup>89</sup> Park districts may be compelled to levy a tax for a park policemen's pension fund because park policemen are required not only for the local government of the park districts, but for the general welfare of the state as a whole.<sup>90</sup> And a city may be made liable for damages to property occasioned by mob violence because the maintenance of good order is a matter of state concern and, to emphasize the necessity for law enforcement by its local governmental agencies, the state may impose a penalty of this character for failure to suppress mobs and riots. The imposition of such a penalty, while it creates a debt against the city which can be discharged only by taxation, is a debt not for a purely local purpose but is for the general state or public purpose of affording more adequate security to life and property.<sup>91</sup>

It has been said in some of the judicial decisions that sections 9 and 10 of this article do not apply to counties and townships.<sup>92</sup> The implication to be derived from these decisions is that the General Assembly may authorize the imposition of taxes for the corporate purposes of counties and townships by persons other than the corporate authorities of those municipal corporations, and that the General Assembly, itself, is free to impose taxes for corporate purposes on such municipalities. The statements to that effect, however, were not necessary to the decisions in which

<sup>81</sup> *People v County of Williamson*, 286 Ill. 44 (1918).

<sup>82</sup> *People v County of Williamson*, 286 Ill. 44 (1918). See *People v Block*, 276 Ill. 286 (1916).

<sup>83</sup> *Board of Supervisors v People*, 110 Ill. 511 (1884).

<sup>84</sup> *Wetherell v Devine*, 116 Ill. 631 (1886).

<sup>85</sup> *City of Chicago, v Knobel*, 232 Ill. 112 (1908); but see *People v Stookey*, 98 Ill. 537 (1881); *Veto Messages*, 1917, p. 44.

<sup>86</sup> *C. M. & St. P. Ry. Co. v Lake County*, 287 Ill. 337 (1919).

<sup>87</sup> *St. Hedwig's School v Cook County*, 289 Ill. 432 (1919).

<sup>88</sup> *Town of Fox v Kendall*, 97 Ill. 72 (1880).

<sup>89</sup> *C. M. & St. P. Ry. Co. v Lake County*, 287 Ill. 337 (1918).

<sup>90</sup> *Board of Trustees v Commissioners of Lincoln Park*, 282 Ill. 348 (1918); but see *Lovington v Wider*, 53 Ill. 302 (1870).

<sup>91</sup> *City of Chicago v Manhattan Cement Co.*, 178 Ill. 372 (1899); *Sturges v City of Chicago*, 237 Ill. 46 (1908).

<sup>92</sup> *Wetherell v Devine*, 116 Ill. 631 (1886); *Bolles v Prince*, 250 Ill. 36 (1911); *Raymond v Hartford Fire Insurance Co.*, 196 Ill. 329 (1902).

they were made, for the debts sought to be imposed in those cases were clearly sustainable as being for a purpose not distinctly local or corporate in character. It is probable that in those cases the court had in mind the distinction between counties and townships on the one hand and cities, incorporated towns and villages on the other. Counties and townships, of course, are political subdivisions of the state and exist primarily as state governmental agencies. Generally any function to be performed by a county or township is of such a character that it cannot be said to be a purely local corporate purpose. But other municipal corporations, such as cities and villages, while they may be charged with the duty of performing functions as state governmental agencies, are created largely for the purpose of local regulation or government as distinguished from the administration of the state government.

These sections of the constitution forbid the imposition of taxes on municipal corporations for local purposes by any persons except their corporate authorities. These sections, however, do not prevent the imposition of taxes on municipalities for other than purely local purposes by some agency other than the corporate authorities. Since the functions of counties and townships generally relate to the administration of the state government, it is obvious that in most cases the imposition of debts or taxes on such municipal corporations is not restricted by the sections of the constitution under consideration. But that is true because the debt or tax imposed is not for a purely corporate purpose and not because these sections fail to prevent the imposition of taxes for corporate purposes on these municipalities by persons other than their corporate authorities. It is believed that the statements made in the decisions previously referred to are based on the fact that counties and townships, because they are political subdivisions, seldom, if ever, perform functions that are distinctly local in character; and that, if the issue is distinctly presented whether or not a debt or tax for a purely local corporate purpose may be imposed on a county or a township without the consent of its people, or that of its duly constituted corporate authorities, the court would probably hold that the constitution forbids such action.

**Uniformity.** Both sections 9 and 10 of this article require that municipal taxes "shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Section 1 of this article provides that, with reference to state taxes, each person and corporation shall pay a tax in proportion to the value of his, her or its property. The requirement of taxation in proportion to value applies to municipal taxes as well as to state taxes. "The 9th section of article nine of the constitution, in authorizing taxes to be laid and collected by municipal corporations, provides that such taxes shall be uniform in respect to persons and property within the jurisdiction imposing the same. To secure that uniformity, two things are essential: First, the assessments shall be just and equal, in proportion to the value of the property liable to assessment; and secondly, when thus assessed, the rate shall be uniform as to every person, and on every species of property, returned by the assessor for taxation."<sup>93</sup> The purpose of the requirement that the taxation of property shall be by valuation is to obtain uniformity and equality of taxation. In the main, therefore, the problem of uniformity with respect to municipal taxes is the same as that relating to state taxes, and since the question of uniformity with reference to state taxes is discussed elsewhere in this volume, there will be no need at this time to repeat that discussion. (See discussion article 9, section 1, center subheading, "Uniformity").

Municipal corporations, however, embrace but a portion of the territory of the state, and the requirement of sections 9 and 10 with respect to uniformity as to persons and property within the limits of the municipalities

<sup>93</sup> *Sherlock v Village of Winnetka*, 68 Ill. 530 (1873).



imposing taxes, therefore, presents some questions that do not arise in connection with taxes for state purposes which are imposed on all the property in the state. All property in a municipality levying a tax for corporate purposes must be subjected to the tax.<sup>94</sup> A municipal tax for general purposes which is levied against only one species of property in the municipality imposing the tax, or against the property in but one portion of the municipality, is void because it does not operate uniformly with respect to all property in the taxing district.<sup>95</sup> When it becomes necessary under the "Juul Law" to reduce the taxes in a certain part of a taxing district, the reduction must be made in the same manner in all parts of the district.<sup>96</sup> And for the same reason the General Assembly cannot authorize a township to levy a poll tax for road purposes but exempt from the tax all persons residing in a city or village included in whole or in part within the boundaries of the township.<sup>97</sup>

This does not mean, however, that a local tax is void simply because a certain tract of land in the municipality has been omitted from assessment as the result of an error. If the tax levy ordinance contemplated that all property in the municipality should be subject to the tax the inadvertent omission of certain property from assessment will not be a violation of the rule of uniformity.<sup>98</sup> But the failure to assess certain property cannot operate to increase the rate of taxation on the property listed for assessment in the municipality imposing the tax.<sup>99</sup>

**Commutation of municipal taxes.** Section 6 of this article is designed for the purpose of preventing the commutation of state taxes—that is, the duty or privilege of paying state taxes in a manner other than according to the method generally employed for the levy and collection of state taxes. (See discussion article 9, section 6, sub-heading, "Commutation of state taxes.") There is no express provision in the constitution forbidding the commutation of municipal taxes, and it has been expressly held that section 6 of this article does not extend to municipal taxes.<sup>1</sup>

Under the constitutions of 1818 and 1848 it was held that the General Assembly had the power to commute state and local taxes.<sup>2</sup> And while,

<sup>94</sup> *People v C. & W. I. R. R. Co.*, 256 Ill. 388 (1912).

<sup>95</sup> *Primm v City of Belleville*, 59 Ill. 142 (1871); *C. B. & Q. R. R. Co. v Aurora*, 99 Ill. 205 (1881); *Village of Lemont v Jenks*, 197 Ill. 363 (1902); see, also, *St. Louis Bridge Co. v City of East St. Louis*, 121 Ill. 238 (1887); *People v Knopf*, 171 Ill. 191 (1898).

<sup>96</sup> *People v C. & A. R. R. Co.*, 247 Ill. 458 (1910).

<sup>97</sup> *Town of Dixon v Ide*, 267 Ill. 445 (1915). The constitution of 1848 (article 9, section 5) contained a similar provision with respect to the uniformity of municipal taxes. During the time that this constitution was in force the General Assembly granted many special charters to cities and villages, some of which contained provisions exempting the inhabitants thereof from the obligation of laboring a certain number of days each year on the roads outside the limits of such municipalities, or from paying taxes to procure such labor. Frequently the cities or villages thus specially incorporated were located within a road district, and the effect of these provisions of the special charters was to exempt the persons living in those cities and villages from the payment of the road taxes (or the duty to labor on the roads) levied by the road district in which they resided. As to whether or not these provisions of the special charters, under such circumstances, violated the constitutional rule of uniformity, there seems to be some confusion in the decisions of the court. In *O'Kane v Treat*, 25 Ill. 557 (1861) such a provision was held void as being in conflict with the rule of uniformity of taxation prescribed by the constitution of 1848. In *Town of Pleasant v Kost*, 29 Ill. 490 (1863) a similar provision was sustained on the ground that road taxes of that character were not taxes in a constitutional sense. And in *Cooper v Ash*, 76 Ill. 11 (1875) a similar provision was sustained on the ground that such a city or village, by reason of the exemption from such taxes, was created into a separate and distinct road taxing district, responsible only for the roads within its limits. See, also, *Butz v Kerr*, 123 Ill. 659 (1888); *Hunsaker v Wright*, 30 Ill. 146 (1863).

<sup>98</sup> *Merritt v Farris*, 22 Ill. 303 (1859).

<sup>99</sup> *Vittum v People*, 183 Ill. 154 (1899).

<sup>1</sup> *Wetherell v Devine*, 116 Ill. 631 (1886).

<sup>2</sup> *State Bank of Illinois v People*, 5 Ill. 303 (1843); *I. C. R. R. Co. v McLean County*, 17 Ill. 291 (1855).

under those constitutions, taxes could not be commuted without the imposition of something in the nature of an equivalent burden on the person or corporation whose taxes were commuted,<sup>3</sup> there was no necessity, in commuting both state and local taxes, to provide that the municipalities, which were deprived of their power to tax certain property in the ordinary way should receive anything for the loss of revenue thus incurred.<sup>4</sup> A local tax prior to 1870 could be commuted merely by the payment of something in lieu thereof into the state treasury.

In *Raymond v Hartford Fire Insurance Company*<sup>5</sup> the court held that sections 9 and 10 of this article, even if they do not absolutely prevent the commutation of municipal taxes, have the effect of forbidding the commutation of such taxes without the payment of something in the nature of an equivalent to the municipalities that are deprived of the power to tax certain property. The decision was based on the ground that these sections of the constitution require that all property in a municipal corporation shall be taxed for the payment of its debts, and that all municipal taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. In the opinion of the court the release of certain property within a municipal corporation from taxation by that body, without at least requiring the payment to the municipal corporation, of something in the nature of an equivalent in lieu thereof, would be in violation of these provisions of sections 9 and 10.

The court realized no doubt that the constitution of 1848 (article 9, section 5) contained provisions similar to those of sections 9 and 10 of this article, and distinguished the case of *Illinois Central Railroad Company v McLean County*,<sup>6</sup> which was decided in 1855, and which sustained the power of the General Assembly to commute local taxes merely for the payment of money into the state treasury, on the ground that the earlier case involved the commutation of county taxes. The court took the position that sections 9 and 10 of this article applied only to municipal corporations proper—that is, cities, incorporated towns and villages as distinguished from counties and townships.

It is difficult to ascertain just what is the effect of this decision. It holds clearly that there can be no commutation of local taxes with respect to cities, towns, villages and other similar municipal corporations, unless those municipalities receive something else of value for the taxes released. But it intimates that, with respect to cities, towns, villages and other like bodies, there can be no commutation of local taxes under any circumstances, and it also intimates that the local taxes of counties and other similar municipalities, such as townships, perhaps, may be commuted under any conditions that the General Assembly may see fit to impose.

**Power of municipalities to impose occupation and franchise taxes.** Sections 9 and 10 of this article refer only to taxes on property. While cities and other similar municipal corporations may be authorized by statute to impose occupation and franchise taxes such taxes are not governed by these sections. The General Assembly by virtue of the last clause of section 1 of this article, has the power to exact occupation and franchise taxes, and this power may, if the General Assembly sees fit, be delegated to municipalities.<sup>7</sup> (See discussion article 9, section 1, subheading, "Taxation of occupations, franchises and privileges.")

<sup>3</sup> *Hunsaker v Wright*, 30 Ill. 146 (1863). This case also held that in the commutation of taxes the General Assembly was the sole judge as to whether or not the value of the burden imposed in lieu of taxes was equivalent to the amount of taxes released. See, also, *Board of Supervisors v Campbell*, 42 Ill. 490 (1867).

<sup>4</sup> *I. C. R. R. Co. v McLean County*, 17 Ill. 291 (1855).

<sup>5</sup> 196 Ill. 329 (1902).

<sup>6</sup> 17 Ill. 291 (1855).

<sup>7</sup> *Walker v City of Springfield*, 94 Ill. 364 (1880); *Banta v City of Chicago*, 172 Ill. 204 (1898); but see *Braun v City of Chicago*, 110 Ill. 186 (1884).

**Special assessments and special taxation for local improvements.** Section 9 of this article provides that "the General Assembly may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise."

#### In general.

The constitution of 1848 contained no express provision authorizing the construction of local improvements by special assessments or special taxation. The power to make such improvements by special assessments, however, was sustained under the provisions of that instrument (article 9, section 5), which authorized the General Assembly to vest the corporate authorities of certain municipal corporations with power to levy taxes for corporate purposes. But the rule of equality and uniformity of taxation required by the second constitution (article 9, sections 2, 5) was applied to such proceedings.<sup>8</sup> Not only was it necessary that the special assessment against a particular lot or tract of land should not exceed the benefits, but it was imperative that all property in the municipality making the improvement should be assessed equally and in proportion to the benefits conferred.<sup>9</sup> "The assessment must be laid upon all property that is substantially and directly benefited. This necessarily excludes all personal property of a movable nature. Its value cannot be affected by laying this pavement. But every estate in land adjacent to the street, whether in fee, for life or for a term of years, may be increased in value. If adjacent property is held under a lease for fifty or a hundred years, the benefit to the property arising from replacing an old by a new pavement, would probably accrue wholly to the lessee."<sup>10</sup> And the judicial decisions under that constitution seem to hold that in any local improvement proceeding it was necessary to charge at least a part of the cost of the improvement to the general funds of the interested municipality. "We cannot understand how it is, that a law which places the burden upon the property adjacent to the improvement, is a more equitable apportionment than if imposed upon the entire property of the city, ward or district. Nor is it true that the grading, paving, etc., of a street in Chicago, or other large and growing city, is a mere local improvement, the expense of which adjacent proprietors should wholly bear. It is a matter of public benefit, extending throughout the chartered limits of the city. Are not the owners of property on Wabash avenue and Halsted street, or on the most remote street in Chicago, and those residing thereon, benefited by the grading, paving, etc., of Lake, Randolph, or Dearborn, or Clark streets? If so, should they not bear a fair proportion of the expense, to be assessed on the principle of valuation and uniformity, and of benefits? It does not follow . . . that the owner of an adjacent lot is benefited by an improvement, the cost of which amounts to the full value of his lot, and which may require an additional expenditure by him, to make his lot accessible. In these improvements, the whole public are interested, and that public should pay the cost, on the principle we have suggested; that is, assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, the residue of the cost to be paid by equal and uniform taxation. In this way, the demands of the constitution may be fulfilled, and injustice done to no one."<sup>11</sup>

<sup>8</sup> *City of Chicago v Larned*, 34 Ill. 203 (1864). The power to levy special assessments under the constitution of 1848 was sometimes referred to as an exercise of the power of eminent domain—that is, that the money of a person whose property was benefited by an improvement was taken and he was compensated therefor by the benefits. See the discussion of this question in the case cited in this note.

<sup>9</sup> *City of Ottawa v Spencer*, 40 Ill. 211 (1866); *Scammon v. City of Chicago*, 42 Ill. 192 (1866); *Bedard v Hall*, 44 Ill. 91 (1867).

<sup>10</sup> *City of Chicago v Baer*, 41 Ill. 306 (1866).

<sup>11</sup> *City of Chicago v Larned*, 34 Ill. 203 (1864); see, also, *St. John v City of East St. Louis*, 50 Ill. 93 (1869).

The effect of this construction of the constitution of 1848 was to prevent any proceeding to charge the entire cost of a local improvement to the abutting or contiguous property without a proceeding to determine whether or not the assessments exceeded the benefits. And that portion of section 9 of article 9 which authorizes the construction of local improvements by special taxation of contiguous property, was inserted in the present constitution for the express purpose of overcoming this construction. (Debates, p. 1671-6).

There is now constitutional authority for the construction of local improvements by special assessments, or by special taxation of contiguous property, or otherwise. What is meant by the terms "special assessment" and "special taxation" as used in the present constitution? With respect to special assessments, the constitution of 1848 required two elements. (1) The assessment on any property should not exceed the benefits. (2) All property in the municipality imposing the assessment should be assessed equally in proportion to benefits. And that constitution probably required a third element. (3) In the construction of any local improvement at least a part of the cost thereof should be assessed to the interested municipality and met by general taxation. While the Supreme Court has said that special assessments under the present constitution are the same as under the earlier document,<sup>12</sup> it seems that only one of the previous elements is now necessary in so far as the constitution of 1870 is concerned. Special assessments may not exceed the benefits<sup>13</sup> but there is no necessity that, with reference to any local improvement, every parcel of property in the municipality making the improvement shall be assessed equally in proportion to the benefits conferred upon it. As a matter of fact, special assessments may be limited to the property contiguous to the proposed improvement.<sup>14</sup> Nor is there any constitutional requirement that a part of the cost of every local improvement shall be met by general taxation.<sup>15</sup>

But while special assessments must not exceed the benefits, this rule does not apply to special taxation of contiguous property. The constitutional provisions with reference to special taxation were inserted for the express purpose of permitting the cost of a local improvement to be assessed against the contiguous or abutting property without a proceeding to ascertain whether or not the tax exceeds the benefits. "Whether or not the special tax exceeds the actual benefit to the lot is not material. It may be supposed to be based on a presumed equivalent. The city council have determined the frontage to be the proper measure of probable benefits. That is generally considered as a very reasonable measure of benefits in the case of such an improvement, and if it does not in fact, in the present case, represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply."<sup>16</sup> "Special taxation, as spoken of in our constitution, is based upon the supposed benefit to the contiguous property, and differs from special assessments only in the mode of ascertaining the benefits. In the case of special taxation, the imposition of the tax by the corporate authorities is of itself a determination that the benefits to the contiguous property will be as great as the burden of the expense of the improvement, and that such benefits will be so nearly limited, or confined in their effect, to contiguous property, that no serious injustice will be done by imposing the whole expense upon such property. In the case of special assessments, the property to be benefited must be ascertained by careful investigation, and the burden must be distributed according to the carefully ascertained proportion in which each part thereof will be bene-

<sup>12</sup> *Guild v City of Chicago*, 82 Ill. 472 (1876); *White v People*, 94 Ill. 604 (1880).

<sup>13</sup> *City of Chicago v Galt*, 225 Ill. 368 (1907).

<sup>14</sup> *Lake v City of Decatur*, 91 Ill. 596 (1879); *West Chicago Park Commissioners v Farber*, 171 Ill. 146 (1898); see also, *Guild v City of Chicago*, 82 Ill. 472 (1876) where it is held that under the constitution of 1870 special assessments are not limited to contiguous property.

<sup>15</sup> *People v Sherman*, 83 Ill. 165 (1876).

<sup>16</sup> *White v People*, 94 Ill. 604 (1880).

ficially affected."<sup>17</sup> But this does not mean that a municipality may build local improvements and charge the cost thereof to the contiguous property absolutely without regard to benefits. Special taxes for local improvements, after all, are based on the theory that the property specially taxed receives an equivalent benefit. The courts ordinarily will not, in a special tax proceeding, inquire into the question whether or not the tax exceeds the benefits, but if it is clear that a municipality is arbitrarily seeking to impose a burden on property without any regard whatever as to the benefits to the property, the collection of the special tax may be successfully resisted. While a municipality is allowed a large degree of discretion in determining that a special tax is equivalent to the benefits, the tax must be imposed as the result of a reasonable and honest exercise of judgment.<sup>18</sup>

As has already been pointed out, special assessments under the constitution of 1848 were governed completely by the general rules of equality and uniformity of taxation. Since 1870, however, these rules have no application to special assessments and special taxation. It is true that special assessments must not exceed the benefits and special taxes must not be arbitrarily imposed without any regard whatever to the question of benefits. But in the main, the rules of uniformity no longer restrict municipal corporations in providing the means of defraying the cost of local improvements. A city may provide that a local improvement in one part of the city shall be made by general taxation and that a similar improvement in another part of the city shall be made by special assessments.<sup>19</sup> And a city may charge against its general funds a greater proportion of the total cost of one local improvement than another.<sup>20</sup>

It must be remembered, however, that the power of municipalities to levy special assessments or special taxes depends upon legislative authorization. Cities, towns and villages cannot levy special assessments or special taxes unless authorized to do so by the General Assembly. And the General Assembly in conferring the power to make local improvements by special assessments or special taxation may impose conditions not required by the constitution. Thus, the General Assembly, while it need not have done so, has required that special taxes shall not exceed the actual benefits, and that the question whether or not the tax exceeds the benefits shall be reviewable by the courts.<sup>21</sup> (Hurd's Revised Statutes, 1917, chap. 24, sec. 541).

Owners of property subject to special assessments or special taxes cannot be made personally liable for the special assessments or special taxes levied against their property.<sup>22</sup> Owners of property, however, may be made personally responsible for general taxes levied against their property.<sup>23</sup>

#### What is a local improvement.

The Supreme Court has sought to define the term local improvement. In *Loeffler v City of Chicago*,<sup>24</sup> it was said: "That term [local improvement] was first mentioned in the constitution of 1870. The term 'local improvements,' as used in said section 9 of article 9 of the constitution, means

<sup>17</sup> *Craw v Village of Tolono*, 96 Ill. 255 (1880); see, also, *Enos v City of Springfield*, 113 Ill. 65 (1885); *City of Galesburg v Searles*, 114 Ill. 217 (1885); *City of Sterling v Galt*, 117 Ill. 11 (1886); *C. & N. W. Ry. Co. v Village of Elmhurst*, 165 Ill. 148 (1897).

<sup>18</sup> *Craw v Village of Tolono*, 96 Ill. 255 (1880); *City of Bloomington v C. & A. R. R. Co.*, 134 Ill. 451 (1890); *C. & N. W. Ry. Co. v Village of Elmhurst*, 165 Ill. 148 (1897); see, also, *Davis v City of Litchfield*, 145 Ill. 313 (1893).

<sup>19</sup> *Murphy v People*, 120 Ill. 234 (1887).

<sup>20</sup> *City of Ottawa v Colwell*, 260 Ill. 548 (1913); see, also, *County of Adams v City of Quincy*, 130 Ill. 566 (1889); *Davis v City of Litchfield*, 145 Ill. 313 (1893).

<sup>21</sup> *Hull v People*, 170 Ill. 246 (1897).

<sup>22</sup> *Craw v Village of Tolono*, 96 Ill. 255 (1880).

<sup>23</sup> *Douthett v Kettle*, 104 Ill. 356 (1882).

<sup>24</sup> 246 Ill. 43 (1910).

such improvements as are paid for by special assessment or special taxation. In a certain sense all improvements within a municipality are local,—that is, they do not extend to all parts of the state. They have, however, locality,—that is, they are nearer to some persons and property than others. Under the constitution of 1848, as well as under the present constitution, it has been held that a special assessment means ‘an assessment to pay for an improvement for public purposes upon real property which is, by reason of the locality of the improvement, specially benefited, beyond the benefits by the improvement to real property, generally, throughout the municipality, proportioned by such benefits.’ A local improvement is a public improvement ‘which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality.’ The test as to whether such an improvement is local is whether it specially benefits the property assessed. An improvement may be local, though of some general benefit to the public; when the substantial benefits to be derived from it are local in their nature and the portion of the city where the improvement is made will be specially and peculiarly benefited in the enhancement of the value of the property. When it is proposed by a municipal corporation to make an improvement, the question whether it is local in its character, so that it can be made by special assessment, is one of fact and not of law. The corporate authorities, however, cannot arbitrarily determine that the improvement shall be treated as local when it is, in fact, general in its character. Their decision on this question is subject to review by the courts.”

Two municipalities cannot join in a special assessment proceeding for the purpose of defraying the cost of an improvement that will extend from one municipality into the other. Thus, the city of Chicago and the town of Cicero cannot, in a joint special assessment proceeding, provide for the construction of a continuous sewer, designed for use by both municipalities, and extending from one into the other.<sup>25</sup> In the opinion of the court a local improvement must be wholly under the control of one municipality.

An improvement which is designed primarily for the accommodation and convenience of the people in a certain part or locality of a municipality, and which is of such a nature that it confers a special benefit upon the property in that locality, is a local improvement, even though it may incidentally benefit the public at large; but an improvement which is designed primarily for the benefit of the general public is not a local improvement even though the property in its immediate vicinity may receive greater benefits therefrom than property generally in the municipality.<sup>26</sup> An improvement which contemplates the widening of the Chicago river for the purpose of improving navigation on the river, is not a local improvement, and the cost thereof cannot be defrayed by special assessments or special taxation.<sup>27</sup> A city has no power to provide for the construction, by special assessments, of a viaduct or bridge over a deep gulch or ravine, for the purpose of restoring the continuity of one of the main streets in the city.<sup>28</sup> But a city may provide for the construction of a viaduct over a series of railroad tracks which cross one of the city’s principal thoroughfares and direct that the cost thereof shall be paid by special assessments. And, in such a case, it is not material that the viaduct when completed will extend across a creek and serve the purpose of a bridge over the stream, if the evidence shows that the viaduct could not be properly constructed without locating one of the approaches on the other side of the stream.<sup>29</sup>

<sup>25</sup> *Loeffler v City of Chicago*, 246 Ill. 43 (1910); see, also, *Hundley v Lincoln Park Commissioners*, 67 Ill. 559 (1873).

<sup>26</sup> *City of Waukegan v DeWolf*, 258 Ill. 374 (1913).

<sup>27</sup> *City of Chicago v Law*, 144 Ill. 569 (1893).

<sup>28</sup> *City of Waukegan v DeWolf*, 258 Ill. 374 (1913); see, also *City of Bloomington, v C. & A. R. R. Co.*, 134 Ill. 451 (1890).

<sup>29</sup> *L. & N. R. R. Co. v City of East St. Louis*, 134 Ill. 656 (1890).

"The cost of constructing a reservoir, of sinking a well, the erection of a stand pipe and the pumping works and buildings for the same, are not local improvements, but of general utility to the inhabitants, and must be paid for by general taxation. The laying of pipes for the conveyance of water along a particular street or streets is local to the particular street and of special benefit, and is a local improvement, and may be paid for by special assessment or special taxation."<sup>30</sup> And it has been held that the poles, wires and lamps in an electric light system are local improvements, but that the power house and generator engines are not.<sup>31</sup>

An act of the General Assembly which authorizes parks to levy a special tax on contiguous property for the maintenance and repair of boulevards and pleasure driveways is unconstitutional. "Original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, and not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the abutting property. Such a case is clearly within the principle of assessing the lots lying upon it . . . but when the street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the original duty of the municipality—for general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments."<sup>32</sup>

A municipality may not resort to special assessments or special taxation to defray the cost of sprinkling streets. "A local improvement . . . is a public improvement which by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessments or special taxation can be sustained is, that from the proposed local improvement, the property subjected to the tax or assessment will be enhanced in value to the extent of the burthen imposed . . . Used, as it is, in connection with special assessments, which are necessarily based upon the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved,—that is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property."<sup>33</sup> And, on the same theory, it has been held that the General Assembly cannot provide for the payment of the cost of exterminating noxious weeds by special assessments against the lands from which the weeds are removed.<sup>34</sup>

#### Municipalities that may be authorized to make local improvements by special assessments or special taxation.

Section 9 of this article provides that "the General Assembly may vest the corporate authorities of cities, towns and villages, with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise." The enumeration of cities, towns and villages has been held to be an exclusion of all other municipalities. The General Assembly may confer the power to make local improvements by special assessments and special taxation only on the corporate authorities of cities, towns, and villages. In *Updike v Wright* (1876),<sup>35</sup> it was held that drainage districts could not be given the power to levy special assessments. The first amendment to the present constitution (article 4, section 31), was

<sup>30</sup> *Hughes v City of Momence*, 163 Ill. 535 (1896); see, also, *Village of Morgan Park v Wiswall*, 155 Ill. 262 (1895); *O'Neil v People*, 166 Ill. 561 (1897); *Hewes v Glos*, 170 Ill. 436 (1897); *Harts v People*, 171 Ill. 453 (1898).

<sup>31</sup> *Ewart v Village of Western Springs*, 180 Ill. 318 (1899).

<sup>32</sup> *Crane v West Chicago Park Commissioners*, 153 Ill. 348 (1894).

<sup>33</sup> *City of Chicago v Blair*, 149 Ill. 310 (1894).

<sup>34</sup> *People v Board of Commissioners*, 221 Ill. 493 (1906).

<sup>35</sup> 81 Ill. 49 (1876).

adopted (1878) for the express purpose of enabling drainage districts to impose special assessments. (For a statement as to the power of drainage districts to levy special assessments, see discussion article 4, section 31.)

Counties and townships cannot be given the power to levy special assessments or special taxes for local improvements.<sup>36</sup> Park districts, however, on the theory that park commissioners are the corporate authorities of the cities, towns and villages in which the park districts are located, may make local improvements by special assessments or by special taxation.<sup>37</sup> And, while it is difficult to see, how the park commissioners of a park district which embraces a part of a city and part of a township can be considered the corporate authorities of a city, town or village, the power of the General Assembly to authorize such a park district to levy special assessments has, nevertheless, been sustained.<sup>38</sup> Only the corporate authorities of cities, towns and villages may levy special assessments or special taxes for local improvements. A township cannot do so. There may be some justification for holding that the park commissioners of a park district located wholly within one city or town, or located wholly within two or more cities or towns, are the corporate authorities for park purposes of the municipality or municipalities in which the park district is located. But how can it be said that the park commissioners of a park district located partly in a city and partly in a township are such corporate authorities, as under the constitution, may be given the authority to levy special assessments or special taxes for local improvements? If the commissioners are deemed the corporate authorities of the city, they are then permitted to exercise jurisdiction beyond the limits of the city. If they are considered the corporate authorities of the township, then the power to levy special assessments and special taxes is being exercised by the township, a municipality which, under the constitution, has no power to levy such assessments and taxes. (See discussion following subheading.)

