CONSTITUTIONAL CONVENTION

Constitution of the State of Illinois

ANNOTATED

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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 1818. 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 opnions 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.

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December, 1919.

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CONSTITUTION OF THE STATE OF ILLINOIS.

Adopted in Convention at Springfield, May 13th, A. D. 1870 [1]

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.

[1] 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, towit: 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.[1] 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."[2] This is substantially the language of the ordinance of 1787, for the government of the Northwest Territory.[3] The language of the enabling act for Indiana,[4] approved April 19, 1816, and of the Indiana constitution[5] 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."[6] This inaccuracy doubtless arose from over-

[1] Act of Congress, 3 Stat. at large 428 (1818).
[2] Act of Congress, 2 Stat. at large 514 (1809).
[3] Article V, Ordinance of 1787.
[4] Act of Congress, 3 Stat. at large 289 (1816).
[5] Constitution of Indiana 1851, article 14, section 1.
[6] 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."[7] 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.[8]

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.[9]

The deed of cession from Virginia conveyed to the United States the territory northwestward of the river Ohio.[10] 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."[11]

The same court in a later case held that the state of Kentucky extended to low water mark on the Indiana shore.[12] 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.[13] 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

[7] Article V, Ordinance of 1787.
[8] I. C. R. R. Co. v Illinois, 146 U. S. 387 (1892).
[9] 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).
[10] Deed of Cession, XI Hen. Stat. Va. 571 (1784).
[11] Handley's Lessee v Anthony, 5 Wheaton (U. S.) 374 (1820).
[12] Henderson Bridge Co. v Henderson City, 173 U. S. 592 (1899).
[13] 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."[14]

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,[15] and Indiana,[16] 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,[17] and Illinois and Missouri.[18]

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."[19] 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.[20] 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."[21] 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.[22]

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.

[14] Ensminger v People, 47 Ill. 384 (1867).
[15] Act of Congress, 3 Stat. at large 428 (1818).
[16] Act of Congress, 3 Stat. at large 289 (1816).
[17] Act of Congress, 5 Stat. at large 742 (1845).
[18] Act of Congress, 3 Stat. at large 545 (1820).
[19] Act of Virginia, XIII Hen. Stat. Va. 19 (1789).
[20] Wedding v Meyler, 192 U. S. 573 (1904).
[21] Union Bridge Co. v Industrial Commission, 287 Ill. 396 (1919).
[22] 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, subheading, "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."[1] 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[2] 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-

[1] People v Turner, 55 Ill. 280 (1870).
[2] 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,[3] nor punish summarily without notice or hearing for a contempt committed out of the view and hearing of the court.[4]

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.[5] 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.[6] 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.[7] 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.[8] 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.[9] 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.[10]

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.[11] 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.[12] 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,[13] 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.[14] Rights of defense arising from the complete running of statutes of limitations, are property within the protection of this provision.[15] An acknowledgment improperly taken before an officer of the corporation which is the grantee or mortgagee in the in-

[3] Walter Cabinet Co. v Russell, 250 Ill. 416 (1911).
[4] Hohenadel v Steele, 237 Ill. 229 (1908).
[5] County of McLean v Humphreys, 104 Ill. 378 (1882).
[6] People v Strassheim, 242 Ill. 359 (1909).
[7] Report Attorney General 1908, p. 630.
[8] Johnson v Jones, 44 Ill. 142 (1867).
[9] People v Steele, 231 Ill. 340 (1907).
[10] Braceville Coal Co. v People, 147 Ill. 66 (1893).
[11] Mathews v People, 202 Ill. 389 (1903).
[12] City of Chicago v Wells, 236 Ill. 129 (1908).
[13] McChesney v People, 200 Ill. 146 (1902); City of Chicago v Hulbert, 205 Ill. 346 (1903).
[14] Atkin v Kansas, 191 U. S. 207, (1903).
[15] 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.[16] 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.[17] An invalid tax sale may not be validated by act of legislature, because the right of defense to such sale becomes a vested right.[18]

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,[19] 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.[20] But in such cases the facts which are given a probative value must have a fair and natural relation to the ultimate fact.[21] 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.[22] 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.[23] The right to have a statutory cause reviewed by appeal or writ of error is not a constitutional privilege.[24]

But it has been held that a person cannot, within the meaning of this section, have a property right to public office,[25] such as that of executor[26] or county treasurer;[27] or to sell or give away a street car transfer issued for continuous trip.[28] 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,[29] 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.[30] 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.[31] 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.[32] 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.[33]

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.[34] Municipalities are entrusted as agencies of the state, with the duty of preserving peace and order and a statute imposing liability on

[16] Steger v Traveling Men's Bldg. & Loan Ass'n., 208 Ill. 236 (1904).
[17] Hunter v Hatch, 45 Ill. 178 (1867).
[18] Conway v Cable, 37 Ill. 82 (1865).
[19] Chicago Terminal Transfer R. R. Co. v City of Chicago, 217 Ill. 343 (1905).
[20] People v Rose, 207 Ill. 352 (1904).
[21] Meadowcroft v People, 163 Ill. 56 (1896).
[22] Shellabarger Elevator Co. v I. C. R. R. Co., 278 Ill. 333 (1917).
[23] McCogg v Heacock, 42 Ill. 153 (1866).
[24] People v Cohen, 219 Ill. 200 (1906).
[25] People v Kipley, 171 Ill. 44, (1898); People v City of Chicago, 242 Ill. 561 (1909); City of Aurora v Schoeberlein, 230 Ill. 496 (1907).
[26] In re petition of Mulford, 217 Ill. 242 (1905).
[27] Donahue v County of Will, 100 Ill. 94 (1881).
[28] City of Chicago v Openheim, 229 Ill. 313 (1907).
[29] Frost v People, 193 Ill. 635 (1901).
[30] People v McBride, 234 Ill. 146 (1908).
[31] Goddard v C. & N. W. Ry. Co., 202 Ill. 362 (1903).
[32] People v Bridges, 142 Ill. 30 (1892); Magner v People, 97 Ill. 320 (1881).
[33] Dixon v People, 168 Ill. 179 (1897).
[34] 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.[35]

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.[36] 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.[37] 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 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.[38] 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.[39]

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.[40] 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.[41] Constructive service of process for the rendition of a personal judgment against a resident defendant has been held to be due process.[42] 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.[43] In fact, in a proceeding for a contempt committed in the presence of the court, due process, from the nature of the offense, does

[35] Sturges v City of Chicago, 237 Ill. 46 (1908).
[36] Green v Red Cross Medical Service Co., 232 Ill. 616 (1908).
[37] Anderson v Shepard, 285 Ill. 544 (1918).
[38] Booz v Texas & Pacific Ry. Co., 250 Ill. 376 (1911).
[39] Commissioners v Smith, 233 Ill. 417 (1908).
[40] Sherman v People, 210 Ill. 552 (1904); Gage v City of Chicago, 225 Ill. 218 (1907).
[41] McChesney v City of Chicago, 226 Ill. 238 (1907).
[42] Nelson v C. B. & Q. R. R. Co., 225 Ill. 197 (1907)
[43] People v Arnold Bros., 282 Ill. 305 (1918).

