THE JUDICIAL VETO IN OHIO

A Thesis Presented for the
Degree of Master of Arts

By

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Approved by:

[Signature]
The purpose of this thesis has been to treat briefly each and every officially reported case in which the Ohio supreme court has nullified a legislative act or municipal ordinance on the ground that the said legislative act or municipal ordinance was in contravention of one or more of the provisions of the Ohio or the Federal constitution. No attempt has been made to include in this list unreported cases or cases which have not been included as a part of and printed in the volumes of the State supreme court reports. With the exception of those early cases in which Judges Huntington, Tod and Pease declared the justices' act of 1805 unconstitutional and void, all of the cases included in this thesis have been published in the volumes of the official State supreme court reports.¹ In searching out these cases the indexes appended to these volumes have been depended upon very largely, and for the most

¹. This exception has been made and these cases have been included here because of the impeachment of Judges Pease and Tod which followed the holding of these acts unconstitutional. Reliable references to other early cases, where they exist at all, are very limited and difficult of access.

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part have been found fairly reliable. Little more has been attempted than to analyze briefly, in a proper classification and sequence, the cases in which legislative acts or municipal ordinances have been held unconstitutional by the State supreme court, giving in each case the provisions held invalid in the statute or ordinance under review, the constitutional provisions contravened, and the gist of the court's decision on the constitutional question involved.

The general classification and arrangement of the cases reviewed in this thesis follows for the most part the arrangement of articles and sections in the Ohio constitution. Deviations from this general plan are necessary at points in order to bring together cases involving closely related constitutional provisions. A few minutes spent in studying the table of contents and tables of cases will enable the reader to overcome the minor disadvantages incurred through the deviation from the general plan above noted. The table of contents and the tables of cases which follow are intended to serve the purpose of an index. Reference to these tables will enable the reader to turn almost immediately to any case or to any constitutional provision referred to or discussed in the body of the text.

The Ohio supreme court was first organized in 1803 under a legislative act passed April 15th of that year providing for the organization of a state judicial system.
No provisions for reporting the decisions of the supreme court were made, however, until twenty years later. On January 20, 1823, an act was passed providing that the judges of the State supreme court should meet annually at the close of their circuits in the town of Columbus in order to decide all cases which had been reserved in any county of the state for decision by all the judges of the court, and further providing "that the said judges shall appoint a reporter, who shall report all decisions, made at said sessions in Columbus, and such other important decisions as he may be directed by said judges to report, and cause the same to be published, as soon as may conveniently be done after each session." In accordance with the provisions of this act the supreme court cases decided at the special December session of that court held at Columbus, 1823-1824, were published as volume one of the Ohio Reports. A few circuit court cases which had been decided before 1823 were also, by direction of the judges, included in this first volume of the Ohio Reports. Between 1823 and 1852 twenty volumes of the Ohio Reports were issued. These twenty volumes along with a volume of Common Pleas Court decisions issued by Judge Tappan in 1831, containing cases decided in 1816, 1817, 1818, and 1819; a volume of Circuit Court decisions issued by Judge Wright, containing cases decided in 1831, 1832, 1833, and 1834; and, a few scattered cases reported

1. 21 Ohio Laws, 10.
in the Western Law Journal, constitute practically all of the early Ohio court decisions that are now extant. Beginning with the 1852 session of the State supreme court a new series of reports known as the Ohio State Reports was begun and has been continued ever since. Until recently it had not been the practice of the judges of the court to publish in the volumes of the Ohio State Reports a complete report of all cases decided by the supreme court. But by a constitutional amendment adopted in 1912, it is now required that "the decisions in all cases in the supreme court shall be reported, together with the reasons therefor."¹ Many of the cases decided by the supreme court are, in practice, however, disposed of without opinion. These cases are, therefore, reported very briefly in the official reports of the court published in the volumes of the Ohio State Reports. Rule IX of the court which covers this point provides as follows:

"All cases disposed of on the General Docket without opinion, except such as are dismissed by the consent of parties, or for failure to file printed record, or for want of preparation, shall be published in the reports of this court, by giving the style of the case, the character of the suit, the judgment of the court, and the cases

¹. Art. IV, Sec. 6.
cited, if any, as authority for the decision, and the attorneys of the parties. ¹

In a number of instances in the cases that follow in this thesis the syllabus of the case under discussion is quoted in preference to the opinion of the judge who read the opinion of the court. Rule VI of the Ohio supreme court fully justifies the acceptance of the propositions set forth in the syllabus as the opinion of the court on the questions or propositions therein contained. Rule VI of the court, referred to above, reads as follows:

"A syllabus of the points decided by the court in each case shall be stated in writing, by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the case that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein for revisal before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein."* ¹

A very liberal use has been made of footnotes throughout the text of this thesis. Original sources have been, wherever possible in so far as time has permitted, searched out and fully indicated in the foot notes in order that the reader may have at hand a ready reference to direct him to the place where he may find without loss of time the act or acts involved in the case in question, as well as the decision of the court.

* 27 Ohio St., iv., 94 Ohio St., ix.
† 94 Ohio St., xi.
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* In this case as well as in a number of other cases in which the court has declared legislative acts unconstitutional as contravening the letter or the spirit of the constitution, the opinion of the court fails to state definitely the particular section or clause of the constitution contravened. In many instances the particular clause or section contravened is obvious; but in a few—and this is one of them—there is room for doubt as to where the case should be classified.

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CHAPTER I

EARLY CASES UNDER THE CONSTITUTION OF THE UNITED STATES
AND CASES UNDER THE OHIO CONSTITUTION OF 1802.

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I

The First Judicial Veto in Ohio and
The Impeachment of Judges Pease and Tod.

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Constitution of the United States, Amendment 7: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law".

The first Ohio statute to be declared unconstitutional by either state or national courts was the act of February 12, 1805, entitled "an act, defining the duties of justices of the peace and constables, in criminal and civil cases." Section 5 of this act provided that the powers and jurisdiction of justices of the peace should be co-extensive with townships in which they were elected; and that their jurisdiction in civil cases should extend to any sum not exceeding fifty dollars. The latter provision of this section was first declared unconstitutional by Judge Tod, a judge of the Ohio supreme court, in a supreme court case which came before that court at a session held by that court at Steubenville, in the county of Jefferson, Ohio, in the month of August, 1807.

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1 Ohio Senate Journal Vol. VIII, pt. II.
Chase's Statutes of Ohio, I, pp. 39.
Only a few months later Judge Pease, sitting as president of the court of common pleas of the third circuit, declared the section, in part, unconstitutional and void; before the end of the year, 1808, section five of the act, in so far as it gave to justices jurisdiction in cases exceeding twenty dollars in value, and so much of the ninth section as prevented plaintiffs from recovering costs in actions commenced by original writ from the court of common pleas for amounts between twenty and fifty dollars, were declared unconstitutional in different cases by Judges Pease, Huntington and Tod, who constituted a majority of the supreme court of the state. The particular provisions of the act in question were declared to be in direct violation of the seventh amendment to the Federal Constitution which requires that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The matter did not end with the action of the courts in nullifying the statute, however, for no sooner had the decisions of the courts come to the attention of the legislature than the judges who had taken part in the decisions were denounced as usurpers of legislative powers and traitors to the best interests of the state. Steps were immediately taken to institute impeachment proceedings against the judges who had taken part in the decisions; but for one reason or another no definite action was taken during the current, 1807-1808, session of the legislature. At the very beginning of the next session, however, advocates of legislative supremacy were on
hand to vindicate the rights of the legislature, and measures were immediately introduced instituting investigations preliminary to the bringing of impeachment proceedings against Judges Tod and Pease; Judge Huntington having been elected governor no action was taken against him.

On December 24, 1808, members of the house of representatives appeared before the senate informing that body that the house had appointed a committee to prosecute impeachment proceedings against Judges Pease and Tod and that they stood ready to enter upon such prosecution before that body, the senate acting as a high court impeachment. Three days later the house committee appeared before the senate and exhibited their impeachment charge against Judge Tod charging him with the commission of a high crime and misdemeanor. The charge was embraced in a single article and alleged that the said Judge Tod, "unmindful of the solemn duties of his office, and contrary to the sacred obligation by which he stood bound to discharge them faithfully and impartially," had, "wilfully, wickedly and maliciously," declared certain provisions of the legislative act of February 12, 1805, unconstitutional "with intent to evade, nullify, and make void the same, and thereby to bring the acts and doings of the * * general assembly into contempt and disgrace, and to induce the good citizens * * * to disregard them, and thereby to introduce anarchy and confusion into the government of the state of Ohio."

On January 9, 1809, Judge Tod stood before the senate acting as a high court of impeachment and made answer to the
charges of impeachment preferred against him by the house. He declared that as a judge of the supreme court of the state he had held that "so much of the act of the general assembly of the state of Ohio, entitled 'an act, defining the duties of justices of the peace and constables in civil and criminal cases,' which extended, the judicial power of justices of the peace, in civil cases, to fifty dollars, was not law, because he deemed it unconstitutional." He declared further: "if an act is passed, forbidden by the constitution, it is absolutely void. Though it has all the outward forms of a law, yet it has not the authority of a law." The determination of whether a given law was constitutional or not was, the judge maintained, a judicial function and as such specifically conferred upon the court by section 1, article 3 of the Ohio constitution which provides that the judicial power of this state shall be vested in a supreme court and other minor courts. The trial continued until January 20, 1809, at which time a vote for conviction or acquittal was called for and the question "How say you, is the respondent, George Tod, guilty or not guilty, as charged in the article of impeachment"? was put by the clerk of the high court of impeachment to each member thereof. Fifteen responded "guilty" and nine "not guilty." One less than the necessary two-thirds for conviction was secured and the speaker declared; "George Tod, one of the judges of the supreme court, is acquitted of the charge contained in the article of impeachment exhibited against him by the house of representatives." The charges preferred against Judge
Pease were more numerous and more inclusive; but the results of the trial were the same, the vote for conviction being fifteen to nine as in the case of Judge Tod.

The above impeachment proceedings were instituted and carried through by the house of representatives and the vote for conviction was dangerously close notwithstanding the fact that a similar attempt on the part of the Rhode Island legislature had failed; and notwithstanding the fact that more than a dozen state courts in other states had before this time declared in unmistakable terms that it was not only the right of the courts to declare null and void legislative acts which were palpable violations of the constitutional guarantees, but that it was also their duty so to declare. Thus it turns out that the Ohio legislature has the distinction of being one of the two state legislatures in American history which has instituted unsuccessful impeachment proceedings against members of the state judiciary for declaring a legislative act unconstitutional and void.

The judiciary won the day in the present contest; but the contest was so close and the advocates of legislative supremacy were so strong that it behooved the members of the judiciary to prove worthy to have and to hold these high and important powers which they claimed and which according to the outcome of the present contest remained with them. Whether the Ohio courts found it necessary or took occasion to nullify any legislative act or acts during the quarter century immediately following 1808, the writer is not prepared to state definitely
at this time. It may be said here, however, that we have no official reports of such holdings if there were such. The first officially reported case in which the court again rose to nullify a legislative act is that of the State of Ohio v. the Commercial Bank of Cincinnati, 7 Ohio Rep., 125, (1835), which will be discussed in the next section of this study.

II

Validity of Contracts Shall not be Impaired
by Legislative Act.

Section 10, Article 1 of the United States Constitution: "No state shall * * * pass any * * * law impairing the obligation of contracts."

Section 16, Article 3 of the Ohio Constitution of 1802: "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood of forfeiture of estate."

The first officially reported instance of the nullification of a legislative act by the Ohio supreme court occurs in 1835 in the case of State of Ohio v. The Commercial Bank of Cincinnati.¹

On February 11, 1829², the legislature passed an act incorporating the Commercial Bank of Cincinnati. Section 6 of this act stipulated, among other things, "that the State of Ohio shall be entitled to receive four per cent. on all divi-

¹ 7 Ohio Rep., 125, (1835)
² 27 Ohio Laws, 72.
dends made by said bank." No mention was made in this act of the state’s right to levy an additional tax nor was the right to change the rate reserved by the legislature, as had been done in the banking act of February 6, 1825, and as was later done in the act of March 3, 1834, in the act incorporating the Clinton Bank of Columbus. On March 12, 1831, the legislature passed a general act entitled "an act to tax bank, insurance, and bridge companies," which provided for a tax of five per cent. on the dividends of all such companies. The Commercial Bank of Cincinnati resisted the collection of the five per cent. tax levied by this general taxing law on the grounds that its charter-contract with the state provided that it should pay only "four per cent. on all dividends made by said bank." When the case was carried before the supreme court the court declared: (1) that it is a well settled question that the charter of a private corporation is in the nature of a contract between the corporation and the state, and is as obligatory as any other contract; (2) that it is customary in the legislation of this state for the legislature to reserve to itself the right to alter or change a charter contract where such right is desired; (3) that to apply this act to the Commercial Bank of Cincinnati and compel the collection of the larger tax rate would vary and impair the validity of the state’s contract with the corporation without its consent and thereby contravene section ten of the first article of the

1 29 Ohio Laws, 802.
United States constitution, and the sixteenth section of the eighth article of the constitution of Ohio which provide that the validity of contracts shall not be impaired. On the grounds above stated the court held that the act of March 12, 1831, in so far as it applied to the Commercial Bank of Cincinnati was null and void, and that no greater tax than four per cent. could ever be collected from the said bank without its consent.¹

¹ "An act to levy and collect a tax from all banks and individuals, and companies, and associations of individuals, that may transact banking business in this state, without being authorized to do so by the laws thereof," and the "act concerning the tax collected from the bank of the United States" were declared unconstitutional by the United States Supreme Court in so far as they applied to and attempted to levy a tax upon the United States bank located within the state. (9 Wheaton. Rep. 739. Chase's Statutes, pp. 1072, 1198. 1834-A.D.) See also Chase's Statutes, p. 42)
Section 4, Article 8: "Private property ought, and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." (Const.1802.)

In the fall of 1790, the Scioto Company introduced into the territory northwest of the Ohio a colony of Frenchmen and surveyed off for them the present town of Gallipolis, leaving a large unsurveyed and undivided tract of land in the center of the town and fronting upon the river, which tract was called "La Place" and was occupied by a large block house. The Scioto Company soon after the settlement found itself financially embarrassed and unable to complete its contract with the colonists; and to make matters worse it was later found that the settlements had not been made on lands belonging to the Scioto Company but on lands belonging to the Ohio company. In 1795 three commissioners were appointed by the citizens of the town to negotiate with and purchase from the Ohio Company the lands which had already been settled by them as colonists of the Scioto Company. The commissioners executed their charge and reported the terms of purchase back to the colonists on December 14, 1795. The colonists immediately voted to accept the terms and appointed a new commission composed of seven.

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1 See Howe's Historical Collections of Ohio for an interesting account of the settlement of Gallipolis, pp.177-187, 574-576.
members to lay out the town, determine the rights of pre-emption, which arose from occupancy, and to appraise all lands and apportion all assessments among the individual land holders. This commission which had been elected by ballot resolved, "that the public good and convenience, and the interest of the inhabitants, require the streets and the Public Place shall remain free, and never be alienated or obstructed on the bank of the river by any kind of buildings," and further that those lots which fronted upon or were near to the "Public Place" should be appraised higher since they were "a source of wealth by their situation." The report of the committee was duly made to and accepted by the colonists on the 17th of December, 1795, and within the next year the town lots were conveyed, in fee, to the colonists in accordance with the recommendations and findings of the above committee of seven.

In February, 1834,1 the legislature passed an act authorizing the president and the trustees of the town of Gallipolis to survey and lease the grounds which had since 1795 been dedicated to and used as a public square. Five citizens of the town who owned lots adjoining or near to the public square and who had been assessed a higher rate for those lots because they were declared by the commissioners to be "a source of wealth by their situation" and because the colonists had through their own commissioners resolved "that the public good and convenience, and the interest of the inhabitants, require the

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1 Ohio L. L. 32-120.
Public Place shall remain free and never be alienated or obstructed on the bank of the river by any kind of buildings", denied the power of the legislature to authorize the president and the trustees of the town to change the character of the Public Place and give it over to such uses as would materially lessen the value of their private property. The court sustained the complainants in the case of Francis LeClerq and others, Inhabitants of the Town of Gallipolis v. The Trustees of the Town of Gallipolis,¹ and denied the right and the power of the legislature to authorize the town authorities to execute such acts on the grounds that to devote the above mentioned Public Square to other uses would result in a violation and confiscation of private property and property values, thus contravening the fourth section of the eighth article of the Ohio constitution which provides that private property shall ever be held inviolate. The legislature is incapable of conferring upon the town officials authority to violate private property without regard to public welfare.

¹ 7 Ohio Rep., 217, (1835).
IV

Compensation Shall Be Made In Money for all

Private Property When Taken for a Public Purpose.

Section 4, Article 8: "Private property ought, and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner." (Constitution, 1802).

Pursuant to a grant of power conferred by the legislative act of March 12, 1838\(^1\), the city council of the city of Cincinnati passed an ordinance in May, 1838, providing for the appropriation of private property where necessary in the opening and extension of certain streets named in the ordinance and providing that certain procedures be followed in making compensation to the owners of freeholds and to those who held renewable leaseholds of ninety-nine years for all property so appropriated. No mention was made of short time leaseholders nor was any provision made or procedure provided whereby such owners could secure compensation for their property when appropriated by and for the use of the city as provided in the city ordinance. The constitutionality of this ordinance was questioned before the supreme court in the case of John P. Foote v. City of Cincinnati.\(^2\) Foote, the defendant in the case, denied the constitutionality of the ordinance on the ground that it appropriated private property for a public purpose without providing a compensation in money as required by the constitution.

\(^1\) 35 Ohio Laws, 241.
\(^2\) 11 Ohio Rep., 406, (1842).
The court sustained the contention of the defendant and held that in so far as the ordinance appropriated the private property of short time leaseholders without affording them any compensation or means whereby such compensation could be secured, it contravened section 4, article 8 of the constitution which specifically provides that whenever private property shall be taken for public use a compensation shall be made therefor in money, and that the ordinance was, therefore, to this extent null and void.

V

Curative Legislation Must Conform to Constitutional Limitations.

On March 9, 1836, the legislature passed an act providing that all acknowledgments made and certified prior to that time, which omitted to state that the deed was read or otherwise made known to the wife, separate and apart from her husband, and that she voluntarily and of her own free will acknowledged and signed the same, should nevertheless, be considered as valid. This curative act was passed to remedy the ever increasing evils and cure the many defects which had arisen out of the execution of deeds by husband and wife under the act of 1820, and to prevent such evils, defects and in-

1. Swan's Statutes, 269.
justices in the future.

On April 9, 1828, one George Zercher and his wife Elizabeth executed a deed for the lands now in question before the court, in the case of Good v. Zercher,\(^1\) to John Glass. The act of 1820, which was in force at that time, required that the acknowledgments of the deed should show that the justice of the peace, before whom the acknowledgments were made, had made known to the wife, separate and apart from the husband, the contents of the deed and that he had made sure that she executed the same of her own free will and without fear or coercion of her husband. The acknowledgments to this deed were not in accordance with this act and could not, therefore, before the passage the act of March 9, 1835, have passed or conveyed the lands in question. The plaintiff in the above case claimed that the act of March 9, 1835, had cured the defects in the deed of April 9, 1828, made to Glass by the defendant, Elizabeth Zercher and her husband George Zercher, and that the deed was thereby made valid and capable of conveying the lands as was intended in the original transaction. The plaintiff prayed further that the court oust the defendant from her possession of said lands and give him his rightful possession. The defendant, in answer, denied the right and the power of the legislature to pass an act making valid and binding acts and deeds which were when executed inoperative and void. The court held in favor of the defendant, declaring that the legislature could

\(^1\) The Lessees of Christian Good v. Elizabeth Zercher, 12 Ohio Rep., 555, (1843).
not by mere legislative fiat validate an act or deed which was void and of no effect when executed; that such acts, if operative, would violate the right of private property guaranteed by the fourth section of the eighth article of the constitution; and, that curative legislation, like all other legislative acts, was limited by the constitution.

The act of March 9, 1835, was first declared void in the case of Good v. Zercher, in 1843. The following year in the case of Silliman v. Cummins, it was reviewed and again declared null and void in so far as it affected cases arising before its passage. In both of these cases the court was divided. Judge Bichard delivered a dissenting opinion in the first case setting forth the great injustices that would arise from the action of the court and asserting the right of the legislature to pass such curative and remedial legislation where a great deal more good than harm was to come through such legislation. In the case of Silliman v. Cummins, Judge Bichard again dissented and reasserted the principles advanced by him in the earlier case of Good v. Zercher. He argued that the action of the court was contrary to the greatest public good and that the legislature had the right and the power to pass curative and remedial legislation where a great deal more good than harm was to be secured through such legislation. Four years later the act again came before the court in the case of Chestnut v. Shane's Lessee. The earlier cases were carefully reviewed and overruled.

1. Swan's Statutes, 269.
4. 16 Ohio, 599, (1847).
The opinion of the court in this case was delivered by Judge Birchard who was at the time Chief Justice and who had from the passage of the act maintained that it was a much needed piece of legislation and wholly within and in accordance with the constitution. This is the first instance of the court's reversing itself and sustaining a legislative act which had previously been declared null and void on constitutional grounds.

It will be noted here that this act had been held unconstitutional and void, in so far as it was declared to have a retroactive operation not because it was a retroactive law, but because it was held to violate private property. The constitution of 1802 contained no prohibition against retroactive or retrospective laws, and such laws where they violated no principle of natural justice but were rather in furtherance of it, were in practice sustained by the courts.¹

VI

The Judicial Powers of This State Are Vested In The Courts And Not In The Legislature.

Section 1, Article 3, Constitution of 1802: "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, in courts of common pleas for each county, in justices of the peace, and in such other courts as the legislature may, from time to time establish."

On February 24, 1943, the legislature passed an act amendatory to and explanatory of the earlier acts of February 26,

². 48 Ohio Laws, 76.
1840, and March 10, 1843, providing for the collection of claims against steamboats and other water craft by name, and applying to all cases whether they arose within or without the state, and applying as well to cases which arose before as to those which should arise after the passage of the act. The constitutionality of this amendatory act was questioned before the supreme court in the case of the Schooner Aurora Borealis v. Thomas Dobbie. The question presented in this case was whether the legislative act of February 24, 1846, did "apply as well to cases already pending as to such as may hereafter be commenced" as it expressly professed to do. The original action in the case now before the court was commenced in 1845 to secure an action against the craft by name for work done and labor performed upon the craft without the state of Ohio. The court had already in the case of Goodall v. The Brig St. Louis put a construction upon the earlier acts limiting their operation to crafts navigating the waters within or bordering upon the state, and when the case of the Schooner Aurora Borealis v. Dobbie was appealed up to the court, the court declared that in so far as the explanatory and amendatory act of March 24, 1849, assumed to usurp the function of the courts in construing and applying the law to cases which arose before the passage of the act, it was null and void. This decision was based upon the principle that the power to construe was judicial and not legislative, and that

1. 39 Ohio Laws, 34; Swan's Stat., 209; Curwen's Stat., 506.
2. 41 Ohio Laws, 51.
inasmuch as the constitution had expressly conferred the judicial powers upon the courts it had withheld such powers from the legislature. The court further held that while the act, so far as it operated prospectively, would be enforced, section two of the act which encroached upon the rights of the courts was unconstitutional and, therefore, null and void.

VII

The Granting of Divorces is a Judicial and Not a Legislative Matter.

The constitution of 1802 did not deny to the legislature the power to grant divorces. No mention was made in the state's first constitution as to where this power rested. So far as practice went the legislature had from the very beginning granted, from time to time, divorces by special legislative acts. The right of the legislature to grant such divorces had never been seriously questioned in this state until the case of Ester Bingham v. Amos Miller, was brought before the court in 1848. The legislature had by a special act on March 3, 1843, at the instance of Ralph Bingham, granted him a divorce from his wife Ester. This said Ester Bingham, the defendant in the above case of Bingham v. Miller, denied the power of the legislature to

2. 41 Ohio Laws 215. A total of nineteen divorces were granted by this forty-first general assembly of the State of Ohio.
grant such divorce, and maintained that she was still a **feme covert** and as such, not liable to be sued by Miller. The court sustained the defendant and declared that the matter of divorce was by its very nature judicial and as such not within the jurisdiction of the legislature. Judge Read in handing down the decision of the court went further than to question the legislature's power to grant divorces. He boldly asserted and maintained that the legislature had not only assumed powers not delegated to it but that it had usurped powers expressly conferred by the constitution upon the courts. It is interesting to compare this bold assertion of Judge Read with that of Judge Hitchcock made just twenty years before.¹ In this early case Judge Hitchcock held that the constitution actually conferred upon the courts no specific jurisdiction but merely made them capable of receiving such jurisdiction at the hands of the legislature. It will be noted that the intervening twenty years had witnessed a very material spread in the jurisdiction and powers of the courts in the minds of the judiciary, if we can accept these assertions as representative of the two periods. Whether these assertions are accepted as representative matters but little when we find that the change in the practices of the court agrees quite closely with the change in the tone of the above assertions.

The court in the case of Bingham v. Miller, supra, declared that all divorces already granted by the legislature would be held valid in order to avoid the consequence of rendering

¹ Heirs of Ludlow v. Johnson, 3 Ohio, 563, (1828).
illegitimate the children of the second marriages in such cases, but that all such grants in the future would be held null and void.

VIII

The Constitutional Powers of the Court of Common Pleas Can Not Be Taken from that Court and Conferred Upon the Supreme Court by Mere Legislative Fiat.

Section 5, Article 3, Constitution of 1802: "The court of common pleas in each county shall have jurisdiction of all probate and testamentary matters, granting administration, the appointment of guardians, and such other cases as shall be prescribed by law."

On March 24, 1861, the legislature passed an act amending an earlier special act entitled "An act directing the mode of proceeding in chancery, in the counties of Wyandot and Crawford." The act as amended provided "That in any cause in equity, now pending, or which may be hereafter instituted, wherein an injunction has been allowed by the court of common pleas, or any president judge thereof, any party against whom such injunction has been allowed, may file a motion in the supreme court of the county in which such case is pending, or in the supreme court in bank.........and the supreme court in the county, or the court in bank, shall have competent power and jurisdiction to hear and determine said motion."

On February 26, 1846, and March 23, 1860, the legislature

1. 49 Local Laws, 331.
2. 44 Ohio Laws, 192.
3. 48 Ohio Laws, 277.
had passed certain laws authorizing and requiring the county commissioners of Crawford county to make certain subscriptions to certain railroad stock, etc., and on the 6th day of November, 1850, the complainants in the case of James Griffith et al. v. The County Commissioners of Crawford County and the Ohio and Indiana Railroad Company\textsuperscript{1} had made application for and secured from the President Judge of the Court of Common Pleas of Crawford County an injunction enjoining the railroad company from selling or in any manner disposing of the bonds already issued and enjoining the commissioners from issuing the additional bonds and levying a tax for the payment of those already issued.

As soon as the special act of March 24, 1851, was passed the respondents in the case of Griffith v. Commissioners, \textit{supra}, filed a motion in the supreme court of Crawford county asking that the court consider and determine said motion. The supreme court for the county reserved the case for the consideration of the supreme court in banc. Two constitutional objections were advanced by the complainants, (1) that the question of the dissolution of the injunction allowed by the President of the Court of Common Pleas was not, nor could it constitutionally be, properly before the supreme court, and (2) that the act of March 23, 1850, authorizing the county commissioners to subscribe to the capital stock of the Ohio and Indiana Railroad company was void "for the reason that it is in violation of the great and essential principles of liberty and free government, as recognized and established by the 'bill of rights.'"

\textsuperscript{1} 20 Ohio Rep., 609, (1851).
The court in disposing of the case held: (1) that the legislature could not by special act confer upon the supreme court power to interfere with the jurisdiction of the "constitutional powers of the common pleas, which are, in their own proper sphere, as sacred as those that appertain to this tribunal," and (2) that the act of March 24, 1861, which attempted to authorize such encroachment upon and interference with the jurisdiction of that court was, in effect, null and void. The second objection raised by the complainants, not being necessary to a proper disposal of the case, was not decided by the court. It proved the occasion, however, for a forceful obiter dictum by Judge Spaulding and a very able reply by Chief Justice Hitchcock. Judge Spaulding denied the power of the legislature to pass laws authorizing local authorities to levy and collect taxes for the purpose of aiding or assisting private corporations in building railroads, etc. Chief Justice Hitchcock in reply reviewed the practice of the courts during the preceding half century of the state's history, maintained that the legislature had the right to pass such laws as those of February 26, 1846, and March 23, 1860, authorizing county commissioners to subscribe to the capital stock of railroad companies, and warned his colleagues against the day, should it ever come, when the constitutionality of a legislative act "would not so much depend upon the written constitution of the country, as upon the opinion of the Judges who should be called upon to decide upon its validity."
Summary: The Judicial Veto in the Half Century of Ohio History Under the Constitution of 1802; and its Impress as Seen in the New Constitution of 1851.

During the first fifty years of the state's history there are only seven officially reported instances of cases in which the Ohio Supreme Court declared the acts of the Ohio legislature null and void, in whole or in part, on constitutional grounds. On one occasion it declared a city ordinance null and void as violating the right of private property; and on one occasion it declared that an act passed by the Michigan legislature was null and void for want of the necessary sovereign legislative authority to enact and because it was repugnant to the laws of Congress.

Of the total of nine cases above referred to, one was held to violate the tenth section of the first article of the United States Constitution and the sixteenth section of the eighth article of the Ohio Constitution; four were held to violate the fourth section of the eighth article of the Ohio Constitution.


2. At its December term in 1851, the Ohio Supreme Court was called upon to construe and determine the constitutionality of an act passed by the Michigan legislature in 1836, incorporating the Manhattan bank. In handing down its decision the court held: "that the creation of a corporation is an exercise of sovereign legislative power; that at the time said act of incorporation was passed the territorial government was still in existence; and therefore the legislative assembly under the constitution, could not exercise legislative power, and said act was void, as repugnant to the act of Congress organizing the territory." -------Myers v. Manhattan Bank, 20 Ohio Rep., 233, (1851).
which guarantees the inviolability of private property; three were held to infringe upon the jurisdiction of the courts as conferred by the third article of the Ohio Constitution; and, one was held null and void for want of sovereign legislative power to enact and for the further reason that it was repugnant to the acts of Congress.

What, if any, appreciable influence had the action of the court in the above cases upon the framers of the constitution of 1851? Just how much the action of the court in the above cases influenced the framers of the new constitution is an open question, but that the influence was very great will hardly be denied. A brief study of the points involved in the above cases and the new constitution reveals some interesting parallels.

In the first case above, that of the State of Ohio v. The Commercial Bank of Cincinnati, the right of the legislature to change the charter of a private corporation without its consent, where such right has not been specifically reserved, was denied. The constitution of 1851, provides in section two, article thirteen, that: "Corporations may be formed under general laws; but all such laws may, from time to time be altered or repealed."

The second, third, fourth, and fifth cases above were concerned with the inviolability of private property. This right is very materially enlarged upon in the constitution of 1851.

In the case of Bingham v. Miller, supra, the court held that the matter of divorce was judicial and not legislative. The constitution of 1802 did not mention the subject at all, but the constitution of 1851, provides in article two, section thirty-two, that, "The General Assembly shall grant no divorce;" and the same section further provides, in keeping with the court's decision in the case of The Schooner Aurora Borealis v. Dobbie, supra, "nor exercise any judicial power not herein expressly conferred." The influence of the dicta of Judge Spaulding in the case of Griffith v. The Commissioners, supra, would be at this time difficult to estimate with any degree of accuracy, and yet we find the principle so ably advanced by the judge in the sixth section of the ninth article of the new constitution in these words: "The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of, such company, corporation, or association."
CHAPTER II

THE BILL OF RIGHTS

Only cases in which the court has declared the act in question unconstitutional as contravening one or more sections of the Bill of Rights, or Section 28, article 2 of the constitution of Ohio are discussed in this chapter. Cases in which the provisions of section 28, article 2 of the constitution which deny to the legislature the power to pass "retro-active laws, or laws impairing the obligation of contracts" are taken from their setting under article two of the constitution and are included here because it is felt that these cases logically belong with those having to do with the constitutional guarantees set forth in the Bill of Rights rather than with those falling under the remaining sections of the second article of the constitution.

I

Inalienable Rights

Section 1, article 1: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."
We shall study in this section only those cases in which the court has held that section 1, of article 1 was contravened by the act in question before the court. There have been fifteen such cases decided and officially reported in the Ohio State reports since the adoption of the constitution of 1851. In more than one-half of these the court held that the right and the freedom of contract had been unnecessarily and wantonly abridged. These cases fall naturally into a half dozen small groups which will now be taken up and treated in order.

A

Cases Concerning Labor and Wages.

Three cases have to do with labor and wages, labor and hours, or labor and contracts in some of their phases. Each of these cases involves the constitutionality of a legislative act which was held to contravene the letter or the spirit of the first section of the first article of the constitution. The first of these cases which we shall study is that of the Coal Company v. Rosser.1

In handing down the decision of the court in this case Judge Bradbury, who read the decision of the court, declared that the fundamental and basic principles of the constitution had been disregarded and that constitutional guarantees had been trampled to the ground by the amendatory act of March 3, 1892, which provided that "If the plaintiff in any action for

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1. 53 Ohio St., 12, (1895).
2. 89 Ohio Laws 59, Section 6563a.
wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow but not in excess of five dollars for his attorney. But no such attorney fee shall be taxed in the costs unless said wages have been demanded in writing, and not paid within three days after such demand. If the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of fifteen dollars for his attorney as the court may allow."

Rosser, the defendant in error, after having demanded in writing from the Coal Company $6.82 which was due him for work and labor, and after having waited the three days required by the act, instituted proceedings against the company before a local justice of the peace asking that he be given judgment for the $6.82 due him and that he be allowed an additional five dollars as an attorney fee as provided by the act of March 3, 1892, supra. The justice granted the original sum prayed for by Rosser and allowed the $5.00 attorney fee. The defendant in error appealed the case to the court of common pleas where the plaintiff again prevailed and was allowed an additional attorney fee of five dollars. The defendant then appealed the case to the circuit court where the decision of the common pleas was affirmed. The defendant then appealed the case to the supreme court. The supreme court reviewed the action of the lower courts and reversed them declaring that the act
while not violating any "direct and express terms" of the constitution, nevertheless, violated "the fundamental principles upon which our government rest as they are enumerated and declared by that instrument in the Bill of Rights." The court declared further that this act, in effect, provided that one party could invoke the action of the court in his behalf at pleasure and without extra hazard while the other party or citizen could do so only at the peril of being mulct in an attorney fee from five to twenty dollars, if for any reason he should fail in his defense and lose his case. Such an act, in operation, was held to contravene the spirit of the constitutional guarantees of the Bill of Rights, especially section one which guarantees the right of possessing and defending property, section two which guarantees equal protection, and section sixteen which guarantees that the courts shall be open to all and that all may secure equal justice therein by and through due course of law.

The second case having to do with labor came before the supreme court in the case of In Re Gilbert D. Preston.\(^1\) The court held in this case that the legislative act of March 9, 1898,\(^2\) entitled "An act to provide for the weighing of coal before screening," was an unnecessary abridgment of the liberty of contract guaranteed by the first section of the first article of the constitution and, therefore, null and void. The part of this act in question before the court provided as fol-

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1. 63 Ohio St., 428, (1900).
2. 93 Ohio Laws, 33.
laws: "It shall be unlawful for any mine owner, lessee or operator of coal mines in this state, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employe sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Ohio." This act was brought before the court in the above case in the form of habeas corpus proceedings in which the petitioner claimed that he had been unjustly deprived of his freedom and rights under the constitution, that the above act contravened the first section of the first article of the constitution and should, therefore, be held null and void by the court. The court sustained the contentions of the petitioner and declared that the act manifestly had no other object than that of limiting the right of contract as between miners and operators and preventing them from entering upon such contracts as would be mutually beneficial and which would give due consideration to the degree of skill and care exercised by the miners in mining, loading and handling the coal. The act was further declared to be an abridgment of the right of contract guaranteed by the first section of the first article of the constitution and since such abridgment was not made necessary by the public welfare the court held that the act was unconstitutional and, therefore, null and void.

The third and last case having to do with labor under the first section of the first article of the constitution was that
of The City of Cleveland v. The Clements Brothers Construction Company.\(^1\) The court was called upon in this case to determine the constitutionality of the so-called eight hour law which had been enacted by the legislature on April 16, 1900.\(^2\) The construction company as plaintiff denied the constitutionality of the act and prayed the court to hold the whole act null and void since it was an unnecessary and unjustifiable limitation of the right of contract, and, therefore, a direct violation of the first section of the first article of the constitution. Section one of the act provided that all workers employed by the state or other employers on public works should be limited to an eight hour day. Section two provided that all state and municipal contracts for public work should contain an eight hour provision and that a penalty should be stipulated therein for any and all infringements or violations of the same. Section three of the act made the violation of the act a misdemeanor punishable by a fine not to exceed five hundred dollars, or imprisonment not to exceed one year, or both.

On July 31, 1900, the plaintiff, supra, entered into a contract with the city of Cleveland for the construction of a sewer for the agreed sum of $9,808.72 which was duly approved by the director of public works. In accordance with and as required by section two of the act of April 16, 1900, above referred to, the contract between the city and the above plaintiff contained an eight hour clause which stipulated that a penalty

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1. 67 Ohio St., 197, (1902).
2. 94 Ohio Laws, 357.
of §10.00 for each and every day in which any laborer worked more than eight hours should be imposed upon the company and deducted from the above total. The company completed the construction of the sewer in due time and in a manner satisfactory to and acceptable by the city; and the city, according to the contract, paid to the said company the agreed sum of $9,908.72 minus $320 which it refused to pay on the grounds that the $320 had been forfeited by the company since it caused or allowed thirty-two of its employees to work more than eight hours in one calendar day contrary to the provisions of the contract.

The plaintiff instituted proceedings to compel the payment of this sum of $320 and appealed the case to the supreme court. The plaintiff alleged that the act unjustly and unnecessarily limited the liberty of contract guaranteed by the first section of the first article of the constitution and that it violated the right of private property guaranteed by the nineteenth section of the same article. The court sustained the plaintiff and declared the act null and void as violating and abridging the liberty of contract guaranteed by the first section of the first article, and as infringing upon and violating the right of property guaranteed by the nineteenth section of the first article in that it denied to and took from municipalities, contractors and subcontractors the right to agree with their employees upon the terms and conditions of employment. The act was not made necessary by public necessity nor was it considered a valid exercise of the police power of the legislature. It was declared to be a palpable violation of the above named sec-
tions and, therefore, null and void.

Of these three cases touching in some manner or other the rights or duties of labor and laborers the first case above was held to infringe upon the employer's inalienable right of possessing and defending property, and the second and third of the above cases were held to contravene and abridge unnecessarily the right of both laborers and employers to contract with each other to their mutual advantage. The right and liberty of contract were held to be inviolate except where the public welfare required that this right be limited or abridged; and then only to the extent actually required by such exigencies could the police power be invoked to limit such rights.

B

The Sale of Merchandise in Bulk Limited.

We have under this head two laws which were held to limit the right of contract unnecessarily and to give in their operation unequal protection and benefits thereby contravening both the first and second sections of the first article of the constitution.

The first of these laws was passed by the legislature on April 4, 1902, and was entitled, "an act to prevent fraud in the purchase, disposition or sale of merchandise." The constitutionality of this act was questioned and the act was brought before the supreme court in the case of Miller et al.

1. 95 Ohio Laws, 96.
Crawford, the defendant in error, in this case denied the constitutionality of the act on the ground that it was an unwarranted restriction of the right of the individual to acquire, possess or dispose of his property, and prayed that the court would, therefore, declare and hold the act null and void as repugnant to the first section of the first article of the constitution. This act provided that the sale of an entire merchandise in bulk, otherwise than in the usual course of trade, should be void unless at least six days before such sale or disposition the seller had taken certain unusual and unnecessary steps to acquaint the purchaser with the names and addresses of all of his creditors. The act further provided that the purchaser to be should give at least five days notice of his intended purchase to all of the creditors whose names and addresses were given to him by the seller of the goods, under penalty of a fine of not less than one nor more than five hundred dollars and further that he should be liable for the claims of said creditors.

The defendant above purchased from one Tilton a stock of merchandise in bulk without complying with the provisions of this act. The plaintiffs in error who were at the time the creditors of Tilton instituted the present action against the defendant to secure the several amounts due them from the said Tilton, and having been denied such relief in the court of common pleas and the circuit court, appealed to the supreme

1. 70 Ohio St., 207. (1904).
court for judgment claiming that under the law of April 4, 1902, they were entitled to relief. The defendant denied the constitutionality of the law. The court declared that the act was repugnant to the first and second sections of the first article of the constitution in that it was "an unwarranted restriction upon the right of the individual to acquire and possess property, and because it contained a forbidden discrimination in favor of a limited class of creditors," and, therefore, null and void.

Six years after the passage of the act of April 4, 1902, and four years after that act had been declared null and void by the supreme court the legislature passed the act of April 30, 1908.1 This latter act, to all intents and purposes, was similar to import and principle to the earlier unconstitutional act. It provided in part as follows: "Every sale or transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's or transferrer's business, or the sale or transfer of an entire stock in bulk shall be presumed to be made with the intent to hinder, delay or defraud creditors within the meaning of this section, unless the seller or transferrer shall not less than seven days previous to the transfer of the stock of goods sold or intended to be sold * * * cause to be recorded in the office of the county recorder of the county ** * his intention to make such sale or

transfer," etc. The constitutionality of this act was questioned before the court in the case of Williams and Thomas Company v. Preslo. 1 Judge Shauck in reading the decision of the court reviewed, approved and followed the case of Miller v. Crawford, supra, and declared that the act of April 30, 1908, created a rule of evidence unfavorable to the defendant in error; that it was an unwarranted abridgment of the liberty of contract, and right of the individual to acquire and possess property guaranteed by the first section of the Bill of Rights; that under such a law merchandise, stocks in bulk, etc., could only be sold or transferred to the great prejudice of the original vendor; and that the act was nothing less than a law to protect the special interests of a few "who desire to obtain advantages not accorded by the general law," and as such repugnant to the second section of the Bill of Rights which guarantees equal protection to all.

The whole spirit, intent and purpose of the two above acts was declared by the court in the above cases to be contrary to the constitutional guarantees expressly set down in our Bill of Rights.

C

Class Legislation; Railroads, and Manufacturers.

The legislature on several occasions have passed acts looking to the protection of the property

1. 84 Ohio St., 328, (1911).
and interests of special or particular classes of persons or property. The policy of the court has been to sustain such acts where, in the opinion of the court, they are beneficial to the community as a whole along with the benefit to the particular class, provided that the rights of other persons or classes are not infringed thereby.

The first of these acts to be declared by the court to contravene the first section of the first article of the constitution was that of April 23, 1902. This was an act to amend an act passed April 9, 1880, entitled "an act to protect manufacturers, bottlers and dealers in ginger ale, seltzer-water, mineral water, and other beverages, from the loss of their bottles and boxes." The act as amended April 23, 1902, made it a crime for one to have in his possession for use or sale certain kinds and classes of bottles or vessels specified in the act without the written consent of the owner; and provided further that a search warrant might be issued wherever and whenever it was believed that the provisions of this act were being violated by any person or persons to be named in the warrants. This act was reviewed by the supreme court in the case of The State of Ohio v. Schmuck. Schmuck, the defendant in error, had been indicted at the April (1905) term of the Cuyahoga court of common pleas for having in his possession with the intent of selling certain bottles and other vessels contrary to the act of April 23, 1902. He made answer to the court by denying the

1. 95 Ohio Laws 248.
2. 77 Ohio Laws, 140.
3. 77 Ohio St., 438, (1908).
constitutionality of the law and the case was referred to the supreme court on the question of law involved. Judge Price in reading the decision of the court declared that the act was not aimed at the prevention of the adulteration of food or beverages, but that its sole end and purpose was that of protecting the particular interests and property of a special class of persons, namely, "manufacturers, bottlers, and dealers in ginger ale, seltzer-water, mineral water, and other beverages, from the loss of their bottles and boxes"; that the whole act was clearly a piece of class legislation; and that it was repugnant to the genius of our constitution and especially and expressly forbidden by sections one, fourteen, and nineteen of the first article of it.

On May 9, 1908, the legislature passed an act "to protect railroad property and guard against personal injuries" which act was to all intents and purposes quite similar to the act of April 23, 1902, supra, for the protection of manufacturers, bottlers, etc. This act provided in part as follows: "Whoever buys, receives, or unlawfully has in his possession any of the aforesaid articles" (journal brasses, nuts, bolts, etc., removed from railroad cars, etc.) "shall upon conviction thereof be imprisoned in the penitentiary not more than five years or less than one year" etc.

Kilbourne, who was a junk dealer, purchased along with other junk in the pursuit of his business certain articles that had been removed from railroad cars which were included

1. 99 Ohio Laws, 464.
in this act. He was thereupon hauled into court and indicted for this infringement of the law. Now it so happened that this purchase and sale of junk had been made by Kilbourne on a commission basis and that he had never even seen the articles in question and was wholly ignorant that any articles removed from railroad cars were included in the shipment, yet notwithstanding this absolute ignorance on the part of Kilbourne he was under the law guilty of purchasing and selling the articles forbidden in the statute of May 9, 1908.