#### Corporate authorities.

Only the corporate authorities of cities, towns and villages may levy special assessments and special taxes. Who are corporate authorities? With respect to the power to levy general taxes the corporate authorities of a municipality are persons who are directly elected by the people to be taxed or selected or appointed in some mode to which the people have

<sup>36</sup> *People v Board of Commissioners*, 221 Ill. 493 (1906); Report Attorney General 1917-18, p. 1034.

<sup>37</sup> *Dunham v People*, 96 Ill. 331 (1880); *West Chicago Park Commissioners v W. U. Telegraph Co.*, 103 Ill. 33 (1882); *West Chicago Park Commissioners v Sweet*, 167 Ill. 326 (1897); *West Chicago Park Commissioners v Farber*, 171 Ill. 146 (1898). The basis of these decisions is found in the reasoning of the court in *People v Salomon*, 51 Ill. 37 (1869), which was decided prior to the adoption of the constitution of 1870. The constitution of 1848 (article 9, section 5), provided that the corporate authorities of counties, townships, school districts, cities, towns and villages could be vested with the power to levy taxes for corporate purposes. The court held that the enumeration of certain municipalities prevented the General Assembly from giving the power of levying taxes for corporate purposes to the corporate authorities of any municipality not included in the enumeration. The General Assembly passed an act establishing a park district in three adjoining towns. The park was to be under the control of a board of park commissioners. In the Salomon case the point was raised that these commissioners could not be given the power to levy taxes for park purposes because they were not the corporate authorities of a county, township, school district, city, town or village. The court took the view, however, that, while it was true that only the corporate authorities of counties, townships, school districts, cities, towns and villages could be given the power to levy taxes for corporate purposes the General Assembly, in the act under consideration, was not attempting to confer a taxing power on the park commissioners as the corporate authorities of the park district, but was conferring upon these commissioners as the corporate authorities for park purposes of the towns in which the park district was located, the power to levy taxes for park purposes. And so, under the constitution of 1870, park commissioners may levy special assessments and special taxes for local improvements not as the corporate authorities of a park district but as the corporate authorities for park purposes of the city, town or village in which the park district is located.

<sup>38</sup> *Van Nada v Goedde*, 263 Ill. 105 (1914).



assented. (See discussion preceding subheading "Corporate authorities"). The same rule applies as to the corporate authorities that may be empowered to levy special assessments and special taxes. They must be elected by the people to be assessed or taxed, or selected in a mode which has been assented to by the people.<sup>39</sup>

(For a statement as to the corporate authorities of drainage districts, see discussion article 4, section 31, sub-heading "Corporate authorities").

#### Combination of methods to defray cost of local improvements.

A municipality, under a proper delegation of legislative authority, may provide that the cost of a particular local improvement shall be met in part by general taxation and in part by special assessments or special taxation. But it cannot provide that a part of the cost shall be paid by special assessments and the remainder by special taxation. Either special assessments or special taxation may be combined with general taxation in one local improvement, but special assessments and special taxation cannot be so combined.<sup>40</sup>

#### Exemptions from special assessments and special taxation.

(See discussion article 9, section 3, sub-heading "Special assessments and special taxation").

**Section 10.** The General Assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation.

(See discussion article 9, section 9, subheadings "Corporate authorities" and "Power of General Assembly to impose taxes on municipal corporations for corporate purposes.")

**Section 11.** No person who is in default, as collector or custodian of money or property belonging to a municipal corporation shall be eligible to any office in or under such corporation. The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term.

(See discussion article 4, section 4; see, also, discussion article 4, section 21, subheading, "Municipal officers").

<sup>39</sup> *Givins v City of Chicago*, 188 Ill. 348 (1900).

<sup>40</sup> *Kuehner v City of Freeport*, 143 Ill. 92 (1892); see also, *Falch v People*, 99 Ill. 137 (1881); *City of Chicago v Brede*, 218 Ill. 528 (1905).

Section 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for State and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt, as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.

This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor.

In general. The words "or other municipal corporation", as used in this section, have been held to include a village and a sanitary district.<sup>41</sup>

This section consists, primarily, of two restrictions upon the incurring of municipal indebtedness. It does not, except as suggested below, restrict the amount, rate or purpose of municipal taxation. "The fact that a municipal corporation is indebted up to the constitutional limit of five per cent does not prevent that municipality from levying taxes for any lawful purpose within the limits fixed by the laws governing such municipal corporations."<sup>42</sup> It should be borne in mind, however, that taxes levied to pay the interest or principal on a municipal debt which is void because in excess of the five per cent limitation, are themselves void because levied for an unlawful purpose. To this extent, the section under consideration does indirectly restrict the levy and collection of municipal taxes. (See discussion subsequent subheadings, "What is a debt", and "Effect of exceeding five per cent limitation").

(As to the requirements of the second sentence of this section with reference to the levy and collection of annual taxes to meet an indebtedness, see discussion subsequent subheading, "Necessity for provision for annual tax").

**Indebtedness authorized before adoption of constitution.** The provisions of the last sentence of this section have been held to validate municipal bonds issued after the adoption of the constitution of 1870, in compliance with a vote had prior to that date, pursuant to a law providing therefor, even though, when the bonds were issued, the municipality was indebted beyond the five per cent limitation, and no provision had been made for the payment of the principal and interest, by an annual tax.

In the case of *Mason v City of Shawneetown*,<sup>43</sup> it appeared that the city charter, a special act of 1861, authorized the city to borrow money for the construction and maintenance of a levee. The city submitted the question of borrowing money for that purpose to the people in May, 1870,

<sup>41</sup> *Village of East Moline v Pope*, 224 Ill. 386 (1906); *Evans v Holman*, 244 Ill. 596 (1910); *Wilson v Board of Trustees*, 133 Ill. 443 (1890); *People v Bowman*, 253 Ill. 234 (1911).

<sup>42</sup> *People v C. & T. Ry. Co.* 223 Ill. 448 (1906); *People v C. & A. Ry. Co.* 253 Ill. 191 (1912).

<sup>43</sup> 77 Ill. 533 (1875).

and, upon a favorable vote, it issued, in 1872, \$50,000 worth of bonds, for a levee. In 1872 the city was so indebted that the total indebtedness, including this bond issue, exceeded the five per cent limitation by some \$10,000. It was alleged that this amount of these bonds was void and that the levy of taxes to pay the principal and interest thereon should be enjoined. The court held that under the last sentence of the section under consideration, these bonds were exempt from the provision in the first sentence of the section, that no municipality should become indebted to an amount in excess of five per cent of the value of the taxable property therein, for the reason that they had been issued in compliance with a vote had prior to the adoption of the constitution pursuant to a law providing therefor—that law being the city ordinance, enacted under the city's charter powers. (See discussion subsequent subheading, "Effect of exceeding five per cent limitation").

In the case of *Board of Education v Bolton*,<sup>44</sup> the facts were these: An act of 1865 authorized school districts to issue bonds, upon a favorable vote of the people. Such a vote was had in 1867. The bonds were issued in November, 1872. No provision was made at that time for the levy or collection of an annual tax to pay the principal and interest thereon in twenty years, pursuant to the requirements of this section. It was alleged, by the defendant in an action of debt upon the bonds, that for this reason the bonds were void. The court held that under the last sentence of this section the requirement of a provision for the levy of an annual tax had no application where the authority to create the debt was conferred by a vote had prior to the adoption of the constitution, pursuant to a statute providing therefor. (See discussion subsequent sub-heading "Necessity for provision for annual tax;" article 9, section 8; separate section 2.)

**Constitutional amendments.** The provisions of this section have been modified by two constitutional amendments embodied in section 34, article 4, and section 13, article 9 of the constitution. In the case of *Stone v City of Chicago*,<sup>45</sup> the court was endeavoring to ascertain whether the city's indebtedness had reached the five per cent limitation prescribed by this section. It was alleged that world's fair bonds in the amount of \$4,517,000 should be included for that purpose. The court held: "These bonds were issued under section 13 of article 9 of the constitution of 1870, which section was adopted as an amendment to the constitution in the year 1890. The funds arising from the sale of said bonds were used in aid of the World's Columbian Exposition. At the time the amendment was adopted the city was in debt beyond the constitutional limit, and the object of the amendment was to confer upon the city power to issue said bonds notwithstanding the constitutional limit of five per cent. It is, therefore, clear that said bonds should not be taken into consideration in determining the amount of the city's indebtedness under the debt limit of five per cent fixed by the constitution." (See article 9, section 13.)

In the case of *City of Chicago v Reeves*,<sup>46</sup> the court was considering the question as to whether the sixth amendment to the constitution of 1870, (article 4, section 34), adopted in 1904, violated the provision of section 2 of article 14, that "the General Assembly shall have no power to propose amendments to more than one article of this constitution at the same session." (See discussion, article 14, section 2.) That is, the court was endeavoring to ascertain to what extent the amendment modified the provisions of other articles of the constitution. The court found that the amendment did, in effect, materially modify provisions in two articles of the constitution, but it held the amendment valid on the ground that these modifications were necessarily incidental to the accomplishment of the purposes contemplated by the provisions of the amendment. (See article 4, section 34.) The court held that the section under consideration

<sup>44</sup> 104 Ill. 220 (1882).

<sup>45</sup> 207 Ill. 492 (1904); *City of Chicago v McDonald*, 176 Ill. 404 (1898).

<sup>46</sup> 220 Ill. 274 (1906).

had been modified by this amendment, "so that the City of Chicago [should a consolidation of the many local governments embraced within the city be effected], may become indebted to an amount aggregating five per centum of the *full* value of the taxable property within its limits as ascertained by the last assessment, either for *state or municipal purposes*, previous to the incurring of such indebtedness, instead of not to exceed five per centum of the value of the taxable property therein to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness." (See subsequent subheading, "Valuation of property used in computing five per cent limitation"): As a matter of fact, such a consolidation of the local governments in Chicago has not, as yet, been effected.

**Annexations of municipalities.** In the case of *True v Davis*,<sup>47</sup> it was held that the provisions of the section under consideration, prescribing the limitations upon municipal indebtedness, do not prohibit the annexation of two or more cities, incorporated towns or villages to each other, pursuant to statute, even though both of the constituent municipalities are at that time indebted beyond the five per cent limitation. This was true, the court said, because the annexation in no way increases the respective amounts of corporate indebtedness originally incurred by the several constituent municipalities.

**Overlapping municipalities.** "The constitutional limitation upon the extent of corporate indebtedness applies to each municipal corporation singly, and where one corporation embraces, in part, the same territory as others, each may contract corporate indebtedness up to the constitutional limitation without reference to the indebtedness of any other corporation embraced wholly or in part within its territory."<sup>48</sup> In the case of *Wilson v Board of Trustees*<sup>49</sup> the facts were as follows: A sanitary district, whose boundaries were not coterminous with those of any other municipal corporation, nevertheless embraced several other municipalities covering various parts of the same territory. One of these municipalities had the power, under its charter, to do what the sanitary district had been organized to do, namely, to construct and operate channels, drains, sewers, etc., for sanitary purposes. The aggregate indebtedness of the several municipalities embraced within the sanitary district, exceeded five per cent of the taxable property in the district. The court held that this was not a case where the powers of an existing municipality were redistributed to a new corporation, to evade restrictions upon the old corporation. The sanitary district was entirely distinct and separate from any other municipal corporation. The provisions of the section under consideration applied to it precisely as they might to any other municipality. The corporate indebtedness of other municipalities could not, therefore, be taken into consideration in determining the limit to which the sanitary district might become indebted.

In this connection, the case of *Russell v High School Board*<sup>50</sup> should be noticed. In that case the facts were these: An organized school district, having a board of education, had, pursuant to statute, established a high school and placed the administration thereof in a separate high school board of education. The original board of education retained control of the grade school. The high school board proposed to issue bonds for the high school in an amount which would raise the school district's total indebtedness to

<sup>47</sup> 133 Ill. 522 (1889).

<sup>48</sup> *People v Honeywell*, 258 Ill. 319 (1913).

<sup>49</sup> 133 Ill. 443 (1890).

<sup>50</sup> 212 Ill. 327 (1904).

seven per cent of the value of the taxable property in the district. The court held that the mere creation of a new administrative agency to manage the high school when the original board of education had ample power to do so, did not operate to create a new school district coextensive with and superimposed upon the other, which could incur an indebtedness without regard to that already incurred by the district. The plan amounted to a mere division of the existing powers of the school district between two boards of education in the same district. The amount of the debt which exceeded five per cent of the taxable property was void and, as to that the high school board was enjoined. (See discussion subsequent subheading, "Effect of exceeding five per cent limitation"). Moreover, the court said, that even if it did operate to create a new school district, the arrangement would merely have amounted to a division and redistribution of the powers of the old district, within the suggestion made in the Wilson case, to evade the constitutional restriction on municipal indebtedness, and would, for that reason be void.

**Valuation of property used in computing five per cent limitation.** In the case of *People v Hamill*,<sup>51</sup> decided in June, 1888, it was held that the basis for computing the five per cent limitation upon municipal indebtedness under the clause of this section "to be ascertained by the last assessment for state and county taxes", was the original assessment made by the local authorities and not the equalized assessed valuation as fixed by the state board of equalization. Justice Magruder dissented from that decision, holding that the assessed valuation as equalized by the state board of equalization was the basis contemplated by the constitution. Five months later, Justice Magruder, speaking for the full court in the case of *Culbertson v City of Fulton*,<sup>52</sup> decided in November 1888, held, without reference to the earlier case, that it was the equalized assessed value as determined by the state board of equalization, and not the original assessment as made by the local officers, that should govern in computing the five per cent limitation upon a municipality's indebtedness.

(By two acts of 1919, the state board of equalization was abolished and its powers conferred upon a state tax commission.<sup>53</sup>)

However, this does not mean that it is the full value of the taxable property, as thus equalized, which is to be taken as the basis for the computation of the five per cent limitation. In 1898, the General Assembly passed an act fixing the assessed value of taxable property as one-fifth of the full value. In the case of *City of Chicago v Fishburn*,<sup>54</sup> the court held that the basis for the computation of the five per cent limitation was not the full value of taxable property, but the assessed value, as fixed by statute, namely, one-fifth of the full value. In 1909, the assessed value was changed from one-fifth to one-third of the full value. In 1919, it was raised from one-third to one-half.<sup>55</sup> Accordingly, the five per cent limitation upon a municipality's indebtedness is now to be computed upon the assessed value for state and county taxes, that is, one-half of the full value of the taxable property in the municipality, as equalized by the state tax commission.

**Necessity for provision for annual tax—twenty year limitation.** It will be noted that the section under consideration contains the following provision: "Any county, city, school district or other municipal corporation

<sup>51</sup> 134 Ill. 666 (1888).

<sup>52</sup> 127 Ill. 30 (1888); *Wabash Ry. Co. v People*, 202 Ill. 9 (1903).

<sup>53</sup> Laws, 1919, pp. 9, 718.

<sup>54</sup> 189 Ill. 367 (1901).

<sup>55</sup> Laws, 1919, pp. 727-728. The object of these changes since the act of 1898 has been that of increasing the borrowing powers of municipalities. (See discussion, *Constitutional Convention Bulletin No. 4*, pp. 289-290).

incurring any indebtedness as aforesaid, shall before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest of such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same." The words "incurring any indebtedness as aforesaid" do not mean "incurring any indebtedness in excess of the five per cent limitation." Rather, they mean "incurring any indebtedness in any manner or for any purpose to an amount which, when added to the original debt, is still within the five per cent limitation."<sup>56</sup>

It is not necessary, under this section, that a direct annual tax sufficient to liquidate the debt within twenty years be provided for in connection with every debt, of whatever kind. The words "any indebtedness" do not literally mean "any indebtedness." The constitution merely requires that such a tax be provided for in connection with debts of a fixed and absolute amount, which are in the nature of bonded debts, that is, those which bear interest and fall due at a fixed time or times in the future. Thus, it is not necessary, when a municipality purchases supplies on credit for the purpose of caring for the poor, or when it enters into a construction contract on which payments are to be made monthly at the rate of eighty-five per cent of the value of the work done, or when it contracts for the use of water hydrants at a maximum annual rental, that the levy and collection of an annual tax to pay the interest and principal thereon within twenty years, be provided for.<sup>57</sup> The indebtedness incurred in these cases was not fixed in amount. However, this rule does not go to the extent of defining the kind of indebtedness to which the five per cent limitation applies. In other words, while the requirement of a provision for an annual tax applies only to interest bearing debts of a fixed amount, the payment of which is deferred to a definite time in the future, the five per cent limitation in the first sentence of this section applies to all debts of whatever kind.<sup>58</sup> (As to the obligations of a municipality which have been held to be the debts within the meaning of the term "indebtedness," as used in the first sentence of this section, see discussion subsequent subheading, "What is a debt.")

Nor does the clause of this section, "shall provide for the collection of a direct annual tax," mean that the municipality, at the time of incurring the debt, shall actually levy the whole amount of the annual taxes necessary to liquidate the debt in twenty years. The constitution merely requires that the necessary steps be taken, at that time, for the levy and collection of that tax in subsequent years. As a matter of fact, under the system of taxation in force today, whereby the valuation of property is ascertained, annually, there cannot be a levy at one time of taxes to be collected each year for a period of years in advance. No valuation of property for the whole period, is then available.<sup>59</sup> (See discussion subsequent subheading, "What is a debt.")

The annual tax provided for must be clearly sufficient to pay the interest as due and also the principal within twenty years. For example, a statute was held to contravene this section which directed the municipality to provide for the levy and collection of an annual tax, the proceeds of which were first to be used for other purposes, the residue only, an indeterminate amount, being available to pay a particular bonded indebtedness.<sup>60</sup> Similarly, a special act prescribing the charter powers of a city was held void which limited to a clearly insufficient rate and amount, the taxes to be devoted to payment of the interest and principal on the corporate indebted-

<sup>56</sup> *City of East St. Louis v People* 124 Ill. 655 (1888); *East St. Louis v Amy*, 120 U. S. 600 (1886); *Town of Kankakee v McGrew*, 178 Ill. 74 (1899); *Pettibone v West Chicago Park Commissioners*, 215 Ill. 304 (1905); but see *City of Carlyle v C. W. L. & P. Co.*, 140 Ill. 445 (1892).

<sup>57</sup> *Town of Kankakee v McGrew*, 178 Ill. 74 (1899); *County of Coles v Goehring*, 209 Ill. 142 (1904); *City of Danville v Danville Water Co.*, 180 Ill. 235 (1899).

<sup>58</sup> *B. & O. S. W. Ry. Co. v People*, 200 Ill. 541 (1903).

<sup>59</sup> *Hodges v Crowley*, 186 Ill. 305 (1900); *Pettibone v West Chicago Park Commissioners*, 215 Ill. 304 (1905).

<sup>60</sup> *Pettibone v West Chicago Park Commissioners*, 215 Ill. 304 (1905).

ness.<sup>61</sup> However, in both of these cases, the constitutional provision was held to be so self-executing as to supplant the provisions of these statutes. That is, this provision, without the aid of further legislation, constituted a direction to the municipality to provide for the necessary tax. Moreover, this constitutional provision is so self-executing as to be independent of the statutes regulating the passage by municipalities of appropriation and tax levy ordinances.<sup>62</sup> For example, where the municipal ordinance incurring the indebtedness and providing for the levy and collection of the necessary tax, was passed after the enactment of the appropriation and tax levy ordinances, it was held that the ordinance was passed pursuant to the constitutional mandate, and that, irrespective of the appropriation and tax levy ordinance, it constituted a binding direction to the proper officers to levy and collect the tax for that year, even though the statute requiring the tax to be embodied in the appropriation and tax levy ordinances had not been complied with.<sup>63</sup> Similarly, where the regular tax levy ordinance embodying this tax was held void, because invalidly enacted, the earlier ordinance providing for the levy and collection of the debt tax was held to constitute sufficient authority for the tax officers to levy and collect the tax in that year.<sup>64</sup>

The second sentence of this section merely restricts the term of a bonded indebtedness incurred by a municipality to a maximum period of twenty years. It does not require such bonds to be issued for a period of exactly twenty years, nor does it prohibit the incurring of a debt for any period less than twenty years, such as, for instance, a period of one year.<sup>65</sup> Moreover, this sentence does not require all bonded debts incurred by a municipality to be paid within twenty years, so as to preclude the possibility of refunding the debt at the end of that period. The debt continues to exist if not paid off within twenty years. If, at the end of that period, the provision first made for the payment of the debt with funds collected from annual taxes has proved to be insufficient to pay the whole debt, the constitution does not prohibit the issuance of new bonds to take up and refund the original debt. There must, however, be express statutory authority for refunding a debt in this manner. That is, the second sentence of this section establishes a policy which requires the liquidation of bonded debts within twenty years from the date thereof, to such an extent as to prohibit the refunding of such debts in the absence of express statutory authorization.<sup>66</sup>

**What is a debt.** The first sentence of the section under consideration provides that no municipality "shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the taxable property therein . . . ." This note discusses the general question as to what constitutes an indebtedness within the meaning of this provision.

Accrued interest, which is due and payable, is a debt and must be computed in determining whether the city is indebted beyond the five per cent limitation prescribed by this section. However, interest not yet due is not a debt, for this purpose. For example, in the case of *Goodwine v County of Vermilion*,<sup>67</sup> the facts were these: Bonds were to be issued by the county, the principal of which did not cause the total indebtedness of the county to exceed the five per cent limitation. However, if the total interest that would fall due during the life of the debt were

<sup>61</sup> *City of East St. Louis v People*, 124 Ill. 655 (1888); *East St. Louis v Amy*, 120 U. S. 600 (1886).

<sup>62</sup> *People v Wabash Ry. Co.*, 281 Ill. 382 (1917).

<sup>63</sup> *People v Sandberg Co.*, 282 Ill. 245 (1918).

<sup>64</sup> *People v Day*, 277 Ill. 543 (1917).

<sup>65</sup> *People v Bowman*, 253 Ill. 234 (1911).

<sup>66</sup> *Kane v City of Charleston*, 161 Ill. 179 (1896); *Hamilton County v Bank*, 157 Fed. 19 (1907); *Coquard v Village of Oquawka*, 192 Ill. 355 (1901).

<sup>67</sup> 271 Ill. 126 (1915); *Stone v City of Chicago*, 207 Ill. 493 (1904).

added to the principal, the aggregate sum of principal and interest would exceed the constitutional limitation. It was urged in a proceeding to enjoin the issuance of the bonds, that for this reason the proposed indebtedness was void under the provisions of the section under consideration. The court held that the interest payable during the life of the loan did not, at the time of issuing the bonds, constitute a debt which should be computed in ascertaining whether the county's pre-existing indebtedness, in addition to that created by the bond issue, would exceed the five per cent limitation.

Judgments against a municipality, which have not been satisfied, are debts which must be computed in ascertaining whether the constitutional limitation upon municipal indebtedness has been exceeded.<sup>68</sup>

Neither special assessment warrants, payable out of funds collected by a municipality from special assessments for public improvements, nor the obligations of a municipality to pay, out of funds raised by general taxation for the current year, its share of special assessments for public benefits from public improvements, constitute debts which are to be computed in ascertaining the amount of municipal indebtedness.<sup>69</sup> (As to special assessments in general see discussion article 9, section 9, subheading "Special assessments and special taxation for local improvements".)

A right of action against a city does not create a debt so as to be rendered void by the fact that the city is indebted beyond the five per cent limitation. For example, in a suit against a city for damages on account of personal injuries caused by a defective sidewalk, the court held: "In the trial of a case like this, we are of opinion that the city cannot raise the question as to whether it is already indebted to an amount in excess of the constitutional limitation. It was not error to exclude proof on that subject."<sup>70</sup> In the case of *City of Chicago v Cement Co.*<sup>71</sup> the court was considering the constitutionality of the mob law of 1887, under which the municipality was made liable for three-fourths of the damages caused to private property by mobs. It was urged that this act violated the section under consideration, but the court held: "By no possible construction can it be held to create a debt against municipal corporations of any particular amount, much less of an amount exceeding the constitutional limit. We certainly cannot be asked to assume that every county and city in the State would be compelled to become indebted, by its enforcement, to an amount, including existing indebtedness, exceeding five per centum on the value of its taxable property, in order to justify a holding against the validity of the act. Whether or not the city of Chicago was, at the bringing of this suit, indebted beyond that amount is wholly immaterial in determining the constitutionality of the law. That question could only arise, if at all, upon a proceeding to collect the judgment. But aside from the foregoing considerations, as already intimated, we do not think the act, in any proper sense, creates a debt against cities and counties. It does no more than provide that under certain circumstances they shall be liable to owners for property destroyed by mobs and riots. Owners seeking to recover for such loss must, as in any other case, make out their cause of action by alleging and proving all the facts prescribed by the several sections of the act. This right of action is no more a debt against a city or a county than is the right of recovery against such municipality for any other wrong or injury."

In the case of *Chicago v P. C. C. & St. L. Ry. Co.*<sup>72</sup> it appeared that a judgment had been recovered by the city against a railroad for certain

<sup>68</sup> *City of Chicago v McDonald*, 176 Ill. 404 (1898); *Stone v City of Chicago*, 207 Ill. 493 (1904).

<sup>69</sup> *Jacksonville Ry. Co. v City of Jacksonville*, 114 Ill. 562 (1885); *Stone v City of Chicago*, 207 Ill. 493 (1904); *People v Honeywell*, 258 Ill. 319 (1913); *Lobdell v City of Chicago*, 227 Ill. 218 (1907).

<sup>70</sup> *City of Bloomington v Perdue*, 99 Ill. 329 (1881).

<sup>71</sup> 178 Ill. 372 (1899).

<sup>72</sup> 244 Ill. 220 (1910).



damages. Thereafter, an ordinance was passed, providing for the elevation of the tracks of this railroad. In consideration of the elevation of the road and of the making of various public improvements, the city, by an ordinance, released the railroad company from its liability on the judgment. It was objected that this ordinance contravened the section of the constitution now under consideration. The court held: "The connection between section 12 of article 9, limiting indebtedness, and the ordinance in question, is not apparent. The plaintiff proved that the city of Chicago was indebted in excess of five per cent of its taxable property, and the argument seems to be, that if the defendant had not been released and had paid into the treasury the damages on account of the viaducts, the city would have had that much more money and the municipal expenses would have been reduced by that amount. We are unable to see that the provision has anything to do with this matter, or that a compromise by which some of the assets were given up in consideration of benefits received amounted to incurring an indebtedness."

Where a city already indebted beyond the five per cent limitation contracts for the furnishing of supplies or services to the city during a period of years, for which payments are to be made by the city upon the furnishing of the supplies or the rendering of the services, in fixed periodical installments, it has been held that the city thereby becomes indebted in violation of the provisions of this section, at the time of the making of the contract. This is so because whether it is the liability to pay the aggregate of the installments or the liability to pay each one as it falls due that constitutes an indebtedness, the city is powerless to incur any indebtedness whatsoever.<sup>73</sup> However, where a city is not indebted beyond the five per cent limitation, and it is not shown that the obligation to pay a particular installment will increase the city's indebtedness beyond the constitutional limitation, even though the obligation to pay the aggregate of the installments will have that effect, it has been held that the city does not, at the time of entering into the contract, thereby become indebted in violation of the provisions of the section under consideration. The actual liability to pay in such a case accrues upon the rendering of the service or the furnishing of the supplies, at the date the installment is due, and not before. Therefore, the amounts that might become due and payable at future installment dates do not, at the time of entering into the contract, constitute a debt of the city, within the meaning of the constitution.<sup>74</sup>

The question as to when the issuance of anticipation warrants, by a municipality indebted beyond the five per cent limitation, to meet current expenses, is prohibited by the section under consideration, seems to have arisen for the first time in the case of *City of Springfield v Edwards*.<sup>75</sup> It was urged by counsel in this case that "when liabilities are created [by municipalities] and appropriations are made, which are within the limits of the revenue accruing to meet them, they are not debts within the meaning of the prohibition of the constitution; and that temporary loans are not, when within the limits of the revenue expected to be realized." This contention was supported by cases from other states. The court held: "These cases maintain the doctrine that revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury; that the appropriation of moneys when received meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. We are only prepared to yield our assent to the rule recognized by the authorities referred to, with these qualifications: First, the tax appropriated must, at the time, be actually levied; second, by the legal effect of the contract between the corporation

<sup>73</sup> *Prince v City of Quincy*, 105 Ill. 138 (1883); 105 Ill. 215 (1883); 128 Ill. 443 (1889); *City of Chicago v McDonald*, 176 Ill. 404 (1898); *City of Chicago v Galpin*, 183 Ill. 399 (1899); *Schnell v City of Rock Island*, 232 Ill. 89 (1908).

<sup>74</sup> *East St. Louis v East St. Louis L. G. L. & C. Co.*, 93 Ill. 415 (1881); *City of Chicago v McDonald*, 176 Ill. 404 (1898).

<sup>75</sup> 84 Ill. 626 (1877).

and the individual, made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment, must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand it is, that in such a case there is no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation—leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased. But until a tax is levied, there is nothing in existence which can be exchanged; and an obligation to levy a tax in the future, for the benefit of a particular individual, necessarily implies the existence of a present debt in favor of the individual against the corporation, which he is lawfully entitled to have paid by the levy. If the making of the appropriation and issuing and accepting a warrant for its payment does not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must, manifestly incur, either absolutely or contingently, a debt. Where a warrant or order, payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for material furnished or to be furnished, so that there is, in fact, but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation—but, obviously, for any failure in that regard, the remedy must be against the officers and not against the corporation, for, otherwise, a contingent debt would, in this way, be incurred by the corporation." These principles have been adhered to in a number of subsequent decisions. The principal difficulty has been that of the application of these principles to particular fact situations. The rule, however, does not seem to have been departed from. In general, it may be said that the principal defect in the warrants that have been held not to come within the rule and to constitute municipal debts which were void because the city was previously indebted beyond the five per cent limitation, has been the fact that the warrants did not state clearly and unequivocally that they were payable out of and only out of a particular fund derived from a particular tax levied for the year in question.<sup>73</sup>

The case of *Hodges v Crowley*<sup>74</sup> is interesting in this general connection. In that case, the facts were these: An act of 1899 authorized the levy and collection, by counties, of an annual tax, of a certain amount, for road purposes, during a period of ten years. The taxes were to be levied in advance, for the whole ten year period, on the basis of the assessed value of the property in the counties, as determined for the year 1898, and were to be extended and collected annually. Anticipation warrants, bearing interest, were then to be drawn, in 1899, against the entire proceeds of the taxes for the ten year period. The court held that under the system of taxation in force, whereby assessments of property for purposes of taxation were made annually, there could not be an actual levy of taxes for ten years in advance for the reason that no assessed valuation for each year would be available. Therefore, anticipation warrants could not be issued against the revenue to be realized during the entire ten year period, for the reason that no valid levy of those taxes could be made, as required by the rule enunciated in the case of *City of Springfield v Edwards*, in advance of the issuance of the warrants. The act was held void, as an attempt to authorize counties, indebted beyond the constitutional five per cent limitation, to evade the provisions of the section under consideration, prohibiting the incurring of further indebtedness. (See discussion preceding subheading, "Necessity for provision for annual tax".)