not require notice and a hearing.[44] 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.[45] 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.[46] 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.[47] 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.[48] 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.[49]

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.[50] An ordinance cannot provide in the case of stock running at large for the assessment of damages by three disinterested men.[51] On the other hand, the state board of examiners may after notice and a hearing, revoke the license of an architect for cause,[52] and the state board of health may revoke a license to practice medicine for advertising under a false name.[53] 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.[54]

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,[55] 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.[56] 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

[44] Hohenadel v Steele, 237 Ill. 229 (1908).
[45] Glennon v Britton, 155 Ill. 232 (1895).
[46] Shellabarger Elevator Co. v I. C. R. R. Co., 278 Ill. 333 (1917).
[47] Durand v Dyson, 271 Ill. 382 (1916).
[48] Sings v City of Joliet, 237 Ill. 300 (1908).
[49] Pearson v Zehr, 138 Ill. 48 (1891).
[50] C. C. C. & St. L. Ry. Co. v People, 212 Ill. 638 (1904).
[51] Bullock v Geomble, 45 Ill. 218 (1867).
[52] Klafter v Board of Examiners, 259 Ill. 15 (1913).
[53] People v Apfelbaum, 251 Ill. 18 (1911).
[54] Public Utilities Commission v C. & W. T. Ry. Co., 275 Ill. 555 (1916).
[55] People v Strassheim, 242 Ill. 359 (1909).
[56] 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,[52] banking,[53] warehousemen and grain elevators,[54] public utility companies,[55] insurance,[61] and places of amusement,[56] but not a public golf course.[63]

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

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,[72] suppressing gambling and grain option contracts,[73] and forbidding the marriage of divorced persons within one year,[74] but the court has held otherwise as to an ordinance to prohibit public dancing in restaurants[75] and one prohibiting all public dances and open air picnics.[76]

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

[52] Chicago Union Traction Co. v City of Chicago, 199 Ill. 484 (1902); C. C. C. & St. L. Ry. Co. v People, 175 Ill. 359 (1898).
[53] Meadowcroft v People, 163 Ill. 56 (1896).
[54] Munn v People, 69 Ill. 80 (1873).
[55] City of Chicago v O'Connell, 278 Ill. 591 (1917); (recently affirmed by the United States Supreme Court).
[61] People v American Life Ins. Co., 267 Ill. 501 (1915).
[63] People v Thompson, 283 Ill. 87 (1918).
[56] Condon v Village of Forest Park, 278 Ill. 218 (1917).
[64] Gundling v City of Chicago, 176 Ill. 340 (1898).
[65] Roy v City of Chicago, 263 Ill. 122 (1914).
[66] People v Solomon, 265 Ill. 28 (1914).
[67] People v Price, 257 Ill. 587 (1913).
[68] Ritchie & Co. v Wayman, 244 Ill. 509 (1910); People v Elerding, 251 Ill. 579 (1912).
[69] Durand v Dyson, 271 Ill. 382 (1916).
[70] Sings v City of Joliet, 237 Ill. 300 (1908).
[71] 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).
[72] City of Chicago v Shaynin, 258 Ill 69 (1913).
[73] Booth v People, 186 Ill. 43 (1900).
[74] Hobbs v Hobbs, 279 Ill. 163 (1917).
[75] City of Chicago v Drake Hotel Co., 274 Ill. 408 (1916).
[76] Village of Des Plaines v Poyer, 123 Ill. 348 (1888).
[77] Lasher v People, 183 Ill. 226 (1899).
[78] People v Thompson, 283 Ill. 87 (1918).
[79] People v William Henning Co., 260 Ill. 554 (1913).
[80] People v Freeman, 242 Ill. 373 (1909).

milk and cream bottles to be permanently stamped thereon.[81] Under the police power, the General Assembly may regulate or prohibit the sale of deadly weapons,[82] fix speed limits for automobiles,[83] and authorize municipalities to create fire limits,[84] 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,[85] dental surgery,[86] plumbing,[87] barbering,[88] and coal mining,[89] 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.[90] 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.[91]

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

Municipalities may be authorized to regulate the location of businesses which may be offensive or dangerous in certain localities. Thus, livery stables[97] and public garages[98] 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.[99] 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.[1] A reasonable regulation however, as to material and dimensions of bill boards to safeguard life and property is a valid exercise of police power.[2] 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

[81] City of Chicago v Bowman Dairy Co., 234 Ill. 294 (1908).
[82] Biffer v City of Chicago, 278 Ill. 562 (1917).
[83] Christy v Elliott, 216 Ill. 31 (1905).
[84] King v Davenport, 98 Ill. 305 (1881).
[85] Williams v People, 121 Ill. 84 (1887).
[86] Kettles v People, 221 Ill. 221 (1906).
[87] Douglas v People, 225 Ill. 536 (1907).
[88] People v Logan, 284 Ill. 83 (1918).
[89] People v Evans, 247 Ill. 547 (1910).
[90] People v Griffith, 280 Ill. 18 (1917).
[91] Bessette v People, 193 Ill. 334 (1901).
[92] Venner v Chicago City Ry. Co., 246 Ill. 170 (1910).
[93] City of Chicago v Schmidinger, 243 Ill. 167 (1909).
[94] People v Fernow, 286 Ill. 627 (1919).
[95] Price v People, 193 Ill. 114 (1901).
[96] Town of Fox v Town of Kendall, 97 Ill. 72 (1880).
[97] City of Chicago v Stratton, 162 Ill. 494 (1896).
[98] People v Eriesson, 263 Ill. 368 (1914).
[99] People v Steele, 231 Ill. 340 (1907).
[1] Haller Sign Works v Physical Culture Training School, 249 Ill. 436 (1911).
[2] City of Chicago v Gunning System, 214 Ill. 628 (1905).

persons.[3] 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.[4] 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,[5] but this view was not shared by the United States Supreme Court in a later decision.[6] 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.[7] Nor can the purchase of receptacles bearing a registered trade mark without the written consent of the original owner, be prohibited.[8] 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,[9] but similar legislation has been sustained in the United States Supreme Court.[10] The General Assembly, in the opinion of the court, may not forbid an employee to pay for goods purchased by working out the debt,[11] 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.[12] The prohibition of the sale of secondhand mattresses is unreasonable inasmuch as the use of such articles may be made safe by sterilization.[13] 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.[14] 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.[15] 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.[16]

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,[17] so long as the rates fixed are reasonable and do not amount to a deprivation of property,[18] or may require uniformity of insurance rates between insurants of the same class.[19]