Kilbourne denied the constitutionality of such a statute and appealed to the supreme court in the case of Kilbourne v. The State of Ohio\(^1\) asking that the court declare it null and void since it limited unjustly and unnecessarily his right to acquire and possess property and his right to pursue his lawful occupation or business, which inalienable rights were guaranteed by the first section of the first article of the constitution. The court sustained the contention of the defendant, reversed the circuit court, and denied that the legislature had the constitutional authority to enact such legislation as that of the act of May 9, 1908.

\(^1\) 84 Ohio St., 247, (1911).
Acts Violating the Right to Possess and Protect Property

For the first time in the history of the state the legislature on April 4, 1906, 1 passed an act levying a per capita tax upon dogs and providing that such "tax shall be levied upon and entered against the real estate upon which the dog is kept or harbored and collected as are other taxes upon real estate." This act was reviewed by the supreme court in the case of Mirick v. Gims, Treasurer. 2 Mirick refused to pay the dog tax levied upon and entered against his property for dogs that were or had been kept by his tenant or tenants without his knowledge or consent. Gims, the county treasurer, instituted proceedings to compel the payment of such taxes. The court of common pleas and the circuit court sustained the law and ordered the tax assessment collected. Mirick appealed the case to the supreme court on the ground that the act was in violation of the right to possess and protect property guaranteed by the first section of the first article of the constitution, and that it impaired the contract existing between him as landlord and his tenants.

The court reversed the court of common pleas and the circuit court and declared that in so far as the act required the levying of such dog tax upon property upon which dogs were

1. 98 Ohio Laws, 87.
2. 79 Ohio St., 174, (1906).
kept or harbored without the knowledge or consent of the owner, it was an unjust and unreasonable exercise of police powers not required by the general welfare and, therefore, unconstitutional, null and void. The right to enjoy, possess, and protect property is expressly guaranteed by the first section of the first article of the constitution; this right cannot be denied, or abridged except when imperatively demanded by the public welfare; and the act of April 4, 1906, the court held, does not come within this exception. The court further declared that since Mirick's property was at the time of the passage of the act and has been ever since under lease and in control of tenants, that it would be a violation of the twenty-eighth section of the second article of the constitution which provides that "The General Assembly shall have no power to pass retroactive laws or laws impairing the obligation of contracts;" if it were applied in the case before the court.

Six years after having disposed of the unconstitutional dog tax in the case of Mirick v. Gims, the court was called upon in the case of Evans v. Mannix, Treasurer, 1 to decide upon the constitutionality of Section 6072 of the General Code which required that the tax on the traffic in intoxicating liquors should be assessed against the real estate on which illegal sales had been made by a tenant who had leased the property for legal purposes other than that of carrying on the traffic in intoxicating liquors, and without regard to whether the owner was aware of such illegal traffic by his ten-

1. 90 Ohio St., 355, (1914).
ant or consented thereto. Judge Johnson in reading the decision of this case reviewed and followed the case of Mirick v. Gims, supra, and declared the act null and void as contravening the constitutional guarantees of the right to possess and protect property found in section one, article one of our constitution.

B

Miscellaneous Cases Under Article One Section One.

The next four cases have only one thing in common and that is that they all were held to contravene the first section of article one of the constitution in one way or another. The first of these cases in point of time was that of Palmer and Crawford v. Tingle, in which the legislative act of April 13, 1894, was reviewed by the court and declared null and void as contravening the inalienable rights of possessing and protecting property guaranteed by the first section of the Bill of Rights.

The mechanic's lien act as amended April 13, 1894, provided that "a person who performs labor, or furnishes machinery or material for * * * * erecting, altering, repairing or removing a house * * * or other building * * * by virtue of a contract with, or at the instance of the owner of or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same * * * * upon such house

1. 55 Ohio St., 423, (1896).
2. 91 Ohio Laws, 135.
or other building **and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise of the owner in the lot or land on which the same may stand, or to which it may be removed." On April 23, 1894, Tingle, the defendant in the above case, contracted with one McComb for the repair of the defendant's house. McComb in turn contracted with Palmer and Crawford to supply the materials necessary to make such repairs as were necessary and as had been agreed upon by contract between Tingle and McComb. When the work was completed Tingle accepted it as satisfactory and paid the amount called for by the contract made by him to McComb in full, thus completing and ending the only contract which he had made. McComb, however, who had made a sub-contract for materials to Palmer and Crawford, the plaintiffs in the above case, for the sum of $214.84 failed to pay the same. The plaintiffs, therefore, in accordance with the act of April 13, 1894, filed the necessary credentials with the county recorder and sought to take out a lien on Tingle's property as provided in said act. Tingle denied the constitutionality of the statute, complained that it deprived him of his right to possess and protect his property as guaranteed by the first section of the first article of the constitution, and appealed to the courts to protect him from the operation of the law. Judge Burket in reading the decision of the supreme court reviewed and affirmed the decision of the circuit court, declared that the right and the liberty of contract was within those inalienable rights guaranteed by the Bill of Rights.
and could be abridged only when made absolutely necessary for the common welfare. The judge further declared that the public welfare did not require that a contractor, who was by the nature of his relation to the owner opposed to his interests, should be empowered and authorized to make other contracts binding upon the owner without his knowledge or consent, and that the act was, therefore, null and void, contravening both the first and second sections of the Bill of Rights.

The liberty of contract was again declared to have been violated by the act of April 20, 1904,1 in the case of The State of Ohio ex rel. v. Robins.2 This act provided that "all bonds and undertakings for the faithful performance of official or fiduciary duties, or the faithful keeping, applying or accounting for funds or property, or for one or more of such purposes * * * * is hereby required to be by" a surety company or companies authorized to do business under the laws of this state. This act, it will be noted, took from the individual his original freedom of selecting his personal sureties and made it mandatory that he secure such surety from a surety company.

Jean D. McKell, respondent in the above case, was appointed administratrix of her late husband's estate and ordered to give bond in the sum of $200,000. A bond for the said sum was duly presented by the respondent to the probate judge who declined to receive it because it was signed by personal sureties and not by a surety company or companies as required by the act of April 20, 1904, supra. The judge stated that he

1. 97 Ohio Laws, 182.
2. 71 Ohio St., 273, (1905).
had no reason to doubt the sufficiency of the bonds offered by the respondent but declined to accept them solely on the ground that the act above required that all such sureties were to be given by surety companies. The relator denied the constitutionality of the act in so far as it abridged her right to contract for surety, and instituted mandamus proceedings to compel the probate to accept the sureties she offered signed by personal sureties. The court sustained the relator and declared the act unconstitutional and, therefore, null and void, in that it violated the first and second sections of the first article of the constitution which provide that the right of contract shall not be abridged unnecessarily, and that equal protection shall be afforded to all.

In the case of Auditor of Lucas County v. The State ex rel. Boyles,1 the legislative act of April 25, 1904,2 entitled "an act to provide relief for worthy blind," was declared unconstitutional and held to be null and void as contravening sections one, two and nineteen of the first article of the constitution. This act provided that all bona fide resident blind males above twenty-one and all blind females above eighteen years of age should, if without property or means of support, be entitled to receive not more than $25.00 per capita quarterly, said amount to be authorized by the county probate and allowed by the county auditor from county funds. Pursuant to this act the probate judge of Lucas county authorized the county auditor to issue a warrant on the county treasurer for the

1. 75 Ohio St., 114, (1905).
2. 97 Ohio Laws, 392.
sum of twenty-five dollars for the benefit of the relator, supra. The auditor denied the constitutionality of the statute and refused to issue the warrant. Whereupon the relator instituted mandamus proceedings to compel the issuance of the warrant. The court of common pleas allowed a peremptory writ which was sustained on appeal to the circuit court. The case was then appealed to the supreme court for final decision.

Judge Summers in handing down the decision of the court reviewed and reversed the lower courts; declared that the power of the legislature was a limited and delegated one; that the right of the legislature to tax was not broader than the purpose for which the state was formed; that the act of April 24, 1904, for the out-door relief of worthy blind, in effect, took the property of private persons through public taxes and gave this property to other persons without regard to public welfare; that such was nothing more nor less than a "gratuitous annuity, a gift pure and simple" and as such not within the power of the legislature to grant from public funds; and that the act contravened the right to possess and protect property guaranteed by the first section of the first article of the constitution, and that part of the second section which guarantees equal protection to all, and the nineteenth section of the same article which guarantees the inviolability of private property.

Four years later, April 2, 1908, the legislature passed another act having as its sole aim and purpose the out-door relief of worthy blind. This latter act was to all intents and

1. 99 Ohio Laws, 56.
purposes essentially the same as the earlier act of April 25, 1904, which was declared null and void in the case of Auditor of Lucas County v. The State ex rel. Boyles, supra, yet this latter act was sustained by the court in the case of State ex rel. Walton v. Edmonson,1 because, the decision reads, "the entire matter is left to the county commissioners"; because "every safeguard has been adopted to secure the application of the money to the support of the individual and to prevent him from becoming a public charge"; and because "it is not an indeterminate annuity, unlimited in time or uncertain in its application." Aside from the superfluity of declarations and legal verbiage with which the opinion of the court in each of these cases is so luminously obscured and beclouded, one is somewhat at a loss in completely reconciling the two opinions; the latter of which is supposed to be in full agreement with the former. The fact that there was a total change in the membership of the court which sat in the two cases might be of some significance in a proper understanding of the action of the court in the two cases.

In the following case of In the Matter of the Application of Henry H. Steube for a Writ of Habeas Corpus2 on appeal the supreme court held that the legislative act of February 27, 1913,3 was repugnant to section one of the Bill of Rights and, therefore, null and void. This act provided that "All articles hereinafter mentioned, when sold, shall be sold by avoirdupois

1. 89 Ohio St., 351, (1913).
2. 91 Ohio St., 135, (1914).
3. 103 Ohio Laws, 136.
weight or numerical count, unless by agreement in writing of all contracting parties." Here follows a long list of fruits, vegetables, etc., among which Irish potatoes are included. The act further provided that "whoever sells or offers for sale any article in this section enumerated, in any other manner than herein specified, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars * * * or imprisoned not more than three months, or both." Steube, the defendant above, was charged with and found guilty of selling about one-fourth peck of Irish potatoes otherwise than by avoirdupois weight or numerical count and without an agreement in writing as required by the above act and when arranged before a local justice of the peace was given a fine of $10.00 and costs and ordered committed to the county jail until such fine and costs were paid. The defendant thereupon petitioned for and secured from the court of common pleas a writ of habeas corpus on the grounds that the act was unconstitutional and void, and that he was being deprived of his liberty by such unlawful imprisonment. The court sustained the claims of the defendant and ordered his discharge. The sheriff instituted proceedings in error in the court of appeals where the court of common pleas was affirmed. The sheriff then appealed to the supreme court for a reversal of the lower courts. The supreme court reviewed the case and affirmed the lower courts, and declared that "the right to contract is recognized as a property right essential to the acquisition, possession
and protection of property"; that "to require the vendor and
purchaser of articles covered by the act to enter into an agree-
ment in writing each time a sale is made by measure, that the
sale may be lawful, conflicts with the right to make contracts";
that the act of February 27, 1913, was not a valid and justifi-
able exercise of the police power; and that the act was clear-
ly an invasion of the property rights guaranteed by the first
section of the Bill of Rights and, therefore, null and void.
The right of contract must remain free and unabridged except
where imperatively demanded by public welfare.

The last two cases which we shall study under this section
of the constitution were concerned with the violation of the
right of contract by city ordinances which were passed under
the authority of Section 3673 of the General Code which gave
to the city council power "to license transient dealers, per-
sons who temporarily open stores or places for the sale of
goods, wares or merchandise, and each person who on the streets,
or traveling from place to place about such municipality sells,
bargains to sell, or solicits orders for goods, wares or mer-
chandise by retail."

The first case to come before the court was that of The
Great Atlantic and Pacific Tea Company v. The Village of Tippe-
canoe. The Tippecanoe village council had on December 2, 1907,
passed an ordinance, in accordance with the grant of power
conferred by Section 3673 of the General Code, entitled "an
ordinance to license hawkers, peddlers and hawkers." Under

1. 85 Ohio St., 128. (1911).
this ordinance the company had been compelled to pay to the city a total of $104.00 in license fees. These fees were paid under protest only to avert the threatened arrest of the company's employees and notice was given by the company that suit would be brought to recover said fees. Suit was, accordingly, brought in the court of common pleas to which the village demurred generally. This demurrer was sustained by the court of common pleas and the circuit court on appeal. The plaintiff then appealed the case to the supreme court for final decision. In rendering the decision of the court Judge Shank declared that Section 3673 of the General Code could not be so interpreted as to give municipalities the right to impose a license upon those who did not sell their wares or other articles upon the public streets but only solicited orders at the homes of their customers for future delivery; and that the Tippecanoe village ordinance of December 2, 1907, was not only null and void for lack of the necessary legislative grant of power to pass but that it was in contravention of the first section of the first article of the constitution which guarantees the liberty of contract.

Four years later, 1915, in the case of The City of Wooster v. Evans, the court held on the authority of The Great Atlantic and Pacific Tea Company v. The Village of Tippecanoe, supra, that Sections 3673 and 3676 of the General Code could not be interpreted to authorize a village or city council to impose a license fee upon transient dealers who solicit orders at the

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1. 92 Ohio St., 604, (1915).
homes of their customers for future delivery only; and that the Wooster city ordinance requiring the payment of such license fee was contrary to the right to make contracts guaranteed by the first section of the Bill of Rights and, therefore, null and void. Moreover, the power to pass such an ordinance was not and could not have been conferred by the legislature.

II

Equal Protection and Equal Benefits to All.

Section 2, Article 1: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly."

This section has been held, in eleven different cases before the supreme court to have been contravened by statutes of the legislature. The act or acts in question before the court in six of these cases was held also to have contravened the first section of the Bill of Rights and have already been discussed in the foregoing pages. The remaining five cases under this section, in each of which the court held that the constitutional guarantee of "equal protection and benefits" had been contravened, will now be discussed.

The first of these cases, in point of chronology, was that of State of Ohio ex rel. v. Ferris, in which the court

1. These cases were: Coal Company v. Rosser; Palmer & Crawford v. Tingle; Miller et al. v. Crawford et al.; State v. Robins; Auditor v. State; Williams & Thomas Co. v. Presto.
2. 53 Ohio St., 315, (1895).
declared the legislative act of April 20, 1894, entitled "an act to impose a direct inheritance tax," null and void as contravening the constitutional guarantee of equal protection. This act provided that all estates under $20,000 should be exempted from the payment of the tax, and that larger estates should pay higher rates than smaller ones, the rate to vary according to the graduated scale contained within the act.

The probate court of Hamilton county refused to apply and enforce the act on the ground that it was unconstitutional. The county prosecutor instituted mandamus proceedings to compel the application and the execution of the law. The circuit court sustained the demurrer filed by the probate court and a petition of error was filed by the prosecutor in the supreme court to reverse the lower courts. Judge Burket in reading the decision of the court declared that the act of April 20, 1894, directly contravened the second section of the Bill of Rights; that the act did not protect equally the right of the people to inherit and receive property in that the right to receive the first $20,000 was not taxed at all, while the right to receive an inheritance of from twenty to fifty thousand dollars was taxed at one rate and larger estates or inheritances at still higher rates. "This," said the judge, "is not equal protection." Chief Justice Minshall dissented, and Judge Shauck concurred only in part in the decision of the court.

About ten years later, 1904, in the case of State v. Gilbert, the principle advanced and upheld by the majority of the

1. 91 Ohio Laws, 166.
2. 70 Ohio St., 229, 1904.
court in State v. Ferris was very materially shattered if not actually reversed. In the latter case the court in a four to two decision upheld the legislative act of April 24, 1904, which provided for the exemption of the first $3000 of an inheritance. Details in the two cases differed somewhat but the fundamental principles were identical.

On April 27, 1896, the legislature passed an act entitled "an act regulating fraternal beneficiary societies, orders, and associations," which provided that the benefits rendered by or obtained from such organization or association organized under the act, should not be liable to be appropriated in any way for the debts of the members of such beneficiary societies or associations. This act came before the court in the case of Williams v. Donough. Action had been brought by the plaintiff in error before a local justice of the peace to secure a judgment for and compel the payment of a debt of two hundred dollars owing and due him from the deceased husband of the defendant. A judgment for the $200 and costs was given the plaintiff in error by the local justice of the peace; but subsequently the justice dismissed the proceedings in aid of execution on the grounds that the funds sought after to pay the debt were benefits secured from a beneficiary organization organized under the act of April 27, 1896, and as such not subject to appropriation for debts contracted by the members of such association. Appeal was taken successively to the court

1. 92 Ohio Laws, 250.
2. 66 Ohio St., 499, (1902).
of common pleas, circuit court and finally to the supreme court. In handing down the decision of the court Judge Spear declared that the act contravened the constitutional guarantee of section two of the Bill of Rights discriminated in favor of the members of the associations named in the act and their beneficiaries, giving to them valuable advantages not enjoyed by the members of any other class or any other individuals in the same class who belonged to insurance organizations and associations not named in the act; and that the act was, by reason of these discriminations, unconstitutional and void.

The next three cases are concerned with legislative acts which were passed by the legislature in its attempts to better provide, in one way or another, for the public health or the public welfare. The first of these was concerned with the act of April 21, 1896, entitled "an act to promote the public health and regulate the sanitary construction of house-drainage and plumbing," providing that "any person, firm or corporation ** working at the business in this state either as master or employing plumber, or as a journeyman plumber shall first secure a license therefore, in accordance with the provisions of this act" and that "in case of a firm or corporation the examination and licensing of any one member of such firm or the manager of such corporation shall satisfy the requirements of this act." The act came before the court on appeal in the case of State of Ohio v. Gardner. 2 Gardner, who had

1. 92 Ohio Laws, 263.
2. 58 Ohio St., 599, (1898).
been arrested and convicted before the mayor of Akron for engaging in the business of plumbing without a license as required by the above act, petitioned the court of common pleas and secured his release and discharge on the ground that the act in question was unconstitutional. The county prosecutor took exception to the ruling of the court of common pleas and filed a bill of exceptions in the supreme court to secure the reversal of the lower court.

Chief Justice Spear in reading the decision of the supreme court declared that the second section of our Bill of Rights specifically "prohibits the granting of privileges to one which are denied to others of the same class," that the plumbers' licensing act of April 21, 1896, was just such a privilege granting act in that it required any plumber, whether master, employing plumber or journeyman, to secure a license before engaging in the business of plumbing, while it permitted all of the members of a firm to engage in and pursue the business of plumbing when and if only the manager of the firm secured a license under the act; and further that the act was repugnant to the twenty-sixth section of article two in that it did not have an equal operation "upon all of a class pursuing the calling under like circumstances" throughout the state. The act was, therefore, declared null and void and the judgment of the court of common pleas affirmed.

The second of these licensing acts came before the court in the case of The State of Ohio v. Gravett. The court held

1. 65 Ohio St., 289, (1901).
in this case that the legislative act of April 14, 1900,\(^1\) amending the earlier act of February 27, 1896,\(^2\) entitled, "an act to regulate the practice of medicine in Ohio," was null and void as contravening section two of the Bill of Rights which guaranteed equal protection and benefits to all. This act required that osteopaths, in order to practice in this state, must have and hold a diploma from a college which offered and required a full four year course for graduation; that they should pass a comparatively short examination; and that they should be given in any case only a limited certificate; while the requirements for those who contemplated the securing of unlimited certificates for the general practice of medicine and surgery were not nearly so extensive in point of time spent in preparation.

Gravett was indicted for practicing osteopathy without complying with the requirements of this licensing act. He denied the constitutionality of the act and the case was appealed to the supreme court for final decision. Judge Shuack, who read the decision of the court, declared that the act discriminated unjustly in requiring that osteopaths who were to take a shorter examination and secure only a limited certificate to practice in a limited field of medicine were required by the act to have completed a longer period of study than those who contemplated the general practice of medicine and surgery and were to be granted unlimited certificates; and that on the authority of State v. Gardner, \textit{supra}, the act was

\(^{1}\) 94 Ohio Laws, 198-201.
\(^{2}\) 92 Ohio Laws, 44, 49.

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unconstitutional and void as contravening the second section of the Bill of Rights.

The last case under this section of the constitution was that of Harmon v. State of Ohio.\(^1\) The legislative act of March 1, 1900,\(^2\) entitled, "an act for the better protection of life and property against injury or damage, resulting from the operation of steam engines and boilers by incompetent engineers and others, "was declared to be a discriminating act, operating unequally upon the members of a class and therefore, null and void, as contravening the second section of the Bill of Rights. Section three of the act empowered the governor with the consent of the senate to appoint a chief examiner, which chief examiner was empowered to appoint with the approval of the governor six district examiners. Section six provided that the district examiners should hold examinations in their respective districts and grant to any applicant "found trustworthy and competent a license" to have charge of or to operate any steam plant etc. Section seven provided that any engineer who had been employed as a steam engineer continuously "in the State of Ohio for a period of three years next prior to the passage of this act" should be granted a license without examination.

The prosecuting attorney of Butler county filed a petition in quo warranto in the circuit court to oust from office the plaintiff in error who had been appointed district examiner, basing his petition on the ground that the licensing act

\(^1\) 66 Ohio St., 249, (1902).
\(^2\) 94 Ohio Laws, 33.
of March 1, 1900, was unconstitutional and, therefore, of no effect. The circuit court held the law unconstitutional and void and rendered a judgment of ouster. Thereupon the plaintiff in error filed a petition of error in the supreme court to reverse the circuit court. The supreme court affirmed the circuit court and declared that section six of the act delegated legislative powers to the district examiner in that it authorized each district examiner to "make the law for his district, limited only by his will as to what shall constitute the standard of the qualification of engineers," thus contravening the first section of article two which provided that "the legislative power of this state shall be vested in a General Assembly;" and that section seven of the act discriminated unjustly creating and promoting the "welfare of a particular three-year class, instead of the common welfare of all," thus contravening the second section of the first article which guarantees that laws passed shall be passed for the equal protection and benefit of all; and that since the whole purpose of the act was so closely interwoven with the unconstitutional sections of the act the whole act would be declared null and void and of no effect.
I

Inviolability of Right of Trial by Jury.

Section 5, article 1: "The right of trial by jury shall be inviolate."

The supreme court has held in four different cases that this constitutional right has been violated. Three of these violations were made by legislative acts and one by a village ordinance.

The first of these cases, that of John W. Work v. The State of Ohio, 1 came before the court soon after the adoption of the new constitution of 1851. The question before the court was the constitutionality of the fiftieth section of the fourth chapter of the act of March 14, 1853, 2 entitled, "an act to establish a code of civil procedure," which provided for a jury of only six in criminal actions before the probate court. The defendant in error had been charged with and convicted by a jury of six of assault and battery. He objected to being tried by a jury of six but was overruled. After the verdict was rendered he appealed to the supreme court to reverse the lower court on the ground that the act under which and the proceedings by which he had been convicted were unconstitutional. The court reviewed and reversed the decision of the lower court, and declared that in so far as the act authorized a conviction upon the findings of a jury of six men in criminal cases it was unconstitutional and void, being in contravention of the fifth

1. 2 Ohio St., 295, (1853).
2. 31 Ohio Laws, 176.

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section of the Bill of Rights which guarantees that "the right of trial by jury shall be inviolate," and the tenth section of the same article which guarantees that "in any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * * * and to have * * * a speedy public trial by an impartial jury"; and that the "essential and distinguishing features of the trial by jury, as known to the Common Law" could not be materially changed by the legislature.

The second case under this section of the Bill of Rights was that of George Thomas v. The Incorporated Village of Ashland.¹ This case is more or less unique in that the Ashland village ordinance which was before the court was held by the court not to have been authorized by the legislative act of April 5, 1866,² "to provide for the organization of cities and incorporated villages" and providing that "any municipal corporation may provide for a further penalty of imprisonment for any term not exceeding thirty days; * * * as may be determined by the city council," which act the court declared was never intended to nor was it capable of authorizing the village council to pass such an ordinance authorizing the village mayor to try and sentence to imprisonment persons charged with violating the village ordinance. The ordinance provided that persons keeping billiard tables, to be used by others, should be subject to imprisonment for a term not exceeding thirty days by the mayor of the village. The plaintiff in error was

¹. 12 Ohio St., 124, (1861).
². 2 S. & C. Stat. 1807.
charged with violating the ordinance and was committed to jail by the mayor as provided by the ordinance. He denied the constitutionality of the ordinance, the legality of such proceedings and demanded a jury trial which was refused. He thereupon applied for a writ of habeas corpus and later when the common pleas sustained the action of the mayor filed a petition of error in the supreme court to reverse the common pleas.

Judge Cholson, who read the decision of the court, declared that where imprisonment was imposed as a punishment for the violation of a village ordinance and not as the result of a process of collecting a fine, it was in the nature of a criminal offense—proceedure and, therefore, was to be governed by the rules of criminal procedure; that it had not been intended by the legislature to authorize by the legislative act of April 5, 1856, such procedures and convictions by the mayors of villages; that the ordinance was null and void for the reason that it was unauthorized; and that if it had been authorized by the act of April 5, 1856, it would have been, nevertheless, unconstitutional, being in contravention of the fifth section of the first article of the constitution. Moreover, the judge declared, "a power which the legislature itself could not exercise, very certainly cannot be delegated to a municipal corporation."

The next case under the present section was that of Zediah Howell v. Peter Fry, Administrator of Elizabeth Howell, deceased. In this case was involved the validity of the legis-

1. 19 Ohio St., 556, (1859).
lative act of February 26, 1843, 1 which provided that upon complaint of an executor or administrator before the probate court against any person for concealing, embezzling or carrying away the property or effects of an estate, such person should be cited to appear before the court, submit to examination, and "if, upon such examination, the probate court shall be of opinion that the person or persons so accused is or are guilty * * * the court shall forthwith render judgment in favor of the executor." Obediah Howell, the plaintiff in error, was charged with and found guilty of carrying off certain articles belonging to the estate of Elizabeth Howell, deceased. He denied the charges and the jurisdiction of the court and demanded that he be given a jury trial. The court overruled his demand for jury trial and rendered judgment against him. Appeal was carried to the supreme court to reverse the action of the lower courts on the ground that he had been denied the constitutional right of a trial by jury. The court's decision was read by Judge Welch who declared that the plaintiff in error who was the defendant in the case before the probate court had the right to a jury trial and could only be dealt with summarily when and in case he did not deny the truth of the charges made against him; that the legislative act of February 26, 1843, authorizing a judgment by such summary proceedings could "only be sustained as constitutional and valid in so far as it" applied to a case where the defendant did not controvert the truth of the charges; and that the statute in so far as it pro-

fessed to authorize a judgment in cases where there was a controversy as to the truth of the charges made against the defendant was unconstitutional and void, as contravening the constitutional guarantee of the right of jury trial which provided that the right of trial by jury shall be and remain inviolate.

The last case under this section of the constitution was that of Turnpike Company v. Parks et al., 1 involving the constitutionality of sections 4914, 4916, and 4918 of the Revised Statutes. Section 4914 provided that any turnpike or plank road in the state upon which toll had been authorized to be taken should, if and whenever found to be out of repair for a period of six months or longer, be deemed to have been abandoned and thereafter no toll was to be paid thereon. Section 4916 provided that the probate court of the county in which the road or portion of the road which had been out of repair for six months or more was situated, should upon petition require the owners of such road or turnpike to appear and answer as to the condition of the road, and if the road should be found to have been out of repair for six months or longer the court should declare the same abandoned and vacated as a toll road. Section 4918 provided that any toll road declared abandoned under section 4916 should be declared to be thereafter a free road.

The plaintiff, the Salt Creek Valley Turnpike Company, had, in accordance with the above act, suffered the loss of its property at the hands of the probate court of Hocking county. The plaintiffs had filed a petition claiming that the company's

1. 50 Ohio St., 568, (1893).
turnpike road had been out of repair for more than six months, and prayed that said turnpike be declared abandoned, vacated and free as provided in the above sections. The probate court received the petition, heard the defendants and declared the company's road abandoned and vacated. This finding was affirmed by the court of common pleas and circuit court on appeal, and the plaintiff filed a petition in the supreme court to reverse the lower courts. Judge Dickman who read the decision of the court declared that the plaintiff in error in the case before the court was entitled to a jury in the probate court; that to deprive the company of its right to receive toll for the use of its turnpike without jury trial would be to take private property without due process of law; and that in so far as sections 4914, 4916, and 4918 of the Revised Statutes authorize the taking of a turnpike company's private property without its consent and without providing for a jury trial or an appeal whereby such jury trial may be had, they are unconstitutional and void, contravening the fifth and sixteenth section of the Bill of Rights, of the Ohio constitution and the first section of the fourteenth amendment to the United States Constitution.

IV

"Due Course of Law."

Section 16, article 1: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law,
and justice administered without denial or delay."

On eight different occasions the supreme court has held that this fundamental constitutional right was violated by legislative act or city ordinance. Two of these cases were also held to have violated at the same time other constitutional guarantees. These have already been discussed above, one under section one, and the other under section five of the Bill of Rights. The remaining six cases will now be discussed in chronological order.

All of these cases are comparatively recent; the first coming before the court in the case of State of Ohio ex rel. v. Guilbert, Auditor of State et al.¹ in June, 1897. The case arose in the form of a mandamus proceeding to compel the defendants, who were state officers, to perform the duties of preparing a uniform system of blanks etc., appropriate to the carrying out of the purposes of the legislative act of April 27, 1896,² entitled, "an act to provide for the registration of land titles in Ohio." The defendants demurred on the ground that the act was repugnant to the constitution and, therefore of no effect. The demurrer was sustained.

This act, which was popularly known as the "Torrens Law," authorized the registration of land titles and provided that a person or persons registering such titles should be presumed to hold and own the lands registered against all other claimants after a relatively short period of time, such title to be good unless fraud were shown; that a tax of one-tenth of one

¹ 56 Ohio St. 575 (1897).
² 92 Ohio Laws 220.
per cent. should be levied on all lands registered for the purpose of maintaining a fund to provide compensation to any person or persons who should prove at a subsequent time that he or they had been unjustly deprived of his or their lands and property through the operation of the act; and that the county recorder should have and exercise certain powers in the hearing and determining of matters concerning the right of property as they were presented to him from time to time in the administration of the registration of lands under the act. Judge Shauk, in reading the decision of the court, reviewed at some length the provisions of the act and their relation to the constitutional guarantees and the effect of the operation of the act on private property, and declared that it unjustly and unnecessarily limited the rights of persons in property; that it destroyed vested rights in property without due course of law; that the act in order to maintain an assurance fund authorized the taking of private property by way of assessment for private purposes and without the consent of the owner; and that it conferred judicial powers upon the county recorder.

For the reasons just enumerated the court held that the whole act was null and void as contravening the "Due course of law" clause of section sixteen, article one; the inviolability of private property guarantee of section nineteen, article one; and the first section of the fourth article which provides that "the judicial power of the State is vested in a Supreme Court ** and * * * other courts, inferior to the Supreme Court."
The second case under this section of the constitution was that of Edson et al v. Crangle et al. The question before the court was the constitutionality of Section 6968 of the Revised Statutes, as amended February 27, 1892. This section as amended provided that there should be a closed season for the use of nets, seines, or other devices for catching fish in Lake Erie from the 15th day of June to the 10th day of September, and that "any nets, seines, pound-nets or other devices for catching fish, set, placed, located or maintained in violation of the provisions of this section, shall be confiscated wherever found, and the same shall be sold to the highest bidder at public outcry * * * and the proceeds derived from such sale shall be paid to the credit of the fish and game fund." The defendants in error, in the case at bar, had their nets seized and carried away by the state game warden in accordance with the above section. They denied the constitutionality of the act and brought an action to recover their nets or the value thereof in money. The common pleas court gave them a judgment for $464 as the value of their nets. The plaintiffs in error filed a petition of error in the circuit court to reverse the common pleas. The circuit court affirmed the judgment of the common pleas and the plaintiffs in error appealed to the supreme court to reverse the lower courts. The supreme court reviewed and affirmed the judgment of the lower courts, and declared that the act was null and void for the reason that it authorized the confiscation of private property.
without providing due process of law by which the confiscation was to be regulated and adjudged; that the act authorized the taking and selling of private property without the consent of the owner and without providing due process of law; that the taking of private property as a fine imposed upon the offender was limited by the sixteenth section of the Bill of Rights to those cases in which "due course of law" was afforded the defendant.

Five years later, 1905, the court held the legislative act of April 26, 1898, to be a valid and constitutional act. The purpose of this act was exactly the same as that of the unconstitutional act of 1892. It differed from the earlier act, however, in that it declared the nets and fishing devices to be a public nuisance and provided a due course of law procedure in authorizing their confiscation.

On February 11, 1895, the municipal council of Chillicothe passed an ordinance, which was accepted by the gas company, fixing the price of gas within the corporation for a period of ten years. About five years later, September 18, 1900, the council passed another ordinance fixing a different rate and attempted to compel the company to accept this new rate. This the company refused to do, and challenged the power of the council to annul the ordinance contract of 1895 and impose in its stead the ordinance of 1900 which was not acceptable to the company.

The matter was carried on appeal to the supreme court.

1. In the case of State v. French, 71 Ohio St., 186 (1905).
in the case of the Logan Natural Gas and Fuel Co. v. Chillicothe,\(^1\) for final decision. In handing down its decision the court declared that the power of the council to pass such ordinances as that in question was quite limited; that it could not "compel the gas company without its consent to furnish gas in a manner and at a rate entirely at the option of the consumer" (i.e. the municipality as represented by the municipal council); and that in attempting this it had not only transcended the power conferred upon it by the legislature, but had also violated the constitutional guarantee of "due course of law." A majority of the court held that the ordinance of September 18, 1900, was, therefore, invalid, unless and until accepted by the gas company.

The next case under this section was that of The Chicago and Erie Railroad Company v. Keith et al.\(^2\). In this case the court held that Sections 3343, 3344, 3345, and 3346 of the Revised Statutes were repugnant to the sixteenth and nineteenth sections of the Bill of Rights. Section 3342 provided that railroad companies should construct and maintain open ditches to carry off the water which accumulated along the sides of their road beds. Section 3343 empowered the probate judge to receive complaints of the company's failure to comply with the preceding section, to appoint an investigating commission and to notify the company that it must have completed such construction on or before a certain future date. Sections

\(^1\) 65 Ohio St., 186, (1901).
\(^2\) 67 Ohio St., 279, (1902).
3344 and 3345 authorized the probate court to let the contract to the highest bidder and enter the case upon the tax duplicate against the company's property in case the company failed to construct the ditches in the time allowed. Section 3346 provided that all expenses, fees and costs incurred by the carrying out of the preceding sections should also be entered upon the tax duplicate against the company's property.

Chief Justice Burkett, who read the decision of the court, declared that section 3346 was valid only in so far as the construction and maintenance of the ditches along the company's right of way were necessary to prevent the accumulation of water that would be detrimental to the public or injurious to contiguous lands; that sections 3343, 3344, 3345 and 3346 were in conflict with the sixteenth section of the first article of the constitution in that they authorized the assessment and the taking of private property without the opportunity of being heard, and in conflict with the nineteenth section of the same article in that they authorized the taking of private property through assessments made for a private and not a public purpose and without the consent of the owner of the property thus assessed and taken; and further that "the power of assessment and taxation can be enforced by the state in the interest of the public only, and not for the redress of private wrongs."

In the case of Byers v. The Meridian Printing Company et al. the court held that the legislative act of April 16,
1900, the presumption and burden of proof as to malice in libel suits, contravened the "due course of law" clause of the sixteenth section of the Bill of Rights. This act contrary to the long settled principle of the Common Law placed the burden of proof as to malice in the publication of defamatory matter or in libel suits upon the plaintiff, and provided that the defendant in any such suit should be subject to damages for the publication of any untrue defamatory statements or libelous matter only after the person libeled had proven actual malice on the part of the publisher. In handing down the decision of the court Judge Dgis declared that the whole matter of libel was one of substantive law and "not mere matter of procedure"; that the publication of defamatory matter which was in fact false and not privileged, was under the Common Law presumed to be malicious; that the burden of proof in such cases rested upon the defendant and not upon the plaintiff; that to change the burden of proof in such cases as provided in the act of April 16, 1900, was a wanton violation of the plaintiff's right of redress and "remedy by due course of law"; and that since the legislature did not give these fundamental rights to the libeled person it could not take them away. The court further held that the protection of property and the protection of reputation were equally guarded and protected by the constitution from the encroachment of the legislature or from any other source.

The last case under this section of the constitution was
that of Jewell v. Mc Cann et al., as the State Medical Board of Ohio et al.¹ The question before the court was the constitutionality of sections 1275 and 1276 of the General Code. Section 1275 provided that the State Medical Board could "upon notice and hearing" revoke for cause any physician's certificate; and section 1276 provided that the physician thus deprived of his certificate might have a final appeal to reverse the action of the board to the governor and attorney general.

Jewell, the plaintiff in error, in the case at bar, instituted an action in the court of common pleas of Franklin county to enjoin the board from holding a hearing upon an application which had been filed with the board for the revocation of his certificate on the ground that such proceedings were in violation of his constitutional right to "due course of law." The court of common pleas sustained the law and this judgment was affirmed by the court of appeals. The plaintiff, thereupon, appealed to the supreme court to reverse the lower courts. The court declared the sections unconstitutional and void on the ground that they violated the "due process of law" clause of the sixteenth section of the Bill of Rights; that while they authorized the board to revoke a physician's certificate "upon notice and hearing" they gave the board no power to compel the attendance of witnesses or the giving of testimony before the board; and that the only appeal provided was to the governor and attorney general who likewise were

¹. 95 Ohio St., 191, (1917).
without power to compel the attendance of witnesses and the
giving of testimony necessary to a proper disposal of such
cases. To authorize the board to revoke a physician's certi-
ficate under such circumstances was, in the minds of the court,
a palpable violation of the "due course of law" guaranteed by
the Bill of Rights.

Of the six cases discussed under this section three were
held unconstitutional and void by the unanimous decision of
the court. In two of the cases one of the judges did not sit.
Only in one case was there dissent and in this one the dissent
was from one of the propositions made in the syllabus and not
from the disposition of the case by the court. Taking the
group as a whole the court were somewhat more in agreement
than is usual in arriving at decisions nullifying the acts of
the legislature on constitutional grounds.

V

Inviolability of Private Property.

Section 19, article 1: "Private property shall ever be
held inviolate, but subservient to the public welfare. When
taken in time of war, or other public exigency, imperatively
requiring its immediate seizure, or for the purpose of making
or repairing roads, which shall be open to the public, without
charge, a compensation shall be made to the owner, in money,
and in all other cases where private property shall be taken
for public use, a compensation therefor shall first be made
in money, or first secured by a deposit of money, and such
compensation shall be assessed by a jury, without deduction
for benefits to any property of the owner."

Of the forty eight different cases in which the court
has declared the constitutional guarantees of the Bill of Rights to have been violated by legislative acts or city or village ordinance fifteen were declared unconstitutional as contravening the first section; eleven the second; four the fifth; one the tenth; one the fourteenth; and twenty-three or nearly one-half of the whole number the nineteenth section. In five of the cases in which legislative acts or city ordinances were declared void as contravening the nineteenth section of the Bill of Rights, one or more of the other sections of the Bill of Rights were held to have been violated by the same acts or ordinances. These cases have already been discussed in the preceding pages. The eighteen remaining cases under this section fall conveniently into four classes as follows: (1) In four cases it was held that the constitutional guarantee of the inviolability of private property had been infringed by legislative acts divesting vested rights; (2) in seven cases the court held that the constitutional requirement for assessment by a jury in the appropriation of private property had been violated; (3) in five cases the court held that the taking of private property had been authorized without regard to public welfare; (4) and in two cases the court held that the right of private property was violated by legislative acts changing the laws of proof and evidence. These last two cases were also held to have contravened article two, section twenty-eight of the constitution and will be discussed, along with other cases, under that article and section in the next section of this thesis.
Vested Rights Violated

The first legislative act to be declared null and void under this section of the new constitution of 1851 was that of March 22, 1849, which was an act amendatory to the earlier act of March 10, 1831, for the relief of occupying claimants.\(^1\)

The act as amended provided that the occupying claimant should have the option of demanding payment in full for the permanent improvements made by him on the lands or of paying the owner the assessed value of the lands without such improvements and keeping the lands, notwithstanding the fact that a solemn judgment had been rendered against him in favor of the rightful owner. Thus, in effect, the act took from the rightful owner his lands and gave them to another without his consent and against his active protestations and offers to pay for the improvements made by the ousted occupying claimant. The case came before the district court in Robert W. McCoy et al. v. William Grandy et al.\(^2\) in the form of an appeal from the court of common pleas and was reserved for decision by the supreme court. The plaintiffs, in an action of ejectment, had recovered title to their lands in the court of common pleas but under the amendatory act of March 22, 1849, they were deprived

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1. An occupying claimant is one who having made improvements upon certain lands occupied by him for a time but which were, in fact, not his own, maintains an action against the real owner of such lands to recover for the improvements made thereon—(Benton v. Dumferton Realty Co., 161 Iowa, 600.).

2. 3 Ohio St., 463, (1854).
of their right to pay for the improvements made by the occupying claimant and keep their lands since the ousted occupying claimant insisted on paying them the unimproved value of the land and keeping it as he had the option of doing under the above act. The plaintiffs denied the constitutionality of the act and filed a petition in the district court to reverse the court of common pleas.

Judge Bartley in handing down the court's decision declared that the occupying claimant law of March 10, 1831, "in securing to the occupant a compensation for his improvements as a condition precedent to the restitution of the lands to the owner, it goes to the utmost stretch of the legislative power touching this subject"; that the act in question, giving to the occupying claimant the option which the original act gave to the owner of the land, and providing for the transfer of the title of the land without the owner's consent and even against his protestations when he stood ready to pay for the improvements made by the ousted occupying claimant was a "palpable invasion of the right of private property, and clearly in conflict with the constitution." The court unanimously declared that the act was null and void as contravening that clause of the nineteenth section of the first article of the constitution which provides that "private property shall ever be held inviolate, but subservient to the public welfare."

The second case in which the court held that vested rights had been divested by legislative act was that of William H. Gilpin and wife v. Francis B. Williams and
others. The legislative acts of April 4, 1859, March 30, 1864, and April 13, 1865, were being questioned before the court on constitutional grounds in this case. The first section of the act of 1859, provided "that it shall be competent for the courts common pleas, on application of the first donees in tail, or for life, to authorize the sale of entailed estates and estates for life with remainder over, when satisfied that the sale would be for the benefit of the applicant and do no substantial injury to the heirs in tail or others in succession, reversion, or remainder."

Euretta Gilpin, plaintiff in the case at bar, had received by the will of her father an estate for her natural life "with remainder to her children after her death, in fee-simple, and in the event of her death without children or their descendants, then to the heirs of her father, Thomas Williams, deceased, in fee-simple." Under the act of April 4, 1859, above, and the acts of March 30, 1864, and April 13, 1865, amendatory and supplementary thereto, the plaintiff demanded the partition and sale of the real estate which came to her by her father's will. The case was appealed to the district court and reserved by that court for decision by the supreme court.

Judge Hellvaine, who read the decision of the court, declared that since Euretta Gilpin, the plaintiff, had no chil-

1. 25 Ohio St., 283, (1874).
2. 1 S. & C. 550.
5. Probated April 15, 1833.

-76-
dren the rights of the defendants in the property were vested, and "not mere expectancies or possibilities of reverter"; that these vested rights were "entitled to the protection of those provisions of the constitution which guarantee the inviolability of private property"; that in so far as the above acts authorized the sale of rights which were vested before their passage and without the consent of the owners of such vested rights, they were unconstitutional and therefore null and void, being in contravention of the nineteenth section of the first article of the constitution which provides that "private property shall ever be held inviolate, but subservient to the public welfare," and section twenty-eight of article two which provides that "the legislature shall have no power to pass retro-active laws."

In the next case, WDclever v. Stewart, 1 the court declared the legislative act of January 31, 1871, 2 entitled "an act to provide for the erection and maintenance of 'chutes' for the passage of fish over dams across the streams of this state," unconstitutional. This act provided that "the owner or owners of any dam across any river or creek in this state" must construct "chutes" for the passage of fish over such dam; and in case the owner or owners failed to do so within one year after having been notified in writing, the county commissioners should authorize the construction of such "chutes", let the contract to the highest bidder and when completed recover the costs of construction by action of law in the name of

1. 36 Ohio St., 148, (1880).
2. 68 Ohio Laws, 15.
the person taking the contract for such construction.