<sup>73</sup> *Law v People* 87 Ill. 385 (1877); *Fuller v City of Chicago*, 89 Ill. 282 (1878); *Fuller v Heath*, 89 Ill. 296 (1878); *Howell v City of Peoria*, 90 Ill. 104 (1878); *Commissioners of Highways v Jackson*, 165 Ill. 17 (1897); *Schnell v City of Rock Island*, 232 Ill. 89 (1908); *Booth v Opel*, 244 Ill. 317 (1910).

<sup>74</sup> 186 Ill. 305 (1900); *Pettibone v West Chicago Park Commissioners*, 215 Ill. 304 (1905).

A question somewhat distinct from that relating to anticipation warrants is that as to when a city, which is indebted beyond the five per cent limitation, incurs a debt within the prohibition of this section, by the issuance of certificates, warrants or bonds for the payment of which property, funds or taxes belonging to or due to the city, are pledged.

In the case of *City of Joliet v Alexander*,<sup>78</sup> the facts were as follows: The city was indebted in excess of the five per cent limitation. It owned a system of waterworks, which yielded an annual income. Pursuant to an act of 1899, it was about to borrow \$240,000 to enlarge the waterworks system, by the issuance of interest bearing certificates of indebtedness. These certificates were to be paid out of the proceeds or income from both the old and the enlarged waterworks, and from no other fund. The loan was to be secured by a mortgage of both the old and the new system. A taxpayer sought to enjoin the proposed transaction on the ground that the city's indebtedness would thereby be increased in violation of the provisions of the section under consideration. The court held that because the city owned both the existing waterworks and the established income derived therefrom, because that income was to be taken for the payment of the certificates, and because the old waterworks could be taken therefor in the event of the foreclosure of the mortgage, the transaction constituted a debt of the city, which, being in excess of the constitutional five per cent limitation, was void. The city was, accordingly, enjoined from proceeding with the transaction.

A slightly different situation was presented in the case of *Village of East Moline v Pope*.<sup>79</sup> The village was indebted beyond the five per cent limitation. It did not own a waterworks system. To procure the construction of such a system, the village was about to issue interest bearing bonds in the sum of \$35,000, payable out of the income to be derived from the system when constructed, and also out of a special annual tax to be levied and collected for the purpose. It was held that inasmuch as the bonds were payable out of the special tax, should the income from the waterworks, when constructed, be insufficient, the transaction constituted a debt of the village. Since that debt would be in excess of the five per cent limitation, and therefore void, the village was enjoined from proceeding with the arrangement.

In both of these cases, however, it was suggested that "what is said relative to mortgaging property owned by the city or pledging its existing income is not intended to apply to a mortgage purely in the nature of a purchase money mortgage, payable wholly out of the income of property purchased or by resort to such property. This is not a case where there is no obligation of the city except the performance of a duty in the creation and management of a fund, and where the waterworks, upon paying for themselves, will become the property of the city. The reasoning in *Winston v Spokane*, 41 Pac. Rep. 888, cannot be applied to a case like this, and could only apply to property or a fund which the city never had, where the property is to be paid for by its own earnings without imposing any further liability on the city." In the *Village of East Moline* case, it was said that "in the case at bar it is manifest that if nothing but the income from the waterworks was pledged or could be reached to satisfy the principal and interest of the bonds the case would be within the meaning of the language last quoted, but here revenue of the village to be obtained by general taxation to the extent of one cent on the dollar of taxables must be applied to the payment of this indebtedness of the income from the waterworks proves insufficient to satisfy it."<sup>80</sup>

An important case in this connection is that of *Lobdell v City of Chicago*.<sup>81</sup> In that case it appeared that the city was indebted almost to the

<sup>78</sup> 194 Ill. 457 (1902); *Schnell v City of Rock Island*, 232 Ill. 89 (1908); *Leonard v City of Metropolis*, 278 Ill. 287 (1917).

<sup>79</sup> 224 Ill. 386 (1906); *Holmgren v City of Moline*, 269 Ill. 248 (1915).

<sup>80</sup> See *Evans v Holman*, 244 Ill. 596 (1910).

<sup>81</sup> 227 Ill. 218 (1907).

five per cent limitation. It proposed, pursuant to statute, to acquire the street railway system. To finance this project the city was about to issue \$70,000,000 of street railway certificates, bearing interest, secured by a mortgage of the system to be acquired and of the franchise right to use the streets for street railway purposes, for twenty years. These franchises were then yielding some \$400,000 a year in license fees. The certificates were to be payable out of the income to be derived from the street railway system, and from no other fund. A taxpayer sought to enjoin the city from proceeding with the transaction. The injunction was sustained. The court said: "If all that is proposed to be done in this case is to pledge the property, and its income, which is purchased with the proceeds of said street railway certificates when issued and sold to secure the payment of said certificates, then, under the doctrine of *Winston v Spokane*, 41 Pac. Rep. 888, which has been approved in the *City of Joliet v Alexander and Village of East Moline v Pope*, *supra*, there would be no indebtedness, within the constitutional inhibition, created by the issue and sale of said street railway certificates and the execution of said trust deed or mortgage, as against the city." The court held, however, that although the city was not directly liable on the certificates, its property, namely, the franchise rights in the streets and the license fees derived therefrom, as well as the railway system, could be taken to satisfy the claims due on the certificates, in the event of the foreclosure of the mortgage. For that reason, the transaction created a debt of the city. In view of the fact that the proposed indebtedness would exceed the five per cent limitation, the city was enjoined from proceeding in the premises.

**Effect of exceeding five per cent limitation.** Several cases have arisen involving the question as to whether a debt incurred by a municipality not theretofore indebted beyond the five per cent limitation, in such an amount as to extend the city's aggregate indebtedness beyond that limitation, was void as a whole or only as to the excess. These cases have been proceedings to prevent the collection of taxes, either by injunction or by objections to applications for tax judgments, for the payment of the interest and the principal on the debt which exceeded the five per cent limitation. It was held that it was only the amount of the indebtedness by which the limitation was exceeded that was void. As to that amount the collection of taxes was prevented. The portion of the indebtedness within the limitation and the taxes levied therefore, however, were held valid.<sup>82</sup> It should be noted, in this connection, that the incurring of an indebtedness which would have the effect of increasing a municipality's aggregate indebtedness beyond the five per cent limitation, has, in a number of cases, been enjoined. This has been because the proposed transaction, as a whole, represented an attempt to violate the provisions of the constitution, even though only the excess would actually be void.<sup>83</sup>

(See discussion preceding subheadings, "In general", and "What is a debt".)

(For a discussion of the question as to when a municipality may be estopped to deny the validity of bonds issued in excess of the five per cent limitation, see *Dillon, Municipal Corporations*, Fifth Edition, section 905, and following.)

**Section 13.** The corporate authorities of the city of Chicago are hereby authorized to issue interest-bearing bonds in said city to

<sup>82</sup> *Culbertson v City of Fulton*, 127 Ill. 30 (1888); *City of Chicago v McDonald*, 176 Ill. 404, at p. 414. (1898); *B. & O. S. W. Ry. Co. v People*, 200 Ill. 541 (1903); *Wabash Ry. Co. v People*, 202 Ill. 9 (1903).

<sup>83</sup> *Russell v High School Board* 212 Ill. 327 (1904); *Lobdell v City of Chicago*, 227 Ill. 218. (1907); *Evans v Holman*, 244 Ill. 596 (1910); *Holmgren v City of Moline*, 269 Ill. 248 (1915).

an amount not exceeding five million dollars, at a rate of interest not to exceed five per centum per annum, the principal payable within thirty years from the date of their issue, and the proceeds thereof shall be paid to the treasurer of the World's Columbian Exposition, and used and disbursed by him under the direction and control of the directors in aid of the World's Columbian Exposition, to be held in the city of Chicago in pursuance of an act of Congress of the United States: Provided, that if, at an election for the adoption of this amendment to the constitution, a majority of the votes cast within the limits of the city of Chicago shall be against its adoption, then no bonds shall be issued under this amendment. And said corporate authorities shall be repaid as large a proportionate amount of the aid given by them as is repaid to the stockholders on the sums subscribed and paid by them, and the money so received shall be used in the redemption of the bonds issued as aforesaid: Provided, that said authorities may take, in whole or in part of the sum coming to them, any permanent improvements placed on land held or controlled by them: And provided further, that no such indebtedness so created shall in any part thereof be paid by the State, or from any State revenue, tax or fund, but the same shall be paid by the said city of Chicago alone.<sup>84</sup>

(See discussion article 9, section 12, subheading, "Constitutional amendments".)

<sup>84</sup> This section was added by the fifth amendment to the constitution. The amendment was proposed by a resolution of the general assembly in 1890. It was ratified by the voters on November 4, 1890, and proclaimed adopted on November 29 of the same year.



## ARTICLE X—COUNTIES

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Section 1. No new county shall be formed or established by the General Assembly, which will reduce the county or counties, or either of them, from which it shall be taken, to less contents than four hundred square miles; nor shall any county be formed of less contents; nor shall any line thereof pass within less than ten miles of any county seat of the county or counties proposed to be divided.

“The object of this section is to prevent the reduction of large counties to small ones, and also to prevent the running of new county lines too near county seats already established.”<sup>1</sup>

The question has arisen whether the ten mile limit, prescribed in the last clause of this section, is to be measured from the county buildings, or from the boundaries of the municipality which has been established as the county seat. The Attorney General has rendered an opinion, based upon decisions of courts in other states, that the ten miles is to be measured from the boundaries of the municipality. But the limits of the county seat will not expand as the particular municipality expands. The boundaries of the county seat are the limits of the municipality at the time the city is established as a county seat.<sup>2</sup>

Section 2. No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county, voting on the question, shall vote for the same.

Section 3. There shall be no territory stricken from any county, unless a majority of the voters living in such territory, shall petition for such division; and no territory shall be added to any county without the consent of the majority of the voters of the county to which it is proposed to be added. But the portion so stricken off and added to another county, or formed in whole or in part into a new county, shall be holden for, and obliged to pay its proportion of the indebtedness of the county from which it has been taken.

Under the Constitution of 1848 it was held that an act of the General Assembly consolidating two counties was in violation of provisions similar

<sup>1</sup> People v Marshall, 12 Ill. 391 (1851).

<sup>2</sup> Report Attorney General, 1908, p. 706.

to those contained in this section, and in section 2 of this article, since no petition was filed and no election held to authorize such a consolidation.<sup>3</sup> For the same reason it has been held that an act of the General Assembly, ostensibly settling disputed county boundaries, but in reality striking land from one county and adding it to another, was invalid.<sup>4</sup>

The question has arisen whether, in forming a new county, composed of parts of two established counties, the petition must be signed by a majority of the voters living in each of the parts proposed to be consolidated. The Attorney General has suggested that, in the absence of authoritative construction, it would be advisable to have the petition signed by the majority of the voters living in each section.<sup>5</sup>

The term "majority of the voters of the county" is interpreted to mean a majority of those voting at the election at which the vote is taken. (See discussion article 10, section 4.)

**Section 4.** No county seat shall be removed until the point to which it is proposed to be removed shall be fixed in pursuance of law, and three-fifths of the voters of the county, to be ascertained in such manner as shall be provided by general law, shall have voted in favor of its removal to such point; and no person shall vote on such question who has not resided in the county six months, and in the election precinct ninety days next preceding such election. The question of the removal of a county seat shall not be oftener submitted than once in ten years, to a vote of the people. But when an attempt is made to remove a county seat to a point nearer to the center of the county, then a majority vote only shall be necessary.<sup>6</sup>

Under a similar provision of the constitution of 1848 it was held that an act of the General Assembly attempting to remove a county seat from one place to another, without a vote of the people of the county affected, was void.<sup>7</sup>

The Supreme Court has pointed out that this section of the constitution contemplates the passage of a law authorizing an election and prescribing the time, place, manner of conducting and determining the result thereof and, without such a statute, there can be no removal of a county seat under this section.<sup>8</sup> (See Hurd's Revised Statutes 1917, Chap. 34, Sec. 93.)<sup>9</sup> The Supreme Court has also said that the power given to the General Assembly to provide, by general law, for an election under this section, does not give the General Assembly the power to prescribe that women and aliens may vote upon all propositions for the removal of county seats.<sup>10</sup> Since this election is a constitutional election only the electors prescribed by article 7, section 1 may vote. (See discussion article 7, section 1, subheading, "Woman suffrage"; article 8, section 5.)

<sup>3</sup> People v Marshall, 12 Ill. 391 (1851).

<sup>4</sup> Rock Island County v Sage, 88 Ill. 582 (1878).

<sup>5</sup> Report Attorney General 1908, p. 706.

<sup>6</sup> In the section as it originally appeared the words "a majority" appeared instead of the word "three-fifths" and the last sentence was omitted. Under the terms of section 12 of the schedule the word "three-fifths" was substituted for the words "a majority" and the last sentence of the section was added.

<sup>7</sup> People v Marshall, 12 Ill. 391 (1851).

<sup>8</sup> Board of Supervisors v Keady, 34 Ill. 293 (1864).

<sup>9</sup> See Village of Ridgway v Gallatin County, 181 Ill. 521 (1899).

<sup>10</sup> People v English, 139 Ill. 622 (1892).



In the constitution of 1848 the words, "voters of the county" were not modified by the words "to be ascertained in such manner as shall be provided by general law" and the question of how the number of voters in the county was to be determined gave rise to some difficulty. The Supreme Court held that, in order to give effect to the constitution it must be presumed that all of the voters of the county voted at the election,<sup>11</sup> and that the fact that the registry lists showed a larger number of voters in the county than voted at the election did not rebut this presumption.<sup>12</sup> But, if the election for the removal of a county seat was held at the same time as another election, the greatest number of votes cast would determine the number of voters in the county.<sup>13</sup> However, the act of 1872 prescribes "The number of legal votes cast at any county seat election held under this act shall be deemed and taken for the purposes of such an election *prima facie* evidence of the number of legal voters of that county at that time entitled to vote on the question; but in case it shall become necessary in consequence of a contest of an election held under this act to ascertain the number of voters of the county entitled to vote upon the question, the court in which the contest may be pending may ascertain the number of voters by taking or causing to be taken, legal evidence, tending to show the actual number of the legal voters of the county entitled to vote upon such question."<sup>14</sup>

Section 5. The General Assembly shall provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such county, voting at any general election, shall so determine, and whenever any county shall adopt township organization, so much of this constitution as provides for the management of the fiscal concerns of the said county by the board of county commissioners, may be dispensed with, and the affairs of said county may be transacted in such manner as the General Assembly may provide. And in any county that shall have adopted a township organization, the question of continuing the same may be submitted to a vote of the electors of such county, at a general election, in the manner that now is or may be provided by law; and if a majority of all the votes cast upon that question shall be against township organization, then such organization shall cease in said county; and all laws in force in relation to counties not having township organization, shall immediately take effect and be in force in such county. No two townships shall have the same name; and the day of holding the annual township meeting shall be uniform throughout the State.

In general. Eighty-five of the 102 counties in Illinois have adopted township organization. It is important in discussing township organization to keep in mind the fact that the terms town and township are used in a number of different senses. The congressional township is a geographical area used in the land surveys, and as such has no political significance.

<sup>11</sup> *People v Warfield*, 20 Ill. 159 (1858). See remarks of Mr. Cody, Debates p. 1239.

<sup>12</sup> *People v Garner*, 47 Ill. 246 (1868).

<sup>13</sup> *People v Wiant*, 48 Ill. 263 (1868).

<sup>14</sup> *Hurd's Revised Statutes* 1917, Chap. 34, sec. 103.

The school township is, in most cases, but not always, coterminous with the congressional township. The civil town, under the township organization law, is more often different in area from the school and congressional township. Incorporated towns are usually villages, incorporated before 1870, within the civil town; but the incorporated town of Cicero is coterminous with the civil town, and has the usual officers of the civil town as well as officers for village functions.

The courts frequently use the term "town" to designate both an incorporated town and a township under the township organization law. In the case of *People v Martin*<sup>15</sup> the Supreme court said: "A town organized under the township organization laws of the State is, as before said, a political or civil subdivision of a county. It is created as a subordinate agency to aid in the administration of the general State and local government. The distinction between such a town and other chartered municipal corporations proper, sometimes denominated towns, is, that a chartered town or village is given corporate existence at the request or by the consent of the inhabitants thereof for the interest, advantage or convenience of the locality and its people, and a town under township organization is created almost exclusively with a view to the policy of the State at large for purposes of political organization and as an agency of the State and county, to aid in the civil administration of affairs pertaining to the general administration of the State and county government, and is imposed upon the territory included within it without consulting the wishes of the inhabitants thereof."

**Organization of townships by general law.** The requirement that the General Assembly shall provide for township organization by general law does not mean that the law must apply in the same manner and with equal force to all counties which have adopted, or which propose to adopt, that form of organization. The Supreme Court has said that "An act general in its terms and uniform in its operation upon all persons and subject matter in like situation is a general law, and one that does not bring within its limits all persons and subject matter in substantially the same situation and circumstances is a special law."<sup>16</sup> The General Assembly has a reasonable discretion to classify communities with respect to township organization. Thus, it was held that an act was a general law which provided that county boards might organize the territory embraced within any city, having a population of 3,000 or over, into a separate township.<sup>17</sup> On the other hand, in an earlier case, it was held that an act of 1891 was not a general law providing for township organization, when it provided that where incorporated towns were coterminous with townships, portions of such towns having a population of not less than 1,000 might form new towns and townships upon petition and vote of the people thereof. In this case the Supreme Court said: "It is manifest the inhabitants of other like areas of territory in the state having the specified population are denied the privileges and advantages granted to these particular localities comprehended within the act of 1891 on the sole ground such territory has not been embraced within the limits of an incorporated town."<sup>18</sup>

The General Assembly is also prohibited, by article 4, section 22, from passing special laws regulating township affairs. (See discussion, article 4, section 22, subheading, "County and township affairs.")

**Abandonment of township organization.** The constitution of 1848 authorized township organization in any county where the majority of the

<sup>15</sup> 178 Ill. 611 (1899).

<sup>16</sup> *People v Martin*, 178 Ill. 611 (1899).

<sup>17</sup> *People v Grover*, 258 Ill. 124 (1913); *People v Hazelwood*, 116 Ill. 319 (1886). *People v Brayton*, 94 Ill. 341 (1880).

<sup>18</sup> *People v Martin*, 178 Ill. 611 (1899).

legal voters, voting at a general election, should decide in favor of that form of government, but there was no express provision for the abandonment of township organization by a county which had adopted it. The Supreme Court held, however, that the General Assembly could not authorize a township to abandon the system by a mere majority of those voting at a special election, and that the same formalities must be observed in abrogating the system as in its adoption, that is, it might only be abandoned by the vote of the majority of the voters of the county at a general election.<sup>19</sup> This construction was, in substance, adopted and carried forward into the constitution of 1870 by the insertion of the second sentence of this section, providing that the question of continuing township organization may be submitted to a vote at a general election "and if a majority of all the votes cast upon that question shall be against township organization, then such organization shall cease in said county."

However, it may be noted that the vote required for the abandonment of township organization is not necessarily the same as that required for the adoption of that form of organization. The vote required for the adoption of township government is a majority of the legal voters of the county voting at a general election;<sup>20</sup> the vote required for the abrogation of township organization is a majority of all the votes cast upon that question at a general election.

Under the constitution of 1870, it was held that a statute giving the county board power to alter the boundaries of townships could not be construed to permit the county board to consolidate townships, since this construction would allow the consolidation of all of the townships and result in the abandonment of the township system without the formalities prescribed in the constitution.<sup>21</sup> In another case it was contended that an act supplanting the township board of review by a county board of review was invalid because it destroyed township government without any compliance with the constitutional requirements for abandoning that form of organization. But the court held that this was untenable since "the whole *modus operandi* of township organization is committed to the legislature, the constitution prescribing no particular form or officers, and the legislature has the power to fix and limit the powers of township officers and to modify them at will."<sup>22</sup>

**Date of annual town meeting.** This section provides that the day of holding the township meeting shall be uniform throughout the state. In 1872 the General Assembly passed a general township organization act, and, in pursuance of this provision of the constitution, fixed the first Tuesday in April as the date of the annual township election. It is held that this act repealed that portion of the special charters of incorporated towns fixing a different election day.<sup>23</sup> In the case of *People v Hazelwood*<sup>24</sup> the court intimated that an act of the General Assembly, which fixed a different date for the election of township officers in townships whose limits were coextensive with cities, was a violation of this provision of the constitution.

**Section 6.** At the first election of County Judges under this Constitution, there shall be elected in each of the counties in this State, not under township organization, three officers, who shall be styled "The Board of County Commissioners," who shall hold sessions for the transaction of county business as shall be provided by law. One of said commissioners shall hold his office for one year,

<sup>19</sup> *People v Couchman*, 15 Ill. 142 (1853).

<sup>20</sup> See *People v Garner*, 47 Ill. 246 (1868).

<sup>21</sup> *People v Brayton*, 94 Ill. 341 (1880).

<sup>22</sup> *People v Commissioners of Cook County*, 176 Ill. 576 (1898).

<sup>23</sup> *Kelly v Gahn*, 112 Ill. 23 (1884).

<sup>24</sup> 116 Ill. 319 (1886).

one for two years, and one for three years, to be determined by lot; and every year thereafter one such officer shall be elected in each of said counties for the term of three years.

(See article 6, section 17, and schedule, section 4.)

**Section 7.** The county affairs of Cook county shall be managed by a Board of Commissioners of fifteen persons, ten of whom shall be elected from the city of Chicago, and five from towns outside of said city, in such manner as may be provided by law.

The constitution (article 4, section 22) prohibits special legislation with reference to the management of county or township affairs. It has been held, however, that this section constitutes an exception to that general provision, and that the General Assembly may pass special laws relating to the management of the affairs of Cook county. The basis for this construction is that the county commissioners are to manage the affairs of Cook county "in such manner as may be provided by law", thus implying a duty on the part of the General Assembly to pass laws relating to the management of the affairs of that county.<sup>25</sup>

But the power of the General Assembly to pass such laws does not deprive the commissioners of that county of certain implied powers. Thus the county commissioners may make appropriations for assistant state's attorneys, although there is no legislative authorization for doing so.<sup>26</sup>

Women may not vote for members of the board of commissioners of Cook County.<sup>27</sup> (See discussion, article 7, section 1, subheading, "Woman suffrage").

Section 17 of article 6 provides that "no person shall be eligible . . . to membership in the 'board of county commissioners' unless . . . he shall have resided in the state five years next preceding his election . . ." In the case of *People v McCormick*,<sup>28</sup> it was held that this requirement of five year's residence in the state, applied only to the board of county commissioners of counties not under township organization, (see article 10, section 6), and had no reference to the board of commissioners of Cook County provided for in this section. The court held that the qualifications for membership in the board of county commissioners of Cook County are fixed by section 6 of article 7 and, since that section makes one year's residence in the state a qualification for office, a statute requiring five year's residence as a qualification for membership in the board of commissioners of Cook county was invalid. (See discussion article 7, section 6).

**Section 8.** In each county there shall be elected the following County Officers at the general election to be held on the Tuesday after the first Monday in November, A. D. 1882, a County Judge,

<sup>25</sup> *People v Day*, 277 Ill. 543 (1917). And see *People v Commissioners of Cook County*, 176 Ill. 576 (1898); *Morrison v People*, 196 Ill. 454 (1902).

<sup>26</sup> *Nye v Foreman*, 215 Ill. 285 (1905); but see *Dahnke v People*, 168 Ill. 102 (1897).

<sup>27</sup> *People v Czarnecki*, 265 Ill. 489 (1914).

<sup>28</sup> 261 Ill. 413 (1914).

County Clerk, Sheriff and treasurer, and at the election to be held on the Tuesday after the first Monday in November, A. D., 1884, a Coroner and a Clerk of the Circuit Court (who may be ex-officio recorder of deeds, except in Counties having 60,000 and more inhabitants, in which Counties a Recorder of deeds shall be elected at the general election in 1884), each of said officers shall enter upon the duties of his office, respectively on the first Monday of December, after his election, and they shall hold their respective offices for the term of four years, and until their successors are elected and qualified:

Provided, That no person having once been elected to the office of Sheriff, or Treasurer shall be eligible to said office for four years after the expiration of the term for which he shall have been elected.<sup>29</sup>

It may be noted that this section provides that the sheriff and treasurer shall not be eligible to re-election "after the expiration of the term for which they have been elected." The Attorney General has held that a person appointed by the county board to act as county treasurer until a new treasurer may be elected, is eligible to be elected to succeed himself,<sup>30</sup> since, under this provision, only officers who have been elected are ineligible to succeed themselves. Thus, one who is elected to fill out the two year unexpired term of a deceased sheriff is in the opinion of the Attorney General, disqualified for re-election.<sup>31</sup>

**Sheriff.** In the case of *Dahnke v People*,<sup>32</sup> it was held that since this section provides for a sheriff without any limitation of his powers or enumeration of his duties, a sheriff such as was known at the common law is created. The General Assembly cannot, therefore, strip the sheriff of his common law prerogatives and functions, such as control of the county jail and court rooms. (See discussion article 5, section 1, subheading, "Attorney General;" Constitutional Convention Bulletin No. 1, p. 16.

**Section 9.** The clerks of all the courts of record, the Treasurer, Sheriff, Coroner and Recorder of Deeds of Cook county shall

<sup>29</sup>As modified by the second amendment to the constitution. The amendment was proposed by a resolution of the general assembly in 1879. It was ratified by the voters on November 2, 1880, and proclaimed adopted on November 22, 1880. Section 8 as originally adopted reads:

"Section 8. In each county there shall be elected the following county officers: County Judge, Sheriff, County Clerk, Clerk of the Circuit Court, (who may be ex officio Recorder of Deeds, except in counties having sixty thousand and more inhabitants, in which counties a Recorder of Deeds shall be elected at the general election in the year of our Lord one thousand eight hundred and seventy-two), Treasurer, Surveyor and Coroner, each of whom shall enter upon the duties of his office, respectively, on the first Monday of December after their election; and they shall hold their respective offices for the term of four years, except, the treasurer, sheriff and coroner, who shall hold their offices for two years, and until their successors shall be elected and qualified." See *People v Board of Supervisors*, 100 Ill. 495 (1881).

<sup>30</sup>Report Attorney General 1912, p. 696.

<sup>31</sup>Report Attorney General 1918, p. 778; 1918, p. 798; but see Report Attorney General 1910, p. 487.

<sup>32</sup>168 Ill. 102 (1891).

receive as their only compensation for their services, salaries to be fixed by law, which shall in no case be as much as the lawful compensation of a judge of the Circuit Court of said county, and shall be paid, respectively, only out of the fees of the office actually collected. All fees, perquisites and emoluments (above the amount of said salaries) shall be paid into the county treasury. The number of the deputies and assistants of such officers shall be determined by rule of the Circuit court, to be entered of record, and their compensation shall be determined by the County Board.

**In general.** This section provides that the salaries of certain Cook County officers shall be fixed by the General Assembly. Under section 10 of this article, the compensation of all county officers not named in this section, must be fixed by the county board. The Supreme Court has held that the General Assembly has no power to fix the salary of those officers of Cook County who are not named in this section, and who are county officers within the meaning of section 10 of this article. Thus, it has been held that the board of commissioners of Cook County, who are not mentioned in this section, are county officers within the meaning of section 10 of this article, and that, therefore, the General Assembly has no power to fix the compensation of the members of this board.<sup>33</sup> (See discussion article 10, section 10, subheading, "County officers").

**Deputies and assistants.** Although the salaries of the officers named in this section may be paid only from the fees collected by their respective offices, it has been held that the compensation of their deputies and assistants is not limited exclusively to such fees as a source of payment.<sup>34</sup> The salaries of these deputies and assistants, however, must be fixed by the county board. Thus, it was held that the Cook county employees' pension fund was invalid, insofar as it applied to these deputies and assistants, because the compulsory payment of the premiums entailed a monthly reduction of their salaries thereby depriving the county board of its constitutional power to fix the salaries of these employees.<sup>35</sup>

It will be noted that the number of the deputies and assistants is to be fixed by the circuit court of Cook County. And in the case of *People v Day*<sup>36</sup> the Supreme Court held that an act requiring the county board to make an annual appropriation covering the salaries of these employees did not operate to deprive the circuit court of its power to determine the number of deputies and assistants to be employed, since the court may fix the number required prior to the adoption of the appropriation bill by the county board.

**Fees.** This section requires that all fees, perquisites and emoluments, remaining after the salaries of the respective officers are paid, be turned over to the county treasury. It has been held that an act authorizing the county treasurer of Cook County to retain for his own use two per cent of the amount of inheritance taxes collected by him, is in violation of this section,<sup>37</sup> and that the county clerk of Cook county may not retain naturalization fees collected by him.<sup>38</sup> It is clear, from the foregoing, that an act in-

<sup>33</sup> *Wulff v Aldrich*, 124 Ill. 591 (1888).

<sup>34</sup> *County of Cook v Hartney*, 169 Ill. 566 (1897).

<sup>35</sup> *Helliwell v Sweitzer*, 278 Ill. 248 (1917); but see *People v Chetlain*, 219 Ill. 248 (1906).

<sup>36</sup> 277 Ill. 543 (1917).

<sup>37</sup> *Jones v O'Connell*, 266 Ill. 443 (1915).

<sup>38</sup> *People v Witzeman*, 268 Ill. 508 (1915).

creasing the fees of these officers will not amount to an increase in their compensation during their term of office.<sup>39</sup> (See discussion article 5, section 23, subheading, "Disposition of fees collected by officers in their official capacities"; article 10, section 10, subheading, "Fees").

**Section 10.** The County Board, except as provided in section nine of this article, shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses, and in all cases where fees are provided for, said compensation shall be paid only out of, and shall in no instance exceed, the fees actually collected; they shall not allow either of them more per annum than fifteen hundred dollars, in counties not exceeding twenty thousand inhabitants; two thousand dollars in counties containing twenty thousand and not exceeding thirty thousand inhabitants; twenty-five hundred dollars in counties containing thirty thousand and not exceeding fifty thousand inhabitants; three thousand dollars in counties containing fifty thousand and not exceeding seventy thousand inhabitants; thirty-five hundred dollars in counties containing seventy thousand and not exceeding one hundred thousand inhabitants; and four thousand dollars in counties containing over one hundred thousand and not exceeding two hundred and fifty thousand inhabitants; and not more than one thousand dollars additional compensation for each additional one hundred thousand inhabitants: Provided, that the compensation of no officer shall be increased or diminished during his term of office. All fees or allowances by them received, in excess of their said compensation, shall be paid into the county treasury.