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

[3] Thomas Cusack Co. v City of Chicago, 267 Ill. 344 (1915).
[4] People v City of Chicago, 261 Ill. 16 (1913).
[5] Ruhstrat v People, 185 Ill. 133 (1900).
[6] Halter v Nebraska, 205 U. S. 34 (1907).
[7] City of Carrolton v Bazzette, 159 Ill. 284 (1896).
[8] Horwich v Walker-Gordon Lab. Co., 205 Ill. 497 (1903).
[9] Ramsey v People, 142 Ill. 380 (1892); Harding v People, 160 Ill. 459 (1896).
[10] Rail and River Coal Co. v Yaple, 236 U. S. 338 (1915); McLean v Arkansas, 211 U. S. 539 (1909).
[11] 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).
[12] Gillespie v People, 188 Ill. 176 (1900).
[13] People v Weiner, 271 Ill. 74 (1915).
[14] City of Chicago v C. & N. W. Ry. Co., 275 Ill. 30 (1916).
[15] Ritchie v People, 155 Ill. 98 (1895).
[16] Ritchie & Co. v Wayman, 244 Ill. 509 (1910); People v Elerding, 254 Ill. 579 (1912).
[17] Munn v People, 69 Ill. 80 (1873).
[18] Chicago Union Traction Co. v City of Chicago, 199 Ill. 484 (1902).
[19] 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,[20] 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.[21] 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.[22] 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.[23]

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.[24] 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.[25] But a somewhat similar statute applying to all employers was sustained in the United States Supreme Court.[26] 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.[27] But a New York statute which required railroad employees to be paid semi-monthly was sustained by the United States Supreme Court.[28] 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,[29] but this view was not shared by the United States Supreme Court.[30] 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.[31] The court has declared discriminatory a licensing act for horseshoers limited to those in cities over a certain population;[32] a statute, which fixed a prohibitive license fee for the sale of patent medicine by itinerant merchants but permitted sales by resident vendors;[33] and a law which required barbershops to close on Sunday.[34]

[20] People v McBride, 234 Ill. 146 (1908).
[21] City of Chicago v Bowman Dairy Co., 234 Ill. 294 (1908).
[22] City of Belleville v St. Clair County Turnpike Co., 234 Ill. 428 (1908).
[23] City of Chicago v Jackson, 196 Ill. 496 (1902).
[24] Bailey v People, 190 Ill. 28 (1901); City of Chicago v Netcher, 183 Ill. 104 (1899).
[25] Frorer v People, 141 Ill. 171 (1892).
[26] Knoxville Iron Co. v Harbison, 183 U. S. 13 (1901).
[27] Braceville Coal Co. v People, 147 Ill. 66 (1893).
[28] Erie Railroad Co. v Williams, 233 U. S. 685 (1914).
[29] Millett v People, 117 Ill. 294 (1886); Ramsey v People, 142 Ill 380 (1892).
[30] McLean v Arkansas, 211 U. S. 539 (1909); Rail and River Coal Co. v Yaple, 236 U. S. 338 (1915).
[31] City of Chicago v Netcher, 183 Ill. 104 (1899).
[32] Bessette v People, 193 Ill. 334 (1901).
[33] People v Wilson, 249 Ill. 195 (1911).
[34] 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.[35] 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.[36] 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.[37] 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.[38] 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.[39]

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[40] 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.[41] 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.[42] So an act amending the school law was held improper since it left to the

[35] Josma v Western Steel Car & Foundry Co., 249 Ill. 508 (1911); but see Commonwealth v Libbey, 216 Mass. 356 (1914).
[36] Magoun v Illinois Trust & Savings Bank, 170 U. S. 283 ((1898).
[37] People v Elerding, 254 Ill. 579 (1912).
[38] People v Schenck, 257 Ill. 384 (1913).
[39] Massie v Cessna, 239 Ill. 352 (1909).
[40] Public Utilities Commission v C. & W. T. Ry. Co., 275 Ill. 555 (1916).
[41] Board of Administration v Miles, 278 Ill. 174 (1917).
[42] 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.[43] 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.[44] 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.[45]

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,[46] 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 JJ. 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."[47] 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

[43] Kenyon v Moore, 287 Ill. 233 (1919).
[44] Arms v Ayer, 192 Ill. 601 (1901).
[45] People v Kane, 288 Ill. 235 (1919).
[46] Christian Church v Church of Christ, 219 Ill. 503 (1906).
[47] 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.[48] Religious worship has been construed to include every variety of religious faith and philosophy of life or death.[49]

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.[50] 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.[51]

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.[52] 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.[53]

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;[54] nor is it a violation of this clause to permit the building of chapels on county poor farms.[55] 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.[56] (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.[57] 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.[58]

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.[59]

[48] North v Trustees of University of Illinois, 137 Ill. 296 (1891).
[49] In re Walker, 200 Ill. 566 (1903).
[50] Chase v Cheney, 58 Ill. 509 (1871); Fussell v Hall, 233 Ill 73, (1908).
[51] Christian Church v Church of Christ, 219 Ill. 503 (1906); Presbyterian Church v Cumberland Church, 245 Ill. 74 (1910).
[52] Central Military Tract R. R. Co. v Rockafellow, 17 Ill. 541 (1856).
[53] Hronek v People, 134 Ill. 139 (1890).
[54] Nichols v School Directors, 93 Ill. 61 (1879).
[55] Reichwald v Catholic Bishop of Chicago, 258 Ill. 41 (1913).
[56] Report Attorney General 1914, p. 130.
[57] People v Apfelbaum, 251 Ill. 18 (1911).
[58] Storey v People, 79 Ill. 45 (1875); People v Gilbert, 281 Ill. 619 (1917).
[59] 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,[60] but that a jury of less than twelve may by law constitute a jury for justice of the peace courts,[61] 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.[62] 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.[63]

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.[64] 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.[65] 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.[66] 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.[67] 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.[68] Two decisions followed,—Brewster v People in 1899 and Paulsen v People in 1902; both consider the right of a defendent in a criminal proceeding to waive a

[60] McManus v McDonough, 107 Ill. 95 (1883).
[61] Hermanek v Guthman, 179 Ill. 563 (1899).
[62] McManus v McDonough, 107 Ill. 95 (1883).
[63] People v Rodenberg, 254 Ill. 386 (1912); City of Chicago v Knobel, 232 Ill. 112 (1908).
[64] Ross v Irving, 14 Ill. 171 (1852).
[65] Commercial Ins. Co. v Scammon, 123 Ill. 601 (1888).
[66] Borg v C. R. I. & P. Ry. Co., 162 Ill. 348 (1896).
[67] George v People, 167 Ill. 447 (1897).
[68] 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.[69] 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.[70]