Stewart, the plaintiff in the case at bar, had been given the contract to construct and had constructed a "chute" over a dam belonging to the defendant, and had later brought an action under and in accordance with the act of January 31, 1871, to recover the costs of the construction. The defendant made answer that the dam had been in use without any chute for more than twenty-one years, that the plaintiff had constructed the chute over his dam without his consent and even against his protests, and that the act under which the work was done and the proceedings brought were unconstitutional and therefore null and void. The case was before the supreme court in the form of a petition to reverse the court of common pleas which had maintained the constitutionality of the act and the validity of the proceedings. Judge Boynton, who read the decision of the court, declared that the defendant's right to enjoy the use of his dam without a chute had become vested through a period of more than twenty-one years of uninterrupted use of the dam without a chute; that the right of the upper owners to the free passage of fish up and down the river had been lost to them since they had suffered the adverse use of the defendant to ripen into a title and that their right to compel the removal of the obstruction was gone. Vested rights were declared to be "as fully withing the protection afforded by the constitution against legislative interference, as any other, however, acquired." The act was held to contravene the inviolability of private property guar-
anteed by the nineteenth section of the first article of the constitution and was, therefore, declared null and void.

The constitutional guarantee of the inviolability of private property was again held to have been violated by legislative act in the case of Ohio ex rel. v. Neff et al. The legislative act in question was that of April 15, 1892, which was amendatory to the earlier act January 22, 1819, "to incorporate the Cincinnati College." The act as amended provided that the entire management and control of the Cincinnati College should be taken from the trustees of that corporation and given over, without regard to their wishes or consent, to the University of Cincinnati. In justification of such action the legislature assigned the following reasons: (1) that the original act of incorporation specifically reserved to the legislature the right to make any subsequent changes that it thought proper; (2) that the endowment of the Cincinnati College was "not sufficient to enable it to carry out the purpose of its charter;" and that it was the opinion of the legislature that the consolidation of the two institutions would be of great benefit to each of them and conducive to the accomplishment of the ends and purposes for which both were created and maintained.

The trustees of the Cincinnati College denied the constitutionality of the act and refused to vacate their offices.

Whereupon the directors of the Cincinnati University institut-

1. 52 Ohio St., 375, (1895).
2. 89 Ohio Laws, 647.
3. 17 Ohio Laws, Ch. 20, p. 46.
ed proceedings in quo warranto to oust the defendants. The circuit court denied the relief sought and dismissed the proceedings. The plaintiffs thereupon appealed to the supreme court to review and reverse the action of the circuit court. The circuit court was affirmed. The opinion of the court was read by Judge Bradbury who declared that the act did nothing more nor less than take the property of the defendants and transfer it for all practical purposes "to a body of strangers"; that it was no answer or justification to assert that the new directory represented the old corporation, or that the Cincinnati College still had a paper title to its property. The court held that the property of private eleemosynary corporations was as fully within the protection of the constitution as that of any other private person. The act of April 15, 1892, the court declared "simply and in unambiguous terms" abrogated the rights of the defendants and transferred them to others without their consent, thus contravening the nineteenth section of the first article of the constitution which specifically guarantees that "private property shall ever be held inviolate." The act was, accordingly, declared unconstitutional and void.
The next seven cases have to do with the right of the owner of lands to have them assessed by a jury of twelve men presided over by a court when such lands are appropriated for public use. Whether provision is made for the assessment by a jury in the first instance has been held repeatedly by the court to be immaterial provided provision for such a jury assessment, on appeal, is made in the act authorizing the appropriation of private property for public use. Such provision must always be specifically provided, however, since the court has repeatedly held that the constitution does not execute itself in providing for jury assessment as required by the nineteenth section of the first article of the constitution.

Only three years after the adoption of the new constitution in 1851, the court held, in the case of Lamb and McKee v. Lane,\(^1\) that a proceeding to take private property for a public purpose without providing by law for the assessment of compensation by a jury of twelve, was unconstitutional and therefore void. The case came before the court in the form of an application for leave to file a petition in error to reverse the court of common pleas. Lamb's property had been appropriated by the county commissioners for use as a public road and damages had been assessed and awarded him to the

\(^1\) 4 Ohio St., 167, (1854).
amount of $400 by a jury of six in the court of common pleas. This sum was refused by Lane on the ground that it was not equal to the value of the land, and that it had not been assessed by a jury of twelve men as required by the nineteenth section of the first article of the constitution. Lane's objections were overruled by the court of common pleas and he appealed to the supreme court to reverse the lower court.

The supreme court unanimously held that "the word 'jury', in section 19 of article 1, as well as in the other places in the constitution where it occurs, means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence, and arguments of the parties." The right of the commissioners or reviewers in the first instance to make assessments was not denied, provided provision was made by law for an appeal to a constitutional jury. The court held that "the constitution, in this particular, does not execute itself, and that, therefore, an appropriation of private property for a public use could only be made after a law providing for the assessment of compensation by a jury either in the first instance or on appeal had been passed. The action of the commissioners above was declared unconstitutional and void, being in violation of the nineteenth section of the Bill of Rights.

The statutes authorizing the appropriation of private property for the establishment of township roads were again before the court in the case of James Shaver v. Joseph
Starrett, the defendant, had been awarded the sum of $40.00 by the township trustees, as the assessed value of his lands which had been appropriated for the purpose of establishing a township road. This he declined to accept and appealed to the probate court for a constitutional and a more equitable assessment of compensation for his lands. The probate court reviewed and confirmed the action of the trustees but raised the assessed compensation to $50.00, whereupon the defendant filed a petition of error in the court of common pleas where the action of the trustees and the probate court was reversed. A petition was then filed by the plaintiffs in error in the supreme court to reverse the judgment of reversal by the common pleas.

Chief Justice Thurman, who read the decision in the case of Lamb and McKee v. Lane, supra., just one year before, read the court's decision in this case and declared that the statutes authorizing the appropriation of private property for the establishment of township roads were constitutional and that they did not contravene the nineteenth section of the first article of the constitution which provides that "private property shall ever be held inviolate, but subservient to the public welfare"; but, that such statutes were "fatally defective" in that they failed to provide for the assessment of private property thus appropriated by a jury as required by this section of the constitution. This section of the constitution specifically provided that "compensation shall be as-

1. 4 Ohio St., 495, (1855).
sessed by a jury." The court held on the authority of Lamb and Makee v. Lane that "jury" in this section meant "a tribunal of twelve men, presided over by a court", and that it must be provided for by law since the constitution did not execute itself in this particular. The court of common pleas was affirmed and the proceedings under the statutes declared null and void.

The next case under this section was that of Watson's Executor v. The Trustees of Pleasant Township, in which the legislative act of February 27, 1867, entitled "an act relating to roads and highways," was declared unconstitutional and void as contravening the nineteenth section of the Bill of Rights. Section 2 of this act authorized the township trustees to enter upon "any lands adjoining or lying near" the public roads or highways, and open, construct and maintain such "drains and ditches" as should be found "necessary for the benefit of the roads." This act did not provide any compensation or any means for assessing and awarding compensation to the owner of the adjoining lands for the damage suffered or property appropriated to public use for the public benefit.

The court declared that the failure of the act to provide compensation to the owner of the lands and private property appropriated to public use was fatal to the act in that it contravened the nineteenth section of the first article of the constitution which provided that whenever private property is

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1. 21 Ohio St., 637, (1871).
2. 64 Ohio Laws, 27.
taken "for the purpose of making or repairing roads * * * a compensation shall be made to the owner in money * * * * and such compensation shall be assessed by a jury." On the authority of Lamb and McKee v. Lane, supra, the court again declared that the procedure for the assessing and awarding of such compensation must be provided by law for the reason that "the constitution, in this particular, does not execute itself."

In the case of Adolphus H. Smith et al. v. The Atlantic and Great Western Railroad Company et al.1 the court declared the legislative act of April 30, 1869,2 "authorizing the building and repairing of leveses to protect lands from overflow," to be in contravention of the nineteenth section of the first article of the constitution and therefore null and void. This act empowered the judge of the probate court of any county, whenever in his opinion it would be conducive to the interests or welfare of any number of the citizens of the county, to authorize the location, construction and establishing of leveses to protect the lands along any stream or water course from overflow. It authorized the judge to appoint viewers to determine the necessity or the advisability of establishing and constructing such levees, to hear argument for and against their establishment and construction and whenever and in case such levees were deemed advisable to appoint an engineer, assess and apportion the cost of the construction and upon application * * * to impanel a jury of twelve dis-

1. 26 Ohio St., 91, (1874).
2. 66 Ohio Laws, 72.
interested freeholders of the county, who shall constitute a jury for such case."

The case came before the court on appeal from the district court which had affirmed the court of common pleas declaring the act unconstitutional and the proceedings under it null and void. The lower courts were affirmed by the supreme court. Judge Rex, who read the decision of the court, declared that the act authorized the taking of the defendants' property without regard to public welfare; that the judge might well, under the act, authorize the location and construction of such levees anywhere; and that "the body of twelve men" provided for in the act was not a "jury" within the meaning of the nineteenth section of the first article of the constitution. "The jury provided for in this act," the judge declared, "are not authorized to hear the testimony, nor the arguments or allegations of the parties, do not sit in a court, and are not subject to judicial direction either in the hearing of the case, or in the making up of their finding or report, and hence have none of the attributes of the jury provided by the constitution, to assess compensation in money for private property taken for the use of the public." The whole act was declared unconstitutional and void as contravening two of the fundamental principles of the nineteenth section of the Bill of Rights, namely, the taking of private property without regard to public welfare and without providing for the assessment of compensation by a jury within the meaning of the constitution.
The next year the act of April 30, 1869, was again in question before the court in the case of James E. Wright, Treasurer of Franklin county and others v. Alfred Thomas. The case came before the court in the form of a petition to reverse the lower courts which had held that an assessment made under this act, "authorizing the building and repairing of levees to protect lands from overflow," was unconstitutional and void. The lands of the defendant in this case were "at the nearest point distant eighty rods" from the levee and it was not shown that he had "actually or impliedly requested the work to be done," or that he had promised to pay for any part of it when completed. The court overruled the motion to file a petition in error to reverse the district court, and declared that inasmuch as the levee did not touch the plaintiff's lands, and inasmuch as he did not actually or impliedly request the improvement to be made he could not be assessed or taxed to pay for the improvements. The act under which the assessment was made had already, in the case of Smith v. Railway Company, supra, been declared unconstitutional and void, as contravening the nineteenth section of the Bill of Rights.

In the case of Handershot v. The State the court held

1. 66 Ohio Laws, 73.
2. 26 Ohio St., (1875).
3. The decision of the court in the above cases declaring that assessments to pay for the levees which had been constructed under the unconstitutional act of April 30, 1869, could not legally be made, was followed by the legislative act of April 17, 1878 (75 Ohio Laws, 114), appropriating the funds necessary to pay the costs of the improvements which had already been made under the act.
4. 44 Ohio St., 209, (1886).
that section 4715 of the Revised Statutes was unconstitutional and void. This section authorized the township road supervisor "to enter upon any uncultivated or improved lands unimumbered by crops, near to or adjoining such roads; * * * * * to dig, or cause to be dug, and carried away, any gravel, sand or stone which may be necessary to make, improve or repair said road"; but it did not provide nor did the "act relating to roads and highways" of which it was originally a part, provide for the assessment of compensation for the private property thus appropriated or damaged by a jury as required by the nineteenth section of the Bill of Rights.

The plaintiff in error, in the case at bar, had resisted the attempts of the road supervisor to enter upon his lands and take gravel as he was authorized to do by the above section of the Revised Statutes. For such resistance of the supervisor in the discharge of his official duties the plaintiff in error had been convicted under section 6906 which made such resistance an offense. He appealed to the supreme court to reversed the lower courts on the ground that the act under which the supervisor acted and under which he sought to take his property was unconstitutional and void, and that he had only acted within his rights and that he was justified in resisting the supervisor and protecting his own property from unlawful appropriation without his consent and without compensation assessed by a jury as required by the nineteenth section of the Bill of Rights. The court declared that inasmuch as the statute before the court did not provide for the assessment of com-
penalty by a jury as required by the nineteenth section of
the Bill of Rights or provide for an appeal by which such as-
sessment by a jury could be obtained, it was unconstitutional
and void; and that the plaintiff in error was not guilty of re-
sisting an officer under section 6908 of the Revised Statutes,
but was within his rights in resisting the unlawful approipa-
tion of his property.

The last act declared by the court to be in contraven-
tion of the constitutional requirement of the nineteenth sec-
tion of the Bill of Rights for the assessment of compensation
by a jury was that of April 6, 1893. This act came before the
court in the case of King et al. v. The Greenwood Cemetery
association. It provided that whenever the officers of any
cemetery association deemed it necessary to secure additional
lands for the purpose of making an entrance to its grounds,
they should make application to the county commissioners; and
that the county commissioners thereupon should "appoint three
disinterested freeholders of the county" to appraise the lands
and report their findings to the county commissioners. Upon
the payment of the appraised value of the lands the title to
them was to vest in the association without further ceremonies
or formalities. The act provided that "an appeal may be taken
from the appraisement made by said appraisers to the probate
court of the county * * * in manner provided in chapter 4,
title 6 of the Revised Statutes of Ohio." Now chapter 4,
title 6 of the Revised Statutes provided no means for an ap-

1. 90 Ohio Laws, 153.
2. 67 Ohio St., 240, (1902).
peal whatever, but title 7 of the same chapter did. The defendants in error contended that the legislature meant and that the act really referred to "chapter 4, title 7 instead of title 6, the latter figure being used by mistake."

The case came before the court on appeal to reverse the district court which had affirmed the action of the court of common pleas vacating a temporary injunction which had been granted the plaintiffs in error restraining the defendants in error from appropriating the lands of the plaintiffs and constructing the road under the act of April 6, 1893. The court reversed the circuit court and court of common pleas and awarded a perpetual injunction to the plaintiffs in error. Judge Price, who read the decision of the court, declared that the act was void for the reason that it authorized the taking of private property without the consent of the owner and at a value assessed thereon by "three disinterested freeholders," and without providing for an appeal to a court wherein the dissatisfied owner might have his compensation assessed by a jury as required by the nineteenth section of the first article of the constitution. The judge further declared that "the intent of the legislature is determined from what it says, and if its language is clear and unambiguous, the courts have no authority to change it." If the legislature meant chapter 4, title 7 of the Revised Statutes instead of chapter 4, title 6, it should have so stated.
Section nineteen of the Bill of Rights provides in part that "private property shall ever be held inviolate, but subservient to the public welfare." Just what is included in the phrase "public welfare" is a matter that the court insists on keeping to itself and determining from time to time as specific cases arise. That the phrase had had a changing meaning and significance is evident from a study of the decisions of the supreme court covering any considerable period of time.

The five cases next to be discussed were concerned in one way or another with the "public welfare" clause of the nineteenth section of the Bill of Rights. These cases are concerned mostly with legislative acts which authorized the appropriation of private property without regard to public welfare and without the consent of the owner. Of these five cases two are concerned with roads and roadways, two with streams and water-ways, and one with the building of line fences by adjoining property owners.

In the case of Mark E. Reeves v. The Treasurer of Wood County et al.\(^1\), the court declared the act of May 1, 1854, authorizing the trustees of townships to establish water courses,\(\text{ etc.}\), and the amendatory act of April 14, 1857, to be in contravention of the nineteenth section of the Bill of Rights and therefore, null and void. The portion of this act

1. 8 Ohio St., 333, (1858).
which was in question before the court and as amended April 14, 1857, authorized the township trustees upon application to enter upon any lands in their township and to establish water-courses and open ditches for the purpose of draining the lands held by two or more persons, and to apportion and assess the cost of constructing the necessary ditches or water-courses among and against the property owners according to the benefits to be derived therefrom.

The case came before the court in the form of an application for leave to file a petition in error to reverse the court of common pleas which had rendered a judgment against the plaintiff for the costs ($100.00) which had been assessed against him under the provisions of the above act for the construction of a water-course through his lands. The application was granted and the court of common pleas reversed. Judge Brinkerhoff in handing down the decision of the court declared "we are unanimously of the opinion that the act does authorize the appropriation of private property for private purposes, irrespective of the public welfare, without the consent of the owner, and is therefore in contravention of the 19th section of the Bill of Rights." 1

In the case of Kiser v. the Board of County Commissioners

1. The court held in this case that the legislature had the power under the constitution to authorize the levying of "assessments" against private property for the purpose of making improvements made necessary by the public welfare and which would be of benefit to the assessed property owner or his property; and that such "assessments" were not within the meaning of the word "taxing" used in section two, article twelve, and therefore not limited by the uniform rule.
of Logan County et al.\textsuperscript{1} the court declared the legislative acts of April 11, 1884,\textsuperscript{2} and March 23, 1893,\textsuperscript{3} amendatory to section 4567a of the Revised Statutes, null and void as contravening section 19 of the Bill of Rights. These amendatory acts provided that whenever a mill had been destroyed or had become useless and remained so for more than five years "without any attempt to repair or rebuild the same" by its owners or others, the mill-dam, water-rights and privileges belonging thereto should "be deemed abandoned and * * * as against the public health, convenience and welfare, under this act, * * * cause and be barred," and that the county commissioners should be empowered "without bargain or compensation" to remove the mill-dam and improve the water-course.

The case came before the court in the form of a petition in error to reverse the circuit court and court of common pleas which had maintained the constitutionality of the acts of April 11, and March 23, under which Kiser's property had been taken. Kiser, the plaintiff in error, denied the constitutionality of the acts and prayed the court to reverse the lower courts and declare the proceedings under the above acts null and void. The court granted his prayer and so declared. Judge Davis who delivered the decision of the court, declared that the legislature had the power to authorize the taking of such mill-dams, water-rights and privileges whenever and wherever necessary for the public welfare since "all private

\textsuperscript{1} 85 Ohio St., 129, (1911).
\textsuperscript{2} 81 Ohio Laws, 135.
\textsuperscript{3} 90 Ohio Laws, 123.
property is held 'subservient to the public welfare,' whether it has been abandoned or not;" but that the statutes before the court were unconstitutional and void on other grounds, for the reason that they declared the plaintiff's property "abandoned" after a period of five years of non-use, and authorized its appropriation by the county commissioners "without bargain or compensation" with or to the owner. Such wholesale sweeping away and taking over the rights of private property by the county commissioners "without bargain or compensation" and even against the protestations of the rightful owners, was declared by the court to be a palpable violation of the inviolability of private property guaranteed by the nineteenth section of the Bill of Rights.1

In the case of The Alma Coal Company v. Cosad, Treasurer,2 the legislative act of April 18, 1904,3 "to provide for the building of line fences," was declared to be null and void in so far as it required the owner of an unenclosed tract of land to contract and maintain a line fence for the sole benefit of an adjoining property owner or owners.

1. Legislation enacted for the "public welfare" is not relieved from the necessity of providing the proper procedure for the adequate protection of private property. It will be noted that the acts nullified in this case were declared unconstitutional because they failed to provide the proper procedure and because they failed to provide for the assessment of compensation for the private property appropriated for the public benefit and not because they authorized the appropriation of private property without regard to the "public welfare." These acts, the court declared, were confiscatory in nature; and this too, without declaring the mill-dams etc. in question to be a "public nuisance."

2. 79 Ohio St., 548, (1909).
Section 4242 of the statutes as amended by the act of April 12, 1904, provided that "if any party neglects to build, or repair a partition fence, or the portion thereof which he ought to build, or maintain, the aggrieved party may complain to the trustees of the township." The trustees were thereupon authorized to view the fence, assign to each of the adjoining proprietors his or their portion and order the fence constructed on or before a certain future time, and in case the defaulting proprietor failed to construct his portion of the fence to proceed to construct it and levy the costs as other taxes are levied on the tax duplicate against the defaulting proprietor.

One W. H. Allen whose property adjoined that of the Alma Coal Company, the plaintiff in error, petitioned the township trustees, under and in accordance with the act mentioned above, to compel the company to construct its portion of the line fence between his and the company's lands. The trustees proceeded under the act to assign to the company its portion of the fence, set a time at which the fence was to be completed, and when the company defaulted constructed the fence and levied the cost thereof on the tax duplicate as provided by law. The company filed a petition in the court of common pleas to prevent the collection of the tax. The petition was dismissed in the court of common pleas and this action was affirmed in the circuit court. The plaintiff then appealed to the supreme court to reverse the lower courts. The lower courts were reversed.
Judge Shauck in delivering the court's decision declared that "a special assessment can be made only in consideration of a special benefit conferred upon the owner of the property assessed or upon the property itself," that the constitution not only forbids the taking of the private property of one and giving it to another but that it also forbids the laying of impositions upon it "for the sole benefit of another," that the construction of a line fence enclosing the open and unenclosed and uncultivated lands of the plaintiff could be of no possible benefit to anyone except the adjoining property owner or owners who desired for their own private benefit to enclose their own lands, that the act of April 18, 1904, was incapable of compelling the company to construct such a line fence or authorizing the township trustees to construct such fence and collect the cost therefor from the company through a levy on the tax duplicate, and in so far as it imposed such burden or authorized such collection it was in contravention of the nineteenth section of the Bill of Rights and therefore null and void.

In the case of Wilkinson v. Culp, the court declared the legislative act of February 8, 1847, entitled "an act to authorize the making of roads and drains in certain cases," and the amendatory act of March 8, 1850, to be in contravention of the nineteenth section of the Bill of Rights.

1. 40 Ohio St., 86, (1885).
2. 45 Ohio (General) Laws, 50.
3. 48 Ohio (General) Laws, 48.
Section 1 of the act of 1847, provided "that any person, persons or company, having the ownership or possession of low lands, lakes, swamps, quarries, mines or mineral beds that, by means of adjacent lands belonging to other persons or public highway, cannot be approached, worked, drained, or used in the ordinary manner without crossing said lands and highways, may be authorized to establish roads, drains, ditches, railways, or tunnels to said places, in the manner herein provided." The following sections provided that the party or parties desiring such right of way should petition the county commissioners to appropriate the lands of the adjoining property owners necessary to its construction, and authorized the commissioners to appoint "not less than three, nor more than five judicious disinterested persons" to act as viewors, lay and establish the right of way and "fix" and assess the amount of damages etc. The right of appeal was preserved to all dissatisfied parties.

The court in handing down its decision declared that the commissioners could not take the lands of the defendant in error for the purposes set forth in the above acts and that the proceedings under the acts were null and void for the reason that the acts themselves were unconstitutional and void, being in violation of the nineteenth section of the first article of the constitution which provides that "private property shall ever be held inviolate, but subservient to the public welfare." These acts authorized the taking of private
property for a private purpose without regard to public welfare.

The latest case under this section and the most recent case under the first article of the constitution was that of Edward et al. v. Myers, in 1918.\(^1\) In this case sections 6887, 6888, and 6889 of the General Code,\(^2\) providing procedures by which outlets could be obtained over the lands of others, were declared to be in contravention of the nineteenth section of the Bill of Rights.

Section 6887 provided that "any person, firm or corporation desiring to secure a road, lane or outlet leading from any land owned by said person, firm or corporation, through the lands of another person or persons, to a public highway," should file a petition describing the outlet desired etc.

Section 6889 provided that upon such application the commissioners should "if in their opinion the road, lane or outlet" was necessary establish the same, assess and "award to each person * * * making application the amount of compensation and damages which they deem to be just and equitable." The right of appeal was preserved to anyone dissatisfied with the award of the commissioners.

The case came before the court on appeal to reverse the judgment of the court of common pleas and the court of appeals, both of which had declared the statutes unconstitutional and

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1. 99 Ohio St., 96, (1918).
2. 106 Ohio Laws, 582; and, 107 Ohio Laws, 73.
the proceedings under them to secure an outlet, for the plaintiff in error, through the lands of the defendant in error, null and void. The judgment of the lower courts was affirmed. The court declared that the statutes in question, in so far as they authorized the county commissioners upon petition to establish a road, lane, or outlet whenever and wherever in their opinion it was necessary for the benefit of any private person, firm or corporation desiring the same, and without regard to public use or public welfare, were in contravention of the nineteenth section of the Bill of Rights which provides that "private property shall ever be held inviolate, but subservient to the public welfare. These statutes, in effect, the court declared, do nothing nothing more nor less than authorize "the taking of private property for private use without the consent of the owner."

VI

Retroactive Laws, and Laws Impairing the Obligation of Contracts.

Section 28, article 2: "The general assembly shall have no power to pass retro-active laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state."

In the case of State ex rel. Huston et al. v. The Commissioners of Perry county the act of March 2, 1853, "to

1. 5 Ohio St., 497, (1856).
provide for the removal of the county seat of Perry county, from the town of New Lexington to the town of Somerset," was declared unconstitutional; first because it imposed upon Perry county a forfeiture of subsisting rights acquired under a legal contract by impairing the obligation of that contract and second because it contravened in spirit and effect the requirement of the constitution specifically set forth in section 30, article 2, that the proposition for the removal of a county seat must be submitted to the electors in the county concerned and be approved before it becomes effective.

On March 22, 1851, the general assembly had passed an act entitled, "an act referring to the voters of Perry county, the question of a removal of the seat of justice of said county" from the village of Somerset, where it was then situated, to the town of New Lexington. The proposition of removal was made dependent upon two conditions, first that those who favored removal should pledge "a sufficient amount of money, to be paid in three equal installments, to erect suitable buildings in the town of New Lexington." (section 6 of the act); and, second, that a majority vote in favor of removal be secured. Both of these conditions were fulfilled and on March 2, 1852, the commissioners entered into a contract with one Samuel Feighley for the erection of the necessary buildings in the town of New Lexington, the buildings to be completed on or before April 1, 1854. But about the month of November, 1853, when the buildings were approaching completion, the then county commissioners refused to carry or permit the work
on the buildings to be carried to completion. The contract-
or accordingly abandoned the buildings and so they remained
when this suit was brought before the court in 1856.

On March 2, 1853, the general assembly passed the act en-
titled "an act to provide for the removal of the county seat
of Perry county, Ohio, from the town of New Lexington to the
town of Somerset, in said county." Sections 1-4 of this act
provided for the submission of the question of the removal of
the county seat of said Perry county from the town of New Lex-
ington back to the town of Somerset in said county, and sec-
tion 5 provided that if a majority voted against the removal
"then all obligations heretofore given to the commissioners of
said county, in accordance with the sixth section of an act en-
titled 'an act referring to the voters of Perry county the ques-
tion of removal of the seat of justice of said county,' passed
March 22, 1851, to secure to be paid to the commissioners of
said county a sufficient sum of money to erect suitable county
buildings in the town of New Lexington, shall be by said com-
missioners delivered up to be cancelled, and the commissioners
shall proceed at once to levy a tax sufficient to erect a court
house, jail and offices, for said county, in the town of New
Lexington, which court house, jail, and offices, shall, in the
aggregate, cost not less than sixteen thousand dollars." This
act was voted upon and accepted by a majority of the electors
of Perry county voting thereon at the general election of Octo-
ber, 1853.

This case came before the court in the form of a peti-
tion for a writ of mandamus to prevent the removal of the county seat from the town of New Lexington and compel the commissioners to carry the work on the county buildings located there to completion. The relators in the case at bar were taxpayers of Perry county, residents of the town of New Lexington and owners of property in or near the town who had advanced money under the act of March 22, 1851, to secure the location of the county seat at New Lexington. The relators maintained that their acceptance of the propositions in the earlier act and their advancement of money in accordance with the provisions thereof constituted a contract between them and the county which the legislature could not at its pleasure at a subsequent time impair or destroy.

Judge Scott, who read the decision of the court in this case, declared that the fifth section of the act of March 2, 1853, in question before the court, imposed upon Perry county a forfeiture of subsisting rights acquired under a legal contract, conditioned upon the rejection of the proposition to remove the county seat from New Lexington; and that it was, therefore, unconstitutional and void, being, in effect, an act "imparing the obligation of contracts." The argument presented to the effect that the relators, in the case at bar, were not injured by a cancellation of their obligations to pay money; and that the county had by a majority vote voluntarily forfeited its rights was, in the opinion of the court, not valid in view of the fact that the act of March 2, 1853, had not given the electors a free choice in the matter. Moreover,
the court declared, the act in question was a negation of the requirements of section 30 article 2, of the constitution that "all laws * * * removing county seats, shall before taking effect, be submitted to the electors" of the county concerned. This act, declared Judge Scott, by the forfeitures therein contained, was intended to dragoon the voters of Perry county into the acceptance of the proposed removal of the county seat. The electors were not given a free choice in this matter since to vote against the act and against removal imposed upon the county the forfeiture of the amounts which had been subscribed by the relators and others in accordance with the act of March 22, 1851, above, and immediately subjected the county to the imposition of a tax of not less than $16,000 to replace the forfeited moneys and pay for the completion of the county buildings at New Lexington. Such legislation, imposing forfeitures, violating legal contracts, and negating the plain requirements of the constitution that the removal of county seats shall be determined by the free choice of the county electors, the court held, violated sections 28 and 30 of article 2 of the constitution, and was, therefore, null and void.

In the case of James Ireland v. The Palestine, Bruffetsville, New Paris, and New Westville Turnpike Company\(^1\) the act of May 3, 1852,\(^2\) "defining the powers of plank and turnpike road companies," was held unconstitutional and void, being a

1. 19 Ohio St., 369 (1869).
2. 50 Ohio Laws, 263.
law impairing the validity of contracts. The part of the act in question authorized turnpike companies to issue bonds in certain cases when found necessary for the purpose of completing their turnpikes, or for the payment of indebtedness incurred in the construction of said turnpikes; and provided that the stockholders of all companies accepting the provisions of the act should be "each individually liable for the payment of such bonds * * * * to a sum at least equal in amount to the stock owned by each."

Ireland, the plaintiff in error in the case at bar, had subscribed for and had paid in full for stock held by him in the above named turnpike company, which had been organized and incorporated under and in accordance with the legislative act of 1849, for the purpose of constructing turnpike roads, etc. There was no provision in the act of 1849, or in the charter of the company making the stockholders individually responsible for the debts incurred by or the liabilities of the company. The act of May 3, 1852, in question before the court, imposed upon the plaintiff in error a burden which did not exist at the time he subscribed for stock and became a stockholder in the above turnpike company. This imposition of an additional burden, the plaintiff in error contended, impaired the obligation which he had with the company, and was, therefore, unconstitutional and void. Judge Welch, who read the decision of the court in this case, declared, and the court held, that in so far as the act in question authorized the levying of assessments against stockholders who had paid the full
amount of their subscriptions, and who by the charter of the company and the laws under which it was organized, were not individually liable for its debts, it was unconstitutional and void, being an act impairing the validity of the stockholders' contract with the company, and contravening, therefore, section 28, article 2, of the constitution which provides that "the general assembly shall have no power to pass * * * laws impairing the obligation of contracts."

In the case of the Iron Railroad Company v. the Lawrence Furnace Company,\textsuperscript{1} the act of March 30, 1875,\textsuperscript{2} to amend the general railroad act of February 11, 1848,\textsuperscript{3} was declared unconstitutional and void, being a law impairing the validity of contracts. This act as amended prescribed specific freight and passenger rates for freight and passenger transportation within this state. This amendatory act violated certain provisions of the twelfth section of the general railroad act of February 11, 1848, which provided that the rates in effect upon all roads organized and operating under said act should not be reduced, unless the net profit of the company had been, for the ten years next preceding, in amount equal to ten per centum of the capital stock of the company. The plaintiffs in error maintained that the company had made less than ten per centum on their capital stock during the ten years next preceding the passage of the act of March 30, 1875, and that they

\footnotesize
1. 29 Ohio St., 208, (1876).
2. 72 Ohio Laws, 143.
were not, therefore, subject to the provisions of the act requiring a reduction in the rates charged by railroad companies in this state, being protected by their charter and the provisions contained in section twelve of the act of February 11, 1848, referred to above.

The court declared, in handing down its decision in this case, that the provisions of the general railroad act of March 11, 1848, providing that "no reductions" in railroad rates shall be made "unless the net profits of the company, on an average for the previous ten years, shall amount to a sum equal to ten per centum per annum on its capital, and then not so as to reduce the probable profits below the said per centum," was in the nature of a contract, (made under the constitution of 1802), and binding on the state; and that it was the opinion of the court "that the act of March 30, 1875, in so far as it assumes to reduce the rates allowed to companies organized under the act of 1848, and prior to the adoption of the present constitution, whose net profits for the ten previous years were in fact below ten per cent. on their capital, and who have not relinquished their right to be governed by the last named act, is unconstitutional and inoperative," being, in effect, a law "impairing the obligation of contracts" and specifically prohibited by section 28, article 2, of the constitution.

In the case of Magruder v. Esmay\(^1\) the legislative act of

\(^1\) 35 Ohio St., 221, (1878).
May 7, 1869, ¹ entitled, "an act to improve the law of evidence concerning the titles of real estate," was declared unconstitutional and void, as contravening that clause of the 19th section of the bill of rights which guarantees the inviolability of private property, and that clause of the 28th section of article two of the constitution which provides that "the general assembly shall have no power to pass retro-active laws."

The sections of this act which were questioned in this case were in part as follows: Section 1 provided that the purchaser of real estate at a tax sale who had received a deed for the lands, and who should "from and after such sale, openly and notoriously claim the title and ownership of said real estate and pay the taxes thereon from and after such sale" should "as against any title acquired by deed executed after such tax sale, be held and deemed in all cases in all courts as prima facie proof of the possession of said real estate by said purchaser." Section 2 of the act provided that "this act shall be in force from and after its passage, and its provisions shall apply to all tax sales heretofore or hereafter made in this state."

Judge Boynton, who read the decision of the court in this case, declared that the legislature was without power to divest the owner of property of his title "by declaring a void tax sale to be valid"; that the act in question which attempted this was a palpable violation of that part of the 19th section of the bill of rights which provides that "private proper-

¹. 66 Ohio Laws, 338.
ty shall ever be held inviolate"; that the purpose of this act "was to create a title by possession in those claiming under a tax sale"; and that in so far as it "set the statute of limitations in motion in respect to tax sales occurring before its passage" and made certain enumerated conditions and information conclusive proof of possession in fact and in law, it contravened both section 19, article 1, and section 28, article 2, which latter section provides, in part, that "the general assembly shall have no power to pass retroactive laws."

Judge Okey dissented from that part of the opinion which declared the act in question unconstitutional and void. Chief Justice Gilmore concurred in the dissenting opinion of Judge Okey.

In the case of Gager, Treasurer, v. A. W. Prout et al.\(^1\) the act of April 14, 1886, amending section 2781, Revised Statutes, was held by the court to be a constitutional act except in so far as it authorized the laying of a penalty upon taxable property which had not been returned by the owners thereof, giving to the act a retroactive operation. Section 2781, as amended by the above act, authorized the county auditor to make additions to taxable property which had been omitted by the owners thereof in making their tax returns for previous years and further provided that a penalty of fifty per centum should be added thereto. The provisions of the act were made to apply to cases of omitted returns or falsification of returns occurring before as well as to those occurring after the

\(^1\) 48 Ohio St., 89, (1891).
passage of the act.

The court held that a retrospective statute, remedial in nature, which merely gave a new and additional remedy for the enforcement of an existing right—like that of securing the payment of taxes on taxable property which had been unlawfully omitted—was a valid enactment and in no way repugnant to the constitutional prohibition against retroactive legislation; but that that part of the amended statute in question which imposed a penalty upon the property of those who made false return or omitted to make any returns, which penalty did not exist at the time of the omission or commission of the act but was subsequently imposed, was within the constitutional prohibition against retroactive legislation and was, therefore, unconstitutional.

The court further held that inasmuch as that part of the act which imposed the penalty, or required that the penalty be imposed, in cases occurring before the passage of the act was capable of being separated from the remainder of the act, and was in no way essential to the operation of the act, the constitutional provisions of the act would be sustained and given the operation and effect intended by the legislature.

In the case of Miller et al. v. Hixson as Treasurer of Highland county,1 the act of April 17, 1886,2 to amend section 4812, Revised Statutes, and adding five years to the period in which extra and additional taxes might be levied under the One Mile Pike Law, was declared unconstitutional.

1. 64 Ohio St., 39 (1901).
2. 83 Ohio Laws, 85.
being, in effect and operation, a retroactive law as to such pikes as had been constructed before its passage. Section 4774, Revised Statutes, provided that a tax of not to exceed 10 mills on the dollar, in any one year and not to extend over a period of time greater than eight years, might be levied by the county commissioners upon the taxable property within any turnpike road district upon being petitioned by a majority of the landowners in the proposed turnpike road district. Section 4777 provided that the annual levy and the number of annual levies to be made should in no case be greater than the amount and number set forth in the original petition, unless the petition be renewed or the county commissioners order an extension of the levy as provided in section 4812, Revised Statutes. Section 4812 empowered the county commissioners, for the purpose of providing means for the completion of any turnpike road or for the liquidation of any indebtedness incurred in the construction of such road, to continue the tax originally levied for constructing the same for a period not exceeding, in the aggregate, five years, in addition to the levy made on petition, as provided in section forty-seven hundred and seventy seven." The five years extension provided for in this section when added to the original eight year limit makes a maximum taxing period of thirteen years. To this thirteen year maximum taxing period the legislature by the act of April 17, 1886, above, added another five year extension, making a total taxing period extending through eighteen years. The extension provided for in the
above act was made to apply "to all free turnpike roads heretofore built, now in process of construction, or hereafter to be constructed."

The opinion of the court in this case was read by Judge Burket who declared that the legislature is incapable of "passing new laws to reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time" of the passage of the act; and the court held that "a statute which imposes a new or additional burden, duty, or obligation or liability, as to past transactions, is retroactive, and in conflict with that part of section 28, article 2, of the constitution, which provides that, 'the general assembly shall have no power to pass retroactive laws,'" and that the amendatory act of April 17, 1886, above adding five years to the taxing period provided for in the One Mile Pike Law was unconstitutional and void, "as to such pikes as had been constructed before the passage of that amendment."

In the case of the State of Ohio v. the Cincinnati Tin and Japan Company,¹ section 218-223, Bates' Statutes, was declared unconstitutional, in so far as it made the "maps, plats, and field notes" prepared by the state canal commission prima facie evidence as to the state's ownership of certain lands as against other claimants. This section authorized the canal commission to survey and determine the boundaries of the state's canal lands, take testimony, etc. and then provided that "the testimony so taken, together with said maps, plats

¹. 66 Ohio St., 182, (1902).
and field notes of such surveys, and the report of said com-
mission as to the boundaries of the lands belonging to the
state of Ohio" shall be taken as competent and prima facie
evidence as to the proof of the state's ownership of lands
when produced in any trial in any court.

- Judge Burket, who read the decision of the court in this
case, declared that in so far as the section purported to make
the commission's findings, maps, plats, field notes, etc.,
prima facie evidence it was unconstitutional; that if such a
principle were allowed the commission could "divest a man of
his title without notice or trial" and vest his title, at
least prima facie, in the state; that such a grant of power
and such a procedure was a plain violation of that part of the
19th section of the bill of rights which provides that "private
property shall ever be held inviolate"; that the statute in
question provided for a change in the rules of evidence ther-
by contravening that part of section 28, article 2, of the
constitution, which provides that "the general assembly shall
have no power to pass retroactive laws; and that the legisla-
ture was, under the limitations of the last named section of
the constitution, without power to impose burdens or duties
unknown to past transactions at the time when they were per-
formed.

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CHAPTER III

THE LEGISLATURE, ITS POWER, DUTIES AND LIMITATIONS

UNDER ARTICLE TWO OF THE CONSTITUTION.

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In more than one-fourth of all the cases in which the supreme court has nullified legislative acts as being in contravention of the constitution it has based such nullification upon one or more sections of this article of the constitution; more than one-half of these, however, have been cases in which the court has held that the 26th section of this article, requiring that all laws of a general nature shall have a uniform operation throughout the state, had been violated by the legislative act or acts in question. In a number of the cases under this section the court held that the law or laws in question contravened two or more sections of this or other articles of the constitution. Some of these cases are, therefore, discussed under such other sections and articles, rather than under this article, in this thesis.\(^1\) Section one of this article, for instance, was held to have been contravened in two different cases; in one of these the law in question was held also to be in contravention of section 2 of the Bill of Rights and in the other the law in question was held to contravene both sections 1 and 26 of article two. Section sixteen of this article, which was the next sec-

\(^1\) See table of cases for number and distribution of cases.
tion to be contravened, was held to have been contravened only in one instance, and in this instance by a law which contravened at the same time section twenty of this article and section one of article ten. These cases are discussed under the latter sections and articles, in each instance, in this thesis.

I

Signatures to Bills Required for Their Validity.

Section 17, article 2: "The presiding officer of each house shall sign, publicly in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills, and joint resolutions passed by the general assembly."

This section of the constitution was held to have been contravened in the case of State v. Kiesewetter, which is the only case under this section. The act before the court in this case was Senate Bill No. 327 which had been passed by the 67th general assembly. The bill was entitled "an act to provide for the publication of volume six, geology of Ohio." The exact date of its passage is not known as it was not entered upon the legislative journals. In the addendum of the Ohio Laws for 1887 these statements are found: "Senate bill No. 327 passed both houses of the general assembly, as set forth in the certificates below (this refers to certain certificates attesting the passage of the bill, and which appear over

the signatures of C. N. Vallandingham, chief clerk of the
Ohio Senate, and David Laming, clerk of the House of Represen-
tatives); but the same for some reason unknown, was not
enrolled, signed and filed in the office of the secretary of
state. This fact was not discovered until after the general
laws had been printed, when the clerk of the senate filed the
copy of the act here printed, in the office of the secretary
of state."

Under and in accordance with the provisions of the act
Edward Orton, state geologist, purchased of the relators in
the case at bar paper to the value of $1,630.40 and upon re-
cipient of the paper presented the bill to the auditor and de-
manded that a warrant for the above amount be drawn in favor
of the relators. This the auditor refused to issue on the
ground that the act was not a valid act since it had never
been authenticated as required by the seventeenth section of
the second article of the constitution which specifically re-
quired that "the presiding officer of each house shall sign, public
ly in the presence of the house over which he presides,
while the same is in session and capable of transacting busi-
ness, all bills, and joint resolutions passed by the general
assembly." An act, such as the one in question, which failed
to meet this specific constitutional requirement, was, the
auditor maintained, unconstitutional and wholly void. Upon
the auditor's refusal to issue the warrant a petition for a
writ of mandamus was filed to compel him to issue his warrant
for the above amount on the state treasurer in favor of the
relators. This petition was duly considered by the court and

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in the end the writ was refused. In handing down the decision of the court Judge Spear declared that the provisions of section 17 article 2, of the constitution were mandatory and not merely directory and that the procedure therein stated must be regarded and followed in all cases. The whole act was, accordingly, declared unconstitutional and void.

II

The Style of Laws.

Section 18, article 2: "The Style of the laws of this state shall be, 'Be it enacted by the General Assembly of the State of Ohio.'"

In the case of State ex rel. Attorney General v. Kinney, Secretary of State, the court declared Senate Resolution No. 14, "providing for holding a constitutional convention," unconstitutional. The resolution as adopted recommended to the voters the necessity of a constitutional convention to revise and change the constitution; directed in what manner they should vote for or against the proposed convention; provided that the convention should not sit more than ninety days; and provided in certain other respects a procedure different from that set forth in the statute laws then in force on such matters. The constitutionality of the resolution was questioned on the ground that it provided for a procedure other than that

1. 56 Ohio St., 721, (1897).
2. Passed April 16, 1895, 92 Ohio Laws, 787.
provided by statute law, thus repealing, in effect, at least for the time being, the existing law while the resolution itself was not a law since it lacked the form and the style of a law required by section 18, article 2 of the constitution. In handing down its decision in this case the court declared: "The statute law of the state can neither be repealed nor amended by a joint resolution of the general assembly"; and since the joint resolution in question provided for a different procedure in calling and holding the proposed constitutional convention and made certain limitations changing the statute law of the state, it is hereby declared null and void.

III

Compensation of Officers.

Section 20, article 2: "The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The twentieth section of this article was held by the court to have been contravened in three different cases; one of these has already been referred to under section sixteen of this article, and the other two will now be discussed in

1. No specific contravention of any section of the constitution is pointed out by the court; however, if more than the spirit of the constitution was violated it was section 18, article 2. This is the section upon which the plaintiff based and urged his claim of the unconstitutionality of the joint resolution.
order.

The earliest case under this section was that of State ex rel. v. Raine, Auditor,\(^1\) in which the court held that the legislative act of March 8, 1888,\(^2\) allowing to each of the county commissioners of certain counties an additional thousand dollars per annum as traveling and other necessary expenses, was unconstitutional and void, being in contravention of the twentieth section of article two of the constitution. This act provided that: "In counties in which, by the last federal census, the population amounted to two hundred and fifty thousand, or upwards, each commissioner shall be allowed for expenses incurred by said commissioner, in the proper discharge of his duties within said county, the sum of (§1000) one thousand dollars per annum. Said sum to be paid out of the county treasury on the warrant of the county auditor."