**County board.** The term "county board" is a general term used to include the board of supervisors, in counties under township organization, the board of commissioners in counties which have not adopted township organization, and the constitutional board of commissioners of Cook county. It was also held to include the county court, in townships not under township organization, in cases where, under section 4 of the schedule, that court survived, for a brief period, the adoption of the constitution of 1870.<sup>40</sup>

**County offices.** This section provides that the county board shall fix the compensation of all county officers, except as provided in section 9. This exception eliminates from the purview of this section the clerks of the courts of record, the treasurer, sheriff, coroner, and recorder of deeds of Cook county.

Who are county officers within the meaning of this section? It has been suggested that the term "county officers," as used in this section, must include those officers who are named as county officers in section 8 of this article, viz: the county judge, county clerk, sheriff, treasurer, coroner, clerk of the circuit court and recorder of deeds.<sup>41</sup> A possible

<sup>39</sup> *People v Gaultier*, 149 Ill. 39 (1894).

<sup>40</sup> *Broadwell v People*, 76 Ill. 554 (1875).

<sup>41</sup> Report Attorney General 1908, p. 321; 1910, p. 387; 1914, p. 371.

doubt as to the accuracy of this suggestion might arise in the case of the county judge. That officer is named as a judicial officer in article 6, and section 32 of article 6 provides that the salaries of all officers named in that article shall be fixed by the General Assembly, where the salary of such officers is not otherwise provided for in that article. Furthermore, section 18 of article 6 authorizes the General Assembly to create districts of two or more contiguous counties in each of which districts there may be elected a single county judge. On the other hand it must be noted that no such districts have ever been created and that the General Assembly has never attempted to assume the powers exercised by the county boards in fixing the salaries of county judges.

The enumeration of county officers in section 8 is not exclusive. County commissioners are not named in section 8, but, in the case of *Wulff v Aldrich*,<sup>42</sup> it was held that the county commissioners of Cook County were county officers, whose compensation must be determined by the county board and could not be fixed by the General Assembly.

On the other hand, it can not be said that every officer who exercises jurisdiction in and for a county is a county officer, whose salary must be fixed by the county board. For example, it has been held that the county superintendent of schools can not be included within the purview of this section, since article 8, section 5 vests in the General Assembly the power to fix the compensation of that officer.<sup>43</sup> Similarly, it has been held that the state's attorney can not be deemed a county officer within the language of this section, since his office is created by section 22 of article 6, and section 32 of article 6 provides that the salaries of officers named in article 6 shall be fixed by the General Assembly, except as otherwise provided in that article.<sup>44</sup> Apparently the probate judge cannot be deemed a county officer within the purview of this section since the creation of that office is authorized by section 20 of article 6 and section 32 of article 6 appears to require, as in the case of the state's attorney, that the salary of the probate judge shall be fixed by the General Assembly.

The question of whether statutory officers are county officers within the scope of this section has given rise to some discussion. However, in 1913, in the case of *McAuliffe v O'Connell*,<sup>45</sup> it was held that by the use of the words "all county officers" the framers of the constitution intended to include only officers who were elected under the provisions of the constitution, and this section, therefore, has no application to offices created by the General Assembly since 1870. It was held in that case that the General Assembly might fix the salaries of the Cook county civil service commissioners, since such officers "were not known to the law at the time the constitution of 1870 was adopted."

**Fees.** This section provides that the county officers receiving fees shall pay into the county treasury all fees and allowances in excess of their salaries and expenses. It may also be noted that section 13 of this article requires that all officers receiving fees shall make a semi-annual report of such fees and emoluments. With few exceptions, it has been held that all sums received for official services, are fees. The Supreme Court has held that the following items are fees within the meaning of this section: money received under federal statutes, by county clerks, as fees in naturalization causes;<sup>46</sup> interest upon public money, received by the county treasurer;<sup>47</sup> money received from the state, by the sheriff, for conveying prisoners, and amounts received by the sheriffs, from the counties, for attendance upon

<sup>42</sup> 124 Ill. 591 (1888).

<sup>43</sup> *Jimison v Adams County*, 130 Ill. 558 (1889).

<sup>44</sup> *Hoyne v Danisch*, 264 Ill. 467 (1914).

<sup>45</sup> 258 Ill. 186.

<sup>46</sup> *People v Witzeman*, 268 Ill. 508 (1915).

<sup>47</sup> *County of Lake v Westerfield*, 273 Ill. 124 (1916).



court.<sup>48</sup> The Attorney General has said that the following amounts are fees within the meaning of this section: amounts received by the county clerks for issuing hunters' licenses;<sup>49</sup> statutory allowance of county clerks for making election returns;<sup>50</sup> statutory allowance to the county treasurer for collecting inheritance taxes;<sup>51</sup> amounts received by the county clerk as a member of the board of review;<sup>52</sup> amounts received by sheriffs for executing process from foreign counties, without deduction for expenses in executing such process;<sup>53</sup> amounts received by county clerk and county treasurer as *ex officio* clerk and treasurer of drainage districts;<sup>54</sup> amounts received by the county treasurer, from the state auditor, as mileage, to the state capital and return, in making final settlement;<sup>55</sup> amounts received by the county clerk for preparing assessment rolls for local improvements;<sup>56</sup> statutory commission of sheriff on sales of real estate.<sup>57</sup> On the other hand the Attorney General has held that the allowances received by the sheriff from the county for dieting prisoners is not a fee,<sup>58</sup> and any amounts received by the county judge for holding court outside of his county need not be reported as a fee, since there is no statutory authority for the county judge to receive any fees in such a case.<sup>59</sup> Similarly, the Supreme Court has held that the *per diem* received by the court bailiffs need not be accounted for as fees.<sup>60</sup>

(For similar provisions requiring fees to be paid into the treasury, see discussion article 5, section 23, subheading, "Disposition of fees collected by state officers in their official capacities"; article 10, section 9, subheading, "Fees")

**Salaries.** It may be noted that this section also provides that the county officers receiving fees shall be paid their salary and expenses only out of the fees collected by them. In the case of *Brissenden v County of Clay*,<sup>61</sup> the Supreme Court said that any attempt on the part of a county board to appropriate funds other than fees for the salary or expenses of these officers would be *ultra vires* and void.

The amounts fixed in this section as limits upon the compensation of the officers in the various classes of counties relate only to personal compensation, and do not in any way limit the expenses of the officers.<sup>62</sup> It seems clear that this section fixes a maximum amount which the county board may not exceed, but places no minimum upon the amount which the county board is required to pay county officers. Thus, the Supreme Court has held that in a county containing between 30,000 and 50,000 inhabitants the county board may fix the salary of the county clerk at less than \$2,000.<sup>63</sup>

**Increasing or diminishing compensation during term of office.** There are several provisions of the constitution forbidding changes in the salaries of officers during their terms of office. All of these provisions are considered together, elsewhere in this volume. It will, therefore be unnecessary to discuss here the cases relating to changes in the compensation of county officers during their terms of office. (See discussion article 4, section 21, subheading "County officers.")

<sup>48</sup> *People v Foster*, 133 Ill. 496 (1890).

<sup>49</sup> Report Attorney General 1912, p. 473.

<sup>50</sup> Report Attorney General 1900, p. 208; 1912, p. 462.

<sup>51</sup> Report Attorney General 1912, p. 226.

<sup>52</sup> Report Attorney General 1900, p. 216.

<sup>53</sup> Report Attorney General 1900, p. 216; 1912, p. 511.

<sup>54</sup> Report Attorney General 1900, p. 212; 1916, p. 358.

<sup>55</sup> Report Attorney General 1900, p. 212.

<sup>56</sup> Report Attorney General 1900, p. 212.

<sup>57</sup> Report Attorney General 1915, p. 317.

<sup>58</sup> Report Attorney General 1910, p. 418.

<sup>59</sup> Report Attorney General 1912, p. 478.

<sup>60</sup> *County of LaSalle v Milligan*, 143 Ill. 321 (1892).

<sup>61</sup> 161 Ill. 216 (1896).

<sup>62</sup> Report Attorney General 1910, p. 370.

<sup>63</sup> *Hall v Beveridge*, 81 Ill. 128 (1876).

Section 11. The fees of township officers, and of each class of county officers, shall be uniform in the class of counties to which they respectively belong. The compensation herein provided for shall apply only to officers hereafter elected, but all fees established by special laws shall cease at the adoption of this constitution, and such officers shall receive only such fees as are provided by general law.

This section had the effect of repealing all special laws relating to the fees of county and township officers. Thus an act passed prior to the adoption of the constitution, which provided for fees, for county and township officers in 51 counties different from those received by the same officers, in the other 51 counties in the state, was repealed by this section.<sup>64</sup>

(For a discussion of the question of the application of this section to compensation as well as fees of officers see discussion article 10, section 12, subheading, "Fees and compensation").

Section 12. All laws fixing the fees of State, County and Township officers shall terminate with the terms, respectively, of those who may be in office at the meeting of the first General Assembly after the adoption of this constitution; and the General Assembly shall, by general law, uniform in its operation, provide for and regulate the fees of said officers and their successors, so as to reduce the same to a reasonable compensation for services actually rendered. But the General Assembly may, by general law, classify the counties by population into not more than three classes, and regulate the fees according to class.

This article shall not be construed as depriving the General Assembly of the power to reduce the fees of existing officers.

In general. The previous section having abolished special acts relative to fees, and remitted the officers to the general law for the determination of their fees, it was intended that this section should abrogate the general laws with the expiration of the term of the officers then in office.<sup>65</sup> In the meantime, the General Assembly was directed to provide for, and regulate the fees of those officers, by a general law which would reduce the fees to a reasonable compensation for services actually rendered.

**Fees and compensation.** It appears that sections 11 and 12 were intended to relate only to the fees, to be charged the public, by township and county officers, as distinguished from the personal compensation of those

<sup>64</sup> Board of Supervisors v Jones, 63 Ill. 531 (1872); and see Union County v Patton, 63 Ill. 458 (1872).

<sup>65</sup> Chance v Marion County, 64 Ill. 66 (1872).

officers, since, at least as far as county officers are concerned, their compensation is regulated by section 10 of this article. This was the understanding in the constitutional convention of 1869-70. When section 11 was under consideration in that convention, a delegate suggested that this section was inconsistent with section 10, previously adopted, since that section fixed the compensation of all county officers. Another delegate responded that section 11 purported only to regulate the fees to be paid by the public and had no reference to the salaries of officers. (Debates, p. 1366.)

In *Board of Supervisors v Johnson*<sup>66</sup> decided in 1872, the Supreme Court took the view that section 11 related only to fees to be charged the public and had no application to the personal compensation of officers. In that case it was contended that an act of 1867, fixing the compensation to be paid the county superintendent of schools in all counties, except Cook county, at \$4 per day, was repealed by this section of the constitution. But the court said: "The *per diem* allowance to the county superintendent of schools may be regarded as 'compensation' and not as 'fees' in the sense in which that word is used in the constitution. Hence the 11th section cited can have no application and does not operate to repeal the law under which the compensation of the appellee was fixed." In 1912, the Attorney General said, in speaking of section 12: "This section relates to fees and has no relation whatever to compensation of public officers".<sup>67</sup>

However, it will be noted that section 12 provides that the fees shall be reduced to a "reasonable compensation for services actually rendered." But it is probable that these words were used to indicate that the fees should be proportioned to the services actually rendered the public and have no reference to the personal compensation of the officer receiving the fee. This latter view is strengthened perhaps by the case of *Cook County v Fairbank*.<sup>68</sup> In that case a statute provided for a probate docket fee in proportion to the value of the estate probated. In the particular case this fee amounted to \$1,250. It was held that this fee was not a reasonable compensation for services actually rendered. The court noted that the clerk did not receive the fee as personal compensation but that it was paid into the county treasury. The court said: "Clearly the framers of the constitution intended that the fees of the probate courts in counties of the third class should be based upon the amount, quality and quantity of the services performed by the clerks of said courts and not arbitrarily fixed on the basis of the value or amount of the estate which might pass through those courts".

However, it must be noted that the compensation of county officers is, in some degree, dependent upon the fees, since it is payable out of the fees collected. And in the case of township officers, the fees frequently constitute the entire compensation of the officer. Again, it must be noticed that section 11 provides that "the compensation herein provided for shall apply only to officers hereafter elected". One of the delegates on the constitutional convention moved to strike out the words quoted on the ground that the purpose of this section was the regulation of fees to be charged the public, and had no reference to personal compensation, but this motion was tabled without debate.

In the case of *People v Vickroy*.<sup>69</sup> decided in 1915, the Supreme Court took the view that sections 11 and 12 of the constitution regulated the personal compensation of the officers as well as the fees to be charged the public. In that case a statute provided that the town collector should receive a commission of two per cent on all moneys collected by him but that in certain classes of counties all excess of commissions and fees over \$1,500

<sup>66</sup> 64 Ill. 149 (1872); and see *Board of Supervisors v Christianer*, 68 Ill. 453 (1873).

<sup>67</sup> Report Attorney General (1912), p. 214; but see Report Attorney General 1914, p. 355.

<sup>68</sup> 222 Ill. 578 (1906).

<sup>69</sup> 266 Ill. 384. See *Hoyne v Danisch*, 264 Ill. 467 (1914).

should be paid into the county treasury, with a proviso that the town board of auditors might reduce the compensation to an amount below \$1,500. However, when the town board attempted to reduce the compensation, the Supreme Court held that this statute violated sections 11 and 12 of article 10 of the constitution. The court said: "The plain purpose of sections 11 and 12 of article 10 of the constitution was that the fees should be uniform in order to bring about a reasonable compensation for services actually rendered; that this uniformity might be based upon the classification of counties into three classes, regulated according to class. If the argument of counsel for appellant on this point is upheld it would place such a construction upon these constitutional provisions as would justify the fixing of a different salary in the manner herein provided for every town collector in the state. One town might pay a very large salary and another town of the same size with the same amount of work, immediately adjoining, might pay a very small salary. Such a construction would effectually destroy all regulation of fees according to the three different classes of counties, and also the purpose of the constitution that various town officials should receive a reasonable compensation for services actually rendered". The court in deciding this case made no reference to the constitutional debates, nor did it refer to the previous decision in the case of Board of Supervisors v Johnson.

It thus appears that there are directly conflicting decisions of the Supreme Court upon the question of whether sections 11 and 12 are limited in their application to the regulation of the fees to be charged the public by county or township officers, or whether those sections include within their purview also the regulation of the personal compensation of town and county officers.

**Section 13.** Every person who is elected or appointed to any office in this State, who shall be paid in whole or in part by fees, shall be required by law to make a semi-annual report, under oath, to some officer to be designated by law, of all his fees and emoluments.

"Following the directions of the constitution, the legislature enacted laws requiring every county officer who shall be paid, in whole or in part in fees, to keep a full, true and minute account of all fees and emoluments of his office, and on the first days of June and December of each year to make a return in writing under oath to the chairman of the county board, of all fees and emoluments of his office, of every name and character, and it is made the duty of the county board to examine such report and ascertain the balance of such fees, if any, and order such officer to pay over such balance, if any, to the county treasurer".<sup>70</sup>

The Supreme Court has held that this section of the constitution relates to constitutional officers and does not refer to statutory officers. Thus an act providing for an official court reporter is not invalid for failing to require a report of the fees of the reporter.<sup>71</sup> (For statement as to what are fees, see discussion article 10, section 10, subheading, "Fees").

<sup>70</sup> Watson, J. in *People v Witzeman*, 268 Ill. 508 (1915). See *Hurd's Revised Statutes*, Chap. 53, Secs. 51-2.

<sup>71</sup> *People v Chetlain*, 219 Ill. 248.

## ARTICLE XI—CORPORATIONS

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Section 1. No corporation shall be created by special laws, or its charter extended, changed, or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State, but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.

**Effect on existing laws.** This section did not repeal the general law relating to the organization of private corporations in force at the time of the adoption of the constitution. That law remained in effect until repealed by the General Assembly.<sup>1</sup>

**Municipal corporations.** The provisions of this section apply only to private corporations. They have no effect upon a special law organizing a municipal corporation, such as a drainage district.<sup>2</sup> (As to the restrictions upon special legislation relating to municipal corporations, see discussion article 4, section 22, subheading, "Necessity for general laws in other cases.")

**Amendment of charters.** The Supreme Court held in the case of *Braceville Coal Co. v People*,<sup>3</sup> that no corporate charter, under this section, may be either expressly or indirectly extended, changed or amended by the General Assembly, except "by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section." In this case, the court held invalid as an indirect amendment of corporate charters, by a special law, an act which required certain types of industrial corporations to pay wages weekly, for the reason that this act restricted the original charter powers of these corporations to contract in and about their business.

Section 2. All existing charters or grants of special or exclusive privileges, under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever.

<sup>1</sup> *Meeker v Chicago Steel Co.*, 84 Ill. 276 (1876).

<sup>2</sup> *Owners of Lands v People*, 113 Ill. 296 (1885).

<sup>3</sup> *Braceville Coal Co. v People*, 147 Ill. 66 (1893); see, also, *People v P. G. L. & C. Co.*, 205 Ill. 482 (1903).

**Burden of proof.** This section, it was held, did not operate to require a railroad corporation created under a special act of 1869, whose right to exist as a corporation was collaterally attacked in 1882, to prove, in the first instance, that it had completed its organization and complied with its charter within the time prescribed by this section. That is, this constitutional provision did not change the rule of evidence whereby a corporation is presumed to be at least a corporation *de facto* upon the introduction in evidence of its charter and of proof of the exercise of corporate powers. Non-compliance with the constitution must be proved by the party attacking the corporate existence.<sup>4</sup>

**Additional privileges.** It was held by the federal circuit court, that this section did not invalidate additional land grants and special privileges conferred upon a fully organized and operating railroad corporation in 1869, even though they enlarged the corporation's original charter powers, when these additional grants and special privileges had not been accepted by the corporation within the time prescribed by the constitution.<sup>5</sup>

**Extent of operation.** This section does not prescribe the extent to which the charter must have been in operation at the date specified. It requires, only, that it must, at that time, have been in operation to some appreciable extent. So, where the case was not that of a mere paper organization, nor that of a dormant charter, but one where there had been an actual organization and a considerable amount of corporate activity leading to the construction of a railroad, the completion thereof being hindered by injunction proceedings, it was held that the charter was in operation at the time prescribed within the meaning of this section.<sup>6</sup>

**Section 3.** The General Assembly shall provide, by law, that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

**In general.** The purpose of this section was to afford representation to minority stockholders. In the opinion of the Attorney General, its provisions are mandatory and self executing, and are applicable alike to all corporations, including banks. No other method may be devised for the election of directors.<sup>7</sup> The Attorney General has ruled that a statute providing that "no director shall be elected unless he shall have received votes representing at least a majority of the shares" of stock must, in view of this section, be construed to mean, not that the directors must be elected by a majority of all

<sup>4</sup> P. & P. U. Ry. Co. v P. & F. Ry. Co., 105 Ill. 110 (1882); St. L. A. & T. Co. v Belleville Ry. Co., 158 Ill. 390 (1895).

<sup>5</sup> State v I. C. Ry. Co., 33 Fed. 730 (1888).

<sup>6</sup> Mc Cartney v C. & E. Ry. Co., 112 Ill. 611 (1884).

<sup>7</sup> Durkee v People, 155 Ill. 354 (1895); Report Attorney General 1900, p. 109; 1910, p. 209.

votes cast, but that they must receive at least a number of votes equal to a majority of the shares of stock. That is, where there were 300 shares of stock, 9 directors to be elected, and, under the cumulative plan of voting prescribed by the constitution, a possible total of 2,700 votes, a director, to be elected, must receive at least 151 votes, representing a majority of the shares of stock, and not necessarily 1,351 votes, representing a majority of the total vote cast. To require otherwise, would, in his opinion, defeat the purpose of the constitution, namely, that of affording representation to minority stockholders.<sup>8</sup> (See discussion article 4, sections 7, 8).

**Bondholders.** This section prohibits a corporation from providing, in either its by-laws or its corporate bonds, that bondholders may vote for directors. That privilege is confined, by the provisions of this section, to the stockholders.<sup>9</sup>

**Preferred stockholders.** The Attorney General has ruled that this section does not secure to holders of preferred stock the privilege of voting for directors. An arrangement may be entered into, in his opinion, so far as the constitution is concerned, whereby the sole voting power is confined to holders of the common stock, while the holders of preferred stock are given preference in the payment of dividends, but are denied the power to vote.<sup>10</sup>

**Voting trusts.** Under the provisions of this section, the privilege of voting for directors may only be exercised by the stockholders, in person or by revocable proxy. They may not, by contract, deprive themselves of that privilege by conferring an irrevocable authority for a period of years upon one minority stockholder, as a trustee, to vote the great majority of the stock for directors, according to his sole discretion, and without any control by the stockholders. Such a contract is contrary to the policy established by the constitution, and may be avoided, by the stockholders who were parties thereto.<sup>11</sup>

**Section 4.** No law shall be passed by the General Assembly, granting the right to construct and operate a Street Railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such Street Railroad.

**Local authorities.** The federal circuit court held that the term "local authorities," as used in this section, means the officers of the municipal corporation elected by the people or appointed in a manner to which they have given their consent, as for instance, the mayor and common council of a city.<sup>12</sup> (See discussion article 9, section 9, subheading, "Corporate authorities.")

**Municipal control.** The Supreme Court has held that this section "merely means that the constitution has conferred upon the city power

<sup>8</sup> Report Attorney General 1908, p. 679.

<sup>9</sup> *Durkee v People*, 155 Ill. 354 (1895).

<sup>10</sup> Report Attorney General 1916, p. 164.

<sup>11</sup> *Luthy v Ream*, 270 Ill. 170 (1915).

<sup>12</sup> *Potter v C & E. S. Ry. Co.*, 158 Fed. 521 (1908).

to determine whether street railways shall be operated upon its streets, and if so, upon what streets. To this extent, and no further, the constitution has committed to the city, the control of the operation of street railways in its streets."<sup>13</sup> While, in granting its consent to the use of its streets by street railways, the city may impose such reasonable conditions as, in its discretion, the public welfare may require, such as an annual license fee for each car or an annual mileage tax,<sup>14</sup> (see discussion article 9, section 1, subheading, "License fees"), nevertheless, this power of the city to impose such conditions is subject to the paramount power of the state to regulate public utilities. (See discussion article 2, section 2; article 13, sections 1, 7.) For example, in the case of *C. & S. T. Co. v I. C. Ry. Co.*,<sup>15</sup> where a city had granted the use of a street to an interurban electric railway on the condition that the railway conform to the grade of the street, throughout its length, including the crossing of a steam railroad, it was held that the state, acting through the railroad and warehouse commission, could, for the public safety, refuse to permit the crossing of the steam railroad by the electric line to be effected at grade. Similarly, in the case of *City of Chicago v O'Connell*,<sup>16</sup> where an ordinance contract, entered into between a city and a street railway, specified, as the conditions of the grant of permission to use the streets, regulations as to rates of fare, transfers, routing, equipment, and number of cars, it was held that these regulations could be superseded by an order as to the same matters made by the state, acting through the public utilities commission.

**Section 5.** No State Bank shall hereafter be created, nor shall the State own or be liable for any stock in any corporation or joint stock company or association for banking purposes, now created, or to be hereafter created. No act of the General Assembly authorizing or creating corporations or associations, with banking powers, whether of issue, deposit or discount, nor amendments thereto, shall go into effect or in any manner be in force, unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for or against such law.

**Foreign banking corporations.** The Attorney General has ruled that sections 5 to 8, inclusive, of this article, establish a public policy against the granting of permission to banking corporations existing under the laws of other states or of foreign countries, to do business, through branch banks, in Illinois. In his opinion, the regulations prescribed by these sections of the constitution could not be effectually enforced against any but Illinois corporations.<sup>17</sup>

**Validation of special charters.** The Supreme Court held, in the case of *People v Lowenthal*,<sup>18</sup> that sections 2, 5 and 7 of this article impliedly

<sup>13</sup> *City of Chicago v O'Connell*, 278 Ill. 591 (1917); (recently affirmed by the United States Supreme Court).

<sup>14</sup> *Byrne v Chicago General Ry. Co.*, 169 Ill. 75 (1897); *Chicago General Ry. Co. v City of Chicago*, 176 Ill. 253 (1898).

<sup>15</sup> 246 Ill. 146 (1910).

<sup>16</sup> 278 Ill. 591 (1917); (recently affirmed by the United States Supreme Court); *Public Utilities Commission v C. & W. T. Ry. Co.*, 275 Ill. 555 (1916).

<sup>17</sup> Report Attorney General 1916, p. 190.

<sup>18</sup> 93 Ill. 191 (1879).



validated all charter powers granted to banking corporations of deposit or discount, by special acts which had been enacted prior to 1870, and which had not been submitted to the people, pursuant to article 10, section 5, of the constitution of 1848. This was on the assumption that the constitution of 1848 required such acts to be so submitted. (See discussion following subheading.)

**Referendum requirements.** The constitution of 1848 (article 10, section 5) contained the following provision: "No Act of the General Assembly, authorizing corporations or associations with banking powers, shall go into effect, or in any manner be in force, unless the same shall be submitted to the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for and against such law." This provision, the Supreme Court held in the case of *People v Lowenthal*,<sup>19</sup> applied, so far as original laws were concerned, only to laws relating to banks of issue; that is, banks having the power to issue bank notes or bills of credit. It did not require an act creating a banking institution with banking powers other than those of issue, namely, the power to accept deposits and to discount notes, to be submitted to the people.

Moreover, this provision of the constitution of 1848 did not require all amendments to banking laws to be submitted to the people. For example, it was held that amendments to a banking law which changed the mode of assessing bank property for purposes of taxation, and which modified the court procedure to be followed in enforcing the liability of bank stockholders, did not have to be submitted to the people, for the reason that the subject matter of these amendments related to revenue and judicial remedies, respectively, and not directly to banking functions.<sup>20</sup>

It will be noted, however, that the section of the constitution of 1870, now under consideration, differs from that quoted from the constitution of 1848, in that the present constitution expressly provides that "No act of the General Assembly authorizing or creating corporations or associations, with banking powers, *whether of issue, deposit or discount, nor amendments thereto,*" shall be effective without a vote of the people. The words in italics are not to be found in the corresponding section of the constitution of 1848. (As to the present status of banks of issue in Illinois, see discussion article 11, section 7).

The Supreme Court has held that this provision applies to an act authorizing the creation of non-stock savings bank associations with power to accept deposits and to discount notes,<sup>21</sup> and the Attorney General has suggested that it might apply to an act authorizing the creation of wage loan corporations, with power to borrow money and to make loans on the security of wage assignments,<sup>22</sup> so as to require these acts to be submitted to a popular vote.

It was held that the term "amendments thereto," as used in this section, included an act authorizing corporations, generally, including banks, to change the corporate name, so as to require that act to be submitted to the people, for the reason that it was the means of effecting an amendment of an important part of a bank's charter.<sup>23</sup>

(As to the history of the constitutional regulation of banking in this state, see *Constitutional Conventions in Illinois*, Second Edition, pp. 13, 41-42, 141.)

**Methods of submission.** The constitution requires that banking laws submitted to the people be submitted to a vote of the people of the state as a

<sup>19</sup> 93 Ill. 191 (1879).

<sup>20</sup> *Bank of Republic v County of Hamilton*, 21 Ill. 53 (1858); *Smith v Bryan*, 34 Ill. 364 (1864).

<sup>21</sup> *Reed v People*, 125 Ill. 592 (1888).

<sup>22</sup> Report Attorney General 1913, p. 30.

<sup>23</sup> *Sykes v People*, 132 Ill. 32 (1890); but see *Hurd's Revised Statutes* 1917, section 17, chapter 16a.

whole, and prohibits the submission of such acts to the people of particular localities, alone. As a result, the General Assembly is without power to enact local legislation relating to banks.<sup>24</sup>

The constitution does not prescribe the manner in which the voters of the state shall be afforded knowledge of the contents of the provisions of a banking law submitted for their approval. The General Assembly is, therefore, free to prescribe the manner in which the act submitted is described on the ballots.<sup>25</sup>

The Attorney General has ruled that since a referendum on banking laws is required by the constitution, women may not be authorized to vote on such a question.<sup>26</sup> (See discussion article 7, section 1, subheading, "Woman Suffrage.")

The submission of an amendment to a banking law is a constitutional step in the legislative process, and the courts may not determine the constitutionality of such a proposed law until every step in its enactment has been taken. Thus, in the case of *Spies v Byers*,<sup>27</sup> it was held that the court had no power, before the act was submitted to the people, to determine whether the private bank bill of 1917 had been validly enacted.

**Section 6.** Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

**Extent of liability—provisions self executing.** Under this section, the liability of a bank stockholder for the debts of the bank includes both the amount invested by him in the stock of the bank and a further amount, equal thereto, for which he is personally liable, but it is only for the latter sum that he may be sued by creditors of the bank. Thus, if a bank which has a capital of \$50,000, owes \$100,000, and is unable to pay its debts, and A owns \$500 worth of the bank stock, the creditors may not only subject the capital of the bank, including A's \$500, to the payment of their claims, but they may, in addition, since the capital is insufficient to liquidate the debt, sue A personally, for \$500, the amount of the stock held by him. They may not, however, hold him personally liable for more than that amount. The constitution does not contemplate that, in addition to having his share of the capital stock subjected to the payment of claims against the bank, a stockholder shall also be personally liable to creditors of the bank for an amount equal to twice the value of the stock held by him, as was suggested in an early case.<sup>28</sup>

This liability extends, however, only to the obligations contracted or incurred by the bank while the stockholder holds the stock, irrespective of when those obligations mature. It does not extend to obligations maturing or becoming payable while he owns the stock, when the credit was extended to the bank prior to the time when he became a stockholder. The term "liabilities accruing" does not mean "causes of action accruing." An assignment of the stock does not operate to release the original stockholder from his constitutional liability.<sup>29</sup>

<sup>24</sup> *Dupee v Swigert*, 127 Ill. 494 (1889).

<sup>25</sup> *People v La Salle Street Bank*, 269 Ill. 518 (1915).

<sup>26</sup> Report Attorney General 1916, pp. 146, 350.

<sup>27</sup> 287 Ill. 627 (1919).

<sup>28</sup> *Golden v Cervenka*, 278 Ill. 409 (1917).

<sup>29</sup> *Golden v Cervenka*, 278 Ill. 409 (1917).