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.[71] Nor may an ordinance authorize a pound master to sell stock taken up unless the owner pays a penalty and costs.[72] 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.[73] 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,[74] nor to a proceeding to disbar an attorney,[75] nor a probate proceeding to compel an executor to inventory personal property,[76] nor to proceedings against sureties on appeal bonds after conviction of the principal,[77] 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,[78] nor to eminent domain proceedings.[79] The guaranty of the right to jury trial does not extend to cases of equity jurisdiction[80] such as a bill to foreclose a mortgage[81] nor a partition suit even in a situation where the practical effect is the same as ejectment,[82] nor a bill to enjoin insurance companies from the prosecution of business until they complied with state laws,[83] nor a proceeding to discover assets of an estate,[84] nor to purely legal

[69] Brewster v People, 183 Ill. 143 (1899).
[70] Paulsen v People, 195 Ill. 507 (1902).
[71] Bullock v Gromble, 15 Ill. 218 (1867).
[72] Willis v Legris, 45 Ill. 289 (1867).
[73] Huston v Atkins, 71 Ill. 491 (1874).
[74] People v Kipley, 171 Ill. 44 (1898); People v Seymour, 272 Ill. 295 (1916).
[75] People v Goodrich, 79 Ill. 148 (1875).
[76] Coffey v Coffey, 179 Ill. 283 (1899).
[77] Hennles v People, 70 Ill. 100 (1873); Whitehurst v Coleen, 53 Ill. 247 (1870).
[78] Ross v Irving, 14 Ill. 171 (1852).
[79] Wabash R. R. Co. v Drainage District, 191 Ill. 310 (1902); Johnson v Joliet & Chicago R. R. Co., 23 Ill. 202 (1859).
[80] Phillips v Edsall, 127 Ill. 535 (1889).
[81] Dowden v Wilson, 71 Ill. 185 (1874).
[82] Flaherty v McCormick, 113 Ill. 538 (1885).
[83] North American Ins. Co., v Yates, 214 Ill. 272 (1905)
[84] 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.[85]

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,[1] such as proceedings to adjudge infants dependent under the juvenile court act,[86] to compel the support of paupers by relatives,[87] to restore lost records,[88] to enforce an attorney's lien,[89] or to destroy gaming apparatus.[90] There is no constitutional right to a trial by jury in appeals from decisions of probate courts admitting wills to probate,[91] or petitions under the assignment act to determine that property had passed to the assignee for creditors.[92]

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,[93] by a creditor of a corporation in equity against stockholders for unpaid stock subscriptions,[94] or to compel a surviving partner to account to the administrator of a deceased partner,[95] or to establish title under the burnt record act in an equity court,[96] regardless of the fact that the decree will have the same effect as a judgment in ejectment.[97]

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.[98]

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;[99] 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.[1]

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

[85] Keith v Henkleman, 173 Ill. 137 (1898); Shedd v Seefeld, 230 Ill. 118 (1907).
[86] Lindsay v Lindsay, 257 Ill. 328 (1913); Petition of Ferrier, 103 Ill. 367 (1882).
[87] People v Hill, 163 Ill. 186 (1896).
[88] Culver v Colehour, 115 Ill. 558 (1886).
[89] Standidge v Chicago Rys. Co., 254 Ill. 524 (1912).
[90] Frost v People, 193 Ill. 635 (1901).
[91] Moody v Found, 208 Ill. 78 (1904).
[92] Holnback v Wilson, 159 Ill. 148 (1895).
[93] Ward v Farwell, 97 Ill. 593 (1881); Chicago Mutual Life Indemnity Ass'n. v Hunt, 127 Ill. 257 (1889).
[94] Parmalee v Price, 208 Ill. 544 (1904).
[95] Maynard v Richards, 166 Ill. 466 (1897).
[96] Heacock v Hosmer, 109 Ill. 245 (1884).
[97] Harding v Fuller, 141 Ill. 308 (1892).
[98] Turnes v Brenckle, 249 Ill. 394 (1911); but see Gage v Ewing, 107 Ill. 11 (1883).
[99] Commercial Ins. Co. v Scammon, 123 Ill. 60 (1888); Frazer v Howe, 106 Ill. 563 (1883).
[1] 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."[2] 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.[3]

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,[4] unless a jury has been waived in the trial court,[5] 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.[6]

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.[7] 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.[8] 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.[9] 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.[10]

[2] Commercial Insurance Co. v Scammon, 123 Ill. 601 (1888); Jones v Fortune, 128 Ill. 518 (1889).

[3] 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).

[4] City of Spring Valley v Spring Valley Coal Co., 173 Ill. 497 (1898).

[5] Manistee Lumber Co. v Union National Bank, 143 Ill. 490 (1892); United Workmen v Zuhlke, 129 Ill. 298 (1889).

[6] Osgood v Skinner, 186 Ill. 491 (1900).

[7] Kincaid v Kincaid, 256 Ill. 548 (1912).

[8] Lindsay v Lindsay, 226 Ill. 309 (1907).

[9] Williams v Gottschalk, 231 Ill. 175 (1907); Morrison Hotel Co. v Kirsner, 245 Ill. 431 (1910).

[10] 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.[11] 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.[12] 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.[13]

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,[14] and such waiver will be presumed from a participation in a trial before a judge without objection.[15] Trial may be had with a jury of less than twelve jurors by agreement of the parties thereto.[16] A waiver of trial by jury is binding only as to the first trial and after a remand either party may demand a jury.[17] Nor is such a waiver binding on the defendant when the plaintiff subsequently files an amended declaration forming new and different issues.[18]

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.[19] It has no application to a rule requiring policemen at certain times to submit to a physical examination.[20] 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.[21] It is not improper for courts in civil proceedings to require the production of books

[11] Patterson v Warfield, 233 Ill. 147 (1908); Hayward v Sencenbaugh 235 Ill. 580 (1908).
[12] Illinois Life Ins. Co. v Prentiss, 277 Ill. 383 (1917).
[13] Meadowcroft v People, 163 Ill. 56 (1896); C. B. & Q. R. R. Co., v Jones, 149 Ill. 361 (1894).
[14] City of Highland Park v McMullin, 249 Ill. 568 (1911); C. S. F. & C. Ry. Co. v Ward, 128 Ill. 349 (1889).
[15] Rothschild v Mudd & Hughes, 33 Ill. 476 (1864); Miller v Simons, 156 Ill. 113 (1895); Burgwin v Babcock, 11 Ill. 28 (1849).
[16] Rehm v Halverson, 197 Ill. 378 (1902).
[17] Rigdon v Moore, 242 Ill. 256 (1909).
[18] Gage v Commercial National Bank of Chicago, 86 Ill. 371 (1877).
[19] North v People, 139 Ill. 81 (1891).
[20] People v Steward, 249 Ill. 311 (1911).
[21] Lippman v People, 175 Ill. 101 (1898).

or writings which contain evidence material to the issue;[22] 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.[23] Consequently a party required to produce books of account may seal up and conceal parts not relating to the matter at issue[24] 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.[25] 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.[26]

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,[27] or to require a sworn monthly report by manufacturers of butter and cheese on the cooperative plan.[28]