This act, the court declared, while not making use of the word 'salary' or 'compensation' has the same effect since it allows to each of the county commissioners of Hamilton county,\(^3\) to which county only it was made to apply,\(^4\) an additional one thousand dollars per annum. The act neither imposed new duties nor created additional expenses. It did, as the court declared, only the one thing it was designed to do, namely, increased the compensation of the county commissioners of Hamilton county during their existing terms of office, and was, the court held, in so far as it accomplished this end, unconstitutional and void, contravening the

\(^1\) 49 Ohio St., 580, (1892).
\(^2\) 85 Ohio Laws, 76.
twentieth section of article two of the constitution. The next case under this section was that of the State of Ohio ex rel. Montgomery v. Rogers et al. ¹ in which the court declared the legislative act of April 25, 1904, ² entitled "an act fixing the salaries of the county surveyors in various counties of the state," unconstitutional. Section one of this act among other things, provided that "the judges of the court of common pleas of each county are hereby constituted a commission to fix the amount of compensation of the surveyor of the county."

Judge Crew, who read the decision of the court, declared that the function imposed upon the court in this case was not that of determining and fixing the compensation for services already performed but that of determining and fixing the compensation for services yet to be performed by a public officer; that this was purely a legislative and not a judicial function; that such legislative function could not be delegated by the legislature to the court of common pleas; and that the act was a palpable violation of the express provisions of the twentieth section of the second article of the constitution which provides that: "The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers."

¹ 71 Ohio St., 203, (1906).
² 97 Ohio Laws, 313-314.
IV

Two-Year Limitation Upon Appropriations.

Section 22, article 2: "No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."

The twenty second section of the second article of the constitution was held to have been contravened but once and this in the case of State of Ohio v. Arnold Madbury and others.¹ In this case the legislative act of March 6, 1845, entitled "an act to amend an act entitled 'an act to abolish the board of canal commissioners and to revive the board of public works,'" was declared unconstitutional and therefore null and void.

This act was passed by the legislature while under the constitution of 1802. Section five of the act provided that the board of public works should prepare plans and specifications for the repair of public works and that said board should let its contracts "to the lowest responsible bidder, for any term of years not exceeding five." On September 25, 1855, the board exercised the power conferred by the act of March 6, 1845, and let its contract for a five year period. All went well for the first two years but in 1857 the legislature, for reasons of its own, refused to appropriate the funds necessary to carry out the contract in the act of April 15, 1857, "making appropriations for the public works for 1857." The court was asked to decide first as to the constitutionality of the statute and second as to the validity of the contracts already en-

¹ 7 Ohio St., 522.
tered upon by the board of public works under the statute.

In handing down its decision the court declared that the legislative act of March 6, 1845, and the contracts made by the board of public works under the act, were, in so far as they made or authorized the making of contracts binding upon the state and involving the expenditure of money for a period longer than two years, in direct violation of the twenty second section of article two of the constitution which provides that "no appropriation shall be made for a longer period than two years," and, therefore, null and void. The making of such long time contracts was, in effect, the court held, to tie the hands of the succeeding legislature. Every succeeding legislature must, the court held, be free to collect revenues and make appropriations as it deems best unhampered by the action of previous legislatures. The court further held that the making of a contract binding upon the state and involving the expenditure of money over a period of time greater than two years was, in effect, the creation of a debt against the state, and in the case before the court a debt outside the exceptions of sections one and two of article eight of the constitution, and therefore, in contravention of section three of that article which provides that with the exceptions named in sections one and two "no debt whatever shall hereafter be created by, or on behalf of, the state."
All Laws of a General Nature Shall Have a Uniform Operation Throughout the State.

Section 26, article 2: "All laws of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in the constitution."

The cases that are included under this section of the constitution fall conveniently into the following groups or classes: Common Schools, Roads and Bridges, Courts, County Government, County Officers, and, Municipalities and Legislation Relating Thereto. The court's interpretation of the constitutional limitation set forth in the above section, as applied to legislation having as its subject-matter any of the above named subjects, has been a changing one; gradually changing from a loose and liberal construction during the latter half of the nineteenth century to a strict and conservative construction during the first two decades of the twentieth century. The cases that are included in each of the above classes are taken up and discussed in chronological order for the purpose of showing this gradual change of attitude and interpretation on the part of the court in applying this constitutional limitation. The above classes will now be taken up and discussed in the order named.
Common Schools.

The first three cases that we shall discuss under this section were concerned with the general subject-matter of common schools and its relation to the constitutional requirement that laws of a general nature should have a uniform operation throughout the state. It will be observed in the study of the following cases that the court itself found it necessary to change its position from time to time as the different cases were brought before it for decision.

The first of these cases was that of The State v. Powers in which the legislative act of March 31, 1879, entitled "an act to consolidate the territory comprising the township of New London, in Huron county, Ohio, into a special school district," was declared unconstitutional as contravening article two, section twenty-six, and article six, section two of the constitution, and therefore, null and void. Section one of this act provided that the New London township school district and the New London village school district, should, in case they voted to do so, be "organized into a special school district, to be known as the New London school district." The other sections of the act provided that a school board should be elected and that the special school district should "be governed and controlled in every manner by the laws of Ohio.

1. 38 Ohio St., 54, (1882).

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now in force relating to village districts."

The case came before the court in the form of quo warranto proceedings to oust the defendants who had been elected and were acting as the members of the school board in the newly created special school district. The plaintiff urged that the act was unconstitutional and void on the ground that it was an act whose subject-matter was one of a general nature without a uniform operation throughout the state, thus contravening article two, section twenty-six; and that it was a special act conferring corporate powers, thus contravening section one, article thirteen. The plaintiff's first proposition was sustained and a judgment of ouster rendered. Judge McLvaine, who read the court's decision, declared that school boards as corporations were not within the constitutional limitation of section one, article thirteen of the constitution but in this respect were like townships and counties, being merely local subdivisions of the state for administrative purposes; that the subject-matter of common schools was unmistakably one of a general nature; that it was practically declared to be such in article six, section two of the constitution which provides that "the General Assembly shall make such provisions, by taxation, or otherwise, as will secure a thorough and efficient system of common schools throughout the state"; that the subject-matter of common schools being thus declared one of a general nature "all laws in relation to the organization and management thereof must have a uniform operation throughout the state"; and inasmuch as the act in question had only a
local operation it was in contravention of the twenty-sixth section of article two which provided that "all laws, of a general nature, shall have a uniform operation through the state." In concluding the judge expressed the view of the majority of the court to the effect that "under peculiar circumstances" local communities might be authorized by special and local legislative acts to meet their own peculiar needs in discharging "duties merely incidental" to the carrying out of the state's educational program. Judges White and Johnson did not concur in the proposition that the act in question before the court was unconstitutional.

Seven years later, 1889, the above decision of the court was overruled in the case of State ex rel. Attorney General v. Shearer et al. and the court held that: "The subject-matter of dividing territory into school districts, is, in its nature, local"; and "the formation of a special school district from territory within the limits of a township, by special act, is not in conflict with section 26 of article 2, of the constitution."

In 1902, in the case of The State of Ohio ex rel. v. Spellmire et al., the court again reversed itself and declared the legislative act of April 2, 1902, entitled "an act to create a special school district in Springfield and Sycamore townships, in Hamilton county, and Union township, in Butler county," to be in contravention of section twenty-six, article two of the constitution. This act, like the act of March

1. 46 Ohio St., 275, (1889).
2. 67 Ohio St., 77, (1902).
3. 95 Ohio Laws, 743.
31, 1879, provided for the establishment of a special school
district, fixed its boundaries, authorized the election of a
special district school board, the raising of the necessary
funds through taxation, and the government and administration
of the schools by the newly created special district board.

The case came before the court in the form of a petition
in quo warranto to oust the directors of the newly created
special school district. Chief Justice Burket read the deci-
sion of the court which is a remarkable piece of judicial de-
claration presented in a straight-forward and very forceful
style. It stands out in bold contrast with most of the pre-
vious decisions of the court dealing with the interpretation
and application of the first clause of the twenty-sixth sec-
tion of article two of the constitution. "The best evidence,"
the judge declared, "that a subject-matter can be covered and
provided for by a general law having a uniform operation, is
the fact that such general law has been passed upon that sub-
ject-matter." The first two paragraphs of the syllabus in
this case so completely cover the whole matter of special
school legislation and its relation to article two, section
twenty-six, that I quote them in full:

"1. Whenever a law of a general nature having a uniform
operation throughout the state, can be made to fully cover and
provide for any given subject-matter, the legislation, as to
such subject-matter, must be by general laws, and local or
special laws cannot be constitutionally enacted as to such sub-
ject matter."
"2. The subject-matter of schools, including school districts, and establishing and changing the same, is of a general nature; and all legislation as to them must be general, having a uniform operation throughout the state. State ex rel v. Shearer et al., 46 Ohio St., 275, overruled, and State v. Powers, 38 Ohio St., 54, reaffirmed."

The defendants, in the case at bar, urged that the act in question was an exception for the reason that it had been passed to meet an emergency. To this the court replied "there is no exception to said section 26 of article 2 found in the constitution. The requirement is that all laws, of a general nature, not some laws, shall have a uniform operation. There is no provision for violating the constitution in an emergency."

The proposition was urged by the defendants that for the court to reverse itself and nullify the many special acts that had been passed creating special school districts would be disastrous; but to this the court, in thunderous terms, replied that the constitution must be preserved.

On April 25, 1904, the legislature passed an act entitled "an act to provide for the organization of the common schools of the state of Ohio, and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio herein named." Section 3891 of this act provided that "any school district, now existing other than a city, village or township school district, and any school district organized under the provision of chapter 5 of this title, shall constitute a special school district"; and section 3929 provided, in the form
of a general law, that "a special school district may be formed of any contiguous territory * * * which has a total tax valuation of not less than one hundred thousand dollars"; and that nothing contained in the act "shall be so considered as to abolish any special school district now existing, but all such districts whether created under the provisions of a general or special act, including the territory now constituting such special district, shall * * * continue to be and remain and be recognized and regarded as legal special school districts," etc. These sections were passed notwithstanding, or rather in spite of, the adverse decision of the court two years before in the case of State v. Spellmire, above.

These sections came before the court in the case of Bartlett et al. v. The State of Ohio in the form of an appeal from the circuit court in a proceeding in quo warranto to oust the plaintiffs in error from the office they held as directors of their local special school district under a special legislative act entitled "an act to establish a special school district in Waterford township, Washington county, Ohio," which act the defendants in error contended was in contravention of section twenty-six, article two of the constitution, as were also original section 3891 and the amended sections 3891 and 3929, of the Revised Statutes. Chief Justice Davis, who read the decision of the court, followed and affirmed the decision of the court in the case of State v. Spellmire, above, and declared the sections of the statutes in question unconstitutional.

1. 73 Ohio St., 54, (1905).
2. 94 Ohio Laws, 630.
al and therefore null and void. "The sections of the statutes now under consideration," he declared, "do not stop short of being a mandate to all of the courts that 'all such districts, whether created under the provisions of a general or special act, including the territory now constituting such special district, shall * * * continue to be and remain and be recognized and regarded as legal special school districts,' etc." This the court held was an unwarranted assumption of judicial powers on the part of the legislature directly in violation of the constitutional prohibition of the thirty-second section of article two which provides that the legislature shall neither have nor exercise any judicial power not "expressly conferred" by the constitution. The passage of the above sections the Chief Justice declared "was an inadvertance on the part of the general assembly; for it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered, or require the courts to treat as valid laws those which are unconstitutional." The court further held that "The power of the legislature to validate any void or ineffectual act is limited to such acts as it might have originally performed or authorized. It therefore cannot, under the mere form and pretense of general legislation, make valid any special legislation which it had enacted in violation of the constitution."

The wavering action of the court in its interpretation and application of section twenty-six of article two to the subject-matter of common school legislation is not the excep-
tion but rather the rule and the history of the action of the court in its interpretation and application of this section. The history of the court's action in applying this section in the matter of municipal corporations, townships and counties, etc. is in all respects quite the same as that in the case of the common schools of the state.

B

Roads and Bridges.

The next five cases are concerned, in general, with the general subject-matter of roads and bridges, or roads or bridges and its relation to the constitutional limitation set forth in section twenty-six, article two of the constitution to the effect that "all laws, of a general nature, shall have a uniform operation throughout the state."

The earliest of these cases was that of Fields v. Commissioners of Highland county,\(^1\) in which the court held that the legislative act of March 29, 1879,\(^2\) entitled, "an act to authorize the commissioners of certain counties to locate and construct turnpike roads," was unconstitutional and therefore null and void, as contravening the second section of article twelve of the constitution, which provides that "laws shall be passed, taxing by a uniform rule" all property within a

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1. 36 Ohio St., 476, (1881).
2. 79 Ohio Laws, 43.
taxing district. Section one of this act provided "that in all counties having a population, at the last federal census of not less than 29,130, and not more than 29,135, the county commissioners, when they become satisfied that the public interests of their county demand and justify special action for the improvement of the roads therein," should appoint five free holders to locate and survey off the necessary turnpikes, etc. Section six provided that upon the establishment of such turnpikes, the county commissioners should be authorized and empowered to, "for the purpose of aiding in the construction thereof, levy annually, in addition to other road taxes authorized by law, a tax for turnpike road purposes, of not more than two mills on the dollar of valuation, on the grand tax duplicate of taxable property in the county"; and section seven provided that "no such taxes shall be levied on any lands which have been heretofore assessed for the construction of any free turnpikes or improved road or roads, already constructed, or in the course of construction at the time of the levy of tax, unless the amount that would be ratably levied upon such lands exceeds the amount of such assessment, and in such cases, such excess only shall be levied and collected."

The case came before the court in the form of an appeal from the court of common pleas to the district court where it

1. This case is taken from under section 2, article 12, where it logically belongs, and included here in order to give a better grasp of the history of the court's action in interpreting and applying section 26, article 2 of the constitution to the subject-matter of roads.
was reserved for decision by the supreme court. Chief Justice Boynton, who read the decision of the court declared, in disposing of the proposition that the act was a local and special act having as its subject-matter one of a general nature and therefore within the limitations of section twenty-six, article two of the constitution, that: "There is no doubt that the county of Highland is the only county in the state to which the provisions of this act can ever apply, and the legislature might just as well have conferred on the commissioners of that county, in express terms, and by direct language, the power actually conferred, as to name the county through the aid of the previous federal census. * * * The act in question is not only local in its operation, but is was so intended to be by the legislature; and is a law of a general nature, within the meaning of the constitution, it is clearly unconstitutional because of such restricted operation." The "and is a law of a general nature," however, was more than the court thought it necessary and expedient, at this time, to decide, and this more especially because of the fact that the act was found to be "clearly in conflict with section 2, article XII, of the constitution, which, with certain specific exceptions, requires all real and personal property to be taxed by a uniform rule, and according to its true value in money." The reluctance on the part of the court to declare this law unconstitutional as contravening section twenty-six, article two, can be better appreciated when we are reminded of the fact that only one year before, in the
second proposition of the syllabus in the case of State ex rel. Hibbs v. Commissioners of Franklin county, the court had declared that "an act providing for the improvement of a designated county road, is local in its nature, and not in conflict with article 2, section 26, of the constitution." That this ghost of the recent past loomed large in the minds of the judges of the court, there can be but little doubt.

Section six of the above act authorized the commissioners to levy a tax—not an assessment against the adjoining property directly benefited by the improvement, but a tax—for the creation of a general road fund "of not more than two mills" on the entire county tax duplicate (using the county as the taxing unit), with the exception that "any lands which have been heretofore assessed for the construction of any free turnpikes or roads" should be exempted from the payment of this tax. This exception the court declared was in direct conflict with the second section of article twelve of the constitution, requiring uniformity in taxation.

In the case of Hixson v. Burson et al. the legislative act of May 16, 1894, entitled, "an act to authorize the county commissioners to provide highways," was declared to be a law of a general nature having only a local operation, and therefore unconstitutional and void as contravening the twenty-sixth section of article two of the constitution. Section

1. 38 Ohio St., 458, (1880).
2. 54 Ohio St., 470, (1896).
3. 91 Ohio Laws, 759.

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one of this act provided "that the county commissioners of any county which by the last federal census had ** a population of not less than thirty-five thousand one hundred and ninety (35,190) and not to exceed thirty-five thousand and two hundred (35,200) when they become satisfied that the public interest of their county demands and justifies special action for the improvement of the roads therein, are hereby authorized and empowered to construct free turnpike roads" if and when approved by a majority vote of the county at any general or special election.

The case came before the court in the form of an appeal from the circuit court to reverse that court and declare the act null and void as contravening the twenty-sixth section of article two of the constitution. Judge Burket, who read the decision of the court, declared that the act was beyond all question a local act. "While it is in form general, it is in its operation local and might just as well have named Athens county, by name, as to have designated it by its population at the last federal census of not less than 35,190, and not more than 35,200." The constitutionality of an act under section 26, article II, the judge declared, "is determined by the nature of its subject matter, its operation and effect, and not by its form only. In form an act may be general, while in operation and effect is it local." In answering the question how to determine whether a given subject is of a general nature the judge set forth some very illuminating principles. He said: "If the subject does or may exist in,
and effect the people of every county in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of every county it is local or special." Here, it would seem, we have a set of principles, which if accepted, will in the future give little room for any difference as to whether a law is concerned with a general subject-matter. But the judge gives still other criteria: "A subject matter of such general nature can be regulated and legislated upon by general laws having a uniform operation throughout the state, and a subject matter which cannot exist in, or affect the people of every county, can not be regulated throughout the state, because a law cannot operate where there can be no subject matter to be operated upon."

With the above criteria as a basis of the decision the court declared that the subject of roads was beyond all question one of a general and not of a local nature. This conclusion and decision on the part of the court involved the overruling of the second proposition of the syllabus in the case of State ex rel Hibbs v. Commissioners of Franklin county, which had proved a nightmare to the court in the case of Fields v. Commissioners, supra. The court was by this time sufficiently far removed from the ghost of State ex. rel. Hibbs v. Commissioners, which declared that "an act providing for the improvement of a county road, is local in its nature, and not in conflict with article 2, section 26 of the constitution," to require the expediency of nullifying the act on other constitutional grounds, which might well have been done
for the court in the present case was of the opinion that
the act "seems to be in conflict with section two of article
one of the constitution", for the reason that it provided for
a tax on all property in the county and at the same time for-
bade the use of any of the funds arising therefrom in any
city of over 1000 population, thus depriving the inhabit-
ants thereof of equal benefits under the act. This point,
however, was left undecided.

In the case of The State ex rel. v. Davis et al., the
act of April 23, 1891,1 entitled, "an act to authorize the
commissioners of Mahoning county to repair, extend, recon-
struct, and rebuild one or more bridges across the Mahoning
river in the city of Youngstown, in said county," and the act
of April 24, 1896, entitled, "an act to authorize the com-
missioners of Mahoning county to build two overhead bridges
across the Mahoning river," were declared null and void as
contravening section 26, article 2 of the constitution. These
acts as indicated by their titles authorized and empowered the
county commissioners of Mahoning county to construct certain
bridges, and this, too, without first having submitted the
matter to the electors of the county for their approval or re-
jection. The commissioners, contrary to the general laws of
the state, were empowered to act without regard to and, upon
occasion, in spite of, the will of the electors and taxpayers
of the county. The case came before the court in the form of

1. 66 Ohio St., 15, (1895).
2. 88 Ohio Laws, 825.
a mandamus proceedings instituted by the attorney-general to oust the defendants and prevent them from issuing bonds and carrying out the constructions authorized by the acts in question.

The decision of the court was read by Judge Shauack who declared that: "By their express terms the operation of these acts is restricted to Mahoning county, and, yet more narrowly, to the construction of the bridges designated."

The subject matter of the acts was declared to be unmistakably one of a general nature, for it had been, even before 1851, "comprehended in legislation of uniform operation throughout the entire state," much of which general legislation was still upon the statute books and in force. As further evidence of the generality of the subject of bridges the court referred to the fact that "for many years there was no legislation of limited operation upon the subject." The principles advanced by Judge Burket, in the case of Hixson v. Burson, supra, were reviewed and accepted; but the court was now, however, ready to go one step further, in its interpretation and application of section 26, article II, and declared that: "Highway bridges, as well as the highways of which they are a part, are general subjects of legislation within the meaning of the constitution."

In the case of Mott et al. v. Hubbard, Treasurer, et al.,1 the court declared the act of March 13, 1894,2 supplementary

1. 59 Ohio St., 199, (1898).
2. 91 Ohio Laws, 64.
to section 4637 of the Revised Statutes, null and void as con-
travening section 26, article 2. The act provided that in
"any county containing a city of the second grade of the first
class," the county commissioners should have power to estab-
lish, widen or alter a county road or roads not to exceed one
hundred feet in width, and that such part of the compensation,
damages and cost as they might deem equitable should be paid
out of the county treasury. The court held on the authority
of Fields v. Commissioners of Highland county, that the act
was a local act and might just as well have designated Cuyah-
oga county by name; and on the authority of Hixson v. Burson,
and State v. Davis, that the subject-matter of the act, being
that of county roads, was one of a general nature, and there-
fore within the prohibition of section 26, article 2, of the
constitution.

In the last case of this group having to do with roads
and bridges, that of Thorniley, Auditor, et al. v. State ex
rel. Dickey, the court declared that section 4903 (of the
Revised Statutes of 1880) contravened section 26, of article
2 of the constitution, "being an essential part of a statute
providing for the management and control of highways by essen-
tially different methods, in different counties of the state,"
and that it was therefore null and void. The case came before
the court on appeal from the circuit court which had held
the statute unconstitutional. This judgment was affirmed by
the supreme court. Judge Shauk, who read the decision of the

1. 81 Ohio St., 108, (1909).
court, declared that the section in question was unconstitu-
tional and that the provisions throughout the whole of Chap-
ter 10, Title 7, of the Revised Statutes of 1880, embracing
sections 4876 to 4907 inclusive, having to do with the re-
paired or improved roads, "do not have a uniform operation
throughout the state." Section 4889 designated, by name,
 thirty-two of the eighty-eight counties and provided that in
each of the thirty-two, each township should be a road dis-
trict. These counties, the court declared, are grouped with-
out any "basis of classification which might be supposed to
justify different policies in the control and management of
the roads." In fact this selected group of thirty-two coun-
ties contained some of the most as well as some of the least
populous, and some of the smallest as well as some of the
largest counties in the state. The cases of Hixson v. Burson,
and The State, ex rel., v. Davis, were reviewed, approved
and followed. This decision practically wiped out the entire
chapter of the statutes dealing with the matter of the re-
pair or improvement of roads. Just how much of the road laws
remained and what they were, was declared by the court to be
an open question.

While the decision in this case, the latest adverse de-
cision on the subject-matter or roads under section 26, arti-
cle 2, left the whole matter up in the air, so to speak,
two fundamental propositions, it would seem, have been fair-
ly well established; first, the subject-matter of roads and
bridges is a matter of general legislation; and, second, by
virtue of section 25, article 2 of the constitution, all such legislation must have a uniform operation throughout the state.

G

Courts

The next six cases are concerned with legislation having as its subject-matter the organization and regulation of, and procedure in, the lower courts of the state and subdivisions thereof under the constitutional limitations of section 25 of article 2.

The first case in this group, and the first case in which a legislative act was held void as contravening section 25, article 2 of the constitution, was that of John Kelley v. The State of Ohio. 1 This case came before the court in 1856, just five years after the new constitution was adopted. The act in question was that of April 9, 1856, 2 entitled, "an act to restore to the court of common pleas the jurisdiction of minor offenses in certain counties in this state." Section one provided "that the court of common pleas, in addition to the criminal jurisdiction it now has, shall have original jurisdiction of all crimes, offenses and misdemeanors, the cognizance of which is now vested in the probate court." Section nine after having named thirty of the counties of the state

1. 60 Ohio St., 269, (1856).
2. 53 Ohio Laws.
specifically provided that the provisions of this act should not apply to them; and that the repeal of chapter four of the act of March 4, 1853, effected by section eight of this act should not "apply to the counties named in this section, but the jurisdiction of the probate court in said counties shall remain the same as if this act were not passed."

The opinion of the court was read by Judge Scott who declared that the act was one whose subject-matter was of a general nature," and yet limited in express terms to a part of the counties of the state." This is the first pronouncement of the court setting forth what was and what was not a law of a general nature, and since the principles laid down in this case by Judge Scott were in time, after much changing about and waving to and fro, largely adopted by the court, it will be well for us to consider them at some length.

Judge Scott was in very close touch with the work of the constitutional convention of 1850-1851 and with those who took part in that convention; his interpretation of this section of the constitution has, therefore, been given great weight especially by those who have favored the extension of the application of this section to an ever-broadening field. "Without undertaking to discriminate nicely or define with precision, it may be said," declared the judge, "that the character of a law as general or local depends on the character of its subject-matter. If that be of a general nature, existing throughout the state, in every county, a subject-matter in which all the citizens have a common interest—if it be a
court organized under the constitution and laws, within and for every county of the state, and possessing a legitimate jurisdiction over every citizen, then the laws which relate to and regulate it are laws of a general nature ** ** * and must have a uniform operation throughout the state" under section 26 of article 2 of the constitution. The courts of common pleas were declared to be within the above described class, and the court held that "the laws then which relate to and regulate their organization and jurisdiction are laws of a general nature, and are imperatively required to have a uniform operation throughout the state."

The whole act was declared null and void, for as the court declared, "the legislative intent to limit its operation in all parts to certain counties is shown by language so explicit as to leave no room for any possible doubt."

The court was divided in its decision. Judges Swan and Brinkerhoff dissenting on the ground that sections one and eight of article four of the constitution gave the legislature authority "expressly to clothe courts inferior to the supreme court with different jurisdiction in different counties." The majority of the court were of the opinion, however, that the exception provided for, in section eight of article four of the constitution, related only to the jurisdiction of the probate court.

More than forty years came and went before the court declared another legislative act, dealing with the organization or operation of the courts, void as contravening the
twenty-sixth section of article two of the constitution; and then it was the so called "Cuyahoga County Jury Law" passed by the legislature May 29, 1894,¹ that was held to contravene this constitutional requirement for uniformity. It came before the court in the case of Silberman et al. v. Hay,² on appeal from the circuit court which had sustained the law. The act provided that in "all counties which now contain, or which may contain, a city of the second grade of the first class" the defendant in certain actions must, in order to be entitled to a jury, demand a jury trial in writing at least five days before the commencement of the term after the issues in the case had been made up in accordance with law, and deposit with the clerk five dollars to be used as jury fees. These requirements were not met by the defendants in the case at bar, who declared that they had the right of a jury trial under the general statutes of the state without complying with such special and local regulations, and that the regulations in question which, in effect, denied to them the right of trial by jury guaranteed by the constitution and provided for by the general statutes were unconstitutional and void.

The opinion of the court was read by Judge Minshall who declared: "It is sometimes a question of some nicety to distinguish between that which is local and that which is general as regards the subject-matter of a law"; but in the present case, in the opinion of the court, there was little if

1. 91 Ohio Laws. 793.
2. 59 Ohio St., 582, (1899).

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any room for doubt since, as the court declared, "there is probably in the entire field of legislation no subject of a more general nature, undoubtedly none of a more general interest, than the right of trial by jury." The defendants in error contended on the authority of McGill v. The State,\(^1\) in which case the act of May 7, 1877,\(^2\) regulating the selection of jurors for and in Cuyahoga county was held not to be "a law of a general nature within the meaning of section 26, article 2 of the constitution." The correctness of this decision was conceded by the court in the present case for the reason that the act in question at that time affected only the mode of selecting electors for jury service. The court declared that there was no similarities between the two acts; that the act in the case at bar was an act of a general subject-matter with a local operation, affecting the right of trial by jury; and, that it was, therefore, null and void.

"The right of trial by jury," the court declared, "is a subject matter of general legislation, and laws affecting it must be uniform in operation throughout the state."

In the case of Schumacher v. Mo Callip sections 3821e and 3821f of the Revised Statutes were declared unconstitutional and void, being of a general nature and not of a uniform operation throughout the state as required by section 26, article 2, of the constitution. Section 3821f provided that

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1. 54 Ohio St., 228, (1877).
2. 74 Ohio Laws, 218.
3. 69 Ohio St., 500, (1904).
the provisions of sections 3821c, 3821d and 3821e relating to the appointment of trust companies as executors or administrators of estates by the probate court, should apply "to probate courts in all counties containing a city of the first class, and to all probate courts in counties containing a city of the class containing by the last preceding federal census a population of less than 33,000." Judge Shauck who read the decision of the court in this case declared that the subject-matter of these sections, being concerned with the qualifications of administrators and the matter of the administration of estates, was one of a general nature and one which required for its validity a uniform operation throughout the state. Counsel urged that these sections were given a uniform operation by the doctrine of classification and section 3821f which extended the provisions of the act to every county in the state containing a city of the first or second class and having a population of not less than 33,000. To this the court replied by holding that this classification, which had been made for the specific purpose of accomplishing the ends contemplated in the act, was a perversion of a classification, which was void, even for the purposes for which it was contrived.

In the case of Wallace v. Leiter et al. the legislative act of April 12, 1900, 2 entitled, "an act to amend section 525-1 of the Revised Statutes, conferring further jurisdiction upon probate courts in certain counties therein named," was

1. 76 Ohio St., 185 (1907).
2. 94 Ohio Laws, 137.
declared null and void, as contravening section 26, article 2 of the constitution. This act provided that litigants in certain kinds of cases in the counties named "shall have as heretofore, the same right of appeal and of error from the probate court to the circuit court as is allowed now by appeal and error proceedings in similar cases from common pleas court to the circuit court." The decision of the court was read by Judge Spear who declared that the subject matter of the act was one of a general nature; and that that section of the act which provided that litigants should have the right of appeal from the probate court, of certain counties named in the act, to the circuit court in partition and other proceedings, contravened the constitutional requirement that "all laws, of a general nature, shall have a uniform operation throughout the state." In the first proposition of the syllabus of this case the court held that: "a law which affects the jurisdiction of the circuit courts of the state is necessarily a law of a general nature and by force of section 26 of article 2 of the constitution, must have a uniform operation throughout the state."

In the case of Hamann, Sheriff, v. Heekin, sections 5210 and 5211 of the General Code, were declared to have an unequal operation upon the members within the class or group upon which they operated, and were, therefore, null and void. Section 5216 provided that the commanding officers of certain military organizations should be authorized to enlist not

1. 88 Ohio St., 207, (1913).
to exceed one hundred and fifty contributing members, and that such contributing members should be subject to such services and dues as the council of the military organization required. In no case were the dues to be less than five dollars per annum. Section 5211 provided that all such contributing members should be "exempt from labor on the public highways and service as jurors during their membership in such military organization."

The case came before the court on appeal from the circuit court where the statutes in question had been sustained and a judgment of the court of insolvency releasing Heakin from the custody of Hamann, the sheriff, on a petition in habeas corpus had been affirmed. Heakin, as a contributing member of the military organization, maintained that under the above sections he was not subject to jury duty and he accordingly, refused to serve. The court was asked to declare the law void on the ground that it was concerned with a subject-matter of general legislation but did not have an equal operation upon all the members within the class throughout the state. Chief Justice Shaw, who read the decision of the court, declared: "The terms of the statute make it entirely clear that the attempt of the legislature to afford the immunity contemplated was not upon equal conditions either as to military service or as to the amount of money to be contributed." One member might be required to do considerable service or contribute a relatively large sum while another would be required to do little or nothing and to contribute
only the minimum sum; the only definite requirement of the statute being that each should contribute at least the minimum of five dollars in dues per annum. This unequal operation of the act upon different members within the class, the court held, rendered it null and void. The power of the legislature to provide for a military organization, establish the qualifications for the membership thereof, exempt citizens from jury service, and determine the basis for such exemption, was, the court declared, unquestioned and undoubted; but that any legislation passed in the exercise of this power must, under the provision of section 25, article 2, "rest equally upon all citizens of the same class," was, in the minds of the court, equally unquestioned and undoubted.

The last case in this group was that of The State, ex rel D'Alton, et al. v. Ritchie et al., in which section three of the act of March 21, 1917, entitled "an act to provide a court of domestic relations for Lucas County, Ohio, and prescribing the jurisdiction of said court," was declared to be in contravention of section 25 of article 2 of the constitution and therefore null and void. The case came before the court in the form of petition praying for a writ of prohibition restraining the carrying out of the provisions of the act on the ground that it contravened some half dozen different sections of the constitution. The several propositions advanced against the act by counsel were carefully

1. 97 Ohio St., 41 (1917).
2. 107 Ohio Laws, 732.
considered by the court but only one was sustained.

Section 3, among other things, provided that "on and after September first, nineteen hundred and seventeen, said court of domestic relations shall have exclusive jurisdiction within said Lucas county in and over all matters or proceedings, actions and courses that are now or may hereafter be within the jurisdiction conferred on a juvenile court or a juvenile judge or judges of the juvenile court, by chapter 8, title 4, part one." Now, it so happens that chapter 8, title 4, part one conferred concurrent jurisdiction on the court of common pleas and the juvenile courts, and when the act of March 21, 1917, above, was passed the question almost immediately arose as to whether the court of common pleas was, under the provisions of the act, deprived of concurrent jurisdiction in these matters with the newly created Court of Domestic Relations for Lucas County. The court held that it was. Judge Donahue, who read the decision of the court declared: "We are forced to the conclusion that the language permits of no interpretation or construction other than that the Court of Domestic Relations for Lucas County shall exercise this jurisdiction to the exclusion of all other courts in that county. For this reason, this provision of the act of March 21, 1917, conferring exclusive jurisdiction on that court, is clearly in conflict with section 26 of article 2 of the constitution." The court held, however, that the act "is valid as conferring jurisdiction concurrent with the jurisdiction of the common pleas court."
This is the latest case in which a legislative act concerned with the organization and jurisdiction of the courts has been declared unconstitutional as contravening section 26, article 2, of the constitution. From a study of the decisions of the court on the generality of the subject-matter and the universality of the operation of legislation having to do with the organization and jurisdiction of courts two far reaching and fundamental propositions have been firmly established. Both of these are restated in the syllabus of this case as follows: (1) "A law establishing a local court is not a law of a general nature, and is not required to have a uniform operation throughout the state." (2) "All laws or parts of laws relating to the jurisdiction of the common pleas court are laws of a general nature, and must have a uniform operation throughout the state."

D

County Government

The following cases are concerned with legislative acts having as their subject-matter the organization, administration, control or distribution of functions in county government. The first five cases next following are concerned with as many different phases of county government; and the next four cases in this group have to do with legislation upon the
general subject of county officers or the compensation of
county officers.

In the case of State ex rel. v. Ellet et al. the act of
March 11, 1869, entitled, "an act to require the county com-
missioners in any county having a population at the census of
1880 of 43,788, and containing a city of the second class,
third grade, to provide a depository for the county funds,
and for other purposes," was declared unconstitutional and
void, as contravening section 26, article 2 of the constitu-
tion. The provisions of the act stripped the county treasur-
er of all the important functions and duties of that office,
empowered the county commissioners and the county treasurer
to contract with one or more banking institutions for the loan
of the public moneys, authorized the treasurer to retain in
his possession not to exceed five thousand dollars to be ex-
pended for certain purposes named in the act, set up a very
detailed mode of handling county funds, and prescribed an
elaborate method of keeping and preserving the physical ac-
counts, vouchers, etc. Section 6841 of the Criminal Code of
the Revised Statutes makes it a felony for the county commis-
sioners or treasurer to authorize or do most of the things
which are made mandatory upon these officials in Summit Coun-
ty by this act. Thus that which is a criminal offense if
done outside of Summit county is not a criminal offense if
done within Summit county. This is precisely the situation

1. 47 Ohio St., 30, (1890).
2. 86 Ohio Laws, 70.
that the framers of section 25 of article 2 of our constitution hoped to avoid by the adoption of this section of the constitution. The subject-matter of this act, declared Judge Williams who read the decision of the court, is such as concerns every county in the state, and that the act in question was intended to apply only to Summit county is not denied or doubted. "We are therefore," declared the judge, "of opinion that the statute * * * is a law of a general nature, applicable only to Summit county, there being no other county having the specified population and containing a city of the designated class and grade, and is in conflict with section 25 of article 2 of the constitution of this state, which requires that 'All laws, of a general nature, shall have a uniform operation throughout the state.'"

In the case of Commissioners v. Rosche Bros., the act of April 16, 1890, entitled, "an act to provide for refunding of taxes erroneously paid under section 2742, Revised Statutes of Ohio, in counties containing a city of the first grade of the first class," was declared unconstitutional as contravening section 25, article 2, of the constitution, because of its limited operation, and as contravening section 28 of the same article, because it imposed obligations on the county of Hamilton, on account of past transactions, which did not exist at the time the act was passed. Judge Bradbury, who read the decision of the court, declared that

1. 50 Ohio St., 103, (1893).
2. 87 Ohio Laws, 212.
in so far as the act imposed upon the county of Hamilton the obligation of refunding taxes which had been, before the passage of the act, erroneously paid into the county treasury under the provisions of section 2742 of the Revised Statutes, it was a retroactive act and as such in conflict with section 28 of article 2 of the constitution, which provides that "the general assembly shall have no power to pass retroactive laws"; and that the act was one of a general subject matter and nature limited in its operation to Hamilton county and therefore in conflict with section 26 of article 2 of the constitution, requiring that "all laws, of a general nature shall have a uniform operation throughout the state."

If such legislation as this is needed—if justice demands such legislation, the judge declared, it "should have been extended to the whole people of the state without regard to the county boundaries." The judge continued: "Otherwise there might be as many different laws on the subject as there are counties within the state, and an action to recover taxes paid in one county could be maintained upon a state of facts that in an adjoining county would be wholly inadequate for the purpose." This want of uniformity, the court held, was fatal to the act. Such legislation, the court declared, "the object of which is to alter the existing law prescribing the right of a tax payer to demand and recover from the public money erroneously or mistakenly paid by him, contravenes section 26 of article 2 of the constitution of 1851, unless it is given a uniform operation throughout the state."
In the case of State ex rel v. Bargus et al.\(^1\) the legislative act of May 14, 1894,\(^2\) to amend the general laws of the state providing for the public support of the poor, was declared unconstitutional and void as contravening section 26, article 2, of the constitution. Section 957 of the Revised Statutes, which provided that "in every county in which there is a county infirmary, there shall be a board of infirmary directors, composed of three persons," was amended by this act to read as follows: "provided, however, that in counties which by the last federal census had, or which by any subsequent federal census may have a population of not less than 31,940 nor more than 31,960, and in counties which by the last federal census had, or which by any subsequent federal census may have a population of not less than thirty-five thousand four hundred (35,400), nor more than thirty-five thousand five hundred (35,500), no infirmary directors shall hereafter be elected, and the terms of those now in office shall expire on the first Monday in January, 1895."

The duties of the board of infirmary directors were in this case, according to the provisions of the act, to devolve upon the board of county commissioners in such counties.

The opinion of the court in this case was read by Judge Shauk who declared that the public support for the poor in this state had from the very beginning been regarded as a matter of general legislation; that this was the first attempt to treat the subject otherwise; that this act by its

\(^{1}\) 53 Ohio St., 95, (1895).
\(^{2}\) 91 Ohio Laws, 237.
express terms was intended to apply only to the two counties described in the act and, therefore, might just as well have named the counties as to have limited the exemption from the operation of the act to those counties by the subterfuge of classification used in the act, since Huron and Erie counties were the only counties having the designated populations. "Isolation," the judge declared, "is not classification."

The court held in the first proposition of the syllabus that, "laws providing for the public support of the poor are of a general nature," and in the second that "an act by which the general assembly attempts to exempt counties from the operation of general laws on account of trivial differences in population is not of uniform operation throughout the state."

It will be of interest just here to refer back again to one of the earlier decisions under this section of the constitution and compare the opinion of the court with that just quoted. Judge Thurman, in reading the decision of the court in the case of Case v. Dillon,¹ in which case the legislative act of March 24, 1851, authorizing Muskingum county to subscribe to the capital stock of the Cincinnati, Wilmington Railroad Company, was being attacked under section 26, article 2, of the constitution, declared: "It (the act of March 24, 1851) is no more of a general nature than would be an act to authorize the construction of a bridge or the erection of a poor house. As well might it be said that the act

¹. 2 Ohio St., 607, (1851).
authorizing Hamilton county to build a jail (49 Ohio Local Laws, 130), was of a general nature and therefore repealed. All such acts are, of necessity, local in their character."

In the case of State ex rel. Attorney General v. Brown et al. the act of April 21, 1898, 2 "to authorize the commissioners of Cuyahoga county to acquire a site and erect new buildings thereon," was declared unconstitutional. The act provided for the creation of a county buildings commission for the selection and purchase of building sites, the letting of contracts, the issuing of bonds not to exceed in amount $1,500,000, etc. Its operation was expressly limited to Cuyahoga county which county was named in the act. Judge Shawak who read the decision of the court declared that the act by its express terms was limited in its operation to Cuyahoga county; that its subject-matter was one that was of concern to each and every county in the state; that the agencies set up by the act to operate in Cuyahoga were to be found in every other county of the state; that the act took Cuyahoga county out from under the operation of section 2825 of the Revised Statutes and denied to the voters and tax payers of Cuyahoga county the opportunity to vote upon and exercise the control over the expenditure of moneys allowed in other counties of the state. In short, the judge declared, "it provides a local and peculiar scheme with respect to a subject existing everywhere and without a distinguishing condition which counsel have been able to suggest."

1. 60 Ohio St., 463, (1899).
2. 93 Ohio Laws, 587.

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The act was held to be a plain violation of section 26, article 2, of the constitution as repeatedly interpreted and applied by the court.

In the case of Pumph v. The County Commissioners of Lucas county et al.\(^1\) the act of May 5, 1877,\(^2\) "to limit taxation in certain counties in this state," which had been carried over into the Revised Statutes as a part of section 2823, was declared to be in contravention of section 26, article 2, of the constitution. The act as originally passed provided "that the commissioners of each county in this state, having at the last federal census, a population of more than forty-five thousand and less than fifty thousand inhabitants" should levy such tax as might be found necessary to meet the improvement and current costs and expenses of the county; provided that in no case should the levy exceed in any one year five mills on each dollar valuation of property within the county. The act was passed with the intent on the part of the legislature that it should apply only to and have an operation in Lucas county, which was the only county with the designated population. This being the case the codifiers disregarded the circumlocutional verbiage of the original act and made the provision when carried over into the Revised Statutes to read "the commissioners of Lucas county", etc. The section as codified was questioned before the supreme court on the ground that its subject-matter was one of general nature while its operation was limited to Lucas county.

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1. 69 Ohio St., 449, (1904).
2. 74 Ohio Laws, 180.
The opinion of the court was read by Judge Davis who reviewed the history of the section and its operation, and declared that inasmuch as the subject-matter of the act was taxation it was of vital interest and concern to every voter in the state and must under the constitution have a uniform operation throughout the state, and that since the act was expressly limited in its operation to Lucas county it was in contravention of section 26, article 2, of the constitution. This attempt, the judge declared, "to confer upon the commissioners of Lucas county such an extraordinary and special privilege and power in respect to matters affecting every county and individual in the state, a privilege and power denied as to all other counties in the state, is therefore null and void."

County Officers.

In the cases of the State of Ohio ex rel. Guilbert, Auditor, v. Yates, Auditor of Pickaway county1 the legislative acts of April 22, 1896,2 "relating to the duties and compensation of certain county officers in Pickaway county," and March 29, 1898,3 amendatory thereto, were declared unconstitutional as contravening section 26, article 2 of the con-

1. 66 Ohio St., 546, (1902).
2. 92 Ohio Laws, 597.
3. 93 Ohio Laws, 507.

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stitution. Section 1 of the earlier act fixed the annual salaries of certain county officers of Pickaway county therein named: the probate judge, for instance, was to receive $2,600; the auditor, $2,900, the treasurer, $2,800. The opinion of the court was read by Judge Davis, who declared in his opening statement: "These acts are undeniably special; and, to us at least, it seems almost as manifest that their subject-matter is of a general nature and that neither of them contains the attributes of legitimate local legislation.* * * They are special, because they are in terms restricted in their operation to Pickaway county. They are of a general nature, because the subject of legislation is a matter of general concern to the state and to every county in the state and to the inhabitants thereof. * * * They are not legitimate local bills, because the subject-matter is not peculiar to the localities named and it does not appear that there was any necessity for such legislation either in time, place or circumstance."

In the first proposition of the syllabus of the decision the court held that: "County officers are not local officers, but are a part of the permanent organization of the government of the state, and the subject of compensation to county officers is not local in its nature, and an act of the general assembly upon that subject is a law of a general nature which must operate uniformly throughout the state." The reaching of this conclusion involved the overruling of the case of Pearson et al. v. Stephens

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et al.\textsuperscript{1} in which case the court had held only five years before that the act in question before the court,\textsuperscript{2} prescribing the compensation for certain county officers of Miami county and limited in its operation to that county, "relates to a subject local in its nature, and therefore does not conflict with section 26 of article 2 of the constitution of this state." The decision in this case was based largely upon the earlier case of Cricket v. The State of Ohio\textsuperscript{3} in which Judge White had declared: "It seems to me the compensation to be attached to a local office is a question in its nature local, and that a law to regulate such compensation can not properly be regarded as a law of a general nature." This dictum of the judge seems to have been accepted and concurred in by the court in the case of Pearson et al. v. Stephens et al., in principle at least, for the first proposition in the syllabus of this case sustains the act then in question before the court on this very point.\textsuperscript{4} In fact the practice of providing for the compensation of county officers by local and special legislation with a limited operation was not only one of long standing but one which had affected in one way or another practically every county in the state. Judge Davis included as a part of the opinion of the court (in the case of State ex rel. Guilbert v. Yates) a tabulated statement of the special salary bills that had already found a place upon the statute books,\

\textsuperscript{1} 56 Ohio St., 126. (1897).
\textsuperscript{2} Act of April 21, 1896; 92 Ohio Laws, 567.
\textsuperscript{3} 18 Ohio St., 9221.
\textsuperscript{4} Act of May 1, 1862.
and a few summary statements based on this tabulation. These summary statements were as follows: "1. Already more than half the counties of Ohio have special laws regulating the compensation of county officers by salary, while the other half compensate by fees. 2. In the counties compensating by salary neither the officers provided for nor the salary are uniform. 3. In many counties, for example Pickaway, some of the county officers are compensated by salary and others by fees."