Each stockholder is liable, to the extent indicated, by virtue of the constitution, for all of the debts of the bank. For example, a section of an act was held void which provided that a claim against a bank should be apportioned ratably among the stockholders, and that each stockholder should be liable only for his *pro rata* share of the debt. However, in this case the court held that the act as a whole would not be rendered incapable of enforcement by the invalidity of the section referred to, for the reason that: "The constitutional provision in regard to the liabilities of stockholders in banking institutions is a self-executing provision, and needs no legislation to enforce it. Being a part of the organic law, it requires no popular election to make its effect more binding. No banking Act can go into operation in this state of which the constitutional provision in question shall not be a part. By virtue of the inherent power of the constitution itself, such provision is grafted into every banking law, which is passed by the legislature or submitted to the votes of the people."<sup>30</sup>

**Enforcement.** The constitutional liability of bank stockholders for debts of the bank runs to the creditors, personally. It is a several and individual liability on the part of each stockholder to each creditor, and not to the creditors as a class. It is the creditors alone, individually or collectively, who can enforce the stockholders' liability. The creditors' rights being granted by the constitution, they cannot be restricted by the legislature. Therefore, the General Assembly is without power to authorize the collection of the debts due the creditors, and the consequent discharge of the stockholders from liability, by a receiver appointed by a court, without the creditors' consent.<sup>31</sup>

**Minors.** The Attorney General has ruled that the section under consideration prevents the issuance of bank stock to a minor, for the reason that the privilege of a minor to repudiate his stock purchase is incompatible with the unusual and absolute liability of bank stockholders for the debts of the bank.<sup>32</sup>

**Section 7.** The suspension of specie payments by banking institutions, on their circulation, created by the laws of this State, shall never be permitted or sanctioned. Every banking association now, or which may hereafter be, organized under the laws of this State, shall make and publish a full and accurate quarterly statement of its affairs, (which shall be certified to, under oath, by one or more of its officers) as may be provided by law.

Since 1866, the federal government, by a prohibitive tax, has prevented the issue of bank notes and bills of credit by all banks other than national banks. This, of course, was known to the framers of the constitution, in 1870. The provisions relating to banks of issue were inserted, however, to become operative in case the tax should be removed and the issue of bank notes and bills of credit by state banks should again become practicable.<sup>33</sup>

<sup>30</sup> *Dupee v Swigert*, 127 Ill. 494 (1889).

<sup>31</sup> *Golden v Cervenka*, 278 Ill. 409 (1917).

<sup>32</sup> Report Attorney General 1918, p. 77.

<sup>33</sup> Debates, pp. 1678-85.

Section 8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of State, of all bills or paper credit, designed to circulate as money, and require security, to the full amount thereof, to be deposited with the State Treasurer, in United States or Illinois State Stocks, to be rated at ten per cent, below their par value; and in case of a depreciation of said stocks to the amount of ten per cent below par, the bank or banks owning said stocks shall be required to make up said deficiency, by depositing additional stocks. And said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer thereof, and to whom such transfer is made.

(As to be present status of banks of issue in this state, see discussion article 11, section 7.)

Section 9. Every railroad corporation organized or doing business in this State, under the laws or authority thereof, shall have and maintain a public office or place in this State for the transaction of its business, where transfers of stock shall be made and in which shall be kept, for public inspection, books, in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amounts owned by them respectively; the amount of stock paid in and by whom; the transfers of said stock; the amount of its assets and liabilities, and the names and place of residence of its officers. The directors of every railroad corporation shall, annually, make a report, under oath, to the Auditor of Public Accounts, or some officer to be designated by law, of all their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law. And the General Assembly shall pass laws enforcing by suitable penalties the provisions of this section.

Corporate acts in other states. The federal circuit court held that this section did not render invalid corporate bonds executed at the New York office of an Illinois railroad corporation. The court said that the constitution "does not prevent the corporation from having [in addition to its local office] an office beyond the limits of the state, nor invalidate the acts of such corporations when performed out of the state."<sup>34</sup>

Section 10. The rolling stock, and all other movable property belonging to any railroad company or corporation in this State, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and

<sup>34</sup> Hervey v I. M. Ry. Co., 28 Fed. 169 (1884).

the General Assembly shall pass no law exempting any such property from execution and sale.

**Effect on early decisions.** Prior to the adoption of the constitution of 1870, the Supreme Court had held that the locomotives, freight and passenger cars, rails, ties and spikes, belonging to a railroad, constituted real property, at least for the purposes of railroad mortgages.<sup>35</sup> It will be noted that the express provisions of the section under consideration apparently establish a policy which is the opposite of that enunciated by these decisions.

**Section 11.** No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon public notice given, of at least sixty days, to all stockholders, in such manner as may be provided by law. A majority of the directors of any railroad corporation, now incorporated or hereafter to be incorporated by the laws of this State, shall be citizens and residents of this State.

**Franchises.** The term "franchises," as used in this section, includes not only the right to exist as a corporation, but the power to exercise the right of eminent domain, as well.<sup>36</sup>

**Consolidations.** The federal circuit court of appeals has held that the term "parallel," as used in this section, does not necessarily mean a line which is at all points equi-distant from the other. It means railroads running in the same general direction, which are in a position to compete with each other. Nor, does the term "consolidation," as used in this section, necessarily mean a merger or the creation of a new company of a permanent nature. Rather, that term is used in the sense of "union" and applies to schemes to unite either the stock, franchises or property of two parallel or competing roads. In this case, the court held that this section operated to render void a ten year lease of one railroad to another, both being local belt lines running along various routes from railroad termini in East St. Louis to a series of Mississippi river ferries.<sup>37</sup>

This section does not prohibit the building by one railroad, of another and parallel track, to be used in connection with the original line as a double track system. The second line is not a competing railroad within the meaning of the constitution.<sup>38</sup>

This section applies, so far as consolidations are concerned, to railroads only. It does not operate to prohibit the consolidation of parallel or competing electric street railways.<sup>39</sup>

**Residence of directors.** The Attorney General has suggested that, even in the absence of legislation, this section is mandatory and self executing

<sup>35</sup> *Palmer v Forbes*, 23 Ill. 301 (1860); *Hunt v Bullock*, 23 Ill. 320 (1860); *Titus v Mabee*, 25 Ill. 257 (1861).

<sup>36</sup> *C. W. & I. Ry. Co. v Dunbar*, 95 Ill. 571 (1880).

<sup>37</sup> *E. St. L. C. Ry. Co. v Jarvis*, 92 Fed. 735 (1899).

<sup>38</sup> *C. & M. E. Ry. Co. v C. & N. W. Ry. Co.*, 211 Ill. 352 (1904).

<sup>39</sup> *Venner v C. C. Ry. Co.*, 258 Ill. 523 (1913).

as to the residence requirements of railroad directors.<sup>40</sup> The Supreme Court held, however, in the case of *O. & M. Ry. Co. v People*,<sup>41</sup> that these requirements only apply to the directors of Illinois railroad corporations, and that they did not therefore, apply to the directors of a railroad corporation existing as the result of a merger of the stock, property and franchises, of Illinois, Indiana and Ohio corporations, under the laws of these three states.

**Section 12.** Railways heretofore constructed or that may hereafter be constructed in this State, are hereby declared public highways, and shall be free to all persons, for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State.

**Public highways.** Under this section, railroads are public highways only in a restricted sense. They are not public highways in the sense of public wagon roads upon which any one may travel with his own conveyance. They are public highways merely to the extent that all persons have an equal right upon them for travel and for the carriage of their goods, in the trains operated by the railroads, and to the further extent that the railroads are subject to control by governmental agencies so far as their relations with the public are concerned.<sup>42</sup>

It is the duty of railroads, under this section, to carry both passengers and freight, and a railroad incorporated under the laws of this state, which is engaged exclusively in the transportation of freight, may be compelled, by *mandamus*, to operate passenger trains.<sup>43</sup>

Moreover, the rolling stock of a railroad being personal property under the provisions of section 10 of this article, a railroad engaged in the business of switching and hauling the freight cars of other railroads, over its line, will under this section be held to the liabilities of a common carrier of those cars.<sup>44</sup>

**Connecting tracks.** The Supreme Court has held that connecting tracks, constructed by the shipper, over lands belonging to the shipper, connecting a coal mine or a manufacturing plant with the main line of a railroad, are not public highways within the meaning of this section and that they are not subject to a public use. For example it was held that the public had no right to use such a track for the shipment of supplies to a state charitable institution located near by, and that a railroad could be enjoined from making such a use of the connecting track.<sup>45</sup> However, a connecting track constructed by a manufacturing company in a city street, under a city ordinance, connecting its plant with a railroad line, has been held to be de-

<sup>40</sup> Report Attorney General 1914, p. 1224.

<sup>41</sup> 123 Ill. 467 (1888).

<sup>42</sup> *T. P. & W. Ry. Co. v Pence*, 68 Ill. 524 (1873); *Lord v City of Chicago*, 274 Ill. 313 (1916).

<sup>43</sup> *L. & M. Ry. Co. v People*, 222 Ill. 242 (1906); *People v St. L. A. & T. H. Ry. Co.*, 176 Ill. 512 (1898).

<sup>44</sup> *P. & P. U. Ry. Co. v C. R. I. & P. Ry. Co.*, 109 Ill. 135 (1884); *U. S. v U. S. Y. S. Co.*, 192 Fed. 330 (1912).

<sup>45</sup> *Koelle v Knecht*, 99 Ill. 396 (1881); *Scholl Bros. v P. & P. U. Ry. Co.*, 276 Ill. 267 (1916); *Kenna v C. H. & S. E. Ry. Co.*, 284 Ill. 301 (1918).

voted to a public use and to be a public highway, within the meaning of the constitution.<sup>46</sup> The distinction seems to be that in the one case, the track was laid by the shipper upon his own property, for a private use, while in the other case, the track was built upon lands belonging to the city as an agency of the public, and nothing appeared to indicate that the track was for the private convenience of the shipper. Moreover, the latter situation was dealt with in cases relating, primarily, to the question as to whether the city could grant the use of its streets for other than a public use.

**Maximum rates.** The Act of 1907, fixing a maximum rate for railroad passenger traffic in Illinois of two cents per mile, was enacted pursuant to this section. The constitution contemplates, however, that laws establishing reasonable maximum rates of charges shall merely fix maximum rates, beyond which the railroads cannot go in fixing their charges. The General Assembly is not precluded, therefore, by having fixed a maximum rate, from authorizing the public utilities commission to fix a rate for an interurban electric railroad of less than the maximum rate of two cents per mile.<sup>47</sup>

**Section 13.** No railroad corporation shall issue any stock or bonds, except for money, labor or property, actually received, and applied to the purposes for which such corporation was created; and all stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days public notice, in such manner as may be provided by law.

**Money, labor or property received and applied.** This section does not mean that stocks and bonds of a railroad corporation are void, unless issued in satisfaction of an existing liability of the company on account of money, labor or property previously received and applied to a corporate purpose. Its framers did not intend to preclude the usual and customary manner of financing railroads by the sale of their securities for money, labor or property, to be used thereafter for corporate purposes. This section does prevent, however, the fraudulent issue of such securities, on the pretense of using the proceeds for corporate purposes when, in fact, the proceeds are not and never were intended to be so used, and when the securities do not represent money, labor or property, either in possession or in expectancy. Thus, railroads may not lend, give away or sell their stocks and bonds on credit, nor may they dispose of them except for a present consideration and for a legitimate corporate purpose.<sup>48</sup>

However, if railroad stocks or bonds are properly issued within the limitations suggested, and then, later, the proceeds thereof are actually misappropriated or used for an illegitimate purpose, the corporation will not be allowed to avoid its liability to holders of the securities on the ground that the securities were void when issued. To this extent, at least, securities will not be held to be void in the hands of innocent purchasers. "In

<sup>46</sup> *People v Blocki*, 203 Ill. 363 (1903); *Chicago Dock Co. v Garrity*, 115 Ill. 155 (1885); *Truesdale v P. G. S. Co.*, 101 Ill. 561 (1882).

<sup>47</sup> *Public Utilities Commission v C. & W. T. Ry. Co.*, 275 Ill. 555 (1916).

<sup>48</sup> *P. & S. Ry. Co. v Thompson*, 103 Ill. 187 (1882); *People v U. E. Ry. Co.*, 263 Ill. 32 (1914); *Ry. Co. v Dow*, 120 U. S. 287.

short, when one, for a present consideration, in good faith purchases bonds or stocks in the regular course of business from a railroad company, and such consideration is accepted by the proper officers of the company, and nothing appears to show that it is to be used or applied to other than legitimate corporate purposes, such bonds or stocks, when thus issued, will be regarded as being issued for money, labor or property 'actually received and applied' within the meaning of the constitutional provision."<sup>49</sup>

This section not only forbids the issue of railroad securities where no money, labor or property is received, as a consideration, for corporate purposes; it also forbids a reckless, fraudulent or dishonest issue in excess of the consideration received. The mere fact, however, that the value of the securities issued exceeds the value of the money, labor or property received therefor will not render the transaction fraudulent and the issue void. Thus, where all that appeared in a petition by a state's attorney for leave to file an information in the nature of *quo warranto* was that \$1,400,000 worth of securities had been issued for money, labor and property worth but \$400,000, it was held that not even a *prima facie* case had been made out, and that to make the securities void under the constitution, there must appear, in addition to such facts, the further fact either of fraudulent intent or of such an excess that the law will presume fraud.<sup>50</sup> Such a case was held to have been made out when it was shown in a similar petition that as a part of a fraudulent scheme to evade the constitutional requirement in making a dishonest and fictitious issue of stocks and bonds, first, \$5,000,000 worth of stock had been given away to another corporation, at par, without any consideration whatever, and, second, \$4,387,000 worth of bonds had been issued and delivered for the construction of a railroad which, when completed and equipped, did not cost more than half that sum.<sup>51</sup>

Section 14. The exercise of the power, and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.

The Supreme Court has held that this section "was inserted out of abundance of caution, and simply declares such property to be subject to the recognized power of eminent domain, and, like other private property, protected by the limitation, that private property shall not be taken without just compensation, to be ascertained by a jury, unless the same is to be made by the State. It is simply a declaration of the law as to the power of the State, as held and known before any such declaration was made. It is simply a recognition of the truth, (and the placing of it beyond cavil), that the property of corporations is, insofar as concerns the ownership thereof, and insofar as concerns the profit or gain to be made from its use—to all intents and purposes—private property, although applied to a use in which the public have an interest."<sup>52</sup>

(As to the whole subject of eminent domain, see discussion article 2, section 13.)

<sup>49</sup> P. & S. Ry. Co. v Thompson, 103 Ill. 187 (1882).

<sup>50</sup> People v U. E. Ry. Co., 263 Ill. 32 (1914).

<sup>51</sup> People v U. E. Ry. Co., 269 Ill. 212 (1915).

<sup>52</sup> Mitchell v I. & St. L. Ry. & C. Co., 68 Ill. 286 (1873); L. S. & M. S. Ry. Co. v C. & W. I. Ry. Co., 97 Ill. 506 (1881); A. & S. Ry. Co. v Vandalia Ry. Co., 268 Ill. 68 (1915).



**Section 15.** The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws, by adequate penalties, to the extent, if necessary, for that purpose, of forfeiture of their property and franchises.

**Franchises.** The term "franchises", as used in this section includes not only the power to exist as a corporation but the power of a railroad corporation to exercise the right of eminent domain, as well.<sup>53</sup>

**Joint rates.** The Attorney General has ruled that this section authorizes and requires the General Assembly not merely to regulate the charges made by each carrier separately, but to regulate, also, the joint through rate tariff agreements made by two railroads hauling the goods over different parts of the same route.<sup>54</sup>

**Unjust discriminations.** The General Assembly has the power, irrespective of this section, by virtue of its "police power," to enact laws preventing unjust and unreasonable discriminations in railroad rates and to enforce that legislation by adequate and appropriate methods. (See discussion, article 2, section 2). Moreover, the railroad charters were originally granted subject to the common law duty of carriers to charge reasonable rates which would not unjustly discriminate between either individuals or communities. This constitutional provision merely makes it mandatory for the General Assembly to enact legislation embodying these policies. However, the discriminations forbidden both by the common law and by the constitution are those which are unjust or unreasonable in fact. Both the common law and the constitution recognize that not all discriminations are prohibited. By implication, therefore, this section denies to the General Assembly the power to prohibit discriminations which are neither unjust nor unreasonable.<sup>55</sup>

**Penalties.** The constitutional convention contemplated that the penalty of forfeiture of franchises should be invoked only in cases of extreme necessity, after more lenient penalties, such as graduated fines, had proved to be ineffectual. Thus, a statutory provision requiring the forfeiture of all franchises for the first offense of unreasonable or unjust discrimination, violates this section.<sup>56</sup> (See discussion, article 2, section 11.)

(As to the extent to which the General Assembly may delegate to a commission the power to fix railroad rates, see discussion, article 4, section 1, subheading, "Delegation of legislative power.")

<sup>53</sup> C. & W. I. Ry. Co. v Dunbar, 95 Ill. 571 (1880).

<sup>54</sup> Report Attorney General 1908, p. 526.

<sup>55</sup> C. & A. Ry. Co. v People, 67 Ill. 11 (1873).

<sup>56</sup> C. & A. Ry. Co. v People, 67 Ill. 11 (1873).



## ARTICLE XII—MILITIA

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Section 1. The militia of the State of Illinois shall consist of all ablebodied male persons, resident in the State, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this State.

Section 2. The General Assembly, in providing for the organization, equipment and discipline of the militia, shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

Section 3. All militia officers shall be commissioned by the Governor, and may hold their commissions for such time as the General Assembly may provide.

Section 4. The militia shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during their attendance at musters and elections, and in going to and returning from the same.

Section 5. The military records, banners and relics of the State, shall be preserved as an enduring memorial of the patriotism and valor of Illinois, and it shall be the duty of the General Assembly to provide by law for the safe-keeping of the same.

Section 6. No person having conscientious scruples against bearing arms shall be compelled to do militia duty in the time of peace: Provided, such person shall pay an equivalent for such exemption.

The power vested in Congress to organize, arm, equip and discipline the state militia is not exclusive. The state may exercise concurrent power of legislation not inconsistent with that of Congress. The control and authority over the militia is retained by the state except in so far as that power has been vested in Congress. The state may provide for organizing such portion of the militia into an active force as it may deem necessary to enforce its laws and maintain order. The organization of the active militia into the Illinois national guard is not a violation of the prohibition in the United States constitution against the keeping of troops by a state in time of peace. When the militia is not in the national service, the General Assembly may direct as to the organization of the militia. It is within the police power of the state to prohibit the organization of military companies other than those organized by the state or the United States.<sup>1</sup>

The Attorney General has said that a member of the national guard is subject to arrest by the civil authorities for treason, felony or breach of the peace even while engaged in active service for the state. It is no bar to a prosecution in the civil courts that the offender has been tried by court martial and punished for the same offense.<sup>2</sup>

(In connection with this article, see discussion article 2, section 15.)

<sup>1</sup>Dunne v People, 94 Ill. 120 (1879).

<sup>2</sup>Report Attorney General 1915, p. 230.

## ARTICLE XIII—WAREHOUSES

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Section 1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

In general. The warehouse article as a whole impliedly requires operators of public warehouses to refrain from practices that might have a tendency to make their private interests adverse to their duties as public warehousemen. For example, it has been held that, even in the absence of legislation, a public warehouseman is prohibited by this article from mixing his own grain with that of his customers and issuing warehouse receipts to himself therefor. Similarly, the General Assembly is without power to authorize such a practice.<sup>1</sup>

The provisions of the section under consideration contemplate that grain belonging to different owners will not, normally, be kept separate and that the holders of warehouse receipts will not, normally, receive back the same identical grains stored.<sup>2</sup>

Regulation of public warehouses. This article is not the source of the power of the General Assembly to regulate public warehouses. The General Assembly has the power to regulate public warehouses, that is, warehouses devoted to a public use and affected by a public interest, by virtue of what is commonly called the "police power."<sup>3</sup> (See discussion article 2, section 2.)

However, an elevator or warehouse where grain or other property is stored for a compensation, is not necessarily made a public warehouse for purposes of state regulation by this constitutional provision. It must, to be a public warehouse, for purposes of regulation by the state, be devoted to a public use and be affected by a public interest, in fact. In other words, it is the public agency and not the private business which the state, by the warehouse article of the constitution seeks to regulate. For example, it has been held that a cold storage warehouse, wherein fruit, vegetables, and dairy products are regularly stored for a compensation for residents of several states, and which is open to the use of all the members of the public, is a public warehouse for purposes of regulation by the state, not because of the provisions of the section under consideration, alone, but because it is devoted to a public use, in fact. On the other hand a grist mill does not become a public warehouse by virtue of this section of the constitution, when, infrequently, and in isolated cases, the owner of the mill stores grain for others, with or without charge, under an option to buy it and use it in his mill.<sup>4</sup>

<sup>1</sup> *Hannah v People*, 198 Ill. 77 (1902).

<sup>2</sup> *Snydacker v Blatchley*, 177 Ill. 506 (1899).

<sup>3</sup> *Munn v People*, 69 Ill. 80 (1873); *Munn v Illinois*, 94 U. S. 113 (1876); *Public Utilities Commission v Monarch Refrigerator Co.*, 267 Ill. 528 (1915).

<sup>4</sup> *Munn v People*, 69 Ill. 80 (1873); *Public Utilities Commission v Monarch Refrigerator Co.*, 267 Ill. 528 (1915); *Mayer v Springer*, 192 Ill. 270 (1901).

Section 2. The owner, lessee or manager of each and every public warehouse situated in any town or city of not less than one hundred thousand inhabitants, shall make weekly statements under oath, before some officer to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots, shall not be mixed with inferior or superior grades, without the consent of the owner or consignee thereof.

(See discussion article 13, section 7.)

Section 3. The owners of property stored in any warehouse, or holder of a receipt for the same, shall always be at liberty to examine such property stored, and all the books and records of the warehouse in regard to such property.

Section 4. All railroad companies and other common carriers on railroads shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of destination.

The provisions of this section and those of section 6 of this article authorize the enactment of legislation embracing the policies therein enunciated, applicable to railroads and common carriers. Therefore, since the constitution establishes both the policy of the regulation and the classification of those subject thereto, legislation which requires railroads to maintain scales for the weighing of grain at stations where grain is shipped, cannot be held invalid as being either unreasonable or class legislation. (See discussion article 13, section 7.) Moreover, this section makes the carrier responsible for any loss of grain in transit, to the full extent of its common law liability in such cases. Its only available excuses for such a loss are those recognized at common law, namely, an act of God, or the public enemy, or the contributory negligence of the shipper. Therefore, the carrier may not limit its liability, by a provision in a bill of lading, for loss caused by leakage, shrinkage or discrepancies in elevator weights. Such provisions are contrary to this section and are void.<sup>5</sup>

<sup>5</sup> Shellabarger Elevator Co. v I. C. Ry. Co., 278 Ill. 333 (1917).

Section 5. All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used, by such railroad companies; and all railroad companies shall permit connections to be made with their track, so that any such consignee, and any public warehouse, coal bank or coal yard may be reached by the cars on said railroad.

**Track which can be used.** The Supreme Court has held that the phrase in the first clause of this section, "any track . . . used, or which can be used, by such railroad companies," includes only those connecting tracks, spurs or switch tracks which can lawfully be used by the railroad company by virtue of some contract with, or license or permission received from the owner thereof. Moreover, in the absence of such authority, the mere fact that the track has been used, infrequently, without right, will not bring the case within this rule. In other words, the constitution can not be construed to compel a trespass.<sup>6</sup>

**Duty to permit connections.** Under the second clause of this section, a railroad company must permit connections to be made with its tracks from coal mines, coal banks, coal yards and public warehouses. (As to whether these connections, when made, are subject to a public use, see discussion article 11, section 12, subheading, "Connecting tracks.") The railroad company may exercise a reasonable discretion as to the point of connection at the time it is made, but not afterward. Once a connection has been made, it may not be discontinued by the railroad. If the privilege is abused, other remedies than removal must be resorted to, to stop and procure reparation for the abuse. If the connection is disrupted by the railroad it must be restored, and the General Assembly is not prohibited from authorizing the public utilities commission to require the railroad company, in reasonable cases, to restore the connection at its own expense.<sup>7</sup>

The duty of the railroad company to permit connections to be made and maintained between its line and a public warehouse, however, does not grant a perpetual right to the shipper to have the connection maintained at the original grade. A city, for the public safety, may require the main line to be elevated. Moreover, the railroad company has the right to elevate its tracks in good faith, for efficiency, economy or safety of operation. In such cases, the connection may be severed, but the warehouseman has the right, under the provisions of this section, to a connection at the new grade.<sup>8</sup>

It has been held that the second clause of this section, relative to connections with coal yards and coal banks, refers only to the duties of carriers and not to those of the owners of the coal banks or coal yards. Therefore, it does not have any bearing on the question as to whether coal mining is a public utility for purposes of regulation by legislation applicable to that business alone.<sup>9</sup>

<sup>6</sup> Hoyt v C. B. & Q. Ry. Co., 93 Ill. 601 (1879); C. M. & N. Ry. Co. v National Elevator Co., 153 Ill. 70 (1894).

<sup>7</sup> Chicago Dock Co. v Garrity, 115 Ill. 155 (1885); C. & A. Ry. Co. v Sufferin, 129 Ill. 274 (1889); Public Utilities Commission v L. E. & W. Ry. Co., 277 Ill. 574 (1917); U. S. Adv. Opinions, 1918-19, p. 410.

<sup>8</sup> Lord v City of Chicago, 274 Ill. 313 (1916).

<sup>9</sup> Millett v People, 117 Ill. 294 (1886).

Section 6. It shall be the duty of the General Assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the constitution, which shall be liberally construed so as to protect producers and shippers. And the enumeration of the remedies herein named shall not be construed to deny to the General Assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common law remedies.

(See discussion article 13, sections 1, 4.)

Section 7. The General Assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce.

The General Assembly has the power to pass grain inspection laws and to vest the enforcement thereof in a commission, irrespective of this constitutional provision, by virtue of its "police power." (See discussion article 2, section 2.) The Supreme Court has held that under this section, "no system is prescribed, and the General Assembly is, therefore, left to the exercise of its discretion in the enactment of statutes, in compliance with this mandate." Legislation of this character, moreover, may be made applicable only to cities of more than 100,000 population, for "the constitution itself, in article 13, section 2, discriminates between public warehouses in cities of not less than 100,000 inhabitants, and those in cities of less population, and recognizes that there is a necessity for regulations in respect to the former, not necessary to the latter."<sup>10</sup>

<sup>10</sup> People v Harper, 91 Ill. 357 (1878).



## ARTICLE XIV—AMENDMENTS TO THE CONSTITUTION

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Section 1. Whenever two-thirds of the members of each house of the General Assembly shall, by a vote entered upon the journals thereof, concur that a Convention is necessary to revise, alter or amend the constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the General Assembly shall, at the next session, provide for a convention, to consist of double the number of members of the senate, to be elected in the same manner, at the same places, and in the same districts. The General Assembly shall, in the act calling the Convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with the expenses necessarily incurred by the convention in the performance of its duties. Before proceeding the members shall take an oath to support the Constitution of the United States, and of the State of Illinois, and to faithfully discharge their duties as members of the Convention. The qualification of members shall be the same as that of members of the Senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the General Assembly. Said Convention shall meet within three months after such election, and prepare such revision, alteration or amendments of the Constitution as shall be deemed necessary, which shall be submitted to the electors for their ratification or rejection, at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved, by a majority of the electors voting at the election, no such revision, alterations or amendments shall take effect.

This section has never been interpreted by the Supreme Court. The Attorney General, however, has been called upon to construe some of its provisions.

Women cannot vote on the question of calling a constitutional convention; nor can they vote for delegates to the convention.<sup>1</sup> (See discussion article 7, section 1, subheading, "Woman suffrage").

A member of the General Assembly may be a candidate for the position of delegate but, if he is elected and qualifies as a delegate, he vacates his seat in the General Assembly.<sup>2</sup> (See discussion article 3, section 3, subheading, "Qualifications of members of the General Assembly").

Delegates must be nominated and elected in the same manner as

<sup>1</sup> Report Attorney General 1917-18, p. 1128. See *Scown v Czarnecki*, 264 Ill. 305 (1914).

<sup>2</sup> Opinion Attorney General, March 1, 1919.

senators and, since senators are nominated in primary elections, delegates must also be nominated in primary elections.<sup>3</sup>

(For a further discussion of the provisions of this section, see Constitutional Conventions in Illinois, Second Edition, pp. 50-56)

**Section 2.** Amendments to this Constitution may be proposed in either House of the General Assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon, shall be entered in full on their respective journals, and said amendments shall be submitted to the electors of this State for adoption or rejection, at the next election of members of the General Assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this Constitution. But the General Assembly shall have no power to propose amendments to more than one article of this Constitution at the same session, nor to the same article oftener than once in four years.

**Vote required.** An amendment to the constitution is not adopted unless it is voted upon favorably by a majority of the voters participating in the election at which it is submitted. The fact that it receives the favorable votes of a majority of those voting for members of the General Assembly is not sufficient, unless that majority is equal to a majority of the total number of votes cast at the election.<sup>4</sup> The phrase "majority of votes" means a majority of male votes, as women cannot vote on the question of adopting a constitutional amendment.<sup>5</sup> (See discussion article 7, section 1, subheading, "Woman suffrage").

**Amendments to more than one article.** While the General Assembly has no power to propose amendments to more than one article of the constitution at the same session, this does not deprive the General Assembly of the power to propose an express amendment to one article, the effect of which will be to work implied changes in other articles, provided that the implied changes are germane and incidental to the purpose of the express amendment.<sup>6</sup> An amendment, however, must be proposed to that article of the constitution to which it has the most definite relationship. For example, the Attorney General has held that a constitutional amendment with reference to taxation must be proposed to the article relating to revenue, and cannot be proposed to the article relating to the legislative department.<sup>7</sup> The Attorney General has also held that this provision of the constitution cannot be evaded by having the General Assembly

<sup>3</sup> Opinion Attorney General, January 28, 1919.

<sup>4</sup> *People v Stevenson*, 281 Ill. 17 (1917).

<sup>5</sup> Report Attorney General 1916, pp. 146, 351. See *Scown v Czarnecki*, 264 Ill. 305 (1914).

<sup>6</sup> *City of Chicago v Reeves*, 220 Ill. 274 (1906).

<sup>7</sup> Report Attorney General 1913, p. 100. See *City of Chicago v Reeves*, 220 Ill. 274 (1906).

propose an amendment to one article at its regular session, and then calling a special session of the General Assembly at which an amendment to another article is proposed, both to be submitted to the voters at the same election; in his opinion amendments to only one article of the constitution can be submitted at any given election.<sup>8</sup> (See Constitutional Conventions in Illinois, Second Edition, pp. 29-35, 46, 98, 135-137).

**Date of going into effect.** An amendment to the constitution becomes a potential and operative part of the constitution as soon as it is proclaimed adopted by the proper canvassing authorities.<sup>9</sup>

<sup>8</sup> Report Attorney General 1912, p. 102.

<sup>9</sup> People v Board of Supervisors, 100 Ill. 495 (1881).



## SECTIONS SEPARATELY SUBMITTED

### ILLINOIS CENTRAL RAILROAD

No contract, obligation or liability whatever, of the Illinois Central Railroad Company, to pay any money into the State treasury, nor any lien of the State upon, or right to tax property of said Company, in accordance with the provisions of the charter of said company, approved February tenth, in the year of our Lord one thousand eight hundred and fifty-one, shall ever be released, suspended, modified, altered, remitted, or in any manner diminished or impaired by legislative or other authority; and all moneys derived from said company, after the payment of the State debt, shall be appropriated and set apart for the payment of the ordinary expenses of the State government, and for no other purpose whatever.