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.[29] 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.[30]

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.[31] 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.[32] A warrant for the search and seizure of property contemplates the taking into custody of the person found in possession.[33] 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.[34] 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.[35] 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.[36]

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.[37]

[22] Swedish American Tel. Co. v Fidelity & Casualty Co., 208 Ill. 562 (1904).
[23] Walter Cabinet Co. v Russell, 250 Ill. 416 (1911).
[24] Denison Cotton Co. v Schermerhorn, 257 Ill. 128 (1913).
[25] Pynchon v Day, 118 Ill. 9 (1886).
[26] Lester v People, 150 Ill. 408 (1894).
[27] National Safe Deposit Co. v Stead, 250 Ill. 584 (1911).
[28] Hawthorn v People, 109 Ill. 302 (1883).
[29] Darst v People, 51 Ill. 286 (1869); Sullivan v City of Oneida, 61 Ill. 242 (1871).
[30] City of Clinton v Phillips, 58 Ill. 102 (1871).
[31] Myers v People, 67 Ill. 503 (1873).
[32] Housh v People, 75 Ill. 487 (1874).
[33] White v Wagar, 185 Ill. 195 (1900).
[34] Glennon v Britton, 155 Ill. 232 (1895).
[35] Frost v People, 193 Ill. 635 (1901).
[36] People v Clark, 280 Ill. 160 (1917); but see People v Viskniski 255 Ill. 554 (1912).
[37] 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.[38] 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.[39]

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,[40] 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.[41] 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.[42] 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.[43]

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.[44]

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

[38] Lynch v People, 38 Ill. 494 (1865).
[39] Bennett v People, 94 Ill. 581 (1880).
[40] Brewster v People, 183 Ill. 143 (1899).
[41] People v Russell, 245 Ill. 268 (1910).
[42] People v Kipley, 171 Ill. 44 (1898).
[43] People v Archibald, 258 Ill. 383 (1913).
[44] 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.[44]

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.[46]

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.[47] 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.[48] A proceeding to disbar an attorney is not a criminal prosecution in which there is a right to meet the witnesses face to face.[49]

The right to appear. The record must show the presence of the accused in court.[50] But if present at the commencement of the trial which proceeds continuously, he will be presumed to have been present at every subsequent stage,[51] down to the return and receipt of the verdict.[52] However, the record must show his presence during the hearing of a motion for a new trial.[53] 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.[54] 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.[55]

[45] Garrison v People, 21 Ill. 535 (1859).
[46] Report Attorney General 1908, p. 52.
[47] Puterbaugh v Smith, 131 Ill. 199 (1890); McIntyre v People, 227 Ill. 26 (1907).
[48] People v Kipley, 171 Ill. 44 (1898).
[49] People v Stonecipher, 271 Ill. 506 (1916).
[50] Harris v People, 130 Ill. 457 (1889).
[51] Padfield v People, 146 Ill. 660 (1893).
[52] Sewell v People, 189 Ill. 174 (1901).
[53] Harris v People, 130 Ill. 457 (1889).
[54] Harris v People, 138 Ill. 63 (1891).
[55] 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.[56]

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.[57] 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.[58] 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.[59]

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.[60] 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.[61] 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.[62] An indictment for robbery need not describe with absolute accuracy the property taken.[63] 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.[64] 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,[65] but an indictment charging the sale of whiskey without a license need not state the name of the purchaser.[66] An averment that the pistol was loaded is unnecessary in an indictment for assault with a deadly weapon, to-wit, a pistol,[67] 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.[68] Evidence of beating the deceased to death with a gun will not support an indictment for murder by shooting.[69]

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

[56] Fielden v People, 128 Ill. 595 (1889).
[57] People v Bopp, 279 Ill. 184 (1917).
[58] Gardner v People, 106 Ill. 76 (1883).
[59] White v People, 90 Ill. 117 (1878).
[60] West v People, 137 Ill. 189 (1891).
[61] People v Brady, 272 Ill. 401 (1916).
[62] Glover v People, 204 Ill. 170 (1903).
[63] People v Nolan, 250 Ill. 351 (1911).
[64] McNair v People, 89 Ill. 441 (1878).
[65] Vandermark v People, 47 Ill. 122 (1868).
[66] Cannady v People, 17 Ill. 158 (1855).
[67] Allen v People, 82 Ill. 610 (1876).
[68] People v Lukoszus, 242 Ill. 101 (1909).
[69] Guedel v People, 43 Ill. 226 (1867).
[70] McCutcheon v People, 69 Ill. 601 (1873)

not aver an intent to defraud, if the statute does not make that a material element.[71] 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.[72] But besides stating the substantive elements of the crime in the statutory language, the particular transaction must be identified and distinguished by apt averments.[73] 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.[74]

Where a statute creating an offense contains exceptions or provisos, these need not be negatived 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.[75]

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.[76]

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,[77] and in both informations and indictments, the proper venue must be laid.[78]

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.[79] 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,[80] 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.[81]

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.[82] Nor is it a deprivation of this right to admit on the trial of a case the testimony given at a preliminary hearing by

[71] Meadowcroft v People, 163 Ill. 56 (1896).
[72] Strohm v People, 160 Ill. 582 (1896).
[73] West v People, 137 Ill. 189 (1891).
[74] Cochran v People, 175 Ill. 28 (1898).
[75] Beasley v People, 89 Ill. 571 (1878).
[76] People v Brady, 272 Ill. 401 (1916).
[77] Parris v People, 76 Ill. 274 (1875).
[78] People v Higgins, 15 Ill. 110 (1853).
[79] Yoe v People, 49 Ill. 410 (1868).
[80] Sokel v People, 212 Ill. 238 (1904).
[81] Tucker v People, 122 Ill. 583 (1887).
[82] Hoyt v People, 140 Ill. 588 (1892).

a witness since deceased.[83] The admission in evidence of dying declarations in homicide cases is an exception to the right to meet the witnesses face to face,[84] 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.[85]

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,[86] it does not bar subsequent prosecution for a different and distinct offense growing out of the same transaction.[87] To give effect to the constitutional intent, the period fixed must date from the arrest, and not from the time the indictment is returned.[88] 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.[89] 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.[90] 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.[91]

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.[92]

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.[93] 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.[94] 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.[95]

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,[96] but it was held that a jury was an indispensable part of a court

[83] Barnett v People, 54 Ill. 325 (1870).
[84] Starkey v People, 17 Ill. 17 (1855).
[85] Weyrich v People, 89 Ill. 90 (1878).
[86] People v Helder, 225 Ill. 347 (1907).
[87] Nagel v People, 229 Ill. 598 (1907).
[88] Guthman v People, 203 Ill. 260 (1903).
[89] People v Jonas, 234 Ill. 56 (1908).
[90] Newlin v People, 221 Ill. 166 (1906).
[91] Marzen v People, 190 Ill. 81 (1901).
[92] Stone v People, 3 Ill. 326 (1840).
[93] Meredeth v People 84 Ill. 479 (1877).
[94] Thompson v People, 144 Ill. 378 (1893).
[95] Schintz v People, 178 Ill. 320 (1899).
[96] 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.[97] 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.[98] 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.[99] 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.[1] 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.[2] 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,[3] or by the court as in convictions for wife abandonment.[4]