After citing the above irregularities and inequalities the judge stops to query whether they can be eradicated by general laws having a uniform operation throughout the state. And then, curiously enough, we find this sentence: "Perhaps it might be accomplished, as suggested *arguendo* by Judge Renney in *Crockett v. State*, by compensation graduated upon population, or perhaps, by compensation graduated upon the income of the office, or again through the medium of a state board of commissioners whose duty it would be to regulate compensation; but it must be borne in mind that the uniformity in compensation which is required, is not uniformity in the total amount received, but uniformity in the rate of compensation, that is, that the same compensation shall be paid for the same
services. Since the judiciary takes so kindly to the friendly advice proffered it by the legislature in matters purely judicial in their nature one cannot but wonder what beneficial effect such friendly and helpful _sugGESTiNG_ advice as that above will have upon the law making branch of our government! The possible legislative remedies did not detain the judge long, however, for he hastened on to declare, in conclusion, "we are satisfied at all events that the loose construction of the constitution in which this court has heretofore indulged, is in part responsible for the abnormal condition of things shown above and we feel disposed to distinctly and finally repudiate it now."

In the case of The State of Ohio ex rel. Allison v. Garver _et al._ the court held the legislative act of April 26, 1898, "to limit the compensation of county officers in Holmes county," null and void as contravening both the first and second clauses of section 26 of article 2 of the constitution. Section one of this act provided, "that in Holmes county, the compensation of the county officers hereafter

---The reader will do well to note that had any one of the proposals set forth here been accepted and carried to its logical conclusion by the legislature the court would have ---in fact has in similar instances---nullified the action of the legislature on the ground that such laws were without uniform operation throughout the state and therefore null and void. In view of this fact it would seem that the judiciary would do well to follow the advice it has on many occasions suggested that the legislature was in peculiar need of when that body had encroached upon the rights of the judiciary.

2. 66 Ohio St., 565, (1902).
3. 93 Ohio Laws, 660.
elected in said county shall be by annual salary exclusively, except as otherwise provided in this section, to be paid in monthly installments as follows: (here follows an enumeration of salaries and fees for each of the several county officers.)

Section 13 of the act provided that the act should become a law when and in case a majority of the electors voting thereon at the next general election voted in favor of the law.

Judge Davis, who read the decision of the court, declared that the act was in contravention of the first clause of section 25, article 2 of the constitution, because it was a law of a general nature without a uniform operation throughout the state; that it contravened the second clause of the same section of the constitution, because it was passed to take effect upon the approval of an authority other than the general assembly; and that the act, in effect, was an attempt on the part of the legislature to delegate its legislative powers and that "even without the limitations contained in section 25, article 2, it could not be delegates" since section one of article two of the constitution provides that:

"The legislative power of this state shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives." This legislative power cannot be delegated to any other body or bodies.

In the case of State v. Lewis¹ the court declared some

twenty-five or more sections of the Revised Statutes, which had been passed or amended in one form or another by the legislature in some half dozen or more different acts, unconstitutional and void as contravening the 26th section of article 2 of the constitution. All of these acts and sections had as their subject-matter the compensation of certain of the county officers of Hamilton county. The decision of the court was read by Judge Davis who reviewed and approved the ruling of the court in State ex rel. v. Yates, and declared this ruling of the court to be "broad enough in its terms to include Hamilton county and to dispose of the issues" in the case before the court. "County officers," the judge repeated, "are not local officers, and even if they were conceded to be such the matter of their compensation is not necessarily local." The circuit court had sustained the acts in question and had refused the writ of mandamus prayed for on the authority of State ex rel. v. The Judges, 1 in which case certain of the acts now in question before the court had been held by the court to be valid enactments. In the first proposition of the syllabus of the latter case the court had held that the laws in question "which can only operate in Hamilton county, are not laws of a general nature, but of a local nature, and are therefore, not in conflict with section 26 of article 2 of the constitution." This decision, Judge Davis declared in the case at bar, is erroneous and, in the unanimous opinion of the court, contrary to the true meaning

1. 21 Ohio St., 1, (1871).
and intent of the constitution; it was accordingly, formally overruled.

In the case of State v. Lewis, the acts of April 20, 1885, and April 10, 1888, "to secure a fuller and better return of property for taxation, and prevent omissions of property from the tax duplicate," were declared unconstitutional and void as contravening section 26, article 2 of the constitution which provides that "all laws, of a general nature, shall have a uniform operation throughout the state." Section 1343a as amended April 20, 1885, provided "that the county commissioners, county auditor and county treasurer, or a majority of said officers of any county in this state containing a city of the first class, and in any county containing a city of the first grade of the second class, shall have full and final power to employ any person or persons" to act as tax inquirers within the county. This section, because of the above terms limiting its operation to counties containing a city of the first class or a city of the first grade of the second class, and having an operation in only four of the eighty-eight counties of the state, was declared unconstitutional as contravening section 26 of article 2 of the constitution. Section 1343-1 of the act of April 10, 1888, provided that "the county commissioners, county auditor, and county treasurer, or a majority of said officers in any coun-

1. State ex rel. Wilson, County Solicitor, v. Lewis, Auditor et al., 74 Ohio St., 403, (1906).
2. 82 Ohio Laws, 152.
3. 85 Ohio Laws, 170.
ty, when they have reason to believe that there has not been a full return of property within the county for taxation, shall have power to employ any person to act as tax inquisitor within the county. Note that the provisions of this section are applicable to each and every county of the state, dependent only upon the needs of the county as determined by the officers named in the act. So far the act is one having a uniform operation throughout the state. The fatal limitation, however, was not to be omitted for in the fourth and last section of the statute it provided: "This act shall not in any manner affect the provisions of sections 1343a and 1343b of the Revised Statutes of Ohio as enacted April 20, 1885." The earlier act was held unconstitutional because it was limited in its operation to only four of the eighty-eight counties of the state, and the latter act was held unconstitutional because it operated in all of the eighty-eight counties except these four. These two acts were undoubtedly intended by the legislature to have a concurrent operation and thus meet the needs of each and every county in the state. Neither of the acts, however, because of the exception of four counties in the one instance and the operation of the act in only these four in the other, met the constitutional requirement that "all laws, of a general nature, shall have a uniform operation throughout the state."
Municipalities and Legislation Relating Thereto.

The remaining cases under this section of the constitution are concerned in one way or another with municipal corporations, municipal government, the classification of municipalities, etc. These cases will now be discussed in chronological order.

The case of Fulk, Exp. 1 involved the constitutionality of section 1924 of the Revised Statutes, which provided that any person found in any city of the first grade of the first class, or within four miles thereof, "having in his possession any burglar's tools, or implements of any kind commonly used by burglars in breaking or entering houses" should be deemed guilty of a misdemeanor, and upon conviction thereof, be fined or imprisoned, or both. The defendant in the case at bar had been convicted under this statute which he maintained was unconstitutional and void, as being in contravention of section 26, article 2 of the constitution. The district court of Hamilton county had sustained the law and the defendant had appealed to the supreme court to reverse the lower court and declare the law void. This was one of the earlier cases under section 26, article 2, and the court as yet was hardly sure where it stood in its interpretation and application of this constitutional limitation. The power of the legislature to classify municipal corpora-

1. 42 Ohio St., 638, (1885).
tions for legislative and governmental purposes had been
declared by the court to be a power to be exercised by the
legislature limited only by its conscience and judgment in
the matter. The court, accordingly, limited its decision in
the case at bar to the one question before it, namely--was
section 1924 of the Revised Statutes in contravention of
section 26, article 2, of the constitution? In answering
this question the court declared: "We content ourselves by
holding, that a statute providing punishment for an act which
is malum in se wherever committed, is a law of a general na-
ture, and to be valid under the constitution, article 2,
section 26, must have a uniform operation throughout the
state."

This is the first instance in which the subterfuge of
classification of municipalities failed in its purpose of
sustaining a law of a general nature, having a limited and
local operation, under section 26, article 2, of the consti-
tution. The court had repeatedly recognized and sustained
the validity of the classification of cities incorporated in
sections 1546-1550 of the Revised Statutes, and in the case
of State v. Brewster1 had declared the reasons underlying
that classification both cogent and satisfactory, holding
that "statutory provisions with respect to any such class
are for governmental purposes, general legislation, and not
in conflict with article 2, section 26" of the constitution.
This subterfuge had not, however, always been so successfully
1. 39 Ohio St., 658, (1884).

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used in connection with other sections of the constitution, 
for in the case of State v. Mitchell\(^1\) the court had held 
that the legislative act of March 30, 1875, "to provide for 
the improvement of streets and avenues in certain cities of 
the second class" was "a special act conferring corporate 
power on the city of Columbus; and * * * therefore, in con-

cflict with section 1, article 13, of the constitution."

In the case of State v. Richard Winch\(^2\) the legislative 
act of April 12, 1876,\(^3\) to prevent gambling and the sale of 
intoxicating liquors at, on or within a distance of two miles 
of Chippewa lake, in the county of Medina, was declared to 
be in contravention of section 26, article 2 of the constitu-
tion and void. The opinion of the court in this case is 
extremely brief, being limited to a statement declaring the 
act in question to be in contravention of section 26, arti-
cle 2 of the constitution which ordains that "all laws of a 
general nature shall have a uniform operation throughout 
the state." The grounds upon which the act was held void 
were not stated in the decision. Counsel in the case of 
Mott v. Hubbard some twelve years later stated that this act 
was declared unconstitutional and void by the court because 
"there was no classification" provided for within the act. 
This statement must, however, if accepted at all, be accept-
ed as a statement and interpretation of the court's action

\(^1\) 31 Ohio St., 522, (1877).
\(^2\) 45 Ohio St., 663, (1888).
\(^3\) 73 Ohio Laws, 321
\(^4\) 59 Ohio St., 209, (1898).
by counsel and not as a statement from or by the court.

In the case of Costello v. Wyoming\(^1\) the act of April 16, 1891,\(^2\) to authorize the council of any village in any county containing a city of the first grade of the first class, in which no sidewalks had been constructed under certain sections of the Revised Statutes, to construct the necessary sidewalks and assess the costs and expenses upon the abutting lots and lands, according to the front feet bounding or abutting upon such improvement, was declared unconstitutional and void, as contravening the clause of the constitution requiring that "all laws of a general nature shall have a uniform operation throughout the state." The opinion of the court in this case was read by Judge Dickman who declared that the subject matter of the act was one of general interest and that the constitutionality of the act depended upon the validity of the classification upon which the operation of the act was based and which had been used in designating the villages included within the operation of the act. If this classification was a reasonable one and within the requirements of the constitution, the act, the court held, could be sustained but if not then the act must be declared void. In stating the findings of the court the judge declared: "In our judgement, the villages designated in the act as authorized to construct sidewalks as therein provided, do not constitute such a classification as will meet the requirements of the

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1. 49 Ohio St., 202 (1892).
2. 88 Ohio Laws, 311.
constitution." The necessity of, and the power of the legislature to make, a reasonable classification of municipal corporations for purposes of government was granted by the court; but the doctrine that "the mode and extent of classification is left to the conscience of the legislature" was, however, no longer acceptable to the court which held in this case, on the authority of *Falk, ex parte*, that section 26, article 2, of the constitution is mandatory, and that a failure on the part of the legislature to observe it will be fatal to the validity of any statute. In other words the court no longer felt that it could trust to the conscience of the legislature (which had acted and which was for another decade to continue to act in this matter of the classification of cities as though it had no conscience or sense of right and public duty). and that it was the duty of the court under the constitution to determine whether or not the classification made by the legislature in any particular case was valid and in accordance with the requirements and limitations of the constitution.

A classification based upon the "obvious principle * * * of population" the court held was a reasonable and satisfactory classification. The needs of large and populous municipalities and the outlying villages were, in the opinion of the court, different from the needs of small municipalities and villages surrounded by large rural areas. The statute in question did not classify villages upon the basis of population but made "a new and unique classification * * * found-
ed on an incident or characteristic, arbitrary and restrictive, unreasonable and illusory," providing that all villages situated in counties containing a city of the first grade of the first class which had failed to construct sidewalks in accordance with certain named sections of the Revised Statutes should constitute a new class. This was not, in the opinion of the court, a reasonable and valid classification within the meaning of the constitution. The failure on the part of a village or villages to take advantage of certain previous legislation did not, declared Judge Dickman, "constitute an appropriate and reasonable basis for their separate classification."

In the case of the City of Kenton et al. v. State ex rel. 1 the court declared the legislative act of April 27, 1893, 2 "to re-district certain cities of the fourth grade of the second class," unconstitutional and void, as contravening section 26, article 2, of the constitution. This act provided "that in every city of the fourth grade of the second class which had at the last federal census a population not less than 5550 and not greater than 5560, or which at any subsequent federal census" should have such population, the mayor upon being petitioned to do so, should appoint a board to redistrict the city. The validity of the statute was attacked on the ground that the classification upon which it was based was not a reasonable one within the meaning of the constitutional limitation upon the legislature which re-

1. 52 Ohio St., 59, (1894).
2. 90 Ohio Laws, 287.
quired it to give to all laws of a general nature a uniform operation throughout the state.

In the case of State v. Hudson, 1 eight years before, the court had held that an act which applied to all "cities of the first grade of the first class" was a constitutional act, notwithstanding there was only one such city, because the act applied to all cities in that class. And in the case of State v. Toledo, 2 just three years before, the court had sustained an act authorizing "cities of the third grade of the first class" to borrow money for the purpose of sinking gas wells, etc. In fact the court had unreservedly committed itself to the classification of cities based upon population. In the case of State v. Hudson Judge Follett had declared; "The peace and prosperity of these cities, and the best interests of the state, require that this system of classification be regarded as stare decisis and settled. * * * Under the power to organize cities and villages * * * the general assembly is authorized to classify municipal corporations, and an act relating to any such class may be one of a general nature." The case of the city of Kenton v. State, now under discussion, is the third case in which the court has nullified the legislature's attempt to create a class within a class for the purpose of meeting the limitation imposed by section 26, article 2, of the constitution. This act, the judge declared, could and was intended by the legislature to

1. 44 Ohio St., 139, (1882).
2. 48 Ohio St., 112, (1891).

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apply only to the city of Kenton when it was passed, since no other city could come within the operation of the act without additional legislation. "We discover no reason why cities of the fourth grade of the second class, because at the last federal census they had a population not less than five thousand five hundred and fifty, and not greater than five thousand five hundred and sixty, should require exclusive legislation; and a classification of such cities by themselves, upon such a basis is, in our judgment, too restrictive, uncertain and illusory, to relieve the act from the constitutional infirmity of not being uniform in its operation throughout the state, but local and special in its character," the court declared.

In the case of the City of Cincinnati v. Steinkamp, Trustee, sections 32 and 61 of the act of February 28, 1886, entitled, "an act to regulate the construction of buildings within any city of the first class and first grade," were declared unconstitutional as contravening section 26, article 2, of the constitution. These sections provided that all buildings of three or more stories, except private residences, should in all cities of the first grade of the first class have suitable fire escapes; and authorized any court having equity jurisdiction to enforce the provisions of the act.

Judge Spear who read the decision of the court declared that the law was one of a general nature, limited by express terms to Cincinnati; and that it was, therefore, in contraven-

1. 54 Ohio St., 284, (1896).
2. 86 Ohio Laws, 34.
tion of section 26, article 2, of the constitution. "The constitutional requirement of uniform operation throughout the state is not answered by showing that the law is of uniform operation within one city of the state only, however populous," the judge declared, "and even though described as a city of the first grade of the first class, if it appears * * * * * * * * * * that the conditions undertaken to be legislated upon are common to other sections of the state generally." Does this decision mean the overturning of the earlier decisions of the court sustaining legislative acts upon the doctrine of classification? Logically it would seem so, and probably would have been so interpreted had not the judge in concluding declared: "It is not intended by this holding to overturn earlier decisions of the court upon kindred questions. Each case stands and must stand, upon its peculiar facts and circumstances. The matter of discrimination between cases is often one of nicety."

In the case of Gaylord et al. v. Hubbard, Treasurer,¹ section 5 of the act of April 13, 1892,² "to provide for the appointment of a board of equalization and assessment in cities of the second grade of the first class," was declared unconstitutional and void, as contravening section 26, article 2, of the constitution. This section authorized the annual board of equalization in the city of Cleveland to set values upon the property of whole districts without giving personal

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1. 56 Ohio St., 25, (1897).
2. 89 Ohio Laws, 283.
notice to the owners of such property, and conferred upon
this board powers not conferred upon the annual board of
equalization in other parts of the state. The case was at-
tacked before the court on constitutional grounds. The plain-
tiffs in error contended that their taxes had been illegally
and unduly raised under this section of the law, which they
maintained was unconstitutional and void, being an act which
conferred upon the Cleveland annual board of equalization
powers materially different from those conferred upon all
other boards of equalization within the state. The court
accepted the argument presented by the plaintiffs in error
on this point for the most part and declared that the sub-
ject-matter of the act was one of a general nature; that the
operation of the act was expressly limited to Cleveland; that
it imposed "a burden upon the owners of real property situat-
ed in cities of the second grade of the first class (Cleveland), not imposed upon the owners of real property, situat-
ed in other parts of the state"; and that the section in
question was a violation of section 26, article 2, of the
constitution which requires that "all laws, of a general
nature, shall have a uniform operation throughout the state."

In the case of State ex rel. Wilmot et al. v. Buckley et
al.\(^1\) section 2926b of the Revised Statutes, as amended April
16, 1896,\(^2\) and providing that "in all such cities of the first
and second class, except Mansfield and cities of the fourth

\(^1\) 60 Ohio St., 273, (1899).
\(^2\) 92 Ohio Laws, 166.
grade of the first class, a 'board of elections,' to consist of four electors of such city, shall be appointed by the mayor," was declared unconstitutional and void, as contravening section 26, article 2, of the constitution. Judge Burket who read the decision of the court in this case declared that the subject of elections with which this section of the Revised Statutes was concerned was a general subject-matter, and that the exception of Mansfield and cities of the fourth grade of the first class from the operation of the act contravened the constitutional requirement that "all laws, of a general nature, shall have a uniform operation throughout the state." The whole section including the repealing clause was declared unconstitutional and inoperative. This left section 2926b of the act of April 28, 1890, in force. And this section was attacked on the ground that it operated only in cities and not in other parts of the state. The court held that this section was saved by "the doctrine of the classification of cities," which was a reasonable doctrine. The judge did not stop here, however. He continued: "But while such classification when applied to cities may be thus upheld, there is no authority for the classification of counties as to elections. As to subjects of a general nature, laws must have uniform operation, and they cannot be made to operate in some counties and be excluded from others." Municipalities and counties had from the adoption of the constitution been regarded as occupying

1. 87 Ohio Laws, 369.
a different status under the constitution and before the law. Nowhere is this difference emphasized more often than in the interpretation and application of section 26, article 2 of the constitution.

In the case of State ex rel. Sheets v. Cowles et al.\(^1\) the legislative act of April 6, 1900,\(^2\) entitled "an act to provide a board of park commissioners, and to provide for the acquisition of grounds for parks, park entrances, park driveways and boulevards, and for the improvement, management and control of the parks, park entrances, park driveways and boulevards, in cities of the second grade of the first class," and the act of April 16, 1900,\(^3\) supplementary thereto, were declared unconstitutional and void, as being in contravention of section 1, article 13, and section 26, article 2, of the constitution. These acts provided for the appointment of a board of park commissioners in cities of the second grade of the first class, that is to say in Cleveland, authorized these commissioners to improve and control any public highway, road, street, avenue or alleyway or ground of any kind within or without such city, and created a class of misdemeanors by provisions peculiar to Cuyahoga county.

Chief Justice Shawel who read the decision of the court in this case declared that the acts in question were acts of a general nature with a limited operation; that they were unconstitutional and void, being in contravention of section

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1. 64 Ohio St., 183, (1901).
2. 94 Ohio Laws, 617.
3. 94 Ohio Laws, 670.
1. article 13, because they conferred corporate powers upon
the municipal corporation of Cleveland; and that they contra-
vened section 26, article 2, because they were concerned with
the establishment of boards of park commissioners, with pub-
lic roads and with misdemeanors, all of which are subjects of
a general nature and under the constitution require for their
validity a uniform operation throughout the state. Counsel
claimed that the acts though special in operation and effect
were in form general and therefore valid, being saved by the
doctrine of classification. To this the court replied that
legislation based upon the doctrine of classification was
originally sustained upon the theory that the classes establish-
ed would remain unchanged and that in the progress of the de-
velopment of the cities of the state they would be advanced
from one class to another. This judicial prophecy, the Chief
Justice declared, had never been fulfilled. While the court
was not, as yet, prepared to reverse its earlier acts and
overturn its earlier decisions sustaining the validity of
the legislative classification of cities for purposes of leg-
islation and government, the majority of the court were pre-
pared to follow the Chief Justice in declaring that "a doc-
trine so completely discredited should not be extended."

In the case of State ex rel. Attorney General v. Ketter
at al.\(^1\) the legislative act of April 14, 1900\(^2\) entitled,"an
act for the protection of life and property in cities of the

\(^1\) 66 Ohio St., 588, (1901).
\(^2\) 94 Ohio Laws, 611.
first grade of the first class," was declared unconstitutional and void on the authority of Cincinnati v. Steinkamp,\textsuperscript{1} as contravening section 26, article 2.\textsuperscript{2} 

In the case of Platt v. Craig, Daly, James et al.\textsuperscript{3} the act of April 14, 1900, to supplement section 2335 of the Revised Statutes, and providing "that any city of the third grade of the first class, may, subject to the provisions herein contained, construct, reconstruct, enlarge or repair a bridge or bridges, across any navigable river or rivers, passing into or through any such city," was held unconstitutional as contravening section 1, article 13, and section 26, article 2, of the constitution.

Judge Davis who read the decision of the court in this case declared that the powers conferred by the act were limited to and conferred upon the city of Toledo; that the act was a special act conferring corporate powers and, therefore, in conflict with section 1, article 13 of the constitution which provided that "the general assembly shall pass no special act conferring corporate powers"; that the plea that municipal corporations are exempt from the constitutional limitation of section 1, article 13, was without reason, for the constitution makes no distinction between private and municipal corporations in this connection; that the act contravened section 26, article 2, of the constitution, because, being a law whose subject-matter was roads and bridges, which was a

\begin{enumerate}
\item 54 Ohio St., 284, (1896).
\item This case is reported very briefly.
\item 66 Ohio St., 76, (1902).
\item 94 Ohio Laws, 175.
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subject-matter of a general nature, it requires for its validity a uniform operation throughout the state upon the class named—a uniformity of operation which this act did not have. Disclaiming any intention of discussing, approving or disapproving "the much mooted doctrine of classification of municipal corporations," the judge declared that if this power of classification is to be exercised at all it must be done by general laws and not by special acts such as the one under consideration. This act attempted to set up a class of cities within a class and composed only of those cities of the third grade of the first class which had a navigable river or rivers passing through them. Such a classification was, in the opinion of the court exceedingly artificial and a sham classification. In the first proposition of the syllabus of this case the court held that the act of April 14, 1900, was a special act conferring corporate powers and therefore in conflict with section 1, article 13; and in the second proposition of the syllabus that "the said act being upon a subject of a general nature, and local in its operation, and it not appearing that any such local and temporary emergency exists as to justify and require special legislation, the act is in conflict with article 2, section 26, of the constitution of Ohio." Judge Burket dissented from that part of the second proposition of the syllabus which referred to an emergency; he declared "there is no emergency clause in the constitution, and none can be grafted thereon by this court or the general assembly."
VI

Power to Elect or Appoint to Office.

Section 27, article 2: "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by laws; but no appointing power shall be exercised by the general assembly, except as prescribed in this constitution, and in the election of the United States senators; and in these cases the vote shall be taken 'viva voce.'"

In the case of State ex rel. Attorney General v. Kennon et al. 1 two legislative acts passed April 12, 1858, were declared unconstitutional as contravening section 27, article 2 of the constitution. The first of these acts was entitled "an act to provide for the more expeditious completion of the new state house, prescribing the order in which it shall be done." 2 Section 1 of this act provided that a board of three persons, to be known as "the commissioners of the state house," should be appointed by William Kennon, Asahel Medbery, and William B. Caldwell, under whose direction, control and authority the work of the state house should be carried to completion. The second act was entitled "an act providing for the appointment and more thorough system of accountability of officers of the Ohio penitentiary, fixing their compensation, prescribing their duties, and determining the manner of working convicts." 3 Section 1 of this act

1. 7 Ohio St., 546, (1857).
2. 55 Ohio Laws, 122.
provided that the said William Kenyon, Asahel Medbery, and
William B. Caldwell, or a majority of them, should appoint
a board of three directors of the Ohio Penitentiary, fill
vacancies occurring in said board of directors, remove said
directors for cause, etc. The attorney general instituted
quo warranto proceedings against the three men named in the
acts to compel them to show by what warrant they claimed to
have, to hold, and to assume to exercise the powers, duties
and privileges conferred by the above named acts.

The opinion of the court in this case was delivered by
Judge Brinkerhoff who declared that the legislature had full
power to direct by law the manner in which all offices exist-
ing or to be created by law or vacancies occurring therein
shall be filled, either by election or appointment, except
in cases provided for by the constitution; that "directing
by law the manner in which an appointment shall be made, and
making an appointment, are the exercise of two different and
distinct powers: the one prescribing how an act shall be done,
being legislative; and the other, doing the act, being admin-
istrative"; and that while the general assembly could by
legislative act provide for the creation of a board and auth-
orize it to appoint commissioners of the state house, and
also for a board of directors of the state penitentiary, it
could not exercise the power of appointing the officers of
such boards without exercising "appointing power," which was
specifically forbidden by section 27, article 2, of the con-
stitution which provides, in part, that "the election and

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appointment of all officers * * * * shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the general assembly."

In the case of the State of Ohio ex rel. Kelly v. Thrall\(^1\) the act of April 26, 1898,\(^2\) to amend sections 1202 and 1203 of the Revised Statutes, was held unconstitutional, being a violation of article 10, section 2, and article 2, sections 26, and 27. Section 1202 of the Revised Statutes prior to the enactment of this amending act provided that "there shall be elected in each county biennially a sheriff and coroner who shall hold their office for two years, beginning on the first Monday of January next after their election." The only change made by the amending act was to substitute for the words underscored the following: "beginning on the first Monday of September next after their election." The effect of this act was to create a vacancy in the office of sheriff and coroner from the first Monday in January, 1899, to the first Monday in September of that year. Section 27, article 2, of the constitution specifically conferred upon the legislature the power to provide for the appointment or election of all officers, and the filling of all vacancies not otherwise provided by the constitution. This broad grant of power the court held was limited by article 10 of the constitution, which (in section one) requires that the leg-

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1. 59 Ohio St., 368, (1899).
2. 93 Ohio Laws, 351.
islature provide by law for the election of the necessary
township and county officers; that (section two) county of-
ficers shall be elected on the first Tuesday after the first
Monday in November, for such term, not exceeding three years,
as may be provided by law; and (section 3) that no person
shall be eligible for sheriff or treasurer for more than four
years in any period of six years. The court further held
that the power conferred upon the legislature, by section 27,
article 2, to fill vacancies, applied to cases, and only to
cases, occurring fortuitously, and that "the power to pro-
vide for the filling of such vacancies does not imply a pow-
er to create an interval in the office between the official
terms of two persons elected to fill it." Judge Shauck who
read the opinion of the court in this case declared that
"with respect to the interval which the general assembly
has attempted to create by the legislation in question it is
'otherwise provided' by the 10th article" of the constitu-
tion.

Counsel argued that the act in question did not create
a vacancy in the office, because it was intended by the leg-
islature—since it did not otherwise provide—that the sher-
iff and coroner in office on the first Monday in January,
1899, should continue in office until the first Monday in
September following. The court replied to this argument by
calling attention to the limitation imposed upon section 27,
article 2, by section 3, article 10, which provides that no

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person shall be or hold the office of sheriff in any county for more than four years in any period of six years. The court then pointed out that it was cognizant of the fact that there were certain counties in the state whose sheriffs would be affected by this constitutional limitation. As to the number of such instances, the court declared it was relatively unimportant, because "in view of the general nature of the subject the act is void since it cannot operate in every county of the state" (section 25, article 2).

The legislature in enacting the above mandatory act exceeded its constitutional powers in three particulars: first, in that it provided for an interval between the official terms of sheriffs and coroners and those elected to succeed them; second, in creating vacancies in certain county offices and providing for the filling of vacancies which had not occurred fortuitously; and third, in passing an act of a general nature which did not have and which could not have, because of constitutional limitations, a uniform operation throughout the state, thus contravening article 10, section 2 and article 2, sections 25 and 27, respectively.

In the case of State ex rel. The Attorney General v. Beal,¹ the act of April 19, 1898,² postponing the beginning of the official terms of prosecuting attorneys from the first Monday in January to the first Monday in Septem-

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1. 60 Ohio St., 208, (1899).
2. 93 Ohio Laws, 125.
ber, and the act of April 26, 1898, 1 effecting a like post-
ponement in the office of infirmary directors, were declar-
ed unconstitutional and void as being legislative acts pur-
porting to effect a change which it was not within the con-
stitutional powers of the legislature to effect in the man-
ner adopted to effect the postponement and change in the
time of the beginning of the official terms of the officers
named. Both acts were held to contravene section 27, arti-
cle 2, of the constitution which expressly limits the leg-
islature's appointing power and imposes upon it the duty
of providing by law for the election or appointment of of-
ficers not provided for in the constitution, and section 2,
article 10, of the constitution which expressly requires that
county officers shall be elected by the electors of each
county. These acts effected a postponement in the begin-
ing of the official terms of the officers named without
providing any machinery whatever for the constitutional el-
lection of officers to fill the interim vacancy thus created
and this too when there was not "in any other statute in
force at the time of their passage, any provision for the
election of a prosecuting attorney or an infirmary director
for the interim contemplated." These offices being county
offices could not, in the opinion of the court, under the
limitations of section 2, article 10, be filled otherwise

1. 93 Ohio Laws, 261.
than by election; failure to provide a procedure and set up machinery whereby the interim created by the act could be filled rendered the acts ipso facto null and void so that there were no vacancies to be filled either by appointment or otherwise. The decision of the court in the case of State of Ohio ex rel. Kelly v. Thrall,\(^1\) supra, was followed and approved.\(^2\)

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1. 59 Ohio St., 368, (1899).
2. In the case of State ex rel. Attorney General v. Brown, (60 Ohio St., 499,1899), the court held, on the authority of the next two preceding cases discussed above, that the act of May 19, 1894, (91 Ohio Laws, 338), changing the time of the commencement of the official terms of the county commissioners was when passed unconstitutional and void, but further held that inasmuch as no action had been brought to test the validity of the act until more than a year after all vacancies had expired "that it was then too late to test the validity of the statute by proceedings in quo warranto, and that the term of office of each county commissioner now in office must be regarded and held to have commenced on the third Monday of September next after his election" as provided by the act in question before the court; notwithstanding the fact that such act when passed was an unconstitutional act.
Section 29, article 2: "No extra compensation shall be made to any officer, public agent, or contractor after the services shall have been rendered or the contract entered into; nor shall any money be paid on any claim the subject matter of which shall not have been provided for by pre-existing law, unless such compensation or claim be allowed by two-thirds of the members elected to each branch of the general assembly."

In the case of John Fordyce v. James H. Godman, Auditor of State,\(^1\) the legislative acts of April 30, 1869,\(^2\) "to provide for the payment of claims growing out of the military expedition of John H. Morgan in the State of Ohio, A.D., 1863," and May 5, 1869,\(^3\) "making appropriations for the year 1869, and the first quarter of 1870," appropriating the funds necessary to pay the claims allowed in the former act, were declared unconstitutional, being in contravention of section 29, article 2 of the constitution. The case came before the court in the form of an application for a writ of mandamus to compel the state auditor to issue his warrant upon the state treasurer to pay the plaintiff's claim as provided in the above acts. The auditor made answer that the acts were incapable of authorizing him to issue his warrant

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1. 20 Ohio St., 1, (1870).
2. 66 Ohio Laws, 66.
3. 66 Ohio Laws, 100.

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upon the treasurer for the payment of the said claims, since they provided for the payment of a claim which had not been previously provided for and since they had not been passed by the necessary two-thirds majority as required by the constitution in all such cases. In support of his argument the auditor presented statements showing that the act of April 30, 1869, had been voted for by only 60 of the 105 members of the house and by only 19 of the 37 members of the senate and that the act of May 5, 1869, had been voted for by only 19 of the 37 members of the senate.

The opinion of the court was read by Judge Scott, who declared that in view of the constitutional limitations imposed by section 29, article 2, and in view of the facts related by the auditor to the effect that the acts provided for the payment of a claim the subject matter of which had not been provided for by previous legislation; and in view of the fact that in such cases an appropriation to satisfy the claim, to be valid, must be allowed by two-thirds of the members elected to each branch of the general assembly; and that since the legislative journals failed to show that the required two-thirds of the membership of each house had voted for the appropriation acts in question they were incapable of authorizing the auditor to issue his warrant upon the treasurer for the payment of the said claim or claims. The writ of mandamus prayed for was, accordingly, refused.
In the case of the State of Ohio ex rel. Field et al. v. Williams, Auditor of State,¹ senate resolution of May 1, 1877, resolving "that the first and second assistant sergeant-at-arms be allowed the per diem of twenty days for extra and faithful services performed during the sessions of the general assembly, and that the president of the senate be authorized to certify to said per diem," was held unconstitutional, being inhibited by section 29, article 2, of the constitution which provides, in part, that no extra compensation shall be allowed to any public agent or officer after the services shall have been performed, unless such compensation shall have been provided for by pre-existing legislation or be voted by a two-thirds majority of the members of each house of the legislature. The case at bar came before the court in the form of an application for a peremptory mandamus to compel the auditor to issue his warrant for the payment of the relators as provided in the above resolution. Judge Gilmore who read the decision of the court declared that the resolution in question contravened the first clause of section 29, article 2 of the constitution in that it allowed extra compensation to public officers for their services after such services had been rendered, and that the resolution might just as well have provided that "one hundred dollars as extra compensation" shall

¹ 34 Ohio St., 218, (1877).
be allowed and paid out of the public treasury to the officers named for services which have been heretofore performed; the judge also declared that the resolution contravened the second clause of section 29, article 2, in that "there was no pre-existing law upon which the resolution of the senate" to pay the stipulated extra compensation, was based; that it did not appear that the resolution had been passed by the necessary two-thirds majority of the members of each house of the legislature as required by the last clause of section 29, article 2, of the constitution; and that the resolution was, therefore, unconstitutional and void.

The court held in the first proposition of the syllabus of this case that "a single branch of the general assembly cannot, by resolution, allow compensation for extra services performed by the sergeant-at-arms, such compensation being inhibited by section 29, article 2, of the constitution unless the services were provided for by pre-existing law, or the allowance be ratified by two-thirds of the members elected to each branch of the general assembly."
CHAPTER IV

THE JUDICIARY, ITS ORGANIZATION, JURISDICTION,
POWERS AND DUTIES.

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The legislative acts declared unconstitutional and void in the cases that follow were concerned in one way or another with one or more of the provisions, requirements or prohibitions set forth by the constitution on the general subject of the judiciary, its organization, jurisdiction, functions, powers, duties, etc. In a few instances, in the cases that follow, the court, in holding the act or acts in question unconstitutional, did not definitely and specifically point out the particular clause and section of sections of the constitution which were contravened by the unconstitutional act while in a few others the case is reported very briefly.

I

The Judicial Power, and Only the Judicial Power, of this State Shall be Vested in the Courts and the Judiciary.

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Section 1, article 4: "The judicial power of this state
is vested in a supreme court, circuit courts, courts of common pleas, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish." (As amended October 9, 1883; 80 Ohio Laws, 382).

In the case of Zanesville v. Telephone and Telegraph company\(^1\) section 3461,\(^2\) Revised Statutes, was held unconstitutional, being an act imposing upon the probate courts a duty which is purely legislative or administrative, and not judicial in character. This act required the probate court, in cases where the municipal authorities and telegraph company officials fail to come to an agreement in the matter of the use of the streets by the latter, to direct in what manner the company may use the streets and alleys of the city or village so as to give the least inconvenience to the inhabitants of the municipality. Judge Minshall, who read the decision of the court in this case, declared that our government was firmly founded and organized upon the principle of the separation and division of the powers of government and that the powers thus divided were distributed among three coordinate branches of government, namely, the executive, the legislative and the judicial; and that the constitution "prohibits the confusion of these powers by conferring upon one branch powers that belong to another, unless necessarily incidental to the powers conferred by

\(^{1}\) 63 Ohio St., 443, (1900).
\(^{2}\) Act of March 31, 1865, 62 Ohio Laws, 72.
the constitution." The probate courts were, the court held, a part of the judicial branch of the government, and as such incapable of receiving legislative or administrative powers at the hands of the legislature "except as the same may be incidental to their judicial powers." Section 3461, Revised Statutes, above, was declared to be a law conferring--imposing--upon the probate courts a power purely "legislative, and not judicial, in character, and * * * therefore unconstitutional."

This case was given a rehearing by the court less than a year later; at which time the above decision declaring the section unconstitutional was reversed, the court holding "that the power to make such order, as provided in section 3461, is not inappropriately conferred on the probate court; and that court has complete jurisdiction of a proceeding instituted therein in conformity with that section. The provision is not obnoxious to the constitution of the state on the ground that the power it confers is distinctly legislative or administrative, but is constitutional and valid." The opinion of the court upon the rehearing of the case was read by Judge Williams and concurred in by Judges Burket, Spear, and Davis. Judge Minshall, who had read the opinion of the court upon the first hearing of the case,

1. 64 Ohio St., 67, (1901).
and Chief Justice Shauck, dissented from the opinion of the majority of the court upon the rehearing of the case.

II

Both the Original and the Appellate Jurisdiction of the Supreme Court is Limited.

Section 2, article 4 reads in part, as follows: "It (the supreme court) shall have original jurisdiction in quo warranto, mandamus, habeas corpus, and procedendo, and such appellate jurisdiction as may be provided by law."

In the case of the Logan Branch at Logan of the State Bank of Ohio Ex-parte, 1 the court declared section 74 of the act of April 13, 1852, 2 entitled "an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money," unconstitutional, being in contravention of article four of the constitution. This section provided, in part, that the auditor of state, with the advice of the attorney general, "shall decide all questions which may arise as to the true construction of this act, or in relation to any tax levied, or proceeding under the same, subject, however, in all cases, to an appeal to the supreme court."

1. 1 Ohio St., 432, (1853).
2. 50 Ohio Laws, 166.
Judge Corwin, who read the decision of the court, declared that all judicial power in this state is vested by the first section of the fourth article of the constitution in the courts of the state; that the legislature was incapable of conferring judicial power on any officer or person, not elected as a judge; that the auditor of state was not a judicial officer within the meaning of section 10, article 4, of the constitution which provides that "all judges, other than those provided for in this constitution, shall be elected by the electors of the judicial district for which they may be created, but not for a longer term of office than five years"; that the original jurisdiction of the supreme court was limited to "quo warranto, mandamus, habeas corpus, and procedendo," specifically named in section 2, article 4; that the appellate jurisdiction of the supreme court which might "be provided by law" was limited by the other provisions of the constitution vesting, defining, limiting and setting forth judicial powers of the courts of the state; that the court had "no idea of an appeal, except from one court to another"; and that section 74 of the act in question was incapable of extending the appellate jurisdiction of the supreme court to cases other than those arising out of "judgments and decrees of courts created and organized in pursuance of the provisions of the constitution."
In the case of Kent et al. v. Mahaffy et al., the court held that section 239 of the act of March 14, 1853, "to establish a code of civil procedure," which provided, in part, that an "injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, by the supreme court," was incapable of conferring upon the supreme court "the power to grant an injunction, in a case pending in a court of common pleas," and that the act was to be differently construed. The section was not declared unconstitutional; but by interpretation it was, in effect, nullified and made inoperative and void, in so far as it provided for the granting of injunctions by the supreme court under the conditions named in the act. Judge Thurman, who read the decision of the court, declared that "to allow an injunction in a case pending in another court, would be an exercise of original, and not of appellate jurisdiction;" that the original jurisdiction conferred upon the supreme court by the constitution was specifically limited to quo warranto, mandamus, habeas corpus, and procedendo; and that "the only jurisdiction that the legislature is authorized to confer upon us, as a court, is appellate jurisdiction," (Section 2, article 4). In the syllabus of this case the court held that "the power to grant an injunction in a case pending in the court of common pleas can not constitutionally be conferred on this court."

1. 2 Ohio St., 498, (1853).
2. 51 Ohio Laws, 96.
III

The Organization of Common Pleas Districts.

Section 3 of article 4 of the constitution reads, in part, as follows: "The state shall be divided into nine Common Pleas District, of which the county of Hamilton shall constitute one, of compact territory and bounded by county lines, and each of said districts, consisting of three or more counties, shall be subdivided into three parts of compact territory, bounded by county lines, and as nearly equal in population as practicable."

In the Matter of the Assignment of Judges to Hold District Courts,¹ the legislative act of May 10, 1878,² entitled "an act to change the common pleas district of the state, and to give greater efficiency to the common pleas and district courts and to repeal certain parts of an act therein named," and the act of May 13, 1878,³ amendatory to the above act, were declared unconstitutional, being in contravention of sections 3 and 5 of article four of the constitution. These acts provided for the reconstruction of the common pleas districts of the state, reducing the eight existing districts, outside of Hamilton county, to four, and leaving the subdivisions of these districts, in the main, as they were under the former organization.

Chief Justice White, who read the decision of the court, declared that section 15 of article 4 conferred up-

¹. 34 Ohio St., 431, (1878).
². 75 Ohio Laws, 139.
³. 75 Ohio Laws, 537.
on the legislature power to change the districts, or the subdivisions thereof; but that the changed "districts must be constituted upon the plan laid down by the constitution for the formation of districts"; and that whether the districts were increased or diminished in number, "they must nevertheless be constituted in accordance with the requirements of section 3 of the judicial article" of the constitution. That is, each district consisting of three or more counties "shall be subdivided into three parts, of compact territory, bounded by county lines, and as nearly equal in population as practicable." The power conferred upon the legislature by section 15 of the judicial article to change the districts therein named, was, the court held, limited by section 3 of that article which "furnishes a permanent rule for the organization of districts under the judicial system established by the constitution."

Section 4 of the former act provided, in part, that the "designated judges shall not be required to hold common pleas courts, and shall continue to act as such district court judges until the expiration of their several terms for which elected, unless sooner relieved by assignment otherwise by the judges of the supreme court." And section 6 of the same act provided, in part, that "the common pleas judges not assigned, as aforesaid to hold district courts, shall be subject to the orders of the judges so assigned, or a majority of them." These sections were, in the opinion
of the court, in contravention of section 5, article 4, of the constitution which provided, in part, that "district courts shall be composed of the judges of the court of common pleas of the respective districts, and one of the judges of the supreme court, any three of whom shall be a quorum." Denying any intention on the part of the court to question the legislature's right and power to apportion the judicial forces of a district to secure the efficient administration of justice, the court declared that "where, as in the present instance, it undertakes to consolidate districts and to provide for the assignment of a part of the judges, during their terms of office, to the performance exclusively of district court duty, and the remainder of the judges to the performance of the duties of the court of common pleas, it assumes an authority which, in our opinion, is clearly not warranted by the constitution."

In conclusion, Chief Justice White declared: "An act violating the true intent and meaning of the instrument, although it may not be within the letter, is as much in the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden."
Section 6, article 4 provides, in part, as follows: "The courts of appeal shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the court of common pleas, superior court and other courts of record within the district as may be provided by law, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court."

In the case of State of Ohio v. Mansfield, sections 13682, 13683, and 13684, General Code, which had been passed under and in accordance with section 2, article 4 of the constitution of 1851, in so far as they purported to confer upon the supreme court appellate jurisdiction in cases of misdemeanors, were held to be inconsistent with sections 2 and 6 of article 4 of the constitution, as amended September 3, 1912, and therefore, without further operation or effect. Section 13681 provided that the prosecuting attorney or attorney general may take exception to a decision of the court in criminal cases; section 13682 provided that the above named officials may present such bill of excep-

1. 89 Ohio St., 20 (October 21, 1913).
tion to the supreme court and apply for permission to file it with the clerk thereof for the decision of that court; section 13683 directed the supreme court, if in its opinion the question should be decided upon by it, to allow the bill of exception to be filed and give a judgment thereon; and section 13684 provided that the judgment given by the supreme court should not affect the case in which the bill was taken but that the judgment should govern in similar cases arising subsequently to the decision. The above sections, the court held, apply "to all criminal cases, felonies and misdemeanors alike." The court had held in the case of State v. Cox, 1 that "Section 13682, 13683, and 13684, General Code, confer appellate jurisdiction upon the supreme court in criminal cases to the extent and for the purposes specified in these sections."