The Illinois Central Railroad was chartered in 1851. By its charter it was authorized to construct a railroad "from the southern terminus of the Illinois and Michigan canal, to the city of Cairo, with a branch to the city of Chicago, and also a branch, via the city of Galena, to a point on the Mississippi river, opposite the town of Dubuque, in the state of Iowa." Whenever this line crossed lands owned by the state, the charter granted a right of way not exceeding two hundred feet in width across those lands. In addition the railroad was granted 2,595,000 acres of land, received by the state from the federal government for railroad purposes. In return for these grants the railroad was required to pay five per cent of its annual gross income to the state. Moreover, an annual tax was to be assessed by the Auditor of Public Accounts upon all the corporate assets, as determined from a statement of those assets filed annually by the company with the Auditor. If this tax should exceed three-fourths of one per cent the excess was to be deducted from the annual payment of five per cent. In case the sum of these two taxes should not equal seven per cent of the annual income of the company, it was required to pay seven per cent of its yearly income to the state in lieu of all other taxes. (Charter of Illinois Central Railroad Company, Private Laws, 1851, pp. 61-74; Brownson, History of the Illinois Central Railroad to 1870, University of Illinois studies in the Social Sciences 1915.)

During the period from 1859 to 1870 the railroad paid annually into the state treasury the seven per cent. of its gross earnings required by the charter. The proposed constitution of 1862 had a provision that the legislature should not modify, alter, remit or impair the obligation to make this payment. In the constitutional convention of 1869-70 representatives of the counties through which the railroad operated wished to have the amount received by the state under the charter distributed among the counties in which the right of way lay, in view of the fact that those counties were compelled to forego the collection of taxes from the railroad. But the opponents of this measure finally prevailed and the last clause of the section making this fund applicable solely to state purposes was adopted. (Debates, pp. 1199-1202; 1243-1256.)

This section was submitted to the people separately and was adopted by a vote of 147,032 in favor of the section, to 21,310 votes against it. The only counties in which a majority of the voters were opposed to the adoption of the section were Champaign, Fayette, Iroquois, Kankakee and Marion. (Debates, pp. 1894-1895.)

This section has met with slight attention from the courts. However, the provisions of the charter of the company exempting it from taxation have been strictly construed. (See discussion article 9, section 3, subheading, "Commutations—Illinois Central Railroad Company.")

In the report of the case of State of Illinois v Illinois Central Railroad Company, decided by the Supreme Court in 1910,<sup>1</sup> there is a resumé of the relations between the railroad and the state, including the court's interpretation of the duties of the company under its charter, particularly with respect to the mode of computing its gross revenue.

#### MINORITY REPRESENTATION.

(See article 4, sections 7, 8).

#### MUNICIPAL SUBSCRIPTION TO RAILROADS OR PRIVATE CORPORATIONS

No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of, such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.

**Railroads.** The constitution of 1848 provided in section 38 of article 3 that the credit of the state should not be given in aid of any individual, association or corporation. (See Constitutional Conventions in Illinois, Second Edition, p. 13). This precluded the state from making donations to railroads or making subscriptions to railroad stocks, but it did not prevent counties, cities, townships and other municipalities, when authorized by the General Assembly, from making such donations or subscriptions.<sup>2</sup> When the constitutional convention of 1869-70 assembled, the municipalities of the state were engaged in a reckless competition to secure railroads by voting extravagant subsidies. This provision of the constitution was inserted to stop this practice. A separate vote was had upon this section and it was adopted by a large majority.

By far the greater number of cases arising under this section have arisen with reference to the construction to be given to the last clause, which provides that subscriptions may be made after the adoption of the constitution "where the same have been authorized, under existing laws by a vote of the people of such municipalities prior to such adoption". In the main it appears that four questions arise with respect to whether or not specific subsidies fall within this saving clause:

(1) The first question relates to the exact date from which the voting of subscriptions is prohibited. In one case a subscription was voted at a

<sup>1</sup> 246 Ill. 188; see, also, *People v I. C. R. R. Co.*, 273 Ill. 220 (1916); Report Attorney General 1914, pp. 44-76; 1916, pp. 31-2.

<sup>2</sup> *Prettyman v Supervisors of Tazewell County*, 19 Ill. 406 (1858).

town meeting held at 9:00 A. M., July 2, 1870, the date of the election at which the constitution was adopted.<sup>3</sup> The Supreme Court of the United States held that this subscription was a valid subscription within the last proviso of the section, since it was voted prior to the adoption of the constitution.<sup>4</sup> However, in another case, where the proposition of railroad aid and the matter of adopting the constitution were balloted upon at the same polls the Supreme Court of Illinois held that the vote authorizing the subscription was not taken prior to the adoption of the constitution.<sup>5</sup>

(2) Another question arose with respect to the interpretation to be given the words "under existing laws" in the clause which allows subscriptions to be made after the adoption of the constitution if they were "authorized under existing laws by a vote of the people of such municipalities prior to such adoption." The Supreme Court took the view that the words "under existing laws" referred to laws existing at the time of the vote of the people of the particular municipality, rather than laws existing at the time of the adoption of the constitution. Thus where a subscription was voted in 1867 without legislative authority, and in 1869 an act was passed validating such election, it was held that the subscription could not be made after July 2, 1870, since it was not authorized under existing laws prior to the adoption of the constitution.<sup>6</sup>

(3) A somewhat peculiar question arose where subscriptions were authorized upon certain conditions by vote taken prior to 1870, and after that date it was attempted to make the subscription upon altered conditions. The Supreme Court took the view that a subscription could be made after the adoption of the constitution only upon the exact condition, by which the people, by the vote taken prior to such adoption, had authorized it to be made.<sup>7</sup>

(4) It will be noticed that the first portion of this section inhibits both donations and subscriptions, while the saving clause by its terms refers only to subscriptions. However, the Supreme Court held that donations were impliedly included within the saving proviso.<sup>8</sup>

(See Schedule, section 24).

**Private corporations.** While, under the constitution of 1848 the General Assembly might authorize counties, cities, townships and other municipalities to make donations to, or subscriptions to the capital stock of railroads,<sup>9</sup> it was held that such municipalities could not be authorized to make donations to private manufacturing corporations, since such an expenditure of municipal funds would not be for a "corporate purpose" within the purview of section 5 of article 9 of the constitution of 1848.<sup>10</sup> (See discussion article 9, section 9, subheading, "Corporate purposes.") However, in one case this separate section has been applied in holding invalid a municipal donation to a private corporation, without any reference to the question of whether the donation was for a corporate purpose. In 1867 the General Assembly incorporated the Washingtonian Home for the care of inebriates, and provided that the city of Chicago should pay to the Home one-tenth of the money received from liquor licenses. The Supreme Court, without any consideration of whether this donation was for a "corporate purpose", held that it was invalid as a donation to a private corporation within the prohibition of the section under discussion.<sup>11</sup> But a statute mak-

<sup>3</sup> This section was submitted to the people separately, and the Supreme Court held that, under section 12 of the schedule, sections submitted separately took effect upon the day upon which they were approved by the people (July 2, 1870), instead of the date specified in the schedule for the remainder of the constitution to go into effect (August 8, 1870). See *Schall v Bowman*, 62 Ill. 321 (1872).

<sup>4</sup> *Louisville v Savings Bank*, 104 U. S. 469 (1881).

<sup>5</sup> *People v Town of Bishop*, 111 Ill. 124 (1884).

<sup>6</sup> *Williams v People*, 132 Ill. 574 (1890).

<sup>7</sup> *Richeson v People*, 115 Ill. 450 (1886).

<sup>8</sup> *C. & I. R. R. Co. v Pinckney*, 74 Ill. 277 (1874).

<sup>9</sup> *Prettyman v Supervisors of Tazewell County*, 19 Ill. 406 (1858).

<sup>10</sup> *Mather v City of Ottawa*, 114 Ill. 659 (1885); *Bissell v City of Kankakee*, 64 Ill. 249, (1872); *English v People*, 96 Ill. 566 (1880).

<sup>11</sup> *Washingtonian Home v City of Chicago*, 157 Ill. 414 (1895).

ing a city liable for loss of private property occasioned by the action of a mob was held not to fall within the inhibition of this section.<sup>12</sup> It was also held that an agreement between the city of Chicago and a railroad, whereby the city agreed to pay all damage sustained by private property owners in the elevation of the railroad tracks, did not violate this section.<sup>13</sup>

#### CANALS

The Illinois and Michigan Canal, or other canal or waterway owned by the State shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to a vote of the people of the State at a general election, and have been approved by a majority of all the votes polled at such election. The General Assembly shall never loan the credit of the State or make appropriations from the treasury thereof, in aid of railroads or canals;

Provided, that any surplus earnings of any canal, waterway or water power may be appropriated or pledged for its enlargement, maintenance or extension; and,

Provided, further, that the General Assembly may, by suitable legislation, provide for the construction of a deep waterway or canal from the present water power plant of the Sanitary District of Chicago at or near Lockport, in the township of Lockport, in the county of Will, to a point in the Illinois river at or near Utica, which may be practical for a general plan and scheme of deep waterway along a route which may be deemed most advantageous for such plan of deep waterway; and for the erection, equipment and maintenance of power plants, locks, bridges, dams and appliances sufficient and suitable for the development and utilization of the water power thereof; and authorize the issue, from time to time, of bonds of this State in a total amount not to exceed twenty million dollars, which shall draw interest, payable semi-annually, at a rate not to exceed four per cent per annum, the proceeds whereof may be applied as the General Assembly may provide, in the construction of said waterway and in the erection, equipment and maintenance of said power plants, locks, bridges, dams and appliances.

All power developed from said waterway may be leased in part or in whole, as the General Assembly may by law provide, but in the event of any lease being so executed, the rental specified therein for water power shall be subject to a revaluation each ten years of the term created, and the income therefrom shall be paid into the treasury of the State.<sup>14</sup>

<sup>12</sup> City of Chicago v Cement Co., 178 Ill. 372 (1899).

<sup>13</sup> City of Chicago v P. C. C. & St. L. Ry. Co., 244 Ill., 220 (1910).

<sup>14</sup> As amended by the seventh amendment to the constitution. The amendment was proposed by a resolution of the general assembly in 1907. It was ratified by the voters on November 3, 1908, and proclaimed adopted on November 24, 1908. The original section was as follows:

"The Illinois and Michigan Canal shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted



Almost as soon as Illinois was admitted to statehood, the project for a canal, connecting the waters of Lake Michigan with those of the Illinois river, took form. In 1822, the federal government made the first grant of land to the state for canal purposes. The problem of financing this internal improvement proved a difficult one, and it was not until 1848 that the Illinois and Michigan Canal, connecting the south branch of the Chicago river with the Illinois river at Utica, was opened to navigation. The total cost of this improvement was approximately six and one half million dollars. At this time, and until 1871, the title to the canal was vested in a board of trustees, who managed the waterway for the benefit of its creditors. The canal had a prosperous career during this period, and in April, 1871, all of the creditors were paid and the trust was dissolved. At this time the trustees paid over to the state a balance of approximately ninety-six thousand dollars. (See Putnam, *The Illinois and Michigan Canal*, University of Chicago Press, 1918, pp. 61-65).

The provision against leasing or selling the canal was inserted in the constitution of 1870 to prevent the railroads from buying or leasing the canal for the purpose of drying it up, and thereby throttling competition. The second sentence providing against any appropriation of money by the General Assembly in aid of canals was inserted to prevent the canal from becoming a burden upon the state in case its expenses should exceed its revenues. (Debates, pp. 311-479; 484-487). This section was submitted to the people separately and was adopted by a large majority.

Commencing in 1879 the annual expenses of the canal exceeded the annual tolls, and the General Assembly fell into the practice of making biennial appropriations from the state treasury to cover the deficits. However, in 1904, in the case of *Burke v Snively*,<sup>15</sup> it was held that such appropriations violated this provision of the constitution. In that case the court said: "We are of the opinion that the true meaning of the constitutional provision with reference to the canal is, that the legislature should have power to operate it to the extent, and to the extent only, that the income of the canal would defray the expenses of operation, maintenance and preservation, and that no moneys shall be appropriated from the treasury of the state in aid of the operation, maintenance or preservation thereof, and that if the earnings of the canal produced a surplus, appropriations of such surplus might be made to aid in the enlargement or extension of the canal, should the legislature deem it wise to so appropriate such surplus."

The Supreme Court has held that the provision against selling or leasing the canal without a popular vote prevented the canal commissioners from giving the city of Chicago the right to maintain perpetually a sewer under the canal. All that can be given in such a case is a license, revocable at will.<sup>16</sup>

In 1908 this section was amended to provide for the construction of a deep waterway from Lockport to Utica. After the passage of this amendment it was urged upon the Supreme Court that an act of the General Assembly providing for an eight foot waterway from Lockport to Utica, for which the obligations of the state were to be issued, violated this section, since the proviso stipulating a "deep waterway" meant a waterway which ocean-going vessels could navigate. But the court refused to hold that an eight foot waterway was not a deep waterway.<sup>17</sup>

to a vote of the people of the state, at a general election, and have been approved by a majority of all the votes polled at such election.

"The General Assembly shall never loan the credit of the State or make appropriations from the treasury thereof, in aid of railroads or canals: Provided that any surplus earnings of any canal may be appropriated for its enlargement or extension."

<sup>15</sup> 208 Ill. 328 (1904).

<sup>16</sup> *City of Chicago v Green*, 238 Ill. 258 (1909); Report Attorney General 1914, p. 123; 1918, p. 699; but see *People v Economy Power Company*, 241 Ill. 290 (1909).

<sup>17</sup> *Hubbard v Dunne*, 276 Ill. 598 (1917).

## CONVICT LABOR.

Hereafter it shall be unlawful for the Commissioners of any Penitentiary, or other reformatory institution in the State of Illinois, to let by contract to any person, or persons, or corporations, the labor of any convict confined within said institution.<sup>18</sup>

<sup>18</sup> The separate section relating to convict labor was added as the fourth amendment to the constitution. The amendment was proposed by resolution of the general assembly in 1885. It was ratified by the voters on November 2, 1886, and proclaimed adopted on November 22, 1886. The original amendment contains no title.

## SCHEDULE

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That no inconvenience may arise from the alterations and amendments made in the constitution of this State, and to carry the same into complete effect, it is hereby ordained and declared:

Section 1. That all laws in force at the adoption of this Constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this State, individuals, or bodies corporate, shall continue to be as valid as if this Constitution had not been adopted.

The provisions of this section are the same as those of section 1 of the schedule of the constitution of 1848. The Supreme Court had occasion to construe these provisions of the constitution of 1848 in the case of *Wood v Blanchard*.<sup>1</sup> The constitution of 1818 had expressly created the office of coroner, and had left the matter of providing for the election and duties of that officer, to the General Assembly. Legislation of that character, enacted in 1819, as amended in later years, was still in force when the constitution of 1848 was adopted. That constitution did not expressly create or continue the office of coroner. The question arose, whether, under the constitution of 1848, there was such an office as that of coroner. The General Assembly had not, since the adoption of the constitution of 1848, expressly created such an office. The court held: "If there be such an office as coroner in this State, it must depend for its existence upon legislative enactments; either those adopted by the constitution, or since passed, or upon constitutional inference; for, as before remarked, it is not expressly created by the constitution. The election law, and the law concerning sheriffs and coroners, of 1845, provide for the election of coroners, and prescribe their duties. Although the old constitution created the office, these laws would be ample, without its aid, to do so; but it is not to be denied, that they were passed with a view to fill the office already created, rather than creating it. Still, as the new constitution expressly continued in force all previous laws, not inconsistent with it, it has certainly continued these former laws in force. The legislature had the right to enact precisely such laws as these under the new constitution, and had this been done, it would thereby have created the office of coroner and prescribed his duties beyond all question. I then ask confidently, whether the convention did not do the same thing, by continuing these old laws in force? Suppose the schedule to the constitution had declared, in express terms, that the laws then in force, providing for the election of coroners and prescribing their duties, should continue in force till repealed or altered by the legislature. Who could

<sup>1</sup> 19 Ill. 38 (1857).

truthfully deny that it was the intention of the convention that the office of coroner should continue to exist? So that I think I may truly say that if the legislature, in passing those laws, did not intend to create the office of coroner, the convention, by continuing them in force, did intend to continue that office in existence, subject to the control of the legislature. The language of the first section of the schedule of the new constitution is this: "That all laws in force at the adoption of this constitution, not inconsistent herewith," "shall continue and be as valid as if this constitution had not been adopted." Now when we admit that the legislature might, under the new constitution, have enacted just such laws as those referred to, we admit that those laws are not inconsistent with the constitution, for the legislature could pass no laws inconsistent with it. If then they are not inconsistent with it, they are declared to be as valid as if the constitution had not been adopted. All the laws thus continued in force are, strictly speaking, reenactments by the convention, and we therefore look to that for their validity. We repeat, therefore, that we are warranted in saying that the office of coroner was continued by the adoption of the new constitution."

The court also held that this view was materially strengthened by the fact that in section 14 of the schedule of the constitution of 1848 the framers of that instrument recognized the continued existence of the office of coroner by the provision: "That if this constitution shall be ratified by the people, the governor shall forthwith, after having ascertained the fact, issue writs of election to the sheriffs of the several counties of this state; or, in case of vacancy, to the coroners, for the election of all the officers whose election is fixed by this constitution or schedule; and it shall be the duty of said sheriffs or coroners to give at least twenty days' notice of the time and place of said election, in the manner now prescribed by law."

(It should be noted, in connection with the foregoing discussion, that although sections 1 and 14 of the schedule of the constitution of 1848 were taken over into sections 1 and 17, respectively, of the schedule of the constitution of 1870, the office of coroner was expressly created by the constitution of 1870 in sections 8 and 9 of article 10 of that instrument. The *Wood v Blanchard* case is discussed here, not because of the fact situation involved, but because of the principles of constitutional construction which it serves to illustrate.)

The case of *City of Bloomington v Pollock*,<sup>2</sup> arose under the provisions of section 1 of the schedule of the constitution of 1870. The facts in that case were as follows: In 1860, the city passed an ordinance fixing the grade to which a certain street was to be raised. The street was not raised to that grade until 1889. A house had been erected on a lot abutting upon the street in 1858. The house and lot were purchased by Pollock in 1878. When the street level was raised in 1889, Pollock sued the city for the damage to his property resulting from the improvement, and recovered. The city appealed, and the court held: "Another claim made is, that the ordinance, of 1860, establishing the grade to which the street was raised in 1889, was passed before the adoption of the constitution of 1870; that prior to the constitutional guaranty in that instrument of just compensation for private property damaged for public use, [article 2, section 13], the city had the right, using due care and skill, to change the surface of the street without incurring liability for resulting damage, and that therefore appellant is not bound to respond in damages in this cause. This claim is predicated upon section 1 of the schedule to the constitution . . . Assuming that the ordinance is a 'law' within the meaning of this section, yet the only effect of said section is, that the ordinance continued in force as a valid official establishment of the grade of the street, and the only 'right' preserved to the city was the right to raise the street to that grade without further legislation on its part fixing the grade determined therein as the official grade

<sup>2</sup>141 Ill. 346 (1892).

of the street. If the ordinance, in fact, carries with it, as an element, immunity from the burden of compensating for damage done private property, then it is a law in regard to which it is impossible to affirm that it is 'not inconsistent' with the constitution, and in that event it is not within the purview of said section 1 of the schedule, and, by necessary implication, was repealed by section 13 of article 2 of the constitution. But, as we understand it, the sole and only function of the ordinance was to establish the grade of the street. The matter of the liability or non-liability for injury that might or might not thereafter be occasioned by bringing the street to the grade so established, was and is a matter wholly dehors the ordinance itself, and the question of such immunity or liability depends exclusively upon the mandate of the law which is in force at the time the grading is in fact done. In our opinion there is no merit in this claim of immunity made by appellant."

(See discussion article 2, section 13, subheading, "What constitutes damage".)

Section 2. That all fines, taxes, penalties and forfeitures, due and owing to the State of Illinois under the present constitution and laws, shall inure to the use of the people of the State of Illinois, under this Constitution.

The Supreme Court has held that this section "of the schedule is clearly a saving clause inserted in the constitution, saving to the state all fines, taxes, penalties and forfeitures then due and owing to the state, and applies to nothing else. This statute, [the wife abandonment act of 1903, under which all fines imposed might be directed by the court to be paid to the wife and children instead of to the state], in nowise affects any fines, taxes, penalties or forfeitures which were due and owing to the State of Illinois at the time of the adoption of the constitution of 1870."<sup>3</sup>

Section 3. Recognizances, bonds, obligations, and all other instruments entered into or executed before the adoption of this constitution, to the people of the State of Illinois, to any State or county officer or public body, shall remain binding and valid, and rights and liabilities upon the same shall continue, and all crimes and misdemeanors shall be tried and punished as though no change had been made in the Constitution of this State.

Section 4. County courts for the transaction of county business in counties not having adopted township organization, shall continue in existence, and exercise their present jurisdiction until the board of county commissioners provided in this Constitution, is organized in pursuance of an act of the General Assembly; and the county courts in all other counties shall have the same power and

<sup>3</sup> People v Heise, 257 Ill. 443 (1913).

jurisdiction they now possess until otherwise provided by general law.

The first clause of this section did not operate to prohibit the General Assembly from conferring additional powers upon county courts in counties not under township organization, between the date of the adoption of the constitution of 1870 and the date of the organization of the board of county commissioners. The words "present jurisdiction," as used in that clause, did, however, limit the nature of the additional powers that might be conferred upon those courts to the type of jurisdiction exercised at the time of the adoption of the new constitution. For example, in the case of *Shaw v Hill*,<sup>4</sup> the facts were as follows: An act of 1872 authorized the county court to call elections relating to the removal of county seats. An order for such an election was entered by the county court in a county not under township organization. It was objected that the statute could not, in view of the provisions of this section, apply to county courts in such counties. The court held: "The 'board of county commissioners,' which, by section 6 of article 10 of the constitution of 1870, will succeed the present county court in the transaction of county business in counties not under township organization, has not yet been elected, and will not be until in November, 1873. The fourth section of the schedule of the constitution of 1870, continued in existence the county court for the transaction of county business in counties which had not adopted township organization, until the election of the 'board of county commissioners,' and authorized such courts to 'exercise their present jurisdiction'. The words 'present jurisdiction' cannot be construed with reference to laws in existence at the time the constitution went into operation. They are not a prohibition upon the legislature in the enactment of any additional laws regulating such courts, but are to be regarded as a mere limitation upon the power to change the jurisdiction from 'county business' to civil or criminal causes." (See article 10, section 6.)

The second clause of this section was held to have preserved a particular jurisdiction conferred by a special act of 1865 upon a county court in a county under township organization, until the enactment in 1872 of a general law defining the jurisdiction of all county courts. That statute, which was passed in compliance with the requirements of article 6, sections 18 and 29, as to the uniformity of the jurisdiction of county courts, necessarily, in view of those sections and of this clause, had the effect of repealing the special act of 1865, by implication.<sup>5</sup>

(See discussion article 6, section 18, subheading, "Statutory jurisdiction," and article 6, section 29, subheadings, "Purpose of the section," and "Provisions self-executing.")

**Section 5.** All existing courts which are not in this Constitution specifically enumerated, shall continue in existence and exercise their present jurisdiction until otherwise provided by law.

This section continued in existence, subject to legislative action, the city courts created by the General Assembly pursuant to the provisions of article 5, section 1 of the constitution of 1848. These courts were not specifically enumerated in the constitution of 1870. The constitution did not, therefore, prohibit the General Assembly from abolishing, in 1871,

<sup>4</sup> 67 Ill. 455 (1873); *Broadwell v People*, 76 Ill. 554 (1875).

<sup>5</sup> *Blake v Peckham*, 64 Ill. 362 (1872).

a particular city court created by a special act of 1869. A general city court act of 1874 was construed to have impliedly continued in existence the various city courts not theretofore abolished, with a uniform name, jurisdiction, and procedure.<sup>6</sup>

**Section 6.** All persons now filling any office or appointment shall continue in the exercise of the duties thereof, according to their respective commissions or appointments, unless by this Constitution it is otherwise directed.

The last clause of this section has been construed in three decisions of the Supreme Court. In the case of *People v Rumsey*<sup>7</sup>, the facts were as follows: An Act of 1867, applicable only to Cook county, authorized the judges of the courts of that county to appoint shorthand court reporters. The reporters appointed under that act rendered services after the adoption of the constitution of 1870. In a *mandamus* proceeding to compel the county treasurer to pay the reporters for these services, the court said: "On the part of the relators, it is urged that they are authorized by section six of the schedule to continue to exercise and perform the duties of their appointment, until they shall be removed, in the manner prescribed by laws under which they were appointed. The section of the schedule only authorizes persons to continue to fill any office or appointment unless otherwise directed by the constitution. If the constitution, in any of its provisions, has repealed the law under which the appointment was made, then the appointment must cease." It was held that the special act under which these reporters were appointed had been impliedly repealed by article 6, section 29 of the constitution of 1870, which required uniformity in the laws relating to courts, immediately upon the adoption of the constitution. (See discussion article 6, section 29, subheading, "Provisions self-executing.")

In the case of *People v Lippincott*,<sup>8</sup> it appeared that the General Assembly, in 1869, had created a city court in a particular city, pursuant to article 5, section 1 of the constitution of 1848. The relator had, in 1869, been elected to fill the office of judge of that court for a six year term. In 1871, the General Assembly had repealed the act creating the court, and provided that no officer thereof should receive any compensation for services rendered thereafter. In a *mandamus* proceeding to compel the Auditor of Public Accounts to audit and allow the relator's claim for compensation as judge of the city court, during the remainder of the six year term, the court held: "But the counsel for relator places the incapacity of the legislature to deprive relator of his office, upon section 6 of the schedule . . . . It was not the purpose of this section to continue all offices otherwise under the control of the legislature, in order that every incumbent might be insured the peaceable possession of his office during his unexpired term. But the purpose is indicated in the heading to the schedule, viz: 'That no inconvenience may arise from the alterations and amendments made in the constitution of this state, and to carry the same into complete effect, it is thereby ordained and declared'; and the proviso to section 6, '*unless by this constitution it is otherwise directed,*' shows that it was intended the right of persons then in office to continue to exercise the duties thereof, was to be entirely subject to the other provisions of the instrument. In that connection we will look at section

<sup>6</sup> *People v Lippincott*, 67 Ill. 333 (1873); *People v City of Aurora*, 78 Ill. (1875); 84 Ill. 156 (1876); *Wolf v Hope*, 210 Ill. 50 (1904).

<sup>7</sup> 64 Ill. 44 (1872); compare, *People v Raymond*, 186 Ill. 407 (1900).

67 Ill. 333 (1873).

5 of the schedule, and immediately preceding the above: 'All existing courts which are not in this constitution specifically enumerated, shall continue in existence and exercise their present jurisdiction *until otherwise provided by law.*' The court in question is not one of those specifically enumerated in the constitution. If so, then, by the express language just quoted, its existence was continued, subject to the power of the legislature to determine it, which was done by the act of April 6, 1871, and the relator was thereby constitutionally deprived of his office." (See discussion, section 5 of the schedule.)

In the case of Board of Supervisors v Christianer,<sup>9</sup> the facts were these: Christianer had been elected to the office of county superintendent of schools, in 1869. In a suit to recover compensation for services rendered as county superintendent of schools, in 1872, the court held: "Appellee having been elected prior to the adoption of the present constitution, the question arises whether his compensation is to be fixed under the law of 1867, or under the provisions of the act of 1872. The 6th section of the schedule to the constitution declares that all persons then filling any office or appointment shall continue in the exercise of the duties thereof, according to their respective commissions or appointments. Appellee was within this saving clause, and could hold his office for the period for which he was elected, viz: for four years from November, 1869. The 10th section of article 10 provides for fixing the compensation of all county officers by the county board, but it is expressly stated, in the 11th section, 'the compensation herein provided for shall apply to officers hereafter elected.' It seems it was the intention of the framers of the constitution, that persons then occupying any county office should not only continue in the exercise of its duties, but should enjoy the emoluments attached thereto by general laws, all fees allowed by special laws having been repealed by the adoption of the constitution. We are inclined to the opinion, therefore, that this clause of the constitution is a limitation on the power of county boards to fix or change the compensation of officers previously elected. In this view of the several constitutional provisions bearing on this question, we must regard the act of 1872 as only intended to have a prospective action and to apply to county officers that should be elected after the adoption of the constitution."

Section 7. On the day this Constitution is submitted to the people for ratification, an election shall be held for judges of the Supreme Court in the second, third, sixth and seventh judicial election districts designated in this Constitution, and for the election of three judges of the Circuit Court in the county of Cook, as provided for in the article of this Constitution relating to the Judiciary, at which election, every person entitled to vote, according to the terms of this Constitution, shall be allowed to vote, and the election shall be otherwise conducted, returns made and certificates issued, in accordance with existing laws, except that no registry shall be required at said election: Provided, that at said election in the county of Cook no elector shall vote for more than two candidates for circuit judge. If, upon canvassing the votes for and against the adoption of this Constitution, it shall appear that there has been polled a greater number of votes against than for it, then no certificates of election shall be issued for any of said Supreme or Circuit Judges.



(As to the Supreme Court judges, see discussion article 6, section 6. As to the circuit judges, see article 6, section 23.)

Section 8. This Constitution shall be submitted to the people of the State of Illinois for adoption or rejection, at an election to be held on the first Saturday in July in the year of our Lord one thousand eight hundred and seventy, and there shall be separately submitted at the same time, for adoption or rejection, sections nine, ten, eleven, twelve, thirteen, fourteen and fifteen, relating to railroads, in the article entitled "Corporations;" the article entitled "Counties;" the article entitled "Warehouses;" the question of requiring a three-fifths vote to remove a county seat; the section relating to the Illinois Central Railroad; the section in relation to minority representation; the section relating to municipal subscriptions to railroads or private corporations; and the section relating to the Canal. Every person entitled to vote under the provisions of this Constitution, as defined in the article in relation to "Suffrage" shall be entitled to vote for the adoption or rejection of this Constitution, and for or against the articles, sections and question aforesaid, separately submitted; and the said qualified electors shall vote at the usual places of voting, unless otherwise provided; and the said election shall be conducted, and returns thereof made according to the laws now in force regulating general elections, except that no registry shall be required at said election: Provided, however, that the polls shall be kept open for the reception of ballots until sunset of said day of election.