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,[5] 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.[6] 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,[7] 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.[8]

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

[97] Harris v People, 128 Ill. 585 (1889); Morgan v People, 136 Ill. 161 (1891); but see Kelly v People, 115 Ill. 583 (1886).
[98] Brewster v People, 183 Ill. 143 (1899).
[99] Paulsen v People, 195 Ill. 507 (1902).
[1] Brewster v People, 183 Ill. 143 (1899).
[2] Schram v People, 29 Ill. 162 (1862).
[3] George v People, 167 Ill. 447 (1897); People v Illinois State Reformatory, 148 Ill. 413 (1894).
[4] People v Heise, 257 Ill. 443 (1913).
[5] Noble v People, 1 Ill. 54 (1822).
[6] Smith v Eames, 4 Ill. 76 (1841).
[7] Spies v People, 122 Ill. 1 (1887).
[8] 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.[9] 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.[10]

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.[11] 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.[12] For the same reason, the city court act can not have application to a city, the territory of which lies in two counties.[13]

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.[14]

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.[15] 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.[16] But testimony elicited by a special interrogation of the accused at a coroner's inquest, not given voluntarily or of his own motion,

[9] Donovan v People, 139 Ill. 412 (1891).
[10] Lavin v People, 69 Ill. 303 (1873).
[11] Weyrich v People, 89 Ill. 90 (1878).
[12] Buckrice v People, 110 Ill. 29 (1884).
[13] People v Rodenberg, 254 Ill. 386 (1912).
[14] Watt v People, 126 Ill. 9 (1888).
[15] People v Butler Street Foundry and Iron Co., 201 Ill. 236 (1903).
[16] Hoch v People, 219 Ill. 265 (1906).

cannot be used to convict him at a later trial.[17] 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.[18] 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.[19] 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.[20]

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.[21] A principal may not refuse to answer for the reason that his answer would criminate his agent;[22] nor can an officer refuse to produce books and papers of a corporation which are not his private records.[23] 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.[24] 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.[25]

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.[26] 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.[27] 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.[28]

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.[29] 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.[30] 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.[31] 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.[32]

[17] Lyons v People, 137 Ill. 602 (1891).
[18] Parrish v Byrns, 67 Ill. 522 (1873).
[19] Boone v People, 148 Ill. 440 (1894).
[20] Gardner v People, 106 Ill. 76 (1883).
[21] Eggers v Fox, 177 Ill. 185 (1898); Buckingham v Angell, 238 Ill. 564 (1909).
[22] N. Y. Life Ins. Co. v People, 195 Ill. 430 (1902).
[23] Lamson v Boyden, 160 Ill. 613 (1896).
[24] Bolen v People, 184 Ill. 338 (1900).
[25] Miller v People, 216 Ill. 309 (1905).
[26] Manning v Mercantile Securities Co., 242 Ill. 584 (1909).
[27] Minters v People, 139 Ill. 363 (1891).
[28] Samuel v People, 164 Ill. 379 (1897).
[29] Weldon v Burch, 12 Ill. 374 (1851).
[30] Lamson v Boyden, 160 Ill. 613 (1896).
[31] People v Argo, 237 Ill. 173 (1908).
[32] 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.[33] 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.[34]

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.[35] 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.[36]

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[37] or by acquittal. This bars the prosecution of a writ of error by the state in a criminal prosecution[38] whether for a felony or misdemeanor.[39] So a person indicted for murder and convicted of manslaughter, who obtains a new trial, may not be tried again for murder.[40]

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;[41] and a trial in which the jury were unable to reach a verdict;[42] and also a trial in which the verdict had been set aside upon motion of the defendant.[43] A trial in a felony case by a judge without a jury does not constitute jeopardy so as to preclude a subsequent prosecution.[44]

One transaction may include several offenses, and the prosecution for one offense will not bar a subsequent prosecution for a separate and distinct offense.[45] One who has been convicted for assault and battery may be placed on trial for riot for the same transaction.[46] 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.[47] 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.[48] 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.[49] The same act may be an offense against the state and a municipality and may be punished by both. Thus,

[33] Miller v People, 216 Ill. 309 (1905).
[34] People v Munday, 280 Ill. 32 (1917).
[35] People v Seymour, 272 Ill. 295 (1916).
[36] Mackin v People, 115 Ill. 312 (1885).
[37] People v Helder, 225 Ill. 347 (1907).
[38] People v Royal, 2 Ill. 557 (1839).
[39] People v Miner, 144 Ill. 308 (1893).
[40] Brennan v People, 15 Ill. 511 (1854).
[41] O'Donnell v People, 224 Ill. 218 (1906).
[42] Dreyer v People, 188 Ill. 40 (1900).
[43] Gannon v People, 127 Ill. 507 (1889); Lane v People, 10 Ill. 305 (1848).
[44] Paulsen v People, 195 Ill. 507 (1902).
[45] Nagel v People, 229 Ill. 598 (1907); People v Nall, 242 Ill. 284 (1909).
[46] Freeland v People, 16 Ill. 380 (1855).
[47] Spears v People, 220 Ill. 72 (1906).
[48] Guedel v People, 43 Ill. 226 (1867).
[49] 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.[50] 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.[51]

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.[52]

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.[53]

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;[54] 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;[55] a penalty of from $1,000 to $5,000 for unjust discrimination in rates for carriage;[56] and a fine of from $500 to $1,000 for rebating by insurance companies.[57] 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.[58] More severe punishments for subsequent convictions are sustained on the theory that a repetition of the offense aggravates the guilt, and are not objectionable.[59]

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.[60]

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.[61]

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

[50] Robbins v People, 95 Ill. 175 (1880); Hankins v People, 106 Ill. 628 (1883).
[51] Wragg v Penn Township, 94 Ill. 11 (1879).
[52] Kelly v People, 115 Ill. 583 (1886).
[53] People v Elliott, 272 Ill. 592 (1916).
[54] C. R. I. & P. Ry. Co. v People, 217 Ill. 164 (1905).
[55] City of Arcola v Wilkinson, 233 Ill. 250 (1908).
[56] People v B. & O. S. W. R. R. Co., 246 Ill. 474 (1910).
[57] People v American Life Ins. Co., 267 Ill. 504 (1915).
[58] People v State Reformatory, 148 Ill. 413 (1894).
[59] Kelly v People, 115 Ill. 583 (1886).
[60] People v Elliott, 272 Ill. 592 (1916).
[61] 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.[62] 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.[63]

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.[64] 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.[65] 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.[66]