Judge Donahue, who read the decision of the court, declared that the original and appellate jurisdiction of the supreme court was specifically conferred and specifically limited by article 4, section 2 of the constitution; that the legislature was without power to increase the extent of the jurisdiction therein conferred; and that "this court has neither original nor appellate jurisdiction in cases of misdemeanors unless such cases involve questions arising under the constitution of the United States or of this state, or

1. 87 Ohio St., 313, (February 11, 1913).
questions of public or great general interest, or in cases the records of which are certified to this court by the judges of the court of appeals under the provisions of section 6 of article IV of the constitution," as amended September 3, 1912.

In the case of Snyder et al. v. Deeds et al., 1 that part of paragraph four of section six of the act of February 5, 1914, 2 "to prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of conservation districts," which provided that if after the hearing of a petition to establish a conservancy district the court of common pleas dismissed the proceedings "any petitioner may, within twenty days after the refusal, appeal from an order refusing to establish such district, to the court of appeals of said county, upon giving bond in a sum to be fixed by the court," was declared to be in contravention of section 5, article 4, and therefore, void.

The court further held in this case that "the court of appeals erred in overruling the motions of appellees to dismiss the appeal therein, and in retaining said cause for review of the judgment of the court of common pleas for errors apparent on the record and in reversing said judgment."

1. 91 Ohio St., 407 (1914).
2. 104 Ohio Laws, 16.
3. This case is reported very briefly and "without opinion" by the court.
In the case of the *Cincinnati Polyclinic v. Balch,* section 26 of the act of April 17, 1913, as amended February 6, 1914, in so far as it limits the appellate jurisdiction of the courts of appeals to review, affirm, modify or reverse the judgments of the courts of common pleas within their respective districts, was declared unconstitutional being in violation of section 6, article 4 of the constitution. Said section 26, as amended by the act of February 6, 1914, provided that "in civil cases in which a judgment of more than three hundred dollars has been granted, or being prayed for has not been granted," appeal may be had as in other cases originating in the court of common pleas of Hamilton county. This section as amended would seem to imply that "in civil cases" in which the judgment was for less than three hundred dollars appeal could not be had as in other cases originating in the court of common pleas of Hamilton county.

Judge Donahue, who read the decision of the court in this case declared that section 6, article 4 of the constitution conferred upon the court of appeals "jurisdiction to review, affirm, modify, or reverse all judgments of the courts of common pleas" not some; that the legislature was without power "to limit the jurisdiction of the courts of

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1. 92 Ohio St., 415, (1915).
2. 103 Ohio Laws, 279.
appeals to any particular class of judgments," or to add to or detract from the appellate jurisdiction conferred upon the courts of appeals by section 6, article 4 of the constitution, as amended September 3, 1912; but that the legislature "may provide by law for the method of exercising that jurisdiction."

In the case of Wagner v. Armstrong,¹ section 12224, General Code, to vest the courts of appeals with jurisdiction in the trial of cases on appeal, was declared to be in contravention of section 6, article 4, of the constitution. Section 12224 provided, in part, as follows: "In addition to the cases and matters specially provided for, an appeal may be taken to the court of appeals by a party or other person directly affected, from a judgment or final order in a civil action rendered by the common pleas court, and of which it had original jurisdiction, if the right to demand a jury therein did not exist."

The opinion in this case was read by Chief Justice Nichols who declared that the passage of this act by the general assembly was a plain attempt to enlarge the jurisdiction on appeal of the courts of appeals; that "this is a power that the general assembly does not possess"; and that when the legislature provided in the section in question before the court that all cases may be appealed wherein

¹. 93 Ohio St., 443, (1916).
the right of trial by jury did not exist it contravened that part of section 6, article 4, of the constitution which limits the jurisdiction of the court of appeals by way of appeal to chancery cases. The Chief Justice further declared by way of exposition that while a chancery case is, generally speaking, one wherein the right to demand a jury does not exist, "the test of the right of trial by jury is no longer the determinative one"; for "there are a multitude of actions and proceedings provided for by statute, not chancery in their nature, wherein the right of trial by jury does not exist."

V

The Jurisdiction of Probate Courts.

Section 8, article 4 reads as follows: "The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction in any county or counties as may be provided by law."

In the case of Meyer v. Dempsey, Treasurer, the supreme court held unconstitutional the act of April 25, 1898, to

1. 62 Ohio St., 637, (1900).
2. 93 Ohio Laws, 659.
amend sections 9 and 13 of an act entitled, 'an act to establish "a court of insolvency in counties containing a city of the first grade of the first class, and for the relief of the probate court in such counties," passed May 21, 1894," and providing that "the said court of insolvency shall have original and exclusive jurisdiction in all cases regulating the mode of administering assignments in trust for the benefit of creditors" etc; the repealing section was included in the declaration of unconstitutionality.

Judge Davis dissented from the decision of the majority of the court on the ground that while the act in question is "unconstitutional so far as it confers exclusive jurisdiction on the solvency court, it is valid as conferring jurisdiction concurrent with the probate and common pleas courts."¹

VI

The Filling of Vacancies in the Office of Judge.

Section 13, article 4: "In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for

¹. This case is reported very briefly.

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the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

In the case of State ex rel. Hoyt v. Metcalfe,¹ the court held that section 13, article 4 of the constitution was not repealed by the adoption of article 17 on November 7, 1905. Sections 2 and 3 of the 17th article as adopted November 7, 1905, read in part as follows; "Any vacancy which shall occur in any elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed or a successor elected and qualified."

And, "Every elective officer holding office when this amendment is adopted shall continue to hold such office for the full term for which he was elected and until his successor shall be elected and qualified, as provided by law." The court further held that the capacity conferred upon an elective officer by article 17 to hold over was as much a part of the incumbent's term of office as the statutory period; that "where, after the election of a judge of the circuit court the person so elected, prior to the time when the term is to commence, and without qualifying as judge, dies, and the judge then holding the office resigns before the expiration of his original term and another is appointed, the appointee succeeds to the entire term including the capacity to hold over enjoyed by his predecessor, and is,

¹. 80 Ohio St., 244, (1909).
by force of the constitution, clothed with the power to hold the office until a successor is elected and qualified;" and that an appointment by the governor to take effect at the expiration of the six year term of the resigning judge to fill the vacancy, which he thought would occur at the expiration of the resigning judge's six year term, was void, since there was in fact no vacancy to be filled by appointment or otherwise.

VII

Ineligibility of Judges of the Supreme Court and Judges of the Court of Common Pleas for any Elective Office Other Than a Judicial Office.

Section 14, article 4: "The judges of the supreme court, and of the court of common pleas, shall at stated times, receive, for their services, such compensation as may be provided by law; which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any office of profit or trust, under the authority of this state, or of the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

In the case of Fulton v. Smith, section 4826, General Code, which provided that "all votes for any judge for an elective office except a judicial office, under the author-

1. 99 Ohio St., 230, (1919).
ity of this state, given by the general assembly, or by the people, shall be void," was declared to be an unwarranted and unconstitutional extension of the restrictions imposed upon certain judicial officers by section 14, article 4 of the constitution which provides, in part, that all votes cast for "the judges of the supreme court, and of the court of common pleas * * * for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people, shall be void."

This case came before the court in the form of an election contest. Fulton, the defeated candidate for the office of secretary of state, maintained that Smith, his successful opponent, was incapable of receiving the votes of the people and being elected to the office of secretary of state, because of the fact that at the time of his election he was a duly elected, qualified and acting judge of the probate court of Muskingum county. Fulton maintained and the court held that section 4826, General Code, just quoted, was comprehensive and embraced the office of probate judge; but the court further held that inasmuch as the constitution has in section 14, article 4, specifically disqualified the judges of the supreme court and of the court of common pleas—-and these judges only—-from receiving the votes of the general assembly or the people for any office other than a judicial office under the authority of this state, the legislature could not by legislative act extend
this disqualification to other judicial officers of the state; and that the provisions of section 4826, General Code, were in so far as they applied to the judges of the probate court or "to the judges of any of the courts created by the constitution other than the common pleas court and the supreme court," unconstitutional and null.

VIII

Clerks of the Court of Common Pleas Are Elected for
and Shall hold the Office for a

Three Year Term.

Section 16, Article 4: "There shall be elected in each county, by the electors thereof, one Clerk of the Court of Common Pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall by virtue of his office, be Clerk of all other courts of record held therein; but the general assembly may provide by law for the election of a Clerk, with a like term of office, for each or any other of the courts of record, and may authorize the Judge of the Probate Court to perform the duties of Clerk for his court, under such regulations as may be directed by law. Clerks of Courts shall be removable for such cause and in such manner as shall be prescribed by law."

In the case of the State of Ohio ex rel. the Attorney General v. Hall, the act of April 30, 1902, amending to section 1240, Revised Statutes, was declared unconstitu-

1. 67 Ohio St., 303, (1902).
2. 95 Ohio Laws, 352.
tional and void, being in contravention of section 16, article 4, of the constitution. This section of the Revised Statutes before the passage of the amendatory act in question provided that "there shall be elected triennially in each county, a clerk of the court of common pleas, who shall hold his office three years, beginning at the first Monday of August next after the expiration of the term of office of his predecessor." The amendatory act of April 30, 1902, substituted the first Monday in January for the first Monday in August and added this proviso: "Provided, however, that successors to clerks of courts of common pleas whose present terms of office expire in 1903, shall be elected at the next general election following the enactment hereof, and thereafter clerks of the courts of common pleas shall be elected at the general election next preceding the beginning of their official terms as fixed by this act."

This section as amended above provided for the postpement of the beginning of the official terms of those already elected to the office of clerk of the court of common pleas to a time later than the law under which they had been elected to that office provided, and created a vacancy from the first Monday in August to the first Monday in January next following the expiration of the official terms of the clerks of the courts of common pleas in office at the time the act was passed.

In disposing of this case the court declared that the
legislature was without power "to defer the commencement of the official terms of persons elected to the office of clerk of the court of common pleas to a date later than that fixed by the law in force when elected"; that section 15, article 4, expressly limited the official term of the clerks of the courts of common pleas to three years, provided only that their successors have been elected and qualified; that on the authority of State v. Heffner,¹ supra, the legislature was incapable of providing "for vacancies in office which do not occur fortuitously"; and that the amending act of April 30, 1902, including the repealing section, was wholly void.

¹ 59 Ohio St., 368. (See State of Ohio ex rel. Kelly v. Thrall, Supra.)
Section 18, article 4: "The several judges of the supreme court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law."

In the case of the Pittsburgh, Fort Wayne and Chicago Railroad company v. Bollin C. Hurd and Isaac C. Fair,\(^1\) section 5 of the "act to relieve the district courts," etc.,\(^2\) was held by the court to be incapable of conferring on a judge of the supreme court jurisdiction at chambers to grant or dissolve an injunction in a case pending in another court. The supreme court had held in the case of Kent v. Mehaffy,\(^3\) supra, three years before, that the power to grant an injunction in a case pending in another court could not be conferred by legislative act upon the supreme court. In the present case Judge Scott, who delivered the opinion of the court, declared that the section in question expressly conferred upon the judges of the supreme court the power to authorize the granting of an injunction in cases pending at the time in another court; that this was an unwarranted and unconstitutional extension of the power of

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1. 17 Ohio St., 144, (1866).
2. S. & C. Statutes, 1157; section 694 of the Code.
3. 2 Ohio St., 498, (1853).
the judges of the supreme court to exercise jurisdiction at chambers, as directed by law; that "the jurisdiction of a judge at chambers, can not go beyond the jurisdiction of the court to which he belongs, or extend to matters with which his court has nothing to do"; that section 18, article 4 of the constitution, granting such jurisdiction at chambers to the judges of the several courts, as may be provided by law, must be understood as limiting the jurisdiction of each judge in such matters to such as are within the proper jurisdiction of his own court; that the legislature was without authority to confer jurisdiction at chambers on a judge of the supreme court, which jurisdiction is clearly withheld from the court itself; and that the act in question was incapable of accomplishing its expressed purposes and ends.
CHAPTER V

SUFFRAGE, ELECTIONS AND QUALIFICATIONS FOR
OFFICE-HOLDING.

I

Qualifications of an Elector

Section 1, article 5: "Every white male citizen of
the United States, of the age of twenty-one years, who
shall have been a resident of the state one year next pre-
ceeding the election, and of the county, township, or ward
in which he resides such time as may be provided by law,
shall have the qualifications of an elector, and be entitl-
ed to vote at all elections."

In the case of James B. Monroe, David Martin and George
A. Lamman v. George W. Collins, the legislative act of
April 16, 1868, "supplementary to the act entitled 'an act
to preserve the purity of elections,' passed March 20th,
1841, and to protect the judges of elections in the dis-
charge of their duties"; and the last clause in the proviso
of section 3 of the act of April 17, 1868, "to amend sec-
tions 2, 4, 5, and 24 of the act entitled 'an act to pre-
serve the purity of elections', passed March 20, 1841," were
declared unconstitutional and void. The provisions of the

1. 17 Ohio St., 665, (1867).
2. 65 Ohio Laws, 97.
3. 65 Ohio Laws, 100-104.
above acts imposed upon these electors of the state having an admixture of African blood, in the opinion of the court, "unreasonable burdens of proof" as to their right to vote, as white male citizens; unduly limited the kind and amount of evidence that such persons might submit in support of their rights; denied to them the same rights as were accorded to other classes of voters; and discriminated against them in imposing punishment and penalties for the violation of election laws. Because of the unwarranted, unjust, illegal and unconstitutional discriminations just enumerated the court held that the act of April 16, 1868, and the clause in the proviso of section 3 of the act of April 17, 1868, referred to above, were unconstitutional. Judge Welch, who read the decision of the court in this case, declared: "It is not only true that the act is calculated to impair and defeat the exercise of the colored men's constitutional right to vote, but any candid man must admit that such seems to be its leading, nay its only object. It seems to be a studied and cunningly devised scheme to effect that single object, to the utmost that it could be effected, without expressly and directly violating the constitution of the state."

In the first syllabus of this case the court held that "male citizens having a visible admixture of African blood, but in whom the white blood preponderates, are white male citizens within the meaning of the constitution of Ohio,
and have the same right to vote as citizens of pure white blood."

In the case of the State ex rel. v. Constantine, the act of April 21, 1884, entitled "an act to amend sections 1998, 2012, 2013, 2014, 2021 and 2022 of the Revised Statutes of Ohio," providing for the election of a board of four commissioners in certain cities with the proviso that "no elector shall at any election vote for more than two persons for such commissioners, and any ballot containing the names of more than two persons for said office shall not be counted for any of the names thereon, and the four persons receiving the highest number of votes cast, shall be declared elected," was declared unconstitutional and void as contravening section 1, article 5 of the constitution which gives to each elector one vote for each candidate for each office to be filled at the election.

Judge McIlvaine, who read the opinion of the court in this case, declared, after calling attention to the provisions of section 1, article 5, of the constitution, that "we have no doubt that each elector is entitled to a vote for each officer, whose election is submitted to the electors, as well as to each question that is submitted. This implication," the judge declared, "fairly arises from the

1. 42 Ohio State, 437, (1884).
2. 81 Ohio Laws, 121.
language of the constitution itself, but is made absolutely certain when viewed in the light of circumstances existing at the time of its adoption. No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adoption of this constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election had never been doubted." The court held in the second proposition of the syllabus of this case that "where an office is filled by an election, the election must conform to the requirements of the constitution, and each elector of the district is entitled to vote for a candidate for each office, to be filled at the election"; and in the second proposition of the syllabus that "a statute authorizing the election of four members of the police board at the same election, but which denies to an elector the right to vote for more than two members is in conflict with article 5 of the constitution."

In the case of Daggett v. Hudson,\(^1\) the act of May 4, 1885,\(^2\) entitled "an act to provide for ascertaining the citizens who shall be entitled to vote in cities of the first and second grades of the first class, by amending and supplementing section 2926 of the Revised Statutes," was declared unconstitutional and void as contravening sec-

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1. 43 Ohio St., 548, (1885).
2. 82 Ohio Laws, 232.
tion 1, article 5 of the constitution. This amendatory act provided that the electors in Cincinnati and Cleveland must register on one of seven, and only one of these seven, specified days within the year; it made no provisions for those who were necessarily absent on these specified days nor did it make any provisions for the registration of electors who had been unavoidably absent (on the seven registration days) within the five days intervening between the last registration day and the day of the election. Those who failed to register for any reason whatever on one of the specified days were thus denied unconditionally and absolutely their right to vote on election day. The court held that this was an unreasonable exercise of the legislature's power to provide by statute for the registration of voters; that it had a direct tendency to impair the right of suffrage; that it disfranchised without any fault of their own a large body of voters necessarily absent from the place of registration on the days set; and that the act was, therefore, unconstitutional, null and void.
II

Election by Ballot

Section 2, article 5: "All elections shall be by ballot."

In the case of the State, ex rel. Karlinger, v. the Board of Deputy State Supervisors of Elections, sections 2966-54 to 2966-67, inclusive, Revised Statutes, providing for the use of voting machines at elections, were held unconstitutional and void, being in contravention of section 2, article 5 of the constitution, which provides that "all elections shall be by ballot." "A ballot," declared Judge Shauck, who read the decision of the court in this case, "is a printed or written expression of the voter's choice upon some material capable of receiving and reasonably retaining it, prepared or adopted by each individual voter and passing by the act of voting from his exclusive control into that of the election officers, to be by them accepted as the expression of his choice." The installation of voting machines by which the voter might by punching certain keys register his choice was not in the opinion of the court election by ballot within the meaning of section 2, article 5 of the constitution; and the court declared the

1 80 Ohio St., 471, (1909).
above statutes providing for the installation and use of voting machines null and void.

III

Election of County and Township Officers.

Section 1, article 10: "The general assembly shall provide, by law, for the election of such county and township officers as may be necessary."

Section 2, article 10: "County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county in such manner, and for such term, not exceeding three years, as may be provided by law." (As amended Oct. 13, 1885.)

In the case of State ex rel. v. Brennan, the act of March 14, 1890, entitled "an act providing for the appointment of a stationary storekeeper, and an assistant in the county of Hamilton," was declared unconstitutional, being in contravention of sections 1 and 2, article 10, of the constitution. This act empowered the clerk of the court of common pleas of Hamilton county to appoint a stationary storekeeper for the county; defined the duties of the newly created office; required the appointee to give bond; and fixed the annual salary of the office at $1500, to be paid out of the county treasury from the general county fund.

Quo warranto proceedings were brought to oust the appointee

1 49 Ohio St., 33, (1892).
2 87 Ohio Laws, 439.
to the office on the ground that the act was unconstitu-
tional and void.

Judge Spear who read the decision of the court declar-
ed that the post of stationery storekeeper for Hamilton
county was an office; that it was a county office; that the
defendant was not only an officer, but that he was a coun-
ty officer; that as such he could not be appointed for a
full term; that the act of March 14, 1890, was an attempt
to constitute a county office and provide for the filling
of the same for a full term by appointment; that "a more
obvious attempt to override the constitution can hardly be
conceived of"; that "the portion of the act which assumes
to give authority to the clerk of the court of common pleas
to appoint a storekeeper, is clearly and palpably in con-
flict with" sections 1 and 2 of article 10 of the constitu-
tion; and that "there being no provisions for an election,
the act as a whole is absolutely and wholly void."

In the case of State ex rel. Armstrong v. Holliday,
Auditor, 1 section 409, Revised Statutes, relating to the ap-
pointment of county game wardens was declared unconstitutio-
hal and void as contravening section 2, article 10, of the
constitution. This section provided in part that "the com-
missioners (of fish and game) shall * * * appoint a

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1 61 Ohio St., 171, (1899).
fish and game warden in each county in the state, who shall hold his office for two years and they shall also appoint a special warden for Lake Erie, and for Mercer county, Lewiston, Licking, Laramie and Sippo reservoirs of the state the compensation of the county wardens shall be from fees the same as are paid the sheriffs of their respective counties for similar services, to be paid from the fish and game fund, which shall be made up from fines arising from convictions for violation of the fish and game laws; and the county commissioners shall, upon the recommendation of the fish and game commissioners, allow to their county warden a salary not exceeding three hundred dollars per annum, which salary shall be paid out of the fish and game fund."

In handing down its decision in this case the court declared that these county wardens had "all the distinguishing characteristics of a public officer as usually defined and understood"; that these county wardens were county officers as evidenced by the fact that they served for a definite term, gave bond for the faithful performance of their duties, enforced the laws of the state in their "respective counties", possessed many of the powers, duties and privileges of a constable or sheriff, received from the county in certain cases a salary of not exceeding $300 and were allowed fees similar to those allowed sheriffs and
constables for their services. "These wardens," declared the court, "are not only appointed for their respective counties, but their duties are limited to 'policing the territory' thereof. Hence their duties being of a public nature and limited to their counties, they are, in every sense, as much county officers within the sphere of their duties as are county sheriffs; and are, therefore, elective and not appointive officers."

The appointment of "special wardens" for Lake Erie and the respective reservoirs of the state named in the act was held to be a constitutional procedure on the ground that these special wardens were "properly state officers and not required to be elected by the people."

In the case of State, ex rel. Pogue, Prosecuting Attorney et al., Groom, Acting City Solicitor,¹ the act of February 16, 1914,² amendatory to section 5649-3b, General Code, and the act of April 16, 1913,³ amendatory to the same section of the General Code, were declared unconstitutional, being in contravention of section 1, article 10, of the constitution. Section 5649-3b, General Code, provided, in part, as follows: "The county auditor, the mayor of the largest municipality in the county as shown by the last federal census, and the prosecuting attorney shall constitute a board

¹ 91 Ohio St., 1, (1914).
² 104 Ohio Laws, 237.
³ 103 Ohio Laws, 552.
to be known as the budget commissioner for the annual adjustment of the rates of taxation. * * * Two members shall constitute a quorum." This section was amended by the act of April 16, 1913, to read, in part, as follows: "The budget commission of each county shall consist of three members; the county auditor, the mayor of the largest municipality of the county (and).....In counties in which the amount of taxable property in the cities and villages thereof exceeds the amount of taxable property of territory outside of the cities and villages, the third member of such county commission shall be the city solicitor of the largest municipality in the county..... In other counties the third member shall be president of the school board of the school district containing the largest municipality of the county ......if an elector; and if such president be not an elector; then a member of such board who is an elector to be designated by the board." This section was again amended by the act of February 16, 1914, but the provisions of the act in question before the court were not changed by this latter amendatory act.

The opinion of the court in this case was read by Judge Donahue who declared that the acts of February 16, 1914, and April 16, 1913, in so far as they purported to authorize the mayor of the largest municipality within the county, and the city solicitor of the largest municipality
in certain cases, and the president of the school board of the school district having the largest municipality, if such president be an elector and if not then a member of such board who is an elector to be designated by that board, in other cases, to sit as members of the annual budget commission, they were unconstitutional, being in contravention of section 1, article 10, of the constitution; that the office of county budget commissioner was one that concerned the whole county and that it was therefore a county office to be filled and occupied only by an officer who has received his mandate from a majority of the county electorate and not from a small portion thereof; that the third member of this commission under the statute in question might well receive his appointment to the commission from a body of men none of whom were electors; that it was altogether possible that the entire membership of the school board in the school district having the largest municipality should not be electors and that in such case no one could be appointed as the third member of this board of commissioners; that under the statutes in question the budget commission which was to be found in each and every county, and which possessed uniform authority in every county throughout the state, could be constituted in three different ways; that the bases on which the board of commissioners were differently constituted in different counties. "Re-
gardless of the proportion of city and urban population,"
constituted, in fact, "a mere arbitrary classification that
cannot be permitted under our constitution."

The repealing section of the act of April 16, 1913,
was also declared invalid, leaving the original section
5649-5b, quoted above, in force. It will be noted that this
section provided that the mayor of the largest municipality
—who is not a county officer—shall be a member of the
county budget commission. The court sustained this section
on the ground that at least two of the three members of
the commission were county officers, and that the section
specifically provided that "two members shall constitute a
quorum." A rather liberal construction, it would seem.

In the case of State ex rel. Godfrey, a Taxpayer, v.
O'Brien, Treasurer, et al.,¹ sections 3, 17, 18, 23, 31, 32,
35, and 37, and the provisions of all other sections of the
act of May 7, 1915,² relating to the appointment, duties,
and powers of assistant assessors and county boards of re-
vision, and the act of May 20, 1915,³ amendatory to the
act of May 7, 1915, above, were declared unconstitutional
and void, being in contravention of sections 16, 20, and
26 of article 2, and section 1, article 10 of the constitu-
tion. Section 3 of the former act provided that tax returns

¹ 95 Ohio St., 166, (1917).
² 106 Ohio Laws, 246.
³ 106 Ohio Laws, 433.
should be made to the county auditor instead of to the dis-

trict assessor as formerly, and that the auditor should have

all the powers and perform all the duties formerly vested

in and exercised by the district assessor. Section 17 of

this act provided that one assessor should be elected in

each assessment district for a two year term; that such

elected assessor should take over the records, etc. of the

appointed assessor, then in office, whose duties were to

terminate upon the election and qualification of the new-

ly elected assessor; that the elected assessor should take

up, carry on and complete any and all of the unfinished

business of the office, and "perform all the duties, exer-
cise all the powers and be subject to all the liabilities

and penalties devolved, conferred or imposed by law upon

the deputy assessor" appointed under the old law, which

law was expressly repealed by section 103 of this act.

Section 18 authorized the county auditor to appoint one

or more assistant assessors and to assign them to assist

any ward, district, city, village or township assessor,

if he deemed it necessary in order to complete the work

of assessment on time. Section 23 of the act provided that

the compensation of assessors and assistant assessors

shall be fixed within certain limits (varying from $3.00

to $6.00 per day) by the county auditor subject to the re-

view and approval of the board of county commissioners.
Section 31 of the act constituted the county treasurer, prosecuting attorney, probate judge and the president of the board of county commissioners a county board for the appointment of the three members of the county board of review; and section 32 authorized this board to appoint annually the three members constituting the county board of review. Section 35 provided that the compensation of the members of each county board of revision should be determined and fixed by the board of county commissioners. And section 39 provided the manner in which the board of revision should be organized, providing that the county auditor should be secretary of the board and that he should receive five dollars for each day the board was in session.

The court held that sections 3 and 17, above, contravened section 16, article 2, of the constitution which provides: "No law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed," in that those sections revived or retained certain specified sections of earlier acts which had been repealed or amended without carrying over into the new act the revived or amended sections as required by the section of the constitution just quoted. This section, the court held, is mandatory.
Section 18, authorizing the county auditor to appoint assistant assessors, sections 31 and 32, constituting the county officers named in the act an ex-officio board for the purpose of appointing the county board of review and authorizing it to appoint this board, and section 39, providing for the organization of the county board of review, were held unconstitutional and void as contravening section 1, article 10, of the constitution which provides that "the general assembly shall provide, by law, for the election of such county and township officers as may be necessary." Judge Donahue, who read the decision of the court, declared: "If an elected township assessor is a township officer, an assistant township assessor appointed under the provisions of section 18 is also a township officer."

Section 23, authorizing the county auditor with the approval of the county commissioners to fix the compensation of the assistant assessors, and section 35, authorizing the county commissioners to fix the compensation of the members of the county board of revision, were held to contravene section 20, article 2, of the constitution which provides, in part, that "the general assembly, in cases not provided for in this constitution, shall fix the * * compensation of all officers." "This," declared Judge Donahue, "is an attempt to delegate to the auditor and
board of county commissioners the legislative authority conferred upon the general assembly by section 20 of article II of the Ohio constitution, to fix the compensation of all officers."

IV

The Holder of a State Office Must Have the Qualifications of an Elector

Section 4, article 15: "No person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector."

In the case of State ex rel. The Attorney General v. Adams, the act of April 26, 1898, to amend section 110 and other sections of the Revised Statutes, was held unconstitutional in so far as it purported to make women eligible to the office of notary public, being in contravention of section 4, article 15, of the constitution. Section 110, Revised Statutes, before the passage of the above amendatory act, provided in part that "the governor may appoint and commission as notaries public as many persons having the qualifications of electors" as he may deem necessary.

1 58 Ohio St., 612, (1898).
2 93 Ohio Laws, 408.
The amending act struck out the phrase "having the qualifications of electors" in order to make women eligible to be appointed to the office.

The court held that the amending act was incapable of making women eligible to the office of notary public; that the act contravened section 4, article 15, which provides that "no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector"; and that an elector in this state is, according to section 1, article 5, of the constitution, a "white male citizen of the United States. * * *".

V

The Time at Which Constitutional Amendments Take Effect.

Section 1, article 16: "Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be submitted to the electors, for their approval or rejection, on a separate ballot without party designation of any kind, at either a special or a general election as the general assembly may prescribe. Such proposed amendments shall be published once a week for five consecutive weeks preceding such election, in at least one newspaper in each county of the state, where a newspaper is published. If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution.
When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment, separately. (Adopted Sept. 3, 1912.)

In the case of State ex rel. McNamara v. Campbell et. al. that part of House Joint Resolution No. 41, which provided that if a majority of the electors voting on the proposed constitutional amendment described as "Article XV, Section 4. - ELIGIBILITY OF WOMEN TO APPOINTMENT AS MEMBERS OF BOARDS OF, OR POSITIONS IN, DEPARTMENT AND INSTITUTIONS AFFECTING, OR CARING FOR WOMEN AND CHILDREN," to be voted on at the November election, 1913, should adopt it, it should "on and after the first day of January, 1914, become and constitute" section 4, article 15, of the constitution, was declared unconstitutional and void, being in contravention of section 1, article 16.

Judge Newman, who read the opinion of the court in this case, declared that the legislature was without authority to postpone the taking effect of a proposed and adopted constitutional amendment to a time later than that fixed by section 1, article 15, of the constitution, unless the proposal to postpone the taking effect of the proposed amendment be submitted to and adopted by a majority of those voting upon the proposition; that section 4, article

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1 94 Ohio St., 403, (1916).
2 103 Ohio Laws, 992.
15, of the constitution as adopted at the November election, in 1913, took effect when adopted as provided in section 1, article 16, of the constitution; and that that part of section 2, of House Joint Resolution No. 41 purporting to postpone the taking effect of the newly adopted amendment until the first day of January, 1914, was inoperative and void.
CHAPTER VI

TAXATION AND PUBLIC DEBTS.

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I

Prohibition of Loans to Private Agencies.
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Section 6, article 8: "The general assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of such company, corporation, or association."

In the case of James Taylor et al. v. The Commissioners of Ross County, the act of April 23, 1872, "to authorize counties, cities, incorporated villages and townships, to build railroads, and to lease and operate the same," was declared to be in contravention of section 6, article 8, and therefore unconstitutional. This act authorized the construction of railroads in certain cases; limited the indebtedness that might be incurred for such railroad con-

1. This section was supplemented by an amendment adopted September 3, 1912. None of these cases, however, is concerned with the supplementary clause.

2. 22 Ohio St., 22, (1872).

3. 69 Ohio Laws, 64.

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struction to, not to exceed, five percent of the assessed valuation of the property in the district at any one time; authorized the county commissioners to lease any road constructed under the provisions of this act "before or after its completion * * * or to sell the same for such compensation and upon such terms as may be agreed upon by said commissioners."

Chief Justice White, who read the decision of the court in this case, declared that taxes can only be levied and collected for public purposes; that the legislature cannot constitutionally authorize any political subdivision of the state to levy such a tax as will enable it partly to construct a line of railway, because "the part of a railroad so to be built can be of no public utility unless used to accomplish an unconstitutional purpose,"—that is such line or link of railway must be completed, if at all, by other parties who will have the beneficial control and management of the road when completed; that such an extension of aid or credit for the benefit of private persons in the construction of railways to be owned and controlled by them "can only be regarded as furnished for, or in aid of, such parties." The authorization of such use of public moneys and public credit is specifically prohibited by section 6, article 8, of the constitution which provides that the legislature shall not authorize any local subdivision of the state to raise money for, or to loan its
credit to, or in aid of, any company, corporation or association. "What the general assembly is thus prohibited from doing directly, it has no power to do indirectly," the court held.

In the case of Jacob Wyscafer et al. v. W. H. Atkinson et al., the act of April 6, 1880, entitled "an act to authorize certain townships to build railroads and to lease or operate the same," was declared to be in contravention of section 6, article 8, of the constitution and therefore void. This act was limited in its operation to Beaver township, Noble County. It authorized the township to borrow not to exceed twenty thousand dollars for the construction of a line of railway, not exceeding seven miles in length, between certain termini within the township and joining two other proposed railways; and provided in section ten of the act that upon completion of such railway the board of trustees should have power "to lease the same to any person, or persons, or company, as will conform to the terms and conditions which shall be fixed and provided by the trustees of the township by which the line of railway is owned." No provision was made within the act for the operation of the proposed railroad by

1. 37 Ohio St., 80, (1881).
2. 77 Ohio Laws, 119.
the township itself, nor was the township authorized to raise more than twenty thousand dollars in completing the construction of the proposed railway—a construction which could not possibly be completed with only twenty thousand dollars.

Judge McLvainie, who read the opinion of the court in this case, declared that the sole intent of the legislature and of the township authorities was to make this proposed railway merely a link in a more extended route or line of railway; that this intent was clearly evidenced by the fact that the township authorities had power only "to lease" and not to operate the proposed railway when completed; that the effect of the authorization of such procedure was "to unite the means and credit of the township with those of other parties in order to promote a common enterprise, to wit: the construction of a continuous line of railway, which could not be accomplished without such combination of interests"; and that this was clearly in violation of section 6, article 8, of the constitution and void.

In the case of Alter v. Cincinnati et al.,¹ section eight of the act of April 24, 1896,² entitled "an act to provide for water-works purposes in cities of the first grade of the first class," was declared unconstitutional,

1. 56 Ohio St., 47, (1897).
2. 92 Ohio Laws, 606.
being in contravention of section 6, article 8, of the constitution. Section eight of this act authorized the board of "commissioners of water works" for the city to contract, in the name of the city, with any person, company or corporation, for the construction of new, or the enlargement, extension, or improvement of existing water-works; authorized said commissioners to convey title to rights and property acquired to such person, company or corporation with the proviso "that if said commissioners enter into said contract and lease, as herein provided for, then said works shall be operated, managed and conducted by such city, as provided by law."

The opinion of the court in this case was read by Judge Burket who declared that the provisions of section eight of the act in question were in contravention of the plain prohibitions set forth in section 6, article 8, of the constitution; and that this section would be declared void while the remaining sections of the act which were constitutional and which were not dependent on this section eight would be sustained. The court held in the first proposition of the syllabus of this case that "under section six of article eight of the constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a pro-
perty which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property"; and in the second proposition of the syllabus the court held that "a city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property."

In the case of State ex rel. Campbell, Prosecuting Attorney, v. The Cincinnati Street Railway Company et al., the Cincinnati city ordinance No. 96, 1917, was declared unconstitutional, being in contravention of section 6, article 8 of the constitution. This was an ordinance amending the original resolutions granting a franchise to the Cincinnati Rapid Transit and Interurban Railway Company. Section 22 of the ordinance in question pledged the gross earnings derived from the operation of the street railways owned and operated by the company, and from the operation of the subways owned by the city but operated by the company, to the payment of securities already issued or to be issued by the company.

Judge Johnson, who read the opinion of the court, declared that a pledge of the income in this case is, in ef-

1. 97 Ohio St., 283, (1918).
fect, by the very nature of the case, a pledge of the capital; and that such a grant authorizing the uniting of the credit and the capital of the city with that of a private concern was in direct contravention of section 6, article 8, of the constitution. The court held in the fourth proposition of the syllabus of this case that "an ordinance of a city providing for the grant to a street railway company of the right to operate jointly a subway or street railway owned by the city with a system of street railways already owned and operated by the company, which provides that the gross proceeds from the operation of such properties shall be used for the payment of existing and hereafter issued securities of the company, is a pledging of the city's credit for the private debts of a street railway company in violation of section 6, article 8 of the constitution, which prohibits a city by vote of its citizens or otherwise from raising money for or loaning its credit to or in aid of any company, corporation or association."

In the case of the City of Cincinnati et al. v. Barth, a Taxpayer, 1 the act of April 17, 1919, 2 entitled "an act to prevent the frequent tearing up and obstruction of streets and other public thoroughfares by authorizing the council of municipalities to require defective and worn

1. 101 Ohio St., 344, (1920).
out rails, ties, roadbeds, and tracks of street railway companies existing in streets and other public thoroughfares proposed to be improved, paved, or repaved, surfaced or resurfaced, to be renewed, replaced, repaired, or reconstructed at the time at which such improvement is made; authorizing municipalities to make such renewals, replacements, repairs or reconstructions upon the failure of the street railway company to do, and assess the cost thereof against such street railway company, and authorizing the issuance of bonds in anticipation of the collection of such assessments," was declared unconstitutional in so far as it authorized a municipality to renew, replace, repair or reconstruct the worn out rails, ties, roadbeds or tracks of street railway companies, being in contravention of section 6, article 3, of the constitution.

The opinion of the court in this case was read by Judge Johnson who declared that any and all improvements made for or upon the property of the street railway immediately became a part of the company's property, "to be used and dealt with in every way that it can use and deal with any of its property"; and that the city could, according to the statutes, only protect and reimburse itself by making the amount of the cost a lien upon the property of the company and levying assessments against it. "That is to say," declared the judge, "it is a simple, plain loan by the city to the company of the amount of money needed for the pur-
pose. The company becomes indebted to the city for the money the city has spent on the company's property. * * * The city has loaned its money and its credit to the company,—the very thing that the constitution in section 6, article 8, declared that it shall not do.

II

The Uniform Rule for the Taxation of Property.

Section 2, article 12: "Laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value two hundred dollars for each individual, may, by general laws, be exempt from taxation; but all such laws shall be subject to alteration and repeal; and the value of all property so exempted shall, from time to time, be ascertained and published, as may be directed by law." (Const., 1851) *

The court has held in nine different cases that this section of the constitution was violated by the legislative act or acts that were being questioned before the court at the time; the first of these was declared unconstitutional in 1854, only three years after the adoption of the new constitution, and the last was nullified as recent—

* This section was amended Sept. 3, 1912, and Nov. 5, 1918.
ly as 1917. Five of the nine cases were decided between 1890 and 1900.

The first case under this section was that of the Exchange Bank of Columbus v. O. P. Hines, Treasurer of Franklin county, in which the court held that section 10 of the act of April 13, 1952, entitled "an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money," which permitted individuals and certain kinds of corporations to make certain deductions in giving in their tax returns, was unconstitutional, being in contravention of section 2, article 12, of the constitution. Section 10 of the act in question provided, in part, that "in making up the amount of moneys and credits, which any person is required to list for himself or any other person, company or corporation, he shall be entitled to deduct from the gross amount of moneys and credits, the amount of all bona fide debts owing by such person, company, or corporation.......

........provided, that nothing in this section shall be so construed as to apply to any bank, company or corporation, exercising banking powers or privileges." That is to say that bona fide debts may be deducted from one's credits in gross in making out and turning in a tax return.

Chief Justice Bartley who read the decision of the court declared that this permission to exempt from tax-

1. 3 Ohio St., 1, (1864).
2. 50 Ohio Laws, 141.
tion certain credits in certain cases was manifestly a palpable violation of section 2, article 12, which explicitly requires that taxes shall be levied taxing all property by a uniform rule according to its true value in money. This includes all property of every description, not certain kinds or classes of property. The constitution knows nothing of exemptions; it does not provide for any other than those expressly set down in the constitution itself; the legislature can not enlarge this list at pleasure and of its own free will. The constitution is not concerned whether one's gross credits exceed his gross liabilities; it makes no division along this line; it simply and expressly requires that all property shall be taxed at its true value in money and by a uniform rule. Credits cannot under the constitution be exempted from taxation. Section 10 of the act of April 13, 1852, in so far as it permits the exemption of credits in certain cases contravenes section 2, article 12, of the constitution and is to such extent null and void. The remainder of the act, having no dependence upon this unconstitutional section, was sustained by the court.

Judge Ranney dissented from the opinion of the Chief Justice and the decision of the court, declaring that it was entirely within the power of the legislature to authorize the deduction of one's bona fide debts from one's credits in making a tax return. Justice demands that this be done,
declared the judge. To this argument the Chief Justice replied: "To say, that if a person be thus taxed upon his credits, that is, upon his claims, which he holds against other persons, without deductions, he is not taxed upon his property, but upon his indebtedness, is, to say the least of it, a most glaring absurdity." Be this as it may, the legislature passed another act only two years later allowing such exemptions and thereafter both the law and the practice were contrary to the decision of the court in this case.

In the case of Treasurer v. Bank,¹ the proviso in section 2759 of the Revised Statutes, regulating returns for taxation of unincorporated banks and bankers, which provided that certain named deductions should be made from the average amount of cash and certain other items in possession of the bank or banker, was declared unconstitutional, being in violation of section 2, article 12, of the constitution, requiring uniformity in taxation. This section provided that the unincorporated bank or banker should return to the auditor of his county a tax list consisting of nine distinct and separate items. The first five of these were as follows: (1) The average amount of all notes and bills receivable, discounted or purchased in the course of business and considered collectible; (2) the average amount of all accounts receivable; (3) the average amount of cash

¹. 47 Ohio St., 505, (1890).
and cash items in possession or in transit; (4) the average amount of all kinds of stocks, bonds, including United States government bonds or evidences of indebtedness held as an investment, or in any way representing assets; (5) the amount of real estate at its assessed value. Upon the receipt of this tax return the county auditor was directed to total these first five items and subtract from this total the sum obtained by adding together the following items; (5) the amount of real estate at its assessed value; (6) the average amount of all deposits; (7) the average amount of accounts payable, exclusive of current deposit accounts; (8) and such portion of the average amount of United States government and other securities as was not subject to taxation. The remainder thus obtained was to be added to the ninth item, namely, the true value in money of all furniture and other property not otherwise herein enumerated, and the total thus obtained was to be entered by the auditor upon the county tax duplicate in the name of the bank or banker to be taxed as other personal property.

In disposing of the case the first thing the court did was to accept the principle advanced by Judge Ramsey in his dissenting opinion in the case of the Exchange Bank of Columbus v. O. P. Hines, supra, to the effect that bona fide liabilities may be deducted from bona fide credits in making a tax return. The earlier case was not, however, formally overruled. This section of the statutes was de-
declared unconstitutional because of the particular manner in which it authorized deductions to be made and not because deductions in themselves were in violation of the constitution. The court held that inasmuch as the fifth item, the amount of real estate at its assessed value, was already taxed on the duplicate as real property it should be deducted; that the eighth item, such portion of the average amount of United States government and other securities as was not subject to taxation, was subject to deduction; and as for items six and seven, it was the opinion of the court that "the bank was entitled to have deducted from the average amount of all its notes and bills receivable, discounted or purchased, and considered good and collectible, the average amount of accounts payable, exclusive of current deposit accounts"; but that the deduction of the average amount of such deposits and accounts payable, from the average amount of the bank's cash or cash items in possession could not be allowed and in so far as the section in question authorized the deduction of such total amount from the total amount of the first five items in this taxing list—the cash or cash items being one of the five—it was in direct conflict with section 2, article 12, of the constitution, requiring that the burden of taxation shall rest uniformly upon all property according to its true value in money. The total amount of cash or cash items in possession or in transit cannot be reduced. Items
six and seven should be deducted; "but this deduction," the judge declared, "should not be made from the average amount of cash and cash items in possession." The statute as a whole was sustained while the particular clause found to be unconstitutional was made, by judicial interpretation and limitation, to accord with the constitutional requirements.

In the case of Railway Company v. State,1 the act of April 15, 1889,2 (251a, Revised Statutes), providing that "every corporation or company operating a railroad, or any part of a railroad within this state, shall pay * * * a fee of one dollar per mile for each mile of track * * * operated by them within this state," was declared unconstitutional as contravening section 2, article 12, of the constitution, which requires that taxes shall be levied according to the true value of all property in money and by a uniform rule; and as contravening section five of the same article which provides that "no tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Judge Bradbury, who read the opinion of the court in this case, declared that a tax law was one imposing a pecuniary burden for the support of the government; that the

1. 49 Ohio St., 189, (1892).
2. 86 Ohio St., 351.
act in question was a tax law notwithstanding the fact that
the legislature had denominated the levy a "fee"; "its nature;
Judge Bradbury declared, "is not affected by the name that
may be assigned to it." The sole purpose of the act was to
increase the funds in the state treasury for the general
support of the government and was not therefore, in the op-
ingen of the court, to be confused with or regarded as an
assessment for a special improvement or special service or
as an act calling into active operation the police powers
of the state. It was, in the opinion of the court, a tax
law, pure and simple, and as such in direct violation of
sections 2 and 5 of article 12 of the constitution.