The meaning of the term "qualified electors," as used in this section, was commented upon in the case of *Beardstown v Virginia*.<sup>10</sup> In that case while construing the provision of section 1 of article 7, "who was an elector in this state on the first day of April, in the year of our Lord, 1848," the court said: "Reference is made by appellants to the use of the words 'qualified electors,' in the 8th section of the schedule of the constitution of 1870, and in the 11th section of the schedule of the constitution of 1848, as indicating a distinction made by the constitution between 'electors' and 'qualified electors.' The words in the schedule of the constitution of 1870 are used in this connection: 'Every person entitled to vote under the provisions of this constitution, as defined in the article in relation to 'suffrage,' shall be entitled to vote for the adoption or rejection of this constitution, and for or against the articles, sections, and questions aforesaid, separately submitted; and the said qualified electors shall vote at the usual places of voting,' etc. And the words are used in the same connection in the schedule of the constitution of 1848. Now, plainly, the words 'qualified electors,' are not here used, in any way, in contradistinction from 'electors,' but merely as expressive of the class of persons who might vote at the approaching election upon the question of the adoption of the constitution. 'The said qualified electors shall vote,' etc., that is, the persons having the said qualifications of voters as named in the preceding clause. The persons who, on the first day of April, 1848, were electors, were qualified

<sup>10</sup> 76 Ill. 34 (1875).

electors; and *vice versa*; there is no distinction between them, and the constitution does not sanction the idea of a distinction."

(As to the meaning of the word "electors," see discussion article 7, section 1, subheading, "Unnaturalized aliens.")

(All of the provisions required by this section to be submitted to the people separately, were adopted. As to the form of the ballot used at the election, see section 10 of the schedule. As to the date when the separate sections became effective, see discussion, section 12 of the schedule).

Section 9. The Secretary of State shall, at least twenty days before said election, cause to be delivered to the County Clerk of each county blank poll-books, tally lists and forms of return, and twice the number of properly prepared printed ballots for the said election that there are voters in such county, the expense whereof shall be audited and paid as other public printing ordered by the Secretary of State is, by law, required to be audited and paid; and the several county clerks shall, at least five days before said election, cause to be distributed to the board of election, in each election district in their respective counties, said blank poll-books, tally-lists, forms of return, and tickets.

Section 10. At the said election the ballots shall be in the following form:

#### NEW CONSTITUTION TICKET

For all the propositions on this ticket which are not cancelled with ink or pencil; and against all propositions which are so cancelled.

For the new Constitution.

For the sections relating to railroads in the article entitled "Corporations."

For the article entitled "Counties."

For the article entitled "Warehouses."

For a three-fifths vote to remove County Seats.

For the section relating to the Illinois Central Railroad.

For the section relating to Minority Representation.

For the section relating to Municipal Subscriptions to Railroads or Private Corporations.

For the section relating to the Canal.

Each of said tickets shall be counted as a vote cast for each proposition thereon not cancelled with ink or pencil, and against each proposition so cancelled, and returns thereof shall be made accordingly by the judges of election.

Section 11. The returns of the whole vote cast, and of the votes for the adoption or rejection of this Constitution, and for or against the articles and sections respectively submitted, shall be made by the several county clerks, as is now provided by law, to the Secretary of State, within twenty days after the election; and the returns of the said votes shall, within five days thereafter, be examined and canvassed by the Auditor, Treasurer and Secretary of State, or any two of them, in the presence of the Governor, and proclamation shall be made by the Governor, forthwith of the result of the canvass.

Section 12. If it shall appear that a majority of the votes polled are "For the New Constitution," then so much of this Constitution as was not separately submitted to be voted on by articles and sections, shall be the supreme law of the State of Illinois, on and after Monday the eighth day of August, in the year of our Lord one thousand eight hundred and seventy; but if it shall appear that a majority of the votes polled were "Against the New Constitution," then so much thereof as was not separately submitted to be voted on by articles and sections, shall be null and void.

If it shall appear that a majority of the votes polled, are "for the sections relating to Railroads in the article entitled "Corporations"; sections nine, ten, eleven, twelve, thirteen, fourteen and fifteen, relating to Railroads in the said article, shall be a part of the Constitution of this State; but if a majority of said votes are against such sections, they shall be null and void. If a majority of the votes polled are for the article entitled "Counties," such article shall be part of the Constitution of this State and shall be substituted for article seven, in the present Constitution entitled "Counties"; but if a majority of said votes are against such article, the same shall be null and void. If a majority of the votes polled are "for the article entitled "Warehouses," such article shall be part of the Constitution of this State, but if a majority of the votes are against said article, the same shall be null and void. If a majority of the votes polled are for either of the sections separately submitted, relating respectively to the "Illinois Central Railroad," "Minority Representation," "Municipal Subscriptions to Railroads or Private Corporations," and the "Canal," then such of said sections as shall receive such majority shall be a part of the Constitution of this State; but each of said sections so separately submitted against which, respectively, there shall be a majority of the votes polled, shall be null and void: Provided, that the section relating to "Minority Representation," shall not be declared adopted unless the portion of the Constitution not separately submitted to be voted on by articles and sections shall be adopted, and in case said section relating to "Minority Representation" shall become a portion of the Constitution, it shall be substituted for sections seven and eight of the Legislative Article. If a majority of the votes cast at such election shall be for

a three-fifths vote to remove a county seat, then the words "a majority" shall be stricken out of section four of the Article on Counties, and the words "three-fifths" shall be inserted in lieu thereof; and the following words shall be added to said section, to-wit: "But when an attempt is made to remove a county seat to a point nearer to the center of a county, then a majority vote only shall be necessary." If the foregoing proposition shall not receive a majority of the votes, as aforesaid, then the same shall have no effect whatever.

Although the constitution, as a whole, pursuant to the provisions of the first paragraph of this section, became effective August 8, 1870, the articles and sections required by section 8 of the schedule to be submitted separately, became effective immediately upon their adoption by the vote of the people, on July 2, 1870.<sup>11</sup>

Section 13. Immediately after the adoption of this Constitution, the Governor and Secretary of State shall proceed to ascertain and fix the apportionment of the State for members of the first House of Representatives under this Constitution. The apportionment shall be based upon the Federal census of the year of our Lord one thousand eight hundred and seventy of the State of Illinois, and shall be made strictly in accordance with the rules and principles announced in the article on the Legislative Department of this Constitution: Provided, that in case the Federal census aforesaid can not be ascertained prior to Friday, the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy, then the said apportionment shall be based on the State census of the year of our Lord one thousand eight hundred and sixty-five, in accordance with the rules and principles aforesaid. The Governor shall, on or before Wednesday, the twenty-eighth day of September, in the year of our Lord one thousand eight hundred and seventy, make official announcement of the said apportionment, under the great seal of the State; and one hundred copies thereof, duly certified, shall be forthwith transmitted by the Secretary of State to each county clerk for distribution.

(As to legislative apportionments, generally, see discussion article 4, section 6. As to the apportionment made by the Governor and Secretary of State, pursuant to this section, see House Journal 1871; first session, pp. 33-34, 58-62, 62-64.)

Section 14. The districts shall be regularly numbered, by the Secretary of State, commencing with Alexander County as Number One, and proceeding then northwardly through the State, and ter-

<sup>11</sup> Schall v Bowman, 62 Ill. 321 (1872).

minating with the county of Cook; but no county shall be numbered as more than one district, except the County of Cook, which shall constitute three districts, each embracing the territory contained in the now existing representative districts of said county. And on the Tuesday after the first Monday in November, in the year of our Lord one thousand eight hundred and seventy, the members of the first House of Representatives under this Constitution shall be elected according to the apportionment fixed and announced as aforesaid, and shall hold their offices for two years, and until their successors shall be elected and qualified.

(As to legislative apportionments, generally, see discussion article 4, section 6.)

Section 15. The Senate, at its first session under this Constitution, shall consist of fifty members, to be chosen as follows: At the General Election held on the first Tuesday after the first Monday of November, in the year of our Lord one thousand eight hundred and seventy, two Senators shall be elected in districts where the term of Senators expire on the first Monday of January, in the year of our Lord one thousand eight hundred and seventy-one, or where there shall be a vacancy, and in the remaining districts one Senator shall be elected. Senators so elected shall hold their office two years.

(As to legislative apportionments, generally, see discussion article 4, section 6.)

Section 16. The General Assembly, at its first session held after the adoption of this Constitution, shall proceed to apportion the State for members of the Senate and House of Representatives, in accordance with the provisions of the article on the Legislative Department.

(As to legislative apportionments, generally, see discussion article 4, section 6.)

Section 17. When this constitution shall be ratified by the people, the Governor shall forthwith, after having ascertained the fact, issue writs of election to the sheriffs of the several counties of this State, or in case of vacancies, to the coroners, for the election of all the officers, the time of whose election is fixed by this constitution or schedule, and it shall be the duty of said sheriffs or coro-

ners to give such notice of the time and place of said election as is now prescribed by law.

(See discussion, section 1 of the schedule.)

**Section 18.** All laws of the State of Illinois, and all official writings, and the Executive, Legislative and Judicial proceedings, shall be conducted, preserved and published in no other than the English language.

**In general.** "It does not militate against the continuing vitality of this section that it is found in the schedule and not in the body of the constitution, for a schedule to a constitution forms a part of such constitution, and is of equal authority therewith. The provisions most usually found in schedules are of temporary character, and for the purpose of preventing inconvenience and confusion upon the constitution taking effect; but from the very nature of the provision in question it is permanent in its scope and operation."<sup>12</sup> The provisions of this section are self-executing.<sup>13</sup>

**Official writings.** The reports and notices required by law to be furnished by municipal officers constitute "official writings," as that term is used in this section. A city may, therefore, be enjoined from publishing these reports and notices in the German language in a German newspaper.<sup>14</sup> The Attorney General has ruled that the term "official writings" includes the contents of the charters of domestic insurance companies, and that a proposed company having a name expressed in the German language cannot, therefore, be organized under the laws of this state.<sup>15</sup> The Attorney General has also ruled that the term includes the annual financial statements required by law to be published by insurance companies, so as to invalidate the publication of such statements in newspapers printed in any other than the English language.<sup>16</sup>

**Legislative proceedings.** The ordinances enacted by a city, a board of forest preserve commissioners, and by a board of county commissioners have been held to constitute "legislative proceedings" as that term is used in this section. This section therefore, prohibits the publication of such ordinances in the German language, or in the English language, in a German newspaper.<sup>17</sup>

**Judicial proceedings.** The term "judicial proceedings," as used in this section, has been held to include special assessment notices, and administrators' notices of adjustments of claims so as to prohibit their pub-

<sup>12</sup> *City of Chicago v McCoy*, 136 Ill. 344 (1891).

<sup>13</sup> *Stein v Meyers*, 253 Ill. 199 (1912).

<sup>14</sup> *City of Chicago v McCoy*, 136 Ill. 344 (1891).

<sup>15</sup> Report Attorney General 1916, p. 258.

<sup>16</sup> Report Attorney General 1916, p. 271.

<sup>17</sup> *City of Chicago v McCoy*, 136 Ill. 344 (1891); *Perkins v Commissioners of Cook County*, 271 Ill. 449, at p. 474 (1916); *People v Day*, 277 Ill. 543 (1917).

lication in a German newspaper, whether the notices are printed in English or in German.<sup>18</sup>

This section does not require all court proceedings to be conducted in English. For example, it has been held that this section has no application to oral testimony, depositions, or documentary evidence.<sup>19</sup> Nor does it operate to prevent the minutes and notes from which the clerk makes up the record, from being entered in an unusual system of abbreviations, such as "Petit, Oct. 17, 1913, Jury verd. fdg. issue for plff. das. at \$9,500.00 & costs. Jdg. on fdg."<sup>20</sup> The requirement of this section, that judicial proceedings be conducted in the English language, is confined to the formal record history of the cause, as distinguished from the temporary memoranda made by the clerk. For example, a judgment was held void because the formal and final record thereof was entered in a system of abbreviations which would be unintelligible to an English speaking person, such as "Fndg. deft. g. withh. prem. descr. in complt.; judg. on fndg. & C."<sup>21</sup>

The Attorney General ruled that this section requires all judicial proceedings to be preserved, so as to render invalid a proposed act of 1917 requiring the destruction of the records of the disposition of cases of delinquent children, when delinquency did not recur within two years. Upon the basis of this ruling, the Governor vetoed the bill.<sup>22</sup>

**Section 19.** The General Assembly shall pass all laws necessary to carry into effect the provisions of this Constitution.

**Section 20.** The circuit clerks of the different counties having a population over sixty thousand, shall continue to be Recorders (ex officio) for their respective counties, under this constitution, until the expiration of their respective terms.

(See article 10, sections 8, 9.)

**Section 21.** The judges of all courts of record in Cook county shall, in lieu of any salary provided for in this Constitution, receive the compensation now provided by law until the adjournment of the first session of the General Assembly after the adoption of this Constitution.

This section operated to limit the time when judges of the courts of record in Cook County were to begin to receive the compensation provided for in the constitution of 1870, to the date of the adjournment *sine die* of the regular session of the General Assembly of 1871-72.

The "compensation now provided by law," for the judge of the old circuit court of Cook County, consisted, under the constitution of 1848

<sup>18</sup> People v McCoy, 136 Ill. 344 (1891); Report Attorney General 1900, p. 350.

<sup>19</sup> Loehde v Glos, 265 Ill. 401 (1914).

<sup>20</sup> People v Petit, 266 Ill. 628 (1915).

<sup>21</sup> Stein v Meyers, 253 Ill. 199 (1912); Loehde v Glos, 265 Ill. 401 (1914).

<sup>22</sup> Veto Messages 1917, p. 51.

and the statutory provisions in force in 1870, of \$1,000 per annum from the state, \$1,500 per annum from the county, and of certain docket fees. The new constitution (article 6, section 23) provided that the circuit court of Cook county should consist of five judges. Section 16 of article 6 of that instrument provided that the circuit judges outside of Cook county should receive \$3,000 per annum from the date of the adoption of the new constitution, until otherwise provided by law. Section 25 of article 6 provided that the circuit judges in Cook county "shall receive the same salaries, payable out of the state treasury, as is or may be paid from said treasury to the circuit judges . . . of the state, and such further compensation to be paid by the county of Cook as is or may be provided by law." In a *mandamus* proceeding begun in 1872, to compel the payment by the state to a judge of the circuit court of Cook county, who had been elected under the new constitution, of a salary of \$3,000 per annum, the court held that all of the judges of the circuit court of Cook county, until the adjournment of the first session of the General Assembly, were entitled under the provisions of section 21 of the schedule to a salary from the state of but \$1,000 per annum. The court suggested, however, that each of the new judges of the circuit court of that county might also be entitled to the \$1,500 per annum paid by the county to the single judge of the old circuit court, and also to the docket fees received by that judge.<sup>23</sup>

In a later case it appeared that: "The legislature commenced its first session on the 4th of January, 1871, and on the 17th day of April, of that year, after winding up the business in the way usual before an adjournment *sine die*, in pursuance of a resolution adopted before, both houses were declared by the respective presiding officers adjourned to the 15th of November, 1871; that the Governor of the state convened the General Assembly, for certain purposes specified in his proclamation, in June, 1871, and after disposing of the business for which the legislature was assembled, both houses adjourned in the same month without day; that afterwards the General Assembly was by the Governor again convened on the 13th day of October, 1871, to consider certain subjects mentioned in his proclamation, and after disposing of the business presented by the Governor, the General Assembly during the same month adjourned without day. At the time before fixed, on the 15th day of November, 1871, the General Assembly re-assembled, and continued to transact business until April 12, 1872, when it adjourned without day."<sup>24</sup> The court held that the adjournment on April 12, 1872, was "the adjournment of the first session of the General Assembly," contemplated by the provisions of the section under consideration.

**Section 22.** The present judge of the circuit court of Cook county shall continue to hold the circuit court of Lake county until otherwise provided by law.

**Section 23.** When this constitution shall be adopted, and take effect as the supreme law of the State of Illinois, the two-mill tax provided to be annually assessed and collected upon each dollar's worth of taxable property, in addition to all other taxes, as set forth in article fifteen of the now existing constitution, shall cease to be assessed after the year of our Lord one thousand eight hundred and seventy.

<sup>23</sup> *People v Lippincott*, 63 Ill. 504 (1872).

<sup>24</sup> *People v Auditor*, 64 Ill. 82 (1872).



**Section 24.** Nothing contained in this Constitution shall be so construed as to deprive the General Assembly of power to authorize the city of Quincy to create any indebtedness for railroad or municipal purposes for which the people of said city shall have voted and to which they shall have given, by such vote, their assent, prior to the thirteenth day of December, in the year of our Lord one thousand and eight hundred and sixty-nine: Provided, that no such indebtedness, so created, shall, in any part thereof be paid by the State, or from any State revenue tax or fund, but the same shall be paid, if at all, by the said city of Quincy alone, and by taxes to be levied upon the taxable property thereof; and provided, further, that the General Assembly shall have no power in the premises, that it could not exercise under the present constitution of this State.

Under the constitution of 1848, the General Assembly had the power to authorize the corporate authorities of a city to subscribe to the capital stock of a railroad company, without a vote of the people. On August 7, 1869, under a city ordinance, the people of the city of Quincy voted in favor of authorizing the corporate authorities of the city to make a subscription to the capital stock of a railroad company. No statute had been passed by the General Assembly empowering the city to hold stock in a railroad company, or authorizing a vote of the people of the city on such a question. The making of the subscription, therefore, was deferred until enabling legislation of this character could be enacted. On December 13, 1869, the date referred to in the section under discussion, the constitutional convention met. This convention inserted a provision in the new constitution prohibiting municipalities from subscribing to the capital stock of any railroad or private corporation. This provision did not, however, apply to subscriptions authorized, under existing laws, by a vote of the people, prior to the adoption of the constitution. (See discussion, separate section 2). "The effect of this provision of the constitution would clearly have defeated the proposed Quincy subscription, as the vote then had was not under an existing law. The convention, with the view, no doubt, of leaving the proposed Quincy subscription unaffected by this clause of the constitution, adopted section 24 of the schedule."<sup>25</sup> At the first session of the General Assembly after the adoption of the constitution, an act was passed authorizing the city to proceed with the subscription voted for on August 7, 1869. The Supreme Court held that this act was validly enacted, pursuant to the provisions of the section under consideration, saying: "We are, therefore, of opinion, that while section 24 of the schedule did not, in the least, legalize or sanction what had been done by the voters of the city, its obvious intent and effect were to leave the matter and the power of the legislature over it unaffected by the constitution of 1870; in other words, to leave the vote and the power of the legislature to confer the right upon the city to take stock, precisely as they would have been under the constitution of 1848."<sup>26</sup>

**Section 25.** In case this Constitution, and the articles and sections submitted separately, be adopted, the existing Constitution

<sup>25</sup> Q. M. & P. Ry. Co. v Morris, 84 Ill. 410 (1877).

<sup>26</sup> Q. M. & P. Ry. Co. v Morris, 84 Ill. 410 (1877); compare veto message, Senate Journal, 1871, p. 377; Quincy v Cooke, 107 U. S. 549 (1882).

shall cease in all its provisions, and in case this Constitution be adopted, and anyone or more of the articles or sections submitted separately be defeated, the provisions of the existing constitution, if any, on the same subject shall remain in force.

Section 26. The provisions of this constitution required to be executed prior to the adoption or rejection thereof shall take effect and be in force immediately.

## INDEX TO CONSTITUTION OF 1870.<sup>1</sup>

### ACCUSATION

*See* Offenses

### ACTS

*See* General Assembly

### ADJOURNMENT OF GENERAL ASSEMBLY

Governor, powers, art. 5, sec. 9  
 limitations, art. 4, sec. 10

### AID

municipal  
 railroads or private corporations, separate  
 sec. 3  
 sectarian institutions or purposes, art. 8,  
 sec. 3  
 state  
 railroads or canals, separate sec. 4  
 sectarian institutions or purposes, art. 8,  
 sec. 3

### AMENDMENT OF LAWS

*See* General Assembly

### AMENDMENTS TO CONSTITUTION

conventions, art. 14, sec. 1  
 legislative proposals, art. 14, sec. 2

### APPEALS AND WRITS OF ERROR

courts  
 appellate, art. 6, sec. 11  
 circuit, art. 6, sec. 11  
 county, art. 6, sec. 19  
 supreme, art. 6, secs. 8, 11  
 criminal cases, Cook County, art. 6, sec. 26

### APPELLATE COURTS

*See* Courts

### APPOINTMENTS

*See* General Assembly, Governor

### APPORTIONMENT

judicial, art. 6, sec. 5  
 senatorial, art. 4, sec. 6

### APPROPRIATIONS

aggregate, how increased, art. 4, sec. 18  
 canals, in aid of, separate sec. 4  
 deficiency, art. 4, secs. 18, 19  
 diversion, art. 4, sec. 17  
 expenditure of, warrant of Auditor, art. 4,  
 sec. 17  
 expiration, art. 4, sec. 18  
 how made  
 by law, art. 4, sec. 17  
 items and sections, art. 5, sec. 16  
 private laws, art. 4, sec. 16  
 items, Governor may veto, art. 5, sec. 16  
 necessary, duty of General Assembly, art  
 4, sec. 18  
 revenue not to be exceeded, art. 4, sec. 18  
 salaries of state officers, art. 4, sec. 16

### ARMY

*See* Militia

### ARREST

General Assembly, members of, privileges,  
 art. 4, sec. 14

### ASSEMBLY

peaceable, right of, secured, art. 2, sec. 17

### ATTORNEY GENERAL

*See* Elections  
 duties, art. 5, sec. 1  
 election, art. 5, sec. 3  
 eligibility to other offices, art. 5, sec. 5  
 report to Governor, art. 5, secs. 20, 21  
 residence at capital, art. 5, sec. 1  
 salary, art. 5, sec. 23  
 term of office, art. 5, sec. 1  
 vacancy, art. 5, sec. 20

<sup>1</sup>The Constitution of 1870 contains five separate sections. Four of these separate sections were submitted and adopted at the same time as the complete constitution. The separate section relating to convict labor was adopted as an amendment to the constitution in 1886. Under the terms of section 12 of the schedule the separate section relating to minority representation, if adopted, was to be substituted for sections 7 and 8 of article 4.

While the original separate sections are not designated by numbers it has been deemed necessary for the purposes of this index, to number them. In this index the separate section relating to the Illinois Central railroad is designated as separate section 1; the separate section relating to minority representation is considered separate section 2; that relating to municipal subscriptions to railroads or private corporations is designated separate section 3; that relating to the canal as separate section 4; and that relating to convict labor as separate section 5.

In the text of the Constitution of 1870, as it appears in this volume, the separate section relating to minority representation, having been adopted, appears as sections 7 and 8 of article 4, and in this index all references concerning minority representation are made to sections 7 and 8 of article 4. But, since the section relating to minority representation, in the original document, appears as the second separate section, it was thought best, in dealing with the separate sections, to permit that section to be considered as separate section 2 and to designate the following separate section as separate section 3.

## INDEX.

- AUDITOR OF PUBLIC ACCOUNTS**  
*See* Elections  
 duties, art. 5, sec. 1  
 election, art. 5, sec. 3  
 eligibility to other offices, art. 5, sec. 5  
 General Assembly  
 expenses of, duty to report, art. 4, sec. 17  
 mileage of members, duty to compute, art. 4, sec. 21  
 report to Governor, art. 5, secs. 20, 21  
 residence at capital, art. 5, sec. 1  
 salary, art. 5, sec. 23  
 term of office, art. 5, sec. 1  
 vacancy, art. 5, sec. 20
- BAIL**  
*See* Offenses
- BALLOT**  
*See* Suffrage
- BANKS**  
 banking corporations, laws authorizing formation, submission to people, art. 11, sec. 5  
 of issue  
 deposit of security, art. 11, sec. 8  
 specie payment, suspension of, art. 11, sec. 7  
 state bank, art. 11, sec. 5  
 state, financial interest in, art. 11, sec. 5  
 statements, art. 11, sec. 7  
 stockholders  
 liability, art. 11, sec. 6  
 registry, art. 11, sec. 8
- BILL OF RIGHTS**  
 art. 2
- BILLS**  
*See* General Assembly
- BLOOD**  
 corruption of, effect of conviction, art. 2, sec. 11
- BOARD OF COUNTY COMMISSIONERS**  
*See* Counties
- BOUNDARIES**  
 state, art. 1
- CANALS**  
 credit of state, in aid of, separate sec. 4  
 deep waterway  
 bonds in aid of, separate sec. 4  
 power from, leasing of, separate sec. 4  
 Illinois and Michigan Canal, sale or lease of, separate sec. 4
- CAPITAL STOCK**  
 municipal subscriptions, separate, sec. 3  
 railroads  
 fictitious increase, art. 11, sec. 13  
 increased, how, art. 11, sec. 13  
 transfer, art. 11, sec. 9
- CAPITOL**  
 expenditure for, art. 4, sec. 33
- CHICAGO**  
 debt limit, art. 4, sec. 34; art. 9, sec. 13  
 local government of, special legislation, art. 4, sec. 34  
 municipal courts, art. 4, sec. 34
- CHIEF JUSTICE**  
 circuit and superior courts, Cook County, art. 6, sec. 24  
 supreme court, art. 6, sec. 2
- CIRCUIT COURTS**  
*See* Courts
- CITY COURTS**  
*See* Courts
- CIVIL POWER**  
 military subordinate, art. 2, sec. 15
- CLAIMS**  
 against state, void, when, art. 4, sec. 19
- CLERKS**  
 county, term and election, art. 10, sec. 8  
 courts of record  
 Cook County  
 assistants  
 compensation, art. 10, sec. 9  
 number, art. 10, sec. 9  
 duties, art. 6, sec. 32  
 election, art. 6, sec. 27  
 removal, art. 6, sec. 30  
 residence, art. 6, sec. 32  
 salaries, art. 10, sec. 9  
 terms, art. 6, secs. 27, 32  
 vacancies, art. 6, sec. 32  
 in general  
 circuit, term and election, art. 10, sec. 8  
 clerk hire, art. 10, sec. 10  
 county, term and election, art. 6, sec. 18  
 removal, art. 6, sec. 30  
 residence, art. 6, sec. 32  
 salaries, art. 6, sec. 32; art. 10, sec. 10  
 supreme term and election, art. 6, sec. 10  
 terms, art. 6, sec. 32; art. 10, sec. 8  
 vacancies, art. 6, sec. 32
- COMMITTEES OF THE WHOLE**  
 open session, art. 4, sec. 10
- COMMON CARRIERS**  
*See* Railroads
- COMMUTATION**  
*See* Pardons; Revenue
- COMPENSATION**  
*See* Claims; Eminent Domain; Fees and Salaries
- CONSCIENC**  
*See* Religion
- CONSOLIDATION**  
*See* Railroads
- CONSTABLES**  
*See* Justices of the Peace and Constables
- CONSTITUTIONAL AMENDMENTS**  
*See* Amendments to Constitution
- CONTEMPT**  
*See* General Assembly

## INDEX.

## CONTRACTS

- county, art. 4, sec. 15
- laws impairing obligation, art. 2, sec. 14
- school, art. 8, sec. 4
- state, art. 4, sec. 15.
- supplies for state, art. 4, sec. 25

## CONVENTION

- See* Amendments to Constitution

## CONVICT LABOR

- separate sec. 5

## CORONER

- See* County Officers

## CORPORATIONS

- art. 11. *See* Banks; Railroads
- directors, how elected, art. 11, sec. 3
- municipal subscriptions and aid, separate sec. 3
- organization
  - general law, art. 11, sec. 1
  - special law, art. 11, secs. 1, 2
- street railways, right to use streets, art. 11, sec. 4

## CORRUPTION OF BLOOD

- See* Blood

## COUNTIES

- board of commissioners, Cook county, art. 10, sec. 7
- board of county commissioners
  - duties, art. 10, sec. 6
  - election, art. 10, sec. 6
  - term, art. 10, sec. 6
- boundaries, art. 10, sec. 1
- county seats, removal, art. 10, sec. 4
- division, art. 10, secs. 2, 3
- indebtedness, effect of formation of new or division, art. 10, sec. 3
- new, formation of, art. 10, sec. 1
- taxes, power to levy, art. 10, sec. 8
- township organization
  - adoption of, effect, art. 10, sec. 5
  - discontinued, how, art. 10, sec. 5
  - names of townships, art. 10, sec. 5
  - township meetings, art. 10, sec. 5

## COUNTY OFFICERS

- Cook County
  - assistants
    - compensation, art. 10, sec. 9
    - number, art. 10, sec. 9
    - election, art. 10, sec. 8
    - salaries, art. 10, sec. 9
    - terms, art. 10, sec. 8
  - in general
    - clerk hire, art. 10, sec. 10
    - enumerated, art. 10, sec. 8
    - expenses, art. 10, sec. 10
    - re-election, eligibility, art. 10, sec. 8
    - salaries, art. 10, sec. 10
    - terms, art. 10, sec. 8

## COUNTY SEATS

- See* Counties

## COUNTY SUPERINTENDENT OF SCHOOLS

- compensation, art. 8, sec. 5
- duties, art. 8, sec. 5
- election, art. 8, sec. 5
- powers, art. 8, sec. 5
- qualifications, art. 8, sec. 5
- terms, art. 8, sec. 5

## COUNTY TREASURER

- See* County Officers

## COURTS

- See* Clerks; Judges
- appellate
  - appeals and writs of error, art. 6, sec. 11
  - authorized, art. 6, sec. 11
  - districts, art. 6, sec. 11
  - organization and jurisdiction, uniformity, art. 6, sec. 11
- circuit
  - appeals and writs of error, art. 6, sec. 11
  - circuits
    - alteration
      - effect, art. 6, sec. 13
      - General Assembly, power, art. 6, secs. 13, 15
    - judicial power vested in, art. 6, sec. 1
    - jurisdiction, art. 6, sec. 12
  - terms
    - additional, art. 6, sec. 14
    - changed, how, art. 6, sec. 14
    - number, art. 6, sec. 12
- circuit, Cook County
  - branches, art. 6, sec. 24
  - chief justice, art. 6, sec. 24
  - judges
    - additional, art. 6, sec. 23
    - number, art. 6, sec. 23
- city, judicial power vested in, art. 6, sec. 1
- county
  - appeals and writs of error, art. 6, sec. 19
  - districts of more than one county, art. 6, sec. 18
  - judicial powers vested in, art. 6, sec. 1
  - jurisdiction, art. 6, sec. 13
- criminal, Cook County
  - judges, art. 6, sec. 26
  - jurisdiction, art. 6, sec. 26
- in general
  - eligibility of judges, art. 6, sec. 17
  - organization, jurisdiction, powers, proceedings and practice, uniformity, art. 6, sec. 29
- municipal, in Chicago, art. 4, sec. 34
- probate
  - authorized, art. 6, sec. 20
  - jurisdiction, art. 6, sec. 20
- superior, Cook County
  - branches, art. 6, sec. 24
  - chief justice, art. 6, sec. 24
  - judges
    - additional, art. 6, sec. 23
    - number, art. 6, sec. 23
- supreme
  - appeals and writs of error, art. 6, secs. 8, 11
  - chief justice, art. 6, sec. 2
  - decisions, art. 6, sec. 2
  - districts
    - alteration, art. 6, secs. 4, 5
    - apportionment, art. 6, sec. 5
    - established, art. 6, sec. 5
    - grand divisions, art. 6, secs. 4, 5
    - jurisdiction, art. 6, sec. 2
    - quorum, art. 6, sec. 2
    - reporter of decisions, art. 6, sec. 9
    - terms, art. 6, sec. 4