Debt, within the meaning of this section, includes any liability to pay money growing out of a contract, either express or implied.[67] 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,[68] nor to penalties for violations of municipal ordinances,[69] nor fines and costs in criminal proceedings.[70] It does not apply to imprisonment in tort actions,[71] nor for wife abandonment,[72] nor bastardy.[73]

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.[74] 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.[75] Thus, imprisonment should not be imposed for contempt for failure to comply caused by an honest misconception of the meaning of the court order.[76]

[62] Collins v Metropolitan Ins. Co., 232 Ill. 37 (1908).
[63] Wall v Pfanschmidt, 265 Ill. 180 (1914).
[64] Burnap v Marsh, 13 Ill. 535 (1852); People v Cotton, 14 Ill. 414 (1853).
[65] Stafford v Low, 20 Ill. 152 (1858).
[66] Malcolm v Andrews, 68 Ill. 100 (1873); Huntington v Metzger, 158 Ill. 272 (1895).
[67] Parker v Follensbee, 45 Ill. 473 (1867).
[68] People v Zito, 237 Ill. 434 (1909); Kettles v People, 221 Ill. 221 (1906).
[69] City of Chicago v Morell, 247 Ill. 383 (1910).
[70] Kennedy v People, 122 Ill. 649 (1887).
[71] McKindley v Rising, 28 Ill. 337 (1862); People v Walker, 286 Ill. 541 (1919).
[72] People v Heise, 257 Ill. 443 (1913).
[73] Rich v People, 66 Ill. 513 (1873).
[74] Wightman v Wightman, 45 Ill. 167 (1867); Barclay v Barclay, 184 Ill. 375 (1900).
[75] Goodwillie v Millimann, 56 Ill. 523 (1870); Blake v People, 80 Ill. 11 (1875).
[76] 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.[77] 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.[78] On the other hand, the use may be a public one though private purposes are incidentally served.[79] 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.[80] 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.[81]

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.[82] (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,[83] for jails,[84] public hospitals, public schools, public parks,[85] roads and streets,[86] forest preserves,[87] and for the carrying on of any business legally conducted by the state or by its agents.[88] The Attorney General has held that the state has power to take over coal mines in emergencies such as those caused by war.[89] (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.[90] Public grist mills come within the rule.[91] 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

[77] C. C. C. & St. L. Ry. Co. v Drainage District, 213 Ill. 83 (1904).
[78] Sholl v German Coal Co., 118 Ill. 427 (1887).
[79] Dunham v Village of Hyde Park, 75 Ill. 371 (1874).
[80] C. B. & Q. R. R. Co. v City of Naperville, 169 Ill. 25 (1897).
[81] Chicago Dock Co. v Garrity, 115 Ill. 155 (1885); Gaylord v Sanitary District, 204 Ill. 576 (1903).
[82] Deneen v Unverzagt, 225 Ill. 378 (1907).
[83] Beidler v Sanitary District, 211 Ill. 628 (1904).
[84] County of Mercer v Wolff, 237 Ill. 74 (1908).
[85] Village of Depue v Banschbach, 273 Ill. 574 (1916).
[86] City of Chicago v Lord, 276 Ill. 544 (1917).
[87] Perkins v Commissioners of Cook County, 271 Ill. 449 (1916).
[88] Helm v City of Grayville, 224 Ill. 274 (1906).
[89] Report Attorney General 1917-18, p. 606.
[90] 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).
[91] Gaylord v Sanitary District, 204 Ill. 576 (1903).

for a public use; the taking of a right of way by a coal mining company;[92] the taking of land for a mill from which the public had no right to demand a service;[93] the taking of land for a private road under the constitution of 1848;[94] 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.[95]

Property subject to condemnation. The power of eminent domain extends to every kind of private property,[96] including all rights and interests of all kinds.[97] 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.[98]

(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,[99] but is subject to judicial review.[1] 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,[2] and railways across streets[3] and other railways,[4] constitute new uses. A railroad may condemn land belonging to another railroad which is not devoted by the latter to railroad purposes,[5] or even a part of the tracks of another railway for a short distance,[6] but cannot condemn a considerable portion of the right of way.[7] A city sewer may be constructed through land devoted to public uses by a sanitary district.[8] 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;[9] nor to condemn a part of a library building for a city street.[10] The taking of property already devoted to public use does not impair the obligation of any contract.[11]

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

[92] Sholl v German Coal Co., 118 Ill. 427 (1887).
[93] Gaylord v Sanitary District, 204 Ill. 576 (1903).
[94] Nesbitt v Trumbo, 39 Ill. 110 (1866).
[95] C. & E. I. R. R. Co. v Wiltse, 116 Ill. 449 (1886).
[96] City of Edwardsville v County of Madison, 251 Ill. 265 (1911).
[97] South Park Commissioners v Ward & Co., 248 Ill. 299 (1911); Johnson v Joliet & Chicago R. R. Co., 23 Ill. 202 (1859).
[98] Village of Hyde Park v Oakwoods Cemetery Ass'n., 119 Ill. 141 (1886).
[99] O'Hare v C. M. & N. R. R. Co., 139 Ill. 151 (1891).
[1] People v Walsh, 96 Ill. 232 (1880).
[2] 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).
[3] M. C. Ry. Co. v C. W. D. Ry. Co., 87 Ill. 317 (1877).
[4] E. 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).
[5] C. W. D. Ry. Co. v M. W. S. El. R. R. Co., 152 Ill. 519 (1894).
[6] L. S. & M. S. Ry. Co. v C. & W. I. R. R. Co., 97 Ill. 506 (1881).
[7] Central Ry. Co. v F. L. H. Ry. Co. 81 Ill., 523 (1876).
[8] City of Chicago v Sanitary District, 272 Ill. 37 (1916).
[9] City of Edwardsville v County of Madison, 251 Ill. 265 (1911).
[10] City of Moline v Greene, 252 Ill. 475 (1911).
[11] 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.[12] 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.[13] 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 1818 and 1848.[14] The express guaranty of jury trial contained in the constitution of 1870 is self-executing.[15] It does not apply to takings by the state,[16] 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.[17]

A statute authorizing commissioners to determine compensation in lieu of a jury in takings other than by the state, is unconstitutional,[18] but a finding by commissioners can be made *prima facie* evidence of just compensation.[19] 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.[20] 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.[21] The right of jury trial in eminent domain proceedings conferred by the constitution is a mere privilege which may be waived by the parties[22] and a waiver of this right will be implied unless a specific objection to trial without jury is made.[23]

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 lands taken for railroad tracks shall remain in the owner.[24] 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.[25] Likewise, a city may take only an easement in land to be used as a street.[26] The abutting owner may use the subsidewalk space.[27] A telegraph company by condemning land under the eminent domain act, merely acquires the right