In the case of Wasson et al. v. Commissioners,\(^1\) the
act of April 23, 1891,\(^2\) providing that "the commissioners
of any county in this state desiring to receive the loca-
tion of the Ohio Agricultural Experiment Station by making
donations therefor, are hereby authorized and empowered to
raise money for such donation by tax on all taxable proper-
ty in such county," was declared unconstitutional, being in
contravention of section 2, article 12, of the constitution,
which requires that all taxes levied for state purposes
shall be levied by a uniform rule upon all taxable property
within the state.

1. 49 Ohio St., 622, (1892).
2. 88 Ohio Laws, 353.
The opinion of the court in this case was read by Chief Justice Spear who declared that the Ohio Agricultural Experiment Station was a state and not a local institution; that its services were to be rendered to and for the state and not for any particular county or locality; that the purposes for which taxes could be levied, raised and expanded under this act—the purchase of a site and the construction of suitable buildings for a State Agricultural Experiment Station—were general purposes of state-wide interest and not local in character; and that under the limitations of section 2, article 12, of the constitution, requiring that all taxes for state purposes shall be levied upon all the taxable property in the state by a uniform rule and according to its true value in money, the legislature was incapable of authorizing the commissioners of any county to burden the taxable property therein with a tax which the constitution required should be borne by the whole state.

In the case of Root v. Board of Education, the act of May 21, 1894, to amend an act entitled "an act to provide higher education in counties containing cities of the first class," was declared unconstitutional, being in contravention of section 2, article 12, because the act did not tax

1. 52 Ohio St., 589, (1895).
2. 91 Ohio Laws, 842.
all the taxable property within the taxing district by a uniform rule. This act provided for the admission of non-resident pupils to city high schools on the same terms and under the same conditions as to tuition as applied to pupils residing within the city school's taxing district and provided that the board maintaining any such city high school attended by non-resident pupils should estimate the cost of schooling these "and certify such estimate to the commissioners of the respective county, who * * * are hereby authorized and directed to assess and levy upon all the taxable property of such portion of said county not within the limits of any such school district maintaining such a high school a sufficient tax annually to provide such additional funds."

The opinion of the court in this case was read by Chief Justice Minshall who declared that this act did not create a new taxing district fixed and defined with any degree of definiteness and permanency—two indispensable characteristics of any taxing district; that the taxing district was, according to the act, the whole county outside of the city school district maintaining the high school and any other school districts in the county maintaining high schools of a similar grade; that is to say the taxing district may comprise the whole county outside the one city school district or it may, in certain cases, comprise nothing at all. These criteria, in the opinion of the
court, were too illusory and indefinite to found a special taxing district upon them. The power of the legislature to provide for the creation of special school districts was not questioned provided that all property in the district created should be taxed alike for the maintenance of the schools. It was just in this particular that the act in question before the court was imperfect, for while it made the county the taxing district for school purposes it exempted the city school district which maintained the high school, permitting this city school board to determine and levy the school tax within the city school district, and authorizing this city school district through its board to determine what amount shall be levied throughout the county for high school purposes while the county commissioners and those who pay the taxes have no voice in determining how much the levy shall be or how the money shall be expended once it is raised. The whole act, the court held, was a direct and palpable violation of section 2, article 12, of the constitution, requiring that within a taxing district all taxes shall be levied by a uniform rule by the electors of the taxing district or their representatives or agents.

In the case of Hubbard, as Treasurer of Cuyahoga County, v. Fitzsimmons, 1 the act of April 27, 1893, 2 entitled

1. 57 Ohio St., 436, (1898).
2. 90 Local Laws of Ohio, 115.
"an act to authorize the commissioners of any county containing a city of the first class, second grade, to borrow money and issue bonds therefor, for the purpose of building and furnishing a central armory in any such city for the use of the Ohio national guard, and procuring a site therefor," was held unconstitutional, being in contravention of section 2, article 12, of the constitution, requiring that taxes levied for a general state purpose shall be levied by a uniform rule upon all the taxable property of the entire state and not of a particular county or minor subdivision of the state.

The opinion of the court was read in this case by Judge Spear who followed very closely the court's decision in the case of Wasson et al. v. The Commissioners, supra. The levying and raising of taxes for the purchase of a site for, and the erection of, an armory for the use of the Ohio national guard constituted, in the opinion of the court, the raising of funds by taxation for a general state purpose, and was therefore within the constitutional limitation, section 2, article 12, that all such taxation shall be by a uniform rule upon all the taxable property within the state. A single county or minor subdivision of the state cannot be burdened with the obligation of erecting, supporting, or maintaining in whole or in part by local taxation an institution belonging to the state and whose services in turn are rendered to and for the state.
In the case of Friend v. Levy, 1 the act of April 2, 1906, providing "that the act entitled 'an act to impose
a tax upon the right to succeed to, or inherit property,'
passed April 25, 1904, (97 Ohio Laws, 398-400), be and the
same are (is) hereby repealed, except as to estates in which
the inventory has already been filed at the date of the pas-
sage of this act," was declared unconstitutional on the
ground that the exception made in the last clause of the
act gave to the law an unequal operation thereby violating
section 2, article 12, of the constitution, requiring that
taxing laws must have a uniform operation upon all taxable
property throughout the state.

Judge Summers who read the opinion of the court in
this case declared that an inheritance tax law required
for its validity uniformity and equality in its operation
and effect; that such a law could not constitutionally be
given an unequal operation by or through the subterfuge of
an amendment or an exception in a repealing clause as was
done in the act in question; and that the exception, in the
act before the court, as to estates in which the inventory
had already been made and filed before April 2, 1906, gave
to the law an unequal operation and rendered it, therefore,
unconstitutional and void.

In the case of the State ex rel. Price v. Prillman, Re-

1. 76 Ohio St., 26, (1907).
2. 98 Ohio Laws, 222.
or the listing of personal property for taxation and for the exemption of stocks in companies, taxed in the state, and mortgages on real estate within the state," was declared unconstitutional as contravening section 2, article 12, of the constitution, requiring that all property—stocks, bonds, mortgages, etc.—shall be taxed by a uniform rule and at its true value in money. This act provided that shares of stock in companies taxed in this state and mortgages on real estate located in and taxed in this state executed after the passage of this act should be exempt from taxation; and further provided that such mortgages "shall be duly recorded in the manner provided by law and a special registration fee of one-half of one per centum on the amount secured by such mortgage in addition to the fee fixed by law for recording such instruments, shall be paid to the county recorder upon presentation of such mortgage for record."

The effect of this legislation, declared, Chief Justice Nichols who read the decision of the court in this case, "is to at once and forever withdraw from the field of taxable property all mortgages hereafter executed covering Ohio real estate." This is classification of property for pur-

1. 96 Ohio St., 545, (1917).
2. 107 Ohio Laws, 695.
poses of taxation—classification pure and simple—a thing unknown to our constitution and directly in violation of section 2, article 12, of the constitution, which requires that all property—moneys, credits, stocks, bonds, mortgages, etc.—shall be taxed according to its true value in money and by a uniform rule. Moneys, credits, stocks and bonds, mortgages, etc., are property or the evidences of it within the meaning of the constitution and must be taxed along with any and all other property according to their true value in money and by a uniform rule. The constitution knows nothing of the ills and ailments that burden the minds of the so-called anti-double taxationists who, having failed to secure the adoption of a classification amendment to the constitution, now maintain that none is needed since the legislature already has and ever has had the necessary power to effect this end and accomplish their purposes.

III

Purposes for Which Taxes May Be Levied.

Section 5, article 12: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

There are only two cases under this section. One of
these was discussed above under section 2, article 12, and the other will now be taken up and discussed below.

In the case of State, ex rel. Walton, v. Edmonson, Auditor of Hamilton County, 1 the act of April 28, 1913, 2 "to create an institution for the relief of the needy blind," was held unconstitutional as being an act requiring the expenditure of public funds raised by taxation for a private purpose, and as contravening that part of section 5, article 12, of the constitution, which requires that moneys raised by taxation shall be applied only to accomplish the object for which they were raised. Section five of this act provided that any blind person resident in this state who had resided here continuously for five years or more prior to making application for relief under the provisions of the act and who was unable to provide for himself or herself should be deemed entitled to the benefits of this act. This section was defective in that it did not distinguish between those who were in absolute need of the benefits afforded by the act and those who might have children who could be compelled by law to support them or those whose relatives and friends might be willing to support them. To give aid and assistance to those needy blind where the need was not critical, absolute, urgent, imperative, was, in the

1. 89 Ohio St., 351, (1913).
2. 103 Ohio Laws, 833.
opinion handed down by this high court of justice, the use of public funds for a private purpose and "the giving of a bounty pure and simple to one who had no real need for it in order to prevent his becoming a charge upon the public." Section eight of the act provided, in part, that the county treasurers of their respective counties should transfer and pay over to the state treasurer, for the purpose of carrying out the provisions of this act, any and all moneys in their possession which had been raised for the accomplishment of a similar purpose under the act of April 2, 1908. Under the act of 1908 each county had raised a fund by local taxation for the relief of its own needy blind, The act in question before the court required that any money which had been or which might later be raised under the earlier act and which had not already been spent should be transferred from the county to the state for the accomplishment of the purpose for which it was raised but to be administered in accordance with the new law. This the court declared was a plain contravention of section 5, article 12, of the constitution, which requires that "no tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied," because, "necessarily the amount and the proportionate amount which each county would raise would be different from each of the other counties, and different from its proportion if originally raised by
the state for state purposes. To require that this money shall be turned over to the state treasurer and used as a part of a fund which belonged to the entire state to be expended for the purposes of the entire state, although the object would be similar, would," declared Judge Johnson who read the opinion of the court, "produce the very inequalities and injustice which the constitution intended to prevent." The whole of the act in question before the court was declared unconstitutional, including the repealing section, which decision, in effect, revived and gave full force and effect to the act of April 2, 1908.
CHAPTER VII

CORPORATIONS, PUBLIC AND PRIVATE.

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I

General and Special Acts Applying to Public and
Private Corporations.

Section 1, article 13: "The General Assembly shall
pass no special act conferring corporate powers."

This section was not found in the constitution of
1802; but long before 1851 the need for such a limitation
upon the power of the legislature to confer corporate
powers was felt. Mr. Norris, a member of the constitu-
tional convention of 1851 and a member of the committee of
corporations other than banking corporations of that con-
vention, stated on the floor of the convention that fully
three-fourths of the legislation for several years past
had been passed in response to an ever increasing number
of appeals which had been made to the legislature for a
grant of corporate powers for one purpose or another.¹ The

¹ Report of the Debates and Proceedings of the constitu-
tion for the Revision of the Constitution of the State

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committee which reported this section out for adoption maintained that all necessary powers could be conferred by general as well as and in fact better than by special acts. The section was discussed at great length; many amendments were proposed and rejected; the advocates of special legislation attacked it from every possible angle; one who follows the report of the proceedings of the convention cannot but be impressed by the formidable argument presented by the opponents of this section. The committee which had unanimously reported the section out stood squarely behind it and it was finally adopted exactly as reported out by the standing committee on corporations.

The first case in which a legislative act was held unconstitutional and void as contravening this section of the constitution was that of Olive C. Atkinson and others v. the Marietta and Cincinnati Railroad Company, as reorganized, 1 In this case the court held that the act of February 23, 1860, 2 "for the relief of the creditors and stockholders of the Marietta and Cincinnati railroad company," was a special act conferring corporate powers and therefore unconstitutional. After reciting in a long preamble that whereas the above named company was "hopelessly insolvent and unable to pay its debts," that whereas said company could neither complete the railroad or operate the same in

1. 15 Ohio St., 21, (1864).
2. 57 Ohio Laws, 128.
its present condition, that whereas doubts existed whether
the decree which had been lately rendered by the court of
common pleas for the county of Ross, "for the sale of said
road and its franchises under proceedings by mortgagees
thereof," would vest the purchasers with the franchises
and the charter of the said company, and that whereas it
seemed expedient and for the best interests of all that a
legislative act be passed protecting the interests of the
stockholders, creditors and others and settling the doubts
which had arisen, this act provided:

"That if a sale of said road shall be made and confirm-
ed as provided for in said decree, all the franchises of
said company shall thereby pass to and vest in the purchas-
er or purchasers, and such purchaser or purchasers shall be-
come invested with the said charter, and be entitled to re-
organize thereunder by the creation of stock not exceed-
ing eight millions of dollars and by the election of a board of
directors, with all the rights and privileges and subject
to all the liabilities, except as hereinafter provided, of
said company."

One of the exceptions referred to above and for which an-
other section of the act provided was to the effect that
"all the property and franchises so decreed to be sold,
shall forever remain exempt from the claims of all credi-
tors and stockholders existing before such sale and re-or-
ganization."

This act, declared Judge Ranney who read the decision
of the court, cannot be sustained, for if the legislature
intended by the passage of this act "to declare as a fact,
that the judicial sale would, as a legal effect, invest
the purchasers with corporate capacity, they declared to
be true what this court has judicially settled was untrue."
The only other basis for the passage of the act in question is the supposition that the legislature has the necessary power to give to "the sale the new and further effect of investing the purchasers with the corporate capacity of the old company," or to confer the same powers directly upon them by special act thereby contravening sections 1 and 2, article 13, of the constitution. "These provisions of the constitution," declared Judge Ranney, "are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations, or conferring upon them corporate powers by special acts of legislation." Moreover, "what the general assembly can not do directly, it cannot do indirectly."

In the last proposition of the syllabus of this case the court held that:

"A 'special act' of the general assembly undertaking to give such an effect to the sale, and authorizing the purchasers to reorganize, create a new stock, and elect another board of directors, is, in substance and legal effect, an attempt to create a corporation and confer corporate powers by a special act; and is in conflict with the first and second sections of the thirteenth article of the constitution of the state."

In the case of the State of Ohio, on the relation of the Attorney-General v. the City of Cincinnati, the act of April 16, 1870, entitled "an act to prescribe the cor-

1. 20 Ohio St., 18, (1870).
2. 67 Ohio Laws, 141.
porate limits of the city of Cincinnati," was declared un-
constitutional and void, being in contravention of sections
1, and 6, article 13, of the constitution. This act great-
ly extended the corporate limits of the city of Cincinnati
and enlarged and extended the city's powers in matters of
police regulation, judicial jurisdiction, taxation and as-
essment over a number of outlying incorporated suburban
villages and other territory not before within the corpor-
ate limits of the city.

Chief Justice Brinkerhoff, who read the decision of
the court in this case, declared in a clear cut, straight
forward and forceful opinion that this act was wholly at
variance with the constitutional requirements as to spec-
ial legislation conferring corporate powers and that it
was just such legislation that the framers of the new con-
stitution of 1851 had hoped to prevent. "No one who has
read the proceedings and debates of the convention" or who
"is old enough to remember the apprehension of evil con-
sequences with which the conferring of corporate powers by
special acts were regarded, can fail to see that it was one
of the ends and aims of the constitutional convention, and
of the people who adopted the * * * constitution * * *
to cut up by the roots, at once and forever, all capacity
of the general assembly to confer by special act any pow-
ers whatsoever upon any corporate body whatsoever." A
majority of the court were of the opinion that the act
clearly transcended the powers granted to the legislature by the constitution and that the constitutional provisions were as clearly applicable to public as to private corporations as was fully set forth in the proceedings and debates of the constitutional convention which framed the constitutional provisions under discussion; accordingly the court held in the first proposition of the syllabus of this case:

"Under the restrictive and mandatory provisions of the first and sixth sections of the thirteenth article of the constitution of 1851, the general assembly cannot, by a special act, create a corporation; nor can it, by special act confer additional powers on a corporation already existing; and in the purview and application of the provisions of those sections of the constitution, there is no distinction between private and municipal corporations."

In the case of the State, ex rel. the Attorney-General v. the City of Cincinnati et al.,¹ the special act of February 29, 1864,² amendatory of section 4 of the act of March 11, 1861,³ entitled "an act regulating the Commercial Hospital of Cincinnati," was declared unconstitutional and void, being a special act conferring corporate powers upon the city council of Cincinnati thereby contravening section 1, article 13, of the constitution. This amendatory act provided that the board of trustees of the Commercial Hospital of Cincinnati should retain the right to initiate all rules and regulations governing the said hospital in

1. 23 Ohio St., 445, (1872).
2. 61 Ohio Laws, 142.
3. 58 Ohio Laws, 161.
accordance with the provisions of the act of March 11, 1861, but that hereafter any rules or regulations initiated by that body should only become effective when approved by the city council. The effect of this amendment was to put the actual power to make rules and regulations governing the hospital in the hands of the city council while leaving with the former unfettered board of trustees only the right to initiate such rules and regulations.

The camouflage used by the legislature in this instance was entirely too thin to accomplish the purpose intended. Chief Justice White, who read the decision of the court, declared that "it seems clear to us that the act in question assumes to confer corporate power on the city council of Cincinnati" in giving to that body power and authority, in effect, to govern the Commercial Hospital of Cincinnati, which is under this act only nominally and not actually under the control of the board of trustees. The act in question, is, therefore, in contravention of section 1, article 13, of the constitution. True this act did not create a new corporation but this matters not, for it makes no difference, the court held, "within the meaning of the constitutional prohibition, whether the effect of the special act is to confer additional corporate power on an existing corporation or create a new one. The power is explicitly denied to the legislature of accomplishing such a result by a special act."
In the case of the State ex rel. the City of Columbus v. John G. Mitchell et al., Commissioners, the act of March 30, 1875, entitled "an act to provide for the improvement of streets and avenues in certain cities of the second class," was declared unconstitutional as contravening section 1, article 13, of the constitution, being a special act conferring corporate powers upon the city of Columbus. Section one of this act provided that its provisions should apply "in cities of the second class having a population of over thirty-one thousand at the last federal census." Columbus was the only city that was or that could ever be in that class of cities of the second class having a population of over 31,000 at the last federal census.

"The effect of the act," declared Chief Justice White who read the opinion of the court, "would have been precisely the same if the city had been designated by name instead of by the circumlocution employed." The act authorized the adjoining property owners along any proposed street-improvement project to elect a board of representatives or commissioners to determine the kind, nature and extent of the improvement to be made and supervise the making of the same, subject however to the general direction of the city council which was, in fact, the real directing head. The act also authorized the city council to issue bonds to pay for

1. 31 Ohio St., 592, (1877).
2. 72 Ohio Laws, 163.
the improvement, the entire amount of such bonds later to
be assessed equally per front foot upon all property
abutting upon such improvement. "That the act undertakes
to confer corporate power upon the city can not be doubted,"
declared the Chief Justice, and, "that the act is in con-
flict with section 1, article 15, of the constitution, it
seems to us is plain."

In the case of the State v. Pugh, 1 the act of February
27, 1885, 2 entitled "an act to reorganize and consolidate
cities of the first grade of the second class (Columbus),
and to reduce the tax levy of said cities," was in so far
as it authorized the city council to appoint a board of
control declared to be an act conferring corporate powers
applicable only to Columbus and therefore unconstitutional,
being in contravention of section 1, article 15, of the
constitution. The court held that in so far as the act
confferred corporate powers upon the Columbus city coun-
cil, and only the Columbus city council, authorizing it
to appoint a board of control for the city it was a spec-
ial act conferring corporate power and as such unconsti-
tutional; and that since it was highly improbable that the
legislature would have provided for the re-districting of
the city separate and apart from the reorganization of the
city as contemplated under the board of control provided

1. 43 Ohio St., 98, (1885).
2. 82 Ohio Laws, 54.
for in the act, the provisions of the act for redistricting the city would fall with those for reorganization.

This act was made to apply only to "cities of the first grade of the second class (Columbus)." It will be observed that "Columbus" was inserted in the title of the act; and even if the name had not been inserted in the title the designation would have been none the less clear or uncertain, for Columbus was the only city of the grade and class named at the time the act was passed. But we are given to understand by the opinion of the court in this case that the fact that a classification made by the legislature includes only one city is not to be urged against the act. Judge Owen, who read the opinion of the court in this case, declared: "It is not to be urged against legislation, general in form, concerning cities of a designated class and grade, that but one city in the state is within the particular classification at the time of its enactment *

* * * * if any other city may, in the future, by virtue of its increase in population and the action of its municipal authorities, ripen into a city of the same class and grade, and come within the operation of the act, it is still a law of a general nature and is not invalid even if it confer corporate powers." Many provisions of the act in question were, however, peculiar to the city of Columbus and no other city could ever in the history of the state come within the operation of the act. It was
these particular provisions of the act which, in the
opinion of the court, gave to the act the characteristics
of a special act and it was because of these that the
court declared the act in part unconstitutional and void.

In the case of the State ex rel. Attorney-General v.
Anderson,\(^1\) the act of March 26, 1886,\(^2\) creating the office
of police judge in all cities of the second class and third
grade having at the last federal census a population of
16,512, and no more, and conferring upon such cities the
necessary power to choose through their electors a police
judge and through their mayor and council to appoint a pros-
ccuting attorney and clerk of the court of such judge, was
declared to be a special act conferring corporate powers
and applicable only to the city of Akron, since Akron was
the only city which had or which ever could have a popula-
tion of 16,512 at the last federal census. "The statute
is not to apply to any city that may at any time hereafter
have the population named," the court declared; "it ap-
plies only to such as had this precise population at the
last federal census; and thereby, instead of classifying
the city of Akron, it is taken from the class to which it
belongs, under the general statute classifying the cities
of the state." The city of Akron might just as well have

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1. 44 Ohio St., 247, (1886).
2. 83 Ohio Laws, 43.
been designated by name. The act, for the reasons indicated above, was declared to be in contravention of section 1, article 13, of the constitution and therefore unconstitutional and void.

In the case of the State ex rel. v. Smith et al.\(^1\) the act of October 24, 1890,\(^2\) entitled "an act to create and establish and efficient board of city affairs in cities of the first grade of the first class," was declared to be a special act conferring corporate powers, applicable only to the city of Cincinnati, and, therefore, in violation of section 1, article 13, of the constitution. This act provided that the bond required of each member of the above named board of city affairs should not be valid until approved by the judge of the superior court of the city wherein such board was established. Cincinnati was the only city in the state which had, and the only one which could have without additional legislation, a superior court. The opinion of the court in this case reads: "Cincinnati is the only city of the first grade of the first class, or of any other grade or class, that can adapt itself to the provisions of the act creating this board; and is, therefore, as certainly indentified as the city, and the only city, for which the statute was adopted, as if it had been

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1. 48 Ohio St., 211. (1890).
2. 88 Ohio Laws, 6.
designated by name; and the act is, therefore, a special act."

It will be noted that this act was held unconstitutional and void because it required that the bond of each member of the board of city affairs be approved by a judge of the superior court of the city, thus limiting the operation of the act to the city of Cincinnati, and not because the act was limited in its operation and effect to said city by designating it as a city of "the first grade of the first class"—the latter classification being one which, in effect, was just as exclusive as, but no more exclusive than, the former. And yet special acts, passed in the form of general laws, conferring corporate powers, were sustained if they made use of the latter exclusive classification while they were nullified as being unconstitutional if they were limited in their operation and effect by the use of the former basis of classification. Such a decision as that in this case certainly seems to be without justification and without reason at first sight; especially is this true when it is recalled that to designate a city as any city of the first grade of the first class as certainly meant Cincinnati and only Cincinnati as any other exclusive nomenclature that could possibly be devised. Why, then, should an act which was intended to be and which was only applicable, and which could under the circumstances only be applicable, to one city when passed be sustained
if it used one kind or variety of camouflage in naming the
city and declared unconstitutional and void if it used an-
other no more exclusive than the former? In answering this
question it will be recalled that the court had accepted
almost without limitation the doctrine that the legislature
had the power under the constitution to classify municipali-
ities on the basis of population. Having accepted this
doctrine the court had sustained every classification made
by the legislature upon the basis of population; provided
only that the legislature had been careful to provide that
every classification made, however minute, was of such a
nature that any other city or cities of the state might at
some future time through the mere passing of years, growth
in population, by action of the city council or by any com-
bination of these ripen into or enter into such classifica-
tion. The degree of likelihood that other cities would
enter into the classification was not material. The court
declared: "It is the possibility that other cities may enter
a certain grade of a class, and not the certainty that they
will, that gives to a law creating the grade a general char-
acter."

It certainly seems to any fair minded person at this
time that the court had early accepted and adopted, in an
honest effort to meet the needs of the municipalities of
the state, the subterfuge of legislative classification
and was following that body at every turn bolstering up
its unconstitutional practices by judicial bombast. Indeed even before the case now under discussion had come before the court for decision the court had in the case of State v. Wall\(^1\) expressed grave doubt as to whether both the spirit and the letter of the constitution had not been already destroyed by legislative practices and possibly by judicial construction. Certainly the spirit had long since departed and the letter was, if not dead, quite impotent under the current judicial construction of the constitutional prohibitions against special legislation conferring corporate powers. In this case for the first time we are told that even the limits of classification have been reached and that the court is itself convinced that it has stretched the constitution to the breaking point. "It must be conceded that the method of classifying cities for the purpose of legislation has been carried to the very verge of constitutional authority," the court declared. "Many conscientious minds believe it has been exceeded." The court was not ready as yet, however, to concede that the legislature had gone beyond its constitutional bounds or that the court had failed in protecting fully the sanctity of that document. "We have heretofore expressed our doubts upon the subject," the court declared, "but feel bound by the previous decisions of the court * * * and are disposed

1. 47 Ohio St., 499.
to sustain any laws falling within the principles of those decisions; but are unwilling to go beyond them, and sanction legislation conferring corporate power, that is plainly and palpably special in character."

In the case of State ex rel. v. Schwab,¹ the act of March 25, 1891,² which provided among other things that "in cities of the third grade of the second class, having a population at the eleventh federal census of seventeen thousand five hundred and sixty-five," one member of the city council shall be elected annually, who shall be president of the council and appoint all standing committees, was declared unconstitutional, being a special act conferring corporate powers and applicable only to the city of Hamilton. Hamilton was the only city in the state of the designated class and grade or of any other class and grade which had at the eleventh federal census a population of exactly 17,565, and it was by the very nature of things the only city in the state that could ever have that population at the eleventh federal census; never in the history of the state could any other city ripen into or by any reasonable construction enter into the classification made by the legislature in the act in question. That the act did and was intended by the legislature to apply only to the city of Hamilton was, in the opinion of the court,

1. 49 Ohio St., 229, (1892).
2. 88 Ohio Laws, 197.

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too evident to admit of the least doubt or require com-
ment. Being a special act conferring corporate powers up-
on the city of Hamilton the whole act was declared to be in
direct violation of section 1, article 13, and therefore
unconstitutional and void.

In the case of Commissioners v. State ex rel., the
act of February 9, 1893, entitled "an act to authorize and
direct the commissioners of Hamilton county to widen and
improve the Montgomery road from the north corporation line
of Cincinnati to the Plainfield road, and for other pur-
poses," was declared to be a special act conferring corpor-
ate power upon the incorporated village of Norwood and the
village of Pleasant Ridge in that section three of the
act provided that the commissioners of Hamilton county
shall "appoint three freeholders of the county as trustees,
one of whom shall be nominated and recommended by the coun-
cil of the village of Norwood and one by the council of
the village of Pleasant Ridge." This grant of corporate
powers to these village councils to nominate two of the
three trustees provided for in this act was, in the opin-
ion of the court, within the constitutional prohibition of
section 1, article 13, of the constitution. The conferring
of this power upon these village councils was, in effect,
the conferring of corporate powers upon the municipalities.

1. 50 Ohio St., 653, (1893).
for, Judge Spear declared, "the council is the governing body of the corporation, its representative and legislative body as well. By its acts, and by its acts only, as a general rule, is the corporation bound. Whatever power resides in the municipality must be worked out through the council. Power, therefore, given in terms to the council, is in effect given to the municipality."

That part of section three of the act which is quoted above was, because of the constitutional prohibition against the conferring of corporate powers by special act, declared unconstitutional. The remaining sections and provisions of the act being dependent upon this unconstitutional section for their operation and execution were held to be inoperative and void on the general principle that where the constitutional provisions of an act cannot be separated from its unconstitutional provisions the whole act must fall together.

In the case of State ex rel. v. Commissioners,¹ the act of April 25, 1893,² authorizing the county commissioners of a particular county to extend and improve a certain road in a specified manner according to a particular plan, and authorizing certain incorporated villages to dedicate certain property to the county in furtherance of the

¹ 54 Ohio St., 333, (1896).
² 90 Ohio Local Laws, 238.
construction and improvement of the roadway in question, was declared unconstitutional, being in contravention of article 10, and section 1, article 13, of the constitution. This act authorized—or rather, in the opinion of the court, commanded—the county commissioners of Hamilton county to improve the road described in the act according to the specific and very detailed plans and specifications set forth in the act—such as the width of the road bed, the total width of the road and lands to be appropriated, the grade of the road and the manner of its construction. It further provided that one-half of the cost should be assessed on the lands lying on either side of the road regardless of whether such adjacent landowners desired, petitioned for or consented to such improvement and assessment, and that the other half should be levied upon the county tax duplicate. Section seven of the act provided that any village through which the road passed should be empowered to dedicate to the county free of all costs such lands as were necessary for the carrying out of the proposed improvement.

Judge Minshall who read the decision of the court in this case, declared that this was an assumption of powers over the affairs of the county not possessed by the legislature; that the whole act was "administrative in character and not legislative"; that the powers exercised by the leg-
islature in the passage of this act were, under article 10 of the constitution, reserved to the people of the county and township and had, "until within the last few moons," always been exercised by them; that the passage of this act "is a wide departure from the principles of local self-government; and so wide, it is not possible to sustain it by any latitude of construction"; that the act conferred corporate powers upon the villages of Bond Hill, Carthage, Wyoming, Glendale and Avondale, in Hamilton county, in that it authorized them to dedicate certain lands free of all costs—powers not possessed by other villages; and that the whole act was a palpable violation of article 10, and article 13, section 1, of the constitution and therefore void.

In the case of the Pittsburgh, Fort Wayne and Chicago Railway Company v. Martin, Treasurer, the act of May 4, 1891, entitled "an act relating to certain cities of the fourth grade of the second class," was held unconstitutional, being a special act conferring corporate powers and therefore in contravention of section 1, article 13, of the constitution. That part of this act which is material to an understanding of the constitutional objections urged against the act provided: "That whenever in any city of the fourth

1. 53 Ohio St., 386, (1895).
2. 88 Ohio Laws, 596.
grade of the second class, which at the federal census of 1890 had a population of not less than 5,750 and not more than 5,800, or which at any subsequent federal census may have such population" it shall be legal for such municipality to construct a railroad, etc. in accordance with the provisions of this act. The constitutionality of the act was attacked on the ground that it was a special act conferring corporate powers upon the city of Salem, Columbiana county, since said city was the only city in the state which had at the time the act was passed the population named in the act. It must be noted here, however, that this act was not subject to the constitutional objection urged against the three or four next preceding cases discussed above, since this act specifically provided, presumably, in order to meet the objection which the court had urged in nullifying the said preceding cases, that this act should apply not only to such cities of the fourth grade and second class as had a population of not less than 5,750 and not more than 5,800 at the federal census of 1890 but to any city "which at any subsequent federal census may have such population." Such a proviso heretofore had always been sufficient to transform any act, however special when passed, into a thoroughly general and constitutional act. There was nothing whatever in this act which would prevent any city of the state at some future federal cen-
sus from ripening into the particular classification set up by this act; provided only time had brought about the necessary increase or decrease in population and the proper and necessary action had been taken by the city council. The court in deciding this case, however, was unwilling to go as far in stretching (to the breaking point and beyond) the constitutional prohibition against special acts conferring corporate powers as it had done in previous cases. This act was, therefore, notwithstanding its elastic clause, declared to be a special act within the meaning of section 1, article 13, of the constitution and void.

This decision was only one of a series which was to culminate in the decision in the case of State ex rel. Attorney General v. Beacom et al., June 26, 1902, overturning the whole scheme and doctrine of legislative classification of municipalities for purposes of legislation. For nearly half a century the court had kept watch over the letter of section 1, article 13, of the constitution only to find near the close of this period that the spirit of the constitutional prohibition set down in this section, to the effect that the general assembly shall pass no special act conferring corporate powers, had long since departed and that nothing remained but the skeleton of what the forefathers had framed to be a living and guiding hand over the welfare of the people and of the state. But once awakened the court set out with vigor and determination to
vindicate, recover, revive and defend the spirit of the consti-
stitution in the matter of conferring corporate powers by
special legislative acts.

Judge Burket who read the opinion of the court in the
present case set forth the following as a new and additional
standard to be used hereafter in determining the constit-
tutionality and validity of laws conferring corporate
powers:

"Whatever may be said as to the validity of a statute
conferring corporate power upon an established class con-
taining only one city, it is clear that when an act is man-
ifestly intended to, and does in fact, at the time of its
passage, apply to only one of a given class, consisting of
many, it is special. The city to which the act, by some
slight characteristic, is made to so apply, does not there-
by become a class by itself, but is thereby excepted out
of the class to which it belongs; and the usual provision
in such statutes, that any city having such characteristic,
or any other city which may thereafter have the same, shall
have the corporate power therein conferred, does not have
the effect to raise such other city into any class, but
has the effect to place it into such exception."

In the unreported case of Fenner v. the City of Cinc-
cinnati,¹ the act of April 26, 1898,² authorizing the board
of administration or the board of city affairs "in cities
of the first grade of the first class" to repair or re-
pave any streets, avenues, highways or alleys in such cit-
ties, was declared to be an unconstitutional act. The par-
ticular constitutional provision contravened by this act

1. 65 Ohio St., 567, (1901).
2. 93 Ohio Laws, 374.
is not specifically stated in this case; from the nature of the act, however, it is reasonable to list this case with those coming under section 1, article 13, of the constitution. Chief Justice Minshall and Judge Williams dissented from the decision of the court in this case.

In the case of the City of Cincinnati v. Trustees of the Cincinnati Hospital, 1 the act of April 29, 1902, 2 entitled "an act to supplement an act entitled 'an act regulating the Commercial Hospital of Cincinnati' (now the Cincinnati Hospital), passed March 11, 1861," was held to be a special act conferring corporate powers upon the trustees of the Cincinnati Hospital, and, therefore, unconstitutional and void, being in contravention of section 1, article 13, of the constitution. This act authorized the trustees of the Cincinnati Hospital to issue bonds, in a sum not to exceed $500,000, to raise funds for the extension and repair of the said hospital, and to levy a tax upon all the taxable property within the city of Cincinnati to pay off the said bonds when due. No artifice or classification subterfuge was employed to limit the operation of the act to Cincinnati; its operation and effect were expressly limited to that city and its special character was not denied the defendants in the case at bar holding that the act

1. 66 Ohio St., 440, (June 24, 1902).
2. 95 Ohio Laws, 849.
was passed to meet a local and temporary emergency pecu-
liar to and existing only in the city of Cincinnati, and 
that, therefore, this emergency—the immediate and imper-
ative need of the city for greatly extended hospital fac-
ilities to prevent human suffering and loss of life—justi-
fied, fully justified, the enactment of the act in question.

The opinion of the court was read by Judge Shauck who 
declared that the conferring of corporate powers upon the 
board of trustees of the Cincinnati Hospital by special act 
was as much a special act conferring corporate powers as it 
would have been if it had conferred the same powers upon 
the city council; that these bodies were equally within 
the constitutional prohibition of section 1, article 13, 
and that the very comprehensive terms of this section do 
not admit of any exception on account of any emergency either 
real or supposed.

In the case of the State of Ohio ex rel. Knisely et al. 
v. Jones et al., the act of April 27, 1902, providing in 
part that "all police powers and duties connected with and 
incident to the appointment, regulation and government of 
a police force in cities of the third grade of the first 
class, shall be vested in and exercised by a board of police 
commissioners," was declared unconstitutional. The court 
holding on the particular point involved that—

1. 66 Ohio St., 453, (June 26, 1902).
2. 96 Ohio Laws, 203.

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"All legislative acts relating to the same subject-
matter should be construed together; and, since all the acts
relating to the classification of municipalities and their re-
classification, and the division of classes into grades,
evince the legislative intention that municipalities having
substantially the same conditions and characteristics shall
not enter and remain in the same class, such acts are ine-
effectual to designate classified recipients of corporate
power, and an act to confer such power upon a single city,
by such classification, is repugnant to section 1 of arti-
cle 13 of the constitution, which ordains that: 'The general
assembly shall pass no special act conferring corporate
powers.'"

The opinion of the court in this case as well as in
the case of the State of Ohio ex rel. the Attorney General
v. Beacom et al., next to be decided, both of which were
decided on June 26, 1902, was read by Judge Shawak who de-
cclared that the argument of the relaters to the effect that
the act in question is general and not special, because it
provides for "the appointment, regulation, and government
of a police force in cities of the third grade of the first
class," notwithstanding the fact that the act applied to
and was intended to apply only to the city of Toledo, was
only a restatement of the old classification doctrine which
the court had formerly reluctantly supported; that the
court was now no longer prepared to sustain the elaborate
scheme of classifications which had been set up by the leg-
islature; and that in State ex rel. v. Beacom et al. short-
ly to be decided the doctrine of classification and the
whole scheme of legislative classification of municipali-
ties for purposes of legislation would be torn up, root
and branch, and the true meaning and intent of the consti-
tutional prohibition against the conferring of corporate powers by special acts revived and given that meaning and force which the framers of our constitution intended it should have. In view of the present prevailing situation, the judge declared, "grades of classes are but added classes"; existing classes are based upon trivial differences in population that bear no real or supposed relation to differences in local needs or local requirements; the intent of the legislature "to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded" them by section 1, article 13, of the constitution, is evident; already "the eleven principal cities of the state are isolated" into eleven different classes "so that an act conferring corporate power upon one of them by classified description, confers it upon no other"; that it was well known that one of the most prominent and most pressing reasons for calling the constitutional convention of 1851, and the subsequent framing by that body of section 26, article 2, and section 1, article 13 of our present constitution, was "to relieve the people of the evils of special legislation"; but that notwithstanding the fact that that honorable body had framed and the people had adopted these sections which were admirably adapted to accomplish the purpose in view no one would ever suspect that such important changes had ever been made
in our organic laws from "a comparison of the bulk and contents of those volumes (of the session laws which appeared just before 1851) with the bulk and content of those which are again appearing." In fact the bulk and the number of special laws conferring corporate power upon municipalities which were passed at every session of the legislature couched in the form of general laws but applicable to only a single city were during the last decade of the nineteenth century about as large and about as numerous as such laws had ever been under the constitution of 1802. Such an increase in bulk and number could not go on indefinitely.

The latest case in which a legislative act has been declared unconstitutional and void as contravening section 1, article 13, is that of the State of Ohio ex rel. the Attorney General v. Beacom et al.\(^1\) in which case the court held that the act of March 16, 1891,\(^2\) entitled "an act to provide a more efficient government for cities of the second grade of the first class," and acts amendatory thereto, being special acts conferring corporate powers upon the city of Cleveland, were unconstitutional. The decision of the court in the case of State ex rel. Knisely et al. v. Jones et al., \textit{supra}, was approved, the earlier decisions

\begin{enumerate}
\item 66 Ohio St., 491, (June 26, 1902).
\item 88 Ohio Laws, 105.
\end{enumerate}
of the court sustaining special legislation conferring corporate powers solely upon the doctrine of the classification of municipalities by the legislature for legislative purposes were reversed, and the whole body of such special legislation then upon the statute books and in force was declared unconstitutional and void. The effect of this decision, if it had been given immediate effect, would have been to leave every important city in the state without any legal basis for its existence and without laws to enforce or officers to enforce them. This predicament and looming chaotic state of affairs was avoided, however, by a suspension of the court's sentence, the court declaring "we think public considerations will justify such suspension of execution as will give to those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create"; and holding "this suspension will be until the second of October, 1902."

Judge Shauck, who read the opinion of the court in this case, declared that upon first hearing the present case the court was rather inclined to uphold the unconstitutional act in question and to continue to sustain the legislature in its unconstitutional practice of conferring corporate powers by special acts by sustaining again the outworn doctrine of classification, but that the importance
of the matter and the plain requirements of the constitution, as interpreted by the present court, no longer permitted the court to acquiesce in such unconstitutional practices and that therefore the whole body of the existing unconstitutional legislation formerly sustained upon the theory and doctrine that the elaborate and meaningless classifications made by the legislature met the constitutional requirements must fall. The long continued practice of the legislature in passing such legislation and a full half century's acquiescence in and approval of such practice by the court, did in no way, in the opinion of the court, bind it irrevocably to continue such acquiescence and approval. Judge Cooley's *Constitutional Limitations*, a work which had long been accepted as a text book on constitutional law, is quoted on this point as follows:

"Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will, and the constitution has appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the constitution."

This statement on the part of Judge Cooley, though written a number of years before, exactly describes the situation that presented itself before the court in the disposition of the present case. The plain constitutional mandates
that the legislature give to all laws of a general nature a uniform operation throughout the state (section 26, article 2), and that the legislature pass no special act conferring corporate powers (section 1, article 13) had been compelled to wait a full half century before they were completely vindicated by our judicial tribunals which had been charged from the very beginning to keep watch over them. It is well, therefore, that no statute of limitations runs against the constitutional guarantees and safeguards set down in our constitution.

II

Dues from Corporations Shall be Secured

By

Individual Liability

Of

Individual Stockholders.

Section 3, article 13: "Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

The only case in this study under this section of the
constitution is that of the State of Ohio, on relation of the Attorney General, v. John Sherman, Kent Jarvis, R. R. Springer, and others.\textsuperscript{1} In this case the act of April 4, 1863,\textsuperscript{2} entitled "an act supplementary to an act entitled 'an act to provide for the creation and regulation of incorporated companies in the State of Ohio,' passed May 1, 1852," authorizing the purchasers of the property of a railroad company which had been sold pursuant to a judicial order, to acquire the franchise to be a corporation in and under the laws of this state, by deed from the company selling such property, was held by the court to be a general law within the meaning of section 2, article 13, of the constitution which provides that "corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." But the court further held that,--

"A deed made by such company to a corporation of another state, which corporation had become the assignee of the property sold as contemplated in said act, without any new organization, or taking of stock, under the deed, or as a corporation of Ohio, does not constitute the foreign corporation, or its members, an Ohio corporation, and in so far as said act may assume to create them such, it is unconstitutional, for the reason that it does not secure the individual liability of the stockholders."

Chief Justice Welch, who read the decision of the court in this case, declared that "By the present constitution of Ohio, the power of the legislature to grant char-

\begin{itemize}
  \item 22 Ohio St., 411, (1872).
  \item 60 Ohio Laws, 54.
\end{itemize}
ters of incorporation is subject to important limitations, which did not exist under the constitution of 1802. One of these is, that the grant must be made by a general law;" this requirement was fully met by the act in question in the present case; "another is that the charter must be subject to alteration and revocation by the legislature;" this reservation was not made in the act in question since it was unnecessary, this reservation being read into every act conferring corporate powers since the adoption of the new constitution whether expressed or not; "and a third is, that the grant must be made in some such form as will subject the stockholders to individual liability, to at least a certain extent, for the debts of the corporation." it was this last requirement that had not been fully provided for, or if fully provided for in the act, then, the provisions of the act had not been conformed to by the parties incorporated thereunder; and in either case the parties could not be considered, under existing circumstances, to be a corporation under the laws of this state.
III

Classification of Municipal Corporations.
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Section 1, article 18: "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law." (Adopted Sept. 3, 1912.)

The only case under this section is that of the City of Elyria v. Vandemark, 1 in which the court held that the act of May 27, 1915, 2 amendatory of sections 4250 and 4276 of the General Code, relating to municipal officers, and providing, in part, that "in cities having a population of less than twenty thousand, the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department," was declared unconstitutional, being in conflict with section 1, article 18, of the constitution as amended September 3, 1912. In the second syllabus of this case the court held: "The constitution of the state having classified municipalities on a basis of population, the legislature is without authority to make further classification thereof for the purpose of legislation affecting municipal government."

1. 100 Ohio St., 565, (1919).
2. 106 Ohio Laws, 483.
IV

Scope of Powers in Matters of Local Self-Government
Possessed by Municipalities.

Section 3, article 18: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

In the case of State ex rel. City of Toledo v. Lynch, Auditor,\(^1\) an ordinance passed by the Toledo city council providing that "the sum of one thousand dollars is hereby transferred from the General Fund to the Department of Public Service Fund, and such amount is hereby appropriated for the purpose of establishing a municipal moving picture theater, and shall be used for no other purpose," and that this ordinance "is hereby declared to be an emergency measure to take effect immediately." was declared unconstitutional and void on the ground that the council of the municipality in passing this ordinance exceeded the powers conferred upon it by the 18th article of the constitution.