## CRIMINAL OFFENSES

- See* Offenses

## CUMULATIVE VOTING

- directors of corporations, art. 11, sec. 3
- General Assembly, house of representatives, art. 4, secs. 7, 8

## INDEX.

- DEBT**  
*See* Indebtedness  
 imprisonment for, art. 2, sec. 12
- DEEP WATERWAY**  
*See* Canals
- DELEGATES TO CONSTITUTIONAL CONVENTION**  
 election, art. 14, sec. 1  
 number, art. 14, sec. 1  
 oath, art. 14, sec. 1  
 qualifications, art. 14, sec. 1  
 vacancies, art. 14, sec. 1
- DEPARTMENTS**  
*See* Government
- DIRECTORS**  
 corporations, how elected, art. 11, sec. 3  
 railroads, art. 11, sec. 11
- DISCRIMINATION**  
 railroad rates, art. 11, sec. 15  
 religious, art. 2, sec. 3
- DISQUALIFICATIONS**  
*See* Office
- DISTRIBUTION OF POWERS**  
 Art. 3
- DISTRICTS**  
*See* Courts; Justices of the Peace and Constables; Senatorial Districts  
 drainage, art. 4, sec. 31
- DRAINAGE**  
 art. 4, sec. 31
- DUE PROCESS OF LAW**  
 art. 2, sec. 2
- EDUCATION**  
 art. 8  
 county superintendent of schools, art. 8, sec. 5  
 donations, art. 8, sec. 2  
 free schools, art. 8, sec. 1  
 school contracts, art. 8, sec. 4  
 sectarian institutions, aid to, art. 8, sec. 3
- ELECTIONS**  
*See* Attorney General; Auditor of Public Accounts; Clerks; Counties; County Officers; General Assembly; Governor; Judges; Justices of the Peace and Constables; Lieutenant Governor; Secretary of State; State Treasurer; State's Attorneys; Superintendent of Public Instruction  
 free and equal, art. 2, sec. 13  
 General Assembly, judge of election of members, art. 4, sec. 9  
 state officers  
 returns, art. 5, sec. 4  
 tie, how decided, art. 5, sec. 4
- ELEVATORS**  
*See* Warehouses
- EMERGENCY LAWS**  
 art. 4, sec. 13
- EMINENT DOMAIN**  
 compensation  
 jury to ascertain, art. 2, sec. 13  
 owners of private property taken or damaged for public use are entitled to, art. 2, sec. 13  
 railroads  
 compensation, jury to ascertain, art. 11, sec. 14  
 fee of land taken by, remains in owners, art. 2, sec. 13  
 subject to, art. 11, sec. 14
- EMPLOYMENT**  
 defined, art. 5, sec. 24
- ENACTING CLAUSE**  
 art. 4, sec. 11
- ENGLISH LANGUAGE**  
*See* Proceedings
- EXECUTIVE DEPARTMENT**  
 art. 5  
 officers constituting, art. 5, sec. 1
- EXECUTIVE POWER**  
 exercised by executive department only, art. 3
- EXEMPTION LAWS**  
*See* Homestead and Exemption Laws
- EXEMPTIONS**  
 militia, art. 12, secs. 1, 6  
 taxation, art. 9, sec. 3
- EXPENSES**  
 General Assembly, duty of Auditor to report, art. 4, sec. 17  
 government, General Assembly to appropriate for, art. 4, sec. 18
- EX POST FACTO LAWS**  
 art. 2, sec. 14
- EXPULSION**  
 General Assembly, members, art. 4, sec. 9
- EXTORTION**  
 railroad rates, art. 11, sec. 15
- FEEES**  
*See* Claims; Compensation  
 classification of counties for purpose of fixing, art. 10, sec. 12  
 county and township officers, art. 10, secs. 11, 12  
 disposition of, art. 5, sec. 23; art. 10, sec. 9, 10  
 officers collecting, duty to report, art. 5, sec. 20; art. 10, sec. 13  
 regulated by general law, art. 10, secs. 11, 12  
 uniformity, art. 10, secs. 11, 12.
- FEEES AND SALARIES**  
*See* Attorney General; Auditor of Public Accounts; Clerks; County Officers; County Superintendent of Schools; General Assembly; Governor; Judges; Justices of the Peace and Constables; Lieutenant Governor; Secretary of State; State Treasurer; State's Attorneys; Superintendent of Public Instruction  
 alteration during term of office, art. 4, secs. 21, 22; art. 5, sec. 23; art. 6, secs. 7, 16, 25; art. 9, sec. 11; art. 10, sec. 10  
 classification of counties for purpose of fixing, art. 10, sec. 10

## INDEX.

## FORFEITURE

- estate, effect of conviction, art. 2, sec. 11.
- railroads subject to, when, art. 11, sec. 15

## FRANCHISE

- appeals and writs of error in cases involving, art. 6, sec. 11
- railroads, subject to forfeiture, when, art. 11, sec. 15

## FREE SPEECH

See Speech

## GENERAL ASSEMBLY

See Appropriations; Lieutenant Governor; Minority Representation

- adjournment, art. 4, sec. 10; art. 5, sec. 9
- appointments

- confirmation by senate, art. 5, secs. 10, 11

- eligibility to, art. 4, sec. 15

- power of, art. 5, sec. 10

## bills

- amendments, art. 4, sec. 12

- origin, art. 4, sec. 12

- passage, final

- journal, entry of yeas and nays; art. 4, sec. 12; art. 5, sec. 16

- manner of voting on, art. 4, sec. 12

- speakers, signature of, art. 4, sec. 13

- vote required, art. 4, sec. 12

- yeas and nays, art. 4, sec. 12

- printing, art. 4, sec. 13

- reading, art. 4, sec. 13

- rejection by either house, art. 4, sec. 12

- veto, art. 5, sec. 16

## branches, art. 4, sec. 1

- contempt, power to punish, art. 4, sec. 9

- debts, may contract, when, art. 4, secs. 18, 19

## house of representatives

- elective, art. 4, sec. 1

## members

- election, art. 4, secs. 2, 7, 8

- number, art. 4, secs. 7, 8

- terms, art. 4, secs. 7, 8

- session, opening, who presides, art. 4, sec. 9

## journal of proceedings

## entries upon

- dissent and protest, art. 4, sec. 10

## yeas and nays

- final passage of bills, art. 4, sec. 12

- passage over veto, art. 5, sec. 16

- right to have recorded on any question, art. 4, sec. 10

- necessity for, art. 4, sec. 10

## laws

- amendment by reference, art. 4, sec. 13

- emergency, art. 4, sec. 13

- operative, when, art. 4, sec. 13

- revivification by reference, art. 4, sec. 13

- style, art. 4, sec. 11

- subject, art. 4, sec. 13

- title, art. 4, sec. 13

## members

- contracts, state and county, interest in, art. 4, secs. 15, 25

- disqualifications, art. 4, sec. 4

- election, returns and qualifications, who to

- judge, art. 4, sec. 9

- elections, art. 4, secs. 2, 6, 7, 8

- expulsion, art. 4, sec. 9

- mileage, art. 4, sec. 21

- oath, art. 4, sec. 5

- privileges, art. 4, sec. 14

- protest, right of, art. 4, sec. 10

- qualifications, art. 4, sec. 3

## GENERAL ASSEMBLY—Concluded.

## members—concluded

- salary, art. 4, sec. 21

- yeas and nays, right to have recorded, art. 4, sec. 10

- officers of, how chosen, art. 4, sec. 9

- quorum, art. 4, sec. 9.

- rules of proceedings, art. 4, sec. 9

## senate

- elective, art. 4, sec. 1

## members

- election, art. 4, secs. 2, 6

- number, art. 4, sec. 6

- terms, art. 4, sec. 6

- president, art. 5, sec. 18

- pro tempore presiding officer, art. 5, sec. 18

- temporary president, art. 4, sec. 9

## sessions

- open, art. 4, sec. 10

- special, art. 5, sec. 8

- time of, art. 4, sec. 9

- yeas and nays, art. 4, secs. 10, 12; art. 5, sec. 16

## GOVERNMENT

- powers, division of, art. 3

- principles, recurrence to, art. 2, sec. 20

## GOVERNOR

## See Elections

- appointments, powers, art. 5, secs. 10, 11

- army and navy, commander in chief, art. 5, sec. 14

- contracts for supplies, approval, art. 4, sec. 25

- duties, art. 5, sec. 1

- election, art. 5, sec. 3

- eligibility to other offices, art. 5, sec. 5

- executive power, supreme, art. 5, sec. 6

## General assembly

- adjournment of, powers, art. 5, sec. 9

- estimates of money needed, duty to furnish, art. 5, sec. 7

- message to, art. 5, sec. 7

- report to, duty, art. 5, sec. 7

- special session of, power to call, art. 5, sec. 8

- vacancies, writs of election, duty to issue, art. 4, sec. 2

- impeachment, art. 4, sec. 24; art. 5, sec. 15

- Lieutenant Governor to act as, when, art. 5, sec. 17

- officers, removal of, powers, art. 5, sec. 12

- pardons, art. 5, sec. 13

- president of senate to act as, when, art. 5, sec. 19

- qualifications, art. 5, sec. 5

- residence at capital, art. 5, sec. 1

- salary, art. 5, sec. 23

- speaker of house to act as, when, art. 5, sec. 19

- term of office, art. 5, sec. 1

- veto, art. 5, sec. 16

## GRAIN

- inspection, art. 13, sec. 7

- producers and shippers, protection of, art. 13, sec. 7

- railroads, duties as to shipments of, art. 13, secs. 4, 5

## GRAND JURY

- abolition of, art. 2, sec. 8

- indictment by, necessary, when, art. 2, sec. 8.

## HABEAS CORPUS

- writ of, suspension of, art. 2, sec. 7

## INDEX.

- HAPPINESS**  
pursuit of, art. 2, sec. 1
- HIGHWAYS**  
*See* Roads and Highways
- HOMESTEAD AND EXEMPTION LAWS**  
General Assembly, duty to pass, art. 4, sec. 32
- HOUSE OF REPRESENTATIVES**  
*See* General Assembly
- ILLINOIS CENTRAL RAILROAD**  
separate sec. 1
- IMPEACHMENT**  
civil officers, art. 5, sec. 15  
conviction, effect, art. 4, sec. 24  
Governor, art. 5, sec. 15  
procedure, art. 4, sec. 24
- IMPRISONMENT**  
*See* Debt  
contempt, General Assembly, punishment by, art. 4, sec. 9
- INDEBTEDNESS**  
Chicago, art. 4, sec. 34  
counties, alteration of boundaries, effect, art. 10, sec. 3  
municipal  
limitations on, art. 9, secs. 12, 13  
property in  
interest, duty to levy taxes for, art. 9, sec. 12  
liability for, art. 9, sec. 10.  
principal, duty to levy taxes for, art. 9, sec. 12  
release of, art. 4, sec. 23; art. 9, sec. 6.  
sale for, art. 9, sec. 10  
state  
power to contract, art. 4, secs. 18, 19  
release of, art. 4, sec. 23; art. 9, sec. 6
- INDICTMENT**  
*See* Grand Jury
- INJURIES**  
remedy should be provided, art. 2, sec. 19
- INSPECTION**  
*See* Grain
- INSURRECTION**  
habeas corpus, writ of, suspension, art. 2, sec. 7  
suppression of  
debts may be contracted, art. 4, secs. 18, 19  
militia, Governor may call, art. 5, sec. 14
- INVASION**  
*See* Insurrection
- ITEMS**  
*See* Appropriations
- JEOPARDY**  
art. 2, sec. 10
- JOURNAL**  
*See* General Assembly
- JUDGES**  
*See* Clerks; Courts  
commissioned by Governor, art. 6, sec. 29  
courts  
appellate, salary, art. 6, sec. 11  
circuit  
duties, art. 6, secs. 16, 32  
election, art. 6, secs. 13, 15  
eligibility, art. 6, sec. 17  
residence, art. 6, sec. 32  
salary, art. 6, sec. 16  
terms, art. 6, sec. 12  
vacancies, art. 6, sec. 32  
circuit, Cook County  
duties, art. 6, secs. 16, 32  
election, art. 6, sec. 23  
eligibility, art. 6, sec. 17  
residence, art. 6, sec. 32  
salary, art. 6, sec. 25  
term, art. 6, sec. 23  
vacancies, art. 6, sec. 32  
county  
duties, art. 6, sec. 32  
election, art. 6, sec. 18; art. 10, sec. 8  
eligibility, art. 6, sec. 17  
residence, art. 6, sec. 32  
salary, art. 6, sec. 32; art. 10, secs. 9, 10  
term, art. 6, sec. 18; art. 10, sec. 8  
vacancies, art. 6, sec. 32  
criminal, Cook County, art. 6, sec. 26  
probate  
duties, art. 6, sec. 32  
election, art. 6, sec. 20  
eligibility, art. 6, sec. 17  
residence, art. 6, sec. 32  
term, art. 6, sec. 20  
vacancies, art. 6, sec. 32  
superior, Cook County  
duties, art. 6, sec. 32  
election, art. 6, sec. 23  
eligibility, art. 6, sec. 17  
powers, art. 6, sec. 24  
salary, art. 6, sec. 25  
term, art. 6, sec. 23  
vacancies, art. 6, sec. 32  
supreme  
duties, art. 6, secs. 16, 32  
election, art. 6, sec. 6  
eligibility, art. 6, sec. 3  
number, art. 6, sec. 2  
residence, art. 6, sec. 32  
salary, art. 6, sec. 7  
term, art. 6, sec. 6  
vacancies, art. 6, sec. 32  
removal, art. 6, sec. 30  
reports, duty to make, art. 6, sec. 31
- JUDICIAL DEPARTMENT**  
art. 6
- JUDICIAL OFFICERS**  
*See* Clerks; Judges; Justices of the Peace and Constables; State's Attorneys
- JUDICIAL POWERS**  
*See* Courts; Justices of the Peace and Constables  
exercised by judicial department only, art. 3
- JURISDICTION**  
*See* Courts



## INDEX.

- JURY**  
*See* Grand Jury  
 eminent domain, art. 2, sec. 13; art. 11, sec. 14  
 justices of the peace, civil cases, art. 2, sec. 5  
 persons accused of crime, rights of, art. 2, sec. 9  
 trial by, guaranteed, art. 2, sec. 5
- JUSTICE**  
 free and prompt, art. 2, sec. 19
- JUSTICES OF THE PEACE AND CONSTABLES**  
 Chicago, abolition, art. 4, sec. 34  
 commissioned by Governor, art. 6, sec. 29  
 Cook County  
 appointment, art. 6, sec. 28  
 jurisdiction, limitation, art. 4, sec. 34  
 removal from office, art. 6, sec. 28  
 terms, art. 6, sec. 28  
 in general  
 districts, election, art. 6, sec. 21  
 duties, art. 6, sec. 32  
 election, art. 6, sec. 21  
 judicial power vested in, art. 6, sec. 1  
 jurisdiction, uniformity, art. 6, sec. 21  
 jury trials, art. 2, sec. 5  
 lucrative office, art. 4, sec. 3  
 removal from office, art. 6, sec. 30  
 residence, art. 6, sec. 32  
 terms, art. 6, sec. 32  
 vacancies, art. 6, sec. 32
- LANGUAGE**  
*See* Proceedings
- LAWS**  
*See* General Assembly; Special Legislation
- LEGISLATION**  
*See* General Assembly; Special Legislation
- LEGISLATIVE DEPARTMENT**  
 art. 4
- LEGISLATIVE POWER**  
*See* General Assembly  
 exercised by legislative department only, art. 3
- LIBEL**  
 truth a defense, when, art. 2, sec. 4
- LIBERTY**  
 deprivation of, due process of law, art. 2, sec. 2  
 preservation of, art. 2, sec. 20  
 secured, art. 2, sec. 1
- LIEUTENANT GOVERNOR**  
*See* Elections  
 duties, art. 5, sec. 1  
 election, art. 5, sec. 3  
 eligibility to other offices, art. 5, sec. 5  
 Governor to act as, when, art. 5, sec. 17  
 qualifications, art. 5, sec. 3  
 report to Governor, art. 5, secs. 20, 21  
 salary, art. 5, sec. 23  
 senate  
 president of, art. 5, sec. 18  
 voting in, art. 5, sec. 18  
 term of office, art. 5, sec. 1  
 vacancy, art. 5, sec. 20
- LIFE**  
 deprivation of, due process of law, art. 2, sec. 2  
 right to and protection of, art. 2, sec. 1
- LOCAL IMPROVEMENTS**  
*See* Special Assessments
- LOCAL LEGISLATION**  
*See* Special Legislation
- LOTTERIES**  
 art. 4, sec. 27
- LUCRATIVE OFFICE**  
*See* Office
- MESSAGE**  
*See* Governor
- MILEAGE**  
*See* General Assembly
- MILITARY**  
*See* Civil Power
- MILITIA**  
 art. 12; *See* Governor, Insurrection; Soldiers  
 appointments in, lucrative offices, art. 4, sec. 3  
 criminal offenses in, prosecution, art. 2, sec. 8  
 formation of, art. 12, sec. 2  
 members, privileges, art. 12, sec. 4  
 officers  
 commissioned by Governor, art. 12, sec. 3  
 terms, art. 12, sec. 3  
 records, banners, relics, preservation of, art. 12, sec. 5  
 service in, who liable to, art. 12, secs. 1, 6
- MILL TAX**  
 abolished, schedule, sec. 23
- MINERS**  
 protection of, duty of General Assembly, art. 4, sec. 29
- MINES**  
*See* Miners  
 railroads, duty of, art. 13, sec. 5
- MINISTRY**  
*See* Religion
- MINORITY REPRESENTATION**  
 plan of, art. 4, secs. 7, 8
- MISDEMEANORS**  
 definition, art. 2, sec. 8  
 prosecution, art. 2, sec. 8
- MUNICIPAL CORPORATIONS**  
*See* Aid; Capital Stock; Corporations; Indebtedness  
 officers  
 compensation, art. 9, sec. 11  
 disqualifications, art. 9, sec. 11
- MUNICIPAL COURTS**  
*See* Courts
- MUNICIPAL SUBSCRIPTIONS TO PRIVATE CORPORATIONS**  
*See* Capital Stock

## INDEX.

## NAVY

*See* Militia

## NOTARY PUBLIC

not a lucrative office, art. 4, sec. 3

## OATH

*See* Religion

civil officers, art. 5, sec. 25

General Assembly, members of, art. 4, sec. 5

## OFFENSES

criminal

appeals, Cook County, art. 6, sec. 26

accused, rights of, art. 2, secs. 9, 10

bail, art. 2, sec. 7

conviction, effect, art. 2, sec. 11; art. 7, sec. 7

indictment, art. 2, sec. 8

jeopardy, art. 2, sec. 10

jury trial, art. 2, secs. 5, 9

penalties, art. 2, sec. 11

trial, art. 2, sec. 9

## OFFICE

appointments to, art. 5, sec. 10

defined, art. 5, sec. 24

disqualifications, art. 4, sec. 4; art. 9, sec. 11

lucrative, what are not, art. 4, sec. 3

qualifications, art. 4, sec. 3; art. 5, sec. 5; art. 6, secs. 3, 17, 32; art. 7, sec. 6; art. 8, sec. 5

removal from, art. 4, sec. 24; art. 5, secs. 12, 15; art. 6, secs. 9, 28, 30

term, extension of, art. 4, sec. 28

vacancies, art. 4, sec. 2; art. 5, secs. 11, 20; art. 6, sec. 32; art. 14, sec. 1

## OFFICERS

*See* Attorney General; Auditor of Public Accounts; Clerks; County Officers; Elections; General Assembly; Governor; Judges; Justices of the Peace and Constables; Lieutenant Governor; Militia; Municipal Corporations; Oath; Office; Secretary of State; State Treasurer; State's Attorneys; Superintendent of Public Instruction

## OPINIONS

*See* Religion

## PARDONS

governor, power of, art. 5, sec. 13

## PENALTIES

*See* Offenses

## POLICE MAGISTRATES

*See* Justices of the Peace and Constables

## POPULATION

defined, art. 6, sec. 33

## POWERS OF GOVERNMENT

distribution, art. 3

exercise, art. 3

## PREAMBLE

Page 13

## PRESIDENT OF SENATE

*See* General Assembly; Governor; Lieutenant Governor

## PRIVILEGES

General Assembly, members, art. 4, sec. 14

militia, art. 12, sec. 4

special, art. 2, sec. 14; art. 4, sec. 22

voters, art. 7, sec. 3

## PROBATE COURTS

*See* Courts

## PROCEEDINGS

executive, legislative, judicial, publication and preservation of, schedule, sec. 18

## PROCESS

art. 6, sec. 33

## PROPERTY

*See* Revenue

due process of law, art. 2, sec. 2

eminent domain, art. 2, sec. 13; art. 11, sec. 14

injury, remedy, art. 2, sec. 19

municipal debts, liability, art. 9, sec. 10

protection of, art. 2, sec. 1

railroads

eminent domain, art. 11, sec. 14

forfeiture, art. 11, sec. 15

movable, subject to execution, art. 11, sec. 10

## PROSECUTIONS

*See* Offenses

carried on, how, art. 6, sec. 33

conclude, how, art. 6, sec. 33

## PROTEST

*See* General Assembly

## QUALIFICATIONS

*See* Office

## QUORUM

*See* General Assembly

## RAILROADS

*See* Aid; Capital Stock; Directors; Eminent Domain; Grain

coal banks and yards, duties, art. 13, sec. 5

consolidation, art. 11, sec. 11

execution, rolling stock subject to, art. 11, sec. 10

forfeiture, property subject to, art. 11, sec. 15

organization, art. 11, sec. 9

public highways, art. 11, sec. 12

rates

discrimination and extortion, art. 11, sec. 15

transportation, art. 11, sec. 12

report to Auditor, art. 11, sec. 9

stockholders, registry of, art. 11, sec. 9

warehouses, duties, art. 13, sec. 5

## RATES

*See* Railroads

## REAL ESTATE

*See* Revenue

## REBELLION

*See* Insurrection

## RECORDER OF DEEDS

*See* County Officers

## INDEX.

## RECORDS

*See* Militia; Proceedings

## REDEMPTION

*See* Revenue

## RELIGION

civil and political rights, no denial on account of, art. 2, sec. 3  
 free exercise and enjoyment, guaranteed, art. 2, sec. 3  
 improper practices, art. 2, sec. 3  
 licentiousness, art. 2, sec. 3  
 ministry or place of worship, support of against consent, art. 2, sec. 3  
 oaths and affirmations, art. 2, sec. 3  
 preferences to religious denominations, art. 2, sec. 3  
 sectarian institutions, aid to, art. 8, sec. 3

## REMEDY

*See* Injuries

## REMOVAL FROM OFFICE

*See* Office

## REPORTER OF DECISIONS

appointment, art. 6, sec. 9  
 removal, art. 6, sec. 9

## REPORTS

*See* Attorney General; Auditor of Public Accounts; Clerks; County Officers; General Assembly; Judges; Lieutenant Governor; Railroads; Secretary of State; State Treasurer; Superintendent of Public Instruction

## REPRESENTATIVES

address, right of people, art. 2, sec. 17

## REPRESENTATIVES, HOUSE OF

*See* General Assembly

## REPRIEVES

*See* Pardons

## REPUTATION

*See* Injuries

## RESIDENCE

qualification for office, art. 4, sec. 3; art. 5, sec. 5; art. 6, secs. 3, 17, 32; art. 7, sec. 6  
 state officers at capital, art. 5, sec. 1  
 voters, art. 7, secs. 1, 4, 5

## REVENUE

art. 9

taxation

exemptions

general law, art. 9, sec. 3  
 property subject to, art. 9, sec. 3

municipal

corporate purposes

corporate authorities, power of, art. 9, secs. 9, 10

General Assembly, power of, art. 9, sec. 10

counties, power of, art. 9, sec. 8

general property tax, art. 9, secs. 9, 10

special assessments, art. 9, sec. 9

uniformity, art. 9, secs. 9, 10

real estate, sale of, for non-payment of taxes

procedure, art. 9, sec. 4

redemption, art. 9, sec. 5

## REVENUE--Concluded.

state

commutation, art. 9, sec. 6

enumerated trades and occupations, art. 9, sec. 1

General Assembly, general power, art. 9, sec. 2

general property tax, art. 9, sec. 1

release, art. 9, sec. 6

taxes, payment of, into State Treasury, art. 9, sec. 7

uniformity, art. 9, sec. 1

valuation, agency to ascertain, art. 9, sec. 1

## REVIVIFICATION OF LAWS

*See* General Assembly

## ROADS AND HIGHWAYS

cities, towns and villages, control of, art. 11, sec. 4

General Assembly, power of, art. 4, sec. 30

railroads declared public highways, art. 11, sec. 12

## ROLLING STOCK

*See* Railroads

## SALARIES

*See* Fees and Salaries

## SCHOOLS

*See* Education

## SEAL OF STATE

custody, art. 5, sec. 22

## SEARCH WARRANTS

affidavit, art. 2, sec. 6

probable cause, art. 2, sec. 6

## SEARCHES AND SEIZURES

unreasonable, art. 2, sec. 6

## SECRETARY OF STATE

*See* Elections

duties, art. 5, sec. 1

election, art. 5, sec. 3

eligibility to other offices, art. 5, sec. 5

house of representatives, presiding officer, when, art. 4, sec. 9

report to Governor, art. 5, secs. 20, 21

residence at capital, art. 5, sec. 1

salary, art. 5, sec. 23

seal of state, custody, art. 5, sec. 22

term of office, art. 5, sec. 1

vacancy, art. 5, sec. 20

## SECTARIAN INSTITUTIONS

*See* Aid

## SEIZURES

*See* Searches and Seizures

## SENATE

*See* General Assembly

## SENATORIAL DISTRICTS

apportionment, art. 4, sec. 6

boundaries, art. 4, sec. 6

compact and contiguous territory, art. 4, sec. 6

population, required ratio, art. 4, sec. 6

## INDEX.

- SENATORS**  
*See* General Assembly
- SESSIONS**  
*See* General Assembly; Special Session of the General Assembly
- SHERIFF**  
*See* County Officers
- SOLDIERS**  
*See* Militia  
 quartering of, art. 2, sec. 16  
 vote, right to, art. 7, secs. 4, 5
- SPEAKER OF HOUSE**  
*See* General Assembly; Governor
- SPECIAL ASSESSMENTS**  
 cities, towns and villages, art. 9, sec. 9  
 drainage districts, art. 4, sec. 31
- SPECIAL LEGISLATION**  
 Chicago, local government of, art. 4, sec. 34  
 corporations, organization of, art. 11, sec. 1  
 county seats, removal, art. 10, sec. 4  
 enumerated subjects, art. 4, sec. 22  
 exemption from taxation, art. 9, sec. 3  
 fees, county and township officers, art. 10, secs. 11, 12  
 township organization, art. 10, sec. 5
- SPECIAL SESSION OF THE GENERAL ASSEMBLY**  
 business of, art. 5, sec. 8  
 Governor, power to call, art. 5, sec. 8
- SPEECH**  
*See* Libel  
 freedom of  
 responsibility for, art. 2, sec. 4  
 secured, art. 2, sec. 4  
 General Assembly, members, privileges, art. 4, sec. 14
- STATE**  
 suits against, art. 4, sec. 26
- STATE TREASURER**  
*See* Elections  
 duties, art. 5, sec. 1  
 election, art. 5, sec. 3  
 reelection, eligibility, art. 5, sec. 2  
 report to Governor, art. 5, secs. 20, 21  
 residence at capital, art. 5, sec. 1  
 salary, art. 5, sec. 23  
 security, additional, art. 5, sec. 2  
 term of office, art. 5, sec. 2  
 vacancy, art. 5, sec. 20
- STATE'S ATTORNEYS**  
 Cook County, salary, art. 6, sec. 25  
 in general  
 commissioned by Governor, art. 6, sec. 29  
 duties, art. 6, sec. 32  
 election, art. 6, sec. 22  
 removal, art. 6, sec. 30  
 residence, art. 6, sec. 32  
 terms, art. 6, sec. 22  
 vacancies, art. 6, sec. 32
- STOCKHOLDERS**  
*See* Banks; Railroads
- STREET RAILWAYS**  
*See* Corporations
- SUFFRAGE**  
 ballot, voting by, art. 7, sec. 2  
 conviction of infamous crime, effect, art. 7, sec. 7  
 soldiers, art. 7, secs. 4, 5  
 voters  
 disqualifications, art. 7, sec. 7  
 privileges, art. 7, sec. 3  
 qualifications, art. 7, sec. 1  
 residence, art. 7, secs. 1, 4, 5
- SUPERINTENDENT OF PUBLIC INSTRUCTION**  
*See* Elections  
 duties, art. 5, sec. 1  
 election, art. 5, sec. 3  
 eligibility to other offices, art. 5, sec. 5  
 report to Governor, art. 5, secs. 20, 21  
 residence at capital, art. 5, sec. 1  
 salary, art. 5, sec. 23  
 term of office, art. 5, sec. 1  
 vacancy, art. 5, sec. 20
- SUPREME COURT**  
*See* Courts
- TAXATION**  
*See* Revenue
- TITLE OF ACTS**  
*See* General Assembly
- TOWNSHIPS**  
*See* Counties
- TREASURER**  
*See* County Officers; State Treasurer
- TRIAL BY JURY**  
*See* Jury
- UNIFORMITY**  
*See* Courts; Fees; Justices of the Peace and Constables; Taxation
- VACANCIES**  
*See* Attorney General; Auditor of Public Accounts; Clerks; General Assembly; Judges; Justices of the Peace and Constables; Lieutenant Governor; Secretary of State; State Treasurer; State's Attorneys; Superintendent of Public Instruction
- VALUATION**  
*See* Revenue
- VETO**  
 Governor, power of, art. 5, sec. 16
- VOTE**  
*See* Suffrage
- VOTER**  
*See* Suffrage
- WAREHOUSES**  
 art. 13  
 definition, art. 13, sec. 1  
 owners, duties of, art. 13, sec. 2  
 railroads, duties of, art. 13, sec. 5  
 receipts, fraudulent, art. 13, sec. 6  
 stored property, right of owners to examine, art. 13, sec. 3

## INDEX.

## WARRANTS

*See* Appropriations; Search Warrants

## WITNESSES

accused persons, rights of, art. 2, sec. 9

## WORSHIP

*See* Religion

## WRIT OF ERROR

*See* Appeals and Writs of Error

## WRONGS

*See* Injuries

## YEAS AND NAYS

*See* General Assembly













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