[12] South Park Commissioners v Ward & Co., 248 Ill. 299 (1911).
[13] L. & N. R. R. Co. v Cincinnati, 76 Ohio 481 (1907).
[14] Johnson v J. & C. R. R. Co., 23 Ill. 202 (1859).
[15] Mitchell v I. & St. L. R. R. Co. 68 Ill. 286 (1873).
[16] People v Stewart, 97 Ill. 123 (1880).
[17] Report Attorney General 1914, p. 153.
[18] Juvinall v Jamesburg Drainage District, 204 Ill. 106 (1903).
[19] C. T. T. R. R. Co. v City of Chicago, 217 Ill. 343 (1905).
[20] Wabash R. R. Co. v Coon Run Drainage District, 194 Ill. 310 (1902).
[21] McManus v McDonough, 107 Ill. 95 (1883).
[22] C. M. & St. P. Ry. Co. v Hock, 118 Ill. 587 (1886).
[23] Juvinall v Jamesburg Drainage District, 204 Ill. 106 (1903).
[24] C. & E. I. R. R. Co. v Clapp, 201 Ill. 418 (1903); R. I. & P. R. R. Co. v Leisy Brewing Co., 174 Ill. 547 (1898).
[25] Miller v Commissioners of Lincoln Park, 278 Ill. 400 (1917).
[26] I. C. R. R. Co. v City of Chicago, 138 Ill. 453 (1891).
[27] 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.[28] The owner retains the fee of land condemned by a drainage district.[29]

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.[30]

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.[31] 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.[32] And this applies to interurban lines,[33] electric light lines[34] and telegraph and telephone lines.[35] The use of streets by street railways, however, has been held not to be an additional servitude.[36]

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.[37]

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,[38] the casting of sparks and cinders upon it,[39] the removal of the lateral support of land[40] and interference with riparian rights.[41]

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

[28] Lockie v M. U. Telephone Co., 103 Ill. 401 (1882).
[29] West Skokie Drainage District v Dawson, 243 Ill. 175 (1905).
[30] 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).
[31] Nevins v City of Peoria, 41 Ill. 502 (1866); Rigney v City of Chicago, 102 Ill. 64 (1882).
[32] Bond v Penn. R. R. Co., 171 Ill. 508 (1898); Spalding v M. & W. I. Ry. Co., 225 Ill. 585 (1907).
[33] 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).
[34] Carpenter v Capitol Electric Co., 178 Ill. 29 (1899).
[35] Burrall v American Tel. & Tel. Co., 224 Ill. 266 (1906); DeKalb County Tel. Co. v. Dutton, 228 Ill. 178 (1907).
[36] C. B. & Q. R. R. Co. v W. C. S. R. R. Co., 156 Ill. 255 (1895).
[37] Doane v Lake St. El. R. R. Co., 165 Ill. 510 (1897); McWethy v Aurora E. L. & P. Co., 202 Ill. 218 (1903).
[38] T. W. & W. Ry. Co. v Morrison, 71 Ill. 616 (1874); Gaylord v Sanitary District, 204 Ill. 576 (1903).
[39] Stone v F. P. & N. W. R. R. Co., 68 Ill. 394 (1873).
[40] City of Quincy v Jones, 76 Ill. 231 (1875).
[41] 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.[41] 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."[43] 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.[44] The physical injuries and inconveniences that result from a railroad dividing farm property[45] as to water, pasture, timber and improvements,[46] together with the noise, smoke, soot, cinders and vibration caused by the operation of trains,[47] 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[48] and increased cost of insurance[49] 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,[50] and the interference with free access to the street and the view.[51] 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.[52]

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

[43] C. B. & N. R. R. Co. v Bowman, 122 Ill. 595 (1887); I. C. R. R. Co. v Turner, 194 Ill. 575 (1902).
[44] Rigney v City of Chicago, 102 Ill. 64 (1882).
[45] Chapman v City of Staunton, 246 Ill. 394 (1910).
[46] C. P. & St. L. Ry. Co. v Blume, 137 Ill. 448 (1891); C. T. T. R. R. Co. v Bugbee, 184 Ill. 353 (1900).
[47] 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).
[48] 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).
[49] I. I. & M. Ry. Co. v Ring, 219 Ill. 91 (1905); C. S. Ry. Co. v Nolin, 221 Ill. 367 (1906).
[50] I. I. & I. R. R. Co. v Stauber, 185 Ill. 9 (1900).
[51] Doane v Lake St. El. R. R. Co., 165 Ill. 510 (1897); Field v Barling, 149 Ill. 556 (1894).
[52] Aldis v Union El. R. R. Co., 203 Ill. 567 (1903).
[52] Aldis v Union El. R. R. Co., 203 Ill. 567 (1903).

not of a kind and character suffered in common by the public generally.[53] The impairment in value of property by reason of personal danger to the owner,[54] or on account of the location of a jail[55] or a small-pox hospital,[56] 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,[57] 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.[58] An owner of property which is taken or damaged is not entitled to have compensation fixed with reference to his religious beliefs[59] or matters of a sentimental nature.[60]

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,[61] 1848,[62] and the same construction has been placed upon this section in the constitution of 1870.[63]

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.[64] This rule was changed

[53] 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).
[54] C. & M. Electric R. R. Co. v Mawman, 206 Ill. 182 (1903).
[55] Rigney v City of Chicago, 102 Ill. 64 (1882).
[56] Frazer v City of Chicago, 186 Ill. 480 (1900).
[57] Hohmann v City of Chicago, 140 Ill. 226 (1892); City of Chicago v Spoor, 190 Ill. 340 (1901).
[58] Otis Elevator Co. v City of Chicago, 263 Ill. 419 (1914).
[59] Dowie v C. W. & N. S. Ry. Co., 214 Ill. 49 (1905).
[60] City of Decatur v Vaughan, 233 Ill. 50 (1908).
[61] State v Evans, 3 Ill. 208 (1840).
[62] A. & S. R. R. Co. v Carpenter, 14 Ill. 190 (1852); Curry v Town of Mt. Sterling, 15 Ill. 320 (1853).
[63] 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).
[64] State v Evans, 3 Ill. 208 (1840); A. & S. R. 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.[65]

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.[66] 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.[67] If the special damage exceeds the special benefits, compensation must be in money.[68] Compensation need not be made before the infliction of the damage and an injunction to restrain the prosecution of the work will be denied.[69]

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.[70] Actual payment is a condition precedent to the right to take.[71] Equity will enjoin a taking until compensation is made.[72] But the condemning authority may enter into the temporary possession of the premises pending an appeal from

[65] 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).
[66] 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, 258 Ill. 509 (1913).
[67] 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).
[68] L. S. & M. S. Ry. Co. v B. & O. R. R. Co., 149 Ill. 272 (1894).
[69] 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).
[70] Caldwell v Commissioners of Highways, 249 Ill. 366 (1911).
[71] Caldwell v Commissioners of Highways, 249 Ill. 366 (1911).
[72] Commissioners v Durham, 43 Ill. 86 (1867).