Chief Justice Shawick, who read the decision of the court, declared that the general laws in operation and effect on November 15, 1912, when article 18 was adopted and took effect were already in force and remained so;

\(^1\) 88 Ohio St., 71, (1913).
"that since the city of Toledo had not by vote of its electors approved any additional law passed by the general assembly, and if it had not adopted a charter, the municipality and all of its departments have only such powers as were conferred by the general law; that is, such power only as it had prior to the 15th of November, 1912." "A fundamental defect in the relator's case," declared the Chief Justice, "is that it assumes that a power conferred upon a municipality is conferred upon its council although every provision of the amendment with respect to this body merely authorizes it to make provisions for ascertaining the will of the electors."

The proposition of establishing municipal moving picture theaters did not seem to the Chief Justice and a majority of the members of the court to be an emergency measure nor did it seem to impress them as being in any sense an educational or police measure within the constitutional use of these terms. The taking of public money secured through taxation for such a purpose was, in the opinion of the Chief Justice and a majority of the court, entirely outside of the field of local government. "How little," the Chief Justice declared, "would remain of the assurance which the Bill of Rights gives to minorities as well as to majorities that: 'All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing and protecting property,' and that pri-
vate property may be taken only for uses which are public, if the proceeds of industry and thrift may be seized for the establishment and operation of moving picture shows and all other imaginable purposes not more frivolous nor more remote from the functions of government." It had long been accepted, the Chief Justice concluded, that "a municipality might own and operate only such utilities as it used in its municipal operations."

The only case under this section in which a legislative act was declared unconstitutional was that of the City of Fremont v. Keating,1 in which section 6307, General Code, providing that "local authorities shall not regulate the speed of motor vehicles by ordinance, by-law or resolution, but for a given time, they may set aside a specific highway for speed tests or races"; and that "the term 'local authorities', as used herein, means all officers, boards, and committees of counties, cities, villages or townships," was held by the court to be in direct conflict with the provisions of section 3, article 18, of the constitution which authorized municipalities to adopt and enforce within their limits such local police, sanitary and other regulations, as are not in conflict with the general laws of the state. Section 12604, General Code, on this subject at the time section 6307, supra, was passed provided that "whoever operates a motor cycle or motor vehicle at a greater speed than eight miles an hour in the business

1. 96 Ohio St., 468, (1917).
and closely built-up portions of a municipality or more than fifteen miles an hour in other portions thereof or more than twenty miles an hour outside of a municipality, shall be fined," etc.

Judge Donahue, who read the opinion of the court in this case, declared: "This statute is a police regulation, and, under the section of the constitution above referred to, the municipality has the right to adopt and enforce within its limits police regulations in regard to the same subject-matter, not in conflict with this statute."

V

Acquisition and Operation of Public Utilities

By Municipalities.

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Section 4, article 18: "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the products or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation of otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

In the case of Driaco-Doyle Company v. Village of
Orrville,\(^1\) section 2990,\(^2\) General Code, was held unconstitutional in so far as it limited the plenary powers conferred upon municipalities by section 4, article 18, of the constitution, to acquire, construct, lease, own or operate certain public utilities. This section of the General Code limited the plenary powers conferred by the constitution upon municipalities in the matter of erecting or purchasing gas or electric works by the proviso that "in villages where gas works or electrical works have already been erected by any person, company of persons, or corporation, to whom a franchise to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall * * * purchase such gas works or electric works already erected therein."

Judge Johnson, who read the decision of the court in this case, declared that the limitations imposed by the proviso in question before the court were "wholly inconsistent with the plenary grant of power" contained in section 4, article 18, of the constitution to municipalities in this state; and that "authority given by the constitution cannot be lessened by statute" since "there is no equivalent for a constitutional provision."

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1. 93 Ohio St., 236, (1915).
2.  Act of May 12, 1902, 95 Ohio Laws, 599.
CHAPTER VIII

REGULATION AND PROHIBITION OF THE LIQUOR
TRAFFIC IN THIS STATE.

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I

No Liquor Licensing in This State.

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Schedule to Constitution of 1851, Section 18: "No license to traffic in intoxicating liquors shall hereafter be granted in this state; but the general assembly may, by license, provide against evils resulting therefrom."

In four different cases under this "no license" provision of the constitution the court has held the legislative act in question before it at the time unconstitutional, in whole or in part, as being, in effect, a license law. In one other case under this section a village ordinance prohibiting the traffic in intoxicating liquors was declared void as exceeding the legislative grant of power to regulate the traffic within its corporate limits. This latter case will be discussed first and the others will then be taken up in chronological order.

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In the case of Bronson v. Oberlin, the court held that the Oberlin village council in passing an ordinance entitled "an ordinance to provide against the evils resulting from the sale of intoxicating liquors," which ordinance prohibited the sale of intoxicating liquors to all persons and for all purposes except mechanical and medicinal, had exceeded the authority conferred upon them by the constitutional legislative act of March 29, 1882, entitled "an act authorizing certain incorporated villages to regulate the sale of intoxicating liquors therein," and providing that incorporated villages having a college or university within their limits "shall have the power to provide by ordinance against the evils resulting from the sale of intoxicating liquors within the limits of the corporation," and that, therefore, sections 2 and 4 of the ordinance so prohibiting the traffic were void.

Judge Hash, who read the opinion of the court in this case, declared that the important question to be determined and decided in this case was the purpose and the extent of the power conferred by the legislative act under which this ordinance was passed; and that considering the words and provisions of the act together with its title the court was of the opinion "that the power conferred was to regulate

1. 41 Ohio St., 476 (1885).
2. 79 Ohio Laws, 59.
the sale of intoxicating liquors, and to provide against evils resulting therefrom, but not to prohibit." "We are confirmed in this conclusion," the judge declared, "from the fact that in previous legislation the word 'prohibit' has been used when that was the object sought, and not alone the words 'to regulate' and 'to provide against evils.' It follows that sections 2 and 4 of this ordinance are void."

In the case of State v. Hipp,\(^1\) the act of April 5, 1882,\(^2\) known as the "Pond Law", entitled "an act to provide against the evils resulting from the traffic in intoxicating liquors," requiring every person engaged or engaging in the traffic to pay a specified annual tax and execute a bond signed by two sureties and further providing that "every person who shall engage or continue in such traffic, without having executed the bond * * * or after his bond shall have been adjudged forfeited * * * shall be deemed guilty of a misdemeanor," was declared unconstitutional. The court held that the act was, "in its operation and effect, as to the traffic not already prohibited, a license, within the inhibition of the section of the constitution which provides that "no license to traffic in intoxicating liquors shall hereafter be granted

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1. 38 Ohio St., 199 (1882).
2. 79 Ohio Laws, 68.
Chief Justice Okey, after reciting the provisions of the act in question, asked: If this is not "what, then, is a license" and what is a license law? The Chief Justice then proceeds to answer the first part of this question as follows: "In general, a license is permission granted by some competent authority to do an act which, without such permission, would be illegal." It was conceded by all sides that the act in question was not in the ordinary form of a license but this was held to be immaterial, for there is an old judicial maxim that a thing is not changed merely by changing its name. Though, inform, this act requires the payment of money and the execution of a bond signed by two sureties, "in legal effect, it is," the Chief Justice declared, "an act granting to those who comply with its provisions, licenses to traffic in intoxicating liquors, to the exclusion of all other dealers, and hence it is in conflict with the constitutional provision under consideration." And "though not called a license law, it authorizes the granting of that which in effect is as clearly a license as the privilege granted under the act of 1831,"1 which was an act "granting licenses and regulating taverns." "The quality of a thing is not altered

1. 2 Swan & Cr., 1426.
by changing its name; and the special privilege to traffic
in liquors which is conferred under this act, is as plain-
ly a license as if it had been in terms so called."

Judge Johnson was unable to agree with the majority of
the court in the present case; he delivered a strong dis-
senting opinion declaring:

"After the most painstaking examination which I am able
to bestow, I cannot assent to the legal proposition that
the act under consideration is a plain and palpable viola-
tion of the constitution."

In the case of State v. Frame,\textsuperscript{1} the act of April 17,
1883,\textsuperscript{2} known as the "Scott Law," entitled "an act further
to provide evils resulting from the traffic in intoxicating
liquors," and providing for annual assessments upon the
business of trafficking in intoxicating liquors was held
to be a constitutional enactment; but it was further held
that "the provisions of the second section of the statute
do not operate where the real property, on and in which
the business is conducted by a tenant, is held by such
tenant under a lease for a term executed before the pas-
sage of the statute."

The respondents in this case challenged the constitu-
tionality of the act on the ground that it provided for a
license for the traffic in intoxicating liquors (Schedule
18 of the Const. 1851); that it attempted to provide a

\textsuperscript{1} 39 Ohio St., 399, (1883).
\textsuperscript{2} 80 Ohio Laws, 164.
general revenue otherwise than by a tax upon property
and that it provided for a tax upon property, but not ac-
cording to its true value in money (section 2, article
12); that it was a law of a general nature without a uni-
form operation throughout the state (section 26, article 2);
and that it violated private property (section 19, article 1).
Each of these objections was carefully considered by the
court and all except the last was dismissed as having no
important bearing upon the act in question. Judge Mc-
Ilvaine, who read the opinion of the court in this case,
declared that it was "a palpable misnomer to call such
a statute a prohibitory liquor law; and unless it be such,
no license or special privilege can be obtained under it";
that even though the last clause of section two of the
act, which made it a misdemeanor for any tenant to continue
to carry on the traffic without the written consent of his
landlord, should be in contravention of the 'no license'
clause of the constitution—a proposition which the court
did not admit—"the balance of the statute must be held,
as far as this question is concerned, to be valid." In
answering and disposing of the respondents' plea that the
act was unconstitutional as contravening the right of pro-
erty guaranteed by the nineteenth section of the Bill of
Rights, inasmuch as the first clause of section two of the
act provided that the penalty which the act imposed upon
the liquor dealer for a violation of the act whether owner
or tenant should "attach to and operate as a lien upon
the real property on and in which such business is conduct-
ed," Judge McLlvaine declared:

"We think * * * that to subject the freehold to the
payment of these assessments when made against a tenant for
carrying on the business upon premises leased prior to the
passage of the statute, would be an unwarrantable interfer-
ence with private property—in other words, in effect, it
is subjecting one man's property to the payment of another's
debts. If this infirmity, however, can be taken out of
the statute by applying it only to cases arising under
leases executed after the passage of the statute, it is
our duty to so construe it. Every presumption must be tak-
en in favor of the validity of statutes. It will be pre-
sumed that the legislative intent was to apply the statute
to subsequent leases only, if necessary to preserve it
from constitutional objection. It will never be presumed
that the legislature intended to pass an unconstitutional
law."

This very simple and common sense interpretation of the
statute and application of the constitutional limitation
appealed to and was accepted by a majority of the court
which held in the syllabus of this case that—

"The provisions of the second section of the statute
do not operate where the real property, on and in which
the business is conducted by a tenant, is held by such
tenant under a lease for a term executed before the passage
of the statute."

Unfortunately the judiciary has not always acted with
that degree of consideration and open mindedness shown by
Judge McLlvaine and his colleagues in disposing of this
case. Too often the court has assumed an overbearing and
dictatorial attitude toward the legislative branch of gov-
ernment in declaring void unconstitutional acts passed by
that body.
In the case of Butzman v. Whitbeck, the "Scott Law" was again before the court and this time was held unconstitutional in so far as it provided for a lien on real estate occupied by a tenant who is a dealer in liquors. Section 1 of this act provided that each person engaged in the business of trafficking in intoxicating liquors should pay annually the assessed sum of $200, and section 2 provided that said assessment should attach to and operate as a lien upon the real property on and in which such business was conducted and that "whoever shall engage or continue in the business aforesaid of selling intoxicating liquors in or upon land or premises not owned by him, and without the written consent of the owner thereof, shall be held guilty of a misdemeanor * * * and each day's continuance upon such premises shall be an additional offense."

This law, declared Judge Owen who read the opinion of the court in this case, cunningly gives to the landlord the right and the authority to say whether his tenant "shall stand as a criminal before the law, or whether his business shall be entirely lawful." This is nothing more nor less than giving to the landlord the authority to license or not, just as he may choose, his tenants to traffic in intoxicating liquors. It will be noted that the constitu-

1. 42 Ohio St., 223, (1864).
2. 80 Ohio Laws, 164.
tion does not provide that the legislature shall grant no license or that a judge shall grant no license; it does, however, specifically and plainly state that "No license to traffic in intoxicating liquors shall hereafter be granted in this state." This is an absolute and blanket prohibition and includes landlords as well as others. The judge continued: "The Pond law"—declared unconstitutional in State v. Hipp, *supra*—"said to the dealer: Procure a bond signed by two sureties or stand condemned before the law. The Scott law"—now before the court—"says to the dealer upon another's premises; Procure the written consent of the owner of your place of business or suffer the penalties denounced against you." This act had all the earmarks of a license law as defined in State v. Hipp, *supra*. It provided that only those who had the permit specified in and required by the act could legally engage in or continue in the business of trafficking in intoxicating liquors if they were tenants; it provided that this permit must be obtained from one who had the authority either to grant or withhold it; and it made the business of trafficking in intoxicating liquors one which required the granting of a special privilege to and the holding of such special privilege by certain persons within the class or group which special privileges are not granted to or held and enjoyed by all members of that class or group. "These provisions," declared the judge, "in our opinion, upon the
authority of State v. Hipp, constituted the act a license law, so far as the act attempts to secure a lien upon real estate occupied by tenants, whether the lease be executed before or after the passage of the act. The act was, therefore, to this extent declared to be unconstitutional and void, contravening the first clause of the 18th schedule of the constitution of 1851. Whether the act was unconstitutional in other respects was not decided in this case. Chief Justice Johnson dissented from the court's decision for reasons assigned in his dissenting opinion in State v. Hipp, supra; and Judge Mollvaine dissented for reasons expressed by him in State v. Frame, supra, in which case the constitutionality of this act was sustained.

In the case of State v. Sinks,\(^1\) the "Scott Law" which had been declared unconstitutional, in part, in State v. Frame, and again, in part, in Butzeman v. Whitman, was now again before the court on the ground that it was an act within the inhibition of the 18th section of the schedule of the constitution of 1851. This time the constitutionality of the act was challenged on the ground that it provided for a lien on real estate which was occupied and used by a dealer in liquors and that it was to this extent, in effect, a license law, and, therefore, unconstitutional.

\(^1\) 42 Ohio St., 345, (1884).
\(^2\) Act of April 17, 1885, 80 Ohio Laws, 164.
and void. This contention was sustained by a majority of the court. The court held that the act was, in so far as it provided for a lien on real estate occupied by a tenant who was a dealer in liquors, unconstitutional, and that inasmuch as it was highly improbable that the legislature would have passed the act without this provision "the whole act, as a tax law, entirely fails." "If we had doubts upon this question," the court declared, "we would resolve them in favor of the validity of the act, but we have no such doubts." This decision involved the approval of State v. Hipp, and Butzman v. Whitbeck, supra, and the overruling of State v. Frame, supra.

Chief Justice Johnson and Judge McIlvaine dissented from the decision in this case for reasons stated by them in the above cases under this section of the constitution.
II

Prohibition of the Sale of Intoxicating Liquors in this State.

Section 9, article 15: "The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The general assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental, or other non-beverage purposes." (Adopted Nov. 5, 1918).

Under section 9, article 15 of the constitution as amended in 1912, providing "License to traffic in intoxicating liquors shall be granted in this state, and license laws operative throughout the state shall be passed," the legislature passed an act on April 18, 1913, entitled "an act to provide for license to traffic in intoxicating liquors and to further regulate the traffic therein; to establish a state liquor licensing board and county liquor licensing boards; to define their powers and duties and to amend sections 6065, and 6071, General Code of Ohio." By the provisions of this act a state liquor licensing board, consisting of three commissioners their assistants and appointees, was established and charged with the duties of carrying out the state's liquor licensing program. This was the law on the subject until May 27, 1919, at which

1. 103 Ohio Laws, 216, Sections 1261-16 to 1261-73, General Code.
time the prohibition amendment of November 5, 1918, be-
came effective, in accordance with the constitutional
schedule which accompanied that amendment providing that
the amendment should, if adopted, become effective May 27,
1919, and that all statutes inconsistent with the prohi-
bition amendment should be thereby repealed.

Notwithstanding the plain provisions of the above
amendment mandamus proceedings were brought in the case
of State ex rel. Rose v. Donahay,¹ to compel the auditor
of state to issue his warrant on the treasurer of state for
the payment of salaries of members and employees of the
state liquor licensing board, created and operating under
the act of April 18, 1913, from the 26th day of May, 1919,
to and including the 31st day of May, 1919. In handing down
its decision in this case the court held that the statutes
under which the board was created and under which it op-
erated until midnight May 26, 1919, were repugnant to the
provisions of section 9, article 15, of the constitution,
adopted November 5, 1918, and that these statutes were re-
pealed upon the taking effect of the said section at mid-
night May 26, 1919, and that "the State Liquor Licensing
Board ceased to have a legal existence after midnight, May
26, 1919."

¹. 100 Ohio St., 104, (1919).

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CHAPTER IX

RECENT CASES UNDER THE
FEDERAL CONSTITUTION AND THE ORDINANCE OF
1787.

The number of cases in which the Ohio supreme court has declared laws enacted by the Ohio legislature null and void as contravening the Federal constitution is comparatively small. For the most part the Ohio judiciary has preferred to base its decisions nullifying legislative acts upon provisions found in the Ohio constitution rather than upon similar provisions found in the Federal constitution in cases where the court has been privileged to choose its grounds for the nullification of the unconstitutional statutes in question before the court.

The twelve cases that are discussed in this chapter are distributed as follows:1 In one case the act in question was declared unconstitutional as contravening that clause of the Federal constitution which reserves to the Congress the power to regulate commerce among the several

1. See table of cases for number and distribution of cases.
1. states; in four different cases legislative acts were declared unconstitutional as contravening that clause of the Federal constitution which denies to State legislatures the power to pass any law impairing the obligation of contracts; 2. in one case the constitutional prohibition against the laying of imposts or duties on imports or exports by state legislatures was held to have been contravened; 3. in two cases acts passed by the Ohio legislature attempting to limit the right of appeal to the Federal courts were declared to be in contravention of that clause of the Federal constitution which provides that the jurisdiction of the Federal courts shall extend to controversies between citizens of different states; 4. in the next two cases discussed in this chapter the acts in question were nullified as being in contravention of the due process of law clause of the Federal constitution; 5. and, in the last two cases of this chapter the legislative act in question was declared unconstitutional and void as violating the personal liberty guarantees set forth in articles two and five of the Ordinance of 1787.

The Ohio supreme court has, throughout the history of the State, for the most part, been governed in its inter-

1. Art. I, Sec. 8, clause 3.
4. Art. III, Sec. 2.
5. Amendment XIV, Sec. 1.

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pretation and application of the provisions of the Feder-
al constitution by the precedents established by the Feder-
al supreme court; at least, in one instance, however, the
Ohio court found it impossible to follow the decision of
the Federal supreme court and accordingly sustained an act
passed by the Ohio legislature which contained provisions
similar to, and which was in import and effect quite the
same as, an act which had, only a short time before, been
declared unconstitutional by the Federal court. Fortunately,
however, such disagreement is the exception rather
than the rule.

I

Inter-state Commerce Not Subject to State
Regulation or Control.

Constitution of the United States, Clause 3, Section
8, Article 1: "The Congress shall have power * * * to
regulate commerce with foreign nations, and among the sev-
eral States, and with the Indian tribes."

In the case of Arnold v. Yanders,¹ the act of May 19,
1894,² entitled "an act to regulate the sale of convict-
made goods, wares and merchandise, manufactured by convicts

1. 56 Ohio St., 417, (1897).
2. 91 Ohio Laws, 346.
in other states," section 1 of which provided that "it shall be unlawful for any person, persons or corporation to expose for sale within the state of Ohio, without first obtaining from the secretary of state, a license to sell any convict-made goods, merchandise or wares, as hereinafter provided," and the other sections of which provided for the levying and collection of a fee of $500 per annum from any person or corporation offering for sale any such imported prison-made goods and imposing other burdens and restraints for the sole purpose of discouraging or prohibiting such purchase and sale of said goods, was declared to be an unconstitutional act, contravening clause three, section eight, article one, of the United States Constitution which provides that "the Congress shall have power * * * to regulate commerce * * * among the several states."

Chief Justice Burket, who read the decision of the court in this case, declared that the states were without power to declare convict-made goods to be not articles of traffic and commerce, and then discriminate against such goods by unfriendly legislation, for "whatever congress, either by silence or by statute, recognizes as an article of traffic and commerce, must be so received and treated by the several states."

"There is," declared the Chief Justice, "no act of congress declaring that convict-made goods are not fit for traffic and commerce, and it therefore follows that such
goods are the subject of commerce, and when transported from one state to another for sale or exchange, become articles of inter-state commerce, and entitled to be protected as such; and any discrimination against such goods in the state where offered for sale in unconstitutional."

Police powers necessary for the protection of the public health and public welfare have been reserved to the state, and with the states resides the right and the power to regulate internal traffic and commerce: but these powers do not extend to or justify an interference with or encroachment upon inter-state commerce. The act in question is not a police regulation, nor is it limited in its operation and effects to the regulation of internal trade. The sole purpose and object of the act was and is to discourage and prevent the importation, sale and use of convict-made goods from other states. The act is in direct violation of clause 3, section 8, article 1, of the United States Constitution, and is, therefore, unconstitutional and void.
State Legislatures Are Without Power to Pass Laws Impairing The Obligation of Contracts.

Constitution of the United States, Clause 1, Section 10, Article 1: "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

In four different cases, since the adoption of the Ohio Constitution of 1851, the court has declared sections or parts of acts passed by the Ohio legislature to be in violation of the above constitutional provision. These cases will now be taken up in chronological order.

In the first case, that of John Matheny for himself and others v. William Golden, Treasurer of Athens County,¹ section 5 of the act of April 13, 1852,² entitled "an act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money," and an act amendatory thereto, passed March 12, 1853,³ were held, in part, unconstitutional. The former act provided that--

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¹ 5 Ohio St., 361 (1856).
² 50 Ohio Laws, 135.
³ Swans's Statutes, 924.
"Property held under a lease for a term exceeding fourteen years, belonging to the state, or to any religious, scientific or benevolent society, or institution, whether incorporated or unincorporated, and school and ministerial lands, shall be considered, for all purposes of taxation, as the property of the person so holding the same, and shall be listed as such by such person or his agent, as in other cases."

The amendatory act of March 12, 1853, exempted certain property of institutions of learning and provided that such exemptions "shall not extend to leasehold estates of real property held under the authority of any college or university of learning in this state." These acts were held unconstitutional in so far as they applied to the lands of the eighth and ninth townships of the fourteenth range of townships of lands formerly owned by the Ohio Company and located in the county of Athens, Ohio, which lands had been by a legislative act passed February 16, 1804, entitled "an act, establishing an university in the town of Athens," set aside, appropriated to and vested in the above named University; the act further providing that these lands together with "the buildings which are or may be erected thereon, shall forever be exempted from all state taxes."

The opinion of the court in this case was read by Judge Brinkerhoff who declared that the case before the court required the answering of two important questions:

1. 2 Ohio Laws, 193,205.
first, could the state legislature, under the state constitution of 1802, make and enter into a legally binding contract? and second, can the state legislature repudiate or alter a contract made and entered into under said constitution without first securing the consent of the other contracting party or parties? The first question was answered by the court in the affirmative and the second in the negative. "The doctrine that legislatures have no capacity to contract," the judge declared," is a novelty in the jurisprudence of Ohio. So far as we know, it was unheard of during the first half century of her existence as a state." The possession of such contractual power by our state legislatures and their right to use it on occasion had been both recognized and affirmed by the Supreme Court of the United States in an unbroken line of decisions.

In answering the second question the court declared that once the legislature had made and entered into a legally binding contract it was bound to the fulfillment of the conditions thereof equally with any other contracting party or parties. The contrary argument the court held was untenable:

"It makes words used in stipulations on the part of the state, mean something wholly different from their ordinary acceptation, and wholly different from what the same words mean when employed to express the engagements of the party contracting with the state. In the mouth of the lessee, forever means always. In the mouth of the state it means just so long as I please, and no longer. Indeed, we have no right to go back and suppose that the parties understood something beside that which appears on the face
of their contract; it is but rational and just to suppose that both parties understood their words to mean just what they said, and that, under the superincumbent and inexorable prohibitions of the constitution of the United States, they were mutually bound to their exact, faithful and perpetual fulfillment. The contrary argument is re-dolent with the odor of repudiation; is rife with the very mischief which it was the special design of the tenth section of the first article of the constitution of the United States to prevent; is condemned by the morality of the world, and can find, we trust, no durable resting place in courts of justice."

The judge further declared that to frame and adopt a new state constitution or an amendment thereto was but to 'pass a law,' and that such a law, like any other, was subject to the supremacy of the constitution of the United States. Limitations imposed upon the Ohio legislature by the constitution of 1851, were limited to a prospective operation and effect.

In disposing of the specific question presented in the case at bar the court held that the acceptance of the leases, let under the act of 1804, at a fixed rental or purchase price by the lessees, constituted a binding contract between them and the state, which both were mutually and equally bound to fulfill, and that the attempt to levy a state tax upon such lands by the subsequent legislative act of April 13, 1852, and the act of March 12, 1853, amendatory thereto, contravened the constitutional prohibition of clause 1, section 10, article 1 of the United States Constitution which provides that "No state shall * * * pass any * * * law impairing the obligation of contracts," and was therefore, pro tanto, null and void.
The case of Elias Kumler and others v. Henry Traber, Treasurer of Butler county, arising out of a grant to, and a leasing of lands by, the Miami University, was in all respects similar to Matheny v. Goden, supra, and was disposed of as was the latter case.

In the case of the State of Ohio ex rel. William D. Morgan, Auditor of State, v. Eliakim H. Moore, Auditor of Athens County, the act of April 13, 1852, entitled "an act for the assessment and taxation of all property in this state, and for levying taxes thereon, according to its true value in money," providing for a higher rate of tax upon banks and banking companies than that prescribed in section 60 of the banking act of February 24, 1845, entitled "an act to incorporate the State Bank of Ohio, and other banking companies," was declared unconstitutional as violating clause 1, section 10, article 1 of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. Section 60 of the latter act prescribed a specific rate of taxes which was to be paid by all banks incorporated under the act, and further provided that such tax when paid shall be in lieu of all other taxes to which

1. 5 Ohio St., 443, (1856).  
2. 5 Ohio St., 444, (1856).  
3. 50 Ohio Laws, 135.
such company, or the stockholders thereof, on account of stock owned therein would otherwise be subject." The Supreme Court of the United States had held that the acceptance of the provisions of this act by the banks organizing thereunder constituted a contract between them and the state, and that the legislature was incapable of modifying the provisions of such contractual legislation, increasing the burden of the obligations arising thereunder by subsequent legislative acts without the consent of the other contracting parties. This decision of the United States Supreme Court and the decision of the Ohio Supreme Court in the recent case of Matheny v. Golden, supra, were declared in the present case to be entirely satisfactory and in keeping with the policy of this court. The act in question was, accordingly, declared unconstitutional and void, in so far as it affected banks and banking companies organized under the act of 1845 providing for a different procedure and requiring a higher rate of tax than that required by the latter act.

In the case of the Ross County Bank in Chillicothe v. Henry S. Lewis, the act of March 21, 1851, "to tax banks, and bank and other stocks the same as other property is now taxable by the laws of this state," was, on the authority of State ex rel. Morgan v. Moore, and Matheny v.

2. 5 Ohio St., 447, (1856).
Golden, supra, and in keeping with the decision of the United States Supreme Court case of Piqua Bank of the State of Ohio v. Knoop, declared to be a law impairing the obligation of contracts within the meaning of the constitutional prohibition against such laws found in clause 1, section 10, article 1 of the Federal Constitution, in so far as it affected banks and banking institutions incorporated under the act of February 24, 1845, and enjoying the privileges of section 60 of that act prescribing the mode of taxing and the amount of tax to which such banks could be subjected.

Chief Justice Barley dissented from the opinion and decision of the court in each of the above cases held unconstitutional under this section of the Federal Constitution. In the case of Matheny v. Golden he read a most masterful and extended dissenting opinion reviewing at length the history of the interpretation and application of clause 1, section 10, article 1 of the Federal Constitution. "The term contract," he declared, "as used in the constitution, was never intended to extend to the civil relations of persons, or to restrain the legislation of the states in regard to their civil institutions." This opinion abounds in a wealth of carefully selected argument in defense of the right of the state legislatures to enact laws such as those which were declared unconstitutional and void in the above cases. Judge Brinkerhoff, who read
the decision of the court in the case of Matheny v. Golden, 
dissented from the decision of the court in both of the 
latter cases under this section on the ground that the 
60th section of the act of February 24, 1845, did not con- 
tain the legal elements of, and was not a contract, and, 
therefore, not within the purview of Federal Constitution.

III

States' Powers to Lay Imposts or Duties on Imports 

Or Exports Limited.

Constitution of the United States, Clause 2, Section 
10, Article 1: "No State shall, without the consent of 
Congress, lay any impost or duties on imports or exports, 
except what may be absolutely necessary for executing its 
inspection laws; and the net produce of all duties and im- 
posts, laid by any state on imports or exports, shall be 
for the use of the Treasury of the United States; and all 
such laws shall be subject to the revision and control of 
the Congress."

The only case under this section was that of Castle v. 
Mason, in which the act of May 9, 1908, entitled "an act 
to provide for the inspection of oils, gasoline and naphtha." 
was declared unconstitutional as being in contravention of 
clause 2, section 10, article 1 of the Federal Constitu-
tion. Judge Jones, who read the opinion of the court in

1. 91 Ohio St., 297 (1915).
2. 99 Ohio Laws, 513. (Sections 844-871, G. C.)
this case, declared that the state has full power to
enact proper and adequate laws, within the state's police
powers, for the inspection of oils, gasoline, naphtha, etc.;
that the constitutionality of such laws when enacted must
be determined by their operation and effect; and that the
inspection law in question operated to impose an unneces-
sarily heavy burden upon commerce—oils, gasoline, naphtha,
etc.—coming from other states "by way of fees, largely
in excess of the expenses necessary for executing the in-
spection law"; and that in so far as it did so it was in
violation of clause 2, section 10, article 1 of the Fed-
eral Constitution, and therefore void. A law of this
character levying a fee to cover the cost of inspection
must be limited to the actual cost of administering the
inspection laws; a surplus must not and cannot accrue to
the state, as was the case in the present instance.

IV

Power of State Legislature to Limit Appeals
To the Federal Courts is Limited by the Federal Constitu-
tion and by Federal Laws.

Constitution of the United States, Section 2, Arti-

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Only in two instances have laws passed by the Ohio legislature been nullified, in whole or in part, by the Ohio Supreme Court, as contravening this section of the Federal constitution; and in both of these cases the court, in principle at least, was opposed to the action which it found either expedient or necessary to take in nullifying the legislative acts in question. The feeling manifested by the court may be fully appreciated from the discussion of these cases which follows.

In the first case, that of the Railway Passenger Assurance Company of Hartford, Connecticut v. Elijah A. Pierce,\(^1\) section 24 of the "act to regulate insurance companies," passed April 15, 1867,\(^2\) as amended May 15, 1868,\(^3\) providing that it shall be unlawful for any foreign insurance company to carry on its business in this state without first having waived "all claim or right to transfer or remove any cause then or thereafter pending in any of the courts of this state, wherein such company may be a party to any of the Courts of the United States," was, on the authority of Insurance Company v. Morse,\(^4\) declared unconstitutional and void, being in contravention of and repugnant to section 2, article 3 of the Federal Constitution, which provides that "the judicial power of the

\(^1\) 27 Ohio St., 155, (1875).
\(^2\) 64 Ohio Laws, 166.
\(^3\) 65 Ohio Laws, 201.
\(^4\) 20 Wallace, 445, (1874).
United States * * shall extend to * * * controversies * * * between citizens of different States," and section 12 of the Federal Judiciary Act of 1789, \(^1\) which provides that--

"If a suit be commenced in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * and the defendant shall at the time of entering his appearance in such State court, file a petition for the removal of the cause for trial into the next Circuit Court to be held in the district where the suit is pending * * * and offer good and sufficient surety for his entering in such court on the first day of its session copies of said process against him, and also for his there appearing, * * * it shall then be the duty of the State court to accept the surety and proceed no further in the cause."

The court declared in the syllabus of this case that:

"The Supreme Court of the United States having decided (20 Wallace, 445,) that a statute of a state which requires a foreign insurance company, before transacting business in the state, to waive its right to remove suits in which it is a party from the courts of the state to the Federal courts, is repugnant to the constitution and laws of the United States and therefore void—that decision will be followed, though not approved by this court."

Chief Justice Scott, who read the opinion of the court, declared that while the United States Supreme court was recognized as the tribunal of last resort in cases such as that under consideration the decision of said court "though entitled to the highest respect, do not bind and conclude the judgment of a state court as the decision of a superior upon an inferior court of the same system; yet it would practically be useless to adhere to our convictions, unless there were reasons to expect that the question

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\(^1\) 1 United States Stat. at Large, 79.
when again presented to that court, would be decided differently." There were apparently no hopes of securing a different decision on a new presentation of the subject before that court,\footnote{1} for in concluding the Chief Justice declared: "We think it advisable, * * to follow, though we do not approve, the decision of the Supreme court of the United States, to which we have referred."

In the case of the Baltimore and Ohio Railroad Company \textit{v.} John Cary,\footnote{2} that part of section 24 of the act of May 1, 1852,\footnote{3} entitled "an act to provide for the creation and regulation of incorporated companies in the State of Ohio," as amended March 19, 1869,\footnote{4} providing that--

"it shall be regarded as one of the conditions upon which a railroad company of another state may lease or purchase a railroad, the whole or any part of which is in this state, or make any arrangement for operating the same under the provisions of this section, that such railroad company of another state thereby waives the right to remove any case from any of the courts of this state to any of the courts of the United States, or to bring a suit in any of the courts of the United States against any citizen of this state,"

was held to be in contravention of section 2, article 3, of the Federal Constitution, and section 12 of the Federal Judiciary Act of 1789, and therefore, unconstitutional and void. The argument presented in this case was in all important and essential respects similar to that presented

\footnote{1}{Chief Justice White and Judge Davis had dissented from the decision of the Federal court in this case.}
\footnote{2}{28 Ohio St., 208, (1876).}
\footnote{3}{Swan \& Critchfield's St., 281, 282.}
\footnote{4}{66 Ohio Laws, 32.}
and reviewed in the next preceding case above.

V

Due Process of Law.

Constitution of the United States, Section 1, Article 14: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States. Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

In the case of Hammond v. The State of Ohio,\(^1\) the last clause of section 6 of the act of April 19, 1898,\(^2\) (Sec. 4427-6, R. S.), entitled "an act to define trust and to provide for criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state," which clause provided that "the character of the trust or combination alleged may be established by proof of its general reputation as such," was declared unconstitutional, as contravening the due process of law clause (Sec. 1, Art. XIV) of the Federal Constitution. This statute, declared

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\(^1\) 78 Ohio St., 16, (1908).
\(^2\) 93 Ohio Laws, 145.
Judge Crew, who read the opinion of the court, "not only permits the conviction of a defendant upon purely hearsay evidence, but it in effect deprives him of the benefit of the presumption of innocence, as to a vital and essential fact which the state is bound to affirmatively establish by competent evidence, by substituting for proof of such fact--proof merely of general reputation as to its existence."

The court in the present case expressed a willingness to concede that within proper constitutional limits the legislature may have power to prescribe rules of evidence and determine methods of proof; but that the arbitrary creation, as in the present instance, of "a conclusive presumption of guilt against the accused, or to any element of the crime charged, by giving artificial and evidential force and effect to certain facts which otherwise would be wholly irrelevant and inconclusive" was entirely without such reasonable and proper constitutional limits and therefore not to be acceded to by any court, since to do so would, in effect, "deprive the accused of the protection of the cardinal presumption that every person is to be presumed innocent until he is legally proven guilty."

The second and latest case under this section of the Federal Constitution was that of Jackson, Chief of Police, et al. v. Berger, in which the act of April 14, 1892, was

1. 92 Ohio St., 130, (1915).
2. 89 Ohio Laws, 269.
entitled "an act to protect employees and guarantee their
right to belong to labor organizations," was, on the author-
ity of and in keeping with the recent decision of the Unit-
ed States Supreme Court in the case of Coppage v. State of
Kansas,\(^1\) declared unconstitutional, being in violation of
the liberty of contract guaranteed by the first section of
the fourteenth article of the Federal Constitution. This
act was carried over into the General Code as section
12943 and as found there reads:

"Whoever, being a member of a firm, or agent, officer
or employee of a company, corporation or person, prevents
employees from forming, joining or belonging to a lawful
labor organization, or coerces or attempts to coerce em-
ployees by discharging or threatening to discharge them from
their employ, or the employ of a firm, company or corpora-
tion because of their connection with such labor organiza-
tion, shall be fined not more than one hundred dollars or
imprisoned not more than six months or both."

These provisions were in their general form, purpose and
intent quite similar to the provisions of the Kansas statute
which had just recently been declared unconstitutional by
United States Supreme Court in the case of Coppage v. State
of Kansas\(^2\) referred to above. Having this recent deci-
sion of the United States Supreme Court before them, al-
though seemingly not at all satisfied with the reasons pre-
sented and accepted and the decision made by a majority of
that court in the case referred to above, a majority of the
court in the present case declared: "The supreme court of

\(^1\) 236 U. S., 1.
\(^2\) January 25, 1915.
the United States having passed directly upon the question, its decision is conclusive upon this court"; and the opinion continues "the construction placed upon provisions of the federal constitution by our highest tribunal, and its decision on purely federal questions, are binding upon the state courts. Conflict of authority between state and nation, on federal questions, would result in antagonism and governmental collision between the nation and the several states."

Chief Justice Nichols, and Judge Newman, Jones and Mathias concurred in the above opinion without comment. Judge Johnson concurred, feeling obliged to "yield to the authority" of the Federal court, but took occasion to express his full agreement with the views of Justices Day, Hughes and Holmes, as set forth in the dissenting opinion in the Coppage case. Judge Wannamaker and Donahue, however, did not prove so docile and submissive. The dissenting opinion read by Judge Wannamaker in this case is a masterpiece. He pointed out the fact that the statute in question was specifically limited to lawful labor organizations and that the penalty provided for in the act could be imposed only upon the employer or his agent who should coerce or attempt to coerce his employees. What Judge Wannamaker asks and what most of us who live in the present commercial and industrial age would like for those logicians, (better suited to the Middle Ages), who nullified the Kansas statute and the

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Ohio statute in question, to point out is that particular provision of the first section of the fourteenth amendment to the Federal Constitution which gives to employers—companies, corporations or their agents—the right to coerce or the right even to attempt to coerce lawful and peaceful citizens of the United States—their employes—who live under the same constitution and who are entitled to all those liberties and privileges possessed and enjoyed by lawful citizens of the United States, and who therefore can not rightfully be the special subjects of coercion or attempts at coercion by or on the part of their employers.

When the Ohio statute is boiled down and paraphrased into its elements, Judge Wannamaker declared, it simply provides that 'any employer who coerces his employe in order to prevent him from belonging to a lawful labor organization shall be fined.' This, then, is a criminal statute prohibiting and penalizing the commission of certain acts and to be unconstitutional "must prohibit something which the constitution permits or protects." Would it not be well for those who have seen fit to nullify the statute in question on the ground that it contravened section 1 of the 14th amendment to the Federal Constitution to state whether this section of the constitution merely permits the coercion provided against in this act or whether the constitution goes so far as to protect those who engage in such coercion?
"There is a substantial and well-grounded public opinion that courts of last resort, and particularly the federal courts," Judge Wannamaker continued, "are too eager to nullify remedial and regulatory legislation enacted by state legislatures under their police power in the interest of the public peace, safety, life, limb, health and morals. The law is not a mummy nor a straight jacket. It is presumably a live, elastic thing, adjusting itself to the changed and changing conditions of our social, political, industrial and commercial life. It must of necessity, therefore, be a growth, an evolution, keeping pace with the advancement of our twentieth century civilization." It is just this sedate, antiquarian, over-conservative, immovable and unadaptable attitude on the part of our higher courts that has justified the commonly accepted and almost axiomatic assertion that if our legislatures are fifty years behind the times in formulating and passing the necessary legislation adequately to meet the present ever changing political, social, commercial and economic needs, our courts are a hundred and fifty years behind in their adjudication of the same pressing problems.
VI

Personal Liberties; Arbitrary and Unnecessary Burdens.

Ordinance of 1787, Article 2: ".........No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary for the common preservation to take any person's property, or to demand his particular service, full compensation shall be made for the same......"

Ordinance of 1787, Article 5: "There shall be formed in said territory not less than three nor more than five states; * * * Provided, The constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles........"

Only in one instance has a law of this state been declared null and void as being in violation of the provisions of the Ordinance of 1787; this occurred in 1911, more than a century after Ohio had become a state, the case was reviewed on a rehearing a year later but the decision of the court upon rehearing the case was the same except that it declared an additional section of the act in question unconstitutional and void.

The case referred to above was that of the State of Ohio v. Boone\(^1\) in which sections 14, 17 and 21 of the act of May 1, 1908,\(^2\) entitled "an act to establish a bureau of vital statistics and to provide for the prompt and permanent registration of all births and deaths occurring within the state of Ohio," were declared unconstitutional, in so far as they related to a physician or midwife in attendance upon a case of confinement, being an unreasonable, unnecessary, unreasonableness.

\(^1\) 84 Ohio St., 346, (1911).  
\(^2\) 99 Ohio Laws, 296.
sary and arbitrary exercise of the police power of the state and in violation of articles 2 and 5 of the Ordinance of 1787. Section 14 of the act provided that the attending physician or midwife at any birth must file a birth certificate containing, among other things, the following information: place of birth, including state, county, township, village, city, ward, street and number etc.; full name of child; sex of child; whether twin, triplet, or other plural number; whether legitimate or illegitimate; full name of father and mother; the father's residence, race or color, birthplace, age and occupation; the mother's maiden name in full, residence, color or race, birthplace, age, and occupation; number of children of this mother and number of children of this mother now living; year, month, day and hour of birth, and whether the child was alive or dead at time of birth; and further provided that "no certificate shall be held to be complete and correct that does not supply all of the items of information called for therein, or satisfactorily account for their omission." Section 17 directed the state registrar of vital statistics to prepare, print and distribute the elaborate blank certificates prescribed in this act and further provided that "no other blanks shall be used than those supplied by the state registrar." Section 21 provided, in part, that any attending physician or midwife neglecting or refusing to file the
aforesaid birth certificate, or any physician neglecting or refusing to make out and file a medical certificate of cause of death as prescribed in this act should be fined, etc.

Judge Davis who read the opinion of the court in this case declared that the legislature could under the police powers conferred by the constitution require attending physicians and midwives to make out and file registration certificates containing "such facts as may naturally and readily come to the knowledge of persons present at a birth, death or marriage"; but that it was entirely and absolutely without power to "compel such persons to inquire for, investigate, and report upon certain collateral matters which may be interesting and of possible value to a bureau of statistics, and that too without substantial compensation." There was, in the present instance, no constitutional prohibition either State or Federal to which the court could conveniently turn or upon which it could base its decision nullifying the statute in question, so it, for the first time in the history of the state, hit upon the idea of falling back upon the provisions of the Ordinance of 1787, holding that the provisions of that famous document were paramount forever in all of those states formed out of the Old Northwest Territory; and that the guaran-
tees of liberty and property contained in articles 2 and 5 of that document constituted a **perpetual obligation** that could neither be removed nor altered by state constitutions or state legislatures. Then coming back to the validity and constitutionality of the act in question, the judge declared that the burden imposed upon attending physicians and midwives by sections 14, 17 and 21 of this act were an unnecessary, unreasonable and arbitrary exercise of the police powers of the state, and contrary to the guarantees set forth in that great, paramount and ever enduring law, the Ordinance of 1787, and that therefore these sections must be held unconstitutional and void. The judge concluded: "We have thus briefly indicated the reasons for our belief, that the Great Charter of the Northwest Territory is still under, and above, and before, all laws or constitutions which have yet been made in the states which are parts of that territory; and that under its guarantees the state has not the right to draft a citizen into particular service without substantial compensation. At least it is clear to us that the provisions of this statute which require a professional man to search out non-professional information and certify it to state authorities, is unnecessary, unreasonable and arbitrary, and is not, therefore, a valid exercise of police power."

Judge Wannamaker must certainly have had just such
cases as the above in mind when he declared that "an analysis of too many decisions of our courts would seem to indicate that the statute was declared unconstitutional, not upon * * clear conflict, but upon some whim, caprice, prejudice or predilection of the court rather than by sound reason or the laws of logic."

In less than a year the above case was before the court again on a rehearing. This time section 13 of the act, which provided that it should be the duty of the attending physician or midwife to file the aforementioned birth certificate "properly and completely filled out, giving all the particulars required by this act," etc., was added to sections 14, 17 and 21 of the act which had been declared unconstitutional upon the first hearing of the case, and "each and all of said sections, so far as they apply to physicians and midwives," were declared unconstitutional and void. The basis for holding the sections unconstitutional was that advanced upon the first hearing of the case.

1. 92 Ohio St., 151, (1915).
2. 86 Ohio St., 313, (1912).